ISSUE 03

Mound Cotton Wollan & Greengrass LLP
COUNSELLORS AT LAW

Decisions

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

Introduction

The year 2015 featured some 54 decisions, many of national interest, favoring Mound Cotton's clients. A third of these matters concerned one aspect or another of Superstorm Sandy. The cases reported are from all of our five offices — New York City, Long Island, New Jersey, Florida, and California — and encompass 25 different federal and state trial and appellate venues in those jurisdictions as well as in Connecticut, the District of Columbia, Massachusetts, Oklahoma, and Utah. These decisions explore most of the leading issues in the insurance field. We are proud of what we accomplish for our clients, and happy to share our product with you. We hope you enjoy this annual Decisions Issue, and we welcome your input.

Inside: 2015 Highlighted Cases

Wakefern Food Corp. v. Lexington Ins. Co. (Middlesex Cty., N.J. Super. Ct., Jan. 2015):

This matter, in which Mound Cotton represented Lexington, was previously discussed in the 2014 Decisions Newsletter. The insured, Wakefern, asked Middlesex County Superior Court Judge Travis Francis to reconsider his October 2014 decision holding that a named storm deductible applied to all of Wakefern's Sandy-related losses. Wakefern argued in requesting reconsideration that the decision was erroneous because there was no proof that a named storm – defined as a "hurricane" – caused Wakefern's losses, given that Sandy was declared a post-tropical cyclone before it hit New Jersey. The court disagreed, siding instead with Mound Cotton's arguments on Lexington's behalf.

According to Judge Francis, "[i]t was unnecessary for the Court to find that Plaintiffs' losses were 'caused by a Named Storm' based on the policies' 'arising out of' language." The policy states that the deductible applies to all losses "arising out of" a named storm, a phrase the court found to be satisfied because Hurricane Sandy was "'part of a chain of events' or part of 'interrelated or concurrent causes'" that led to Wakefern's claim. "The 'arising out of language' was dispositive in deciding the extent of the connection required."

The court also declined to apply a special, pro-insured causation rule that allows insureds, in certain cases, to avoid policy exclusions. Wakefern had asked the court to treat the named storm deductible like an exclusion and to hold that it did not apply under this special rule. The court denied the request, agreeing instead with Lexington. Judge Francis explained: "Applying Plaintiff's logic, every deductible would be subject to this special rule." Further, the named storm deductible was not "so high that the same could be considered exclusionary."

Finally, the court upheld its prior ruling in Lexington's favor regarding the calculation of the named storm deductible, explaining that the deductible is calculated by taking two percent of the insured's total insurable values, not two percent of a sublimit as the insured argued.

This decision provides an important precedent for insurers involved in Sandy litigations as many property insurance policies include "arising out of" wording, and many insureds in Sandy disputes have asked courts to apply special, pro-insured presumptions when deciding difficult causation questions.

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

Morales v. Castlepoint Ins. Co. (N.Y. App. Div., 2d Dep't, Feb. 2015):

This action concerned a first-party property insurance claim for fire damage to a property held for investment or rental. In the application for insurance, it was represented that the structure to be insured was occupied by the owner as his "primary residence." It was undisputed, however, that the owner, plaintiff Morales, never lived at the premises. Upon receiving an insurance claim following a fire and then discovering that the representation in the application was untrue, Castlepoint denied coverage, alleging that plaintiff's misrepresentation was material because Castlepoint would not have issued the same policy for the same premium if it had known that the structure was not owner-occupied.

Mound Cotton represented Castlepoint in the litigation that followed, commencing in Kings County Supreme Court. Plaintiff alleged in opposition to the insurer's summary judgment motion that he never saw the application and

that, while it might have been submitted by his mortgage company, he did not authorize anyone to represent that the premises would be owner-occupied. Castlepoint's motion was denied in the lower court upon a ruling finding an issue of fact as to whether the misrepresentation in the application could be attributed to Morales. Castlepoint appealed.

The Appellate Division, Second Department reversed the Supreme Court's decision and granted summary judgment to Castlepoint dismissing Morales's complaint. The appellate court held that, regardless of whether plaintiff authorized the misrepresentation regarding owner occupancy in the first instance, his acceptance of a policy and its renewal policies for years ratified that misrepresentation because "the first page of the policy indicated that the premises were owner-occupied."

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

Five Towns Nissan, LLC v. Universal Underwriters Ins. Co. (N.Y. App. Div., 1st Dep't, Feb. 2015):

In another lawsuit arising out of Superstorm Sandy, the Appellate Division, First Department reversed an order of the New York County Supreme Court that had permitted a Long Island Nissan dealership to seek up to $3 million in Sandy-related business interruption coverage for flood damage notwithstanding that the policy issued by Tower excluded losses resulting from flooding. Mound Cotton represented the insurer in both courts.

Supreme Court held in a bench ruling following oral argument that the flood exclusion was inapplicable to Five Towns' loss of business income. But Tower argued before the Appellate Division that, to be compensable, the business interruption must result from a covered cause of loss, which flood was not. The appellate court "declared that the subject policy's flood exclusion bars coverage for plaintiff's loss of business income and extra expense."

As the First Department unanimously held, "the BI and Building Forms share a 'Covered Cause of Loss' requirement, and defined that term by looking to the 'Cause of Loss – Special Form,' which covers all risks, except those otherwise excluded, such as loss due to flooding or waves." Thus, Supreme Court's finding – "that the Special Form operates to define a 'Covered Cause of Loss' for purposes of only physical damage coverage – overly emphasized the chart attached to the Commercial Property Coverage Part Declarations and ignored the terms of the BI Form and its coverage grant."

Remarkably, the Appellate Division not only reversed Supreme Court's grant of partial summary judgment to Five Towns but also, *sua sponte*, granted partial summary judgment to Tower barring all coverage for loss of business income and extra expense.

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

128 Hester LLC v. N.Y. Mar. & Gen. Ins. Co. (N.Y. App. Div., 1st Dep't, Mar. 2015):

Mound Cotton represented Tower in this successful appeal to the Appellate Division, First Department from a decision of the New York County Supreme Court denying summary judgment dismissing the complaint.

In connection with the construction of a 19-story Wyndham hotel at 99 Bowery Street in Manhattan, the owner of that property formed 128 Hester LLC, which purchased the building located adjacent to 99 Bowery, at 128 Hester Street. Plaintiff, 128 Hester, then sought an insurance policy from Tower. Tower's insurance application form unequivocally asked for loss history.

As a result of construction of the adjacent hotel, on May 27, 2009 the New York City Buildings Department observed that the subject premises was "unsafe/collapse prone," and on June 2, 2009 the Department issued an emergency declaration regarding that inspection. Plaintiff nonetheless failed to mention this circumstance in its June 17, 2009 insurance application and remained silent until after the Tower policy was issued on July 12, 2009, notwithstanding that on July 2, 2009 it submitted the loss notice to New York Marine, its former insurer.

As the Appellate Division observed, "a material misrepresentation made at the time an insurance policy is being procured may lead to a policy being rescinded and/or avoided," even if it is an innocent misrepresentation. Where, as in this case, Towers's underwriter's affidavit and excerpts from its underwriting guidelines "establish that the insurer would not have issued the policy if it had known the true nature of the risk, a material misrepresentation warranting policy rescission can be determined as a matter of law." Accordingly, the appellate court granted Tower "summary judgment dismissing the complaint, the third-party complaint and all cross claims as against it."

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

DGP Assocs. v. Am. Guar. & Liab. Ins. Co. (San Francisco Cty., Cal. Super. Ct., Mar. 2015):

American Guarantee issued a policy to Columbus Foods with a provision that required claims to be adjusted with and paid to Columbus because it was the "first named insured." A building that Columbus leased and used to make its meat products burned down. Columbus instructed the insurer how to allocate the payment of the agreed replacement costs between it and the building owner, DGP, which American Guarantee did.

DGP then sued American Guarantee, arguing that the $12 million paid to Columbus for the building should instead have been paid to DGP. DGP also argued that the insurer was in bad faith because it did not investigate the value of the respective interests of Columbus and DGP. Mound Cotton defended American Guarantee in this matter before the San Francisco Superior Court.

Superior Court Judge Ernest H. Goldsmith granted summary judgment to the insurer, finding that Columbus "purchased the insurance and it was listed as the first named insured," that Columbus "facially appears to be entitled to coverage and defendant properly paid sums to it," and that Columbus "did in fact have an insurable interest" under California law. The court held that American Guarantee's payment of the undisputed building replacement cost according to the instructions of Columbus was proper and DGP was not entitled to any further insurance benefits or to bad faith damages.

DGP's appeal to California's First District Court of Appeal is pending.

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

Bamundo, Zwai & Schermerhorn, LLP v. Sentinel Ins. Co., Ltd. (U.S. Dist. Ct., So. Dist. of N.Y., Mar. 2015):

Plaintiff, a law firm located at 111 John Street, an office building within Flood Zone A in Manhattan, was required by an executive order of the mayor on October 28, 2012 to evacuate its offices in anticipation of Superstorm Sandy. A day later, Sandy reached its full intensity, with floodwaters surging over Lower Manhattan. On October 31, the mayor issued another order continuing his prior order and also directing that buildings in Flood Zone A could be reoccupied only on certification of the Department of Buildings. Fourteen more executive orders continued the evacuation of Zone A until January 4, 2013. Plaintiff's building was declared available for reoccupancy as of December 24, 2012.

The law firm submitted a claim to its insurer, Sentinel, for loss of business income commencing October 30, 2012. The civil authority provision of plaintiff's policy afforded coverage for the actual loss of business income, after 72 hours, "when access to your [office] is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your [office]." A covered cause of loss was defined as a "risk of direct physical loss unless the loss is" excluded. The policy excluded "loss or damage caused directly or indirectly by" water, including flooding.

Sentinel denied coverage on the ground that the interruption of the firm's business resulted from flooding conditions. Plaintiff maintained that because 111 John Street itself "did not suffer any flood damage," plaintiff was entitled to coverage under the civil authority provision. The law firm sued Sentinel for coverage, and Sentinel retained Mound Cotton.

Federal District Judge Richard J. Sullivan of the Southern District of New York granted Sentinel's motion for summary judgment dismissing the law firm's claim, finding that the October 31, 2012 order and subsequent orders of the civil authority were not the direct result of a covered cause of loss to property in the immediate area of the law firm's office "for the simple reason that 'Covered Cause of Loss' is defined in the Policy to exclude loss due to flooding." According to the court, plaintiff was not entitled to its lost business income "because the evacuation orders were the direct result of flooding in Zone A" and thus "were, by definition, *not* the direct result of a 'Covered Cause of Loss' to 'property in the immediate area,' since Plaintiff's policy expressly excluded flooding from the definition of a Covered Cause of Loss."

Having dismissed the claim for breach of contract because there was no coverage, Judge Sullivan likewise dismissed plaintiff's cause of action for bad faith and unfair claim settlement practices.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Frank J. DeAngelis** or **David A. Nelson**.

Trademark Plastics Corp. v. Hartford Fire Ins. Co. (U.S. Dist. Ct., Dist. of N.J., Mar. 2015):

Mound Cotton represented Hartford in a lawsuit involving the disappearance of some 300,000 pounds of plastic resin. Hartford denied the claim of Trademark Plastics on the basis of an exclusion for "loss caused by, resulting from, or arising out of the disappearance of property when there is no clear evidence to show what happened to it."

The resin had been stored in a third party's warehouse in Massachusetts, and could not be located after the warehouse changed locations. Trademark argued to the New Jersey federal District Court that an "inference of theft" should be made, urging among other things that 300,000 pounds of resin are too big to lose inadvertently and that the warehouse owner showed guilt by attempting to cover up the loss. But the warehouse owner testified that he had become overwhelmed with the demands of his business, stored inventory haphazardly in the warehouse, and kept sloppy inventory records in a manual system, thus leading to the unexplained disappearance.

Federal District Judge Susan D. Wigenton held that, under the policy language, an inference of theft was not sufficient; the disappearance of property was not covered if, as here, there was "no clear evidence" of what had happened to it. The court found that plaintiff had not come forward with "clear evidence" of how the resin disappeared. Although theft was a possibility, that theory was "largely speculative" because there was no physical evidence of theft, there were no eyewitnesses, and there was no evidence that the resin had been sold on the black market. Accordingly, all claims against Hartford were dismissed.

For a copy of the order and decision, please **click here** and for inquiries about this case, please contact partner **Lloyd A. Gura** or counsel **Scott J. Sheldon**.

W2001Z/15 CPW Realty, LLC v. Lexington Ins. Co. (N.Y. App. Div., 1st Dep't, Apr. 2015):

This matter, in which Mound Cotton represented a market of insurers, was previously discussed in the firm's 2014 Decisions Newsletter. More recently, in a unanimous decision, the Appellate Division, First Department affirmed the granting of summary judgment in favor of Mound Cotton's clients in this builder's risk claim made by the owner-developer of a two-building, luxury condominium complex located at the corner of West 61st Street and Central Park West in Manhattan.

The insured argued that the closings on a number of condominium units were delayed as a result of two water leaks, one on July 12, 2007 and another, more significant one on August 14, 2007. Specifically, the insured argued that the closings on a total of 84 condominium units were delayed by as many as 459 days as a result of the water leaks, even though only four of those units and portions of the lobby and concierge area sustained physical loss or damage. According to the insured, the damage that was sustained had a domino effect on the closings for the other units.

