FIREMAN'S FUND INSURANCE COMPANY *v.* TD BANKNORTH INSURANCE AGENCY, INC.
(SC 18796)

Rogers, C. J., and Norcott, Palmer, Zarella, McDonald and Vertefeuille, Js.

Argued February 5—officially released July 30, 2013

Frederick M. Klein, for the appellant (defendant).

Christopher B. Weldon, with whom, on the brief, was *Darren P. Renner*, for the appellee (plaintiff).

James Andriola filed a brief for United Policyholders as amicus curiae.

Coleman C. Duncan III and *Laura Pascale Zaino* filed a brief for the National Association of Subrogation Professionals as amicus curiae.

Opinion

ZARELLA, J. This case comes before us upon our acceptance of a certified question from the United States Court of Appeals for the Second Circuit, arising within the context of a dispute between the defendant, TD Banknorth Insurance Agency, Inc. (TD Banknorth), and the plaintiff, Fireman's Fund Insurance Company (Fireman's Fund), pertaining to a liability insurance policy. Pursuant to General Statutes § 51-199b,[1] we accepted certification with respect to the following question: "Are insurance policy deductibles subject to Connecticut's make whole doctrine?"[2] *Fireman's Fund Ins. Co.* v. *TD Banknorth Ins. Agency, Inc.*, 644 F.3d 166, 172–73 (2d Cir. 2011). Because it does not appear that Connecticut expressly has adopted the make whole doctrine, we deem it appropriate to reformulate the question, pursuant to § 51-199b (k),[3] in the following manner: (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? We conclude that (1) the make whole doctrine is the default rule under Connecticut law but that (2) the doctrine does not apply to insurance policy deductibles.

In certifying the question to us, the Second Circuit Court of Appeals set forth the following relevant facts and procedural history. "In 2005 Haynes Construction Company [Haynes] began work on a housing development and retained TD Banknorth as its agent to arrange insurance. TD Banknorth procured a [b]uilder's [r]isk insurance policy from Peerless Insurance Company [Peerless] and an [i]nland [m]arine insurance policy from Hartford Insurance Company [Hartford]. In February 2006, a fire destroyed a house being built on Lot 14 of the Haynes development. Peerless denied coverage of the loss because Lot 14 was not listed in its [b]uilder's [r]isk policy—an error of omission by TD Banknorth. Haynes thereupon claimed against TD Banknorth for its negligent omission of Lot 14.

"To protect against the risk of such negligence, TD Banknorth had purchased [e]rrors [and] [o]missions coverage [(errors and omissions contract) from] Fireman's Fund . . . . Fireman's Fund undertook to pay on TD Banknorth's behalf any sums TD Banknorth became 'legally obligated to pay as damages because of a negligent act, error or omission in the performance of [TD Banknorth's] professional services.' The [errors and omissions] [c]ontract had a deductible of $150,000 per claim. TD Banknorth gave timely notice of the loss to Fireman's Fund.

"In July 2006, TD Banknorth and Fireman's Fund settled with Haynes for $354,000. Of that, TD Banknorth contributed $150,000 (its single claim deductible) and Fireman's Fund contributed the $204,000 remainder.

In the settlement, Haynes assigned its rights against Peerless and Hartford to Fireman's Fund and TD Banknorth collectively.

"TD Banknorth—and Fireman's Fund as subrogee—then proceeded against Peerless and Hartford for the $354,000. In the ensuing settlement, Peerless paid $88,000 and Hartford paid [$120,000] in exchange for complete releases. TD Banknorth and Fireman's Fund 'reserve[d] all rights that they may have against each other relating to the allocation of the [settlement funds] held in escrow.' The $208,000 was deposited in an escrow account.

"In March 2008, Fireman's Fund commenced this action against TD Banknorth in the [United States District Court for the] District of Connecticut, seeking a declaratory judgment that it was entitled to all of the escrow funds. Fireman's Fund claimed $10,000 in defense costs (incurred on TD Banknorth's behalf) in addition to the $204,000 it had paid Haynes: a total of $214,000. TD Banknorth counterclaimed for a declaratory judgment that, under Connecticut's make whole doctrine, it was entitled to recover its $150,000 deductible from the escrow funds.

