ISSUE 04

Mound Cotton Wollan & Greengrass LLP
COUNSELLORS AT LAW

Decisions

A Newsletter from the Law Firm of Mound Cotton Wollan & Greengrass LLP

Introduction

Four years have passed since Superstorm Sandy left a wake of destruction in the New York and New Jersey area. This year, eleven of the twenty-nine Mound Cotton victories related to first-party coverage disputes arising out of Sandy. In addition to our Superstorm Sandy cases, most of which were venued in the federal and state courts of New York or New Jersey, Mound Cotton received favorable decisions from courts in Connecticut, Tennessee, Delaware, and California. These decisions explore most of the leading issues in the insurance field, including the duty to defend, trigger of coverage, bad-faith, suit limitation provisions, application of deductibles, application of sub-limits, contingent business interruption, and application of various exclusions, including pollution and corrosion exclusions. We are proud of the work our lawyers accomplished in 2016 and are pleased to share these victories with you.

Inside: 2016 Highlighted Cases

SINCE 1933

Scottsdale Ins. Co. v. 490 Fulton Owner, LLC, Case No. 156410/14, Sup. Ct., N.Y. Co. (July 14, 2016):

Scottsdale sued Mound Cotton's client, KSK Construction and Kiska Development Group (collectively "KSK"), seeking a declaration that it had no duty to defend KSK as additional insureds under a general liability policy issued to Steel Toe, Inc., in connection with two underlying actions arising out of a construction accident. KSK claimed it was an additional insured under the Scottsdale policy based on a contract between KSK and Steel Toe that required Steel Toe to name KSK as additional insureds on its GL policy for liabilities arising out of Steel Toe's work at the construction site. By endorsement, the Scottsdale policy provided primary and non-contributory additional insured coverage for liability arising out of Steel Toe's operations where required by written contract.

The complaints in the underlying actions both alleged that KSK entered into a contract with Steel Toe to perform work at the construction site, and that the plaintiffs were injured during the course of their employment with Steel Toe. Scottsdale initially agreed to defend KSK in one of the two underlying actions. However, after Steel Toe's owner testified at deposition that the individual who signed the contract between Steel Toe and KSK (Brunner) did not have the authority to do so, Scottsdale disclaimed any further duty to defend or indemnify KSK and commenced a declaratory judgment action.

KSK moved for summary judgment seeking a declaration that Scottsdale had a duty to defend KSK in both of the underlying actions based on the pleadings in those cases and the plain language of the agreement between KSK and Steel Toe. KSK moved to dismiss the remainder of Scottsdale's complaint on the ground that a determination of Scottsdale's indemnity obligation toward KSK was premature.

The court held that Scottsdale had a duty to defend KSK in both of the underlying actions because the allegations of the underlying pleadings, the contract between KSK and Steel Toe, and the provisions of the Scottsdale policy all established, *prima facie*, that KSK were additional insureds under the policy. Further, the court held that the extrinsic evidence submitted by Scottsdale in support of its declination, i.e. Steel Toe's owner's self-serving denial of "the existence of a written agreement or that Brunner was authorized to enter one, or that demolition work was ever performed," was "controverted by the written agreement itself, and thus the testimony does not conclusively establish, as a matter of law, a factual or legal basis relieving plaintiff of its duty to defend." The court held that the validity of the agreement between Steel Toe and KSK would be determined in the underlying actions, and stayed discovery on that issue pending resolution of the underlying claims.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Ellen Margolis** or associate **Tanya Gondiosa.**

Liberty Mut. Ins. Co. v. The Fairbanks Co. and The Fairbanks Co. v. National Union Fire Ins. Co. Of Pittsburgh, Pa., 170 F.Supp.3d 634 (S.D.N.Y. 2016)

Judge John G. Koeltl of the United States District Court for the Southern District of New York awarded summary judgment to Liberty Mutual in two related insurance coverage declaratory judgment actions: Liberty Mutual Insurance Company v. The Fairbanks Company, 1:13-cv-03755-JGK, and The Fairbanks Company v. National Union Fire Insurance Company of Pittsburgh, PA et al., 1:15-cv-01141-JGK.

The litigation concerned the extent of Liberty Mutual's insurance coverage and indemnity obligation for its insured, The Fairbanks Company, arising from numerous asbestos personal injury actions filed against Fairbanks. The claimants in the underlying actions alleged asbestos exposure and related progressive injuries spanning several decades. Liberty Mutual provided general liability coverage to Fairbanks and thus sought a declaration that it was responsible only for its pro rata, time on the risk share of the asbestos losses. Liberty Mutual also sought a declaration that New York law applied to its policies even though Fairbanks re-domesticated to Georgia in the mid-1980's. Finally, Liberty Mutual sought a declaration that, notwithstanding a Georgia insolvency statute that Fairbanks contended supported all sums allocation, Liberty Mutual was not responsible for the so called "orphan share" arising from the May 2013 insolvency of one of Fairbanks' other insurers, Lumbermens Mutual Insurance Company. The court adopted all of Liberty Mutual's legal arguments on the pro rata point, and ruled as follows:

- Notwithstanding Fairbanks' relocation to Georgia in 1985, and its presence there when Liberty Mutual issued its policies to Fairbanks, New York substantive law applied to Liberty Mutual's policies.

- The Liberty Mutual policies, which cover "bodily injury" that occurs "during the policy period," unambiguously provide for pro rata allocation under settled New York precedent.

- Pro rata allocation applies notwithstanding the alleged prior course of conduct between the parties and the insurers' full funding of numerous asbestos settlements.

- Pro rata allocation applies notwithstanding the non-cumulation provision in the Liberty Mutual policies and the related certified question from In re Viking Pump, Inc., 146 A.3d 1046 (Del. 2015) (decided by the New York Court of Appeals in In re Viking Pump, 27 N.Y.3d 244 (2016)).

Specifically, Judge Koeltl opined that "[t]he Delaware Court of Chancery's decision in Viking Pump…has limited persuasive value…." In rejecting Fairbanks' non-cumulation position, Judge Koeltl also acknowledged a recent ruling of the court (likewise obtained by Mound Cotton for Liberty Mutual) in Liberty Mutual v. J.&S. Supply, Inc., 13-cv-4784 ("the district court in J&S Supply rejected the same argument regarding a nearly identical non-cumulation provision…").

As noted, in finding that Liberty Mutual is not responsible for the orphan share arising from the Lumbermens insolvency notwithstanding the Georgia statute, the court acknowledged the New York center of gravity of the risk Liberty Mutual insured as well as New York's significant interest in regulating the conduct of insurance companies doing business in New York, particularly where the insured's risk is widespread.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Lloyd Gura** or **Mark Weber.**

General/Commercial Litigation

Hadco Metal Trading Co., LLC v. Barcol-Air, Ltd., 165 Conn.App. 465 (2016)

The Defendant-Appellant Barcol-Air, Ltd. appealed from a judgment of the trial court granting the application for a prejudgment remedy in the amount of $250,000 filed by Hadco Metal Trading Co., LLC, who was represented by MCWG. Barcol claimed that the court improperly concluded that the purchase orders at issue contained all relevant terms, including dates for delivery by Hadco of a custom product. Specifically, Barcol argued that the trial court should have considered certain provisions of the Uniform Commercial Code in interpreting the terms of the purchase orders between the parties. Hadco argued that Barcol failed to raise the applicability of the UCC in the trial court such that the issue was not properly preserved for appellate review. The Appellate Court agreed and affirmed the trial court's decision.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Barry Temkin** or special counsel **Jodi Tesser.**

Defriese v. Am. Airlines, Inc., Case No. 2014-583, TN Cir. Ct., Williamson Co. (Aug. 9, 2016)

Summary judgment was granted in favor of Mound Cotton's client, American Airlines, enforcing the limitation of liability provision in an air waybill contract of carriage. Plaintiff sought to recover for American Airlines' alleged delay in the carriage of a shipment of caviar from Tennessee to New Jersey. It was undisputed that the air waybill form clearly provided that the liability of the carrier was limited to 50 cents per pound of shipment, absent a declaration of value. It was also undisputed that no value for carriage was listed in the air waybill form and that plaintiff did not pay any additional fee associated with a declaration of value for the shipment.