The insured sought to recover in excess of $6.4 million in connection with its delay in completion claim. In addition, following the two losses, the insured elected to investigate and replace compression fittings in numerous other units because it was concerned that they had not been installed properly. The insured also made a claim to recover those costs, which totaled in excess of $140,000, asserting that they were incurred to prevent a future loss. In addition, the insured claimed consequential damages for the insurers' alleged breach of good faith and fair dealing in failing to pay the amounts claimed.

Coverage for the project was provided by a market of insurers consisting of Lexington, Arch, Illinois Union, XL, and Zurich. The policies at issue contained delay in completion endorsements, which provided coverage for certain soft costs incurred by the insured as a result of a delay in completing the project caused by a covered loss.

There was no evidence that the completion of the overall project was delayed as a result of the two water losses. The insured argued, however, that it was entitled to recover for delays sustained in connection with the closing of individual units and that it was not necessary to establish a delay in completing the overall project. In support of this argument, the insured noted that the insurers were well aware they were insuring a condominium project and that the closings were going to take place on a rolling basis.

It was the insurers' position that in order to recover under the policies, the insured was required to establish that there was a delay in the overall completion of the project; merely establishing that the closings on certain units were delayed was not sufficient to trigger coverage. In addition, the insurers argued that the delay in completing the project must be caused by physical loss or damage resulting from a covered cause of loss; delays resulting from anything else simply were not covered. Of the 84 units that were the subject of the claim, 80 did not sustain any damage as a result of the water leaks and many of the units that were part of the claim were located on floors above where the water leaks occurred or in a completely separate building. The insurers also argued that the costs incurred to investigate and replace the compression fittings were not covered because their policies expressly excluded coverage for costs incurred in making good on faulty workmanship. Finally, the insurers argued that the insured failed to state a claim under New York law for recovery of consequential damages.

After New York County Supreme Court ruled in favor of the insurers on every issue, the insured appealed to the First Department. The appellate court held that the motion "court correctly found that the subject insurance policies were unambiguous and, hence, excluded extrinsic evidence." The court further held that the policies at issue provided coverage only for a delay in the completion of the entire project; there was no coverage for delays in the completion or sale of individual units.

Moreover, the court held that the faulty workmanship exclusion barred coverage for the costs incurred to investigate and replace the other fittings. Finally, the court held that the insured failed to identify any consequential damages, and therefore there was no basis for such a claim under New York law.

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

Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co. (U.S. Dist. Ct., So. Dist. of N.Y., Apr. 2015):

Federal District Judge Katherine Polk Failla of the Southern District of New York granted summary judgment in favor of Zurich American, Mound Cotton's client, in connection with a contingent business interruption claim asserted by its insured, Lantheus Medical Imaging. The insured claimed that it sustained a contingent business interruption loss in excess of $75 million as a result of the shutdown of the Chalk River Reactor, also known as the NRU Reactor, in Ontario, Canada.

Lantheus, a specialty pharmaceutical company that manufactures and distributes diagnostic medical imaging products, purchased Molybdenum-99, a radioactive isotope produced by the reactor, from Nordion. The reactor was shut down for more than one year after a leak of heavy water was discovered. The heavy water leaked through two penetrations in the wall of the reactor vessel. After an extensive investigation, Atomic Energy of Canada (AECL), which operates the reactor, determined that the loss was caused by corrosion.

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

Lantheus conducted extensive discovery of AECL in Canada 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 court rejected each of the arguments raised by Lantheus. In doing so, it noted that the term "corrosion" was not defined in the policy. Thus, it looked to the dictionary definition of the term:

> Webster's defines "corrosion" as "the action or process of corrosive chemical change not necessarily accompanied by loss of form or compactness; typically: a gradual wearing away or alteration by a chemical or electrochemical essentially oxidizing process (as in the atmospheric rusting of iron)."

The court rejected Lantheus's argument that the exclusion applied only to corrosion damage that takes place inevitably over the useful life of a machine and, therefore, would not apply to the corrosion at issue. According to the court:

> Nothing in the dictionary definition narrows the scope of "corrosion" to that which occurs "inevitably" over the life of a machine. Other courts have rejected analogous attempts to narrow the definition of "corrosion."

Judge Failla also found that "rapid" corrosion falls within the exclusion. As noted by the court, "[i]mplicit in Lantheus's argument is the notion that a 'gradual' process cannot also occur rapidly. This is not so. A 'gradual' process 'proceed[s] by steps or degrees,' but it does not necessarily do so slowly." According to Lantheus's expert, the corrosion at issue took place over a period of 29 days.

With respect to Lantheus's contention that a pressure transient caused the failure of the vessel wall, the court "accept[ed] for the purpose of [the] motion that the breach

occurred because of a 'pressure surge . . . act[ing] upon an already weakened point.'" Judge Failla went on to note, however, that "in light of the anti-concurrent causation language, this theory simply begs the question of what process caused the vessel to be 'already weakened.'" Because the court found that corrosion caused the "already weakened" condition of the vessel, there was no coverage.

Judge Failla likewise rejected Lantheus's argument that the loss fell within the ensuing loss exception to the corrosion exclusion. She held that "the ensuing loss provision cannot be applied . . . to restore coverage for the loss caused by corrosion." According to the court, Lantheus would be entitled to coverage under the ensuing loss exception only if it could prove that "collateral or subsequent" damage occurred to other insured property as a result of the excluded peril. Here, there was no evidence of any collateral or subsequent damage. "Even under Lantheus's theory of the case, the aeration cell operated in tandem with the hydraulic transient to cause the through-wall breach – there was, therefore, no 'ensuing loss.'"

Because it granted summary judgment to Zurich based on the corrosion exclusion, the court did not need to consider whether the shutdown of the reactor resulted in a "necessary suspension" of Lantheus's business. It did note, however, that "the [policy] provisions suggest that Lantheus's CBI coverage hinges on whether its business activities at the Billerica Facility ceased completely as a result of the NRU Reactor shutdown." Judge Failla further noted that "[t]he majority of courts have reached the same conclusion when faced with this language."

An appeal to the Second Circuit Court of Appeals is pending.

For a copy of the decision as redacted for publication, please **click here** and for inquiries about this case, please contact partners **Philip C. Silverberg** or **William D. Wilson**.

El-Ad 250 West LLC v. Zurich Am. Ins. Co. (N.Y. App. Div., 1st Dep't, July 2015):

This matter was previously discussed in the firm's 2014 Decisions Newsletter. On appeal, the Appellate Division, First Department unanimously affirmed the motion court's grant of partial summary judgment to Mound Cotton's client, Zurich American. Previously, the New York County Supreme Court had found that Zurich properly applied the builder's risk policy flood sublimit to cap coverage for both property damage and delay in completion losses claimed in connection with Sandy flooding at the insured's Manhattan construction project. The Appellate Division agreed, finding plaintiff's contentions "unavailing."

Mirroring its positions in the motion court, the insured argued on appeal that the delay in completion coverage, provided by endorsement to the builder's risk policy and subject to a $7 million annual aggregate limit, constituted a "stand-alone and self-contained indemnity policy," providing coverage "for *economic* losses arising out of the resulting delay in completion of the insured project." By this reasoning, the delay in completion coverage contains no cap for flood losses "because it does not provide coverage for physical losses," and thus, the policy's $5 million flood sublimit could not be applied to the insured's delay claims even if caused by flooding. According to the insured, the Supreme Court incorrectly held that the absence of the word "physical" from the flood definition meant that the delay in completion coverage for losses caused by flood was limited by the policy's $5 million flood sublimit.

Zurich's appeal continued to rely on the express policy language, which provided that the $5 million annual flood sublimit – applicable to all "loss or damage" by the

peril of flood – contained no limitation to "physical" damage only. Additionally, the delay in completion endorsement stated that it was "subject to all terms, conditions, limitation and exclusions" found in the policy, which "remain[ed] unchanged and appl[ied] equally" to the endorsed delay coverage.

The Appellate Division agreed with the motion court and Zurich, stating that "[t]he plain language of the delay in completion coverage form, which incorporated the policy terms by reference . . . applied the $5 million flood sublimit to 'all' losses, including nonphysical damage losses, such as those resulting from a delay in completion." According to the court, "reading coverage in such a way as to find that flood losses do not apply to delay in completion losses would render the flood limit meaningless with respect to that coverage." The Appellate Division also flatly rejected the insured's "separate premiums, separate policies" argument, stating that "[t]he fact that the main policy and the coverage form may have separate deductibles or coverage periods pertains to the type of losses at issue, and does not preclude a single overriding flood limit."

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Philip C. Silverberg** or **Mark S. Katz** or associate **Andrew H. Rice**.

Nat'l R.R. Passenger Corp. v. Arch Specialty Ins. Co. (U.S. Dist. Ct., So. Dist. of N.Y., Feb., June, and July 2015):

Federal District Judge Jed Rakoff of the Southern District of New York signed an order at the end of June dismissing with prejudice all insurers, including Mound Cotton's five clients, from Amtrak's lawsuit seeking almost $1.2 billion for alleged damages to its train tunnels beneath the Hudson and East Rivers from Superstorm Sandy. The dismissals came two weeks before the scheduled trial date and only ten days after Judge Rakoff granted partial summary judgment on several key issues in favor of Mound Cotton's clients and other insurers. In granting insurers' summary judgment motions, the court rejected each of Amtrak's arguments, thereby limiting the maximum amount Amtrak could recover to $125 million.

Amtrak commenced this lawsuit by filing a complaint for $500 million in alleged damages in September 2014. In December, Amtrak amended its complaint, doubling its claim to almost $1.2 billion. The court ordered fast-track deposition and document discovery in this complex case, involving more than a dozen locations and 22 defendants, with discovery to be completed less than six months after suit was filed.

Amtrak sought, among other things, a judgment declaring that its Sandy loss constituted multiple occurrences and that the so-called storm surge that inundated Amtrak's property was not flood, or, alternatively, if the "storm surge" was flood as defined in the insurance contracts, the damage was caused by ensuing loss, not subject to the policies' $125 million flood sublimit. The court denied Amtrak's motions for summary judgment on the flood and occurrence issues in February, and also dismissed the majority of Amtrak's claim for consequential damages.

Mound Cotton's legal team, in coordination with the three law firms representing the other insurers, moved for partial summary judgment in March. The insurers argued that all of Amtrak's alleged damages constituted a single occurrence caused solely by flood and thus subject to the $125 million flood sublimit. The insurers also sought dismissal of the portion of Amtrak's claim seeking coverage for the parts of its benchwall and track bed inside the tunnels that were not damaged by Sandy on the basis that Amtrak could not demonstrate that such costs were covered under the "demolition and increased cost of construction" provision.

Judge Rakoff granted insurers' partial summary judgment motions, agreeing with insurers that all of Amtrak's alleged damages

from Sandy constituted flood under the unambiguous definition in the policies and that any damage was not ensuing loss and therefore was subject to the flood sublimit. Judge Rakoff also agreed that all of Amtrak's claimed Sandy loss constituted a single occurrence. Accordingly, the court dismissed all of the excess carrier defendants from the case. Finally, Judge Rakoff held that, under the policies, Amtrak was not entitled to compensation from its insurers for replacing undamaged portions of the tunnels' benchwall and track bed, much of which was over a century old.

On July 31, 2015 Judge Rakoff issued a 34-page memorandum explaining his previous "bottomline" rulings in insurers' favor. Holding that Amtrak's argument that Sandy's storm surge was not a flood "falters at each step," the court also confirmed that the "chloride attack" on Amtrak"s tunnels was neither an ensuing loss nor a separate occurrence from the flood and that there was no coverage for the undamaged portions of the tunnels.

Following Judge Rakoff's order granting partial summary judgment to all defendants and dismissing the excess insurers from the case, Amtrak and the primary insurers reached a confidential settlement. Amtrak then filed an appeal to the Second Circuit Court of Appeals disputing Judge Rakoff's dismissal of the excess carriers. Amtrak's appeal is pending, and Mound Cotton represents seven of the excess insurers on the appeal.

For a copy of the decisions, please **click here** and for inquiries about this case, please contact partners **Costantino P. Suriano** or **Bruce R. Kaliner**. Other partners and associates also formed a part of Mound Cotton's legal team.

Boyett Constr., Inc. v. Allianz Global Risk US Ins. Co. (Placer Cty., Cal. Super. Ct., Aug. 2015):

Allianz, represented by Mound Cotton, moved for summary judgment before Commissioner Michael A. Jacques of the Placer County, California Superior Court. The motion sought judgment on subcontractor Boyett Construction's claim under its builder's risk policy with Allianz for "loss caused by [the general contractor's] withholding of $300,000 in retention payments" held back for Boyett's allegedly defective workmanship in plastering walls of a county correctional facility.

Allianz denied Boyett's claim under the builder's risk policy on the ground that "the withholding of contractual payments cannot constitute direct physical loss of or direct physical damage to the Project." Boyett maintained that the claim was covered "because the withholding of the payment resulted from physical loss or physical damage to the Project."

