NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-12164

GREAT DIVIDE INSURANCE COMPANY vs. LEXINGTON INSURANCE COMPANY.

Suffolk. March 6, 2017. - November 1, 2017.

Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, & Budd, JJ.[1]

Motor Vehicle, Insurance. Insurance, Motor vehicle insurance, Excess liability insurance.

Certification of a question of law to the Supreme Judicial Court by the United States District Court for the District of Massachusetts.

Adam R. Doherty (Thomas M. Elcock also present) for the plaintiff.

Kimberly A. Hartman, of Illinois, for the defendant.

GAZIANO, J. In this case we answer a certified question from the United States District Court for the District of Massachusetts concerning the priority of coverage of two automobile insurance policies that both covered a single motor vehicle accident. The accident occurred when an employee of a

[1] Justice Hines participated in the deliberation on this case prior to her retirement.

refuse company, driving a garbage truck owned by another company, struck and killed a bicyclist. The policies were issued respectively by the plaintiff and defendant insurers to the employer of the driver and the company that owned the truck.[2] A portion of the loss was covered by a primary insurance policy from a third insurance company, not a party here. The two policies at issue were triggered, according to the language in each policy, after the exhaustion of the primary policy. Although the relevant language of the policies differs, each policy states that it provides "excess" coverage[3] (in the circumstances here) and each policy also contains an "other insurance" clause.[4] As the Federal District Court judge noted in his certification order, the circumstances here involve a question of first impression, because one of the two policies is a "hybrid" policy that provides primary coverage for an incident where its insured is driving a vehicle owned by the insured, and excess coverage for an accident where its insured is the driver but is driving a vehicle owned by someone else. The other

---

[2] The company that employed the driver and the company that owned the truck, which was being used that day with permission because the truck ordinarily used on that route had broken down, share some common ownership.

[3] An "excess insurance" policy is applicable only after the primary insurance policy is exhausted.

[4] The "other insurance" provisions here state that the particular policies provide coverage in excess of all other collectible insurance (from whatever source).

policy is a "true . . . umbrella" policy that provides only excess coverage where other coverage has been exhausted. For the reasons that follow, we conclude that both excess policies cover the accident equally, after exhaustion of the underlying primary policy, to the extent of their respective policy limits.

1. Background and procedural history. The undisputed facts are drawn from the decision of the Federal District Court judge certifying the question to this court, supplemented by additional facts set forth in the parties' cross-motions for summary judgment. On April 3, 2014, an employee of EZ Disposal Service, Inc. (EZ), was driving a garbage truck assertedly leased by Capitol Waste Services, Inc. (Capitol), and owned by Atlantic Refuse Leasing Equipment, LLC (Atlantic), when he struck and killed a bicyclist. The bicyclist's wife and brother thereafter brought a wrongful death action in the Superior Court against EZ, Capitol, and Atlantic.

The loss at issue was covered by three insurance policies. The first policy, not at issue here, was issued by Commerce Insurance Company (Commerce) and provided Capitol with primary insurance, up to a limit of $1 million. The second policy, issued by Lexington Insurance Company (Lexington), provided Capitol with excess insurance, and contained a limit of $10 million. The third policy, issued by Great Divide Insurance Company (Great Divide), provided EZ with primary insurance for a

number of different risks, including accidents involving automobiles owned by EZ, up to a limit of $1 million. Great Divide's policy also contained an "Other Insurance" clause, which stated, "For any covered 'auto' you don't own, the insurance provided by this coverage form is excess over any other collectible insurance."

Commerce defended all the insureds in the underlying tort action. In October, 2015, Great Divide filed a complaint against Lexington in the Superior Court, seeking a declaration that its policy and Lexington's policy were both excess policies covering the same level of loss. Lexington removed the case to the United States District Court for the District of Massachusetts on diversity grounds. In a decision on the parties' cross motions for summary judgment, the Federal District Court judge certified the question at issue to this court.

The parties agree that the policy issued by Capitol's primary insurer, Commerce, provides the primary coverage for the first layer of the loss. They also agree that both the Lexington policy and the Great Divide policy cover the loss beyond the Commerce limits as excess policies. The dispute centers on whether the primary policy issued by Great Divide, which contains an "other insurance" clause, must be exhausted before Lexington's "true excess" policy is triggered, or whether

both policies are applicable to the same extent for the loss in excess of the Commerce limits.