Plaintiff testified though, that she had been shipping commercial cargo for many years on numerous airlines and it was her practice to declare value on American Airlines' air waybill form until approximately late 2011, when she was told by an American Airlines employee that this was unnecessary. Under federal common law, a limitation of liability is enforceable if the shipper was given the option of receiving a higher recovery upon paying a higher rate and provided reasonable notice of such option. The court held that the limitation of liability contained in American Airlines' air waybill form provided reasonable notice to the shipper as a matter of law. The court refused to look outside the four corners of the air waybill contract, holding that it was irrelevant what plaintiff was told by an American Airlines employee and whether she had read the air waybill before signing it, because plaintiff had an obligation to read the air waybill prior to signing it and the terms of the air waybill expressly precluded oral modification by an agent or employee of American Airlines.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Frank Montbach** or associate **Olga Sekulic.**

Fisher v. Wolff v. Mori Partners LLC, No. HUD-L-1994-14, Sup. Ct. Hudson Co. (Aug. 22, 2016)

Summary judgment was granted in favor of Mound Cotton's client, Mori Partners, LLC, on a claim of constructive eviction and infliction of emotional distress. Mori Partners leased a condominium unit in the Riva Pointe Condominium Tower to the Riva Pointe Condominium Association, which in turn sublet the unit to third-party plaintiff Sandra Wolff. Ms. Wolff complained that, to force her out of the unit, Mori Partners had allowed electrical service to the unit be shut off. However, the written lease stated that Mori Partners had no obligation to provide electricity, and that any termination of electricity to the unit would not be an act of constructive eviction. The electricity was turned off by the electric utility company when neither the Condominium Association nor Ms. Wolff paid the bills. There was no evidence that Mori Partners did anything affirmatively to harass Ms. Wolff or to cause the electricity to be shut off. The court therefore held that Mori Partners did not constructively evict Ms. Wolff, inasmuch as Mori Partners had no obligation to provide electricity to the unit and Ms. Wolff had provided no evidence to support a claim of infliction of emotional distress. All claims against Mori Partners were therefore dismissed.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Wayne Glaubinger** or of counsel **Scott Sheldon**.

Best Value Kosher Foods, Inc. v. Am. Airlines, Inc., No. 16-cv-02263, 2016 WL 7217639 (E.D.N.Y. Dec. 12, 2016)

The court granted summary judgment dismissing the action against Mound Cotton's client, American Airlines. Plaintiff sought to recover for the alleged delay and mishandling of a shipment of cheese carried by American Airlines from Paris to New York. Plaintiff alleged that American Airlines had a duty to properly refrigerate the shipment during the six days that the shipment was waiting to clear customs. The court found that plaintiff failed to provide adequate evidence of the condition of the shipment on receipt by American Airlines in Paris. The court rejected plaintiff's attempt to rely on a document that purported to be an official health certificate attesting to the lack of dangerous bacteria, and an informal statement by the consignor in France that the cheese was free of bacterial defect and had been kept refrigerated. Moreover, the court found that plaintiff failed to provide adequate evidence of damages and that the delay in delivering the shipment fell within the "act of public authority" exception to the strict liability of carriers under the Montreal Convention.

Plaintiff's principal testified at the hearing that the shipment was the subject of a customs hold. The court reasoned that, even if American Airlines had a duty to keep the cargo refrigerated, it was obligated to use reasonable care only, and, thus, it was unreasonable to expect that American Airlines was to keep plaintiff's shipment of cheese refrigerated indefinitely pending customs clearance.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Frank Montbach** or associate **Olga Sekulic**.

Trustees Of Columbia Univ. In The City Of N.Y. v. Gorz, No. 61869/2015, N.Y. Sup., Westchester Co. (Sept. 19, 2016)

In a one-page order, the Supreme Court of the State of New York, Westchester County, vacated a default judgment that had been entered against a medical student concerning certain alleged unpaid debts, and dismissed the matter in its entirety for lack of personal jurisdiction.

Columbia University had sought and obtained a default judgment against the medical student that ordered the student to pay for certain alleged summer tuition-related debts. Default judgments are ordinarily issued against parties who fail to defend themselves or otherwise respond in any way to lawsuits filed against them; after a default judgment is issued against a party, it often becomes much more difficult for that party to defend itself on the merits of the underlying lawsuit.

Mound Cotton, representing the student pro bono, filed a motion to vacate the default judgment on the basis that the student was never given the proper notice about Columbia University's original lawsuit in the first place and, therefore, could not have timely responded or asserted any defenses. Moreover, Mound Cotton moved to dismiss the case in its entirety rather than simply seeking vacatur of the default judgment and allowing the student to assert a defense on the merits.

After the motion was filed and briefed, and the student's arguments and positions were detailed in full, Columbia University decided not to oppose the motion. Accordingly, the court granted the motion in full by vacating the default judgment and dismissing the lawsuit with prejudice in its entirety.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Wayne Glaubinger** or associate **Jared Markowitz**.

Trump Entertainment Resorts, Inc. v. Lexington Ins. Co., No. AM-458-15T4, NJ Super. App. Div. (Apr. 11, 2016)

The Appellate Division ruled in favor of Mound Cotton's clients, Lexington Insurance Company and Aspen Specialty Insurance Company, and severed and stayed all bad-faith claims made by the plaintiffs. The lawsuit sought recovery for lost revenues at the Trump Plaza and Trump Taj Mahal casinos in Atlantic City following Superstorm Sandy. The insurers had denied the claim on the basis that it did not exceed the policy's weather catastrophe deductible and that no coverage existed for a generalized downturn in business in the aftermath of a weather catastrophe. The trial court denied the insurers' motion to sever and stay plaintiffs' bad-faith claims. On interlocutory appeal, the Appellate Division held that the trial court's denial was an abuse of discretion and a departure from past Appellate Division precedent under which bad-faith claims ordinarily should be severed and stayed. The Appellate Division therefore reversed the trial court and directed that the bad-faith claims be severed and stayed.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Wayne Glaubinger**, of counsel **Scott Sheldon**, or associate **Andrew Rice**.

Shamokin Commons LLC v. Lexington Ins. Co., No. 153336/2014, Sup. Ct., N.Y. Co. (Mar. 2, 2016)

Mound Cotton obtained an order granting summary judgment in favor of its client, Lexington Insurance Company, dismissing all claims made by the plaintiff Shamokin Commons LLC. The case involved vandalism to rooftop HVAC units at a retail building in Pennsylvania. Lexington's insured, Capmark Bank, sold the building and assigned the insurance claim to Shamokin. Before the sale, Capmark signed a statement of loss that reflected the damage amount that both Capmark and Lexington had accepted. Shamokin, however, refused to accept that amount, claiming that the cost to replace the HVAC units was double what had been agreed to by Capmark, and that the vandalism had caused extensive interior water damage to the building that was not included in the agreement.

