

LEGAL Dimensions

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SJC Rejects Selective Tender

When an insured learns of a loss, it often reports the loss to its insurer, seeking defense and indemnity for the claim. But what happens when an insured has more than one policy available to provide primary coverage for the same loss? May the insured intentionally tender the claim to one insurer and thereby eliminate the obligations of the other insurer to contribute with regard to the claim? The Massachusetts Supreme Judicial Court (SJC) recently considered a certified question from the United States Court of Appeals for the First Circuit that dealt with these issues.

In **Insurance Company of the State of Pennsylvania v Great Northern Insurance Company**, SJC-11897 (March 7, 2016), the court held that where two workers compensation policies provide primary coverage for the same loss, an insurer which pays on the loss has a right to equitable contribution from the other coinsurer for its share of the loss. An insured cannot prevent the insurer that paid on the loss from exercising its right to equitable contribution by intentionally notifying only one insurer of the loss, that is, selectively tendering the claim. The SJC extended its rejection of selective tender to general liability insurance contexts in addition to workers compensation insurance.

Background

In January 2010, an employee of Progression Inc. (Progression) was injured in an automobile accident on a business trip abroad. Progression had two workers compensation policies providing primary coverage: one issued by the Insurance Company of the State of Pennsylvania (ISOP), which

provided compulsory workers compensation coverage, and a second policy issued by Great Northern Insurance Company (Great Northern), which provided workers compensation coverage for employees traveling abroad. The injured employee gave timely notice of his injuries to Progression and pursued a workers compensation claim before the Department of Industrial Accidents (DIA). Progression notified ISOP of the claim, and ISOP immediately began making payments on the claim and defending the claim before the DIA. Progression did not notify Great Northern of the claim.

When ISOP learned that Progression had workers compensation coverage under the policy issued by Great Northern, ISOP notified Great Northern of the claim and requested contribution. Great Northern declined ISOP's tender, stating that it learned from Progression that Progression had intentionally tendered the claim only to ISOP and had not authorized ISOP to report or tender the claim to Great Northern. ISOP responded by filing a complaint against Great Northern in the U.S. District Court for the District of Massachusetts on November 7, 2013, seeking a declaration that the doctrine of equitable contribution required Great Northern to pay one-half of past and future defenses costs and indemnity payments related to the claim. The court in such a case is bound to follow Massachusetts law.

In August 2014, the District Court granted Great Northern's motion for summary judgment. The District Court judge reasoned that in absence of binding Massachusetts law precedent, any obligation of equitable contribution by

one coinsurer to another did not arise until a claim for defense or indemnity was tendered by the insured or its authorized agent.

ISOP appealed to the First Circuit, Court of Appeals, and the First Circuit certified a question to the SJC as follows: "Where two workers compensation insurance policies provide coverage for the same loss, may an insured elect which of its insurers is to defend and indemnify the claim by intentionally tendering its defense to that insurer and not to the other and thereby foreclose the insurer to which tender is made from obtaining contribution from the insurer to which no tender is made?" The SJC answered the question in the negative.

The Doctrine of Equitable Contribution Applies in Massachusetts

The SJC began its analysis with a discussion of the doctrine of equitable contribution. Under the doctrine, where more than one insurer provides coverage for a loss, an insurer that pays more than its share of defense costs and indemnity is entitled to a proportionate contribution from the other coinsurers. The right of equitable contribution derives from equitable principles which imply an obligation to contribute toward a common liability, rather than from an express contract. Because the obligation arises from equity rather than contract, unlike subrogation, the right to contribution belongs to the insurer and exists independently of the rights of the insured.

The SJC highlighted the policies furthered by the doctrine of equitable

contribution. The doctrine prevents the unfairness that would result if the first insurer to pay on a loss is left to pay the entire loss. Moreover, where multiple insurers share equal contractual liability for an obligation, the selection of which will bear the loss should not be left to the "often arbitrary choice of the loss claimant." Rather, each insurer should pay its share. Further, an insured which expects one insurer to fully cover the loss may have no incentive to seek coverage from another insurer covering the same risk. The equitable contribution doctrine seeks to eliminate any incentive to the insurer to avoid paying a cognizable claim in hopes that the claimant will be fully paid by another coinsurer. In addition, apart from considerations of fairness, the doctrine supports the risk-spreading aim of insurance by permitting insurers to share the costs of a claim amongst all insurers with coverage obligations.

The SJC noted that it was among the majority of states which had recognized the right of an insurer to seek equitable contribution from coinsurers on the same risk. The SJC then explicitly adopted the doctrine of equitable contribution as the law of Massachusetts.

Selective Tender Does Not Provide an Exception to the Doctrine of Equitable Contribution Under Workers Compensation or General Liability Policies

After adopting the doctrine of equitable contribution, the SJC then analyzed the issue of selective tender. Where recognized, selective tender provides an exception to equitable contribution, such that where an insured has not tendered a claim to an insurer, that insurer has no duty to contribute on the claim.

Great Northern argued that equitable contribution did not apply to the case because Progression had purposely tendered the workers compensation claim only to ISOP. By the language of its policy, Great Northern had no obligation to provide coverage unless Progression fully complied with the policy's terms and conditions. One such term was that Progression provide notice to Great Northern at once of an injury which might be covered by the policy. Progression had not provided such notice,

instead tendering to only ISOP. Great Northern argued that the doctrine of equitable contribution could not defeat the explicit policy language. Because Progression did not give the required notice, Great Northern asserted it had no duty to provide coverage for the claim. In the absence of coverage for the claim, Great Northern argued, there could not be equitable contribution, which arises when multiple insurers provide coverage for the same loss.

