

SUPERSTORM SANDY COVERAGE BULLETIN

Both the Federal and State Courts in New York and New Jersey recently issued decisions in disputes arising from Storm Sandy. The Eastern District of New York's "express train" discovery schedule limiting and expediting discovery in Storm Sandy cases continues. The United States District Court for the District of New Jersey has followed suit. There are over 1,000 Storm Sandy cases alone pending in the Eastern District of New York.

The American Arbitration Association reports that the number of pending mandatory mediations requested by insureds with regard to the mandatory programs set up in New York and New Jersey is very low. In February, 2014, the programs were extended for another year. There are currently approximately 70 Storm Sandy mediations still pending in New York, down from 3,000 at one point. As we approach the 2 year anniversary of Storm Sandy, we can expect more lawsuits to be filed and possibly more mandatory mediations.

The following decisions were recently issued in Storm Sandy disputes:

Newman Myers Kreines Gross, P.C. v. Great Northern Insurance Co., No. 13 Civ. 2177, 2014 U.S. Dist LEXIS 57338 (S.D.N.Y. Apr. 24, 2014). On April 24, 2014, the United States District Court for the Southern District of New York issued a decision in a dispute arising from Con Edison's preemptive shutoff of power in certain areas of New York City, including the area in which the Newman Myers law firm is located. The Court noted that Con Edison's decision to shut off power was the result of rising floodwaters at its utility stations in an effort to preserve the integrity of its equipment. Newman Myers was without power for several days. While the building was not physically damaged, the building elevators were not functioning and Newman Myers' employees were advised that the building was closed because the electricity had been turned off. Newman Myers' building did not sustain any flooding or physical damage on account of the storm.

As a result of the multi-day shutoff, Newman Myers submitted a loss of business income and extra expense claim to its insurer, Great Northern. The Great Northern Policy provided loss of business income and extra expense coverage occasioned by "direct physical loss or damage." The policy also provided Ingress/Egress coverage for loss of business income and extra expenses due to impairment of business operations when existing ingress to, or egress from, the insured property was prevented due to direct physical loss or damage to "property at a location contiguous to such premises." The policy further provided Loss of Utility coverage. Under all policy coverages, "direct physical loss or damage" was a condition precedent to recovery.

Great Northern denied coverage on the basis that Newman Myers had not sustained a covered loss under the policy. Newman Myers filed a declaratory judgment action and the parties filed cross-motions for summary judgment. At the outset of the court's analysis, the court recognized that Newman Myers, as an insured, carried the burden of showing coverage under the Great Northern Policy, which required a showing that the insured premises experienced "direct physical loss or damage." Newman Myers argued that this phrase does not require actual structural damage to the insured premises, but rather only an "initial satisfactory state that was changed by some external event." Newman Myers argued that this standard was met by the power shutoff making ingress to their 26th floor office impossible, in addition to physical damage to the Con Edison facility providing power to the insured premises in the week following the storm.

The court rejected Newman Myers' arguments, holding that the policy language unambiguously required some form of physical damage to the insured's premises to trigger business income and extra expense coverage. The court recognized that a utility company's preemptive decision to shut off power to several utility networks to safeguard its equipment does not fit into either of these circumstances. As a result, the court held that Newman Myers had not met its burden of showing that the Great Northern Policy covered its loss.

433 Main Street Realty, LLC v. Darwin National Assurance Co., 2014 WL 1622103 (E.D.N.Y. Apr. 22, 2014).

On April 22, 2014, the United States District Court for the Eastern District of New York dismissed 433 Main Street Realty, LLC's ("433 Main") cause of action against its insurer for alleged breach of the covenant of good faith and fair dealing in connection with a property claim related to Superstorm Sandy. The court concluded that the bad-faith claim was redundant and duplicative of the insured's cause of action for breach of contract.

433 Main sought coverage under a commercial inland marine policy issued by Darwin National Assurance Company ("Darwin") for wind and water damage to a residential property which was subject to a \$10,000 deductible, except for loss caused by flood, which was subject to a \$250,000 deductible. Although Darwin agreed that the claim was covered under the policy, the parties disagreed as to whether the property damage was caused by flood and, therefore subject to the \$250,000 deductible. 433 Main commenced a declaratory judgment action asserting, among other things, causes of action for breach of contract and breach of the insurer's good faith obligations premised upon Darwin's alleged mishandling of the claim and its insistence that the higher deductible applied.