In granting summary judgment in Lexington's favor, Justice Ellen Coin of the New York Supreme Court held that Capmark and Lexington had agreed on the amount of loss, and Shamokin, as assignee, could not recover more than what Capmark had agreed to accept. Justice Coin also dismissed Shamokin's claim under New York's unfair trade practices law (§ 349 of the General Business Laws), holding that the statute applied only to consumer claims and, additionally, that Shamokin had not submitted any evidence of any unfair trade practices by Lexington.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Wayne Glaubinger** or of counsel **Scott Sheldon**.

State Farm & Cas. Co. a/s/o Breier v. Homesite Home Ins., Case No. 5524/13, N.Y. Sup. Ct., Nassau Co. (Apr. 6, 2016)

This matter involved State Farm's claim against Homesite as subrogee of the insureds, Robert and Sabine Breier, for the costs of remediating a fuel-oil spill at the insureds' residence. Specifically, the Breiers discovered corrosion leaks in their underground storage tank during the summer of 2008 while converting their home heating system from fuel oil to natural gas. As a result of the leaks, fuel oil leached into the ground. State Farm's investigation determined that the leak began during the Homesite policy period in 2003. Accordingly, State Farm paid the claim and ultimately sued Homesite to recover the amounts paid. Homesite denied the claim because it was not notified of the alleged damage until January 31, 2012, which was outside the applicable three-year statute of limitations.

In its decision, the court agreed that the action was untimely, based on both the policy's two-year suit limit provision and the three-year statute of limitations set forth in New York's Civil Practice Law & Rules. The court also agreed that the policy's exclusion for discharge or dispersal of pollutants applied to bar coverage.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Kevin Buckley.**

XL Ins. Am., Inc. v. The Howard Hughes Corp., Case No. 155660/14, N.Y. Sup. Ct., N.Y. Co. (June 27, 2016)

On June 27, 2016, Justice Manuel J. Mendez of New York County Supreme Court issued a decision in **XL Insurance America, Inc. v. The Howard Hughes Corporation** ("HHC") granting summary judgment dismissing HHC's claim against XL for alleged losses from Superstorm Sandy to HHC's properties at the South Street Seaport.

Mound Cotton's client XL was one of a number of insurers that, by separate policies – all of which conformed for the most part to a Willis manuscript – provided two-tiered property, business interruption, time element, and extra expense coverage to HHC for, among other properties, those South Street Seaport properties of which HHC was the ground lessor. By Endorsement 2 to its policy, XL agreed to provide coverage in the amount of 50 percent of $150 million, or $75 million, in excess of $50 million and also 100 percent of $50 million in excess of $200 million. HHC's coverage with other carriers provided the first $50 million for a loss in excess of the deductibles and also covered the $75 million above $50 million but below $200 million that XL did not insure.

Endorsement 2 also clearly stated that XL "does severally, but not jointly, agree to indemnify the Insured for the amount recoverable in accordance with the terms and conditions of this Policy and any Endorsements hereto, provided that… [XL's] collective liability does not] exceed its percentage of the Limit of Liability or any appropriate Sub-limit of Liability or any aggregate Limit of Liability in any annual Policy Year."

The Willis manuscript also contained a $50 million limit of liability for loss caused by flood with respect to locations set forth in an appendix, and provided – at clause 13, titled Earthquake and Flood – that "Flood does not mean Flood and Storm Surge as a result of Named Storm."

The XL policy was revised by the addition of Endorsement 3. That endorsement defined "flood" ("[n]otwithstanding any provisions to the contrary" in the policy or endorsements) as including the inundation of normally dry land from "storm surge" and "Named Storm." Endorsement 3 also defined "High Hazard Flood Zones" so as to encompass the Seaport properties and provided that for floods in High Hazard Flood Zones XL would "not be liable, per occurrence and in any one policy year, for more than its proportion of $50,000,000 which shall apply separately to each peril."

Endorsement 3 capped XL's liability for a flood in a High Hazard Flood Zone at "its proportion of $50,000,000," but under Endorsement 2, XL was liable for *no* portion of the first $50 million of any loss. Accordingly, XL sued HHC for a declaratory judgment that HHC's loss was caused by storm surge and was subject to the $50 million limit of liability for flood and that the claim was not covered under XL's policy because it provided coverage only for loss in excess of $50 million. After joinder of issue and document discovery, XL moved for summary judgment declaring that there was no coverage under XL's policy for HHC's claim.

Alleging some $86 million in damages from Superstorm Sandy at the South Street Seaport, HHC made two main arguments in opposition to summary judgment. First, HHC maintained that clause 13 of the Willis manuscript trumped Endorsement 3 so that the damage to the Seaport properties from the storm surge was not a "flood" in a High Hazard Flood Zone and XL's coverage was not limited by Endorsement 3 but fell under Endorsement 2. Second, HHC maintained that, even if the $50 million limitation of Endorsement 3 was applicable, it incepted not ground up but only above the first $50 million for which XL had no liability under Endorsement 2. In either event, according to HHC, XL should be held liable for 50 percent of HHC's damages between $50 million and $86 million or whatever higher amount eventuated up to $100 million.

As Justice Mendez wrote in his decision, XL's contention was "that there were multiple insurers providing coverage to HHC, with each participating for a stated percentage, at varying levels of coverage, and that under the policy Endorsement 2, plaintiff [XL] had no participation and no liability for loss."

Justice Mendez held that the definition of flood in clause 13 of the policy was self-contained and intended to apply only to that paragraph. On the other hand, Endorsement 3 was "not ambiguous or self-contained" but, rather, clarified the definition of flood for High Hazard Flood Zones and referred to both storm surge and Named Storm.

Justice Mendez also found no ambiguity in the policy's limitations of coverage, which specifically identified HHC's Seaport properties as within the High Hazard Flood Zone. According to the court: "There never was flood coverage for 'High Hazard Flood Zone' properties, including the Seaport Properties, because the initial attachment point is at, or above, an amount equal to the imposed sublimit. In other words,…'High Hazard Flood Zone' properties are covered by other insurers and not part of plaintiff's [XL's] layer of coverage."

Finally, Justice Mendez held, in declaring that XL was not liable for HHC's claim, that "[d]efendant has not stated a basis to avoid summary judgment for outstanding discovery. The discovery sought would not avoid the plain meaning of the policy." XL's motion for summary judgment was therefore granted in all respects.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Costantino Suriano**, **John Mezzacappa**, or **Jeffrey Crawford**.

TV Realty v. Tower Ins. Co. Of New York, No. 306589/2013, N.Y. Sup. Ct., Bronx Co. (July 11, 2016)

This litigation arose from plaintiff's insurance claim for alleged rain-water damage to its Bronx apartment building on December 27, 2012. Plaintiff did not report the incident until January 10, 2013. By the time Tower was given access to plaintiff's building, the entire roof had been replaced, and all of the allegedly damaged materials had been discarded. In addition, the investigation by Tower's consultants, as well as the few pre-repair photographs provided by plaintiff, indicated that the loss was not caused by the minimal winds on the date of loss but, rather, an inadequate roof drainage system coupled with long-term wear and tear and plaintiff's failure to maintain its property. Accordingly, Tower moved for summary judgment based on plaintiff's breach of policy conditions requiring prompt notice and preservation of allegedly damaged property.

