

ALERT

Second Circuit Certifies Question Regarding Make Whole Doctrine and Deductibles to Connecticut Supreme Court

May 17, 2011

The United States Court of Appeals for the Second Circuit has certified to the Connecticut Supreme Court the question whether an insurance policy deductible is subject to Connecticut's "make whole doctrine," which provides that an insurer may enforce its subrogation rights only after the insured has been fully compensated for its loss. *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc.*, 2011 WL 1601993 (2d Cir. Apr. 29, 2011). In doing so, the appellate court rejected the district court's conclusion that the policy's subrogation provision abrogated the make whole doctrine, but concluded that state law was unsettled as to whether the doctrine applied to deductibles in the first instance.

The United States District Court for the District of Connecticut entered judgment in favor of an insurer, holding that, where an E&O policy contained a subrogation clause, all funds held in escrow as proceeds from the settlement of third-parties claims should go to the insurer despite Connecticut's make whole doctrine and the fact that the insured had satisfied a \$150,000 deductible before the E&O carrier paid the balance of the underlying claim. The insured appealed.

On review, the appellate court first noted that, under Connecticut law, insurers have a common law right of subrogation even in the absence of express contractual subrogation provisions. It further determined that "boilerplate" subrogation clauses in insurance policies simply restate this right and do not otherwise increase a carrier's common law rights. As a result, the appellate court determined that the lower court erred in determining that the "boilerplate" subrogation clause in the E&O policy contained language sufficient to abrogate the common

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law make whole doctrine. However, the court also concluded that there was no clear guidance under Connecticut law as to whether the make whole doctrine applied to deductibles, and noted that there were “strong arguments” that it should not, as insurance contracts anticipate that the insured will bear the loss related to satisfying a deductible, not the insurer. Accordingly, the court certified the following question to the Connecticut Supreme Court: are insurance policy deductibles subject to Connecticut’s make whole doctrine?