The court acknowledged that New York implies a duty of good faith and fair dealing into every express contract, but further recognized that a breach of that duty is merely a breach of the underlying contract. In that regard, the court concluded that New York authorities do not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim based upon the same facts is also pled.

The court held that the core of the dispute was that Darwin had not paid what 433 Main believed was due under the insurance policy. Because 433 Main failed to allege facts showing bad faith differing from the facts supporting the alleged breach of contract, the court dismissed the bad faith claim as redundant. The court acknowledged in a footnote that dismissal of the bad faith claim does not preclude 433 Main from claiming consequential damages beyond the policy limits on their breach of contract claim based on allegations of bad faith. This is yet another decision in a first-party case where the court has raised the prospect of an insured being able to seek consequential damages.

Johnson Gallagher Magliery, LLC v. The Charter Oak Fire Insurance Company, No. 13 Civ. 866 (S.D.N.Y. March 18, 2014). This case arises out of an insurance claim for losses sustained by a law firm during and following Superstorm Sandy. Johnson Gallagher Magliery, LLC ("JGM") filed a claim for loss of business income with its insurer, the Charter Oak Fire Insurance Company ("Charter Oak"), after allegedly suspending its operations for slightly more than two months due to a mandatory evacuation order, the lack of electricity, heat, telephone, and internet resulting from Storm Sandy. JGM leased office space at a building located at 99 Wall Street in Manhattan. The building is supplied electricity from the Con Edison's Bowling Green Network. Charter Oak denied the claim and JGM filed suit.

Charter Oak moved for partial summary judgment, contending that JGM was not entitled to insurance coverage for loss of business income caused by an interruption of electrical service under a specific provision of the Charter Oak Policy. JGM's insurance policy with Charter Oak included coverage for loss of business income. At issue in this partial summary judgment motion was JGM's coverage for loss of business income caused by the interruption of utility services.

The Charter Oak policy provides loss of business income coverage when the insured is forced to suspend business due to property damage on its premises:

We [Charter Oak] will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

The Lawyer's Endorsement to the Charter Oak Policy extends the insured's loss of business due to the loss of utility services resulting from property damage not on its premises:

Utility Services – Time Element

- (1) When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the loss of Business Income or Extra Expense caused by the interruption of service to the described premises. The interruption must result from direct physical loss or damage by a Covered Cause of Loss to the following property not on the described premises: (a) "Water Supply Services;" or (b) "Power Supply Services."

The term "Power Supply Services" is defined in the primary policy as:

"Power Supply Services (a) means the following types of property supplying electricity, steam, or gas to the described premises: (1) Utility generating plants; (2) Switching stations; (3) Substations; (4) Transformers; and (5) Transmission lines and (b) does not mean overhead transmission lines."

The court indicated that the following two policy exclusions were pertinent to the case:

- (g) Water
1. Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, whether driven by wind or not;
 2. Mudslide or mudflow;
 3. Water or sewage that backs up or overflows from a sewer, drain, or sump; or

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4. Water under the ground surface pressing on, or flowing or seeping through:
 - a. Foundations, wall, floors or paved surfaces;
 - b. Basements, whether paved or not;
 - c. Doors, windows or other openings; all whether naturally occurring or due to man made or other artificial causes.

But if Water, as described in Paragraphs (1) through (4) above results in fire, explosion, or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion, or sprinkler leakage.

The second exclusion relates to “acts and decisions” and reads as follows:

- b. Acts or decisions, including the failure to act or decide, of any person, group, organization, or government body.

The court then examined the events of “Hurricane Sandy.” Its discussion was based principally on a Con Edison report titled “Preparation and System Restoration, Sandy, October 29 through November 12, 2012” and published on January 11, 2013 (“Con Edison Report”).

In the days leading up to the storm, Con Edison identified three networks, including the Bowling Green Network, as possibly requiring preemptive shutdown. On October 28, 2012, the day before the storm hit, Mayor Michael Bloomberg issued Executive Order 163, which declared a state of emergency in New York and issued a mandatory evacuation order for Zone A, as defined by the Office of Emergency Management. JGM’s building is located in Zone A. Evacuation was required by 7 p.m. on October 28. Con Edison installed sandbags to protect underground transformer vault locations in flood zones.