The court agreed and granted summary judgment to Tower, holding that plaintiff breached the conditions of the policy requiring prompt notice and to make damaged property available for inspection. Specifically, the court held that there was not a "single valid excuse for plaintiff's failure to notify Tower of the damages just before or just after notifying plaintiff's public adjuster of the damages."

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Kevin Buckley** or **Dan O'Connell.**

Gitter v. NYPIUA, New York Supreme (April 7, 2016)

On April 7, 2016, New York Property Insurance Underwriting Association ("NYPIUA") received a decision from the Supreme Court of Queens County granting summary judgment against plaintiff Jeffry S. Gitter in a Superstorm Sandy dispute over the application of the policy's water exclusion endorsement and anti-concurrent causation clause. Plaintiff sued NYPIUA for allegedly breaching its contract of insurance by failing to pay the $253,775 loss plaintiff purportedly suffered to his premises. During Sandy, plaintiff's premises sustained extensive damage from flood, an excluded peril, to the lower level of the house, which was largely displaced, and much less damage to the upper floor. Following Sandy, NYPIUA investigated the loss and concluded that the majority of the damage to plaintiff's residence was caused by flood. NYPIUA issued payment to plaintiff for the limited damage caused by wind. Plaintiff's adjuster concluded that the purported damage was caused by a tidal surge, driven by wind, and stated that it was the "combination" of the two forces (storm surge and wind) that caused the damage to plaintiff's premises.

NYPIUA convinced the court that coverage was precluded by the policy's water exclusion endorsement. NYPIUA further argued that the policy's anti-concurrent causation provision precluded coverage where, as here, the pre-dominant cause of loss was an excluded peril.

The court agreed, siding with Mound Cotton's arguments on behalf of NYPIUA. The court opined that "the parties' dispute can be distilled to a single question: does the damage caused to Plaintiff's property fall within the water damage exclusion of the Policy? It is clear, by the plain and unambiguous language of the policy, that the damage does fall within the exclusion. Ultimately, it is clear that even if wind was a contributing cause and/or the second floor damage was in some way 'driven by wind,' the exclusion still applies and thus bars Plaintiff from recovering under the Policy for the damage to his property," wrote Justice Robert L. Nahman. "Defendants established that the loss was caused by storm surge when the lower level of plaintiff's residence was struck with portions of the displaced concrete driveway and boardwalk. Thus, defendants proved that an excluded peril was the dominant and proximate cause of the water damage."

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Costantino Suriano**.

Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co., 650 Fed.Appx. 70 (2d Cir. 2016)

In a summary order, the United States Court of Appeals for the Second Circuit held that summary judgment was properly granted to Zurich American Insurance Company in a matter concerning a $70 million contingent business interruption ("CBI") claim.

At issue was a contingent business interruption ("CBI") claim asserted by Zurich's insured, Lantheus Medical Imaging, Inc. The insured sought to recover lost income in excess of $70 million following the shutdown of a certain third-party's equipment that had been used to produce a key raw material required by the insured. The district court had sided with Zurich's decision to deny coverage on the basis of a corrosion exclusion in the policy issued to Lantheus, and Lantheus appealed that decision. On appeal, the Second Circuit essentially adopted the reasoning of the district court, concluding that the court's analysis was "thorough and sound."

Lantheus, a specialty pharmaceutical company that manufactures and distributes diagnostic medical imaging products, purchased certain raw materials from an Ontario, Canada supplier, including a radioactive isotope called Molybdenum-99 ("Moly-99"). After a heavy water leak had been discovered in the wall of the reactor vessel that produced Moly-99, the insured's supplier shut down the reactor. The Atomic Energy of Canada Limited ("AECL"), which operated the reactor, determined that the leak was caused by corrosion.

In light of the AECL's findings, Zurich denied coverage on the basis of a corrosion exclusion in the policy. The corrosion exclusion contained anti-concurrent causation language. Thus, the policy barred coverage for corrosion "regardless of any cause or event that contributes concurrently or in any sequence to the loss or damage."

Lantheus conducted extensive discovery of the AECL in an effort to develop evidence establishing that the loss was caused by something other than corrosion. Lantheus also retained a corrosion expert who testified that the particular type of corrosion at issue, electrochemical cell corrosion, did not qualify as "ordinary" corrosion because it happened very rapidly. Therefore, according to the insured, the corrosion exclusion did not apply. The insured also argued that the final penetration of the reactor wall occurred as a result of a sudden surge of water in the vessel, which caused a drastic increase in pressure (i.e., a pressure transient). In other words, the "straw that broke the camel's back" was a pressure transient and not corrosion.

The exclusion at issue provided that there was no coverage "for loss or damage resulting from…[d]eterioration, depletion, rust, corrosion, erosion, loss of weight, evaporation or wear and tear," and "regardless of any cause or event that contributes concurrently or in any sequence to the loss or damage." The insured argued that, when "read as a whole," the exclusion "generally connotes a process by which material is gradually consumed or worn away, either by external forces or the material's own inherent qualities." Lantheus also argued "that the ordinary meaning of corrosion is a 'gradual process' that does not occur rapidly."

The Second Circuit rejected the insured's arguments. Specifically, the court held that the district court properly drew all inferences in favor of the insured in concluding that the final breach of the reactor wall was caused by a pressure surge operating on an already weakened wall. The court further held that it was not error for the district court to conclude that the creation of the electrochemical cell contributed "concurrently or in any sequence" to the weakening of the wall. The Second Circuit explained "that the [damage caused by the development of the electrochemical cell] and its concurrent involvement in the through-wall breach that shut down the [reactor] is sufficient to bring the loss within the corrosion exclusion."

Finally, the court concluded that, since "the [penetration] of the reactor vessel wall took approximately twenty-nine days to occur and was caused at least in part by the differential aeration cell," there was "no question of material fact that the [reactor] shutdown falls into [the corrosion exclusion], even accepting Lantheus' proposed version of events."

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Philip Silverberg, William Wilson**, or associate **Jared Markowitz**.

Almah LLC v. Lexington Ins. Co., No. N15C-01-237, 2016 WL 369576 (Del. Super. Jan. 27, 2016)

The Superior Court of Delaware granted Lexington Insurance Company's motion for summary judgment insofar as it had sought a ruling that a first-party commercial property insurance policy's flood sublimit of liability caps the amount of coverage available for Superstorm Sandy-related time-element losses.

Lexington's insureds, Almah LLC and SL Green Realty Corporation, sustained certain physical and non-physical losses following Superstorm Sandy in 2012. After Lexington paid its insureds $25 million for their claimed losses, the insureds filed suit, alleging that they were entitled to an additional $15.8 million for various non-physical damages and losses, including Extra Expense, Rental Loss, and other time-element losses. Lexington denied liability for the additional claimed amount on the basis that any further recovery had been capped by the policy's sublimit of liability for flood.

Lexington moved for an order granting summary judgment on the basis that the flood sublimit capped any further recovery. The insureds argued that the flood sublimit only capped the amount of coverage available for physical flood damage and that the flood sublimit did not cap recovery for non-physical losses from flood.

The court sided with Lexington, holding that the Flood Sub-limit applies to many of Plaintiffs' claims arising from the Superstorm Sandy flood." The court pointed out that "plain language of the Policy provides that the $25,000,000 coverage for FLOOD…is for total loss or damage including any insured TIME ELEMENT loss" and, therefore, that "any claim by Plaintiffs that arises out of TIME ELEMENT–SECTION C falls within the $25,000,000 limit of liability for FLOOD."

