CONNECTICUT LAW UPDATE:

MAKE WHOLE DOCTRINE DOES NOT APPLY TO INSURANCE POLICY DEDUCTIBLES

In *Fireman's Fund Insurance Company v. TD Banknorth Insurance Agency, Inc,* 309 Conn. 449 (2013), the Connecticut Supreme Court agreed to answer the following certified question received from the United States Court of Appeals for the Second Circuit: "Are insurance policy deductibles subject to Connecticut's make whole doctrine?" Because Connecticut had not previously expressly adopted the make whole doctrine, the Supreme Court reformulated the certified question as follows: "(1) Is the make whole doctrine recognized as the default rule under Connecticut law; and, if so, (2) does the make whole doctrine apply to insurance policy deductibles under Connecticut law?" The Court answered "(1) the make whole doctrine is the default rule under Connecticut law, but (2) the doctrine does not apply to insurance policy deductibles."

In 2005, Haynes Construction Company ("Haynes") commenced the construction of a housing development and retained the services of TD Banknorth Insurance Agency, Inc. ("TD Banknorth"), to procure a builder's risk insurance policy from Peerless Insurance Company ("Peerless") and an inland marine insurance policy from the Hartford Insurance Company ("Hartford"). In February 2006, a fire destroyed one of the houses that Haynes was constructing on a lot. Peerless denied coverage because the builder's risk insurance policy did not list the specific lot where the incident occurred. Haynes asserted a claim against TD Banknorth on the basis that it negligently omitted the lot from the policy. Fireman's Fund Insurance Company ("Fireman's Fund") insured TD Banknorth under an errors and omissions insurance policy (the "Fireman's Fund policy"). The Fireman's Fund policy had a deductible of $150,000. In July 2006, TD Banknorth and Fireman's Fund settled with Haynes for $354,000, whereby TD Banknorth contributed $150,000 to the settlement and Fireman's Fund contributed the remaining $204,000. Also, as part of the settlement, Haynes assigned its rights against Peerless and the Hartford to Fireman's Fund and TD Banknorth. Subsequently, TD Banknorth and Fireman's Fund, as subrogee, asserted claims against Peerless and Hartford to recover $354,000. Peerless and the Hartford settled the claims for $208,000, whereby Peerless paid $88,000 and the Hartford paid $120,000. TD Banknorth and Fireman's Fund reserved their rights with respect to the allocation of the $208,000 and deposited the amount into an escrow account.

In March 2008, Fireman's Fund commenced a declaratory judgment action in the United States District Court for the District of Connecticut and sought a declaration that it was entitled to the $208,000 in escrow. Fireman's Fund's total claim was $214,000 and included $10,000 in defense costs expended during its defense of TD Banknorth against Haynes' claim and the $204,000 it paid to Haynes under the Fireman's Fund policy. TD Banknorth counterclaimed and sought a declaration that it was entitled to recover the $150,000 policy deductible under Connecticut's make whole doctrine. (In other words, TD Banknorth claimed that its deductible should be reimbursed before Fireman's Fund.) After both parties moved for summary judgment, the District Court granted summary judgment in favor of Fireman's Fund holding that the subrogation clause in the Fireman's Fund policy abrogated Connecticut's make whole doctrine. TD Banknorth appealed to the Second Circuit.

The Second Circuit relied on *Wasko v. Manella*, 269 Conn. 527, 533 – 34 (2004) (which stands for the proposition that "boilerplate subrogation clauses are inadequate to abrogate default common-law subrogation rules") and concluded that the Fireman's Fund policy did not abrogate Connecticut's make whole doctrine. Also, relying on dictum from *Wasko*, the Second Circuit held that Connecticut's make whole doctrine applied to first-party losses as well as to third-party liability claims. Lastly, the Second Circuit considered whether Connecticut's make whole doctrine applied to insurance policy deductibles. Based on a lack of statutory and precedential support, the Second Circuit was unable to reach a decision on this question. The Second Circuit certified the question to the Connecticut Supreme Court and it accepted the question.

Before the Connecticut Supreme Court, TD Banknorth argued that under Connecticut's make whole doctrine it was entitled to recover its policy deductible before Fireman's Fund could assert a claim for equitable subrogation against a responsible third-party. Fireman's Fund countered TD Banknorth by maintaining that the make whole doctrine does not apply to a policy deductible and to conclude differently would covert a policy with a deductible into a policy without one.