"Both parties moved for summary judgment. The [D]istrict [C]ourt found that the subrogation clause in the [errors and omissions] [c]ontract abrogated Connecticut's make whole doctrine . . . and accordingly granted summary judgment in favor of Fireman's Fund." (Footnote omitted.) *Fireman's Fund Ins. Co.* v. *TD Banknorth Ins. Agency, Inc.*, supra, 644 F.3d 168.

Thereafter, TD Banknorth appealed to the Second Circuit Court of Appeals. Relying on our decision in *Wasko* v. *Manella*, 269 Conn. 527, 533–34, 541, 849 A.2d 777 (2004), for the proposition that boilerplate subrogation clauses are inadequate to abrogate default common-law subrogation rules, the Second Circuit concluded that the District Court incorrectly determined that the terms of the errors and omissions contract abrogated the make whole doctrine. *Fireman's Fund Ins. Co.* v. *TD Banknorth Ins. Agency, Inc.*, supra, 644 F.3d 169–70. In addition, the Second Circuit rejected Fireman's Fund's alternative argument that, under Connecticut law, the make whole doctrine applied only to insurance for first party losses rather than third party liability. See id., 171. With respect to Fireman's Fund's argument that the make whole doctrine does not apply to deductibles, however, the Second Circuit determined that "no statutory or precedential support for either position" could be found in Connecticut law. Id., 172. Accordingly, the Second Circuit certified the question to this court under § 51-199b (d), and we accepted certification.

Relying on the make whole doctrine, TD Banknorth claims that, before Fireman's Fund may assert any right

of equitable subrogation against a responsible third party, TD Banknorth is entitled to recover $150,000, which represents the amount of its deductible that it paid to settle the Haynes claim. Fireman's Fund, by contrast, maintains that the deductible is not part of the loss to which the make whole doctrine applies and that to conclude otherwise would essentially convert the policy into one without a deductible, thereby providing TD Banknorth with an unbargained for windfall at the expense of Fireman's Fund. We agree with the position advanced by Fireman's Fund.

The resolution of the questions before us presents a question of law, over which our review is plenary. See, e.g., *DeLeo* v. *Nusbaum*, 263 Conn. 588, 593, 821 A.2d 744 (2003); see also *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 753, 36 A.3d 224 (2012) (determination of rights and liabilities under insurance policy presents question of law).

I

We begin with the threshold question of whether the make whole doctrine should apply in Connecticut, because it has not heretofore been addressed expressly by this court. The doctrine arises in the context of legal or equitable subrogation. "In its simplest form, subrogation allows a party who has paid a debt to step into the shoes of another (usually the debtee) to assume his or her legal rights against a third party to prevent that party's unjust enrichment." (Internal quotation marks omitted.) *Rathbun* v. *Health Net of the Northeast, Inc.*, 133 Conn. App. 202, 211, 35 A.3d 320, cert. granted, 304 Conn. 905, 38 A.3d 1201 (2012). The common-law doctrine of legal or equitable subrogation therefore enables an insurance company that has made a payment to its insured to substitute itself for the insured and to proceed against the responsible third party. See, e.g., *Allstate Ins. Co.* v. *Mazzola*, 175 F.3d 255, 258 (2d Cir. 1999); *Albany Ins. Co.* v. *United Alarm Services, Inc.*, 194 F. Supp. 2d 87, 93 (D. Conn. 2002).

"As we stated in *Westchester Fire Ins. Co.* v. *Allstate Ins. Co.*, [236 Conn. 362, 372, 672 A.2d 939 (1996)], insurers that are obligated by a preexisting contract to pay the losses of an insured proceed in a subsequent action against the responsible party under the theory of equitable subrogation, and not conventional subrogation." (Emphasis omitted.) *Wasko* v. *Manella*, supra, 269 Conn. 533. In such cases, in the absence of express contractual language indicating an intention to depart from the default rules, "[t]he contract . . . is not the source of the right, but rather is a reference to those rights that may exist at law or in equity." (Internal quotation marks omitted.) Id.; see also id., 532 ("[t]he right of [legal or equitable] subrogation . . . does not arise from any contractual relationship between the parties, but takes place as a matter of equity, with or without an agreement to that effect" [internal quotation

marks omitted]). Thus, although a "right of true [equitable] subrogation may be provided for in a contract . . . the exercise of the right will . . . have its basis in general principles of equity rather than in the contract, which will be treated as being merely a declaration of principles of law already existing." (Internal quotation marks omitted.) Id., 533–34.

