SIMPSON THACHER
INSURANCE LAW ALERT
NOVEMBER 2010

This Alert addresses a variety of decisions relating to general liability, commercial property and D&O insurance policies, including rulings on choice of law and jurisdictional requirements. Please "click through" to view articles of interest.

- ***Commercial Property Insurers Owe No Coverage for Arthur Andersen's Post-9/11 Losses***

  A New Jersey appellate court upheld an insurer's denial of claims by the now-defunct accounting firm Arthur Andersen LLP for $204 million in losses allegedly caused by the September 11th attacks. *Arthur Andersen LLP v. Federal Insurance Co.*, No. L-2809-03 (N.J. App. Div. Sept. 30, 2010). Because Andersen failed to allege causation between the property damage and its subsequent loss in revenue, the court found no coverage as a matter of law. *Click here for full article*.

- ***New York Court Denies Coverage to Madoff Investors Who Realized Net Profit***

  A federal court in New York rejected arguments that a homeowner's policy covered losses arising from investments in Bernard Madoff's Ponzi scheme. *Horowitz v. American International Group, Inc.*, No. 09 Civ. 7312 (PAC) (S.D.N.Y. Sept. 30, 2010). The court found that plaintiffs suffered no loss within the meaning of the policy because they realized a net gain from their initial investment. *Click here for full article*.

- ***Office Depot May Not Recover Internal Audit and Investigation Costs or Costs Incurred in Complying with SEC Investigation, Says Florida Court***

  A federal court in Florida ruled that D&O insurers were not required to cover costs incurred in responding to a Securities and Exchange Commission investigation that did not result in the filing of a formal complaint. The court also held that Office Depot was not entitled to indemnification for costs incurred in conducting an internal investigation and an audit triggered by a whistleblower complaint. *Office Depot, Inc. v. National Union Fire Ins. Co.*, 2010 WL 4065416 (S.D. Fla. Oct. 15, 2010). *Click here for full article*.

- ***Texas Court Vacates Preliminary Injunction Requiring Defense Cost Advancement, Finding a "Substantial Likelihood" that Money Laundering Exclusion Bars Coverage***

  Where insurers had demonstrated a substantial likelihood that a money laundering exclusion applied to the claims at issue, D&O insurers were no longer obligated to advance defense costs. *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, No. H-09-3712 (S.D. Tex. Oct. 13, 2010). *Click here for full article*.

- ***Kentucky Appellate Court Strains Policy Language to Extend Coverage Under Claims-Made Policy***

  A divided Kentucky appeals panel ruled that a failure to report a claim during the policy period of a claims-made policy did not bar coverage. *AIG Domestic Claims, Inc. v. Tussey*, 2010 WL 3603844 (Ky. Ct. App. Sept. 17, 2010). The court reasoned that the policyholder was entitled to a seamless continuation of coverage in light of the two back-to-back policies at issue. *Click here for full article*.

- ***California Court Dismisses Fraud Claim Against Insurer Based on Sales of Annuities***
  A federal court in California granted summary judgment in favor of Jackson National Life Insurance Company, dismissing all class action claims alleging that the insurer engaged in unlawful practices in the solicitation, offering and sale of fixed deferred annuities to senior citizens. *Kennedy v. Jackson National Life Ins. Co.*, C No. 07-0731 CW (N.D. Cal. Oct. 6, 2010). *Click here for full article*.

- ***Eleventh Circuit Vacates Earlier Ruling on Class Action Fairness Act ("CAFA") Requirements***
  The Eleventh Circuit vacated its previous ruling, concluding that the CAFA does not contain a jurisdictional requirement that at least one plaintiff meet the amount in controversy set forth in 28 U.S.C. § 1332(a). *Cappuccitti v. DirecTV, Inc.*, 2010 WL 4027719 (11th Cir. Oct. 15, 2010). *Click here for full article*.

- ***Insurer Need Not Reimburse Policyholder for Belatedly-Requested Defense Costs, Third Circuit Rules***
  The Third Circuit affirmed that National Union Fire Insurance Company was not liable for defense costs incurred in underlying litigation with a tobacco company because the American Legacy Foundation never activated National Union's defense obligations and coverage was barred by explicit policy language. *American Legacy Foundation v. National Union Fire Ins. Co.*, 2010 WL 3960579 (3d Cir. Oct. 12, 2010). *Click here for full article*.