The Connecticut Supreme Court began its analysis by considering whether the make whole doctrine applies in Connecticut. The Court held that the make whole doctrine is sound policy and the default rule in Connecticut. "When the amount recoverable from the responsible third party is insufficient to satisfy the total loss sustained by the insured and the amount the insurer pays on the claim, . . . [the] principle [of subrogation] may lead to inequitable results." *Fireman's Fund Insurance Company*, 309 Conn. 449 at *4. "The make whole doctrine addresses this concern by restricting the enforcement of an insurer's subrogation rights until after 'the insured has been fully compensated for her injuries, that

is . . . made whole.'" *Id*. (citations omitted.)

The Supreme Court also considered whether "an insured is fully compensated for purposes of the make whole doctrine when she receives compensation equal to the amount of her loss, less the value of her deductible." *Id*. at *5. The Supreme Court answered this question in the affirmative. The Supreme Court held that the make whole doctrine does not apply to policy deductibles. The Supreme Court relied on a small number of cases from other jurisdictions holding that the make whole doctrine does not apply to policy deductibles and the following rationale: "[i]f the insured were to reimbursed for its deductible before the insurer is made whole, the insured would be receiving [a non-] bargained for, unpaid for, windfall. Under the terms of the insurance policy, it was agreed that, as a condition precedent to the insurer being out of pocket for even one dollar, the insured had to first be out of pocket the amount of the deductible. The [make] whole doctrine deals with situations in which the combination of the amount of the deductible and the amount of the insurance payment is a sum that was insufficient to make the insured whole, and a recovery is made from a third-party (typically, the insurer for the tortfeasor [who] injured the insured)." *Id*. (citations omitted.) In further support, the Supreme Court stated that "[a] deductible represents the level of risk that insured has agreed to assume, ordinarily in exchange for a lower premium cost for the insurance policy." *Id*. at *8 (citations omitted.) The Supreme Court also stated that "[w]hen there is a recovery, the 'excess' level of insurance is entitled to recover before a lower level of insurance/deductible can recover . . .. By the same token, the amount of the insured's loss in excess of the insurance policy must be reimbursed before the insurer is reimbursed by virtue of the same principle: reimbursements go to the highest level of excess and work their way down to the lowest level." *Id*. (citation omitted.)

In conclusion, the Supreme Court stated that "[i]f we were to decide . . . as TD Banknorth urges, we would effectively disturb the contractual agreement into which TD Banknorth and Fireman's Fund entered, thereby creating a windfall for TD Banknorth for a loss that it did not see fit to insure against in the first instance when it contracted for lower premium payments in exchange for a deductible." *Id*.

RHODE ISLAND LAW UPDATE:

Supreme Court Discusses "Connecticut Rule" for Snow and Ice Cases

In *Sullo v. Greenberg*, 2013 WL 3013623 (R.I. June 18, 2013), the Rhode Island Supreme Court discussed the application of the "Connecticut Rule" when determining whether a landlord owes a duty regarding treatment of surfaces during and after a snowstorm. The Court also considered whether a doctor's status as a patient's physician heightens the duty of care that he or she owes to a patient who falls on the entrance to the doctor's office.

In November 2007, the plaintiff patient was on her way to a scheduled appointment at the office of the defendant doctor during a winter storm. Due to an injured tendon in her left leg, the plaintiff was on crutches and had a soft cast on her left foot. The plaintiff alleged that while walking across a wooden walkway towards the office door, her left crutch slipped on wet wood, causing her to fall on her left leg and foot. The plaintiff alleged that the fall resulted in severe and permanent injuries. She filed suit alleging that the defendant was negligent for failing to treat the walkway and caused her fall and resulting injuries.

The plaintiff made inconsistent statements regarding the weather at the time of her fall over the course of litigation. In the complaint, she stated that snow was accumulating on the walkway when she fell. During her deposition, she stated that there was a mix of rain and snow, that the walkway was wet, and contained no accumulation of snow. In her pre-briefing statement to the court, the plaintiff stated that it was not snowing when she arrived at the defendant's office. The defendant, however, maintained that it was snowing at the time of the plaintiff's fall.

