Simpson Thacher

Insurance Law Alert

March 2015

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> "We have used other firms for insurance to just get a case worked up, but if it looks like it's going to go to trial, we will switch counsel to Simpson Thacher. That alone sends the other side a message that things are getting serious."
>
> *–Benchmark Litigation 2015*

"Innocent Insured" Doctrine Does Not Prevent Insurer from Rescinding Policy

The Illinois Supreme Court ruled that the "innocent insured" doctrine does not preclude an insurer from rescinding a policy based on misrepresentations in the policy application. *Illinois State Bar Assoc. Mut. Ins. Co. v. Law Office of Tuzzolino and Terpinas*, No. 117096 (Ill. Feb. 20, 2015). (click here for full article)

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The Fifth Circuit ruled that houses with a design based on an infringed copyright constituted "advertisements" for the purposes of liability coverage. *Mid-Continent Cas. Co. v. Kipp Flores Architects, L.L.C.*, 2015 WL 795882 (5th Cir. Feb. 26, 2015). (click here for full article)

Indiana Supreme Court Rules That Broker May Be Liable for Insufficient Coverage Based on "Special Relationship" with Policyholder

The Indiana Supreme Court denied a broker's summary judgment motion on the basis that questions of fact existed as to a special relationship with the policyholder. *Indiana Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc.*, 2015 WL 1087199 (Ind. Mar. 12, 2015).
(click here for full article)

Delaware Supreme Court Rules That Statutory Damages Are Not Excluded "Penalties"

The Delaware Supreme Court ruled that damages imposed against a policyholder pursuant to a Louisiana state statute were not excluded "penalties" under an errors and omissions policy. *CorVel Corp. v. Homeland Ins. Co. of N.Y.*, 2015 WL 1021459 (Del. Mar. 6, 2015).
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Florida Court Rules That Policy Limits Determine Amount in Controversy for Diversity Jurisdiction

A Florida federal district court ruled that the $75,000 amount-in-controversy requirement for diversity jurisdiction was met where the governing policy's limit was $300,000. *Witherup v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 419064 (M.D. Fla. Feb. 2, 2015).
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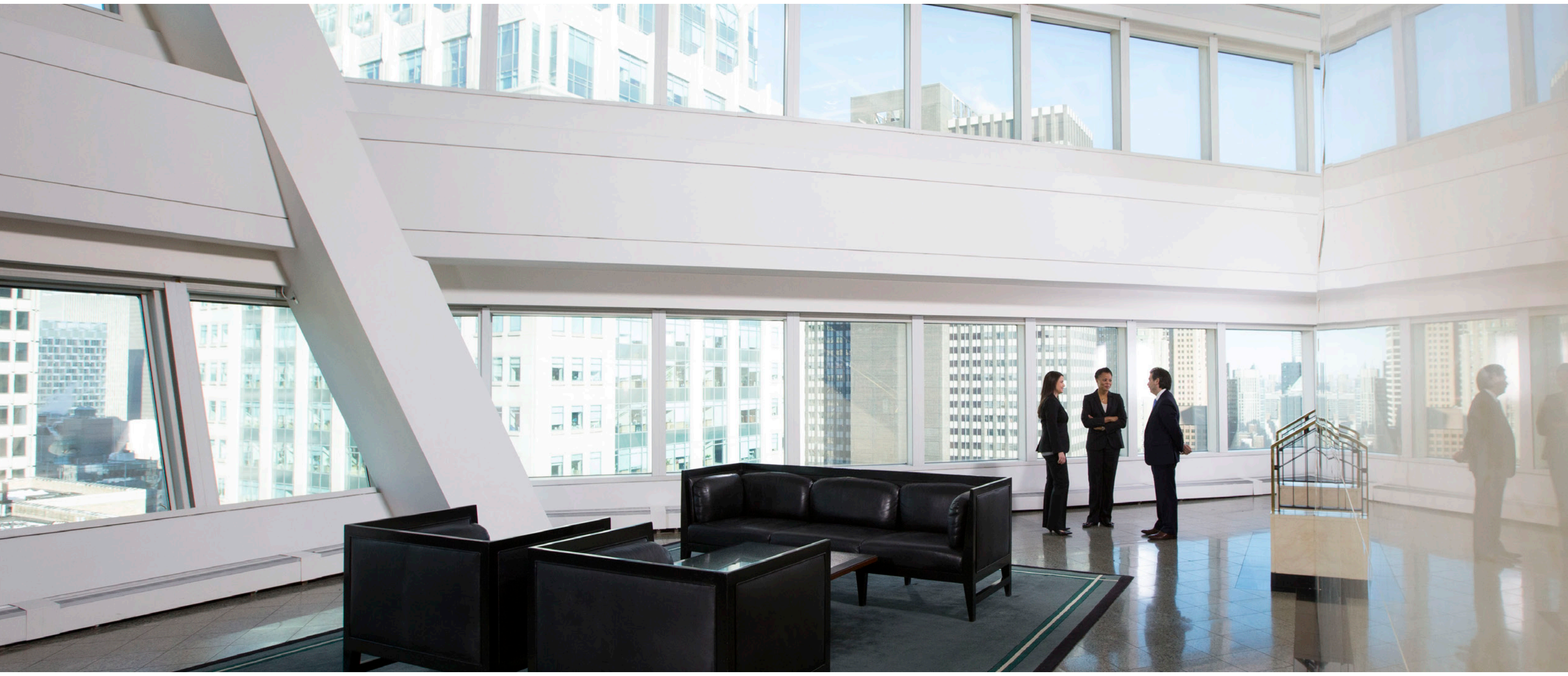