The SJC began its analysis by noting that the selective tender exception to equitable contribution has been adopted by only a minority of jurisdictions. Those jurisdictions reason that where the insured chooses not to tender a claim, the insurer has no obligation to defend or indemnify that claim, and therefore has no obligation to contribute toward the defense or indemnity of that claim. The SJC held, however, that this reasoning is incorrect as to Massachusetts workers compensation law.

In Massachusetts, workers compensation insurance is controlled by statute, and all workers compensation policies are interpreted to comply with applicable statutes and regulations. The workers compensation statute provides that an employee who is injured in the course of his employment "shall be paid compensation by the insurer ...". G.L. c. 152, § 26. Thus, although the employer purchases the policy and is the named insured thereunder, a workers compensation insurer is directly liable to an injured employee for workers compensation benefits. The insurer does not reimburse the employer for payments of workers compensation benefits.

Under Massachusetts law, an injured employee makes a claim for workers compensation benefits by providing written notice of the injury to his employer or the workers compensation insurer as soon as practicable after an accident. The employer is required to provide notice to the DIA and its workers compensation insurer within seven days. The employer's failure to provide the required notice results only in a nominal fine; however, it does not prevent the employee from obtaining benefits from the workers

compensation insurer. Rather, the employee is barred from receiving workers compensation benefits under the statute only if the insurer, the employer and their agents had no knowledge of the injury, and the insurer is prejudiced by the absence of notice. Thus, by giving notice of the injury to the employer alone, the employee preserves his right to workers compensation benefits.

Based on this statutory framework, the SJC held that Great Northern's obligation to defend and indemnify the claim was triggered by the notice given to Progression by its employee, regardless of whether Progression provided notice of the claim to Great Northern. Selective tender did not defeat Great Northern's obligations. As applied to workers compensation benefits, the provisions in Great Northern's policy making its obligations thereunder contingent on the employer providing notice of the injury were contrary to Massachusetts law and void with respect to a Massachusetts employee.

The SJC continued its opinion with an analysis of selective tender in the context of general liability insurance. Under Massachusetts law, a general liability insurer's coverage obligations are triggered by notice of a claim regardless of the source or timing of the notice, unless the insurer is prejudiced thereby. See G.L. c. 175, § 112. The SJC highlighted its previous opinions which held that an insured's failure to give an insurer timely notice of a claim protects the insurer from liability on the claim only where the insurer is prejudiced by the late notice. Because the premise of selective tender is that an insurer is not liable on a claim where the insured fails to provide timely notice, the selective tender doctrine conflicts with Massachusetts statutory and case law governing liability insurance.

The SJC found further support for its holding in public policy. Selective tender, the SJC reasoned, would reward insurers that ignore their coverage obligations to the detriment of those that honor them. For example, an insured with two insurers might tender a claim to the insurer which would promptly pay the claim with minimal inconvenience and paperwork and avoid tendering to

the company which would delay the payment and maximize inconvenience. The adoption of selective tender could reward insurers who failed to promptly accept coverage and defend claims. Moreover, selective tender could potentially burden the Massachusetts Insurers Insolvency Fund, if an insured selectively tendered to an insurer which later became insolvent.

If any doubt remained, it is now clear that the doctrine of equitable

contribution is the law in Massachusetts and applies to insurers that insure the same insured for the same loss. Selective tender has been rejected in both workers compensation and general liability contexts. Where an insurer receives late notice of a claim for which another policy also provides primary coverage, the insurer's obligations to defend and indemnify under the policy and the doctrine of equitable contribution are avoided only where the late notice prejudices the insurer. ■

Public Commentary Sought on N.H. Coastal Flood Risk Commission Report

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storm surge and flooding, and this report will help the state meet its responsibilities. I am pleased with the pragmatic, common sense principles that guided the commission recommendations.”

The recommendations focus on refining science-based understanding of coastal flood risks, completing detailed assessments of vulnerabilities and implementing actions that protect and adapt built structures and facilities as well as New Hampshire's economy, natural resources and heritage.

The recommendations are primarily directed to the state legislature, state agencies and municipalities, but successful implementation of the recommendations will require collaboration between the public and private sectors and among many stakeholder groups, noted the commission.

“The state and municipalities each have responsibilities for roads, public buildings, sewer and water and other infrastructure,” said Senator David Waters. “The report emphasizes that early and consistent collaboration between state and local governments can result in solutions which in turn increase our preparedness and resiliency.”

The report is available for public review and comment on the commission's website at nhcrhc.stormsmart.org.

Copies of the report have also been made available for review at public libraries and town and city halls located in several designated coastal zone municipalities.

In addition to submitting written comments via the website, the public is also being encouraged to attend and provide input on the draft report and recommendations at public meetings scheduled for May 26th and June 1st. The public comment period will end at 4:00 p.m. EST on June 30th. ■

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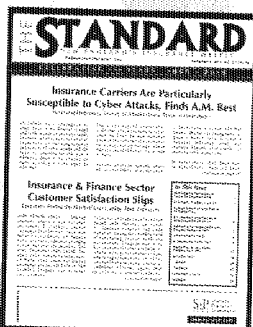
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