On October 29, the day that Sandy hit, Con Edison assigned observers to critical network areas to monitor flooding. Because the storm surge of 14.06 feet exceeded the 11.7 foot forecast, these observers reported that water levels were rising above the protective barriers installed at transformer faults. At that point, Con Edison alleges to have preemptively shut down three networks to prevent extensive customer and network equipment damage and to reduce the time required to replace or repair equipment necessary to restore the networks. The Bowling Green Network was preemptively shut down on October 29, 2012 at 6:42 p.m. The preemptive shutdown of the Bowling Green Network did not cause any physical damage to the network.

Over the next two hours, “[s]evere flooding . . . caused the shutdown” of the East 13th Street transmission station, the East River transmission station, and the Seaport No. 1 sub-station, causing eleven more networks in Manhattan to lose power. With fourteen electrical networks down, much of lower Manhattan was shrouded in darkness.

After the storm ended on October 30, Con Edison began restoration work. Con Edison reports that in order to restore the three networks that were preemptively shut down, Con Edison had to assess all distribution electric

facilities in the flood areas to determine if equipment needed to be isolated before energization. Con Edison found the following:

Extensive water damage was found in most locations, and defective equipment needed to be isolated before the networks could be energized. This involved over 250 sites and 1,000 transformers and associated network protectors. Emergency procedures were implemented to expedite the isolation of high voltage feeders from damaged equipment to allow the restoration of non-damaged distribution equipment to service.

Once the assessment phase was completed, Engineering determined the minimum number of feeders required to energize each network grid safely. As the defective equipment isolated, the remaining equipment was prepared for energization. This included preemptively closing equipment on feeders that would be restored to service to avoid overloads in any areas. Once the network grid was energized, customers that were not affected by the flood waters were restored.

At 1:33 a.m. on November 3, the Bowling Green Network was re-energized. JGM's building, however, did not actually receive electricity from Con Edison until sometime on November 11. Moreover, under Executive Order 165, New York City did not permit re-occupation of buildings in Zone A until it gave specific approval. The approval to re-occupy the building came on November 14.

Charter Oak's motion for partial summary judgment was narrow. Charter Oak sought a ruling concerning the issue of coverage under the "Utility Services–Time Element" provision in the Lawyers Endorsement. Charter Oak's motion did not address loss of business income caused by any alleged sewer backup on JGM's premises, or an interruption of other utility services, such as telephone and internet. Rather, the only issue before the Court was whether JGM could recover under its policy for loss of business income when that loss was due to the interruption of electrical service to the building. This interruption lasted two weeks, from October 29 through November 11.

Relying on the Con Edison Report, Charter Oak presented three arguments for why JGM was not entitled to such coverage. First, there was no "direct physical loss or damage," because the Bowling Green Network was not damaged but rather preemptively shut down. Second, the "acts or decisions" exclusion applies, because the loss of electrical service was attributable to a decision by Con Edison. Third, the "Water" exclusion applies, because any damage to the Bowling Green Network was caused by water.

With regard to Charter Oak's argument that the interruption in electrical service was not a result of "direct physical loss or damage" to Con Edison's power supply services, the Court referenced the Con Edison Report, which states that the networks that were preemptively shut down, which include the Bowling Green Network, suffered "extensive water damage" as a result of the storm. Furthermore, the report establishes that, even though Con Edison began restoration efforts immediately after Sandy receded on October 30, the Bowling Green Network was not re-energized until a few days later, on November 3. The court referenced deposition testimony which confirmed that the Bowling Green Network was damaged from flooding during Sandy. The court commented that the decision

to preemptively shut down the network prevented far worse damage to the power system and shortened the duration of the business interruption in lower Manhattan, but the undisputed evidence demonstrates that Sandy caused “direct physical loss or damage” to the Con Edison power supply services. As a result, the court held that Charter Oak was entitled to summary judgment on this prong of its motion for only a few hours, the time between the preemptive shutdown and the arrival of Sandy and its invading and damaging flood tide.