Rescission Alert:

"Innocent Insured" Doctrine Does Not Prevent Insurer from Rescinding Policy

The Illinois Supreme Court ruled that the "innocent insured" doctrine does not preclude an insurer from rescinding a policy based on misrepresentations in the policy application. *Illinois State Bar Assoc. Mut. Ins. Co. v. Law Office of Tuzzolino and Terpinas*, No. 117096 (Ill. Feb. 20, 2015).

A law firm was insured by the Illinois State Bar Association Mutual Insurance Company ("ISBA"). In a renewal application for the policy, Sam Tuzzolino (a member of the law firm) had represented that the firm was not aware of any circumstances that could give rise to a claim, when in fact he had recently attempted to settle potential malpractice claims. When ISBA learned of this information, it sought to rescind the policy. An Illinois circuit court granted ISBA's summary judgment motion, ruling that rescission was proper and that ISBA had no duty to defend an underlying malpractice suit against the firm, Tuzzolino, and Will Terpinas, another member of the law firm who had not participated in the preparation of the policy. Terpinas appealed, arguing that he was an "innocent insured" with respect to the misrepresentation. An appellate court agreed, and held that the policy should not be rescinded as to that attorney. The Illinois Supreme Court reversed.

Illinois statutory law permits rescission if a statement made in the application is false and either (1) made with actual intent to deceive or (2) materially affects the risk assumed by the insurer. *See* Ill. Ins. Code 215 ILCS 5/154. Terpinas did not dispute that the misrepresentations at issue were material, but argued that Section 215 rescission was barred by a "common law innocent insured doctrine." The Illinois Supreme Court disagreed. The court held that the doctrine is limited to cases in which an innocent insured seeks to recover under a policy notwithstanding application of a policy exclusion (usually relating to intentional or wrongful acts) as to other insureds. The court explained that "the rationale for applying the innocent insured doctrine to questions of policy exclusions and insurance coverage is absent from the rescission context." Although an insured's innocence is relevant to whether an intentional acts exclusion applies, it is irrelevant to the rescission analysis because Section 215 allows rescission as to innocent insureds so long as the misrepresentation was material.