"The object of [legal or equitable] subrogation is the prevention of injustice. It is designed to promote and to accomplish justice, and is the mode [that] equity adopts to compel the ultimate payment of a debt by one who, in justice, equity, and good conscience, should pay it." (Internal quotation marks omitted) Id., 532. Subrogation further promotes equity by preventing an insured from receiving more than full indemnification as a result of recovering from both the wrongdoer and the insurer for the same loss, which would unjustly enrich the insured. See, e.g., 16 L. Russ & T. Segalla, Couch on Insurance (3d Ed. 2005) § 223:135, pp. 223-151 through 223-152; E. Rinaldi, "Apportionment of Recovery Between Insured and Insurer in a Subrogation Case," 29 Tort & Ins. L.J. 803, 803 (1994) ("Although an insured is entitled to indemnity from an insurer pursuant to coverage provided under a policy of insurance, the insured is entitled only to be made whole, not more than whole. Subrogation prevents an insured from obtaining one recovery from the insurer under its contractual obligations and a second recovery from the tortfeasor under general tort principles.").

When the amount recoverable from the responsible third party is insufficient to satisfy both the total loss sustained by the insured and the amount the insurer pays on the claim, however, this principle may lead to inequitable results. See, e.g., 16 L. Russ & T. Segalla, supra, § 223:133, p. 223-145. 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." (Internal quotation marks omitted.) *In re DeLucia*, 261 B.R. 561, 567 (Bankr. D. Conn. 2001), quoting *Barnes* v. *Independent Automobile Dealers Assn. of California Health & Welfare Benefit Plan*, 64 F.3d 1389, 1394 (9th Cir. 1995); see also *United States* v. *Lara*, United States District Court, Docket No. 3:08-cr-00169 (VLB) (D. Conn. November 6, 2009) ("the insurer may enforce its subrogation rights only after the insured has been fully compensated for all of its loss"); J. Parker, "The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation," 70 Mo. L. Rev. 723, 737 (2005) ("[I]n the event of a subrogation dispute between the insurer and its insured, the insured has priority of rights to collect from the responsible third party. Thus, [when] the insured's recovery from both the insurer and [the] tortfeasor is less than or equal to its loss the insurer forfeits its right to subrogation."). As one authority on insurance law

explains, "[t]he equitable principle underlying the [make] whole [doctrine] is that the burden of loss should rest on the party paid to assume the risk, and not on an inadequately compensated insured, who is the least able to shoulder the loss." 16 L. Russ & T. Segalla, supra, § 223:136, pp. 223-152 through 223-153.

In light of this reasoning, we are persuaded that the make whole doctrine is sound policy. We note, however, that the parties rely on our decision in *Wasko* v. *Manella*, supra, 269 Conn. 527, to support the doctrine's adoption in this state, as have other courts. See, e.g., *United States* v. *Lara*, United States District Court, Docket No. 3:08-cr-00169 (VLB), supra; cf. *Yeager* v. *Alvarez*, Superior Court, judicial district of Waterbury, Docket No. CV-07-6000541-S (July 19, 2010), rev'd on other grounds, 134 Conn. App. 112, 38 A.3d 1224 (2012). In *Wasko*, we observed that, "under traditional principles of subrogation, if an insured brings an action against a negligent party, an insurer generally is entitled to recover the amount it paid to the insured only if the amount of damages awarded exceeds the difference between the amount the insurer paid and the insured's actual damages"; *Wasko* v. *Manella*, supra, 537; and referred to decisions in other states, along with a treatise on insurance law, in support of this premise. Id. 537 n.8, citing *Skauge* v. *Mountain States Telephone & Telegraph Co.*, 172 Mont. 521, 528, 565 P.2d 628 (1977), *Transamerica Ins. Co.* v. *Barnes*, 29 Utah 2d 101, 105, 505 P.2d 783 (1972), and 6A J. Appleman & J. Appleman, Insurance Law and Practice (1972) § 4094, p. 265. As the United States District Court for the District of Connecticut has recognized, however, the discussion in *Wasko* regarding the make whole doctrine was dictum; see *ACSTAR Ins. Co.* v. *Clean Harbors, Inc.*, 783 F. Supp. 2d 312, 319 (D. Conn. 2011); presumably because, in *Wasko*, the recovery from the third party tortfeasor was equal to the amount that the insurer had paid to the insured, and thus it was unnecessary to determine priority between the insurer and the insured. See *Wasko* v. *Manella*, supra, 529–30. Consequently, we deem it appropriate to expressly recognize the make whole doctrine at this time. Accordingly, to the extent that we have not previously done so, we now clarify that the make whole doctrine operates as a default rule in Connecticut insurance contracts.