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Wayne Glaubinger, William Wilson**, or associate **Jared Markowitz**.

DGP Assoc. L.P. v. American Guarantee & Liab. Ins. Co., 2016 WL 7242533, Cal. Ct. App. 1st Dist. (Dec. 15, 2016)

Mound Cotton recently won an appeal in favor of American Guarantee and Liability Insurance Company that an insurer is only obligated to make one payment to the "First Named Insured" for building damage according to the terms of the insurance policy. American Guarantee issued a policy that named Columbus Foods, a purveyor of quality meats, as the "First Named Insured." As the First Named Insured, Columbus Foods was entitled to have losses adjusted and payable to it. DGP was also a named insured.

Columbus Foods rented a building from DGP in which it processed meat. After a fire destroyed DGP's building, both Columbus Foods and DGP made claims for building damage. American Guarantee, Columbus Foods and DGP agreed that the value of the building damage was $15.5 million. Columbus Foods instructed American Guarantee to pay Columbus Foods $12 million and DGP $3.5 million. American Guarantee followed that instruction. DGP, however, sued American Guarantee to be paid an additional $12 million for the building damage. Mound Cotton won summary judgment for American Guarantee in the trial court.

On appeal, DGP contended that American Guarantee's building payment to Columbus Foods did not discharge its obligation to pay DGP the full value of damage to the building because DGP was the building owner and, therefore, the only entity with an insurable interest. Accordingly, DGP argued that American Guarantee should not have paid Columbus Foods for building damage. American Guarantee contended it was only obligated to make one payment for building damage as instructed by Columbus Foods, the First Named Insured, and that Columbus Foods' use of the building gave it an insurable interest.

The appellate court agreed with American Guarantee. It held that the nature of insurance does not allow there to be a total recovery in excess of the value of property when there is one loss. It further found that both Columbus Foods and DGP had an insurable interest in the building and the payment to Columbus Foods was proper. The court also held that American Guarantee's payment was proper because it followed the direction of Columbus Foods, the First Named Insured. Finally, the court found that American Guarantee appropriately investigated and handled the claim by requesting information from DGP and that DGP was not forthcoming in responding to American Guarantee's requests.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Jonathan Gross** or special counsel **Victor Jacobellis**.

Kashaka v. Tower Ins. Co. of N.Y., 2016 N.Y. Slip Op. 32499(U), 2016 WL 7407081 (Sup. Ct., Kings Co., Dec. 22, 2016)

This litigation concerned a first-party property insurance claim under a policy issued by Tower Insurance Company of New York, for damage to a building as a result of a fire. The premises was represented to be the plaintiff's primary residence in the application for insurance. In addition to stating that the structure would be owner occupied, the plaintiff also represented that no business would be operated from that location. When a fire occurred that destroyed the structure, Tower became aware that the plaintiff never resided in the premises, but rather had purchased the property as an investment. Moreover, plaintiff operated a daycare facility out of the premises in contrast to her representations in the application. As a result of these misrepresentations, Tower denied coverage for the damage on the ground that the policy was void from inception because of plaintiff's material misrepresentations.

Tower moved for summary judgment and supplied evidence that the premises was not the plaintiff's primary residence and that the structure was not owner occupied. It also noted that plaintiff represented in her application for insurance that she had no other residence, which further suggested that she resided only in the premises. Tower's underwriter stated in his affidavit that the company's underwriting selection rules would not have allowed the policy to be issued had the true facts been known.

Plaintiff cross-moved for summary judgment, contending that she did occupy the premises because she was there regularly due to her childcare business and allegedly slept there about once a week. Plaintiff also alleged that Tower had waived its defenses based on a misrepresentation of the commercial use of the property and plaintiff's primary residence because those defenses were allegedly not set forth in Tower's letter denying coverage. Finally, plaintiff argued that residence and occupancy were not synonymous and Tower only denied coverage based on occupancy.

The court held that plaintiff made material misrepresentations that voided the policy because "the record indicates that Plaintiff did not ever reside in the subject premises." The court found it "undisputed that the subject policy applies only to 'dwellings...occupied by owner...[for] primary usage" and plaintiff "never intended on occupying the subject premises as their primary residence." The court also rejected plaintiff's waiver argument because the denial letter mentioned that the building contained a business. Most notably, the court noted that "Plaintiff continued to ratify the application and its answers by accepting the policy and permitting it to be renewed for years thereafter on the same terms." The motion was granted and cross-motion denied. This is one of only two reported decisions in New York that have recognized the principle of ratification in the context of an application misrepresentation. *Morales,* cited in the decision, was also obtained by Mound Cotton.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Kevin Buckley** and associate **Bradley Small**.

Five Towns Nissan, LLC v. Universal Underwriters Ins. Co., 2016 NY Slip Op 32316(U), 2016 WL 6916478 (Sup Ct., N.Y. Co., Nov. 22, 2016)

This litigation concerned first-party insurance claims under two commercial property insurance policies, one of which was issued by Tower National Insurance Company, for alleged business interruption loss property damage arising out of Superstorm Sandy. While the lower court granted summary judgment in favor of Five Towns on its claim for business interruption coverage, the appellate court reversed and awarded judgment to Tower on that claim because flood loss was excluded from the policy's business interruption coverage.

Thereafter, Tower moved for summary judgment in the lower court to dismiss the remainder of the claim, which was for property damage. The policy's coverage for property damage was also subject to the same flood exclusion; however, Five Towns argued that the exclusion did not apply because the loss was caused by a "storm surge," which the appellate court allegedly never addressed. The lower court agreed with Tower that a storm surge was just another type of flood and said a finding to the contrary would be at odds with the appellate court's prior decision. Accordingly, the complaint was dismissed. The issue, whether a flood exclusion excludes loss caused by a "storm surge," had not been directly addressed in a reported decision in New York or any northeast jurisdiction, although the argument has been seen in several southeast jurisdictions over the last decade.

This decision was reported in the PLRB Frontlines, December 28, 2016, case 9612, and Law360 Insurance on November 29, 2016, Mealey's Litigation Report, Catastrophic Loss, Vol. 12 Issue 3, December 6, 2016 and The Harris Martin Superstorm Sandy Insurance Coverage Litigation Report, November 29 2016. This decision was preceded by the following appellate court decision: 125 A.D.3d 580, 5 N.Y.S.3d 35 (1st Dept. Feb. 25 2015)(Appellate court reversed lower court's grant of summary judgment of up to $2M in business interruption coverage because the business interruption must be caused a covered cause of loss, which flood is not.) This decision was reported in the PLRB Frontlines, March 4, 2015 case 14024 and Law360 Insurance on March 2, 2015.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Kevin Buckley** and **Daniel O'Connell**.

Five Towns Mason Materials v. Hermitage Ins. Co., 2016 NY Slip Op 32444, 2016 WL 7381806 (Sup Ct., Nassau Co., Nov. 4, 2016)

This litigation concerned plaintiff's first-party property insurance claims for damage to two commercial buildings in Inwood, New York allegedly as a result of wind from Superstorm Sandy. The claims were denied because Hermitage's investigation determined that the claimed damages were caused by flood (excluded from coverage) or pre-existed the storm.

In the litigation that followed, Hermitage moved for summary judgment, relying on the following: pre-loss photographs showing the existence of some of the alleged wind damage; the testimony of plaintiff's representatives who were unable to identify the specific areas of alleged wind damage and conceded that much of the claimed damage was caused by flood; and the expert opinion of Hermitage's engineer. In opposition, plaintiff relied on the opinion of its out-of-state building consultant, who claimed the damage was caused by wind.