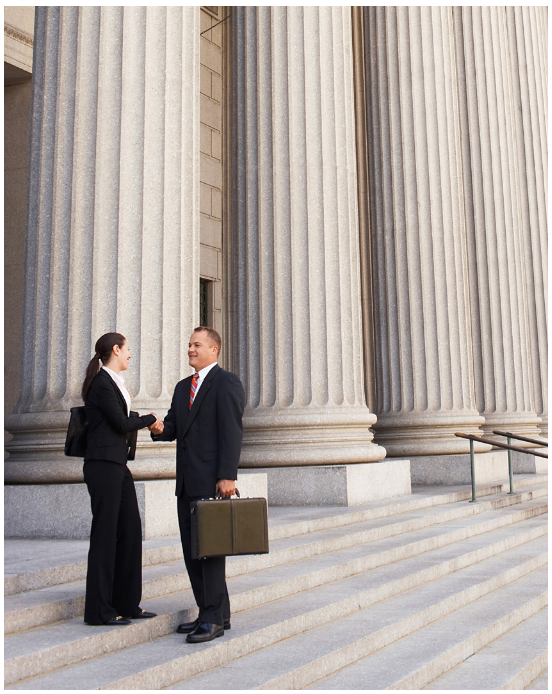
The court also rejected Terpinas' assertion that a severability clause allowed for partial rescission, reasoning that although the clause creates a "separate agreement for each insured," it does not "permit the application—or the misrepresentations it contains—to be split off from any individual contract."

Three other courts have also recently allowed insurers to rescind policies based on misrepresentations in policy applications. *See Maryland Cas. Co. v. Malone*, 2015 WL 1088105 (N.D. Ga. Mar. 11, 2015) (rescission of liability policy proper because misrepresentations in application were false and material as a matter of law); *Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc.*, 778 F.3d 69 (1st Cir. 2015) (marine policy voidable under *uberrimae fidei* doctrine, which requires insured to make full disclosure of all material facts); *Morales v. Castlepoint Ins. Co.*, 2015 WL 775007 (N.Y. App. Div. 2d Dep't Feb. 25, 2015) (property policy void as a result of material misrepresentation in application, even if made without policyholder's authority, because policyholder ratified representations by accepting and renewing policy).

False Claims Act Alert:

Two Courts Address Insurer's Duty to Defend False Claims Act Suits

An Illinois federal district court ruled that a liability insurer was obligated to defend an underlying *qui tam* suit filed under the False Claims Act ("FCA") because the suit alleged wrongful employment practices within the scope of policy coverage. *United States Liab. Ins. Co. v. Sigmatek, Inc.*, 2015 WL 801504 (N.D. Ill. Feb. 20, 2015).



A former employee of Sigmatek, a manufacturer of gun mounting systems, sued the company alleging violations of the FCA. The complaint alleged that Sigmatek knowingly submitted false documents to federal agencies in order to receive more than $20 million in government contracts. Sigmatek tendered defense of the FCA suit to its insurer, who denied coverage on the basis that the complaint did not allege covered "wrongful employment practices." The court disagreed.

The insurance policy covered any "Claim" made against Sigmatek for "Wrongful Acts," defined as any actual or alleged act of discrimination, harassment, retaliation, wrongful termination, or workplace tort. The court concluded that the FCA complaint supported a claim for "Wrongful Acts" because it alleged a violation of Section 3730(h) of the FCA (entitled "relief from retaliatory actions"), which permits an employee to obtain damages for harassment, discrimination, or discharge. Although only one paragraph of the 200-plus paragraph complaint contained such wrongful act-based allegations, the court noted that the aforementioned paragraph was incorporated in each of the six counts of FCA violations. The court held that "incorporating Section 3730(h) in each count, along with his broad prayer for all relief to which he may reasonably appear entitled to, is sufficient to assert a claim for relief for wrongful employment practices." The court therefore ruled that the insurer had a duty to defend the FCA action. Importantly, the court distinguished cases in which the underlying *qui tam* plaintiff did not seek damages for wrongful employment acts. The insurer filed an appeal to the Seventh Circuit on March 20, 2015.