- ***Despite Limited California Ties, Florida Court Rules that California Law Governs Drywall Suit***
  Despite substantial connections to Florida, a Chinese drywall insurance coverage dispute will be governed by California law, a federal court in Florida ruled. *American Home Assurance Co. v. Peninsula II Developers, Inc.*, No. 09-23691 (S.D. Fla. Oct. 19, 2010). Applying the *lex loci contractus* principle, the court found that California law governs the dispute because the last act necessary to complete the insurance contracts took place in California.
  Click here for full article.

Coverage Alerts:

Commercial Property Insurers Owe No Coverage for Arthur Andersen's Post-9/11 Losses

A New Jersey appellate court denied claims by the now-defunct accounting firm Arthur Andersen LLP to recover $204 million in losses allegedly caused by the September 11th attacks. *Arthur Andersen LLP v. Federal Insurance Co.*, No. L-2809-03 (N.J. App. Div. Sept. 30, 2010). Andersen's position, in a nutshell, was that "the September 11 attacks caused property damage; that there was a resulting economic downturn and that Andersen's lost revenue thereafter was therefore caused by the property damage on September 11." *Id*. at 8. Because coverage under commercial property policies requires more than a generalized theory of causation between incidents of property damage and harm to the insured, the court found no coverage as a matter of law.

Andersen failed to establish that its loss in revenue following the attack was the result of property damage—a prerequisite to coverage under the policy. The court explained that "Andersen has neither identified any interruption of its business nor any customer who was unable to receive services *as a result of property damage* to the WTC or Pentagon." *Id*. at 18 (emphasis added). Rather, the court concluded, Andersen's loss stems from the overall terrorist event. In addition, coverage was not implicated by the policy's Interdependency Clause, which applies when the policyholder sustains losses at one insured location as a result of property damage at another insured location. Coverage under this provision requires that the policyholder have an insurable interest in the property at issue. The court concluded that Andersen did not meet this test because it did not own, lease or insure the World Trade Center or the Pentagon, nor did it derive any pecuniary benefit from the existence of those properties.

The court also rejected Andersen's argument that it was entitled to a jury determination on the issue of whether its losses were in fact caused by the property damage that occurred on September 11th. Citing to cases involving terrorist attacks at the World Trade Center in 1993 and the Oklahoma City bombing in 1996, the court concluded that causation—normally a fact question for juries—is a question of law when no evidence could lead a jury to find a causal nexus between the property damage at issue and the claimed injuries.

Andersen sends a clear message to policyholders seeking insurance coverage for revenue losses: insurance coverage is likely unavailable for losses arising from myriad economic and intangible factors that exist in the wake of a disaster.

New York Court Denies Coverage to Madoff Investors Who Realized Net Profit

A federal court in New York rejected claims by investors in Bernard Madoff's Ponzi scheme to recover under a homeowner's policy that covered loss of money or securities resulting directly from fraud or embezzlement. *Horowitz v. American International Group, Inc.*, No. 09 Civ. 7312 (PAC) (S.D.N.Y. Sept. 30, 2010). Because the plaintiffs suffered no loss within the meaning of the policy, the court dismissed the policyholders' lawsuit in its entirety.

Between 1997 and 2008, plaintiffs Robert and

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Harlene Horowitz deposited over $4.3 million into Madoff's business, but also withdrew over $4.5 million, realizing a net gain of more than $225,000. After disclosure of the Madoff fraud, the Horowitzs filed a putative class action against AIG, seeking to recover losses based on the balances shown in their last statement, which, including phantom profits, exceeded $8 million. AIG denied the claim, reasoning that the Horowitzs had not experienced a "loss."

The court agreed with AIG, finding that based on a plain reading of the unambiguous policy language, the Horowitzs did not experience an insurable "loss." The court explained: "Because the Plaintiffs recovered [their] principal plus an additional amount, they suffered no direct loss. To the extent that they ultimately did suffer some loss on account of this fraud, that loss was indirect. To the extent that they failed to recover the remaining balance of that account, that 'loss,' though direct, was not truly a loss but rather was as illusory as the initial, fraudulent gain." *Id*. at 12. Implicit in this holding is the notion that a policyholder cannot claim a "loss" for phantom profits because s/he was never actually entitled to those profits. The court also denied the Horowitzs' remaining claims, all of which were derivative of and/or dependent upon the primary breach of contract claim.