The court further held that recovery for these same few hours on October 29 is also barred by the policy exclusion for “acts and decisions” of an organization or government body. The court found that Charter Oak had shown that the decision by Con Edison to shut down the Bowling Green Network preemptively was responsible for a few hours of the loss of power to the building before Sandy’s waters damaged the Bowling Green Network. However, the court held that, to the extent that Charter Oak relies on this exclusion to avoid coverage beyond these few hours, that portion of its motion is denied. The court reasoned that it is undisputed that Con Edison’s preemptive shutdown of the Bowling Green Network caused no physical damage to Con Edison’s power supply services. When the flood waters from Sandy entered the network, however, they damaged it and prevented it from being immediately restored. Thus, the court held that Charter Oak cannot invoke the “acts or decisions” exclusion to relieve it of the obligation to insure JGM for the business interruption losses that followed those initial few hours of the storm. The electrical service loss that followed that short period was proximately caused by the damage to the Bowling Green Network resulting from Sandy.

The court referenced that both parties devoted the entirety of their briefing on the “acts or decisions” exclusion as to issues of whether Con Edison is a civil entity, whether the loss was fortuitous, or whether the preemptive shutdown itself caused another Covered Cause of Loss. The Court noted it was unnecessary to address these issues when, at best, Charter Oak would be entitled to escape liability under this exclusion for only a few brief hours of the claimed coverage period, and because coverage for these hours is also barred by the policy requirement that interruption in electrical services be caused by direct damage to the power supply services.

In its third and final argument, Charter Oak argued that the water exclusion barred coverage. The court commented that the water exclusion contained in the policy is broad and includes flood waters and overflows from any body of water, and the exclusion extends to all damage caused “directly or indirectly” by water. The court referenced that the Con Edison Report stated that when Con Edison began restoration of the networks that were preemptively shut down, which includes the Bowling Green Network, Con Edison found that these networks had suffered “extensive water damage.” A deposition witness also repeatedly characterized the damage to Con Edison’s equipment as “water” damage. The Court held that Charter Oak has thus shown through the report, as confirmed by a witness, that water caused “direct physical loss or damage” to the Bowling Green Network that prevented the re-energizing of the network until 1:33 a.m. on November 3. The court held that this is an excluded cause of loss from JGM’s insurance policy.

Accordingly, the court held that JGM cannot claim loss of business coverage for the interruption in its electricity service from the shutdown of the Bowling Green Network, *i.e.*, until 1:33 a.m. on November 3. The court held that Charter Oak has not shown, however, that Con Edison’s failure to supply power to the building for the days following November 3 was caused by water damage to Con Edison power supply services. Thus, Charter Oak’s request for partial summary judgment from November 3 through November 11 was denied.

The court held that JGM was not entitled to insurance coverage for the interruption in electrical service for the period of roughly one week, from October 29 through 1:33 a.m. on November 3, the period of time that the Bowling Green Network was shut down. However, the court held that Charter Oak had not shown that it was entitled to summary judgment for November 3 through November 11, the week or so before Con Edison delivered electricity to the Building.

Carevel, LLC v. Aspen Am. Ins. Co., 2014 U.S. Dist. LEXIS 65928 (May 14, 2014). On May 14, 2014, the United States District Court for the District of New Jersey issued a decision denying plaintiff Carevel, LLC's ("Carevel") motion to remand the case to state court.

This action arises from Aspen American Insurance Company's ("Aspen") denial of a property claim related to damage caused by Storm Sandy. Carevel procured a policy of insurance with Aspen for a property in Jersey City, New Jersey. Carevel alleges that Storm Sandy caused substantial damage to that property, and that it "properly" submitted insurance claims for that damage.

On November 26, 2012, Carevel alleges that it submitted an invoice to Aspen for charges of \$23,130 related to the storm damage. Aspen denied the claim. On October 29, 2013, Carevel filed a civil action in the Superior Court of New Jersey, Law Division, Hudson County, against Aspen. On December 16, 2013, Aspen filed notice to remove the case to Federal Court under 28 U.S.C. § 1446(a) (2006). Aspen alleged that diversity jurisdiction was proper under 28 U.S.C. § 1332, because the parties were diverse and the damages at issue exceeded \$75,000. On January 12, 2014, plaintiff filed a motion to remand.