II

With respect to the make whole doctrine's application to deductibles, the second issue under our reformulation of the certified question, we must determine whether an insured is fully compensated for purposes of the make whole doctrine when she receives compensation equal to the full amount of her loss, less the value of her deductible. TD Banknorth, relying on a law review article for the proposition that the make whole doctrine should apply to deductibles, advances a posi-

tion that would require us to answer this question in the negative. Fireman's Fund maintains that the make whole doctrine does not apply to deductibles, relying on the decisions of several of our sister states and a treatise on insurance law to support its claim that an insured should be considered fully compensated for her loss under the make whole doctrine if she recovers all but the amount of her deductible. We agree with Fireman's Fund.

The question of whether the make whole doctrine applies to deductibles has been addressed in only a small number of cases. E.g., *Jones* v. *Nationwide Property & Casualty Ins. Co.*, 613 Pa. 219, 234–36, 32 A.3d 1261 (2011); *Averill* v. *Farmers Ins. Co. of Washington*, 155 Wn. App. 106, 111–15, 229 P.3d 830, review denied, 169 Wn. 2d 1017, 238 P.3d 502 (2010); see also *Birch* v. *Fire Ins. Exchange*, 122 P.3d 696, 698 (Utah App. 2005) (observing that, as of 2005, "it appears that the precise question arising from this factual scenario had not been addressed by courts in [Utah] or any other [state]"). Relying primarily on these cases and on general equitable principles, the author of one insurance treatise notes that "the [make] whole doctrine does not apply to deductibles. If the insured were to be reimbursed for its deductible before the insurer is made whole, the insured would be receiving an unbargained 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)." (Footnote omitted.) 2 A. Windt, Insurance Claims and Disputes: Representation of Insurance Companies and Insureds (6th Ed. 2013) § 10:6, pp. 10-42 through 10-43, citing *Jones* v. *Nationwide Property & Casualty Ins. Co.*, supra, 234–36, *Averill* v. *Farmers Ins. Co. of Washington*, supra, 111–15, and *Birch* v. *Fire Ins. Exchange*, supra, 699–700.[4]

In *Jones* v. *Nationwide Property & Casualty Ins. Co.*, supra, 613 Pa. 219, the Supreme Court of Pennsylvania addressed the application of the make whole doctrine to deductibles within the context of collision coverage under an automobile insurance policy. See id., 227–36. The named plaintiff in that case, Brenda Jones, brought a class action against the defendant, Nationwide Property and Casualty Insurance Company (Nationwide), Jones' insurance carrier. Id., 224. Jones claimed that Nationwide's practice of reimbursing insureds' deductibles pro rata following recovery from third party tortfeasors violated the common-law make whole doctrine despite state insurance regulations expressly sanc-

tioning such a practice. Id., 224–25. Although the make whole doctrine applied generally in Pennsylvania, the court relied on the argument of the acting state insurance commissioner (commissioner), as amicus curiae, that the make whole doctrine could not apply to collision coverage because, unlike other forms of insurance, there are no coverage limits; according to the commissioner, therefore, there could never be a shortfall of coverage between the coverage limit and the actual damages sustained by an insured. Id., 231–32. Instead, as the commissioner explained, "a deductible is a thin layer of first dollar liability retained by the consumer (and specifically not transferred to the insurer) to ensure risk-sharing and loss avoidance. . . . Under the policy, the insured agreed to pay the deductible as a first dollar obligation prior to implicating the insurer's obligation to cover the damages. Therefore, the loss of the deductible is not a shortfall in the insurance coverage." (Citation omitted; internal quotation marks omitted.) Id., 232.