Judge Diamond found that this evidence made it clear that the claimed damage was either caused by excluded flood or pre-existed the storm. Indeed, the decision states that the evidence relied on by Hermitage "overwhelms" plaintiff's contention that the damage was caused by wind, "thus leaving no question of fact to be resolved at trial."

The court also dismissed plaintiff's extra-contractual causes of action for the alleged breach of the covenant of good faith, and General Business Law § 349, finding that the "conclusory" allegations were not supported by the evidence.

This decision was reported in the New York Law Journal, as a Decision of Interest, on November 22, 2016, Mealey's Litigation Report, Catastrophic Loss, Vol. 12 Issue 3, December 6, 2016, and The Harris Martin Superstorm Sandy Insurance Coverage Litigation Report, November 29, 2016.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Kevin Buckley** and **Daniel O'Connell**.

Great American Ins. Co. of NY v. CNY Excavating And Concrete, LLC, 2016 NY Slip Op 31950(U), 2016 WL 6139777 (Sup. Ct., N.Y. Co., Oct 18, 2016)

This case concerns a property insurance coverage dispute that arose from damage that occurred in Oneida County, New York. CNY Excavating and Concrete, LLC commenced suit in Oneida County against Great American Insurance Group ("GAIG"), the parent company of Great American Insurance Company of New York ("GAICNY"). Inasmuch as GAICNY issued the policy to CNY, not GAIG, GAIG moved to dismiss the action in Oneida County and GAICNY simultaneously commenced a declaratory judgment action in New York County, where GAICNY maintains an office. The suit in Oneida County was eventually dismissed as GAIG had no contract with CNY.

Thereafter, CNY moved to change the venue of the GAICNY action from New York County to Oneida County based on its allegations that: (i) all the witnesses resided in and around that county, (ii) the loss occurred there, (iii) the policy was sent there, and (iv) the property proving the loss remained there. While none of these facts were contested, the motion to transfer was denied because CNY failed to properly support its motion with the type of evidence required by CPLR 510(3) and the convenience of CNY's own witnesses was not a "weighty factor" in considering the motion.

This decision was reported in the New York Law Journal as a "Decision of Interest" on October 25, 2016.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Kevin Buckley** and associate **Bradley Small**.

HB Holdings & Realty Mgmt., LLC v. Tower Ins. Co. of N.Y., 2016 N.Y. Slip Op 31857 (U), 2016 WL 5940228 (Sup Ct., Westchester Co., Sept 30, 2016)

This litigation concerned a first-party insurance claim under a commercial property insurance policy issued by Tower Insurance Company of New York for the alleged collapse of a commercial building's roof due to the weight of rain and snow. Tower allegedly breached the contract by failing to pay the claim submitted by plaintiff.

Tower moved for summary judgment based on the insurance policy's Collapse Exclusion and the Additional Coverage for Collapse provision since it did not appear that any part of the building abruptly fell down as required by the policy's Additional Coverage provision. The evidence supporting the motion included an engineer's affidavit that explained that the physical property exhibited only long-term deterioration and water seepage with a deflection of the roof as a result. In opposition to the motion, plaintiff provided witness statements that portions of the ceiling and roof had collapsed on the date of the loss, including a beam. Plaintiff's opposition was further supported by an engineer's affidavit that concluded the weight of snow and rain caused the roof to deflect nine inches.

While conflicting expert reports normally create a "battle of the experts" that results in the denial of summary judgment, the court considered the factual and engineering support, and awarded Tower summary judgment because the policy required a part of the premises to fall to the ground. It found a nine-inch deflection is not a collapse, nor is the falling of portions of the ceiling pursuant to the policy's definition.

Accordingly, the complaint was dismissed as the court concluded the premises was not damaged by a covered collapse. The issue--whether the damage constitutes a collapse under the insurance industry's commonly used definition--has been disputed, and the decisions have not been uniform regarding whether a deflection of a roof or the falling of smaller parts of a building is a "collapse."

This decision was reported in Mealey's Litigation Report, Catastrophic Loss, Vol. 12 Issue 1, October 12, 2016; Mealey's Litigation Report: Insurance, Vol. 30, Issue 47, October 19, 2016; and in the PLRB Frontlines, October 19, 2016.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Kevin Buckley** and **Daniel O'Connell.**

Brady v. Tower Group Companies, Index No. 14938/2014 (Sup. Ct., Queens Co., Sept 22, 2016)

This litigation concerned a first-party insurance claim under a homeowners property insurance policy issued by Tower Insurance Company of New York for the destruction of a vacation house located in Breezy Point, N.Y. during Superstorm Sandy. Tower allegedly breached the contract by failing to pay the claim submitted by plaintiffs.

Tower moved for summary judgment based on the insurance policy's exclusion barring coverage for damage caused by flooding, and submitted evidence that the entire community was inundated by several feet of flood water during the storm. This evidence included an engineer's affidavit explaining the forces that flood water exerts on a structure and the different evidence resulting from flood exposure as compared to wind damage. In opposition, plaintiff alleged that all of its claimed damage, which was the complete destruction of the premises, was the result of the high winds that accompanied the storm. Plaintiff supported this allegation with an affidavit from its own engineer, in which the engineer opined that the physical evidence proved the damage was caused by wind.

The court considered the factual and engineering support, as well as the "common sense appeal" behind Tower's engineer's opinion and contrasted that with the plaintiff's engineer's lack of any explanation for certain physical evidence. Given that plaintiff's engineer failed to address contrary evidence, the court concluded that a "Moses-like parting of the waters" would have had to occur if plaintiff's expert's opinion were correct. As a result, the court deemed the plaintiff's opinion speculative and disregarded it.

The complaint was dismissed, with the court concluding that the premises was damaged by flooding, an excluded peril under the insurance policy.

The issue here, whether the damage after a storm was caused by wind or water, is a dispute that arises in numerous litigations after almost every major hurricane. This decision is instructive as to how the evidence may prove one over the other.

This decision was reported in Mealey's Litigation Report, Catastrophic Loss, Vol. 12 Issue 1, October 12, 2016; and in the New York Law Journal as a "Decision of Interest" on October 13, 2016.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Kevin Buckley.**

Almonte v. Castlepoint Ins. Co., 45 Misc. 3d 1218(A), 2014 WL 6434448 (Sup. Ct., NY Co., Oct. 8, 2014) aff'd 108 A.D.3d 1056 (1st Dep't June 30, 2016)

This litigation concerned a first-party insurance claim under a homeowners property insurance policy issued by Tower Insurance Company of New York for fire damage to a three-family apartment house. In contrast to the physical configuration of the structure, plaintiff procured an insurance policy covering a two-family dwelling. Accordingly, the trial court granted CastlePoint summary judgment.

The appellate court affirmed the dismissal of the complaint because the structural configuration of the property did not fall within the policy definition of a covered "Residence Premises," which was limited to a two family dwelling.

Notably, plaintiff alleged that an insurance policy provision that limited coverage to one or two family dwellings was in violation of Insurance Law §3404. "That statute codifies the New York standard fire insurance policy, and provides the minimum level of coverage permissible for fire loss." Section 3404 prohibits policies that contain provisions that are any more restrictive than that found in the standard fire policy. The lower court held that, notwithstanding § 3404, appellate courts have "uniformly enforced provisions in fire insurance policies that are identical to those at issue in this action." Plaintiff made this same argument on appeal, but it was not addressed (and thus rejected) by the First Department.