Plaintiff Carevel argued that removal was improper for two reasons. First, it believed the parties were not diverse because Aspen is considered a citizen of New Jersey for purposes of the suit under the "direct action" exception, citing 28 U.S.C. § 1332(c). Second, Carevel alleged that the amount in controversy did not exceed \$75,000 because the complaint did not indicate any amount of damages and Aspen allegedly failed to prove that the amount exceeds \$75,000.

The court held that this was not a tort case where an injured party brought suit against the alleged tortfeasor's insurer without joining the tortfeasor as a defendant. Instead, it was a straightforward case by an insured against its own insurer, a category of cases which the Third Circuit has explicitly held is not a "direct action" for purposes of 28 U.S.C. § 1332(c).

Carevel also argued that removal was inappropriate because "[t]he Complaint does not state a specified amount of damages, and defendant provides no proof that the amount would exceed \$75,000." Aspen responded that Carevel's claim for entitlement to reimbursement of \$23,130 in expenses, plus punitive damages and attorney's fees, puts them over the \$75,000 threshold.

The Court held that for jurisdictional purposes only, it sufficed at this preliminary stage to consider the \$23,130 invoice amount to be a fair assessment of potential compensatory damages. The Court considered that Carevel's punitive damages could rise as high as five times its compensatory damages, which means a jury could return punitive damages of as much as \$115,650. The Court held that the jurisdictional facts were satisfied by a preponderance of the evidence. Because the parties were diverse and a reasonable jury could award damages in

excess of \$75,000, the court ruled that it had diversity jurisdiction over this case. Carevel's motion to remand was denied.

Cammeby's Management Company, LLC, et al. v. Affiliated FM Insurance Company and Alliant Insurance Services, Inc., No. 13 Civ. 2814 (S.D.N.Y. May 29, 2014). On May 29, 2014, the United States District Court for the Southern District of New York issued an order with respect to the motions for summary judgment filed by the parties. This case arises from an insurance coverage dispute in the aftermath of Storm Sandy and involves three sets of parties: plaintiffs Cammeby's Management Co., et al., the insureds, defendant Affiliated FM Insurance Co. ("Affiliated"), the insurer, and defendant Alliant Insurance Services, Inc. ("Alliant"), the insurance broker.

In November 2013, the parties filed four motions for summary judgment. Cammeby's moved for summary judgment against Affiliated on the ground that Affiliated breached the plain language of the insurance policy at issue by failing to cover \$30 million of damages caused by Storm Sandy. Affiliated cross-moved for summary judgment in its favor against Cammeby's, arguing as follows: (a) that the contract should be reformed to reflect the parties' alleged mutual intent to provide \$10 million in coverage for the damaged properties at issue because a scrivener's error incorrectly reflected \$30 million in coverage, and (b) that Affiliated was not vicariously liable for any negligence of Alliant because Alliant, as Cammeby's broker was not Affiliated's agent. Cammeby's also moved for summary judgment in its favor against Alliant on the ground that in the event that the Court had found that the insurance policy at issue covered only \$10 million in losses for the covered properties, Alliant breached its duty to Cammeby's in multiple ways. Alliant cross-moved for summary judgment in its favor against Cammeby's, contending that Alliant is not liable to Cammeby's because, even if Cammeby's did not initially authorize reduced coverage for the properties at issue, it ratified any such reduction.

On January 15, 2014, the court denied all four motions for summary judgment. On May 29, 2014, the court issued a Memorandum Order setting forth the reasons for the denial of the motions.

Cammeby's is a large real estate management company that, together with various entities, owns or otherwise has an insurable interest in an expansive portfolio of real estate properties, including the properties that are collectively referred to as the "Bush Terminal Complex."

Before Cammeby's procured the Affiliated policy that is the subject of this case, its previous commercial property insurance policies provided \$50 million of blanket coverage for all of the insured properties. These prior policies were set to expire on June 30, 2011. In or about May 2011, an outside consultant who was hired by Cammeby's to manage its property and casualty insurance needs, began to seek bids for new policies for Cammeby's. The consultant contacted Alliant and requested that it obtain quotations from various carriers. After receiving quotations and negotiating, the consultant accepted a quotation from Affiliated in an email dated June 29, 2011.

