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QUARTERLY INSURANCE COVERAGE NEWSLETTER: NEW YORK

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CASES OF INTEREST BY TOPIC

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ALLOCATION/UNAVAILABILITY RULE

<u>KeySpan Gas East Corp. v. Munich Reinsurance Am.,</u> 31 N.Y.3d 51 (March 27, 2018).

KeySpan Gas East Corporation commenced this action seeking a declaration of coverage and determination of liability owed under a number of insurance policies, including the policies issued by Century Indemnity Company. Between 1953 and 1969, Century issued eight excess liability insurance policies to Long Island Lighting Company, KeySpan's predecessor, which owned and operated manufactured gas plants in Rockaway Park, NY and Hempstead, NY. Decades after gas production ceased, the New York Department of Environmental Conservation ("DEC") determined that there had been long term, gradual environmental damage at both sites and required KeySpan to undertake costly remediation efforts. The particular question before the Court of Appeals was whether, under the "pro rata time-on-the-risk" method of allocation, Century is liable to its insured, KeySpan, for years outside of its policy periods when there was no applicable insurance coverage available in the marketplace, a matter of first impression in New York. In 2014, Century moved for partial summary judgment declaring that it was "not responsible for any portion of the property damage at the Rockaway Park and Hempstead sites that occurred outside the Century policy periods," and that "[a]ny covered costs are to be allocated pro rata over the entire period during which property damage at each site occurred." In opposition, KeySpan did not dispute that pro rata time-on-the-risk allocation controlled under the relevant policies, but argued that Century's pro rata share should not be reduced by factoring in the years in which pollution property damage liability insurance was unavailable for purchase. The trial court partially granted Century's motion, holding that liability should be allocated to KeySpan for the years in which it elected to self-insure and in which the legislature mandated a pollution exclusion in liability policies. However, the trial court denied the motion with respect to those years in which the relevant insurance coverage was otherwise unavailable in the marketplace. On Century's appeal, the Appellate Division reversed the trial court's order, holding that Century did not have an obligation to indemnify KeySpan for losses that are attributable to

time periods when liability insurance was otherwise unavailable in the marketplace. Thereafter, the Court of Appeals affirmed. While it was undisputed that pro rata allocation was applicable, KeySpan contended that the "unavailability rule" followed by some jurisdictions should be adopted. Under this approach, a policyholder bears the risk for periods of time when it elected not to purchase available insurance, but not for those years when insurance was otherwise unavailable. The Court of Appeals found that the unavailability rule is inconsistent with the contract language that provides the foundation for the pro rata approach – specifically, the language which limits the insurer's obligation to liability incurred "during the policy period." To allocate risk to the insurer for years outside of the policy period would be to ignore the very premise underlying pro rata allocation. The Court of Appeals agreed with the Appellate Division's rational 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," and that "[i]n 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." Moreover, from an equitable standpoint, the policyholder is the one who allegedly caused the injury and therefore, should be financially responsible should insurance prove insufficient. Ultimately, because the pro rata allocation method limits indemnification to losses and occurrences during the policy period, the unavailability rule cannot be reconciled with the pro rata approach and the New York Court of Appeals rejected the application of the unavailability rule for time-on-the-risk pro rata allocation.

EXCLUSIONS

<u>Employers Insurance Company of Wausau v. Harleysville Preferred Insurance Company</u>, 2018 WL 1612212 (2d Cir., April 4, 2018).

Employers Insurance Company of Wausau filed a declaratory judgment action seeking an order that Harleysville Preferred Insurance Company and Travelers Indemnity Co. had a duty to defend and indemnify Hellman Electric Corp., the Metropolitan Transportation Authority ("MTA") and the Triborough Bridge and Tunnel Authority ("TBTA") in an underlying wrongful death tort lawsuit brought by the widow of a Hellman's employee after a fatal accident occurred while unloading materials from a truck owned by Monarch Electric Co. Because of the Workers' Compensation bar, Hellman was named as a third-party defendant in the underlying lawsuit. Wausau issued a commercial general liability insurance policy, and Harleysville issued a commercial auto insurance policy to Hellman. Further, Monarch was a named insured and Hellman an insured on an auto policy issued by Travelers that was procured by Monarch's parent company. Pursuant to the relevant subcontracts, the MTA and the TBTA were additional insureds on the relevant insurance policies for any vicarious liability imposed on them for the other defendants' negligence. Harleysville and Travelers disclaimed coverage in connection with the underlying lawsuit based upon the Mechanical Device exclusion and the Employer Liability exclusion within each of their policies. The Mechanical Device exclusion precluded coverage for bodily injuries arising out of the movement of property using mechanical devices, and the Employer Liability exclusion barred coverage for injuries to the employees of the insured arising from their employment and contained an "insured contract" exception. The Second Circuit ruled that the Mechanical Device exclusion in each policy did not apply to bar coverage even though the allegations in the complaint along with the bill of particulars raised a

