

## Litigators of the Week: Covington Scores a Major Insurance Coverage Win For Brooklyn Gas Co. Over Gowanus Canal Cleanup Costs

By Ross Todd  
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Brooklyn Union Gas Co. has already spent \$200-plus million as part of the project to clean up in and around the Gowanus Canal, the 1.8-mile Brooklyn waterway that doubles as a [Superfund Site](#). The company is poised to spend hundreds of millions more. Thanks to a hard-fought trial victory by the company's lawyers at **Covington & Burling**, a team led by **Ben Razi**, **Gretchen Hoff Varner** and **Mike Lechliter**, the company's former insurer, Century Indemnity Company, is now set to chip in for part of that cleanup bill.

After nearly five weeks of trial in New York Supreme Court where the Covington team was pitted against the insurer's team at **O'Melveny & Myers** led by **Dan Petrocelli**, a Manhattan jury [this week sided](#) with their client Brooklyn Union Gas finding that the damage the company caused was overwhelmingly accidental and its notice to the insurer was timely.

**Litigation Daily: Who is your client and what was at stake?**

Mike Lechliter: We represent The Brooklyn Union Gas Company, which has been providing gas service to the people of Brooklyn for 150 years. Under modern strict liability environmental laws, Brooklyn Union has been required by the government to pay hundreds of millions of dollars to clean-up the Gowanus Canal and the nearby sites of three former gas plants. Brooklyn Union's environmental liability arises from pollution damage occurring many decades ago at so-called manufactured gas plants (which do not exist anymore due to the advent of natural gas pipelines). This lawsuit was about whether one of Brooklyn Union's insurers from the 1940s, 1950s, and 1960s, Century Indemnity Company, would be required to pay some of Brooklyn Union's past and future environmental remediation costs.



Courtesy photos

**L-R: Gretchen Hoff Varner, Michael E. Lechliter, and Benjamin J. Razi of Covington & Burling.**

**Who all is on your team and how did you divide the work?**

Ben Razi: Our team was led by Mike, Gretchen, and me. We developed strategy and made assignments together on a collaborative basis. At trial, I delivered the opening statement and closing argument (with essential prep work by our special counsel **Ryan Buschell**, among others), and each of us presented important witnesses. Mike has worked with this client for many years and was involved in every aspect of the case.

The main factual issue was whether the pollution damage to the Canal and the groundwater was caused by accident (as we argued) or whether it was expected or intended by Brooklyn Union (as the insurance company argued). I developed and presented that part of our case with lots of help, including most importantly from **Justin Howell**, an associate who did essential digging into the history of these gas plants and how they operated.

The second major trial issue was notice: the insurance company argued that Brooklyn Union waited too long before providing notice and that as a result there was no

insurance coverage. Gretchen took the lead on this key part of our case, with essential support from Ryan Buschell and **Josh Silver**. Their work culminated in compelling testimony from a former Brooklyn Union environmental engineer as well as an insurance expert witness.

The third critical piece was Brooklyn Union's extensive and expensive environmental remediation at the Canal and the former gas plant sites. Mike developed this evidence and presented a key Brooklyn Union witness on this topic. He was ably supported by associates **Brian Foster** and **Daniel Rios**.

Finally, Mike and Ryan, with support from our strong associate team, took the lead on briefing and arguing legal issues, including issues relating to the jury charge and special verdict form.

In all these efforts, the team was supported by the most resourceful and energetic paralegals, **Jake Nemetz** and **Ford Phelps**.

#### **Why has it taken so long for this matter to get to trial?**

Gretchen Hoff Varner: Brooklyn Union Gas notified its insurance companies of this issue back in 1993, and the parties sued each other in 2001. As you might imagine for a case that looks at the past 150 years, discovery was prolonged and complicated; most of the people who actually worked at these facilities have passed away, so the case largely depended on experts and an extensive documentary record to reconstruct Brooklyn Union's business operations from back in the day. In addition, this case has raised questions about complex insurance coverage issues, such as the allocation of damages to policies over an extended period of time, and those issues took time to be resolved by the appellate courts. Finally, we were set for a trial date in fall 2020, but of course, COVID interrupted those plans.

#### **Tell me about the courtroom setup. I gather that the jury was scattered around and masked. How did the setup affect your trial presentation?**

Gretchen Hoff Varner: Under New York's COVID protocols, everyone in the courtroom was masked; the witness and the speaking lawyers were allowed to use a face shield while speaking as well. The jury was seated in the public gallery, not the jury box, and was physically distanced. Each juror had an individual screen to review demonstratives and exhibits.

As a result of the masks and the distance, it was challenging to connect with the jury, particularly for witnesses. We used a

range of tools to try to close that distance. For example, one of our experts used a simple animation to explain the movement of coal tar into groundwater that was very effective. Another expert told his story through extensive photographs. I structured one of my direct examinations around a chart that the witness and I filled out together to help the jury keep track of all the different environmental agencies and plant sites that were at issue. But ultimately, while these tools were all useful, there's nothing quite as powerful as standing in front of a jury, even wearing a mask, showing the jury your evidence and explaining your case.