The Superior Court found that "[t]he clear intent of the . . . Policy is to provide insurance for the cost to repair, replace or re-erect direct physical loss or damage to the Project." The court further found that the benefits Boyett sought to obtain did not constitute benefits for direct physical loss or damage but instead arose out of a contractual dispute with the general contractor. "While the withholding of payment undoubtedly results from physical loss or damage to the Project, this does not change the nature of the claim tendered to Allianz under the Policy, which was not for physical loss or damage."

In its decision granting judgment for Allianz, the court further held that the withholding of contractual payments for alleged defective workmanship constitutes a consequential loss excluded by the express policy language.

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

Stevens v. Zurich Am. Ins. Co. (U.S. Dist. Ct., No. Dist. of Cal., Sept. 2015):

The primary issue in this lawsuit was Zurich's coverage of Stevens for property allegedly stolen by Stevens's landlord. Mound Cotton represented Zurich's interests.

Stevens fell behind in his rent by some $34,000 and received a three-day notice from his landlord to pay rent or quit. Stevens moved out most but not all of his equipment. He claimed that he ceased his efforts to remove anything further because his employee was told that he didn't really belong there.

Advised thereafter by the landlord's attorney that he could return to the store and remove certain property, Stevens failed to do so. He never made any subsequent arrangements to remove his equipment even though both the landlord and the new tenant testified that he was free to remove any or all of it.

Federal District Judge Samuel Conti of the Northern District of California dismissed Stevens's complaint against Zurich. The court found that there was no theft of Stevens's equipment under the policy, *viz.*, no "deprivation of property 'in a criminal manner, rather than by due process of law.'" Rather, by means of the three-day notice and the breach of contract action in which Stevens counterclaimed for the value of his equipment, the parties "pursued their rights and settled their dispute regarding the equipment through 'due process of law.' To the extent that Stevens was deprived of his property, it was not done 'in a criminal manner.'"

Further, the court held that "Stevens was locked out because he did not pay his rent," not in order to steal his property, and that there was no evidence that the landlord "intended to permanently deprive Stevens of his equipment," particularly because the landlord testified that Stevens could pick up the equipment at any time and Stevens did not try to do so.

Finally, the court held that the two-year contractual suit limitation period of the policy barred Stevens's claims, and that the claims were not tolled by California's "reasonable discovery rule [or] . . . equitable tolling doctrine."

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

La Casa di Arturo, Inc. v. Tower Grp., Inc. (N.Y. Cty. Sup. Ct., Oct. 2015):

Plaintiff restaurant, located in Lower Manhattan, sued Tower Group and Tower National Insurance Co. for coverage for food spoilage, business interruption, inability to conduct business, and loss of business income resulting from a loss of power at its premises for several days following Superstorm Sandy. Mound Cotton represented Tower.

Tower's adjuster, supported by an investigative report from Consolidated Edison, found that plaintiff's damage was "caused by off premises power outage as a result of Hurricane Sandy" and that "[t]he outage was caused by flooding." The policy provided that coverage for loss associated with power interruptions is limited to those that "result from direct physical loss or damage by a Covered Cause of Loss."

Noting that under the policy "Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is . . . Excluded," and that among the policy exclusions is "Flood," New York County Supreme Court Justice Cynthia S. Kern held that "[t]he above provision unambiguously excludes from the definition of Covered Cause of Loss any loss caused by flood." She then observed that both the adjuster's and Con Edison's reports "explicitly state that the substation supplying power to the Premises was damaged by flooding from Sandy, which resulted in a power interruption to the Premises" for the time in question. Accordingly, the court found that, "under the clear and unambiguous provisions of the Policy, plaintiff's claim at issue herein is excluded from coverage."

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

Great Am. Ins. Co. of N.Y. v. The Towers of Quayside No. 4 Condo. Ass'n (U.S. Dist. Ct., So. Dist. of Fla., Nov. 2015):

This case concerns the issue of insurance coverage for "matching." The issue arises when, as here, after a property loss an insured seeks coverage, via such a claim, not only for damaged building components but also for undamaged ones. The insured's rationale for seeking coverage for the undamaged components is that, if only the damaged components are replaced, those new components will not be aesthetically uniform with the older components that were undamaged. Therefore, purportedly to preserve aesthetic uniformity, insureds will seek replacement of undamaged building components so that all will match after repairs.

Precisely such a claim was at issue in this lawsuit in the federal District Court for the Southern District of Florida. In this case, a water leak in the east hallway of the 11th floor of a condominium building caused damage to certain components – carpeting, baseboards, and woodwork – in the east hallways of floors 3 through 11 of the building. The insured condominium sought coverage not only for the damaged components, for which Great American acknowledged coverage, but also for undamaged building components in the west hallways of floors 3 through 11 and for the undamaged hallways of floors 12 through 25 of the building. The condominium argued "matching" regarding the undamaged components.

Mound Cotton represented Great American, and moved for summary judgment on the "matching" issue, arguing that the condominium's "'matching' claim does not come within the [p]olicy's coverage grant [as a] prerequisite to trigger coverage under the [p]olicy is that the property for which coverage is sought has sustained direct physical loss or damage." The insurer also argued that the "matching" claim was barred by the policy's consequential loss exclusion, which excludes "[d]elay, loss of use, loss of market, or any other consequential loss," as the condominium, via its "matching" claim, was admittedly "seeking coverage for the loss of devaluation of the building due to allegedly 'mismatched' components."

Federal District Judge James Lawrence King granted in part Great American's motion for summary judgment. The court held that "the policy plainly only provides coverage for 'direct physical loss,' specifically excludes coverage for consequential loss, and makes no mention of 'matching' or 'aesthetic uniformity' at all." The court therefore held that "Great American is entitled to a declaration that it has no obligation to provide coverage to replace" the undamaged components on floors 12 through 25 or the undamaged carpeting in the west hallways of floors 3 through 11. The court left open for further development only "whether the wallpaper, baseboards, and woodwork" on floors 3 through 11 "form a continuous run from one end of the building to the other," without separation by the central elevator lobby, and, if so, what the consequences might be for "'matching' coverage for those components."

Because the "matching" jurisprudence in the State of Florida in the context of commercial-residential and commercial property insurance is limited, this decision represents a meaningful step toward clarification of how Florida law treats such claims.

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

Elshazly v. Castlepoint Ins. Co. (N.Y. Cty. Sup. Ct., Nov. 2015):

Plaintiff lived in a house in Bay Shore, Long Island, occupying the first and third floors along with his daughter, and also had a closet on the second floor. One Victor Wilson occupied an apartment in the rear of the first floor. One Maryann Krill and her son occupied the second floor, which included a bathroom, two bedrooms, a living room, and a small kitchen.

Elshazly notified his insurer, Castlepoint, of a fire at the premises and, by inspecting the premises and interviewing Elshazly as part of its investigation, Castlepoint learned for the first time that the premises was a three-family dwelling. Plaintiff explained that the Krills were his close friends, that their living quarters were in no way partitioned or sectioned off from the rest of the house, and that the Krills did not have a lease or pay rent but simply "helped out" by paying certain expenses and occasionally contributing money and food.

Castlepoint ultimately disclaimed coverage on the basis that the building failed to qualify as a "residence premises" under Castlepoint's policy because it contained three separate dwelling units. Plantiff sued Castlepoint, which was represented by Mound Cotton, in New York County Supreme Court.

At issue, according to Justice Carol Edmead, was "whether the second floor, which was occupied by Ms. Krill and her son, constituted a separate dwelling unit, so as to render the Policy inapplicable to the Premises." Citing the decision in a 2014 New York County Supreme Court case also defended by Mound Cotton on Castlepoint's behalf, Justice Edmead noted that in that case the premises was found to be a "three-family residence that does not qualify for coverage" where, *inter alia*, "[e]ach of the three living units contained its own kitchen, bathroom and living area." That case, in turn, relied on a 2013 Castlepoint decision from the Appellate Division, First Department holding that a premises "is a three-family dwelling because of its structural configuration" where each of its units has "its own kitchen, bathroom and separate entrance."

Justice Edmead held that "[t]he structural configuration of the premises is determinative, rather than how the occupants utilize the property." Here, "the second floor containing a kitchen, bedroom, living room, and bathroom, is an area separated by an interior door that led to an interior common hallway/staircase; whether one was able to lock such door with a key from either side is also of no moment, given that this interior door that separated the common hallway/staircase from the remaining areas . . . created a configuration tantamount to a separate dwelling." "Although it cannot be said, as a matter of law, that the three alleged separate dwelling units constitute an 'apartment'" under the building code, nevertheless the "structural configuration of the Premises was arranged to consist of three dwelling units, each with its own bathroom, kitchen, living area/bedroom and separate entrance."

Accordingly, Castlepoint's motion for summary judgment dismissing Elshazly's complaint was granted.

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

Azor v. Tower Ins. Co. of N.Y. (Kings Cty., N.Y. Sup. Ct., Dec. 2015):

Plaintiff's building, insured by Tower, suffered fire damage. Her policy provided coverage both for one-family dwellings where the policyholder resided and for two-family dwellings where the policyholder resided in at least one of the units. Tower disclaimed coverage on the basis that plaintiff never resided at the premises, as she later conceded under oath. Plaintiff sued in Kings County Supreme Court, and Mound Cotton defended Tower in the action.

Justice Wavny Toussaint granted summary judgment to Tower dismissing plaintiff's case on the ground that the damaged property was not a "residence premises" as defined in the policy. The court rejected as "irrelevant to the 'residence premises' defense" plaintiff's argument that Tower, by issuing her a separate homeowners' policy, knew that she had another home, as "[c]ourts have recognized that 'a person may have more than one residence for the purposes of insurance coverage.'" The court noted further that there was no waiver or estoppel because plaintiff did not show that "Tower took any affirmative act upon which [plaintiff] relied to her detriment other than to issue her a policy of insurance which she requested."

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

Lend Lease (US) Constr. LMB Inc. v. Zurich Am. Ins. Co. (N.Y. App. Div., 1st Dep't, Dec. 2015):

In this matter, the Appellate Division, First Department ruled in favor of a market of insurers represented by Mound Cotton, declaring that the insurers "have no obligation to provide coverage under the builder's risk policy" for a multi-million dollar tower crane that suffered extensive damage at the insured project during Superstorm Sandy.

The market – comprised of Zurich, ACE, XL, Travelers, and Axis – collectively issued a $700 million builder's risk policy insuring a building under construction at 157 West 57th Street in Manhattan. The project, constructed by owner-developer Extell and construction manager Lend Lease, is a 74-floor mixed use hotel and residential building.

Strong winds during Sandy caused the boom of the tower crane, standing nearly 750 feet above street level, to whip about, flip back on itself, and, ultimately, hang precariously over the street and the project until it could be secured and removed. Parts of the tower crane fell to the street, while others struck the glass façade of the building, causing minimal damage. The removal and replacement of the damaged tower crane delayed construction of the project for an extended period.

Thereafter, Extell and Lend Lease sought coverage under the builder's risk policy for losses incurred in connection with the damaged tower crane, including a claim under the delay in completion coverage endorsement to the policy. The insurers denied coverage on the grounds that the tower crane was not covered property as defined in the builder's risk policy and that the policy's exclusion for "contractor's tools, machinery, plant and equipment" precluded coverage for the claim.

Lend Lease and Extell sued the market of insurers in New York County Supreme Court, and moved for summary judgment, seeking a declaration of coverage under the policy and alleging breach of contract by the insurers.

The market members opposed these motions and also cross-moved for summary judgment. The motion court denied all parties' motions and ordered discovery to proceed, opining that "issues of fact" surrounded "whether the Tower Crane was intended to become a permanent part of the Project, which is relevant to the applicability of the Contractor's machinery and equipment exclusion."

All parties appealed to the First Department, which modified the motion court's order on the law and granted the insurers' cross-motions for summary judgment by a divided, 3-2 vote.

The majority of the appellate justices agreed with insurers' arguments that the tower crane did not constitute a covered "Temporary Works" as defined in the policy. Specifically, the majority held that the tower crane could not be considered a "temporary structure" as used in the definition of "Temporary Works," because it was not "incidental to the project." In this regard, the majority recognized that the insured project was explicitly designed to incorporate the tower crane during construction. Moreover, the majority held that, rather than serving a minor or subordinate role, the tower crane was used to lift items such as concrete slabs, structural steel, and equipment, and was therefore integral and indispensable to the project.

Further, the majority concluded – applying the maxim of *ejusdem generis*, whereby the meaning of an undefined term is ascertained by reference to the words surrounding it – that a tower crane is nothing like the words surrounding the undefined term "temporary structure," *i.e.*, scaffolding, formwork, falsework, shoring, fences, and office and job site trailers. Thus the Appellate Division found that the tower crane did not constitute a covered "Temporary Works." The court also held that the tower crane constituted "equipment" as used in the contractor's machinery and equipment exclusion, and was therefore excluded property under the policy.

Lend Lease appealed as of right to the New York Court of Appeals from the divided decision of the First Department, and the appeal is pending.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Philip C. Silverberg**, **Mark S. Katz**, or **Sanjit S. Shah**.