On June 30, 2011, Affiliated bound coverage on the subject Affiliated policy for Cammeby's. The binder included \$50 million of flood insurance coverage in connection with the various insured locations. However, with respect to certain identified locations, the amount of flood insurance was limited to \$10 million. This more limited coverage, which is also referred to as the "Coverage Sublimit," was the subject of this litigation.

Once the Affiliated policy was in place, and before the expiration of the then-existing policy on June 30, 2011, Cammeby's consultant, through Alliant, sought to increase the Coverage Sublimit from \$10 million to \$30 million.

Alliant then relayed the consultant's request to Affiliated, which issued a quote for the increased coverage. Eventually, the consultant, on behalf of Cammeby's, and Affiliated agreed to increase the Coverage Sublimit to \$30 million on July 1, 2011, and this was confirmed in a revised binder that was issued on July 5, 2011.

However, on July 26, 2011, the consultant inquired of an Alliant employee about reducing the Coverage Sublimit back to \$10 million. The consultant wrote, "If requested, will Affiliated cancel the \$20MM of additional flood coverage at the Brooklyn locations back to inception? Also, can we cancel the additional NFIP coverage and receive a pro-rata refund?" An Affiliated Underwriter reported back, "I can cancel the 20 x 10 flood eff 7/26 and return the pro rate amount. Endorsement to follow." Affiliated then reduced the additional \$20 million in flood insurance coverage for the subject premises.

There is a dispute as to whether the coverage reduction was undertaken with Cammeby's express or implied approval. On September 26, 2011, Alliant sent Cammeby's a copy of the Affiliated policy and General Change Endorsements numbered 1, 2, and 3. Then, on September 27, 2011, Alliant sent the consultant an email, which included those same Endorsements. General Change Endorsement No. 1 ("Endorsement No. 1") indicates, on its face, a reduction of the Coverage Sublimit to \$10 million. On the other hand, General Change Endorsement No. 3 ("Endorsement No. 3") indicates, on its face, that the Coverage Sublimit was \$30 million and also modifies the list of addresses covered by the relevant section of the subject policy. Between September 27, 2011 and the date of the loss, October 29, 2012, Affiliated issued thirteen additional endorsements, none of which changed or made reference to the Coverage Sublimit at issue.

On or about October 29, 2012, as a result of Storm Sandy, the properties covered by the Coverage Sublimit suffered substantial damage. Cammeby's filed a \$30 million claim for these properties. Affiliate paid out \$10 million for the damage to these properties because it asserted that the Coverage Sublimit covered only that amount. In addition, on or about November 30, 2012, Affiliated, after receiving plaintiffs' notice of claim, issued General Change Endorsement No. 19, which indicated that the Coverage Sublimit was \$10 million, effective from the date of Endorsement No. 3. Cammeby's seeks \$20 million in damages from Affiliated, Alliant, or both in the lawsuit.

In its order of May 29, 2014, the court first reaffirmed its denial of Cammeby's and Affiliated's competing motions for summary judgment on whether Affiliated breached the subject policy by not insuring \$30 million in losses related to the properties covered by the Coverage Sublimit and whether Affiliated had a defense, such as mutual mistake or estoppel, for not following the unambiguous language of Endorsement No. 3.

Cammeby's argued that Affiliated breached the unequivocal terms of the subject policy without justification or legal excuse. Specifically, Cammeby's argues that the subject policy contains a Coverage Sublimit of \$30 million on its face, that reformation is inappropriate as a result of an allegedly unilateral mistake by Affiliated, and that Affiliated cannot avail itself of any equitable defenses. In support of its own motion for summary judgment, Affiliated contends that it is entitled to reformation of Endorsement No. 3 due to a mutual mistake, that Cammeby's should be bound to the admissions of its broker Alliant that the Subject Policy was intended to provide a \$10 million Coverage Sublimit, and that Affiliated cannot be held vicariously liable for Alliant's actions because Alliant was not Affiliated's agent.

The court noted that while Endorsement No. 1 and Endorsement No. 3 are clear on their faces, a genuine dispute exists as to whether the Coverage Sublimit listed on each reflected the parties' mutual intent at the time of the Endorsement. While Cammeby's asserts that Endorsement No. 3 corrected an error in Endorsement No. 1 and therefore restored a \$30 million Coverage Sublimit, Affiliated counters that the reference to a \$30 million Coverage Sublimit in Endorsement No. 3 was a scrivener's error that did not reflect the parties' mutual intent, which allegedly was to reduce the Coverage Sublimit to \$10 million. The court found that both parties produced sufficient admissible evidence to present these competing arguments to a jury.