The court in *Jones* thus observed that the "[a]pplication of the [make] whole doctrine to deductibles would not only be contrary to the relevant . . . provisions [of the state's insurance regulations] but, when considering the inherent nature of deductibles, would [also] run counter to the equitable principles underlying the [make] whole doctrine and subrogation." Id., 235. Specifically, it would unjustly enrich the insured because the insurer "accepted only the risk of paying if the loss exceeded the amount of the deductible, with premiums calculated based [on] the amount of first dollar liability accepted by the insured. Application of the [make] whole doctrine in such a case would force the insurer essentially to cover the risk of the deductible [when] the insured has not paid premiums to cover that risk." Id., 236. The make whole doctrine therefore did not compel the insurer in *Jones* to refund the full amount of the insured's deductible before enforcing its subrogation rights because the insured, rather than the insurer, retained the risk associated with the amount of the deductible under the express language of the insurance policy. See id.

Similarly, the decision of the Washington Court of Appeals in *Averill* v. *Farmers Ins. Co. of Washington*, supra, 155 Wn. App. 106, addressed "whether the [make] whole doctrine applies to insurance policy deductibles." Id., 111. The insured and named plaintiff, Pearl Averill, brought an action against her automobile insurer, Farmers Insurance Company of Washington (Farmers), following an automobile accident for which Farmers paid Averill the value of her loss, less the amount of her deductible. Id., 109–10. Farmers then sought to recover from the insurer of the other driver involved in the accident. Id., 110. After an arbitrator determined that each driver was "50 percent at fault"; id.; the other driver's insurer paid Averill an amount

equal to one half of her deductible, and paid Farmers approximately one half of the total that it had paid to Averill. Id. Averill contended, however, that she should have received her full deductible, rather than a prorated portion, before Farmers was entitled to any subrogation recovery. See id.

The court in *Averill* disagreed. See id., 114–15. As the court explained, a conclusion that the make whole doctrine does not apply to deductibles "is consistent with the purpose of the deductible. A deductible indicates the amount of risk retained by the insured. . . . The insurance policy shifts the remaining risk of any damages above the deductible to the insurance company. . . . Averill contracted to be out of pocket for the [amount of the deductible]. Farmers' subrogation interest was for the amount of the loss it paid Averill, not including the deductible amount. When Farmers pursued its subrogation interest, that interest did not include Averill's deductible. Allowing Averill to recover her deductible from Farmers' subrogation recovery would have changed the insurance contract to one without a deductible. We are not at liberty to rewrite the policy in this manner." (Citations omitted.) Id., 114.[5]

In the present case, TD Banknorth attempts to cast doubt on *Averill* and *Jones* by relying on a law review article that supports its position that the make whole doctrine applies to deductibles. See M. Quinn, Review Essay, "Subrogation, Restitution, and Indemnity," 74 Tex. L. Rev. 1361, 1385–87 (1996) (reviewing book entitled "The Law of Subrogation," by Charles Mitchell). This article arrives at its conclusion by criticizing the English case of *Lord Napier & Ettrick* v. *Hunter*, [1993] A.C. 713, 2 W.L.R. 42 (H.L.) (appeal taken from Eng.) (*Napier*), in which the House of Lords addressed subrogation in the context of an insurance policy with a deductible.[6] Accordingly, in order to address the position advanced by the author of the article on which TD Banknorth relies, we turn first to the facts of that case.[7]

The insureds in *Napier* were underwriters at Lloyd's of London (insurance company) who, due to the purported negligence of a third party, faced significant underwriting losses that exceeded their stop loss insurance policy limits. See N. Andrews, Case and Comment, "Subrogation and Contracts of Insurance," 52 Cambridge L.J. 223, 223 (1993). After a settlement with the purportedly negligent third party, the insureds recovered an amount insufficient to cover both the total losses of the insureds and the amounts paid by the insurance company. See id. The insurance company maintained that it was entitled to recover its payments before the insureds recovered their deductibles. See id.

