SIMPSON THACHER
INSURANCE LAW ALERT
SEPTEMBER 2013

This Alert discusses recent decisions relating to the "make whole" doctrine, the voluntary payments provision and the scope of additional insured coverage. We also report on rulings relating to coverage for advertising injury, unfair competition claims and lead paint public nuisance claims, among others. Please "click through" to view articles of interest.

- ***Connecticut Supreme Court Rules That "Make Whole" Doctrine Does Not Apply to Deductibles***

  The Connecticut Supreme Court ruled that insurers must be fully compensated for their losses before policyholders can recoup deductible payments from third parties. *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc.*, 2013 WL 3818112 (Conn. July 30, 2013). *Click here for full article*

- ***Texas Supreme Court Requires Insurer to Indemnify Voluntary Payments in Absence of Prejudice***

  The Texas Supreme Court ruled that an insurer is obligated to pay for a policyholder's voluntary replacement of defective products even though the policyholder initiated the program without insurer consent. *Lennar Corp. v. Markel America Ins. Co.*, 2013 WL 4492800 (Tex. Aug. 23, 2013). *Click here for full article*

- ***New York's Highest Court Will Rehear Duty to Defend Decision***

  The New York Court of Appeals granted a motion to rehear a ruling that held that an insurer that breached the duty to defend could not rely on policy exclusions to avoid indemnity obligations. *K2 Investment Grp., LLC v. American Guarantee & Liability Ins. Co.*, 2013 WL 4711158 (N.Y. Sept. 3, 2013). *Click here for full article*

- ***California Appellate Court Rules That Reservation of Rights Did Not Create Conflict of Interest***

  A California appellate court ruled that insurers' reservation of rights did not create a conflict of interest and that the policyholder was therefore not entitled to choose its own defense counsel. *Federal Ins. Co. v. MBL, Inc.*, 2013 WL 4506049 (Cal. Ct. App. Aug. 26, 2013). *Click here for full article*

- ***Illinois Appellate Court Rules That Named Insured's Breach of Notice Provision Does Not Necessarily Preclude Additional Insured Coverage***

  An Illinois appellate court ruled that a named insured's violation of a notice provision does not necessarily preclude coverage for additional insureds that have complied with their notice obligations. *Mt. Hawley Ins. Co. v. Robinette Demolition, Inc.*, 2013 WL 3864520 (Ill. App. Ct. July 26, 2013). *Click here for full article*

- ***Insurer Has No Duty to Indemnify Settlement in Lead Paint Public Nuisance Action, Says Ohio Court***

  An Ohio court held that an insurer had no duty to indemnify a settlement of a nuisance suit arising out of lead paint claims because the claims failed to allege covered "property damage." *Millennium Holdings, LLC v. Lumbermens Mutual Casualty Co.*, No. 00-CV-411388 (Ohio Ct. Common Pleas Aug. 9, 2013). *Click here for full article*

- ***California Supreme Court Rules That Policyholders May Assert Unfair Competition Law Claims Against Insurers***

  The California Supreme Court ruled that policyholders may bring state law Unfair Competition Law claims against insurance companies even where the alleged conduct violates the Unfair Insurance Practices Act, so long as the allegedly wrongful conduct also violates some other statute or common law. *Zhang v. Superior Court*, 57 Cal. 4th 364 (2013). *Click here for full article*

- ***Missouri Supreme Court Rules That Insurer Must Reimburse TCPA Settlement***

  The Missouri Supreme Court held that a general liability insurer that wrongfully refused to defend a fax blasting suit under the Telephone Consumer Protection Act was liable for the costs of settling the suit. *Columbia Casualty Co. v. HIAR Holding, L.L.C.*, 2013 WL 4080770 (Mo. Aug. 13, 2013). *Click here for full article*

- ***Insurer Has No Duty to Defend Price-Fixing Suit, Says California Court***

  A California district court ruled that a general liability insurer had no duty to defend price-fixing conspiracy claims because they were not even arguably within the scope of covered "advertising injury." *Epson Electronics America, Inc. v. Tokio Marine & Nachido Fire Ins. Co., Ltd.*, 2013 WL 3811203 (N.D. Cal. July 19, 2013). *Click here for full article*

- ***Second Circuit Asks New York's Highest Court to Rule on Validity of "Apportionment of Loss" Clause***

  The Second Circuit recently asked the New York Court of Appeals for guidance on the validity of an apportionment of loss clause in a fire insurance policy. *Quaker Hills, LLC v. Pacific Indem. Co.*, 2013 WL 4558688 (2d Cir. Aug. 29, 2013).
  Click here for full article

Subrogation Alert:

Connecticut Supreme Court Rules That "Make Whole" Doctrine Does Not Apply to Deductibles

Addressing a matter of first impression, the Connecticut Supreme Court ruled that insurers must be fully compensated for their losses before policyholders can recoup deductible payments from third parties. *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc.*, 2013 WL 3818112 (Conn. July 30, 2013).