2. Discussion. The certified question is as follows:

> "Where there is a motor vehicle accident and the primary commercial automobile liability insurance policy issued to the owner of the vehicle involved in the accident is exhausted, what is the priority of coverage between (1) a second primary commercial automobile liability insurance policy insuring the driver of the vehicle, which contains an other insurance/nonowned vehicle clause providing (a) that, with respect to motor vehicles the insured owns, this insurance is primary, (b) that, with respect to motor vehicles the insured does not own, this policy is excess and (c) that 'when this coverage form and any other coverage form or policy covers on the same basis, either excess or primary, we will pay only our share'[;] and (2) a true excess liability insurance policy insuring the owner of the vehicle that contains an other insurance clause providing that 'if other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the "other insurance"'?"

For the reasons that follow, we conclude that with respect to the covered loss at issue here, both Great Divide's primary policy with an "other insurance" clause, and the "true excess" policy issued by Lexington, cover the same level of risk, namely, the level in excess of the Commerce limits.

Great Divide maintains that, while it provides primary coverage for automobiles owned by EZ, its policy covers the same level of risk for EZ drivers operating automobiles that EZ does not own as does Lexington's umbrella policy, because the unambiguous language of the "other insurance" clause states that for automobiles not owned by EZ, the policy is "excess over any

other collectible insurance." Lexington argues, to the contrary, that the "other insurance" language in the Great Divide policy does not change the inherently primary nature of that policy, and therefore that the policy does not cover the same level of risk as does Lexington's "true excess" policy, and must be exhausted before Lexington's policy is triggered. Lexington points to the fact that, in nearly every other instance, the Great Divide policy functions as primary insurance for EZ. The certified question asks, essentially, whether the Great Divide insurance policy is an excess policy with respect to automobiles not owned by EZ, such that, by definition, it covers the same level of risk covered by the Lexington "umbrella" policy.

In interpreting an insurance policy, we apply the same principles of construction as we would to any other contract. Boston Gas Co. v. Century Indem. Co., 454 Mass. 337, 355 (2009). We begin with the language of the policy. Id. If the language is clear and unambiguous, we must give effect to that language, without considering the underlying intent of the parties. See Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London, 449 Mass. 621, 634 (2007) ("What the parties intended the words [of an insurance contract] to mean is relevant only when an ambiguity in the contractual language is apparent"); Mission Ins. Co. v. United States Fire Ins. Co., 401 Mass. 492, 496

(1988) (Mission).

In Mission, supra at 496-497, we rejected "the humanistic rule of construction" that "insurance clauses that conflict are to be reconciled and interpreted upon the determination of the sense and meaning of the terms the parties used," and adopted an approach that "attempt[ed] to effectuate the language of the policies at issue," as with any other contract (citation omitted). See Reliance Ins. Co. v. Aetna Cas. & Sur. Co., 393 Mass. 48, 52 (1984) ("the court cannot properly disregard the plain language of the policy in order to give effect to what it considers the intentions of the parties probably to have been"). Each party argues that the decision in Mission, supra, supports its view of the matter, although each agrees also that the facts in that case are not on all fours with the present case.

The Mission case addressed the priority of coverage between two primary policies containing "other insurance" clauses. Mission, 401 Mass. at 500-501. The Mission Insurance Company had issued an "Umbrella Liability Insurance" policy that contained a clause stating that it was excess to both the insured's primary insurance and "other valid and collectible insurance . . . available to the insured." Id. at 493. The U.S. Fire Insurance Company had issued a "Commercial Comprehensive Catastrophe Liability Policy" that also contained a clause stating that it was excess to both the insured's

primary insurance and "other valid and collectible insurance . . . available to the insured." Id. We concluded that, in order to determine which policy had priority, rather than try to divine the intent of the parties based on any of the previously applied rubrics -- the nature of the policy, the ratio of premium payments to coverage limits, or the title of the policy -- we would begin with the plain language of each policy. Id. at 496-497 ("court will apply clear language of policy despite evidence that parties' intent may have been different"). Because the language of each policy was unambiguous, we concluded that both policies were clearly written to be excess insurance, and therefore that both covered the same level of risk. Id. at 499-500.

