New York Appellate Division Holds Policyholder Responsible for Periods When Insurance Was Unavailable, Rejecting Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178 (2nd Cir. 1995).

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In a major departure from New York Law as predicted by the Second Circuit, The New York Appellate Division (1st Department) has rejected the "unavailability" exception to pro-rata allocation, holding that the policyholder is responsible for the pro-rata share of damages allocable to periods where insurance for the risk was unavailable in the marketplace. Keyspan Gas E. Corp. v Munich Reins. Am., Inc., 2016 N.Y. App. Div. LEXIS 5824 (N.Y. App. Div. 1st Dep't 2016). This is the first time a New York State Appellate Court has addressed this issue, and as such, the ruling is a significant victory for insurers.

Keyspan, a National Grid PLC subsidiary, filed suit seeking coverage for environmental contamination at multiple sites from Century Indemnity Company ("Century") and other insurers who provided general liability insurance to Keyspan from 1953 through 1986. The underlying environmental contamination occurred as a result of gradual pollution taking place between 1903 and 2012 at two New York manufactured gas sites. Century brought a motion for partial summary judgment on various allocation-related issues. The motion court held that pro-rata time on the risk allocation applied to the policies; that Keyspan was responsible for the pro-rata share attributable to periods where Keyspan did not purchase insurance that was otherwise available in the market; and that Keyspan was responsible for the pro-rata share attributable to the period between 1971 and 1982 when New York's Insurance Law expressly prohibited insurers from insuring liability arising from environmental pollution. Those rulings were not challenged on appeal. Century did, however, appeal the motion court's ruling that (except for the 1971-1982 period where the legislature prohibited the sale of pollution liability insurance) periods where insurance was unavailable in the marketplace should be excluded from the pro-rata allocation, effectively assigning liability for those periods to Century as the only non-settled insurer. As the Appellate Court noted, at issue on appeal was responsibility for as many as 70 years' worth of allocated risk.

The Century policies all contained language stating that they applied to "occurrences" or "property damage" that takes place "during the policy period." The policies' definitions of occurrence also spoke of damages or injury "during the policy period." None of the policies contained non-cumulation provisions such as those at issue in Matter of Viking Pump, 27 NY3d 244 (2016). The Appellate Division held that the policy language was consistent with a time on the risk allocation, and found that "[u]navailability is inconsistent with time on the risk, since it allocates [to the insurers] responsibility for periods of time when no insurance was purchased and is, therefore, inconsistent with the policy language." 2016 N.Y. App. Div. LEXIS 5824 at *18. The Appellate Division found that there were no policy provisions in Century's policies justifying the unavailability exception to pro-rata allocation, and rejected arguments that the policies were ambiguous: "Keyspan's interpretations would expose Century to risks beyond those contemplated by the parties when the policies were purchased, as evidenced by the plain language of the policy." The Appellate Division also rejected various public policy arguments raised by Keyspan.

After noting that New York courts will not rewrite a policy for equitable reasons, or disregard policy provisions inserted into a policy and accepted by the insured, the court held that “the spreading of industry risk through insurance is accomplished through the setting and payment of premiums for insurance, consistent with the parties’ forward looking assessment of what that risk might entail. In the absence of a contract requiring such action, spreading risk should not by itself serve as a legal basis for providing free insurance to an insured.”

The Keyspan decision is a rejection of the Second Circuit’s prediction in Stonewall Ins. Co. v. Asbestos Claims Management Corp., 73 F.3d 1178 (2nd Cir. 1995) and Olin Corp. v. Ins. Co. of North America, 221 F.3d 307 (2nd Cir. 2000), that New York would apply the unavailability exception to pro-rata allocation, and is a reaffirmation that the New York Courts’ primary focus for resolving insurance coverage issues is the bargained-for language of the specific policies at issue.

If you have any questions about the decision, please feel free to contact Lorraine M. Armenti larmenti@cmg.law, (973) 631-6008 or Christopher S. Frangeš, cfranges@cmg.law, (973) 631-6017.