Fireman's Fund issued an errors and omissions policy to TD Banknorth that contained a $150,000 deductible. Pursuant to the policy, Fireman's Fund defended and settled a negligence claim against TD Banknorth. TD Banknorth contributed $150,000 to the settlement, and Fireman's Fund contributed $204,000. Following the settlement, Fireman's Fund, as subrogee for TD Banknorth, sued third parties to recover the settlement payments. The suit resulted in a $208,000 payment. Fireman's Fund argued that it was entitled to the full payment as compensation for its settlement and defense costs. TD Banknorth claimed that under Connecticut's "make whole" doctrine, it was entitled to recover its $150,000 deductible payment before Fireman's Fund could be compensated. The Connecticut Supreme Court agreed with Fireman's Fund.

As a preliminary matter, the court expressly endorsed the "make whole" doctrine as the default rule in enforcing insurance contracts, an issue of prior uncertainty under Connecticut law. Under the doctrine, an insurer may not enforce its subrogation rights until the policyholder has been fully compensated for its injuries. The court clarified, however, that the "make whole" doctrine did not apply to deductibles, reasoning that a policyholder is considered fully compensated for its loss if it recovers all but the amount of the deductible. The court stated that "to

decide otherwise … 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."

Few courts have addressed the issue of whether the "make whole" doctrine applies to deductibles. Given the uncertainty of state law on this issue and the frequency of substantial deductibles in commercial policies, disputes in this context are likely to continue.

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Voluntary Payments Alert:

Texas Supreme Court Requires Insurer to Indemnify Voluntary Payments in Absence of Prejudice

Reversing an appellate court decision, the Texas Supreme Court ruled that an insurer is obligated to pay for a policyholder's voluntary program to replace defective products even though the policyholder initiated the program without the insurer's consent. *Lennar Corp. v. Markel America Ins. Co.*, 2013 WL 4492800 (Tex. Aug. 23, 2013).

Lennar, a home builder, used an insulation product later determined to be faulty in the construction of several hundred homes. The product allowed water to enter the homes, causing rot and other structural damage. When Lennar learned of the problem, it contacted all affected homeowners and offered to remove and replace the product. Lennar then notified Markel and its other liability insurers of this initiative. After Markel denied coverage, Lennar brought suit against Markel and a jury ultimately found in favor of Lennar. A Texas appellate court reversed, rendering judgment in Markel's favor. The Texas Supreme Court reversed the appellate court decision.

Markel's umbrella policy prohibits Lennar, "except at [its] own cost, [from] voluntarily mak[ing] any payment, assum[ing] any obligation, or incur[ring] any expense … without [Markel's] consent." Although it was undisputed that Lennar violated this provision, the Texas Supreme Court ruled that coverage would be forfeited only if Markel suffered prejudice as a result. The court further held that the jury was reasonable in finding that Markel did not establish prejudice as a result of Lennar's voluntary payments. The court stated: "The jury was entitled to credit evidence that, had Lennar not proceeded as it did, the damages would have worsened and the remediation costs increased." In so ruling, the court rejected Markel's argument that prejudice is established as a matter of law when an insurer is asked to indemnify a voluntary settlement in which it had no involvement, particularly where, as here, "the insured actively solicited claims which might otherwise never have been brought."

The Texas Supreme Court also held that Markel's policy covered the costs of determining whether damage existed in the first place (*i.e.*, the costs of removing all insulation in order to evaluate whether damage had occurred). The court reasoned that

policy language requiring Markel to cover all costs "because of property damage" encompassed the cost of identifying potential property damage. Finally, the court ruled that Markel's policy covered all remediation costs, even those that extended beyond Markel's policy period. The court explained: "For damage that occurs during the policy period, coverage extends to the 'total amount' of loss suffered as a result, not just the loss incurred during the policy period."