First-Party: Procedural Issues

Tremarco v. Lexington Ins. Co.; DeFranco v. Lexington Ins. Co. (Monmouth Cty., N.J. Super. Ct., Apr. 2015):

These were two separate lawsuits, consolidated for disposition, against Mound Cotton's client Lexington before Monmouth County, New Jersey Superior Court Judge Jamie Perri. In both matters, individual condominium owners sued to recover under their condominium association's insurance policy for damage to association property within their units, such as water damage to structural elements including walls and floors, as well as cabinetry and fixtures.

The master deed defined these items as condominium association property, not that of the individual unit owners. Although the unit owners were not insureds under the association's policy with Lexington and did not own the damaged property, Tremarco and DeFranco sued the insurer to compel payment for the damage, claiming to be either direct or third-party beneficiaries of the policy.

Judge Perri dismissed both lawsuits for plaintiffs' lack of standing. In a ruling read into the court record, she held that individual unit owners do not have standing either directly under the condominium association policy or as third-party beneficiaries of the policy to pursue insurance coverage for damage to property within their units owned by the association.

The court noted that under the association's by-laws, the repair of that property is to be carried out by the association. Thus, if individual owners could recover for damage to association property, the procedures established by the by-laws would be undermined and, indeed, a unit owner could keep the money without performing the repairs. In that event, the policy's coverage would be depleted, creating "an untenable situation both with respect to the insurer's ability to adjust the claim and with regard to the disbursement of insurance proceeds."

Judge Perri concluded that if the unit owners were aggrieved by the condominium association's failure to perform the repairs, "their claim is against [the condominium association], not under the Lexington policy."

For a copy of the transcript of the court's oral decision, please **click here** and for inquiries about this case, please contact partner **Philip C. Silverberg** or counsel **Scott J. Sheldon**.

Ranger Pipelines, Inc. v. Lexington Ins. Co. (U.S. 9th Cir. Ct. of App., July 2015):

This matter was previously reported in the firm's 2013 Decisions Newsletter. Over two years later, Ranger's appeal from the lower court's dismissal of its amended complaint was finally heard by the federal Ninth Circuit Court of Appeals. Mound Cotton represented Lexington both in the lower court and on Ranger's appeal.

Ranger was an additional insured under an all risk and builder's risk property insurance policy issued by Lexington to the Regents of the University of California for a construction project that suffered an alleged $35 million loss. Ranger did not dispute that it failed to commence suit against Lexington within one year after discovery of the loss as required by the policy. Ranger alleged, however, that the Regents earlier had made a claim "on behalf of itself and its additional insureds, including [Ranger]."

Ranger therefore contended that Lexington was notified of Ranger's claim within the limitation period. Accordingly, Ranger argued that the limitation period was tolled from the time Regents notified Lexington of its loss. Ranger further contended that Lexington was barred from raising the limitation defense by reason of equitable estoppel because, at meetings that were attended by Ranger following the loss, Ranger was led to believe that the claim presented by the Regents would be resolved.

Applying California law, the Ninth Circuit unanimously concluded that Ranger had failed adequately to allege in its amended complaint that the Lexington policy's suit limitation period was equitably tolled, and had also failed adequately to allege equitable estoppel. Turning first to Ranger's arguments respecting equitable tolling, the appeals court noted the conclusory nature of the allegation that the Regents made a claim on behalf of Ranger as well as itself, observing that the complaint did not allege that the claim mentioned Ranger by name nor did the complaint allege any affirmative steps Ranger took to request that the Regents assert a claim on Ranger's behalf. Moreover, the court noted that the complaint specifically alleged that Ranger did not receive a copy of the claim made by Regents. Taking Ranger's allegations as true, the court found that there was insufficient factual material in the complaint to make out a plausible claim that Ranger notified its insurer of the damage within the limitation period. Further, the court observed that "even if the [amended complaint] had adequately alleged that Regents made a claim on Ranger Pipelines's behalf, it did not allege when that claim was denied." As a result, the allegations did not establish for how long the limitation period was tolled.

Turning next to equitable estoppel, the Ninth Circuit pointed out that the allegations regarding Lexington's representations were "general and conclusory." Because Ranger did not allege specifically what Lexington told Ranger, the court found it "impossible to assess whether Lexington intended that Ranger Pipelines rely on the representations and delay filing a claim."

Lastly, the appeals court rejected Ranger's argument that Lexington had an affirmative duty to inform Ranger of the appropriate time limits. Ranger argued that Title 10 of the state's Code of Regulations imposed such a duty to perform; but the court found that the regulation applies to "a first-party claimant or beneficiary" and that the allegations did not establish that, as defined in the regulations, Ranger qualified as either.

Because Ranger admittedly failed to comply with the requirement of the one-year suit limitation provision of the Lexington policy, and because neither equitable tolling nor equitable estoppel applied to excuse Ranger's failure to comply, the Ninth Circuit affirmed the decision of the lower court dismissing Ranger's amended complaint with prejudice.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Wayne R. Glaubinger** or **John Mezzacappa**.

Beachfront N. Condo. Ass'n, Inc. v. Lexington Ins. Co. (U.S. Dist. Ct., Dist. of N.J., Aug. 2015):

Mound Cotton represents Lexington in this lawsuit seeking an additional insurance recovery for a claim for Superstorm Sandy related wind damage. Lexington requested as part of discovery that Beachfront produce the documents exchanged between and among Beachfront, its attorneys, and the law firm's causation consultants regarding Beachfront's insurance claim and the consultants' property inspections and reports. Beachfront objected, arguing that the requested documents were protected by the attorney-client privilege and/or the work product doctrine.

Because the particular documents at issue were not identified, federal Magistrate Judge Joel Schneider of the District of New Jersey was able to provide only "general guidelines" for Beachfront "to use for its document production" as ordered by the court. Finding that Beachfront had proven no earlier date on which it anticipated litigation, the court held that September 11, 2014 – the date when Lexington denied Beachfront's claim – was operative for the purpose of applying the work product doctrine.

The court held that by producing its consultants' reports in August of 2013 and designating those consultants as trial experts, Beachfront waived any attorney-client privilege as to all information the consultants "considered" to prepare their reports, including information reviewed or reflected upon by the testifying expert that he "ultimately rejects."

Next, the court held that Beachfront must produce all relevant and requested non-privileged communications between itself and the consultants. According to the Magistrate Judge, all relevant facts contained in the documents and electronic materials are discoverable, even if the remainder of the item may be privileged.

Communications between Beachfront and its counsel prior to October 27, 2014 – the date litigation commenced – for the purpose of securing legal advice are privileged. To the extent there are relevant and requested non-privileged communications between Beachfront and its counsel, they must be produced.

Finally, the Magistrate Judge held that all allegedly privileged communications that are withheld in whole or in part must be identified on a privilege log.

The Magistrate Judge denied reconsideration of his order early in 2016.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Wayne R. Glaubinger** or **James M. Dennis** or special counsel **Daniel J. Endick**.

Geffrard v. Castlepoint Ins. Co. (Qu. Cty., N.Y. Sup. Ct., Aug. 2015):

Castlepoint and Tower paid plaintiff some $7,000 for damage to her detached garage and front door and other minor damage arising from Superstorm Sandy. "At some point thereafter," she learned that the damage to her home, inside and out, was far more extensive than "the immediate and visible damage that plaintiff had originally discovered." It was not until November 14, 2014 that plaintiff sued Castlepoint and Tower for coverage of her additional damages. Represented by Mound Cotton, the insurers moved to dismiss on the ground that plaintiff's lawsuit was not commenced within one year of the loss as required by her policy.

Queens County Supreme Court Justice Timothy J. Dufficy reluctantly granted the insurers' motion, observing that "a one-year time limitation provision for commencing an action under a policy of insurance, such as the subject provision, is valid and enforceable," but finding "the resultant outcome here to be offensive . . . given the crippling effect of the storm [and] the displacement of Sandy's victims for months, if not years."

Justice Dufficy found no basis for invoking the doctrine of equitable estoppel to bar the statute of limitations as a defense inasmuch as "[t]he plaintiff failed to adduce sufficient evidentiary facts to establish that she was induced to delay commencement of this action as a result of any affirmative misconduct by the defendants (actual misrepresentation, affirmative wrongdoing)." Indeed, "[t]he record is devoid of any basis to conclude that the defendants ever advised the plaintiff not to commence suit, engaged in conduct which can be considered misleading or deceptive or otherwise lulled plaintiff into sleeping on her rights." Accordingly, the court dismissed the complaint as time-barred.

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

Rockaway Commons LLC v. Lexington Ins. Co. (N.Y. Cty. Sup. Ct., Aug. 2015):

Arch Specialty provided second-layer excess coverage attaching above $10 million to plaintiffs, whose real property was damaged by Superstorm Sandy. The primary carrier, with limits of $5 million, paid out $4,775,107 for plaintiffs' claim, and the first-layer excess insurer, with limits of a second $5 million, paid nothing. As the two-year period following Sandy during which the insureds might bring suit against Arch under its policy was about to expire, plaintiffs commenced this action against Arch Specialty and its parent company, Arch Group, for $25,000,000. Mound Cotton represented the companies' interests.

Both defendants moved to dismiss. New York County Supreme Court Justice Barbara Jaffe granted Arch Group's motion, with prejudice, because it did not issue the policy to plaintiffs, hence there was no contractual relationship between them to support a breach of contract claim. Regarding Arch Specialty, the court found that, because the full $10 million primary and first-layer excess "limits have not been met," Arch's "obligation has not ripened and plaintiffs may not assert a cause of action against it for denial of coverage."

The court held further that "any issue as to a future statute of limitations defense is not ripe for judicial review" and accordingly, as to Arch Specialty, it dismissed the complaint "without prejudice."

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Wayne R. Glaubinger** or **James M. Dennis**.

CNY Excavating & Concrete, LLC v. Great Am. Ins. Grp. (Oneida Cty., N.Y. Sup. Ct., Sept. 2015):

Mound Cotton's client was Great American Insurance Group, which was the sole defendant sued and served by plaintiff in this case alleging coverage for damage to the insured's dump truck, which had logged almost one million miles as of the date of the accident. Oneida County, New York Supreme Court Justice David A. Murad granted Great American Insurance Group's motion to dismiss for lack of privity.

In fact, plaintiff's insurance contract was only with Great American Insurance Company of New York, which was not a party to the lawsuit. Plaintiff cross-moved to amend the caption to add Great American Insurance Company of New York, but the court denied the cross-motion for lack of jurisdiction inasmuch as Great American Insurance Company of New York had not been properly served with the summons and complaint.

For a copy of the court's order, **please click** here and for inquiries about this case, please contact partner **Kevin F. Buckley** or associate **Bradley Small.**

Iwachiw v. Travelers (U.S. Dist. Ct., East. Dist. of N.Y., Sept. 2015):

Plaintiff, *pro se* and on behalf of two corporate entities, sought monetary relief for alleged property damage as a result of Superstorm Sandy from Tower Insurance Co., other insurance companies, the City of New York, and N.Y.U. Medical Center. According to the complaint, plaintiff suffered flood damage both to and at his "premises" in Sunnyside, Queens and to his "stored research" at N.Y.U. Medical Center. Tower's homeowners' policy covered the Queens premises.

Tower moved for judgment on the pleadings dismissing plaintiff's claims against it. Federal Magistrate Judge Steven I. Locke of the Eastern District of New York recommended that Tower's motion be granted, and District Judge Sandra J. Feuerstein so ordered over plaintiff's objections.

Iwachiw's breach of contract claim was dismissed for lack of standing to sue because the only insured parties under Tower's policy were Josefa and Michael Iwachiw, not plaintiff, Walter Iwachiw. Further, plaintiff was not an intended third-party beneficiary of the insurance contract inasmuch as payment for any loss was clearly provided to Josefa or, alternatively, Michael. Indeed, Tower made a $25,000 insurance settlement with Michael Iwachiw for damage to the premises from Sandy, which plaintiff claimed was illegal. Plaintiff, on the other hand, could establish, "[a]t most," that "any benefit to [him] was merely incidental to his living in at the Queens Property."

His negligence claim was dismissed as legally deficient as "there can be no separate cause of action for negligence" where "there is no alleged harm beyond the breach of the insurance contract." His unjust enrichment claim was also dismissed as "untenable" because "it simply duplicates . . . a conventional contract or tort claim."

It is interesting to note that Iwachiw had previously been enjoined from commencing new matters in the Eastern District of New York without prior permission of the court in light of his history of filing repetitive lawsuits and frivolous appeals in other cases. Accordingly, the motions to dismiss his complaint in this case were considered on the merits only because he did not originally commence his lawsuit in the federal Eastern District. Rather, it was filed in New York County Supreme Court, removed by the insurers to the Southern District of New York for diversity of citizenship, and then transferred to the Eastern District because that court had exclusive jurisdiction as the situs of the insured premises. In these unusual circumstances, the Magistrate Judge recommended that permission be given *nunc pro tunc* for the filing of Iwachiw's claims and the consideration on the merits of the motions to dismiss.

On review of Magistrate Judge Locke's report and recommendations, Judge Feuerstein dismissed plaintiff's claims against Tower with prejudice for failure to state a claim for relief. Plaintiff appealed to the Second Circuit Court of Appeals, which dismissed his appeal early in 2016 as "lack[ing] an arguable basis either in law or in fact."