A Louisiana federal district court reached a different conclusion in *XL Specialty Ins. Co. v. Bollinger Shipyards, Inc.*, 2015 WL 853993 (E.D. La. Feb. 26, 2015). In *Bollinger*, the coverage dispute turned on whether the policyholder had provided timely notice of FCA claims under two claims-made D&O policies. The court held that it did not, and therefore that the insurers had no duty to defend.

The FCA suit arose out of a ship conversion project that Bollinger had completed for the U.S. Coast Guard. Bollinger sought coverage from several insurers for the costs of defending the suit. The insurers refused to defend on the basis that Bollinger failed to report a claim within the policies' applicable deadlines. Both policies at issue required claims to be reported during the policy period or within thirty days after the end of the policy period. Because the factual record established that notice was not provided within the designated time frame of either policy, the court found no coverage. In so ruling, the court expressly rejected Bollinger's argument that notice should be considered timely because its "Policy Period has been extended year after year by its repeated renewals of its D&O coverage." As the court noted, Louisiana law rejects this "merged into one" argument for notice requirements in back-to-back claims-made policies. Last month, the Colorado Supreme Court rejected a similar "seamless coverage" argument in *Craft v. Philadelphia Indemnity Insurance Co.*, 2015 WL 658785 (Colo. Feb. 17, 2015) (reported in our February 2015 Alert).

Duty to Defend Alert:

Louisiana Appellate Court Refuses to Prorate Defense Costs for Long Latency Disease Claims

A Louisiana appellate court ruled that an insurer was required to fully fund a policyholder's future defense costs in a long latency disease case even though the insurer's policies covered less than five percent of the time span during which underlying plaintiffs' alleged exposure occurred. *Arceneaux v. Amstar Corp.*, 2015 WL 798980 (La. Ct. App. Feb. 25, 2015).

The coverage dispute arose out of occupational hearing loss claims asserted by employees of the policyholder, American Sugar. The suit alleged that employees' exposure to industrial noise at American Sugar's refinery resulted in hearing loss. American Sugar sought coverage from Continental under liability policies in effect from 1963 to 1978. Continental did not provide a defense, but agreed to pay twenty-five percent of the defense costs, reserving its right to contest its duty to defend. Thereafter, American Sugar filed suit seeking reimbursement from Continental for 100% of the defense costs incurred in the underlying litigation since its inception, as well as a declaration that Continental owed a full defense going forward. In response, Continental argued that Louisiana law allows for the proration of defense costs based on an insurer's time on the risk in long latency disease cases, and thus that Continental was responsible for only 4.3 percent of the total defense costs (reflecting its 26 month period of coverage during a 60 year period of exposure). A Louisiana trial court disagreed and granted American Sugar's summary judgment motion as to future defense costs, but denied the claims for reimbursement for past defense costs. The appellate court affirmed.

Although Louisiana law endorses pro rata allocation of indemnity costs among insurers in continuous injury cases, Louisiana courts have not directly addressed whether such allocation should extend to defense costs as well. Although the court noted that numerous other jurisdictions have applied pro rata allocation to defense costs as a matter of equity, the court declined to do so here. The court acknowledged that the Louisiana Supreme Court "seem[ed] to indicate that the jurisprudence is moving in the direction of proration of the duty to defend," *see Southern Silica of La., Inc. v. La. Ins. Guar. Ass'n*, 979 So.2d 460 (La. 2008), but nonetheless concluded that precedent was "fundamentally distinguishable from the present case." An appeal may be forthcoming, as the appellate court expressly noted that the present case presented an opportunity for the Louisiana Supreme Court to "decide to extend and/or clarify the law on this issue."