Horowitz comports with other decisions holding that the loss of fictitious or theoretical profits does not constitute a "direct loss" in the insurance context. *See, e.g., Citizens Bank & Trust Co. v. St. Paul Mercury Ins. Co.*, 2007 WL 4973847, at *5 (S.D. Ga. Sept. 14, 2007); *FDIC v. United Pac. Ins. Co.*, 20 F.3d 1070, 1080 (10th Cir. 1994).

D&O Alerts:

Office Depot May Not Recover Internal Audit and Investigation Costs or Costs Incurred in Complying with SEC Investigation, Says Florida Court

On October 15, 2010, a federal court in Florida ruled that Office Depot's D&O insurers were not required to cover costs incurred by the company in responding to a Securities and Exchange Commission ("SEC") investigation that did not result in a formal complaint against Office Depot or its officers or directors. The court also held that Office Depot was not entitled to indemnification for costs incurred in conducting an internal investigation and audit triggered by a whistleblower complaint. *Office Depot, Inc. v. National Union Fire Ins. Co.*, 2010 WL 4065416 (S.D. Fla. Oct. 15, 2010).

In 2007, the SEC notified Office Depot that it was initiating an informal inquiry regarding the company's profit and sales projections. At about the same time, Office Depot received an internal whistleblower letter alleging accounting improprieties. As a result, Office Depot's Audit Committee initiated an internal investigation. During this same period, two shareholder derivative suits and two securities suits were filed against the company and several officers and directors, all of which were ultimately dismissed. In 2008, the SEC issued a formal investigation order, and subsequently subpoenaed a number of Office Depot employees. In 2009, the SEC issued so-called "Wells Notices" to three Office Depot officers, indicating the SEC's intent to initiate enforcement proceedings.

In connection with these developments, Office Depot incurred more than $23 million in legal fees and expenses. Office Depot requested that National Union reimburse Office Depot for these expenses under its Executive and Organization Liability Policy. National Union acknowledged coverage for costs associated with (1) compliance with the SEC subpoenas and the Wells Notices and (2) the defense

of the lawsuits, but denied reimbursement of the costs spent responding to the SEC inquiry and investigation and conducting an internal investigation and audit.

The "organizational liability" portion of National Union's policy provides coverage for losses arising from a "Securities Claim" made against Office Depot for "any Wrongful act." *Id.* at *9. A "Securities Claim" is defined as a claim *"other than an administrative or regulatory proceeding against, or investigation of an Organization."* *Id.* The court agreed with National Union that this exclusionary language unambiguously bars coverage for costs incurred in complying with the SEC inquiry and investigation. Furthermore, the court rejected Office Depot's contention that coverage was restored by a "carve-back" provision, which stated that a "Securities Claim" shall "include an administrative or regulatory proceeding against an Organization, but only if and only during the time that such proceeding is also commenced and continuously maintained against an Insured Person." *Id.* Under the plain meaning of the term "proceeding," this carve-back does not restore coverage for an *investigation*, the court held. Moreover, the mention of specific individuals in the relevant SEC documents did not constitute a proceeding against an insured person within the meaning of the carve-back.

The court also rejected Office Depot's argument that coverage was implicated by the executive indemnity portion of National Union's policy. According to the court, the SEC inquiry and investigation did not constitute a "Claim made against an Insured Person." *Id.* at *14. Although the policy defines "Claim" to encompass SEC investigations, the policy limits the scope of the term investigation to mean "after service of a subpoena" or upon "identifi[cation] in writing … [of] a person against whom a proceeding … may be commenced." *Id.* at *3. Because the individual subpoenas and Wells notices were not issued until late 2008 and 2009, the investigative costs prior to that time are not within the policy's coverage.

Office Depot's request for reimbursement of its internal investigation and audit expenses likewise failed. The court found that neither these costs (nor the SEC response costs, for that matter) qualified as covered losses or defense costs. Although the defense of the securities and derivative lawsuits against Office Depot fall within policy coverage, "it does not follow that any pre-suit investigation costs which may have related to and benefited the defense of those suits … are transformed into a covered 'loss' which 'arises from' that securities litigation … ." *Id.* at *15. While defense costs may include the costs of investigating actual claims, they do not encompass the costs of investigating potential claims.

Office Depot reinforces the distinction, often critical in insurance coverage litigation, between costs expended in connection with governmental or administrative investigations on the one hand, and formal claims on the other hand. In a variety of contexts, courts have rejected policyholders' attempts to obtain insurance coverage for sums expended in the investigation (rather than the actual defense or payment) of potential claims.