Our decision in that case to focus on the plain language of an insurance policy, rather than derive the parties' intent through other means, reflects our acknowledgement that an insurance policy is a bargained-for contract, see City Fuel Corp. v. National Fire Ins. Co. of Hartford, 446 Mass. 638, 640 (2006), and that the parties should have the benefit of their stated bargain. See Boazova v. Safety Ins. Co., 462 Mass. 346, 357 (2012), citing Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 320-321 (1996) (enforcing contract according to its express terms based on "principles governing freedom of contract"). Since our decision in Mission, 401 Mass.

at 496, when interpreting insurance policies, we strive to effectuate not our own ideas about the language that could have been used to best effectuate the intent of the parties but, rather, the actual contract language. See 11 R.A. Lord, Williston on Contracts § 31:5, at 455 (4th ed. 2012) ("the question whether a bargain is smart or foolish, or economically efficient or disastrous, is not ordinarily a legitimate subject of judicial inquiry").

Here, notwithstanding their assertions that the court's decision in Mission should govern, both parties essentially urge an interpretation based on what would have been the likely intent of the parties. The language in the Great Divide "excess" provision clearly says that it is "excess over any other collectible insurance" for nonowned automobiles. To some extent, the parties argue that the question turns on whether the Great Divide policy provided the coverage set forth in that unambiguous language, or whether the fact that it functioned "mostly" as a primary policy means that its excess clause does not have the usual meaning of such clauses and that we should look elsewhere to derive its meaning from the intent of the parties.

Notwithstanding the plain language of the "excess" provision, Lexington argues that the "other insurance" clause in Great Divide's policy means that it must be exhausted before

Lexington's "true excess" policy is triggered. In support of this view, Lexington argues that the Great Divide policy is, by its nature, a primary policy, because it covers mostly primary risk; the Great Divide policy has high premiums and a low coverage limit, which is typical of primary (and not excess) policies; and the Great Divide policy is not clearly labeled as an "excess" or "umbrella" policy, while Lexington's policy is labeled a "Commercial Umbrella Liability Policy."

First, we address Lexington's argument that the Great Divide policy is, by its nature, a primary policy because it covers mostly primary risk. The 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 before a "true excess" policy is triggered. See, e.g., United Servs. Auto. Ass'n v. Empire Fire & Marine Ins. Co., 134 Ariz. 64, 66 (1982); Illinois Emcasco Ins. v. Continental Cas. Co., 139 Ill. App. 3d 130, 133-134 (1985); Monroe Guar. Ins. Co. v. Langreck, 816 N.E.2d 485, 496 (Ind. Ct. App. 2004). For example, in LeMars Mut. Ins. Co. v. Farm & City Ins. Co., 494 N.W.2d 216, 218-219 (Iowa 1992), the Iowa Supreme Court determined that the language of a primary policy with an excess "other insurance" clause supported a conclusion that the policy provided the same level of coverage as would a "true excess" policy. Focusing on the intent of the parties, however,

the court concluded that "the surrounding circumstances, the situation of the parties, and the objects the parties were striving to attain" required it to interpret the policy as providing coverage that must be exhausted before the "true excess" policy would be triggered. Id.

Other State courts, however, have determined that primary insurance policies with "other insurance" clauses cover the same level of risk as "true excess" policies. See, e.g., Liberty Mut. Ins. Co. v. Fireman's Fund Ins. Co., 479 A.2d 289, 292 (Del. Super. Ct. 1983) (looking to language of policy rather than "umbrella" policy label to determine whether two policies provided differing levels of coverage); Uniguard Ins. Group v. Royal Globe Ins. Co., 100 Idaho 123, 128 (1979) (construing "contract of insurance as it is written . . . [instead of] mak[ing] a new contract for the parties, or . . .add[ing] words to the contract of insurance to either create or avoid liability"). We conclude that the approach adopted by the courts in these other cases, which gives effect to all the words in the policy, is the better approach.

