

Experts Say Contamination Verdict Result Of Diligent Jurors

By **Shane Dilworth**

Law360 (April 28, 2022, 7:23 PM EDT) -- A recent New York state court verdict in favor of the former operator of three manufactured gas facilities in a sprawling coverage dispute over discharges into the Gowanus Canal has legal experts stressing the importance of empaneling jurors who can follow meticulous instructions.

Following a monthlong trial, a New York Supreme Court, New York County jury completed a 47-page verdict sheet that concluded a majority of discharges of wastewater by Brooklyn Union Gas Co., between 1941 and 1969 were accidental and thus covered by excess policies issued by Chubb unit Century Indemnity Insurance Co.

Tuesday's verdict, experts say, is instructive because the jurors addressed whether Brooklyn Union, which is now owned by Northern Grid, provided timely notice to Century and whether the discharges were accidental or specifically intended to contaminate.

Over the 28-year stretch, the six-person jury found that only discharges into the Gowanus Canal from a Brooklyn facility called the Citizens Works Site from 1963 to 1968 were not accidental, thereby foreclosing coverage for cleanup costs.

Discharges from the Citizens Works site from 1941 to 1963, as well as discharges at two facilities from 1941 to 1969 were found by the jury to be accidental and therefore covered.

"We are pleased that after decades of avoiding its insurance obligations, the jury has required Century to pay its fair share of the cleanup costs at the Gowanus Canal Superfund site," Gretchen Hoff Varner, a Covington & Burling LLP attorney who represents National Grid, told Law360.

"This is a victory not just for National Grid, but for a safe, clean environment in Brooklyn and around the Gowanus Canal," Varner's Covington & Burling colleague Mike Lechliter added.

Complicated Instructions

The length of the trial and complex issues presented highlights the importance of an attentive jury, experts say.

James R. Murray of Blank Rome LLP, who was not involved in the case, told Law360 the verdict reaffirmed his faith in the jury system.

Murray, who represents policyholders and is a chair of his firm's insurance recovery team, pointed out that jurors had quite the task completing the long and complicated 47-page verdict form.

"I've been doing this area for a long time, and I know some of the issues and I still had to study it [the verdict sheet] to know exactly what was going on," Murray said. "It shows that this jury followed instructions."

He went on to say that the jurors "obviously were smart" and knew how to approach the instructions in the verdict form.

"They followed them assiduously," Murray said, "and they got it right in terms of consistency."

Mounting Cleanup Costs

The jury's verdict comes almost two decades after Brooklyn Union first filed suit in 2001, seeking coverage from Century and a number of other excess insurers for the costs of cleaning up contamination along the Gowanus Canal.

According to court documents, Brooklyn Union operated manufactured gas facilities along the canal from approximately 1860 to 1960. The company's operations resulted in the release of coal tars into the soil and groundwater.

In 2010, the U.S. Environmental Protection Agency designated the Gowanus Canal as a Superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act. Remediation of the contamination at the site is being overseen by the EPA and the New York Department of Environmental Conservation.

In its action, Brooklyn Union asserted that it began facing liability for the contamination in 1993 and quickly provided notice to its insurers about potential claims under its policies. The policyholder also asserted claims against reinsurer Munich Re, but was able to resolve that dispute before it reached the jury.

The Chubb unit said it was not obligated to cover the cleanup costs on grounds that it did not receive timely notice and that Brooklyn Union's discharges were not accidental.

Balancing Time and Science

Environmental coverage disputes such as those in the Brooklyn Union case are unique since they involve events that occurred decades ago, when people and companies were not as tuned into the dangers of pollution and the discarding of waste, experts say.

Convincing a jury about the intent to pollute or the presence of contamination presents a significant challenge, Blank Rome's Murray said, based on the time during which the alleged events took place. At the same time, however, modern science can be used to demonstrate that discharges caused contamination and property damage.

Murray explained that jurors should be regularly reminded to remember the timeframe during which the events took place.

He pointed out that when the first policy was issued, Franklin D. Roosevelt was president and that by the last policy, Richard Nixon was president.

"Those are the kinds of things that kind of jolt you back into that time period," Murray said.

