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Expert Analysis

Second Circuit Affirms Sandy-Related Negligence Claim Against Broker

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We recently passed the five-year anniversary of Hurricane Sandy, one of the most devastating storms ever to make landfall in the New York coastal area. The hurricane and the powerful storm surge caused damage and destruction in the region through flood, wind and related fires. It is now estimated that the storm caused approximately $19 billion in property damage in New York City alone. Private insurance claims for auto, home and business losses related to Hurricane Sandy have exceeded $18 billion and about half of those payouts went to New York state policyholders. See Katie Honan, "5 Years After Sandy, Here's How NYC is Spending Billions in Federal Aid," DNAinfo (Oct. 26, 2017).

Even now, over five years later, the courts are still working through property damage and insurance disputes arising out of the devastating storm. In December, the Court of Appeals for the Second Circuit reviewed the latest round of a three-party dispute between the insured, the insurer and the broker over the insurance policy limits applicable to a Hurricane Sandy-related flood claim.

'Cammeby's v. Alliant'

The case, on appeal from a ruling by Judge Jed S. Rakoff in the Southern District, concerns an insured property owner's claim for up to $30 million in flood damages under a property insurance policy. *Cammeby's Management Company v. Alliant Insurance Services*, No. 17-88-cv, 2017 WL 6463204 (2d Cir. Dec., 19, 2017). The insurer maintained that a $30 million sublimit of liability for flood damages had been reduced to $10 million and that the insured's recovery was therefore capped at $10 million. The insured contended that if the sublimit had been reduced from $30 million to $10 million, the broker was negligent and responsible for the difference in limits. The broker argued that the insured had first requested and later ratified reduction of the sublimit from $30 million to $10 million.

In 2014, a jury found that the applicable sublimit of the property insurance policy had been reduced to $10 million, thus capping the insurer's liability and resolving the dispute between the insured and the insurer. *Cammeby's Management Company v. Alliant Insurance* Services, No. 13 Civ. 2814, 2016 WL 3922641 (S.D.N.Y. July 11, 2016). The jury also found that the broker was liable for negligence with regard to the reduction of the sublimit. The broker moved for judgment as a matter of law or a new trial and the district court granted the request for a new trial, but only with regard to the broker's ratification defense. At the second trial in 2016, a jury again rejected the ratification defense.

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Following the second trial, the broker again moved for judgment as matter of law or a new trial. This time, the district court denied the motion and the broker appealed to the Second Circuit. On Dec. 19, 2017, the Second Circuit affirmed the district court's ruling holding the broker liable for negligence with respect to the reduced policy limit.

The Basis of the Dispute

Cammeby's Management Company is a real estate management company that owns and manages a portfolio of properties in Brooklyn, N.Y. On or about Oct. 29, 2012, as a result of Hurricane Sandy, the Brooklyn properties were flooded, resulting in damages of more than $30 million.

The properties were insured for first-party property damage through an insurance policy issued by Affiliated FM Insurance Co. The Affiliated policy had been renewed on June 30, 2011 and included a $50 million limit of liability for flood insurance coverage for some insured locations, but a $10 million sublimit for the Brooklyn properties at issue.

Following renewal of the policy, Cammeby's insurance consultant had emailed the broker, Alliant Insurance Services, to inquire about increasing the $10 million flood sublimit to $30 million. The broker solicited a quote from Affiliated to increase the sublimit and Cammeby's accepted the quote. As a result, Affiliated issued a new policy reflecting a $30 million sublimit for flood insurance for the Brooklyn properties.

However, according to court rulings, the additional premium for the increased flood sublimit upset some of the property managers. Consequently, on July 26, 2011, the insurance consultant emailed the broker and inquired about reducing the flood sublimit to the original $10 million. The broker reportedly contacted Affiliated to determine whether the extra $20 million limit could be cancelled and Affiliated agreed to cancel $20 million of the limit effective July 26, 2011, and return the pro rata portion of the increased premium.

