

Excess Insurer Not Bound by Primary Insurer's Coverage Determination

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A state trial court, applying Massachusetts law, has held that an excess insurer providing coverage under a "follow form" policy was not bound by the primary insurer's coverage determination and that the excess insurer was entitled to summary judgment based on the primary policy's prior claims exclusion and the "known loss" doctrine. *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London*, 2004 WL 2341388 (Mass. Super. Ct. Sept. 30, 2004).

In October 1997, the insured company was sued in a class action alleging that it had engaged in improper sales of life insurance policies through the use of misrepresentations involving, *inter alia*, the "future value or performance" of the policies. The insured settled the class action and its primary insurer agreed to tender policy limits. The company's excess insurer, which had issued a "follow form" policy providing coverage in accordance with the terms of the primary policy, notified the company that the class action was not covered under the primary policy's terms. The company filed this suit for breach of contract and the parties cross-moved for summary judgment.

The excess insurer asserted that it was not bound by the primary insurer's coverage determination and that coverage was precluded by, *inter alia*, the primary policy's prior claims exclusion, which barred coverage for claims "based upon, directly or indirectly arising out of, or in any way involving":

(1) any Wrongful Act or any matter, fact, circumstance, situation, transaction or event which has been the subject of any Claim made against [the insured] prior to the [effective date]; or

(2) any other Wrongful Act, whenever occurring, which, together with a Wrongful Act which has been the subject of such Claim, would constitute Interrelated Wrongful Acts....

The excess insurer also argued that the doctrine of "known loss" precluded coverage because the insured had prior knowledge of a substantial probability that the claim would arise.

After noting that the issue appeared to be one of first impression in Massachusetts, the court held that the excess insurer was not bound by the primary insurer's interpretation of the policy. The excess insurer was not a party to the settlement and was not part of the agreement reached between the primary insurer and the company. Further, the settlement did not constitute a requisite "judgment" for claim or issue preclusion

analysis. Finally, the court acknowledged that the primary insurer's decision to pay under the policy could have been driven by business considerations and thus may not have reflected the primary insurer's true interpretation of the policy language. Thus, the court concluded that the excess insurer was not bound by the primary insurer's decision to settle the claim.

The court next determined that coverage was precluded under both the prior claims exclusion and the "known loss" doctrine. With respect to the exclusion, the court noted that the insured had been sued in 1992, prior to the policy's effective date, for alleged "fraud and misrepresentation[s] by one of the insured's affiliates and/or its sales agent as to the future performance of the policy." The court observed that these claims were "very similar" to the ones presented in the current class action, and that the plaintiff in the 1992 action "likely would have been a class member [in the underlying class action]." The court accordingly held that the "multitude of similarities between these two actions" placed the later suit squarely within the terms of the exclusion and granted summary judgment to the excess insurer.

The court then observed that, even if the exclusion had not applied, coverage would be precluded under the "known loss" doctrine. According to the court, that doctrine "eliminates coverage of a loss that had already happened or the insured knew was highly probable to occur." The excess insurer produced evidence that, since 1990, the insured had received 300 complaints of the type asserted in the underlying class action. The court concluded that this evidence showed the insured knew of this probable loss when it sought coverage.

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