Data Breach Alert:

Eleventh Circuit Rules That Insurance Does Not Cover Cyber Theft Losses

The Eleventh Circuit ruled that a property, liability, and crime policy did not provide coverage for losses resulting from the electronic theft of funds by cyber hackers. *Metro Brokers, Inc. v. Transp. Ins. Co.*, 2015 WL 925301 (11th Cir. Mar. 5, 2015).

Metro Brokers maintained bank accounts with Fidelity Bank. In 2011, thieves used a computer virus to gain access to Metro Brokers employee identification numbers and passwords, and illegally authorized the transfer of payments from a Metro Brokers client's account to other accounts. Metro Brokers sought coverage from Transportation Insurance Company ("TIC") pursuant to a Fraud and Alteration endorsement. TIC denied coverage, citing a "malicious-code and system penetration exclusion." In ensuing litigation, a Georgia district court granted TIC's summary judgment motion. The Eleventh Circuit affirmed.

The Eleventh Circuit ruled that the loss was not covered by the Fraud and Alteration endorsement, which provided coverage for "loss resulting directly from 'forgery' or alteration of, on, or in any check, draft, promissory note, bill of exchange, or similar written promise, order or direction to pay a sum certain." The term "forgery" was defined as "the signing of the name of another person or organization with intent to deceive." The court held that the electronic fund transfers did not involve any of the written instruments listed in the endorsement and could not be characterized as a "written promise, order or direction to pay." In so ruling, the court noted that under federal and Georgia law, electronic fund transfers are distinguished from and treated differently than fund transfers made by check, draft, or bill of exchange. The court also held that because the theft did not involve the "signing of [a] name," there was no forgery under the policy. In this context, the court held that the use of stolen identification numbers and passwords is not equivalent to the signing of another person's name. Although a Georgia appellate court has held that the theft of a bank card and personal identification number constituted a "forgery" under a homeowners policy, the *Metro Brokers* court distinguished that decision on the basis that the term "forgery" was undefined in the policy at issue in that case, whereas here, the term was "expressly and unambiguously" defined.

Bad Faith Alert:

Eleventh Circuit Upholds Sanctions Against Non-Party for Bad Faith Witness Preparation

The Eleventh Circuit ruled that a Florida district court did not abuse its discretion by imposing sanctions against a non-party for its bad faith preparation of a trial witness. *Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 2015 WL 795593 (11th Cir. Feb. 26, 2015).

Lincoln National Life Insurance issued a $5 million life insurance policy to Barton Cotton. Upon Cotton's death, Lincoln discovered that Cotton had used Imperial Premium Finance Company to finance the purchase of the policy in order to market it to speculators under an illegal stranger-originated life insurance scheme. In ensuing litigation, Lincoln sought to depose Imperial, which was not a party to the suit but was under criminal investigation at the time. Imperial sought a stay of its deposition based on Fifth Amendment issues or, alternatively, permission to prepare and use an outside witness to testify as a designated corporate representative. The court allowed use of an outside witness and Imperial hired Norris, an independent economist. During Norris's deposition and examination at trial, he was unable to answer a significant number questions about Imperial or the transaction at issue. After the jury returned a verdict in favor of the Cotton trust, the court *sua sponte* raised the issue of sanctions against Imperial and Norris based on Norris's "blatant [ ] failure to follow the rules for a designated witness." Following a hearing, the court imposed $850,000 in sanctions against Imperial, finding that Norris had "exhibited deliberate ignorance to any inquiry harmful to Imperial's interests while at the same time trying to affirmatively help the Trust and Imperial's counsel at every opportunity." The Eleventh Circuit affirmed.

The Eleventh Circuit held that improper and strategic witness preparation was a sufficient

basis for sanctions. The court explained that selectively educating a designated witness constitutes bad faith if the witness is "knowledgeable about the helpful facts and dumb about harmful ones." In so ruling, the court deemed it irrelevant that Lincoln did not object to Norris's testimony, noting that even if Lincoln was arguably estopped from seeking sanctions for failure to raise the issue, such estoppel had no effect on the court's inherent power to raise and address a sanctions issue. Although the decision sends a clear message about the improper use of a designated witness for strategic purposes, the factual record in this case—namely, that Imperial's conduct was the "driving force behind the litigation"—may have been a significant factor.

