COURT UPHOLDS FLOOD SUBLIMIT, DISMISSES CASE AGAINST MOUND COTTON CLIENT

On June 27, 2016, Justice Manuel J. Mendez of New York County Supreme Court issued a decision in the case of *XL Insurance America, Inc, v. The Howard Hughes Corporation* ("HHC") granting summary judgment dismissing HHC's claim against XL for alleged losses from Superstorm Sandy to HHC's properties at the South Street Seaport. Mound Cotton partners Costantino P. Suriano, John Mezzacappa, and Jeffrey C. Crawford represented XL in this proceeding.

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

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

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

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

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

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

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

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

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

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