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

Seco Basic v. Admiral Ins. Brokerages Corp. (Kings Cty., N.Y. Sup. Ct., Nov. 2015):

Mound Cotton represented Tower Insurance Company of New York in this matter before Justice Peter P. Sweeney of Kings County Supreme Court. The insured sued for breach of contract and a declaratory judgment as to coverage.

Prior to suit, the insured had submitted a claim to Tower for damages allegedly caused by wind during Superstorm Sandy. Tower paid for some repairs, but the insured demanded considerably more money. Eventually, the insured commenced suit.

Tower moved to dismiss on the basis of the policy's two-year suit limitation provision, and the court granted the motion.

For a copy of the court's order, please **click here** and for inquiries about this case, please contact partner **Kevin F. Buckley** or associate **Bradley Small**.

First-Party: Extracontractual Issues

Evans v. N.Y. Prop. Ins. Underwriting Ass'n (Suff. Cty., N.Y. Sup. Ct., Jan. 2015):

This is one of several first-party property disputes arising from Superstorm Sandy in which Mound Cotton, here representing NYPIUA, convinced separate Long Island Supreme Court Justices to dismiss all of the extracontractual claims against the insurer, leaving for further disposition only the causes of action for alleged breach of the insurance policies.

In the *Evans* litigation, Suffolk County Supreme Court Justice Denise F. Molia dismissed plaintiffs' claims for breach of the implied covenant of good faith and fair dealing, bad faith, and the violation of Section 349 of the General Business Law, as well as for attorneys' fees. The court found duplicative the claim for breach of the implied covenant, because the allegations supporting that cause of action alleged only the same facts as the claim for breach of the policy. The court held that the bad faith claim was without foundation because such allegations alone do not provide an independent basis for recovery in New York.

Justice Molia also agreed with NYPIUA's argument that Section 349 did not apply to this case because it was merely a private contractual dispute and did not involve consumer-oriented conduct aimed at the public at large. Finally, the court noted that, in New York, insureds cannot recover attorneys' fees incurred in bringing an affirmative action against an insurer to settle their rights under a policy.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Costantino P. Suriano**, **Robert S. Goodman**, or **Jeffrey C. Crawford** or senior attorney **Jon Quint.**

McCarthy v. N.Y. Prop. Ins. Underwriters Ass'n (Nass. Cty., N.Y. Sup. Ct., Apr. 2015):

This was another in a series of similar first-party property disputes in the Long Island courts arising out of Superstorm Sandy in which the court dismissed all of the extracontractual claims against Mound Cotton's client, leaving for resolution only the causes of action for alleged breach of the insurance policies.

In the *McCarthy* matter, Nassau County Supreme Court Justice Antonio I. Brandveen dismissed the allegations contained in six paragraphs of the complaint. Although plaintiff pleaded only a single cause of action, for alleged breach of the insurance policy, he bolstered that claim with various extracontractual theories of recovery, including the alleged breach of the New York Unfair Claims Settlement Act or the Insurance Code and NYPIUA's alleged false representations made to plaintiff.

Justice Brandveen held that there was no private right of action under the Unfair Claims Settlement Act or the Insurance Code, and that plaintiff had not sustained his claim for false representations because, by omitting any factual allegations from his complaint, he failed to satisfy the New York requirement of particularity in such a pleading. Accordingly, the court granted Mound Cotton's motion to strike from the complaint the six paragraphs disputed by NYPIUA.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Costantino P. Suriano**, **Robert S. Goodman**, or **Jeffrey C. Crawford** or senior attorney **Jon Quint**.

Sinha v. Great N. Ins. Co. (Nass. Cty., N.Y. Sup. Ct., Apr. 2015):

This is one more of the cases in in the Long Island courts arising out of Superstorm Sandy in which the court dismissed all of the extracontractual claims against Mound Cotton's client, in this instance Great Northern.

The *Sinha* complaint was virtually identical to that filed by plaintiff McCarthy in the case discussed above. Without opposition, Nassau County Supreme Court Justice John M. Galasso explicitly relied on the *McCarthy* decision of his colleague Justice Brandveen to strike six similar paragraphs against Great Northern for the same reasons, leaving only the claim for alleged breach of the insurance contract.

For a copy of the order, please **click here** and for inquiries about this case, please contact partners **Costantino P. Suriano**, **Robert S. Goodman**, or **Jeffrey C. Crawford** or senior attorney **Jon Quint**.

Econo Vision Ctr. Ltd v. Peerless Ins. Co. (Nass. Cty., N.Y. Sup. Ct., June 2015):

In this Sandy matter, as in other similar matters recounted above, Nassau County Supreme Court Justice F. Dana Winslow dismissed the allegations set forth in five paragraphs of plaintiffs' complaint against Mound Cotton's client, Peerless. The complaint set forth a single cause of action, for breach of contract, but asserted extracontractual allegations grounded in various tort theories, which included violations of the New York Unfair Claims Settlement Act and Insurance Code and claims of false representations by the insurer.

The court struck these allegations from the complaint, ruling that no private right of action existed for violations of these insurance statutes and that plaintiffs' complaint had included no factual allegations in support of its claim of false representations. Because the court denied permission to amend the complaint, the only surviving allegations are for breach of contract.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Costantino P. Suriano** or associate **Diana E. McMonagle**.

T.G. Mgmt., L.L.C. v. Allied World Assurance Co. (U.S. Dist. Ct., West. Dist. of Okla., Aug. 2015):

Mound Cotton represented defendant Allied World in this matter in the federal Western District of Oklahoma. District Judge Joe L. Heaton granted defendant's motion to dismiss "for substantially the reasons stated in defendant's brief."

Plaintiffs in this hail damage case amended their complaint to add a claim for bad faith. But the new count contained no specific factual allegations concerning Allied World's handling of the insurance claim. Rather, it merely pled a boilerplate list of generalities from the Oklahoma Unfair Claims Practices Act, such as that the insurer "applied restrictions not contained in the policy," "refused to consider the reasonable expectations of the insured," and "knowingly misconstrued and misapplied provisions of the policy."

Mound Cotton successfully maintained that such a pleading did not meet even the minimal requirements for a federal court complaint as set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Accordingly, the court dismissed the bad faith claim.

For a copy of the court's order, please **click here** and for inquiries about this case, please contact partner **Wayne R. Glaubinger** or counsel **Scott J. Sheldon**.

Barbarovich v. Tower Grp., Inc. (Kings Cty., N.Y. Sup. Ct., Oct. 2015):

Mound Cotton represented both Tower Group and Castlepoint in this matter before Justice Karen B. Rothenberg in Kings County Supreme Court. Plaintiffs alleged damage to their property from Superstorm Sandy.

Plaintiffs' insurance contract was solely with Castlepoint, but plaintiffs maintained that they were also in privity with Tower Group because they received correspondence from Tower during the adjustment of their claim. The court dismissed the case against Tower for lack of privity.

Castlepoint moved to dismiss plaintiffs' bad faith causes of action as duplicative of the breach of contract claim. Although plaintiffs argued that their complaint alleged Castlepoint acted in bad faith during the adjustment of the claim, Justice Rothenberg held that the complaint did not plead facts independent of the contract cause of action and she therefore dismissed the claims of bad faith against Castlepoint.

For a copy of the court's order, please **click here** and for inquiries about this case, please contact partner **Kevin F. Buckley** or associate **Bradley Small**.

Bayshore Recycling Corp. v. ACE Am. Ins. Co. (U.S. Dist. Ct., Dist. of N.J., Oct. 2015):

In this Superstorm Sandy insurance coverage action in the New Jersey federal District Court, Mound Cotton, on behalf of ACE American, moved to sever and stay plaintiff's cause of action for "Bad Faith Claims Handling." Federal Magistrate Judge James B. Clark, III of the District of New Jersey granted ACE's motion.

Rule 21 of the Federal Rules of Civil Procedure gives the court discretion to sever and stay any claim. In a number of recent insurance coverage matters in New Jersey, the courts have been asked to consider whether it would be more efficient to resolve breach of contract causes of action on the coverage issues before turning attention to the bad faith elements of the suit. In many instances, it would not be necessary to adjudicate the bad faith allegations if the coverage position taken by the insurer were to be upheld.

In weighing whether or not to sever a claim, courts consider a number of factors, including whether the issues sought to be tried are significantly different from one another and whether the party requesting severance will be prejudiced – for example, by the admission of evidence relevant to bad faith but not germane to breach of contract, or by a significant increase in the scope of document discovery, or by a far lengthier trial – if severance is not granted.

Here, Judge Clark considered the relevant factors and noted that the scope of initial discovery would be significantly greater if it included the outstanding requests pertaining exclusively to the bad faith claim. The court concluded that the factors weighed in favor of severing and staying the bad faith claim, and therefore granted ACE's motion.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Jeffrey S. Weinstein** or **William D. Wilson**.

Polo Elec. Corp. v. Aspen Am. Ins. Co. (N.Y. Cty. Sup. Ct., Nov. 2015):

The two plaintiffs, which the court described as "really one [electrical] contractor," sued Aspen in New York County Supreme Court for property damage and business interruption at locations in Lower Manhattan and Carlstadt, New Jersey resulting from Superstorm Sandy. Mound Cotton represented Aspen's interests.

The seven causes of action were for breach of the insurance contract, bad faith failure to investigate the claim, fraudulent investigation of the claim, negligent misrepresentation, a declaratory judgment for full flood coverage, specific performance, and violation of the National Flood Insurance Act and the Code of Federal Regulations. Aspen moved to dismiss all except the first cause of action.

Finding the second claim "in a sense" for "a breach of good faith and fair dealing," Justice Shirley Werner Kornreich dismissed that cause of action as duplicative of the breach of contract claim. With regard to the third and fourth claims, the court dismissed these for failure to plead fraud and negligent misrepresentation with the required specificity. The fifth claim, for a declaratory judgment, was dismissed as "merely repetitive of the breach of contract cause of action." The sixth, for specific performance, was dismissed as an "equity action" where there is "an action in law which covers the exact same thing."

As to the seventh cause of action, that Aspen violated the National Flood Insurance Act and the CFR, Aspen argued that its "commercial property policy that happens to provide coverage for flood" was not governed by those federal requirements. Further, Aspen maintained that plaintiffs' cause of action for that claim could not be sustained because the statute of limitations for the property that it concerned, in Carlstadt, had expired before the complaint was filed and, because of lack of notice of the intended claim, the complaint could not be amended so as to relate back to the original filing date. The court reserved decision on that issue, and still has not ruled.

For a copy of the transcript of the court's oral decision, please **click here** and for inquiries about this case, please contact partners **Wayne R. Glaubinger** or **Hilary M. Henkind**.

Fantecchi v. Hartford Ins. Co. of the Midwest (U.S. Dist. Ct., So. Dist. of Fla., Nov. 2015):

After Fantecchi sustained damage to her home and Hartford denied liability, she sued in three counts, for breach of contract, failure timely to respond to claim-related communications, and bad faith. The case was removed on diversity of citizenship grounds to the federal District Court for the Southern District of Florida. Mound Cotton, representing Hartford, moved to dismiss the second and third counts of the complaint on the ground that, under Florida law, "a plaintiff cannot contemporaneously assert claims for coverage as Fantecchi does in Count I while raising the bad faith claims alleged in Counts II and III."

According to District Judge Cecilia M. Altonaga, Florida statutory and case law make it clear that a first-party bad faith claim against an insurer does not accrue until there is a final determination of both the insurer's liability and the amount of damages it owes. Fantecchi conceded in its motion papers that its second and third counts were for bad faith. Thus, "[a]s Hartford notes, Fantecchi is impermissibly proceeding simultaneously on a claim to determine liability or damage in Count I as well as bad faith claims in Counts II and III."

Fantecchi proposed as a remedy that the court abate rather than dismiss her bad faith counts. But the court cited a Florida intermediate appellate case holding that "the usual justifications for abatement" were absent from a first-party bad faith action, and the court further observed that "[b]ringing a premature bad-faith claim is contrary to the Federal Rules of Civil Procedure." Accordingly, Judge Altonaga exercised her discretion to dismiss Fantecchi's second and third counts without prejudice instead of abating them.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **William D. Wilson** or **Lionel F. Rivera** or associate **Brooke D. Oransky**.

Contaminated Products Coverage

Trans-Packers Servs. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. (N.Y. App. Div., 1st Dep't, May 2015):

This matter was previously reported in the firm's 2014 Decisions Newsletter. New York County Supreme Court held that a general release, "unambiguous on its face," of "all actions, causes of action, suits, . . . damages, judgments, . . . and demands whatsoever" "arising out of the 2008 salmonella contaminations" barred Trans-Packers' $1.66 million business interruption claim against National Union after the parties had settled an April 2008 product contamination claim for a payment of $19,000 above the $50,000 deductible. An earlier, separate product contamination claim fell below the deductible.

Trans-Packers appealed to the Appellate Division, First Department, which affirmed on the ground that the release "encompasses all costs arising out of the March 2008 and April 2008 contamination incidents, and resolves any and all causes of action in connection with the claim, *i.e.*, losses arising from the salmonella contamination incidents in March and April 2008." Like the motion court, the First Department also rejected Trans-Packers' "assertions of mutual or unilateral mistake in connection with the release."

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Jeffrey S. Weinstein** or **David A. Nelson** or associate **Sara F. Lilling**.