Advertising Injury Alert:

Fifth Circuit Rules That Houses Are "Advertisements" for Purposes of Advertising Injury Coverage

Our February 2015 Alert reported on an Illinois appellate court decision holding that in store displays constituted "advertisements" under an advertising injury provision. Last month, the Fifth Circuit adopted a similarly expansive interpretation of the term, concluding that houses with a design based on an infringed copyright constituted "advertisements" for the purposes of liability coverage. *Mid-Continent Cas. Co. v. Kipp Flores Architects, L.L.C.*, 2015 WL 795882 (5th Cir. Feb. 26, 2015).

In litigation between an architecture firm and a home builder, a jury found that the builder committed copyright infringement by building homes based on the architect's copyrighted designs without paying the required license fee. Mid-Continent argued that it had no duty to indemnify the underlying judgment because it did not arise from covered advertising injury. The policy defined advertisement as "a notice that is broadcast or published to the general public … for the purpose of attracting customers or supporters." Mid-Continent argued that because a house is not a "notice" and cannot be "broadcast" or "published," it cannot be an advertisement as a matter of law. The court disagreed. The court reasoned that "the houses themselves were used to attract customers" and were the builder's "primary form of marketing" because homebuyers viewed model homes, yard signs, and floor plans prior to purchasing a home. The court further reasoned that Texas law supported an expansive interpretation of the terms "notice" and "broadcast" to encompass the general act of imparting information to the public.

Broker Alert:

Indiana Supreme Court Rules That Broker May Be Liable for Insufficient Coverage Based on "Special Relationship" with Policyholder

Although it is well established that insurance brokers owe a duty of reasonable care to their clients, a broker generally has no duty to provide specific coverage advice unless the broker and the insured have a "special relationship." The existence of a special relationship depends on several factors, including but not limited to the following: (1) whether the broker holds himself out as a highly-skilled expert; (2) whether the policyholder relied on the broker's expertise in its coverage decisions; and (3) whether the broker received compensation, above the customary premiums, for the advice provided. Although this inquiry is inherently fact-driven, courts frequently dismiss special relationship allegations as a matter of law. In a recent decision, however, the Indiana Supreme Court ruled that summary judgment was improper because questions of fact existed as to a special relationship. *Indiana Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc.*, 2015 WL 1087199 (Ind. Mar. 12, 2015).

The Indiana Supreme Court held that the factual record supported "conflicting inferences" as to a special relationship. Several factors mitigated against a finding of a special relationship: the broker received no extra commission for specialized expertise; the parties had not met in person until the insurance claim at issue arose; and policy limit increases were typically initiated by the policyholder rather than the broker. However, the court noted that other evidence weighed in favor of a special relationship: the extensive length of the parties' relationship; the issuance of annual questionnaires by the broker to the policyholder about insurance needs; the broker's representations in marketing materials that it was an "authorized administrator" for the specific type of coverage at issue; and the broker's routine distribution of "risk review" newsletters (authored by a third-party) to clients. In denying summary judgment, the court noted the "high bar" for summary judgment under Indiana law and emphasized that special relationships remain the exception rather than the rule.

As reported in our March 2014 Alert, the New York Court of Appeals similarly reversed a summary judgment ruling in favor of a broker, finding questions of fact as to a special relationship. *Voss v. Netherlands Ins. Co.*, 2014 WL 804129 (N.Y. Feb. 25, 2014).

Penalties Alert:

Delaware Supreme Court Rules That Statutory Damages Are Not Excluded "Penalties"

The Delaware Supreme Court ruled that damages imposed against a policyholder pursuant to a Louisiana state statute were not excluded "penalties" under an errors and omissions policy. *CorVel Corp. v. Homeland Ins. Co. of N.Y.*, 2015 WL 1021459 (Del. Mar. 6, 2015).