Texas Court Vacates Preliminary Injunction Requiring Defense Cost Advancement, Finding a "Substantial Likelihood" that Money Laundering Exclusion Bars Coverage

In our May 2010 Alert, we highlighted a Fifth Circuit ruling that required a directors and officers liability insurer to advance defense costs incurred in connection with an alleged Ponzi scheme, unless and until a trial court determined that a money laundering policy exclusion applied. *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562 (5th Cir. 2010). In that case, the Fifth Circuit remanded the matter to the Texas district court to resolve the factual "money laundering" determination. Following remand, the district court held a preliminary injunction hearing. Based on the factual evidence presented, the district court ruled that the insurers

had demonstrated a substantial likelihood that the money laundering exclusion applied to each of the three directors and officers. *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, No. H-09-3712 (S.D. Tex. Oct. 13, 2010). As such, the insurers were no longer obligated to advance defense costs to those individuals in connection with pending civil and criminal actions. Issuing another victory to the insurers, the court also ruled that a stay pending appeal was not justified. The court concluded that "there is no serious legal question regarding the Policy's Money Laundering Exclusion." *Id*. at 43. The court also reasoned that granting a stay would harm the insurers by forcing them to continue paying defense costs they would have little chance of recouping.

Notice Alert:

Kentucky Appellate Court Strains Policy Language to Extend Coverage Under Claims-Made Policy

In a decision that cuts against many prior precedents, a divided Kentucky appeals panel ruled that a policyholder's failure to report a claim during the period of a claims-made policy did not bar coverage for the claim. *AIG Domestic Claims, Inc. v. Tussey*, 2010 WL 3603844 (Ky. Ct. App. Sept. 17, 2010). At issue were two back-to-back single year claims-made policies issued by National Union to the Pike County Board of Education. Both policies contained the following notice provision: "THIS IS A CLAIMS-MADE FORM … COVERAGE OF THIS POLICY IS LIMITED GENERALLY TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED AND REPORTED IN WRITING TO THE COMPANY WHILE THE POLICY IS IN FORCE." *Id*. at *2.

Although an action was filed against the Board during the first policy period, the Board did not report this claim until the middle of the second policy period. National Union denied coverage. In the subsequent coverage action, Nation Union moved for summary judgment, contending that because the claims were not reported within the first policy period, they were not covered under the first policy. The trial court denied National Union's motion and granted summary judgment in favor of the Board, and the appellate court affirmed.

Essentially blurring the line between the first and second policy periods, the court found that the two policies created "seamless coverage over the two-year period," and that "[i]t is difficult to fathom that a claim accruing during the two policy periods would not be covered by either policy." *Id*. at *3. The court relied primarily on the policy's "Discovery Period" clause, which provides that if either party cancels or refuses to renew the policy, the policyholder has the right, upon payment of an additional premium, to an additional period of twelve months in which to give notice of any claim made during that extended period. The court interpreted this provision to permit the policyholder to report a claim during the second policy period if the claim arose during the first, holding that "because the discovery provision sets forth only two circumstances when the purchase of an extension is necessary to maintain coverage [cancellation or refusal to renew], the renewal of the policy provides a continuation of coverage and the purchase of an extension is unnecessary." *Id*. The court declined to entertain a belated argument by National Union—raised on appeal—that coverage should be denied on the basis of late notice.

As the *Tussey* dissent observed, the majority's decision "break[s] rank with the overwhelming majority of jurisdictions all over this country who have repeatedly held that failure to notify an insurer within the policy period in a claims-based policy defeats coverage under the policy."

Id. at *5. Indeed, the reporting requirement is the very feature that distinguishes claims-made policies from broader occurrence-based policies. In blurring this distinction, *Tussey* appears to afford the policyholder more coverage than was bargained for. This decision is all the more striking in light of the fact that it did not present a rare "eleventh hour" situation, in which a claim accrued at the end of a policy period and was not reasonably known or reported until the beginning of a second policy period. Rather, the Board had more than four months left during the first policy period in which to report the claim, but waited more than one year before making a claim under the second policy. Because *Tussey* departs from well-established case law, its ramifications are questionable, and an appeal may be likely.