The trial court decision was reported by the New York Law Journal as a "Decision of Interest" on November 5, 2014 and the appellate court decision was reported in the PLRB Frontlines, July 6, 2016.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Kevin Buckley**.

215 Benziger Ave., LLC v. Hermitage Ins. Co., Index No. 15347/2015 (Sup. Ct., N.Y. Co., June 28, 2016)

This litigation arose out of plaintiff's first-party property insurance claim for damage to a building it rented to others. Upon receipt of the claim, Hermitage investigated the cause of the loss and concluded that the damage was due to the tenant's "hard use" of the premises. Hermitage's inspection revealed the second floor of the premises was in a "filthy" condition, as evidenced by urine and feces on the walls, ceilings, and floors; saturated and soiled carpeting; fly infestation with fly strips placed throughout the apartment; broken doors; window damage; floor damage; water damage; roach infestation; garbage buildup; and damaged drywall. As a result, Hermitage denied coverage based on the insurance policy's "wear and tear" exclusion. The plaintiff disputed the cause of the loss and alleged that the damage was caused by vandalism caused by its tenant. Possibly in response to Hermitage's position, plaintiff filed a police report alleging the tenant vandalized its property.

In addition to the "wear and tear" defense, Hermitage asserted as an affirmative defense the policy exclusion for loss caused by or resulting from dishonest or criminal acts of "one to whom you entrust property," i.e., the "entrustment exclusion." In response to discovery demands, plaintiff made several admissions that it was the tenant that caused the damage. Accordingly Hermitage moved for summary judgment on the "entrustment" exclusion, since the property was entrusted to the tenant at the time of the loss and the damage was intentionally caused by the tenant. Plaintiff argued that the exclusion was ambiguous and that proof of the intent of the tenant was necessary to prove that it committed a criminal or dishonest act. The court disagreed, ruling from the bench that the loss was barred by the "entrustment" exclusion based on plaintiff's admission to the police that the tenant had committed the crime of vandalism. The fact that Hermitage did not deny coverage on this basis was not a bar to summary judgment.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Kevin F. Buckley**.

The Provencal LLC v. Tower Ins. Co. of N.Y., 45 Misc. 3d 1204(A), 2014 WL 4937936 (Sup. Ct., Rockland Co., Sept. 18, 2014) aff'd 138 A.D.3d 732 (2d Dep't 2016)

This is a case involving commercial property damaged to a strip mall by a storm. Plaintiff alleged that it suffered interior water damage from rainwater that entered its premises via "vents" in its roof drains. It also alleged coverage for a large retaining wall that collapsed during the storm. Tower Insurance Company of New York investigated the claim and denied coverage based on exclusions for flood and faulty workmanship, among others. Specifically, Tower found that the pressure applied to the retaining wall from surface water caused it to collapse and the water that entered the premises through the drainage system was due to a faulty design of that system.

In the litigation that followed, the parties prepared motions *in limine* and stipulated to certain facts in an effort to narrow the scope of the pending trial. The court considered the motions and the language of the policy, and although it had previously denied summary judgment to Tower, it dismissed the case before trial based on its finding that the claimed damages were excluded from coverage due to the policy exclusions for loss caused by collapse, faulty design, surface water, and rain.

On appeal, plaintiff focused solely on the damage caused to the large retaining wall and argued that Tower had waived its right to assert the "surface water" exclusion because Tower had not specified the exclusion in its letter to plaintiff denying coverage. Plaintiff also alleged estoppel. The appellate court disagreed with plaintiff's arguments. It held that Tower did not waive, and was not estopped from enforcing, the insurance policy's flood exclusion regardless of whether it was specified as a basis for the denial of coverage when the claim was denied. Plaintiff could not prove that it changed its position as a result of anything Tower did, and coverage that does not exist under a policy cannot be created by waiver.

These decisions were reported in: Mealey's Litigation Report, Insurance, Vol. 28 Issue 44, September 24, 2014 and the appeal in Vol. 30 Issue 22, April 13, 2016; Mealey's Litigation Report, Catastrophic Loss, Vol. 11 Issue 7, April 2016; PLRB/LIRB Frontlines, Nov. 5, 2014, PLRB Case 9038 and the appeal on April 20, 2016, PLRB Case 9414; Law360 Insurance on September 19, 2014, and the appeal on April 6, 2016; Advisen Front Page News April 21, 2016; and as a "Decision of Interest" in the September 24, 2014 issue of The New York Law Journal.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Kevin Buckley** and **Daniel O'Connell**.

Northern Spy Food Co., LLC v. Tower Nat. Ins., 2016 N.Y. Slip Op. 30514(U), 2016 WL 1161522 (Sup. Ct., N.Y. Co., March 24, 2016)

This litigation concerns a first-party insurance claim under a commercial property insurance policy issued by Tower National Insurance Company ("TNIC") for a restaurant located in New York City. TNIC allegedly breached the contract by failing to pay the claim submitted by plaintiff for loss of business income and spoiled food sustained when plaintiff's restaurant lost power as a result of flooding from Superstorm Sandy.

TNIC moved for summary judgment based on the policy's provision excluding coverage for loss due to "off premises power failure" unless certain circumstances are present, including that the power failure is due to a Covered Cause of Loss. Here, the power failure was the result of severe tidal flooding that occurred at the power supplier's substation. In support of the motion, TNIC submitted a report prepared by the electrical service provider, ConEd, that explained that the power outage was caused by the flooding of its substation. Inasmuch as the policy excluded loss caused directly or indirectly by "water," which includes flood, a Covered Cause of Loss did not cause the power failure and resulting business interruption.

Plaintiff argued that the flood exclusion only applied to flooding at the premises, not flooding at a remote utility substation.The court disagreed.

Justice Edmead found it uncontested that the "claim is for food spoilage and loss of business income…that resulted from a power outage, and that the power outage was due to flooding at a ConEdison Substation." Although the court attributed the loss of business income to the spoilage of plaintiff's food stock, i.e., property at the premises, rather than the lack of power, it held that the damage to that property did not result from a Covered Cause of Loss.

This decision was reported in: Mealey's Litigation Report, Catastrophic Loss, Vol. 11 Issue 7, April 2016; PLRB/LIRB Frontlines, May 4, 2016 edition, PLRB Case 9425; and as a Decision of Interest in the New York Law Journal on April 5, 2016.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Kevin Buckley** and **Daniel O'Connell**.

CAC 3, LLC v. Tower Group, Inc., 2016 N.Y. Slip Op 30424(u), 2016 WL 1123226 (Sup. Ct., N.Y. Co., March 9, 2016)

This litigation concerned a first-party insurance claim under a commercial property insurance policy issued by Tower National Insurance Company ("TNIC") for a restaurant located in New York, NY. TNIC allegedly breached the contract by failing to pay the claim submitted by plaintiff for spoiled food and loss of business income sustained when plaintiff's restaurant lost power as a result of Superstorm Sandy. Specifically, approaching flood waters prompted the utility provider, Con Edison, to shut down its electric substation supplying electricity to plaintiff's restaurant.

TNIC moved for summary judgment based on the policy's provision excluding coverage for loss caused directly or indirectly by "water," which included flood, and other provisions that only covered loss caused by utility service interruption under certain circumstances. As per the insurance policy, "off premises" power failure was not a covered cause of loss. In support of the motion, TNIC submitted a report prepared by ConEd that explained the power outage was caused by the preemptive shut down of the utility's substation to prepare for flooding. Plaintiff opposed the motion by arguing that the ensuing loss exception to the off premises power failure exclusion provided coverage because plaintiff suffered an ensuing business interruption loss. Plaintiff also argued that a preemptive shut down is not a power "failure" such that the exclusion was not triggered in the first instance.