reasonable possibility that the employee's death resulted from the movement of property by mechanical device. In that regard, the Second Circuit reversed the lower court's ruling because although the fatal injury involved the use of a hydrolytically powered pallet jack, the exact sequence of events of when and in what manner the pallet jack was used remained open. With regard to the Employer Liability exclusion, the Second Circuit found that the exclusion in the Harleysville policy did not apply to bar coverage, whereas Travelers was relieved of its duty to defend Hellman. The Second Circuit reasoned that because the exclusion consistently referenced "the insured" rather than "an insured" or "the named insured," it is reasonable to read "the insured" as referring solely to whichever insured was seeking coverage. As such, Harleysville was not excused from defending the MTA and the TBTA in the underlying lawsuit because they were not the employers of the deceased. Harleysville did not challenge the existence of coverage for Hellman based upon the "insured contract" exception. The court, however, found the Employer Liability exclusion applied to relieve Travelers of its duty to defend Hellman because it was not the named insured under the Travelers policy. In that regard, the Employer Liability exclusion did not apply to liability assumed in an "insured contract," which was defined in the Travelers policy as a contract "under which *you* assume the tort liability of another." Significantly, the Travelers policy defined "*you*" as the "Named Insured shown in the Declarations," which was Monarch. Accordingly, in that Hellman was an insured that employed the deceased, Hellman fell squarely within the exclusion, and is not subject to the "insured contract" exception.

<u>Houston Casualty Company v. Cavan Corporation of NY, Inc.</u>, 158 A.D.3d 536 (1st Dept., February 20, 2018). Cavan Corporation of New York, Inc. entered into a "Construction Management Agreement" with the owners of a construction project pursuant to which Cavan agreed to act as a "construction manager". In October 2013, the principal of the project's sidewalk restoration contractor was injured in the course of the work and subsequently commenced a bodily injury lawsuit against Cavan and the owners. Houston Casualty Company issued a commercial general liability insurance policy to Cavan and instituted this declaratory judgment action to decide whether coverage was excluded. In that regard, the Houston policy contained an endorsement entitled "Exclusion-Construction Management for a Fee," providing that the insurance does not apply to losses "arising out of 'construction management,' regardless of whether such operations are conducted by you or on your behalf." The endorsement defined "construction management" to mean the planning, coordinating, supervising or controlling of construction activities while being compensated on a fee basis by an owner or developer." The First Department held that the Houston policy did not afford Cavan coverage based upon the construction management exclusion. Even though the complaint in the underlying action alleged that Cavan may have been acting as general contractor for the project, and notwithstanding that it may ultimately be determined in that action that Cavan was actually functioning as the project's general contractor for purposes of the claim under Labor Law 240(1), the policy, in defining the term "construction management," excluded from coverage operations for which Cavan was "being compensated on a fee basis." Pursuant to the Construction Management Agreement, Cavan was compensated for its work on the project on a flat fee basis rather than through progress payments covering the cost of the work done by the trade contractors plus an additional increment to provide Cavan with a profit. The foregoing suffices to bring Cavan's operations within the scope of the exclusion.

ADDITIONAL INSURED COVERAGE

Netherlands Insurance Company v. Endurance American Specialty Insurance Company, 157 A.D.3d 468 (1st Dept., January 9, 2018). Bangor Realty, LLC, which was insured by Netherlands Insurance Company, entered into a "Bid Proposal Document" for the construction work which allegedly was the cause of the bodily injury giving rise to the underlying lawsuit. The Bid Proposal identified the parties, provided the "total agreed price," contained the dated signatures of the parties and incorporated by reference "the approved plan for the entire project." Although the parties may have intended to execute a more formal agreement at a later point in time, the Bid Proposal constituted a binding agreement and required the contractor, which was insured by Endurance American Specialty Insurance Company, to name the owner (Bangor) as an additional insured. In reversing the lower court's decision, the First Department held that the Endurance Policy's additional insured endorsement was implicated as it affords coverage to "[a]ny entity required by written contract…to be named as an insured" and the Bid Proposal constituted such a written contract.