Relying on the "Connecticut Rule," which Rhode Island previously adopted, the trial court awarded summary judgment to the defendant. Under the "Connecticut Rule," a landlord or business invitor has a duty to clear accumulation of snow, ice, or frozen rain and treat surfaces impacted by a winter storm, but this duty does not arise until a reasonable amount of time after the storm has ended. The trial court concluded that there was no dispute that the storm on the day of the plaintiff's fall included snow. The trial court also held that the defendant was justified in waiting until the storm had ended before treating the walkway. There was nothing about the circumstances to warrant a heightened duty of care owed by the defendant to the plaintiff.

On appeal to the Supreme Court of Rhode Island, the plaintiff argued that there was a genuine issue of material fact as to whether the storm in question was a snowstorm that would trigger the "Connecticut Rule." The plaintiff additionally argued that the trial court erred in failing to recognize a heightened duty of care owed by defendant as plaintiff's physician. The Supreme Court acknowledged the plaintiff's inconsistent statements regarding the weather, but viewed the plaintiff's deposition testimony and the pleadings in the light most favorable to the plaintiff. The Court held that "the

only undisputed facts relevant to this case seem to be that plaintiff fell on a wet surface in mid-November during a precipitation event." The plaintiff claimed that the walkway where she fell was wet rather than covered in snow, while the defendant maintained that it was snowing at the time of the plaintiff's fall. The Court determined that there was a genuine issue of material fact as to whether there existed an accumulation of snow or ice sufficient to invoke the "Connecticut Rule." The Court vacated summary judgment and remanded the case to Superior Court for trial to determine if it was snowing (in which case recovery would be barred) or it was not and merely wet because of snow, ice, or frozen rain (in which case recovery would be permitted).

In addition, the Court rejected the plaintiff's argument that the defendant doctor's status as the plaintiff patient's physician, created a heightened duty of care owed to the plaintiff. Relying on *Terry v. Central Auto Radiators., Inc.*, 732 A.2d 713, 717 (R.I. 1999), the Court stated that a business invitor holds a heightened duty of care to invitees only when a business invitor has "exacerbated and increased the risk" to invitees. The Court concluded that the defendant did not exacerbate the risk to the plaintiff, and that the defendant's status as the plaintiff's physician did not heighten the duty of care he owed to the plaintiff.

MASSACHUSETTS LAW UPDATE:

Does a Commercial General Liability Policy Afford Coverage for an Insured's "Temporary Worker"?

In *Central Mutual Insurance Company v. True Plastics, Inc.,* 84 Mass. App. Ct. 17 (2013), the Massachusetts Appeals Court considered whether a commercial general liability insurer owed a duty to defend or indemnify an insured in an action brought by a person who was injured after being assigned to work for the insured by a labor leasing firm.

The insured, True Plastics, Inc., was a manufacturer of made-to-order plastic components. In September 2004, True Plastics received a large order from a customer, and assessed that its existing workforce was insufficient to complete the order. True Plastics, due to the fluctuating nature of its business, regularly utilized staffing agencies when its own workforce was insufficient, and did so in this instance. The owner of True Plastics estimated that it would take one worker six or seven weeks to complete the order, but did not disclose the estimate to the staffing agency. The owner and the staffing agency understood that the worker, Marciala Sanchez, would be assigned to True Plastics for an indefinite period until she was no longer needed.

Sanchez began working as a machine operator in September 2004. A few days later, after training and waiting for raw materials to arrive, she began working exclusively on the large order. In October 2004, about three weeks later, she was injured while operating a molding machine at True Plastics. At this point, Sanchez had completed about half of the order. Sanchez made a claim under the staffing agency's workers' compensation insurance, and also sued True Plastics. True Plastics sought defense and indemnification for the tort claim under its CGL policy issued by Central Mutual Insurance Company. In turn, Central Mutual filed an action for declaratory judgment seeking a judgment that it owed no duty to defend or indemnify under the CGL policy. Central Mutual argued that Sanchez was a "leased employee" excluded under the CGL policy, rather than a "temporary employee" included under the policy.

True Plastic's CGL policy with Central Mutual included bodily injury coverage subject to an exclusion of coverage "for any employer liability for bodily injury to '[a]n 'employee' of the insured' arising out of the course of his or her employment." The policy defined "employee" as including a "leased worker" but not a "temporary worker." The policy defined a "leased worker" as "a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. 'Leased worker' does not include a 'temporary worker.'" The policy defined a "temporary worker" as "a person who is furnished to you to substitute for a permanent 'employee' on leave or to meet seasonal or short-term workload conditions."