Attorney Malpractice Coverage

Sicari v. Hartford Ins. Co. of the Midwest (Bergen Cty., N.J. Super. Ct., Sept. 2015):

Plaintiff is an attorney who maintained his business personal property, commercial general liability, and lawyers' professional liability insurance through a policy with Hartford of the Midwest through Suburban General Insurance Agency, which was Hartford's agent as well as Sicari's broker. In May 2011 Hartford sent a letter to plaintiff advising him that his current policy was about to expire. The notice also stated that there would be "a 'Reduction in Coverage' as to 'Lawyer's Professional Liability.'" Attached was a notification of non-renewal of lawyers' professional liability insurance as an endorsement to plaintiff's main policy, along with a statement that Hartford will continue to offer stand-alone lawyers' professional liability insurance. Plaintiff and Suburban both testified that they did not receive the May 2011 non-renewal notice.

In June 2011 plaintiff filled out and signed a coverage application to Twin City, a Hartford affiliate, with the heading "Lawyers Professional Liability Insurance Application," which he submitted to Hartford by an e-mail in July from Suburban. The e-mail requested that Hartford review the application and contact Suburban with any questions. Twin City never issued a lawyers' professional liability policy to plaintiff.

But Hartford issued a renewal policy providing the same coverage as the previous policy except for the omission from the new policy of lawyers' professional liability coverage. The premium for the new policy was $649, as compared to $2,728 for the prior policy year. The following year, Sicari's policy was renewed again, likewise with no lawyers' professional liability coverage, and the premium was $663. Sicari testified at his deposition that he reviewed the terms and prices of each of these insurance policies. Sicari finally inquired about his coverage in June 2013, apparently in anticipation of a malpractice claim, and commenced this action when he was informed he had no applicable coverage for the period in question.

Mound Cotton defended Hartford and moved for summary judgment following discovery. Bergen County, New Jersey Superior Court Judge Robert P. Contillo dismissed plaintiff's claim, ruling as a matter of law that, whether or not Sicari or Suburban actually received the notice of non-renewal, it constituted valid constructive notice as a matter of law because it contained all the necessary information and the insurer obtained a date stamped certificate of mailing showing the name and address of the insured as required by statute.

Moreover, on the basis of Sicari's admission to reading each new policy, including its declarations page "showing that Hartford did not cover Plaintiff for lawyers' professional liability insurance" and the amount of premium, whose "drastic drop . . . from one year to the next is a clear indication that there had been a change in the policy," the court found that Sicari had both "statutory and sufficient notice of the change in . . . coverage, and cannot argue that [he] was reasonably unaware of the lack of professional liability coverage."

Finally, the court held that the application to Twin City "did not create a contract," and that plaintiff "could not reasonably believe that it had lawyers' professional liability coverage based merely on its submission of the renewal application, and its non-rejection" by Hartford, but with no manifestation of Hartford's intent "to be legally bound by Plaintiff's completion and submission of the renewal application."

Sicari's appeal to the New Jersey Appellate Division is pending.

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

Reinsurance

First State Ins. Co. v. Nat'l Cas. Co. (U.S. 1st Cir. Ct. of App., Mar. 2015):

This matter, which originated as a 2012 reinsurance arbitration award in favor of Mound Cotton's client, First State, was first reported in the firm's 2014 Decisions Newsletter after the previously confidential award was unsealed as part of a federal court proceeding. The arbitration panel's award was confirmed and entered as a judgment of the federal District Court for the District of Massachusetts in May 2014, and National Casualty appealed.

A panel of the First Circuit Court of Appeals that included retired Supreme Court Associate Justice David H. Souter affirmed the panel's payment protocol award. In language that was at times considerably more colorful than the legal principles under review, Circuit Judge Bruce M. Selya, writing for the Court of Appeals, rejected National Casualty's claim that the payment protocol fashioned by the arbitrators was "ultracrepidarian" – roughly translated as "outside the area of their expertise" – finding that the argument comprised "more cry than wool" – meaning that it was a "dramatic assertion backed by little evidence."

According to the court, it was readily apparent from the panel's references in its award to "the terms of" and "the obligations existing under" the reinsurance agreements that "the arbitrators understood" that "the nature of their task" was to "interpret[] the underlying contract" and "arguably" did so. This finding was corroborated by the fact that "the payment protocol limned in the award tracks the plain language of the relevant provisions in the parties' reinsurance agreements."

The Court of Appeals further held on this issue that "[w]hether the arbitrators were correct either in their interpretation of the underlying agreements or in their implementation of a particular payment protocol is not within our purview. For present purposes, it suffices that, when compared to the text of the underlying agreements, the contract interpretation award leaves no doubt that the arbitrators were arguably construing those agreements."

The court also considered, and rejected, National Casualty's argument that "the reservation of rights procedure adumbrated in the contract interpretation award does not draw its essence from the underlying agreements." Considering and addressing as a matter of first impression "the operation and effect of an honorable engagement provision in an arbitration clause," the First Circuit opined "that an honorable engagement provision empowers arbitrators to grant forms of relief, such as equitable remedies, not explicitly mentioned in the underlying agreement" and that "the reservation of rights procedure is such a remedy." According to the court, "[a]n honorable engagement provision ensures . . . flexibility" and thus "measurably enhance[s]" "the prospects for successful arbitration."

"Discerning no error" on either issue, the court therefore affirmed the arbitration award in all respects.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Lloyd A. Gura** or **Amy J. Kallal** or special counsel **Matthew J. Lasky**.

Liberty Mut. Fire Ins. Co. v. J.&S. Supply Co. (U.S. Dist. Ct., So. Dist. of N.Y., June 2015):

Mound Cotton represented Liberty Mutual's interests in this coverage action for underlying asbestos liability before federal District Judge Vernon S. Broderick in the Southern District of New York. The court held over J.&S.'s objection that, under New York law, the special multiperil policy (SMP) at issue, in effect from March 1987 to March 1988, unambiguously provided for pro rata allocation of indemnity based on Liberty Mutual's time on the risk for a progressive asbestos injury whose precise date of origin was unknown.

The district court first observed that in *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995), the Second Circuit noted that New York law was not yet settled on how liability should be apportioned in continuing injury cases where there was no clear date of origin. The appeals court concluded that when a continuous injury triggers coverage under successive policies that indemnify the insured for "all sums" arising from an injury "during the policy period," liability should be allocated pro rata among the insurers according to their time on the risk. Thereafter, in *Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307 (2d Cir. 2000), the Second Circuit held that where policies were ambiguous but their language was consistent with pro rata allocation, considerations of equity and public policy favored the pro rata rule under New York law.

Judge Broderick next considered *Consol. Edison Co. v. Allstate Ins. Co.,* 98 N.Y.2d 208 (2002), where the New York Court of Appeals held that policies requiring the insurer to pay "all sums" for which the insured was liable arising out of an "occurrence" – meaning "an event, or continuous or repeated exposure to conditions, which causes injury, damage or destruction during the policy period" – unambiguously authorized not joint and several allocation of the entire risk to each insurer but, rather, "[p]roration of liability among the insurers" to "acknowledge[] the fact that there is uncertainty as to what actually transpired during any particular policy period." The Second Circuit in *Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89 (2d Cir. 2012), thereafter interpreted *Consol. Edison* as holding that, absent contrary wording, "courts should use the pro rata approach to allocating liability for damages in cases of progressive environmental injury under these circumstances."

J.&S. unsuccessfully argued on several grounds that *Consol. Edison* did not dictate pro rata allocation under the Liberty Mutual policy. J.&S.'s first contention was that its policy was ambiguous because, unlike the policy in *Consol. Edison*, it did not expressly state that it applied only to occurrences taking place within the policy period; rather, it was sufficient under J.&S.'s policy that the "bodily injury" occurred during the policy period even if the "occurrence" took place earlier.

Judge Broderick agreed with J.&S. that its policy differed from the policy at issue in *Consol. Edison*. The district court nonetheless found this distinction immaterial because, in the later case of *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 21 N.Y.3d 139 (2013), the New York Court of Appeals found pro rata allocation consistent with a policy that, like J.&S.'s, provided coverage for bodily injury occurring during the policy period that was caused by an occurrence. Thus it was irrelevant that the language of J.&S.'s policy did not expressly limit coverage to occurrences within the policy period.

J.&S.'s second contention was that *Consol. Edison* did not control the outcome of its case because J.&S.'s policy allegedly included "extended" coverage "for death at any time resulting" from bodily injury occurring during the policy period. Judge Broderick, however, held that this provision did not undercut the rationale for pro rata allocation in light of the Second Circuit's decision in *Olin v. Am. Home* that wording affording the insured continuing protection, following the policy's termination, against liability for personal injury arising out of a covered occurrence did not impose joint and several liability. As Judge Broderick

stated, "even if a policy provides continuing coverage after the policy period for an injury that arose during the policy period, pro rata allocation remains appropriate under New York law when the nature of the injury makes it impossible to specify the injury's origin."

Two further issues of importance sharply divided the parties in *J.&S*. All copies of a business owners' liability policy (BOP) written by Liberty Mutual in favor of J.&S. and in force commencing December 1985 were missing. The parties disagreed as to whether the BOP policy was canceled as of March 1, 1987, the effective date of the SMP policy, or continued through December 1988. J.&S. argued that there was a factual dispute not only on that question but also as to whether the BOP policy contained terms that would affect the allocation of liability under the SMP policy.

The district court ruled that it need not consider these factual issues because the SMP policy unambiguously stated that its terms "shall not be waived, changed or modified except by endorsement issued to form a part of this policy," no such endorsement had been presented to the district court, and in the circumstances the terms of no other policy – even if produced – could be used to modify or interpret the unambiguous SMP policy. Moreover, Judge Broderick observed that there would be nothing improper or illogical in applying "two different methods of allocation under two different contracts if the terms of those contracts actually provided for different methods of allocation."

J.&S. further argued that it could not be obligated to repay any portion of the settlement payment Liberty Mutual had made in the underlying asbestos case because Liberty Mutual had settled the action without J.&S.'s consent and thus made the payment voluntarily. Judge Broderick, however, noted a clause in the SMP policy unambiguously providing that the company may make such "settlement of any claim or suit as it deems expedient." Citing New York and federal appellate case law holding that, as a matter of law, a "deems expedient" clause affords the insurer discretion to settle an action within the policy limits as it deems appropriate, even over the objection of the insured, the district court held that "J&S is obligated to contribute its pro rata share of indemnity for whatever period before 1985 it did not have insurance, and [Liberty Mutual] is not obligated to indemnify J&S for any periods insured by other carriers or any periods without insurance prior to 1985."

Judge Broderick likewise rejected J.&S.'s argument that the existence of non-cumulation provisions in J.&S.'s umbrella excess policies – including those in effect at the same time as J.&S.'s SMP policy – would make pro rata allocation unfair and provide Liberty Mutual with a windfall. Although the non-cumulation provision was not directly implicated in this case, Judge Broderick recognized that such clauses do not preclude the application of pro rata allocation; rather, "even if the anti-stacking clauses were relevant here, J&S fails to explain how their enforcement is inconsistent with pro-rata apportionment of liability among insurers or is unfair under the circumstances."

Notably, Judge Broderick opined, contrary to J.&S.'s argument, that since the anti-stacking clauses reduce Liberty Mutual's coverage obligations for a particular occurrence by the amount of each payment *by the company* (as contrasted with payments made by other insurers) with respect to the same occurrence under prior policies or prior annual periods of the same policy, there is no "double credit" in applying the provision.

Finally by the same decision, Judge Broderick addressed and granted Liberty Mutual's separate motion for a protective order blocking J.&.S.'s attempt to obtain expensive and irrelevant "other insured" discovery. Judge Broderick concluded that, inasmuch as the SMP policy and the other policies providing coverage for bodily injury occurring "during the policy period" were not ambiguous, it would be impermissible to resort to extrinsic evidence to interpret the SMP policy. Accordingly, he held J.&S.'s discovery demands improper under Rule 26 of the Federal Rules of Civil Procedure. Even if J.&S.'s demands sought relevant information, Judge Broderick – interpreting the newly amended version of FRCP 26(b)(1) and relying on Liberty Mutual's burden affidavit – opined that the demands were unduly burdensome and Liberty Mutual was therefore not required to comply with them.

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

Castlepoint Ins. Co. v. Vines (N.Y. Cty. Sup. Ct., Jan. and July 2015):

Castlepoint, represented by Mound Cotton, commenced an action in New York County Supreme Court seeking a declaratory judgment that it was not obligated to defend or indemnify either its insured, Vines, or Williams, who had sued Vines in the underlying personal injury action in Kings County Supreme Court. Vines failed to answer, so Castlepoint sought a default judgment; Williams answered but submitted no papers opposing Castlepoint's summary judgment motion. By a December 2014 decision filed in January 2015, Justice Eileen Rakower granted Castlepoint's motions without opposition.

Following the decision, Williams moved to vacate the order on the ground that his attorneys were never served with the summary judgment motion papers and did not learn of the motion until after the decision. Castlepoint countered with an application for costs and sanctions for frivolous motion practice. Castlepoint proved that Williams's attorneys, who had not opted out of the court's mandatory electronic filing requirements, had been served with the motion papers electronically. Moreover, Castlepoint produced a stipulation signed by Williams's attorneys agreeing to postpone the return date of the motion. That stipulation was dated over a month before the decision.