The implications of *Lennar* are uncertain. Although the ruling appears to establish a prejudice requirement for coverage denials based on breaches of voluntary payments provisions under Texas law, it leaves open the question of what constitutes prejudice in this context.

Defense Alerts:

New York's Highest Court Will Rehear Duty to Defend Decision

Our July/August 2013 Alert discussed a New York Court of Appeals ruling that held that an insurer that breaches the duty to defend could not rely on policy exclusions to avoid indemnity obligations. *K2 Investment Grp., LLC v. American Guarantee & Liability Ins. Co.*, 2013 WL 2475869 (N.Y. June 11, 2013). The decision was controversial, as it departed from prior New York case law in this context. Based on briefing by the insurer as well as several insurance organizations, the court granted a motion for rehearing, raising the possibility of a different outcome or reasoning. *K2 Investment Grp., LLC v. American Guarantee & Liability Ins. Co.*, 2013 WL 4711158 (N.Y. Sept. 3, 2013). We will continue to monitor developments and keep you apprised.

California Appellate Court Rules That Reservation of Rights Did Not Create Conflict of Interest

A California appellate court ruled that insurers' reservation of rights did not create a conflict of interest and that the policyholder was therefore not entitled to choose its own defense counsel. *Federal Ins. Co. v. MBL,*

Inc., 2013 WL 4506049 (Cal. Ct. App. Aug. 26, 2013).

MBL was named as a third-party defendant in dry-cleaning contamination suits. MBL tendered the suits to its insurers, which agreed to defend under a reservation of rights. MBL refused to accept insurers' choice of counsel, arguing that the reservation of rights created a conflict of interest. MBL sought to retain its own counsel to be funded by the insurers. The insurers brought a declaratory judgment action seeking a ruling that there was no conflict of interest. A trial court granted the insurers' motion for summary judgment, and the appellate court affirmed.

Under California law, a policyholder may be entitled to retain independent counsel at the insurer's expense if a conflict of interest exists between the insurer and policyholder, based on possible non-coverage under the policy. *See* Cal. Civil Code § 2860. However, "not every conflict of interest triggers an obligation on the part of the insurer to provide the insured with independent counsel at the insurer's expense." For independent counsel to be required, the conflict of interest must be "significant, not merely theoretical; actual, not merely potential." Thus, there is no right to independent counsel when the coverage issues are independent of the disputed issues in the underlying action.

Applying these standards, the court rejected MBL's contentions that pollution exclusions in the policies and/or a dispute over the number of occurrences presented by the claims created conflicts. The court explained that because the insurers did not specifically

reserve the right to deny coverage on those bases, there was no actual conflict. As to the one insurer that did explicitly reserve its right to deny coverage on the basis of a pollution exclusion, the court still found no conflict, explaining that application of the pollution exclusion would not be litigated in the underlying suit against MBL, which sought contribution for CERLCA costs. The court also ruled that a conflict was not created by the insurers' reservation of the right to deny coverage for damages occurring outside their respective policy periods. The court explained that both the insurers and MBL shared a common interest in defeating liability and that a coverage issue relating only to the timing of damages did not create a conflict under Section 2860. Finally, the court held that a conflict was not created by certain insurers' defense of other third party defendants in the underlying action because different law firms defended the other policyholders and separate adjusters handled the claims.

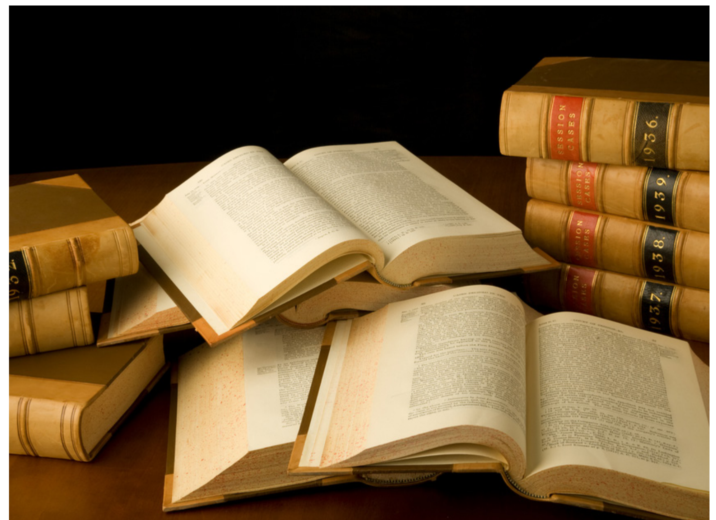
As discussed in our January 2012 Alert, other courts have rejected similar attempts to retain independent counsel on the basis of an insurer's reservation of rights.