At the outset, the Massachusetts Appeals Court noted that the CGL policy was "designed to 'protect an insured employer against liability for losses to third parties arising out of the operation of the insured's business.'" *Cent. Mut. Ins. Co.*, 84 Mass. App. Ct. 17 (citing *Monticello Ins. Co.* v. *Dion,* 65 Mass. App. Ct. 46, 47 (2005)). "Injuries to employees are typically excluded from coverage . . . as the expectation is that the employer will have in place workers' compensation insurance (or self-insurance) in one of the forms made compulsory by G.L. c. 152, § 25A." *Id.* "Unlike the 'leased worker,' for whose benefit workers' compensation insurance was reliably maintained by the general employer (the labor-leasing agency), it is possible that the 'temporary worker' exception to the general exclusion of coverage for employees may have been intended as gap coverage to protect the special employer (*i.e.*, the CGL insured) where the furnishing employer may lack coverage." *Id.* at 49 – 50. "It appears to meet a short-term workload condition." The Appeals Court stated that [the Insurance Services Office, Inc. (ISO),] added the definitions of 'employee,' 'leased worker,' and 'temporary worker' in 1993 to 'cover the non-traditional

employment relationship where a client company is using the services of employees of a staffing company.'" *Id*.

Relying on *Monticello Ins. Co.* v. *Dion*, the Massachusetts Appeals Court held that the CGL policy issued by Central Mutual extended coverage under a so-called "temporary worker exception" to persons who are "temporary workers." The Court stated that True Plastics had the burden of establishing that Sanchez was a "temporary worker." In assessing whether Sanchez was a "temporary worker" the Appeals Court analyzed the undefined phrase "short-term workload condition." The Appeals Court stated that a "short-term workload condition" is to be assessed prospectively, that is, from the time the worker was furnished. Even if a worker's assignment ends up being lengthy, he or she will still be a 'temporary worker' within the meaning of the policy, provided the insured held an objectively reasonable expectation at the time that the worker was furnished to meet a short-term condition.

The Appeals Court held that True Plastics met its burden of proving that Sanchez was a "temporary worker" as defined by the CGL policy because it proved she was furnished to meet a short-term workload condition. At the time that Sanchez was furnished, True Plastics held the objectively reasonable assessment that one worker working six or seven weeks was needed to complete the order. That True Plastics had a regular practice of utilizing temporary employees did not mean that the order was anything other than a "short-term workload" condition, or that Sanchez was furnished for any reason other than meeting that condition. The Court concluded that Central Mutual owed a duty to defend True Plastics.

NEW HAMPSHIRE LAW UPDATE:

Does a Commercial General Liability Insurance Policy Afford Coverage for a Commercial Tennant's Contractor?

In *Great American Dining, Inc. v. Philadelphia Indemnity Ins. Co.,* 164 N.H. 612 (2013), the New Hampshire Supreme Court considered whether a commercial tenant's contractor was an additional insured under a commercial general liability insurance policy issued by Philadelphia Indemnity Insurance Company ("Philadelphia") to the commercial tenant.

DW Ray Commons, LLC ("DW Ray"), owned and leased a property (the "leased premises") to Webster Place Center, Inc. ("Webster Place"). DW Ray required that Webster Place obtain a commercial general liability policy listing DW Ray as an additional insured. Webster Place obtained a commercial general liability policy through Philadelphia (the "Philadelphia policy") in March 2008. In October 2008, Dr. James Kenneth Wyly fell through a porch railing at the leased premises and sustained injuries. Dr. Wyly asserted personal injury claims against DW Ray and Webster Place, which the parties settled. After the settlement, DW Ray and Webster Place commenced a contribution action against GAD. DW Ray and Webster Place contended that GAD constructed, installed, and maintained the porch railing. The contribution action proceeded to trial and a jury determined that Great American Dining, Inc. ("GAD") was 45% at fault for Dr. Wyly's injuries. Subsequently, GAD filed a declaratory judgment action against Philadelphia and sought a declaration that it was an additional insured under the Philadelphia policy.

