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Massachusetts Adopts Minority Rule in Determining Priority Among Policies

On November 1, 2017, Massachusetts joined a minority of jurisdictions to rely on a strict construction focused on solely the language of “other insurance” clauses when determining priority of coverage between a “true excess” policy and a primary policy that is excess under certain circumstances. In *Great Divide Insurance Company v. Lexington Insurance Company*, SJC-12164 (Mass. Nov. 1, 2017), a garbage truck operator employed by EZ Disposal Service, Inc., was driving a garbage truck leased by Capitol Waste Services, Inc. when he struck and killed a bicyclist. The limits of Capitol’s primary policy (underwritten by an insurer who was not a party to this suit) were only sufficient to cover only a portion of the loss. Great Divide Insurance Company issued a “hybrid” policy to EZ providing primary coverage for occurrences involving EZ owned automobiles and excess insurance where an occurrence involved a non-owned vehicle like the garbage truck here. Lexington Insurance Company issued an umbrella policy to Capitol that sat above its primary policy. Great Divide brought a declaratory judgment action against Lexington in the United States District Court for the District of Massachusetts seeking a ruling that once the primary policy was exhausted,

both Lexington and Great Divide needed to contribute as excess insurers. Lexington argued that Great Divide had issued an essentially primary policy that must be exhausted before its own “true excess” policy could be triggered. The District Court submitted a certified question to the Massachusetts Supreme Judicial Court, seeking guidance on whether the two policies cover the same level of risk.

The Massachusetts Supreme Judicial Court held that the two insurance companies insured the same level of risk. In so holding, it grounded its opinion in the language of the policies, and in particular, in the “other insurance” provisions. It said that its role is “to effectuate not [its] own ideas about the language that could have been used to best effectuate the intent of the parties but, rather, the actual contract language.” A plain reading of the “other insurance” provisions demonstrated that they were both excess policies, as applied to this particular accident.

In reaching its holding, the Massachusetts Supreme Judicial Court noted that “[t]he majority of courts in other States have held that a primary policy with an ‘other insurance’ clause is essentially a primary policy, and therefore must be exhausted

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before a 'true excess' policy is triggered." Applying this majority rule, the Lexington policy would not have been triggered until after the Great Divide policy had been totally exhausted. However, the Court felt that the minority approach, "that primary insurance policies with 'other insurance' clauses cover the same level of risk as 'true excess' policies," more closely reflected the plain language of the "other insurance" provisions. Indeed, the Court rejected many of the rationales articulated in majority jurisdictions as going beyond the plain language of the policies, including examination of policy premiums or the label of the policy. Because there was no ambiguity in the "other insurance" provision of the Great Divide policy, there was simply no reason to look beyond that language to premium information or policy title.

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