The coverage dispute arose out of allegations that CorVel, a "preferred provider organization," failed to comply with a Louisiana statute that required CorVel to give notice to a medical provider when a rate discount is to be applied. The statute allows the imposition of damages "double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorney fees to be determined by the court." La. R.S. § 40:2203.1(G). CorVel settled the underlying statutory claims and then sought coverage from Homeland Insurance Company. Homeland sought a declaration that it had no duty to indemnify the settlement because it constituted a "penalty" excluded by the policy. A Delaware trial court agreed and granted Homeland's summary judgment motion. Shortly thereafter, a Louisiana trial court, faced with the same coverage dispute between CorVel and a different insurer, issued a contrary ruling, finding that the statutory damages were not penalties and therefore that the underlying settlement was covered under the applicable policy. A Louisiana appellate court affirmed. CorVel then appealed to the Delaware Supreme Court, arguing that under the prinicples of comity, Delaware law should defer to Louisiana's interpretation of the statutory damages as non-penalties. The Delaware Supreme Court agreed.

The Delaware Supreme Court ruled that deference was warranted because the Louisiana appellate court "considered the same Louisiana statute and analyzed almost identical insurance policy language as that involved in this case." The Delaware Supreme Court found it irrelevant that the Delaware trial court had rendered its decision before the Louisiana trial court issued its ruling. The court also reasoned that the "center of this litigation" had been in Louisiana and that Delaware had "very little connection" to the litigation. Therefore, the court concluded that Louisiana law should govern interpretation of the Louisiana statute, notwithstanding the parties' agreement to apply Delaware law to questions of policy interpretation. The dissenting opinion criticized the ruling, stating:

> the dispositive question of law is what the contractual terms mean, which here the parties do not dispute is governed by Delaware, not Louisiana law. In other words, the issue is not what a state's

particular statute calls the remedy, or how that state's courts would interpret the statute; the question is whether the remedy afforded by the statute in fact amounts to covered damages or excluded penalties as those terms are used in the parties' contract.

As discussed in our June 2013 Alert, courts have similarly addressed whether other statutorily-imposed damages (*e.g.*, Telephone Consumer Protection Act damages) are excluded penalties under liability policies.

Jurisdiction Alert:

Florida Court Rules That Policy Limits Determine Amount in Controversy for Diversity Jurisdiction

A Florida federal district court ruled that the $75,000 amount-in-controversy requirement for diversity jurisdiction was met where the governing policy's limit was $300,000. *Witherup v. State Farm Mut. Auto. Ins. Co.*, 2015 WL 419064 (M.D. Fla. Feb. 2, 2015).

In a coverage dispute between an automobile insurer and an injured driver, the insurer removed the case to federal court based on diversity jurisdiction. The driver sought to remand the case back to state court, arguing that the amount in controversy was not met. The court held that where, as here, the complaint does not contain a specific damage amount, the court may look to the notice of removal or other relevant documents to determine the amount in controversy. However, the court emphasized that "it is the value of the claim, not the value of the underlying policy, that determines the amount in controversy." The court concluded that here, the value of the claim at issue was the full policy limit because the validity of the entire policy was at stake. In particular, the coverage dispute turned on whether the subject policy was in force on the date of the collision (or conversely, whether a rejection of coverage as to the driver's previous car extended to his current car, which was involved in the accident). The court reasoned that the nature of this dispute "put the entire $300,000 value of the policy at stake" because the "object of the litigation is to determine whether UM coverage is in force … regardless of whether [ ] personal injury damages actually reach that amount."

The court distinguished several cases that held that a policy limit does not establish the amount in controversy where a specific damage amount is not pled. The court explained that those "cases all hinge upon the amount of plaintiffs' personal injury damages under concededly in-force policies. None of those cases involve the validity of an insurance policy or whether coverage exists at all."

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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