GAD contended that it was an additional insured under the Philadelphia policy based on a policy provision entitled "Managers, Landlords or Lessors of Premises" (the "additional insured provision"). The additional insured provision applied to "'any person or organization' whose liability 'aris[es] out of ownership, maintenance or use'" of the leased premises." The trial court found that the additional insured provision was not restricted to just managers, landlords, or lessors. The trial court also found, notwithstanding its title, the additional insured provision broadly encompasses any person or organization with respect to its liability arising out of the ownership, maintenance or use of the property. The trial court held that GAD was an additional insured under the Philadelphia policy. The trial court also held that Philadelphia owed GAD a duty to defend GAD against the contribution action because Dr. Wyly's writ sufficiently alleged that GAD engaged in maintenance. Lastly, the trial court held that Philadelphia owed a duty to indemnify GAD because "'the trial evidence and theory upon which the judgment was actually entered establish that GAD's liability arose from its 'maintenance' of the lease[d] premises.'" Philadelphia appealed.

On appeal to the New Hampshire Supreme Court, Philadelphia argued (1) GAD was not an additional insured under the Philadelphia policy because it was not a manager, landlord, or lessor, (2) GAD's liability did not arise out of "the ownership, maintenance or use" of the leased premises, and (3) GAD was a stranger to the policy, and ambiguities need not be construed in its favor.

First, the Supreme Court declined to read the additional insured provision narrowly. Under New Hampshire law, when interpreting an insurance policy, the court "must read [the policy] as a whole and from the vantage point of an ordinary person." *Great American Dining, Inc.,* 164 N.H. at 847. Applying these principles, the Supreme Court considered whether the additional insured provision should be read narrowly based on its title or broadly to "[a]ny person or organization" as stated in the text of the provision. The Supreme Court construed the Philadelphia policy as a whole and

found the additional insured provision ambiguous because there was more than one reasonable interpretation of provision. One interpretation limited the provision to managers, landlords or lessors. The broader interpretation covered "'any person or organization with respect to their liability arising out of the ownership, maintenance or use' of the premises." *Id*. at 849. The Supreme Court did not find that the Philadelphia policy or the additional insured provision limited coverage to managers, landlords or lessors.

The Supreme Court also rejected Philadelphia's argument that the trial court's reading of the additional insured provision improperly construed ambiguities in favor of GAD and such an interpretation would lead to an absurd result of extending coverage to strangers to the policy, such as independent contractors. The Supreme Court determined that the provision only covered "persons and organizations whose liability arises out of the ownership, maintenance, or the use of the leased premises" and therefore, limited the covered persons. *Id*. at 851. The Supreme Court acknowledged that although Philadelphia offered a plausible interpretation of its policy (*e.g.*, the caption narrowed the additional insured provision's broad language referencing "any person or organization"), "[w]hen an insurance policy's language is ambiguous and more than one reasonable interpretation favors coverage . . . we construe the policy in the insured's favor and against the insurer." *Id*. at 851. The Supreme Court also found Philadelphia's argument that GAD was a stranger to the policy to be circular. The Supreme Court noted that the very question before it was "who is an insured under the terms of the policy." *Id*. at 852.

Lastly, the Court rejected Philadelphia's argument that the additional insured provision did not cover GAD because its work on the porch railing constituted "renovation" rather than "maintenance" and the two words are not synonymous. The Court noted that the Philadelphia policy does not define the terms "maintenance" or "renovation." "Where disputed terms are not defined in the policy, we construe them in context, and in light of what a more than causal reading of the policy would reveal to an ordinarily intelligent insured." *Id*. (citations omitted.) The Supreme Court concluded that based on the overlapping definitions, "'maintenance' could reasonably be understood to include 'renovation.'" *Id*. at 853.

The Supreme Court agreed with the trial court and it held that GAD was an additional insured pursuant to the additional insured provision. The Supreme Court also held that Philadelphia owed a duty to defend GAD against the contribution action brought by DW Ray and Webster Place. The Supreme Court further held that the record supported the trial court's conclusion that Philadelphia owed GAD a duty to indemnify. The Court noted that it was unclear from the record whether the jury based GAD's negligence on its construction, operation, maintenance, or any combination of these functions. However, the Supreme Court noted that this determination was not necessary because under New Hampshire law the insurer has the burden of proving that no insurance coverage exists and Philadelphia did not meet its burden.

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