Notice Alert:

Illinois Appellate Court Rules That Named Insured's Breach of Notice Provision Does Not Necessarily Preclude Additional Insured Coverage

An Illinois appellate court ruled that a named insured's violation of a notice provision does not necessarily preclude coverage for additional insureds that have complied with their obligations under the policy's notice provision. *Mt. Hawley Ins. Co. v. Robinette Demolition, Inc.*, 2013 WL 3864520 (Ill. App. Ct. July 26, 2013).

The coverage dispute arose out of a construction site injury. An injured worker brought suit against Robinette, a demolition company, and Valenti, a contractor. Both were additional insureds under a general liability policy issued by Mt. Hawley to Cobra, a concrete cutter. When the defendants turned to Mt. Hawley for defense of the suit, Mt. Hawley denied coverage on the basis of the policy's notice provision. In particular, Mt. Hawley argued that because Cobra, the named insured, failed to provide notice of the accident "as soon as practicable," coverage for additional insureds was forfeited. Although Cobra's late notice was not contested, Robinette and Valenti argued that they were nonetheless entitled to additional insured



coverage because they had complied with the notice obligations under the policy. The trial court ruled in Mt. Hawley's favor, finding that the named insured's notice violation precluded additional insured coverage. The appellate court reversed.

The appellate court's decision turned on applicable policy language. It reasoned that because the policy contained different notice obligations for named and additional insureds, a violation by the former would not necessarily preclude coverage for the latter. Because it was undisputed that Robinette and Valenti complied with their obligation to forward copies of suit papers immediately, the appellate court found that they were entitled to additional insured coverage.

The ruling highlights the importance of policy language in additional insured coverage cases. The

court noted that had the parties intended to make coverage for additional insureds contingent upon the named insured's compliance with notice provisions, it could have included specific language to that effect.

Coverage Alert:

Insurer Has No Duty to Indemnify Settlement in Lead Paint Public Nuisance Action, Says Ohio Court

An Ohio court ruled that an insurer had no duty to indemnify a settlement in an underlying nuisance suit arising out of lead paint claims because the claims failed to allege covered "property damage." *Millennium Holdings, LLC v. Lumbermens Mutual Casualty Co.*, No. 00-CV-411388 (Ohio Ct. Common Pleas Aug. 9, 2013).

A public nuisance action was brought against Millennium Holdings seeking the abatement of lead paint in various properties. After the case settled, Millennium turned to its primary and excess liability insurers for indemnification. The insurers denied coverage, arguing among other things, that the settlement resolved a claim that was outside the scope of coverage provided by the applicable policies. The court agreed.

The court held that the insurers had no duty to indemnify the settlement because it did not provide compensation for covered "property damage." The court noted that the underlying nuisance action sought "remediation of a public health hazard" and that a related nuisance action based on damage to property had been barred. Similarly, negligence and strict liability claims based on property damage had been dismissed in the underlying action. In light of these rulings, the court reasoned that "whether or not lead had actually resulted in an injury to any property was not an element of the remaining nuisance claim and could not have been the basis for liability being imposed on the Millennium Plaintiffs." As such, the public nuisance claim "was not covered under [the insurers'] policies for property damage." Additionally, the court held that the insurers had no duty to indemnify the settlement because it fell outside the applicable policy periods. The court explained that public nuisance claims trigger a policy if a lawsuit is brought during the policy period or if during the policy period, lead accumulates to an amount sufficient to constitute a public hazard. Because neither event occurred during the applicable periods, the court concluded that policies did not provide coverage for the settlement.

Unfair Competition Alert:

California Supreme Court Rules That Policyholders May Assert Unfair Competition Law Claims Against Insurers

The California Supreme Court ruled that policyholders may bring state Unfair Competition Law ("UCL") claims directly against insurance companies even where the alleged conduct violates the Unfair Insurance Practices Act ("UIPA"), so long as the allegedly wrongful conduct also violates some other statute or common law. *Zhang v. Superior Court*, 57 Cal. 4th 364 (2013). The ruling clarifies previously unsettled state law regarding policyholders' right to assert claims that allege conduct proscribed by the UIPA.