To simplify the analysis, the House of Lords used the following hypothetical for illustrative purposes. See *Lord Napier & Ettrick* v. *Hunter*, supra, [1993] A.C. 729. The insured, who had suffered a loss of £160,000,

had £100,000 in stop loss insurance that became applicable after the £25,000 deductible was satisfied. Id. Lord Templeman treated this loss as divisible into three parts: (1) the insured was responsible for the first £25,000, that is, the deductible (first part); (2) the insurer then paid £100,000 to the insured (second part); and (3) the insured was responsible for the excess £35,000 (third part). Id. The insured then recovered £130,000 from the negligent third party. Id. Of this £130,000, the trial court determined that the insured should be allocated £60,000, reasoning that this, combined with the £100,000 paid by the insurer, would make the insured whole; the remaining £70,000 was to be allocated to the insurer. Id.

Lord Templeman of the House of Lords disagreed, observing that the trial court's "analysis . . . ignores the fact that the [insured] agreed to bear the first £25,000 . . . of any loss." Id. Lord Templeman determined that the funds received from the negligent third party were to be distributed as they would have been if the insured had obtained insurance from another insurer to cover the deductible and the excess above the stop loss insurance policy rather than retaining the risk itself.[8] See id., 730. Thus, the £35,000, which constituted the loss in excess of the policy limits *and* the deductible, was first allocated to the insured, as this portion was analogous to coverage under an excess insurance policy. Id. Next, the insurer was entitled to the second part, up to the £100,000 that it had paid on the claim. Because only £95,000 remained, however—£30,000 recovered from the negligent third party less the £35,000 loss in excess of the policy limits—the insurer could not recover the full amount that it had paid to the insured. Id. Finally, the loss attributable to the remaining part, namely, the deductible, appropriately was borne by the insured because "an insured is not entitled to be indemnified against a loss which he has agreed to bear." Id., 731.

In critiquing *Napier*, the author of the article on which TD Banknorth relies explained that "[n]othing in any insurance contract—whether it is the deductible provision or the coinsurance clause—remotely implies that an insurer should be reimbursed, based [on] subrogation, before the insured. Nor does the [court in] *Napier* . . . give anything in the way of an argument. The function of the deductible is to relieve the insurer of dealing with smaller claims, to encourage safety on the part of the insured, and to control the price of the contract. None of these considerations suggest[s] that the insurer should recover ahead of the insured, insofar as the deductible is at stake. Insurers do not compute subrogation recoveries into the price-deductible computation. Subrogation recoveries are too iffy to play any role in controlling moral hazards." M. Quinn, supra, 74 Tex. L. Rev. 1386.

We do not find this rationale convincing. Specifically,

we find it unlikely that an insurer would not consider such factors in fixing premium costs, and the author advancing this argument does not cite to any authority in support of his view that insurers do not do so. See id.; cf. *Jones* v. *Nationwide Property & Casualty Ins. Co.*, supra, 613 Pa. 223 ("[n]ot surprisingly, if an insured is willing to bear the risk of paying a higher deductible, [the insured's] premiums will be reduced to reflect that the insurer will be responsible for covering less risk"). Indeed, the author acknowledges that a primary purpose of a deductible is "to control the price of the contract," which would be undermined if the interplay between subrogation recovery and premium cost was not taken into account. M. Quinn, supra, 74 Tex. L. Rev. 1386. A deductible represents the level of risk that the insured has agreed to assume, ordinarily in exchange for a lower premium cost for the insurance policy. See, e.g., *Averill* v. *Farmers Ins. Co. of Washington*, supra, 155 Wn. App. 114. Therefore, we are not of the opinion that equity dictates a departure from the terms of the insurance contract into which the parties voluntarily entered under such circumstances.