The court referenced that Affiliated offered evidence that could allow a reasonable juror to infer that a mutual mistake, in the form of a scrivener's error, caused Endorsement No. 3 to indicate a \$30 million Coverage Sublimit. Additionally, the court noted that the circumstances surrounding Cammeby's retention of the excess premium associated with the additional \$20 million in coverage, and the evidence that a Cammeby's employee was aware of the coverage reduction, would support a reasonable inference that Cammeby's intended to reduce the Coverage Sublimit. The court held that when this evidence of intent is taken together with evidence of Affiliated's reliance, particularly its decision to cancel its reinsurance coverage, genuine factual disputes also remained as to whether Cammeby's should be equitably estopped from seeking to enforce a \$30 million Coverage Sublimit. Therefore, the court denied Cammeby's motion for summary judgment in its favor against Affiliated.

On the other hand, the court reasoned Cammeby's presented sufficient evidence to permit a reasonable juror to conclude that Affiliated breached and has no defense or justifications for breaching the policy by not covering \$30 million in losses associated with the subject premises. The court noted that if Affiliated cannot prove by clear and convincing evidence that the \$30 million Coverage Sublimit, which is delineated unambiguously in Endorsement No. 3, failed to reflect the parties' mutual intent, then Cammeby's would prevail as to that defense. The court held that Cammeby's introduced enough evidence to create a genuine factual dispute as to whether the parties mutually intended to reduce the Sublimit from \$30 million to \$10 million.

Additionally, the court found that jury questions remained as to whether Cammeby's should be bound to Alliant's admissions and whether Affiliated can be held vicariously liable for Alliant's actions. While the court referenced that an insurance broker is generally considered an agent of the insured party during an insurance transaction, the court could not, on the evidence before it, conclude that, as a matter of law, Alliant was not Affiliated's agent, particularly in light of the producer agreement and other relationships between Affiliated and Alliant. Therefore, the court denied Affiliated's motion for summary judgment in full.

Furthermore, the court ruled that similar factual disputes to those discussed above also require the court to deny Cammeby's motion for summary judgment in its favor against Alliant, as well as Alliant's motion for summary judgment in its favor against Cammeby's. On its motion against Alliant, Cammeby's argued that, if the court found that the Coverage Sublimit was only \$10 million, Alliant must pay plaintiffs the difference between the \$10 million and \$30 million in coverage because Alliant acted negligently in effectuating Affiliated's reduction of the Coverage Sublimit without authorization and in failing to inform Cammeby's about the reduction.

The court referenced that Cammeby's offered evidence that draws into factual dispute Alliant's contention that Cammeby's ratified any unauthorized reduction in coverage, even assuming Alliant initially acted without Cammeby's authorization. For example, Cammeby's raised valid questions as to whether anyone at Cammeby's

to whom knowledge can be imputed knew about the coverage reduction, especially in light of the significant role played by a purportedly low-level employee. At the same time, the court found that Alliant had offered sufficient evidence to support its view that, even if it acted without authorization in initiating the coverage reduction, Cammeby's ratified any unauthorized reduction by knowingly accepting the benefits of the reduction and not communicating its desire to maintain the \$30 million Coverage Sublimit. The court reaffirmed its denial of all four motions for summary judgment.

Please contact Seth I. Weinstein, Esq., Vice-Chair of the Property Practice Group, if you should have any questions. Seth's contact information appears below.



ADMISSIONS

- New York

PRIMARY PRACTICE

- Insurance Coverage
- General Liability
- Bad Faith Litigation
- Insurance Contract Drafting
- Directors & Officers Coverage & Litigation
- Construction

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Seth Weinstein is Vice-Chair of the Property Insurance Practice Group. Seth's practice is principally concentrated in the areas of insurance coverage and property damage litigation, including the defense and prosecution of subrogation actions. These claims/cases often involve catastrophic building fires, explosions, building collapse, equipment and machinery malfunction, construction accidents, construction defects, adjoining property damage, water damage, floods, tropical storms, hurricanes, water main breaks, mold, theft of property, business interruption and income loss, employee dishonesty, property contamination, and other pollution-related matters.

