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New York Court Finds No Coverage Owed for Asbestos Losses Because Insured Failed to Prove Material Terms

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In the long-tail insurance context, it is not unusual to have issues arise addressing "lost" or "missing" policies. In an opinion issued on January 22, 2021, a New York court ruled that an insurer did not owe coverage to its insured for underlying asbestos claims because the insured had failed to establish the material terms of a "lost" policy under which it sought coverage for the underlying claims. The lawsuit, *Cosmopolitan Shipping Company, Inc. v. Continental Insurance Company*,[1] arose out of a coverage dispute between Plaintiff Cosmopolitan Shipping Co., Inc. (Cosmopolitan) and its insurance carrier, Continental Insurance Company (CIC), in connection with bodily injury claims arising out of asbestos exposure. The case provides a good analysis of what an insured must do to establish coverage under a "lost" or "missing" policy.

During and after World War II, Cosmopolitan chartered and operated a number of shipping vessels on behalf of United Nations Relief and Rehabilitation Administration (UNRRA). In the 1980s, seamen who had worked on board Cosmopolitan's vessels between 1946 and 1948 filed lawsuits against Cosmopolitan seeking damages for injuries arising out of alleged exposure to asbestos on Cosmopolitan's vessels. Cosmopolitan sought coverage from CIC for the claims, alleging that CIC had insured Cosmopolitan's vessels during the relevant time period under a protection and indemnity policy issued to the UNRAA (the P&I Policy).

Except for three endorsements, the P&I Policy could not be located, and CIC denied coverage on that basis. Cosmopolitan filed a declaratory judgment action, and the court held an evidentiary hearing at which both parties relied upon expert and lay witness testimony to support their respective positions.

After the hearing, Cosmopolitan filed affidavits to establish that it had conducted a sufficiently diligent search for the relevant insurance policies. New York law provides that, where an insured demonstrates it has made a "diligent but unsuccessful search and inquiry for the missing policy," the insured may rely on secondary evidence to prove the existence and terms of the policy.

Cosmopolitan submitted evidence that it had: (1) asked its former broker to search for policies from the relevant time period; (2) conducted a thorough search of its own internal records; (3) issued subpoenas to other insurance entities permitted to provide P&I coverage for UNRRA vessels during the relevant time frame; and (4) searched various archives for insurance policies issued to Cosmopolitan and the UNRRA. The court determined that such efforts constituted a "sufficiently diligent" search, and Cosmopolitan was accordingly permitted to introduce on secondary evidence.

New York law is unclear as to whether a party using secondary evidence to establish coverage under a "lost policy" must prove the existence and terms of the lost policy by a preponderance of the evidence or by clear and convincing evidence. However, determination of the proper standard was unnecessary in this case because – although Cosmopolitan had proven by clear and convincing evidence that CIC provided insurance to the UNRRA – Cosmopolitan had nevertheless "failed to prove even by a preponderance of the evidence" the terms of the P&I Policy.

The clear and convincing evidence establishing that CIC provided coverage to the UNRRA during the relevant time period included: (1) the three endorsements identified by Cosmopolitan – one of which included language stating that it should be attached to the P&I Policy "of Continental Insurance Company and issued to the UNRRA"; (2) the dates on the three endorsements, which showed coverage

from at least May of 1946 to August of 1947; and (3) Cosmopolitan's witness' testimony, which established that only four insurance carriers, including CIC, were writing P&I insurance during the relevant time frame.

Although Cosmopolitan established the existence of the P&I Policy, the court still found that CIC did not owe coverage. To create a binding contract, there must be evidence of a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. In this case, Cosmopolitan failed to establish one of the most critical terms of the contract: the limits of the policy. Without knowing the policy limits, the court was unable to determine how much insurance was available to Cosmopolitan for each eligible asbestos plaintiff under the Policy. Accordingly, because the use of secondary evidence did not establish the material terms of the P&I Policy, CIC was not obligated to provide coverage for the underlying asbestos claims.

The *Cosmopolitan* case provides insurers with guidance when addressing "lost" or "missing" policy issues, which should be considered for spotting issues to assist in defending these types of coverage claims. The decision reflects that the insured has a significant burden and insurers should be aware of that burden and hold the insured to their proofs.

If you have questions or would like further information, please contact Gregory S. Capps (cappsg@whiteandwilliams.com; 215.864.7182) or Marianne E. Bradley (bradleym@whiteandwilliams.com; 215.864.7094).

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[1] 2020 U.S. Dist. LEXIS 241310 (S.D.N.Y., Dec. 22, 2020)