Class Action Alert:

California Court Dismisses Fraud Claim Against Insurer Based on Sales of Annuities

A federal court in California granted summary judgment in favor of Jackson National Life Insurance Company, dismissing all class action claims alleging that the insurer engaged in unlawful practices in the solicitation, offering and sale of fixed deferred annuities to senior citizens. *Kennedy v. Jackson National Life Ins. Co.*, C No. 07-0731 CW (N.D. Cal. Oct. 6, 2010). Based on the allegations in the complaint and the evidence presented during motion practice, the court concluded that there

was no triable issue as to whether the insurer engaged in a scheme to defraud or had the specific intent to defraud. In rejecting plaintiffs' claims, the court focused on two central issues: (1) whether Jackson National misrepresented or failed to disclose information about sales commissions, and (2) whether it misrepresented its offer of an "initial interest rate bonus."

On the first point, the court explained that Jackson National could be liable for non-disclosure of commissions received by sales representatives only if it had a fiduciary or statutory duty to disclose such information, or if the information presented constituted a half-truth. Neither element was established. California Insurance Code section 785(a), which imposes a duty of good faith upon insurers in transactions with insureds over the age of 65, does not mandate disclosure of commissions, and plaintiffs cited no case law supporting such a duty. Similarly, the court expressed skepticism as to whether section 332 of the Code, which addresses parties' good faith obligations to disclose material information, imposes a duty to disclose commissions. However, even assuming without deciding that section 332 imposes a duty to disclose information that would have a "'probable and reasonable influence' on prospective purchasers' estimation of the 'disadvantage' of annuities," the court found that no such hypothetical obligation had been violated. *Id*. at 17.

On the second point, the court rejected plaintiffs' allegation that Jackson National misrepresented or provided an inadequate disclosure regarding an "interest rate bonus" for certain annuities. Jackson National's prominent disclosure adequately explained the nature and consequences of the interest rate bonus. As such, there was no "affirmative misrepresentation or an inadequate disclosure" on this issue. *Id*. at 23. This conclusion, the court noted, follows other decisions in which courts have rejected analogous claims. *See Phillips v. American International Group, Inc.*, 498 F. Supp. 2d 690 (S.D.N.Y. 2007); *Delaney v. American Express Co.*, 2007 WL 1420766 (D.N.J. 2007).

Ruling on a third issue, the court rejected a claim that Jackson National could be liable for failing to

disclose the effect of a numerical value in the "excess interest adjustment" provision, which applies if an individual withdraws more than a certain amount during a calendar year. It was undisputed that the numerical value was provided in the contract, and Jackson National was under no obligation to explain the application and/or monetary effect of that figure.

As *Jackson National* illustrates, fraud claims against insurance companies will fail where allegations of non-disclosure and/or misrepresentations are unsupported by the facts at issue or by the duties imposed upon the insurer by applicable law. As the court recognized, plaintiff's misunderstanding or ignorance of contractual terms are insufficient to support allegations of fraud.

Jurisdiction Alert:
Eleventh Circuit Vacates Earlier Ruling on Class Action Fairness Act ("CAFA") Requirements

In our September 2010 Alert, we highlighted an Eleventh Circuit decision holding that CAFA actions require at least one class member to allege an individual amount in controversy over $75,000. *Cappuccitti v. DirecTV, Inc.*, 611 F.3d 1252 (11th Cir. 2010). On October 15, 2010, the Eleventh Circuit vacated this ruling, explaining that "[s]ubsequent reflection has led us to conclude that our interpretation was incorrect." *Cappuccitti v. DirecTV, Inc.*, 2010 WL 4027719, at *1 (11th Cir. Oct. 15, 2010). Relying on the plain text of the CAFA, the court concluded that it contains no jurisdictional requirement that at least one plaintiff meet the minimum amount in controversy set forth in 28 U.S.C. § 1332(a). Accordingly, the district court had subject matter jurisdiction over the dispute as an original matter. Given the rise in insurance-related class action disputes, the jurisdictional requirements for class action suits in federal court, either as an original matter or by removal, are of great importance, and we continue to monitor the case law in this frequently-litigated context.

Defense Alert:
Insurer Need Not Reimburse Policyholder for Belatedly-Requested Defense Costs, Third Circuit Rules

The Third Circuit affirmed that National Union Fire Insurance Company was not liable for defense costs incurred by the American Legacy Foundation in underlying litigation with a tobacco company. The court ruled that the Foundation never activated National Union's defense obligations, and that in any event, coverage was barred by explicit policy language. *American Legacy Foundation v. National Union Fire Ins. Co.*, 2010 WL 3960579 (3d Cir. Oct. 12, 2010).