In the result, Williams's motion was denied, summary judgment was confirmed, and $500 in costs were assessed against Williams for his "frivolous motion."

For a copy of the decisions, please **click here** and for inquiries about this case, please contact partner **Wayne R. Glaubinger** or associate **Tania A. Gondiosa**.

Genting N.Y., LLC v. Navigators Ins. (N.Y. Cty. Sup. Ct., July 2015):

Genting and three other plaintiffs moved before New York County Supreme Court Justice Robert R. Reed for a declaration that Navigators was required to defend and indemnify them in an underlying action, pending in the state Court of Claims, in which a carpenter working on the construction of a casino at Aqueduct Racetrack alleged that he was injured as the result of the negligence of a subcontractor that Navigators insured. Apparently, Genting and another plaintiff owned the casino, the third was their general contractor, and the fourth owned the racetrack. Mound Cotton represented Navigators.

The plaintiffs argued that they were additional insureds under Navigators' policy for the subcontractor because the general contractor's written agreement with the subcontractor required the subcontractor to provide them with such coverage. But only the general contractor, not Genting or the other two plaintiffs, "entered into a contract with [the subcontractor] requiring that [the subcontractor] name it as an additional insured." Accordingly, because, under Navigators' policy, "only a party that contracted in writing with the insured for coverage as an additional insured was entitled to such coverage," "none of the plaintiffs, except [the general contractor], can show that it is entitled to coverage as an additional insured on the Policy" notwithstanding the provisions of the subcontractor's contract with the general contractor.

In other words, "a contract that requires one party to purchase insurance coverage for the other, as an additional insured, is binding upon the first party, but not upon that company's insurer, a stranger to the contract." Only "the

insurance policy . . . determines whether a party is an additional insured under that policy."

Navigators further argued that the motion of all plaintiffs, including the general contractor, was premature, because Navigators' policy included a wrap-up clause, which provided that the insurance did not apply to bodily injury "arising out of any project that is or was subject to a 'wrap-up insurance program.'" Here, the contract between the general contractor and the subcontractor provided for a "Contractor Controlled Insurance Program," also called a CCIP, which is a form of wrap-up program in which the owner, the general contractor, and eligible subcontractors are all enrolled. Accordingly, the court opined that "if the CCIP was, in fact, issued, and if [the subcontractor], in fact, enrolled in it, then Navigators has no obligation to defend or indemnify any of the plaintiffs," including the general contractor.

The court next found that Navigators' disclaimer on the basis of the wrap-up exclusion was timely, because plaintiffs' service of the subcontract upon the attorney whom Navigators had selected to defend the subcontractor was not service upon the insurance company and did not impute knowledge to the insurance company inasmuch as defense counsel's duty "runs solely to the insured."

Finally, the court held that any declaration requiring Navigators to indemnify the general contractor would in any event be premature until it was determined whether plaintiff's injury in the underlying case arose out of the subcontractor's work. Accordingly, all aspects of plaintiffs' motion were denied.

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

Caporuscio v. Goffle Realty, LLC (Bergen Cty., N.J. Super. Ct., Dec. 2015):

Caporuscio, an employee of third-party defendant National Alliance Securities Corp., slipped and fell on the exterior staircase of the premises where he worked, owned by defendant Goffle Realty and leased in part to National Alliance. The lease required National Alliance to maintain public liability insurance that would include Goffle as an additional insured. Caporuscio sued Goffle in Bergen County, New Jersey Superior Court, alleging that his injuries occurred because of Goffle's negligent maintenance of the premises. Goffle in turn sued National Alliance by a third-party complaint. Goffle alleged in its first count that National Alliance was negligent in causing Caporuscio's injuries, and in its second count that National Alliance breached its lease by not procuring insurance for Goffle as an insured party.

Superior Court Judge James J. DeLuca granted summary judgment to National Alliance dismissing count I of the third-party complaint, for negligence, because Goffle was solely responsible for maintenance of the exterior steps where Caporuscio fell, National Alliance had no maintenance responsibilities for that area, and "National Alliance was not negligent and cannot be held liable for the alleged injuries sustained by Plaintiff at the Premises." Judge DeLuca declined to dismiss count II, for breach of contract.

Goffle amended its third-party complaint to add National Alliance's insurer, Navigators, as a defendant. Goffle now alleged, by a third count, that it was insured under the policy issued by Navigators to National Alliance. The insurer, represented by Mound Cotton, moved for a declaration that no coverage flowed to Goffle under the policy, and sought dismissal of count III of the third-party complaint.

In support of Navigators' motion to dismiss count III, it argued that the policy did not list or identify Goffle as a named insured, although it listed 84 others. Navigators argued that the additional insured endorsements of the policy extended coverage only for bodily injury caused, in whole or in part, by the acts or omissions of National Alliance. Thus, in light of the court's previous holding that National Alliance was not negligent and could not be held liable for Caporuscio's injuries, Navigators urged that no coverage flowed to Goffle under the additional insured endorsements.

Judge DeLuca granted Navigators' motion, holding that the policy was clear that "coverage does not extend to Goffle," as it "is covered only with 'respect to liability for bodily injury' caused in whole or in part by (i) National Alliance's acts or omissions; or (ii) [t]he acts o[r] omissions of those acting on National Alliance's behalf." Because Caporuscio's claims were "direct claims against Goffle Realty for its own negligence," they "were not covered by the Policy," and the motion for summary judgment was granted.

For a copy of the order and decision, please **click here** and for inquiries about this case, please contact partner **Ellen G. Margolis** or counsel **Pamela J. Minetto**.

Tower Ins. Co. of N.Y. v. Hossain (N.Y. App. Div., 1st Dep't, Dec. 2015):

Singletary, a tenant, sued Hossain, the owner of the premises, for injuries Singletary allegedly suffered when she fell down some steps. Tower insured Hossain for the premises where the incident occurred. The policy included an exclusion for bodily injury occurring at a location where the owner did not reside. Tower's investigator established from Hossain that he had not resided at the premises since about two years before the incident. Tower, represented by Mound Cotton, then sued Hossain and Singletary in New York County Supreme Court for a declaration that it had no duty to defend or indemnify Hossain in the underlying personal injury action commenced against him by Singletary.

Hossain defaulted, and Tower sought a default judgment against him and summary judgment against Singletary. The motion court denied Tower's application as premature on the ground that, although Hossain had admitted he did not reside in the premises, "Singletary has sufficiently established that discovery in this action" – *viz.*, a deposition of the investigator who spoke to Hossain and an effort to locate and depose Hossain – "may lead to admissible evidence sufficient to defeat plaintiff's motion for summary judgment."

Tower appealed to the Appellate Division, First Department, where only Singletary appeared in opposition to the appeal. The appeals court unanimously ruled that the lower court had "erred in finding that defendant Singletary, a tenant in the premises and the plaintiff in the underlying action, established that discovery might lead to evidence that would defeat plaintiff's motion" in view of Hossain's admission, by his statement to Tower's investigator and default in appearing, "that he did not reside at the premises at the relevant time." The First Department therefore directed a judgment declaring that Tower "has no duty to defend or indemnify Hossain in the underlying personal injury action."

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

Securities Arbitration

Aukofer v. Multi-Fin. Sec. Corp. (FINRA Dispute Resolution, Mar. 2015):

In this FINRA arbitration, Mound Cotton represented a financial adviser accused of recommending unsuitable, illiquid alternative investments such as real estate investment trusts, managed futures, and a business development corporation. The claimant, a retiree in need of increased income, signed numerous documents authorizing the sale of her original portfolio and the purchase of new securities, including four real estate investment trusts, a business development corporation, and a managed futures fund.

At the hearing in Washington, D.C., the defense established that the investments recommended by the financial adviser were suitable for the claimant's stated need for income, and that the claimant, after being made aware of the risks of the investments through prospectuses and multiple meetings with the financial adviser, authorized the sale of her old portfolio holdings and the purchase of the recommended investments.

In its written award, the arbitration panel denied the claim in its entirety and recommended that reference to the claim be expunged from the financial adviser's Central Registration Depository record.

For a copy of the award, please **click here** and for inquiries about this case, please contact partner **Barry R. Temkin** or associate **Kate E. DiGeronimo**.

Errors & Omissions Defense

Fed. Deposit Ins. Corp. v. Burke (U.S. Dist. Ct., Dist. of N.J., Jan. 2015):

This was an appraisal negligence suit brought by the FDIC as receiver for AmTrust Bank against Burke, Mound Cotton's client, who was insured by Navigators. The FDIC alleged that Burke and a second appraiser had improperly valued a horse farm and home, and that the appraisals had induced AmTrust to make a $1.54 million refinance loan on the property, causing AmTrust's loss when the loan went into default and the property was sold in foreclosure. The lawsuit was part of a nationwide effort by the FDIC to recover the losses of failed banks from the malpractice insurers of the appraisers who had valued the mortgaged properties.

Mound Cotton's defense raised several grounds, including that the loss on the property resulted from the defunct AmTrust Bank's reckless lending practices with regard to proof of assets and income and the collapse of the housing market between the dates of the loan in 2007 and the foreclosure sale two years later. Mound Cotton further argued that the FDIC lacked standing to bring the claim inasmuch as, before the foreclosure sale, AmTrust had been forced by federal regulators to sell off a large proportion of its nonperforming loans, including the loan here at issue, which was sold and assigned to Goldman Sachs.

Accordingly, Burke moved to dismiss on the premise that it was Goldman Sachs, not AmTrust, that possessed any right of recovery for the post-assignment loss on the loan. New Jersey federal District Judge Michael Shipp agreed with Mound Cotton's argument, holding that "Plaintiff cannot demonstrate an injury-in-fact for standing purposes because it does not have a legally protected interest in a claim AmTrust assigned to Goldman Sachs. Accordingly, this Court lacks subject matter jurisdiction to hear this action," with the result that the claims against Burke and the other appraiser were dismissed.

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

Travelers Prop. & Cas. Ins. Co. v. AGG Creperie (U.S. Dist. Ct., East. Dist. of N.Y., Jan. 2015):

Mound Cotton represented defendant Chief Fire Contractors in this fire loss, previously reported in the 2014 Decisions Newsletter. Federal Judge Frederic Block of the Eastern District of New York ruled that neither Chief Fire nor co-defendant High Rise Fire Protection owed a duty of care to Travelers' insured, Loehmann's, to whose store the fire had spread. Chief Fire then sought reconsideration of a claim the court had failed to pass on in its original decision, *viz.*, Chief Fire's cross-claim for contractual indemnification from the owner of the mall, co-defendant 2027.

On reconsideration, Judge Block held that the contractual requirement that 2027 "indemnify Chief Fire . . . in any amount above stated liability [of $100]" encompassed Chief Fire's attorneys' fees incurred in defending against the main claim, as – unlike common law indemnification – the broad contractual indemnification provision required no showing of negligence by 2027.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partners **Philip C. Silverberg** or **Steven A. Torrini**.

PKR Assocs., P.C. v. Middletown Ventures Assocs., LLC (Middlesex Cty., N.J. Super. Ct., Mar. 2015):

The plaintiff alleged for its breach of contract claims against Mound Cotton's clients, the former owners of the defendant medical imaging company, that defendants had terminated plaintiff's radiology services agreement without proper cause and had improperly hired away one of plaintiff's radiologists. For its fraud and duress claim, the plaintiff alleged that Mound Cotton's clients had induced plaintiff to sell its interest in the medical imaging company by promising that the company would consider reinstating the radiology services contract, at a time when plaintiff's principal was in financial straits.

Judge Arthur Bergman of the Middlesex County, New Jersey Superior Court dismissed the breach of contract claims, holding that the individual defendants could not be liable for the defendant company's alleged breach of contract, either directly – because as individual owners they were not parties to the company's contract – or by piercing the corporate veil – because as 50 percent owners they could not have "dominated" the company's actions. The court also dismissed the duress claim because plaintiff had not alleged any "wrongful or unlawful act or threat" that "deprives the victim of his unfettered will" as New Jersey law requires. Finally, Judge Bergman dismissed the fraud claim on the basis that a promise to consider reinstating a contract in the future is not a "material misrepresentation of existing fact," a required element of fraud in New Jersey.

For a copy of the court's order and the transcript of its oral decision, please **click here** and for inquiries about this case, please contact partner **William D. Wilson** or counsel **Scott J. Sheldon**.

Air Carrier Liability

Burgett v. Delta Airlines, Inc. (U.S. Dist. Ct., Dist. of Utah, Feb. 2015):

Appearing *pro se*, Burgett sued Delta Airlines in May 2014 for its alleged failure in April 2008 properly to transport the shipment from Budapest to Salt Lake City of her French bulldog and ten puppies of the same breed. Mound Cotton represented Delta, which moved to dismiss the complaint for failure to state a claim upon which relief may be granted. The motion was referred to federal Magistrate Judge Dustin Pead of the District of Utah for his report and recommendation.

The Magistrate Judge found that the Montreal Convention applied to Burgett's claim as her lawsuit involved the international transportation of cargo from one state that is party to the Convention to another and "the alleged damages occurred in the course of Delta's international carriage of goods" from Hungary to the United States. The court held that the Convention had preemptive effect over all other federal and state laws and provided Burgett's exclusive remedy.