Zhang sued her general liability insurer alleging breach of contract, bad faith and violation of the UCL. The UCL claim alleged that the insurer had engaged in false advertising by promising to provide coverage in the event of a covered loss, when it had no intention of doing so. The insurer demurred to the UCL claim, arguing that Zhang's UCL claims were based on conduct proscribed by the UIPA, for which there is no private right of action. A California trial court agreed and sustained the demurrer. An appellate court reversed, finding that the false advertising allegations provided an independent basis for a UCL cause of action. The California Supreme Court affirmed.

The California Supreme Court's ruling turned on its interpretation of *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal. 3d 287 (1988), which held that there is no private right of action under the UIPA. In the wake of *Moradi-Shalal*, California courts have issued mixed rulings as to whether a policyholder may bring a UCL claim based on conduct that is also covered by the UIPA. Resolving this split, the California Supreme Court ruled that *Moradi-Shalal* does not preclude first party UCL claims (claims asserted by a policyholder against its insurer) based on conduct covered by the UIPA, so long as the allegedly wrongful conduct violates other state statutory or common law.

The impact of the decision may be limited for several reasons. First, the court emphasized that plaintiffs must be able to establish economic injury caused by the alleged unfair competition in order to pursue a UCL claim. Second, the remedies for UCL claims are limited, generally extending only to injunctive relief and restitution. Finally, the decision applies to claims brought by a policyholder against its insurer and does not resolve the question of whether UCL claims may be asserted against an insurer by policy beneficiaries or other third parties.

Advertising Injury Alerts:

Missouri Supreme Court Rules That Insurer Must Reimburse TCPA Settlement

The Missouri Supreme Court ruled that a general liability insurer that wrongfully refused to defend a fax blasting suit under the Telephone Consumer Protection Act ("TCPA") was liable for the costs of settling the suit. *Columbia Casualty Co. v. HIAR Holding, L.L.C.*, 2013 WL 4080770 (Mo. Aug. 13, 2013).

The coverage dispute arose from a TCPA class action against the policyholder. Columbia Casualty refused to defend, arguing that the suit fell outside the scope of coverage. The policyholder ultimately reached a court-approved settlement with the class. The class, subrogated to the rights of the policyholder, then sued Columbia Casualty for payment of the settlement. A Missouri trial court ruled that Columbia Casualty had a duty to defend the suit because the claims alleged "advertising injury" and "property damage" within the meaning of the policy. The trial court further found that Columbia was required to indemnify the full settlement amount because it had wrongfully refused to defend. The Missouri Supreme Court affirmed.

First, the court rejected the argument that a TCPA statutory damages award ($500 charge per violation) is outside the scope of "damages" in the policy. The court reasoned that the TCPA statutory damage award is remedial rather than penal in nature, and that the undefined term "damages" encompassed such awards. In reaching this result, the court overruled Missouri lower court cases that distinguish between TCPA damages based on actual monetary loss (deemed remedial) and TCPA damages based on the $500 per violation statutory provision (deemed penal).

Second, the court rejected the notion that the TCPA claims did not allege an "occurrence" because the act of sending junk faxes was intentional rather than accidental. The court reasoned that because the policyholder did not intend to cause harm when it sent the junk faxes, coverage was not precluded on the basis of uninsurable intentional conduct.

Third, the court held that TCPA violations are advertising injury, defined by the policy as a violation of "a person's right to privacy." The court reasoned that the right to privacy is not limited to the right to secrecy (*i.e.*, the right to keep the content of certain material private) but rather includes the right to seclusion (*i.e.*, the right to be free from unwanted intrusions). As discussed in our March 2010 Alert, courts are divided as to whether general liability policies provide advertising injury coverage for fax blasting claims.

Finally, the court ruled that an insurer that wrongfully refuses to defend may be held liable to indemnify the policyholder for any "reasonable" judgment. Typically, an insurer is entitled to litigate the reasonableness of the damage award. Here, however, the court noted that reasonableness was already established because the class action award had been approved by a court following a hearing.