The Foundation was sued in underlying tobacco-related litigation in Delaware state court. At various times, the Foundation sent notices to National Union, which provided Individual and Organization ("I&O") and umbrella policies to the Foundation. National Union denied coverage under both the umbrella and I&O policies, relying on general coverage provisions in the umbrella policies, and a policy exclusion in the I&O policy barring coverage for claims arising out of breach of contract. In the present action, the Foundation sought to recover nearly $17 million in defense costs. The Delaware district court granted summary judgment in favor of National Union, and the Third Circuit affirmed.

Under the terms of the I&O policy, National Union is required to advance defense costs at the written request of the Foundation, provided that such costs are incurred with National Union's written consent. Here, the Foundation neither requested approval of any defense expenses nor demanded payment of accrued defense costs during the course of the underlying litigation. Nor did the Foundation contest National Union's coverage denial. As the court observed, both parties "seemed content to await the ultimate disposition of the [underlying] claims before turning to the insurance coverage issues." *Id.* at *5. Given this unusual sequence of events, the central issue before the court was not whether National Union had a duty to advance defense costs, but rather, whether in light of the "reality" established by the holdings in the

underlying dispute, the Foundation was entitled to recover unadvanced defense costs.

The court found that the holdings in the underlying litigation established that the claims at issue were based upon a straightforward breach of contract and that National Union's I&O policy explicitly excluded claims arising out of alleged contractual liability. Accordingly, the I&O policy did not provide coverage for the underlying claims, and National Union had no obligation to reimburse the Foundation for its defense costs. The court also found that claims against the Foundation, sounding in contract, did not allege personal or advertising injury within the scope of umbrella coverage.

American Legacy sends a message to policyholders that a failure to pursue defense costs early in the underlying litigation, where a policy so requires, may result in a forfeiture, particularly where the underlying litigation subsequently reveals that the claims fall outside the scope of policy coverage. Along similar lines, a policyholder's failure to actively contest a coverage denial, via a declaratory judgment action or other means, may be relevant in determining whether reimbursement of unadvanced defense costs is warranted.

Choice of Law Alert:
Despite Limited California Ties, Florida Court Rules that California Law Governs Drywall Suit

Despite substantial Florida connections, a Chinese drywall insurance coverage dispute will be governed by California law, a federal court in Florida ruled. *American Home Assurance Co. v. Peninsula II Developers, Inc.*, No. 09-23691 (S.D. Fla. Oct. 19, 2010). Applying the *lex loci contractus* principle, the court ruled that because the last act necessary to complete the insurance contracts took place in California, California law governs the dispute. Courts disagree as to whether the last necessary act to issuance of an insurance policy

is "(1) the place where an acceptance (or binder) is received, or (2) the place from which the acceptance (or binder) is sent." *Id.* at 15. Here, the court did not need to resolve this issue, as it was undisputed that the binder was neither sent from nor received in Florida.

Peninsula is interesting in several respects. First, application of California law seems to defy "common sense" given Florida's strong connection to the dispute. *Id.* at 12. The insured property is located in Florida and all three insureds are Florida entities. The only link to California is that an insurance agent's office was located in Los Angeles. Second, the court strictly adhered to the *lex loci* theory despite the fact that Florida courts have departed from *lex loci* in certain limited circumstances. Indeed, the Eleventh Circuit has endorsed an exception to the *lex loci* rule in the context of insurance policies covering a stationary risk (i.e., real property)—the precise scenario presented here. *See Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116 (11th Cir. 1990) (declining to apply *lex loci* to property insurance dispute and relying on Restatement principles and a "law of the situs" approach); *LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511 (11th Cir. 1997) (following *Shapiro* and applying the "significant relationship" test rather than *lex loci* rule to insurance dispute); *see also Great Am. E&S Ins. Co. v. Sadiki*, 170 Fed. Appx. 632 (11th Cir. 2006) (following *Shapiro* and *LaFarge*). Given the odd result in *Peninsula*, and the divergent approaches taken by Florida courts and the Eleventh Circuit in this context, an appeal may follow.

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"Sources praise [Simpson Thacher's] powerhouse [insurance] practice for its tremendous disputes offering, talented attorneys and ability to handle large, complex cases."

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