The author of the article on which TD Banknorth relies also criticizes the *Napier* decision to the extent that it "implies that when there [are] . . . layers of excess policies atop a primary policy . . . the highest level excess carrier should receive the first monies out of the subrogation pot," asserting that "the court's vision of sound policy is impaired" if this is indeed the intention of the court in *Napier*. M. Quinn, supra, 74 Tex. L. Rev. 1386. The author provides no authority for this assertion, however, and we are not persuaded that there is anything atypical about this approach to priority with respect to subrogation recoveries. Indeed, a number of courts have indicated that, as a matter of course, "[w]hen more than one insurer contributes to the payment of a loss, the highest level insurer is . . . entitled to be made whole before a lower level insurer can be reimbursed." 2 A. Windt, supra, § 10:5, pp. 10-29 through 10-30; see, e.g., *Travelers Property Casualty Ins. Co. of America* v. *National Union Ins. Co. of Pittsburgh, Pennsylvania*, 621 F.3d 697, 716 (8th Cir. 2010) (applying Missouri law and concluding that "[t]he industry practice, in short, is that excess carriers are the last insurers obligated to pay claims and the first insurers entitled to recover in subrogation"); *Westchester Fire Ins.* v. *Heddington Ins. Ltd.*, 883 F. Supp. 158, 167 (S.D. Tex. 1995) ("Money recouped by insurers after paying a claim is first applied to the highest layer of coverage, or ' "off the top" ' of the ultimate net loss. *Vesta Ins. Co.* v. *Amoco* [*Production*] *Co.*, 986 F.2d 981, 988 [5th Cir. 1993] cert. denied, [510] U.S. [822], 114 S. Ct. 80, 126 L. Ed. 2d 48 [1993] [interpreting Texas law]."), aff'd mem., 84 F.3d 432 (5th Cir. 1996); *Century Indemnity Co.* v. *London Underwriters*, 12 Cal. App. 4th 1701, 1710, 16 Cal. Rptr. 2d 393 (1993) ("[When] the insurers'

coverage is in the nature of layers, the excess carriers should recover under subrogation before primary insurers can be reimbursed. One can look at a subrogation recovery as reducing the net loss in which case the excess carriers would not be obligated to pay the loss." [Internal quotation marks omitted.]). Commenting on this industry practice, the Eighth Circuit Court of Appeals has observed that "[i]nsurers know and understand this apportionment of risk among fellow insurers, and they price their insurance accordingly . . . ." *Travelers Property Casualty Ins. Co. of America* v. *National Union Ins. Co. of Pittsburg, Pennsylvania*, supra, 716.

Thus, with this subrogation priority policy in mind, we find persuasive the analogy that the deductible is, in effect, akin to "a primary layer of self-insurance underlying the [liability insurance] policy, which policy is, as a practical matter, the equivalent of an excess policy. . . . [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." (Citation omitted.) 2 A. Windt, supra, § 10:6, p. 10-44.

Accordingly, we conclude that the equitable considerations supporting the make whole doctrine are inapplicable to deductibles. Cf. 16 L. Russ & T. Segalla, supra, § 223:136, pp. 223-152 through 223-153. If we were to decide otherwise, 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. See, e.g., *Jones* v. *Nationwide Property & Casualty Ins. Co.*, supra, 613 Pa. 236; *Averill* v. *Farmers Ins. Co. of Washington*, 155 Wn. App. 114.

The answer to the certified question of whether the make whole doctrine is the default rule under Connecticut law is: yes; the answer to the certified question of whether the make whole doctrine applies to insurance policy deductibles under Connecticut law is: no.[9]

No costs shall be taxed in this court to either party.

In this opinion the other justices concurred.

[1] General Statutes § 51-199b (d) provides in relevant part: "The Supreme Court may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

[2] Other courts have referred to this rule as either the "make whole" or "made whole" doctrine. Compare *US Airways, Inc.* v. *McCutchen*, U.S. , 133 S. Ct. 1537, 1546, 185 L. Ed 2d 654 (2013) ("make-whole doctrine"),

and *In re DeLucia*, 261 B.R. 561, 566–68 (Bankr. D. Conn. 2001) ("Make-Whole Rule"), with *Jones* v. *Nationwide Property & Casualty Ins. Co.*, 613 Pa. 219, 222, 227–37, 32 A.3d 1261 (2011) ("made whole doctrine"), and *Muller v. Soc'y Ins.*, 309 Wis. 2d 410, 416, 419–49, 750 N.W.2d 1 (2008) (same). Throughout this opinion, we employ the terminology used by the Second Circuit Court of Appeals in certifying this question to us. Accordingly, we refer to the rule as the make whole doctrine.

[3] General Statutes § 51-199b (k) provides: "The Supreme Court may reformulate a question certified to it."

[4] The parties advance very different understandings of the decision of the Utah Court of Appeals in *Birch*. Although we do not find the result in *Birch* inconsistent with our conclusion that the make whole doctrine does not apply to deductibles, we note that the court narrowly decided that case on the basis of its "unique facts," namely, that the insured recovered more than his total loss even without a full recovery of his deductible. *Birch* v. *Fire Ins. Exchange*, supra, 122 P.3d 700.