Justice Wright found unambiguous the policy's language requiring that a Covered Cause of Loss occur to trigger coverage, which term specifically excludes loss caused by "the loss of power…off premises." Since the court found that "off premises power outage" was a "non-covered cause of loss," he granted TNIC's motion for summary judgment and dismissed Plaintiff's complaint in its entirety.

This decision was reported in: Mealey's Litigation Report, Catastrophic Loss, Vol. 11 Issue 7, April 2016; and PLRB Frontlines, March 23, 2016 edition as case 9393.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Kevin Buckley** and **Daniel O'Connell**.

National R.R. Passenger Corp. v. Arch Specialty Ins. Co., No. 15-2358-cv-2016, 2016 WL 4570327 (2d Cir. 2016)

This matter, in which Mound Cotton represented several of a market of insurers, was discussed in the 2015 Decisions Newsletter. The insured, Amtrak, appealed the reversal of the district court's summary judgment dismissing the insurers that provided coverage to Amtrak excess of the $125 million primary limit. Amtrak argued that the district court erred in holding that the $125 million flood sublimit applied to Amtrak's claimed damages caused by storm surge and that chloride damage caused by the floodwaters did not constitute an ensuing loss not subject to the flood sublimit. Amtrak also argued that the district court erred in holding as a matter of law that Amtrak could never establish that it was entitled to coverage under the demolition and increased cost of construction ("DICC") provision. Amtrak did not appeal the district court's determination that its losses constituted only one occurrence under the policies.

The Second Circuit affirmed the district court's determination that the damage caused by the inundation by storm surge from Superstorm Sandy qualified as flood under the policies. The court held that, while the policies issued by the excess insurers contained three definitions of flood, all three flood definitions unambiguously encompassed storm surge and the definitions were not rendered ambiguous simply because three different definitions were used.

The Second Circuit also affirmed the district court's determination that the damage that occurred after the floodwaters were removed from Amtrak's tunnels did not constitute an ensuing loss and such damage was subject to the policies' $125 million flood sublimit. The flood sublimit contained an loss clause stating that "Even if the peril of flood…is the predominant cause of loss or damage, any ensuing loss or damage not otherwise excluded herein shall not be subject to any sublimits."

In reaching its holding, the Second Circuit rejected Amtrak's argument that the "chloride attack" to the metal components in the tunnels constituted a covered peril separate from the flood because the corrosion began after Amtrak pumped the seawater out of the tunnels. Amtrak contended that this meant that the corrosion damage was not contemporaneous with the flood and therefore was an ensuing loss. The Second Circuit rejected that argument, holding that Amtrak's proposed interpretation of the ensuing loss clause was "so broad,…that it 'would contravene the [flood sublimit's] purpose, as expressed in unambiguous language.'"

The Second Circuit explained that the corrosion of the metal "cannot meaningfully be separated from water damage that is plainly subject to the flood sublimit, nor can it be attributed to a distinct 'covered peril,' arising from the original, sublimited peril (the flood)." The court therefore concluded that, even accepting Amtrak's version of the facts, corrosion resulting from the so-called "chloride attack" after the flood did not constitute an "ensuing loss" and such losses were therefore subject to the flood sublimit.

While the Second Circuit agreed with insurers that the insured had not yet demonstrated that it was entitled to DICC coverage, the court found it was premature to conclude that the insured could *never* meet its burden to establish coverage. The court held that the insured could later submit a claim for DICC coverage if some governmental entity issued an order or directive requiring the insured to replace the undamaged property as a result of the flood damage. The issue was remanded to the district court to determine in the first instance whether the DICC sublimit could be "stacked" on top of the flood sublimit.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Costantino Suriano**, **Bruce Kaliner**, and **Deanna Manzo**.

Aspen Specialty Ins. Co. v. 4 NYP Ventures LLC, 162 F.Supp.3d 337 (S.D.N.Y. 2016)

In this case, Judge Paul Crotty of the District Court for the Southern District of New York granted summary judgment to Mound Cotton's clients, plaintiffs Aspen Specialty Insurance Company and Landmark American Insurance Company (collectively, the "Insurers"), holding that five percent of the insured property's value – or, $19.2 million – was the proper deductible, rather than the $100,000 that the insured, 4 NYP Ventures LLC, argued should apply. The Insurers were part of a secondary excess layer, providing flood insurance to 4 NYP's office building located in lower Manhattan. 4 NYP had a $100 million multilayered insurance program including flood coverage when the building was heavily damaged by Superstorm Sandy. Under the program, Factory Mutual Insurance Company ("FM") provided $20 million in primary coverage, while the next $30 million in coverage was provided by the first excess layer of non-party insurers. Thereafter, Aspen, Landmark, and non-party Lloyds covered the remaining $50 million in varying shares.

The FM master policy contained certain exceptions to the policy deductibles. For Flood, the policy provided "USD100,000 for Property Damage and Time Element combined, per Occurrence except as respects Locations as described in Appendix F, the following will apply…." Appendix F of the FM policy identified "High Hazard Flood Locations," and 4 NYP's office building was added to Appendix F shortly after the FM policy was bound, with concurrent notice to the insured's broker. For locations listed on Appendix F, the FM policy identified the deductible, in relevant part, as "Property Damage – 5% of the value, per the VALUATION clause of the LOSS ADJUSTMENT AND SETTLEMENT section, of the property insured at the Location where the physical damage occurred, per Location." This same provision stated that the "above Flood deductibles are subject to a minimum deductible of USD100,000 for Property Damage and Time Element combined, per Location." In providing excess flood coverage, the Landmark authorization specifically referred back to this 5% primary deductible, as did an authorization issued by a first-layer excess insurer. The Lloyds authorization noted that the FM deductible was "5% or $19,200,000."

Though the Insurers made partial payment on their second excess layer coverage, 4 NYP sought the full limits, contending that the FM policy provided only for the $100,000 deductible referenced in the first line of the Flood deductible provision. The parties cross-moved for summary judgment on the issue, and oral argument was held before Judge Crotty on January 14, 2016. 4 NYP argued, inter alia, that the deductible provision was ambiguous and counseled in favor of a $100,000 deductible. It further argued "that interpreting the FM Master Policy to impose a $19.2 million deductible results in illusory coverage," in light of FM's $20 million limit.

The Insurers disagreed, pointing to the plain language of the provision as requiring a deductible of "5% of the value…of the property insured at the Location where the physical damage occurred…."

In its February 25, 2016 Order and Decision, the court rejected 4 NYP's various contentions, noting that "none of the arguments hold water." In the court's opinion, the deductible clause was "unambiguous" and the Insurers' interpretation was "clearly correct." Essentially, because "the property was added to Appendix F, the five percent flood deductible applie[d]. And since the quote that Defendant agreed to provide[d] for a combined property value plus time element of $384.2 million, the deductible [was] $19.2 million." Furthermore, "[s]ince the FM Master Policy afford[ed] Defendant $20 million in flood loss coverage on top of the $19.2 million deductible (which FM has in fact paid to Defendant), the coverage [wa]s not illusory."

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Jeffrey Weinstein**, **Emilie Bakal-Caplan**, and **Deanna Manzo**.

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