



## Pro Rata Allocation Summary Judgment Ruling For Mound Cotton's Client

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

Mound Cotton partners Lloyd Gura and Mark Weber and associate Peter Fabiankovic represented Liberty Mutual in both cases.

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

The Court adopted all of Liberty Mutual's legal arguments on the pro rata point, and ruled as follows:

- Notwithstanding Fairbanks' relocation to Georgia in 1985, and its presence there when Liberty Mutual issued its policies to Fairbanks, New York substantive law applied to Liberty Mutual's policies.
- The Liberty Mutual policies, which cover "bodily injury" that occurs "during the policy period," unambiguously provide for pro rata allocation under settled New York precedent.



- Pro rata allocation applies notwithstanding the alleged prior course of conduct between the parties and the insurers' full funding of numerous asbestos settlements.
- Pro rata allocation applies notwithstanding the non-cumulation provision in the Liberty Mutual policies and the related certified question from *In re Viking Pump, Inc.*, — A.3d —, 2015 WL 3618924 (Del. 2015), currently pending before the New York Court of Appeals. Specifically, Judge Koeltl opined that “[t]he Delaware Court of Chancery’s decision in *Viking Pump*...has limited persuasive value...” In rejecting Fairbanks’ non-cumulation position, Judge Koeltl also acknowledged a recent ruling of the court (likewise obtained by Mound Cotton for Liberty Mutual) in *Liberty Mutual v. J.&S. Supply, Inc.*, 13-cv-4784 (“the district court in *J&S Supply* rejected the same argument regarding a nearly identical non-cumulation provision...”).
- As noted, in finding that Liberty Mutual is not responsible for the orphan share arising from the Lumbermens insolvency notwithstanding the Georgia statute, the Court acknowledged the New York center of gravity of the risk Liberty Mutual insured as well as New York’s significant interest in regulating the conduct of insurance companies doing business in New York, particularly where the insured’s risk is widespread.

For inquiries or a copy of the decision, please contact **Lloyd Gura** or **Mark Weber**.