When interpreting priorities of competing insurance policies, we discern no reason, and the parties have advanced none, to depart from the rule of construction set forth in Mission, 401 Mass. at 500-501, and Boston Gas Co., 454 Mass. at 355-356. In Massachusetts, "[e]very word in an insurance

contract 'must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable' . . . without according undue emphasis to any particular part over another" (citations omitted). Boston Gas Co., supra. While we must read the language of an insurance policy as a whole, that does not mean giving effect to some policy provisions at the expense of another provision. See Woogmaster v. Liverpool & London & Globe Ins. Co., 312 Mass. 479, 481 (1942) (we construe insurance policies "without according undue emphasis to any particular part [of the policy] over another"). Here, that means giving full effect to the "other insurance" clause with respect to vehicles not owned by EZ.

In another argument that relies on looking beyond the plain language of the policy, Lexington maintains that the Great Divide policy is earlier in priority than the Lexington policy because the Great Divide policy has high premiums and a low coverage limit, attributes usually contained in other primary policies. See Illinois Emcasco Ins. Co., 139 Ill. App. 3d at 133 ("An examination of the premiums generally charged for umbrella coverage also reflects an intent that umbrella policies serve a different function [from primary policies with excess clauses]"); LeMars Mut. Ins. Co., 494 N.W.2d at 218-219 ("true excess" policies usually have low ratios of premiums to coverage limits, while primary policies have higher ratios). See also 1

J.E. Thomas & F.J. Mootz, III, New Appleman of Insurance Law Library Edition § 1.06[7] (LexisNexis 2016).

This argument is unavailing, for the same reason that Lexington's prior argument failed. The plain language of the Great Divide policy does not suggest any reason to look beyond that language. Even were we to consider Lexington's claim, on the purported ground that it provides a clear indicator of the insurer's intent and clarifies the nature of the policy in a way that contradicts its plain language, the ratio of higher premiums to lower coverage limits in the Great Divide policy as compared to the Lexington policy does not evince an intent that is contrary to the plain language of the Great Divide policy itself. See Mission, 401 Mass. at 500-501 ("it will not always be clear what factors caused or allowed insurers to provide given levels of coverage for whatever premium"); Liberty Mut. Ins. Co., 479 A.2d at 293 (noting that multitude of variables that determine premium levels make it difficult to determine why given policy has particular premium); Carriers Ins. Co. v. American Policyholders' Ins. Co., 404 A.2d 216, 221 (Me. 1979). In Sharples v. General Cas. Co. of Ill., 85 Ill. App. 3d 899, 901-902 (1980), for example, the Illinois Appellate Court rejected the view that premium payments are evidence of an intent that is contrary to the plain language of the policy. Instead, the court concluded that "the clear and unambiguous

language of the policy rebutted the existence of any subjective intent of [the] plaintiff." Id. at 902.

Lexington also argues that the Great Divide policy is earlier in priority than the Lexington policy because the Great Divide policy is not labeled as an "excess" or "umbrella" policy, while Lexington's policy is called a "commercial umbrella liability" policy. See LeMars Mut. Ins. Co., 494 N.W.2d at 219. The risk that a policy covers does not depend on how the insurer chose to label the policy. See Moroney Body Works, Inc. v. Central Ins. Cos., 87 Mass. App. Ct. 774, 777 (2015). To determine whether two policies insure the same level of risk, the "distinction [between the names of the policies] alone is not dispositive. Instead, the inquiry turns on the terms of the respective policies." Id. While, in cases of ambiguity, the name of a policy may be informative, it is by no means determinative. See id. Here, despite the fact that the Lexington policy is labeled an "umbrella policy" and the Great Divide policy is not, the terms of the Great Divide policy clearly state that it covers the same level of excess risk for "non-owned vehicles" as does the "excess" provision in the Lexington policy. See Liberty Mut. Ins. Co., 479 A.2d at 292.

Therefore, we conclude that both policies cover the loss at issue as excess insurers, and neither has priority over the other.

3. Conclusion. We answer the certified question as follows:

> "Where neither insurer is the primary insurer in the circumstances of this case, Great Divide and Lexington insure the same level of risk, notwithstanding the noted differences in the language of each insurance policy."

The Reporter of Decisions is to furnish attested copies of this opinion to the clerk of this court. The clerk in turn will transmit one copy, under the seal of the court, to the clerk of the United States District Court for the District of Massachusetts, as the answer to the question certified, and will also transmit a copy to each party.