TIMELY NOTICE/DISCLAIMER

Liberty Mutual Fire Insurance Company v. Navigators Insurance Company, 158 A.D.3d 431 (1st Dept., February 1, 2018). Liberty Mutual Fire Insurance Company as subrogee of Edison Properties, LLC, Edison Construction Management, LLC and 5030 Broadway Properties, LLC brought this action against Navigators Insurance Company seeking reimbursement of sums paid in settlement of the underlying action. Liberty Mutual had previously sought additional insured coverage on behalf of its named insureds from the Navigators excess policy and the primary policy that sat below. Navigators resisted the tender on late notice grounds (pursuant to New York's former no prejudice rule). When notice to an excess carrier is at issue, the initial focus is on whether the insured reasonably should have known that the claim against it would likely exhaust its primary insurance coverage and trigger the excess policy. Moreover, consideration must be given to whether the delay between the insured acquiring knowledge that the claim would likely exceed the available primary insurance and providing notice to the excess carrier was reasonable under the circumstances. The First Department found that Liberty Mutual's November 17, 2010 letter was sufficient to provide notice of claim to Navigators. However, even if the June 2010 supplemental bill of particulars evidenced the likelihood that the primary policy would exhaust and Liberty Mutual's notice to Navigators was late, Navigators' disclaimer issued 37 days later was untimely as a matter of law.

AMBIGUITY

Certified Environmental Services, Inc. v. Endurance American Insurance Company, 158 A.D.3d 1209 (4th Dept., February 2, 2018). Certified Environmental Services, Inc. was indicted by a grand jury and later convicted upon a jury verdict of, inter alia, aiding and abetting violations of the Clean Air Act, but the conviction was subsequently vacated on appeal and the matter was remitted for a new trial. Certified thereafter pleaded guilty to the criminal charge of negligently releasing into the ambient air a hazardous pollutant, i.e., asbestos, thereby negligently placing other persons in imminent danger of death or serious bodily injury. During the criminal action, Certified sought a defense and indemnity under insurance policies issued by various insurers including Indian Harbor Insurance Company. The Indian Harbor policy included a "Professional Liability" coverage part and a "Contractors' Pollution Legal Liability" coverage part. The Indian Harbor policy was governed by New York law which provides that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."

Moreover, whether an agreement is ambiguous "is an issue of law for the courts to decide." The Fourth Department concluded that the Indian Harbor policy was unambiguous and not obligated to provide a defense to Certified for the claims in the criminal action. In that regard, the "Professional Liability" coverage part required Indian Harbor to defend the insured "against any 'suit,'" which is defined as "a civil proceeding." Inasmuch as there was no civil proceeding instituted against Certified, there was no "suit" and, thus, Indian Harbor had no duty to defend. Likewise, under the "Pollution Liability" coverage part, Indian Harbor was required to pay "those sums that [Certified] becomes legally obligated to pay as compensatory damages…as a result of a 'claim' first made against [Certified]" and provided that Indian Harbor has the duty to defend [Certified] "against any 'suit' seeking those compensatory damages." Although Certified argued that the allegations of the indictment, if true, could have resulted in civil claims and liability, the Fourth Department disagreed and concluded that the contract was unambiguous and did not provide coverage for the defense of the criminal action.

LOST OR MISSING POLICY

<u>American Precision Industries, Inc. v. Federal Insurance Company</u>, 2018 WL 1046790 (W.D.N.Y., February 26, 2018). American Precision Industries, Inc. ("API") commenced this action seeking a declaration that North River Insurance Company and certain other insurers must defend and indemnify API in connection with asbestos-related claims and reimburse defense fees and costs and settlement amounts. Among other policies, API sought coverage under a North River commercial general liability policy issued for the period 1974-1977; however, neither API nor North River were able to locate a copy of the policy. Although API had produced secondary evidence of the policy's existence, such as contemporaneously issued certificates of insurance and premium audits referencing or describing the policy, North River refused to acknowledge that it issued the policy. As part of a discovery dispute, the Court indicated that although it is the policyholder's burden of establishing that the insurance contract covers the loss, it "may rely on secondary evidence (i.e., evidence other than the policy itself) to prove the existence and terms of an insurance policy," provided the insured "demonstrates that it has made a diligent but unsuccessful search and inquiry for the missing policy." Moreover, it was stated that courts within the Second Circuit have relied on "specimen" or standard policy forms as secondary evidence of a lost or destroyed policy's terms.

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