The United States Court of Appeals for the First Circuit recently affirmed multiple trial court rulings that were favorable to our client, Century Indemnity Company, in a long-running dispute over insurance coverage for environmental pollution at former manufactured gas plant (MGP) sites in Massachusetts. See *Boston Gas Co. v. Century Indem. Co.*, No. 11-1931, 2013 WL 203578 (1st Cir. Jan. 18, 2013). MGP operations at the site in question took place between the late 1880s and the early 1930s. At trial in 2007, the insured, Boston Gas Company, contended that the resulting pollution had occurred continuously and indivisibly from the beginning of MGP operations through 2007. Boston Gas further contended that at least “some” of the damage had occurred during the Century policy periods (1951-1969) and, therefore, it could recover all of its site investigation and cleanup costs from Century under a joint-and-several (or “all sums”) allocation. Although the jury found that some damage had occurred during each Century policy year, it agreed with Century that the policies’ exclusion for damage to the insured’s property barred coverage for over half of the claimed costs. On the verdict form, however, the jury recorded the amount of the excluded costs as the covered damages. Century immediately moved to correct this apparent mistake, but the trial court deferred ruling until the Massachusetts Supreme Judicial Court (SJC) decided a related appeal.

In that appeal, Century, also represented by White and Williams, urged the SJC to reject joint-and-several allocation categorically and adopt *pro rata* allocation in cases of continuous environmental damage. In 2009, the SJC agreed with Century and held that damages are to be allocated *pro rata* by time on the risk unless the evidence in a particular case permits a more accurate (i.e., “fact-based”) allocation to specific periods. See *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290 (Mass. 2009).

Following the SJC’s ruling, the district court ruled, on Century’s motion, that Boston Gas was judicially estopped from contradicting its position at trial that the pollution at the site had occurred continuously and indivisibly during the 1886-2007 period. The district court further ruled that the evidence did not permit a “fact-based” allocation and, under the SJC’s decision, Boston Gas’ damages therefore would be spread evenly across the entire 121-year period. This reduced Century’s share of the damages from 100% to under 15%. The district court also ordered a new trial on the owned-property issue after agreeing with Century that the jury had likely erred in recording the amount of covered damages on the verdict form. Boston Gas ultimately concluded that a
trial on that limited issue was not economical and, therefore, stipulated to the entry of judgment and appealed to the
First Circuit.

The First Circuit affirmed the district court on all grounds. First, and most notably, the Court of Appeals refused to
recognize a per se rule that the owned-property exclusion does not bar coverage for the costs of cleaning up natural
resources under Massachusetts law. Boston Gas argued that it had incurred certain cleanup costs to remedy the impact
to air above a particular area of the site and those costs fell outside the scope of the exclusion because the air was not
its property. The First Circuit declined to delve deeply into property law and land use issues concerning air rights above
Boston Gas’ property, and agreed with Century that the proper focus is on whether contamination on an insured’s
property poses a significant risk to the public or to private third parties’ use and enjoyment of their property. According to
the First Circuit, Boston Gas thus could defeat the owned-property exclusion as a matter of law only if the evidence
indisputably established a significant risk of migration onto third-party property. The Court of Appeals determined that,
because a reasonable jury could be persuaded that no such evidence existed, the district court correctly refused to enter
judgment as a matter of law in Boston Gas’ favor on the owned-property exclusion.

Second, the First Circuit disagreed with Boston Gas that the jury had performed a “fact-based” allocation. The First
Circuit recognized that the case was tried on a joint-and-several basis and, therefore, the jury was asked to find whether
some damage had occurred during the Century policy years and was not tasked with quantifying the property damage by
year from 1886 to 2007. The First Circuit also held that the doctrine of judicial estoppel precluded Boston Gas from
arguing that the evidence permitted an allocation of the damage to specific years.

Third, the First Circuit found no error in the district court’s conclusion that the jury had made a mistake in recording the
amount of covered damages. The First Circuit concluded that it was appropriate to vacate the jury’s findings on the
owned-property issue and remanded to the district court for further proceedings.

Finally, the Court of Appeals upheld the district court’s denial of Boston Gas’ request to reopen discovery after the 2007
trial. According to Boston Gas, further discovery was necessary to address “substantial additional contamination” that
allegedly had been discovered at the site. The district court cited the lengthy history of the litigation and suggested that
Boston Gas initiate a separate lawsuit if it wished to pursue recovery for any newly-discovered contamination. The First
Circuit held that the district court was within its broad discretion in determining whether to hold separate trials in the
same case.

Century was represented by Guy Cellucci, Patricia Santelle and Shane Heskin at trial, and by Messrs. Cellucci and Heskin
on appeal.