Insurer Has No Duty to Defend Price-Fixing Suit, Says California Court

A California district court ruled that a general liability insurer had no duty to defend price-fixing conspiracy claims because such claims were not even arguably within the scope of covered "advertising injury." *Epson Electronics America, Inc. v. Tokio Marine & Nachido Fire Ins. Co., Ltd.*, 2013 WL 3811203 (N.D. Cal. July 19, 2013).

Epson was named as a defendant in multi-district litigation alleging a price-fixing conspiracy. Epson sought a defense from its liability insurer, Tokio Marine, on the basis that the claims implicated the "advertising injury" provision of the policy. The court disagreed and granted Tokio Marine's summary judgment motion.

The court held that the underlying claims against

Epson, no matter how liberally construed, did not fall within the scope of advertising injury. The complaints alleged that Epson made false promotional statements justifying the relatively high prices it was charging for its products. The relevant inquiry was whether the facts alleged, rather than labels or theories, would demonstrate a possibility of coverage. The court held that it would be an "unwarranted stretch" to classify such statements as "advertisements." Furthermore, the court held that even if that were not the case, Epson's claim for coverage would nonetheless fail because there was no "use of another's advertising idea," as required by the advertising injury provision. In this context, the court rejected the argument that Epson used another's advertising idea by copying the false price explanations of other co-conspirators. The court explained that policy language referring to "use of another's advertising idea" contemplates a misappropriation claim.

The court's refusal to impose a duty to defend serves as a reminder that an insurer's defense obligations are not without limits. As the court noted, it need not accept a policyholder's "attempt to characterize the underlying complaints as implicating [covered] claims" where to do so would "stretch[ ] the policy language beyond any reasonable interpretation."

Property Insurance Alert:

Second Circuit Asks New York's Highest Court to Rule on Validity of "Apportionment of Loss" Clause

The Second Circuit recently asked the New York Court of Appeals for guidance on the validity of an apportionment of loss clause in a fire insurance policy. *Quaker Hills, LLC v. Pacific Indem. Co.*, 2013 WL 4558688 (2d Cir. Aug. 29, 2013).

Pacific Indemnity issued a fire insurance policy to Quaker Hills that provided approximately $14 million in coverage. However, the policy contained an apportionment of loss clause, which reduced Pacific Indemnity's liability to 38% of any loss. Pacific Indemnity explained that the clause was included at the policyholder's request in exchange for lower premiums. Although Quaker Hill denied this contention, the court found that Quaker Hill "was aware of and assented to its inclusion in the policy." During the policy period, a fire occurred, resulting in a total loss of the property. Quaker Hill sought more than $26 million in losses and replacement costs. Pacific Indemnity refused to pay more than $5.5 million, representing

38% of the $14 million coverage. In ensuing litigation, Quaker Hill argued that the apportionment of loss clause was unenforceable because it did not meet the minimum requirements imposed by New York's Standard Fire Insurance Policy (codified in N.Y. Ins. Law § 3404). In contrast, Pacific Indemnity argued that apportionment of loss clauses are analogous to co-insurance clauses, which have been routinely enforced under New York law.

A New York federal district court sided with Quaker Hill, finding that the apportionment of loss clause was void under New York law. The court reasoned that the policy failed to meet the statutory minimum coverage requirements for the lesser of "the actual cash value of the property at the time of loss" or "the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss" or "the value of the property as predetermined in the policy." The district court ruled that decisions enforcing co-insurance provisions (which divide risk between the insurer and the policyholder when the policy fails to cover the total value of the property) were not analogous because they pertain to instances of partial loss, rather than total loss, as was the case here.

On appeal, the Second Circuit noted the lack of controlling precedent as to whether apportionment of loss clauses should be upheld as analogous to co-insurance clauses in the event of a total loss. Therefore, the Second Circuit certified to the New York Court of Appeals the following questions:

(1) In an insurance policy that provides a stated dollar amount of loss coverage in the event of a fire, does a policy clause that, in exchange for a reduction in the premium charged, limits the insurer's liability to a percentage of any loss violate New York insurance law?

(a) If such a clause violates New York Insurance Law, is the clause void, or is it voidable or subject to principles of waiver or estoppel?

(2) If such a clause is in general permissible under New York Insurance Law, is it enforceable where there has been a total loss of the subject property?

(3) If such a clause is in general permissible under New York Insurance Law, is there a limit on the percentage of liability that can be apportioned to the insured?

We will keep you updated on future developments in this and other noteworthy property insurance matters.

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

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