#### **Mr. Razi said in his closing that this was "a story that covers a 150-year period." What were some of the complications of telling a story like that to a jury?**

Razi: The fact that many relevant events in this case occurred between 60 and 160 years ago created challenges and also opportunities. Of course, there are no living witnesses who could testify about what happened at the gas plants in the 1800s or the early part of the 1900s. So that was a challenge. But we had a rich documentary record that was reconstructed and interpreted by experts on both sides. The jury was able to see photographs, diagrams, reports and trade articles showing how gas was made at these plants and what the plants did with their byproducts like tar. Ultimately, we were able to present a textured portrait of a company trying to do business in a responsible way, not to cause property damage.

#### **What were your key trial themes? And how did you drive them home?**

Razi: There were three key themes that we hit over and over again.

First, Brooklyn Union has taken responsibility for the environmental damage caused by its historical operations. Our first witness was a Brooklyn Union engineer whose full-time job for 20 years has been designing, overseeing, and implementing the massive Gowanus Canal environmental cleanup. He is the personification of Brooklyn Union taking responsibility for its share of this community problem.

Second, Brooklyn Union's actions must be judged by the standards and understanding at the time of its actions—not by hindsight. Once you understand how different things were in the gas plant era of the late 19th century and early 20th century, you see that Brooklyn Union could not have expected or intended the property damage it is

being required to clean up today. For better or worse, the city built the Gowanus Canal to be an outlet for sewage and an industrial waterway. It is hard to understand or accept today—when we think all bodies of water should be pristine—that the government would do that. But it happened, and it wasn't Brooklyn Union's fault. Relatedly, in the gas plant era, people did not understand that chemicals would persist in the environment for hundreds of years and that leaching from waste materials could pose threats decades or generations later. In short, Brooklyn Union did not understand that its business was causing long-term environmental damage, so that damage was accidental and covered by insurance.

Third, Century needs to live up to its obligations and pay its fair share. Under the insurance allocation rules, Century will never be required to pay the full amount of Brooklyn Union's cleanup costs because the property damage began before Century provided coverage and continued after Century's coverage. But Century did sell insurance policies to Brooklyn Union promising to cover liability for accidental property damage occurring from 1941 to 1969. Century should be required to pay its fair share based on those 28 years of coverage.

#### **What are the takeaways for other policyholders from this trial outcome?**

Razi: I see two key takeaways. First, juries are smart: they can understand the difference between intending to cause property damage, which is not covered by insurance, and running a business that inadvertently causes property damage, which is covered by insurance. The fact that property damage or other harm occurs—even if it is a lot of harm—does not mean it was expected or intended. Second, if you want to get what you're entitled to from an insurance company, you have to be willing to fight for it. Nothing came easy in this case. We don't expect anything to come easy from here on out.

Hoff Varner: In this case, we asked the jury to do a little time-traveling. They really needed to be able to put themselves in the shoes of plant engineers designing manufactured gas factories in 1860, or environmental engineers reading about CERCLA in 1980, or risk managers reviewing insurance policies in 1993, to be able to understand why Brooklyn Union took the actions it did. That was particularly important here, in a case with such a vast historical record, but it is a

valuable lesson for other policyholders as well. People ask for insurance because something has gone wrong. Mistakes happen; accidents happen. It's so important for policyholders to effectively communicate to judges and juries about why those things went wrong, and how people making good choices and doing their very best can nevertheless end up with expensive accidents and in need of their insurance to provide coverage.

#### **What comes next here? I know the jury calculated some values for the claims on the verdict sheet, but is that the last word on that front?**

Lechliter: We expect the court will enter a final judgment implementing the jury verdict soon. This was a very important win, but the dispute with Century will not be over even after the final judgment. There are other gas plant sites that Brooklyn Union is cleaning up and for which it is seeking coverage from Century. We look forward to bringing those sites to trial as soon as possible and to getting Brooklyn Union all the insurance coverage to which it is entitled.

#### **What will you remember most about this matter?**

Ben Razi: The commitment and dedication shown by our hard-working jury over the course of almost five weeks. They were patient and attentive as both sides presented their evidence. They stuck it out through a rise in COVID cases. And when their turn came, they methodically worked through a 47-page special verdict form to deliver justice in this case. It was great to be back in New York.

Hoff Varner: It was amazing to be back in a courtroom, in front of a jury, after this long pandemic. After years of working from home and Zoom hearings, it was a thrill to be back in court, and to have the opportunity to connect with jurors and court staff and witnesses and the judge in person. It reminded me that while remote work has been a blessing in many ways, there's nothing quite like late-night prep sessions with your trial team or hard-fought legal battles in chambers to generate that creative spark and excitement that makes this job so fun and rewarding.

Lechliter: Trial planning needs to start early. It is important to master the facts and the law from the start, and that can only be done with a wonderful team of associates. We had that wonderful team of associates here, and that's the main reason this case resulted in a great win for our client.