This is the point where the primary dispute arises, as the parties contest whether Cammeby's actually agreed to the sublimit reduction. The key issue was whether Cammeby's requested and agreed to a reduced sublimit, or whether it simply asked the broker to ascertain whether Affiliated would agree to a reduction, if requested. As the Southern District explained, "[t]here is a dispute as to whether the coverage reduction was undertaken with Cammeby's express or implied approval." *Cammeby's Management Company v. Affiliated FM Insurance Co.*, No. 13 Civ. 2814, 2014 WL 2451567 *3 (S.D.N.Y. May 28, 2014). On the same issue, the Second Circuit noted, "Alliant responded to [the insurance consultant] that the flood sublimit *could* be reduced, but the parties did not memorialize in writing that the flood sublimit *would* be reduced." *Cammeby's*, 2017 WL 6463204 at *2

The Evidence Submitted

Cammeby's argued that it never agreed to the reduced sublimit—that no authorized representative accepted the offer to reduce the sublimit and return the pro rata premium. Alliant disagreed, contending that a Cammeby's vice president verbally accepted the offer at a meeting and, in the alternative, that Cammeby's had ratified the agreement to reduce the sublimit by accepting the returned premium.

The second trial solely addressed the ratification issue, and both sides pointed to evidence in support of their positions. Alliant relied on two emails sent or received by a Cammeby's vice president on Aug. 5, 2011, not long after the sublimit was reduced. In the first email, the vice president wrote that "[w]e have $10mm of flood coverage." In the second, the vice president's assistant informed the vice president that she was told that Cammeby's had "$10mm flood coverage." *Cammeby's*, 2017 WL 6463204 at *3.

Standing alone, these emails appear to demonstrate, as Alliant argued, that Cammeby's was aware of the reduction in limits. The Second Circuit acknowledged that "[t]o be sure, both these emails tend to support Alliant's argument that in August 2011 Cammeby's knew and approved of the late-July 2011 flood sublimit reduction." Id.

But these emails did not stand alone and were not the only relevant evidence. In support of its position, Cammeby's submitted evidence that, subsequent to those August 2011 emails, the broker had confirmed by email that the Affiliated policy provided $30 million in flood sublimits. Cammeby's also pointed to three endorsements to the policy which the broker had emailed to Cammeby's and its insurance consultant on Sept. 26 and Sept. 27, 2011.

The first of the three endorsements confirmed reduction of the policy sublimit to $10 million. But Endorsement No. 3 modified the list of covered addresses and indicated that the sublimit was $30 million. Thirteen additional endorsements were issued by Affiliated between Sept. 27, 2011 and the date of the loss, but none further modified the flood sublimit.

In addition, Cammeby's offered the testimony of its insurance consultant, who testified that he never approved the reduction in sublimits and that he believed the sublimit remained $30 million, because the copy of the policy he received in August 2011 showed a $30 million sublimit for flood damages.

Jury Verdicts And Appellate Ruling

In 2014, as a result of the conflicting evidence, the Southern District had refused to grant the parties' pretrial motions for summary judgment. *Cammeby's Management Company v. Affiliated FM Insurance Co.,* No. 13 Civ. 2814, 2014 WL 2451567 (S.D.N.Y. May 29, 2014). In the first trial, the jury found that the broker was negligent, inherently rejecting the ratification defense. But following the first trial, the Southern District granted a new trial on the ratification defense due to a defect in the original jury instructions. After a second trial on the ratification issue, the jury assessed the evidence and again rejected the broker's ratification defense.

Following the Southern District's denial of Alliant's post-trial motions, the Second Circuit addressed the ratification issue on appeal. As the Second Circuit pointed out, "ratification requires full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language." *Cammeby's*, 2017 WL 6463204 at *3. Based on this standard, the Second Circuit upheld the jury verdict, holding that a reasonable jury could find that Cammeby's did not have the requisite knowledge of the limits reduction to ratify such a change. As a result, the broker was liable for the $20 million difference in damages that Cammeby's would have recovered under the policy if the sublimit had not been reduced. The Second Circuit explained that "[w]here there are conflicts in testimony, we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." Id.

Although the courts ultimately upheld the verdict against the broker, the rulings suggest that this was a close case, with evidence submitted by both sides that prevented the courts from resolving the case on motion practice and instead required a jury verdict.

Looking Forward

Although the courts ultimately upheld the verdict against the broker, the rulings suggest that this was a close case, with evidence submitted by both sides that prevented the courts from resolving the case on motion practice and instead required a jury verdict. Given the increasing frequency of extreme weather events like Hurricane Sandy, businesses would be well advised to review their insurance programs to make sure they are sufficiently insured for catastrophic events caused by storms and floods. In addition, as this case demonstrates, business counsel should be sure to well document their communications regarding such insurance, in case a conflict later arises.

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