Seth assists insurance carriers with claims investigation, coverage interpretation, policy drafting, and litigation of losses throughout the United States and abroad. He also regularly conducts and participates in fraud investigations, including examinations under oath. He has significant experience in first-party property, general liability, directors and officers liability and professional liability coverage disputes. He serves as national coverage counsel for clients and monitors claims and litigation across the country. Seth has vast experience with regard to insurance claims, disputes and lawsuits concerning condominiums, homeowner's associations, and co-op's. He has served on condominium and co-op boards for over a decade. Seth is also a certified mediator.

Seth has been involved with many high profile property losses and multi-party litigations, including losses involving damages in excess of \$100 Million Dollars. Representative claims/cases include:

- Numerous claims, mediations and lawsuits arising from Superstorm Sandy:

Seth has defended numerous insurers in mediations in connection with the mandatory mediation programs established in New York and New Jersey following the storm. He has conducted examinations under oath of insureds claiming damage from the storm and spear headed fraud investigations on behalf of clients. Further, he is defending insurers in declaratory judgment actions. Seth has lectured on the relevant coverage issues faced by insurers in connection with the storm and assisted clients with establishing best practices protocols to promptly and efficiently resolve claims.

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- Numerous claims and lawsuits arising from the events of September 11, 2001 and clean-up efforts: Seth represented numerous insurers in declaratory judgment actions filed in connection with the tragic events of September 11th. He also conducted examinations under oath and assisted clients with establishing settlement programs to promptly and effectively resolve claims. He worked with numerous experts to investigate claims, which lead to many claims being withdrawn or settled for a fraction of what was initially claimed. Seth also defended parties in litigation concerning the clean-up efforts at the WTC site.

- Con Edison Steam Pipe Explosion at 41st Street and Lexington Avenue litigation:

Seth has been one of the lead counsel defending over 100 lawsuits filed in connection with a large steam pipe explosion.

- Central Synagogue fire litigation:

Seth defended one of the target defendants in this \$50 Million property damage action concerning a catastrophic fire to one of the oldest synagogues in the United States. This case went to verdict in 2001.

- Served as lead counsel for numerous cases concerning large water main breaks in New York City:

Seth has served on numerous plaintiffs' committees in prosecuting large property damage actions, subrogation and otherwise, arising from water main breaks in New York City. He has been involved in such losses for over 20 years. He served as the Chairman of a Plaintiff's Committee that recovered over \$15 Million as a result of a water main break in 1998. Seth's efforts lead to the settlement of all of the cases.

ASSOCIATIONS

- Claims and Litigation Management Alliance
- Community Association Institute

SPEAKING ENGAGEMENTS & PRESENTATIONS

- Reservation of Rights Letters – General Rules and Protocols under New York and New Jersey Law, April 8, 2014
- Material Misrepresentation – Legal Standard for Rescinding a Policy Due to Material Misrepresentation In An Insurance Application, April 8, 2014
- What You Say May Come Back to Haunt You - Protecting the Claim File, October 25, 2013
- Superstorm Sandy and its Aftermath – the Latest Developments and What Property Insurers
- Need to Know, March 14, 2013
- Techniques in Defending Property Damage Actions - Adjoining Construction Cases and Related Coverage Issues, July 27, 2012
- Insurance Claims: Investigation and Adjuster Negotiations, March 15, 2012
- Director and Liability Coverage Law Update, January 26, 2012
- Good Faith Claims Handling, November 17, 2011
- Property Insurance Law Update, October 7, 2008
- Construction Defect and Insurance Coverage Trends, June 16, 2006

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- E-Discovery and its Impact on Insurance Industry, November 17, 2005
 - Current Issues Impacting Defense Practice (Mold and Insurance Coverage), August 5, 2005
 - Challenges in New York Litigation – Subrogation, August 10, 2004
 - Mold Insurance Coverage and Litigation Update, June 18, 2004
 - Oil Spill and Property Damage Litigation, April 29, 2004

EDUCATION

- New York Law School, *Juris Doctor*, 1995
- Florida Atlantic University, Bachelor of Arts, 1991