Gerald "Jay" Konkel of Morgan Lewis & Bockius LLP told Law360 that an important pretrial ruling benefited Brooklyn Union and made it more difficult for Century to prove that discharges were not accidental.

According to Konkel, who represents policyholders, Brooklyn Union's stance was bolstered by a Feb. 17 ruling denying Century's motion in limine seeking to preclude argument and evidence that the company did not expect or intend the specific type of property damage it is liable to clean up today. The ruling, he elaborated, allowed key expert testimony to be considered and resulted in a key framing of an issue the jury had to resolve of what constitutes an "accident" under the policies.

The decision opened the door for Brooklyn Union to argue that property damage was "caused by an accident" since the more recent scientific knowledge and understanding that drives that liability simply did not exist during the policies' periods in the 1940s, 1950s and 1960s.

Timely Notice

The jury's rejection of Century's argument that Brooklyn Union's notice was late was also extremely important, Konkel said, since a contrary ruling would have relieved Century of its obligations.

Under the policies, Brooklyn Union was required to provide notice of losses and occurrences "that appear reasonably likely to involve liability on the part of the [insurer]." Under New York law, if notice is "late," there is no coverage.

Brooklyn Union notified Century in 1993, shortly after it received a notice of New York City's intent to assert a claim seeking the cleanup of one of the manufactured gas facility sites. Century argued Brooklyn Union was aware of pertinent property damage that it should have known was reasonably likely to implicate the insurer's potential liability before 1993, but the jury spurned that contention.

Calculating Costs

In addition to determining if discharges during decades-old policy periods were accidental and if notice was timely, the jurors were tasked with doing some math as well.

Before trial, based on the language in the Century policies and New York precedent, the court determined that pro rata allocation would apply to determine the amount of the losses for which Century would be liable.

As part of its verdict, the jury concluded that the Chubb unit should pay a pro rata share of the \$250 million National Grid spent on past cleanup costs as well as a portion of the future cleanup costs. The jury arrived at that total after engaging in complex analysis to decipher the "attachment points" for the Century excess policies, or when the policies' coverage would kick in.

According to the verdict sheet, the jurors were instructed to calculate the number of years of property

damage at each of the three sites at issue by subtracting the year the property was first damaged from the year it ended. The jurors were then told to multiply the years of damage by each policy's "self-insured retention," or deductible, amount. The resulting amounts reflect the total amount Brooklyn Union had to pay at each site before Century had to pay its pro rata share under each policy of the loss for that site.

The jury's ability to handle these labyrinth of issues was heartening to Blank Rome's Murray. He concluded that, while environmental coverage disputes will continue, the verdict reaffirms his belief in the jury system.

"My big takeaway from this is, at the end of the day, have faith in the jury, no matter how complicated the issue," he said. "Have faith in your abilities as a trial lawyer to simplify the issues, make the jury understand and also have faith that the jury will follow the instructions and how important those instructions are."

Chubb declined to comment on the verdict.

Counsel for the insurer did not respond to a request for comment.

Justice Gerald Lebovits presided over the trial.

National Grid is represented by Gretchen Hoff Varner, Mike Lechliter, Ben Razi, Ryan Buschell, Mike Nicholson, Todd Itami, Brian Foster, Justin Howell, Daniel Rios and Josh Silver of Covington & Burling LLP.

Century is represented by Tancred V. Schiavoni, Leah Godesky, Jonathan Rosenberg and Anton Melitsky of O'Melveny & Myers LLP, by Robert P. Firriolo of Altieri & Firriolo PLLC and by Lawrence A. Nathanson of Siegal & Park.

Munich is represented by William G. Blaine of Landman Corsi Ballaine & Ford PC, by John Albert Mattoon and Michael Lewis Alnania of Ford Marrin Esposito Witmeyer & Gleser LLP and by Maryann C. Hayes and Robert J. Bates of BatesCarey LLP.

The case is Brooklyn Union Gas Co. v. Century Indemnity Insurance Co. et al., case numbers 603405/2001 and 403087/2002, in the New York Supreme Court, New York County.

--Editing by Nick Petruncio.