[5] TD Banknorth urges us to disregard the decision in *Averill* because the Washington State Office of the Insurance Commissioner has since promulgated a regulation that applies the make whole doctrine to deductibles, and the case therefore no longer represents the current law in that state. We disagree that such a regulatory enactment need alter our analysis. In the present case, we consider only the default rule applicable in the absence of express contractual, statutory, or regulatory language to the contrary. Thus, like the Washington State Office of the Insurance Commissioner, our state's legislature or insurance commissioner is equally free to alter this default rule in an appropriate manner.

[6] The policy at issue in *Napier* refers to the deductible as the "excess"; *Lord Napier & Ettrick* v. *Hunter*, supra, [1993] A.C. 729; for clarity, however, we refer to it as the deductible in this opinion.

[7] A decision of this nature, of course, is not binding on this court, nor does this case implicate the particular preference that federal courts have traditionally afforded to English courts when *marine* or *maritime* insurance policies are at issue. See, e.g., *Standard Oil Co. of New Jersey* v. *United States*, 340 U.S. 54, 59, 71 S. Ct. 135, 95 L. Ed. 68 (1950) ("[I]t is true that we and other American courts have emphasized the desirability of uniformity in decisions here and in England in interpretation and enforcement of marine insurance contracts. Especially is uniformity desirable [when] . . . the particular form of words employed originated in England. But this does not mean that American courts must follow [the] House of Lords' decisions automatically." [Footnote omitted.]); *New York & Oriental Steamship Co.* v. *Auto. Ins. Co. of Hartford, Connecticut*, 37 F.2d 461, 463 (2d Cir. 1930) ("in matters maritime, and especially insurance, the importance of conformity between the English law and our own has been often emphasized"). Nevertheless, in light of our common legal heritage, and given TD Banknorth's reliance on the position of a commentator who is critical of *Napier*, we find it appropriate to consider the approach that the House of Lords took in *Napier*. Cf. *Bassett* v. *City Bank & Trust Co.*, 115 Conn. 393, 398, 161 A. 852 (1932) ("[although] Connecticut has not formally adopted the common law of England by constitutional or legislative provisions, we have made it our own by 'practical adoption' with such exceptions as diversity of circumstances and customs require").

[8] Similar to the example in *Napier*, the author of a treatise on insurance provides the following hypothetical to illustrate this principle:

"A. A fire causes the insured a $100,000 loss.

"B. The insurance policy provides $50,000 in coverage excess over a $10,000 deductible.

"C. By virtue of the deductible, the first $10,000 of the loss must be borne by the insured in order to trigger the insurance coverage. The $50,000 in insurance is paid, therefore, because the loss equals or exceeds $60,000. That payment, therefore, leaves a loss of $40,000 that the insured has not agreed to bear as a condition precedent to triggering the insurance coverage.

"D. $60,000 is then recovered from the person who set the fire.

"E. Under the [make] whole doctrine, the first $40,000 of that recovery would [g]o to the insured, and the remaining $20,000 would go to the insurer. [Ten thousand dollars] of that $20,000 could not go to the insured to reimburse it for its deductible because . . . the insured must remain out of pocket for the amount of the deductible. The first $10,000 of the loss must be borne by the insured because that was the agreement made by the insured and the insurer. As a practical matter, the $10,000 deductible represents a primary layer of self-insurance underlying the $50,000 policy, which policy is, as a practical matter, the equivalent of an excess policy. . . . [W]hen

there is a recovery, the excess level of insurance is entitled to recover before a lower level of insurance/deductible can recover. . . . (T)he highest level insurer is, of course, entitled to be made whole before a lower level insurer can be reimbursed. 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." (Citation omitted; internal quotation marks omitted.) 2 A. Windt, supra, § 10:6, pp. 10-43 through 10-44.

[9] We note, however, that this is merely the default rule and that parties are free to provide differently in their contract, provided they do so expressly. Moreover, if the legislature or the commissioner of insurance determines that a different result is warranted, either one could likewise modify this doctrine, as the Washington State Office of the Insurance Commissioner did in response to *Averill*. Cf. 16 L. Russ & T. Segalla, supra, § 223:138, p. 223-154 (discussing different approach to such subrogation disputes).