The court held that the dogs were not passengers but cargo. Further, the court held that Burgett's allegations that Delta was guilty of willful and intentional misconduct did not render the Convention inapplicable, did not work to remove the monetary liability limitations because that exception was limited to intentional misconduct in the carriage of persons, and would not have precluded the applicability of the remainder of the Convention even if the dogs had not been cargo.

The court also held that Burgett's allegations did not create a separate incident, commencing only after the dogs had reached their destination and thus outside the terms of the Convention, as Burgett was afforded information about and access to her dogs immediately upon their arrival as well as the opportunity at that time to examine both the adult animal and the remaining puppies. For all of these reasons, the Magistrate Judge applied the Montreal Convention's two-year statute of limitations to Burgett's claims and recommended the dismissal of her complaint. The court also held, in the alternative, that in the event other federal or state limitation periods applied instead, they too had expired.

Federal District Judge Robert Shelby of the District of Utah entered an order adopting Magistrate Judge Pead's report and recommendation and dismissing the case.

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

Yoly Farmers Corp. v. Delta Air Lines, Inc. (U.S. Dist. Ct., East. Dist. of N.Y., July 2015):

This action involved the international shipment of fresh vegetables by air from the Dominican Republic to New York. Both destinations are signatories to the Montreal Convention, whose terms govern all international carriage of cargo. Plaintiff alleged that seven shipments of its fresh vegetables were negligently handled and damaged by Delta during their carriage. Mound Cotton represented Delta in this lawsuit in the federal Eastern District of New York.

Delta moved for partial summary judgment dismissing plaintiff's claims as to four of the seven shipments in their entirety and one in part; it did not move as to the other two shipments. District Judge Brian M. Cogan found partly in favor of each party.

According to Judge Cogan, the Montreal Convention requires that a complaint in writing be dispatched to the airline within 14 days of delivery of damaged cargo. "[A]ctual notice of the damage may not substitute for formal written notice." The delivery slip and receipt for one shipment contained plaintiff's notations "damaged" and "shown to USDA inspector"; a second delivery slip and receipt contained plaintiff's notations "frozen" and "damaged by weather"; and a third contained plaintiff's notations "cargo damaged" and "reported to Bobby yesterday."

Finding, based on prior Second Circuit and Eleventh Circuit dictum and Florida federal case law, that "notations on delivery receipts may satisfy the Montreal Convention's notice requirements" and, based on Illinois federal case law, that "[t]here is nothing in the text of the Montreal Convention that requires an express and definite statement that the shipper intends to hold the carrier liable," the court held that plaintiff's notations on these three delivery slips and receipts, "which all indicate that the cargo carried under these waybills was, *inter alia*, 'damaged,' provided defendant with sufficient notice that it may be held liable for plaintiff's claims and gave defendant an opportunity to investigate the claims."

But regarding the two out of seven deliveries as to which written notice was untimely, or there was no written notice that specified there was damage, or notice was only oral, the court held in Delta's favor.

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

Logan v. IAP Worldwide Servs. (U.S. Dep't of Labor, Nov. 2015):

This matter arose from a claim for benefits under the federal Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act. Mound Cotton represented the employer, IAP, at a hearing in Washington, D.C. before Administrative Law Judge Daniel F. Solomon.

The central issue at the hearing, on which Logan bore the burden of proof, was whether or not she was a "widow," and thus entitled to statutory death benefits following the suicide of her husband, under a statute defining "widow" as including "only decedent's wife . . . living with or dependent for support upon him . . . at the time or his . . . death; or living apart by justifiable cause or by reason of his . . . desertion at such time." According to Judge Solomon, "A legal marriage alone is not sufficient to establish entitlement to death benefits."

Logan's tax returns suggested she was not dependent on decedent for at least half her support, she paid the household bills and continued to pay for all the expenses after his death, and Logan's own retained expert stated that decedent "became dependent on his wife for financial support." Thus, although Logan and decedent were living apart at the time of his death, the ALJ found that she was not dependent upon him for support at the time of his death.

Logan further argued that she and decedent were living apart by reason of his desertion of their home. But the ALJ found that they were separated for only a little more than two weeks and that it was Logan who had requested an automatically renewable one-year order of protection from decedent.

She also argued that they were living apart for a justifiable cause and, as Supreme Court case law also requires when "justifiable cause" is the ground, that there was a conjugal nexus. But even though Judge Solomon found that "[t]here was justifiable cause for Claimant and Decedent to live separately," he held that Logan, who bore the burden of proof, did not establish the conjugal nexus as she and decedent "did not retain any relationship in the time prior to Decedent's suicide and as such, a finding of a 'conjugal nexus' would be against the weight of the evidence." This conclusion was reinforced by the facts that "the couple had not had sexual intercourse for many months, possibly over a year," and "Claimant did not pay or help pay for Decedent's funeral," thus indicating that "the couple's separation was likely permanent" as of the date of his suicide.

For all of these reasons, the ALJ found that Logan was not a "widow" as defined under the applicable statute, and he dismissed her claim for benefits.

Claimant sought review of Judge Solomon's decision from the Department of Labor's Benefits Review Board, and her appeal is pending.

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

Food Sciences Corp. v. Cox (U.S. Dist. Ct., Dist. of N.J., Dec. 2015):

Plaintiff sued its former employee in the federal District Court for New Jersey for breach of contract, breach of the duty of good faith and fair dealing, tortious interference with customer relationships, and violation of the state Trade Secrets Act. Plaintiff moved for a preliminary injunction pursuant to the Federal Rules of Civil Procedure, and Mound Cotton opposed the motion on defendant's behalf.

Essentially, plaintiff's application sought to prevent defendant from resuming the types of consulting and public speaking activities she had pursued before she was employed by plaintiff. Plaintiff also claimed that defendant had misappropriated plaintiff's trade secrets, improperly contacted its customers, and secretly assisted its competitors.

Following two days of testimony, District Judge Robert B. Kugler denied plaintiff's motion on his finding that plaintiff "fails to demonstrate a likelihood of success on the merits." His conclusions were that plaintiff had shown no reasonable probability of prevailing at trial on its claims that defendant violated her non-competition agreement with plaintiff, misappropriated trade secrets, and solicited competitors. Accordingly, the court found that plaintiff had not shown that it had or was likely to suffer irreparable harm from defendant's actions after her termination.

For a copy of the court's order and findings of fact and conclusions of law, please **click here** and for inquiries about this case, please contact partner **Kenneth M. Labbate** or counsel **Scott J. Sheldon**.

Business and Personal Litigation

Hadco Metal Trading Co., LLC v. Barcol-Air, Ltd. (Conn. Super. Ct., Ansonia/Milford Jud. Dist., Mar. 2015):

Mound Cotton represents the plaintiff, Hadco Metal Trading, in this lawsuit for breach of contract, unjust enrichment, and account stated arising out of the sale of custom-made copper tubing and aluminum profile allegedly ordered by the defendant, Barcol-Air, but for which it either refused to pay or refused to accept delivery.

Hadco applied to Connecticut Superior Court Judge Arthur A. Hiller for a prejudgment remedy and, after an evidentiary hearing, the court found that Barcol-Air owed Hadco "for deliveries that it accepted but for which it did not pay" and also that Barcol-Air owed Hadco about $150,000 for "custom copper tubing and aluminum profile orders of which [Barcol-Air] never took full delivery and for which [Barcol-Air] has failed to pay" that "can only be sold for scrap."

Accordingly, Judge Hiller found it "probable that judgment will be entered in favor of [Hadco]" and granted its application for a prejudgment remedy in the sum of $148,437 principal, interest at 18 percent as provided in the accepted purchase orders, and attorneys' fees, for a total amount of $250,000.

Barcol-Air's appeal to the Connecticut Appellate Court is pending.

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

Braider v. Polirer (Nass. Cty., N.Y. Sup. Ct., Mar. 2015):

Braider sued Polirer in Nassau County Supreme Court for, among other claims, notarial misconduct. Polirer, a notary public, then retained Mound Cotton, which moved to dismiss the complaint on the ground of collateral estoppel. Justice Angela G. Iannacci granted the motion, holding that Braider was collaterally estopped from arguing in this lawsuit that her signature on a mortgage notarized by Polirer was a forgery that Polirer had notarized in her absence.

The court observed that upon an appeal to the Appellate Division, Second Department from a grant of mortgage foreclosure by default against Braider in Suffolk County Supreme Court, the appeals panel had ruled that Braider failed to raise a meritorious defense in Suffolk Supreme Court sufficient to vacate the judgment of foreclosure against her and should not be given still another chance to argue the merits of whether or not her signature on the mortgage was forged or properly notarized.

According to Justice Iannacci, inasmuch as the issue affirmed by the Second Department in the Suffolk County action "is identical to the issue in the complaint" in the Nassau County action, the "decision of no meritorious defense to the validity of the signatures on the mortgage documents is the law of the case," requiring dismissal of the current complaint for collateral estoppel.

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

Fortunatas Grex Int'l, Inc. v. Bakhshi (N.Y. Cty. Sup. Ct., July 2015):

Plaintiff, in its own right and as a shareholder of and in the right of 539 JB Enterprises, sued Bakhshi and another individual, Porco. Bakhshi counterclaimed against plaintiff and interposed third-party claims against the two individual principals of Fortunatas. Mound Cotton, representing the plaintiff and the third-party defendants, moved before New York County Supreme Court Justice Nancy M. Bannon to dismiss Bakhshi's counterclaims and third-party complaint. The court granted the motions and dismissed both the counterclaims and the third-party claims, leaving only plaintiff's claims against Bakhshi and Porco.

Fortunatas and 539 JB own and operate nightclubs. Bakhshi is a nightclub investor, with whom Fortunatas partnered to develop, construct, and operate a supperclub. The parties entered into a subscription agreement and a shareholders' agreement. Porco was hired to manage the supperclub's renovation. Fortunatas commenced this action in 2012 alleging Bakhshi's mismanagement of the supperclub. In 2013 another New York County Supreme Court Justice dismissed Fortunatas's complaint except its causes of action for breach of contract, an accounting, and a derivative claim for breach of fiduciary duty and the duty of loyalty against Bakhshi, and a cause of action for breach of the duty of loyalty against Porco. Bakhshi then interposed an answer asserting seven counterclaims against plaintiff, and commenced a third-party action asserting six causes of action against Fortunatas's principals.

Justice Bannon dismissed Bakhshi's counterclaim for breach of contract because Bakhshi failed to allege either Bakhski's performance or Fortunatas's breach, and thus "fails to allege all material elements of the cause of action." She dismissed the second counterclaim, for fraud, on the ground that Bakhshi failed to allege a material

misrepresentation, the intent to induce reliance, justifiable reliance, and resulting damages.

The court dismissed Bakhshi's counterclaim for breach of fiduciary duty because, to the extent he alleged harm to 539 JB, "he failed to bring this action in a derivative capacity and, thus, has no individual claim against Fortunatas for a wrong against the corporation" and, to the extent he alleged individual harm, "any such harm does not fall within the ambit [of] any fiduciary relationship between Fortunatas and Bakhshi as shareholders of 539 JB." The court dismissed the counterclaims for negligence, unjust enrichment, and an accounting because Bakhshi was not suing in a derivative capacity but each of these counterclaims alleged "damage to the corporation rather than to Bakhshi individually and are, thus, derivative in nature." As for Bakhshi's final counterclaim, for contractual indemnification, it was dismissed because no facts were "pled suggesting that any of these lawsuits [allegedly brought against him] or other liabilities were embraced by the indemnification provision or contemplated by the contract of sale."

Justice Bannon likewise dismissed all of Bakhshi's third-party claims, holding that "the third-party defendants are not alleged to be parties to the contracts at issue here in their individual capacities and any allegations of a breach pertain to plaintiff Fortunatas"; that "Bakhshi fails to allege all material [elements of a] cause[] of action on his cause of action for fraud"; that he "failed to assert his negligence claim in a derivative capacity"; and that he "alleged the existence of valid and enforceable written contracts." Further, his remaining third-party claims "do not contemplate any liabilities arising out of this action and contain insufficient facts to allege a duty to indemnify him in any other action based on the contract of sale." Thus, the court dismissed the whole of Bakhshi's third-party complaint for breach of contract, fraud, negligence, unjust enrichment, contractual indemnification, and indemnification.

For a copy of the decision, please **click here** and for inquiries about this case, please contact partner **Michael R. Koblenz** or associate **Sara F. Lilling**.

Offices:

New York City Office

One New York Plaza
New York, NY 10004
P: (212) 804-4200
F: (212) 344-8066

Long Island, New York Office

855 Franklin Ave
Garden City, NY 11530
P: (516) 417-5700
F: (516) 741-6831

New Jersey Office

30A Vreeland Road
Florham Park, NJ 07932
P: (973) 494-0600
F: (973) 242-4244

Florida Office

101 NE Third Avenue
Fort Lauderdale, FL 33301
P: (954) 467-5800
F: (954) 467-5880

California Office

1900 Powell Street, 6th Floor
Emeryville, CA 94608
P: (510) 900-9371
F: (510) 900-9381