

UPDATE FROM THE INSURANCE DOCKET

Massachusetts Court Adopts Selective Tender Rule for Claims of Equitable Contribution Among Co-Insurers

In *Insurance Company of the State of Pennsylvania v. Great Northern Insurance Co.*, No. 13-cv-12821 (D. Mass. Aug. 25, 2014), the US District Court for the District of Massachusetts ruled that an insurer could not seek equitable contribution from a co-insurer where the insured never tendered the claim to the co-insurer.

There, the insured's employee was injured while working abroad and pursued a worker's compensation claim before the Massachusetts Department of Industrial Accidents ("DIA"). Both the Insurance Company of the State of Pennsylvania ("ISOP") and Great Northern Insurance Co. had issued concurrent worker's comp policies to the insured, each of which covered the insured's claim. The insured, however, tendered the claim to ISOP only. While the claim remained before the DIA and after ISOP had made initial payments on the claim, ISOP learned of the Great Northern policy and tendered the claim to

Great Northern, without the insured's consent, seeking indemnification.

Great Northern denied coverage on the basis that the insured intentionally tendered the claim to ISOP and not to Great Northern. In ISOP's action seeking a declaration that it was entitled to equitable contribution from Great Northern, the parties each moved for summary judgment.

It is widely accepted that an insurer may seek equitable contribution from a co-insurer. *See, e.g., Rubenstein v. Royal Ins. Co. of Am.*, 44 Mass. App. Ct. 842, 852 (1998). However, jurisdictions are split as to whether equitable contribution is available to a co-insurer when the claim was tendered not by the insured, but by the other insurer. *Compare, e.g., Truck Ins. Exch. v. Unigard Ins. Co.*, 79 Cal. App. 4th 966 (2000) (timely notice of the claim by a co-insurer is enough to allow equitable contribution) *with, e.g., Inst. Of London Underwriters v. Hartford Fire Ins. Co.*, 599 N.E. 2d 1311 (Ill. App. 1992) (contribution unavailable where the co-insurer, and not the insured, tendered claim).

Ruling on a matter of first impression, the District Court concluded that contribution was unavailable where the insured never

tendered the claim to Great Northern and the policy explicitly required the insured to notify Great Northern for coverage to apply. In so ruling, the court left to the insured the decision of whether or not to invoke the terms of its policy, recognizing that an insured may have legitimate reasons for not tendering a claim, such as a desire to prevent premium increases or to maintain policy limits for other claims. Finally, the court found that the "late tender" rule, which allows coverage to apply where late notice of a claim does not prejudice the insurer, did not apply as no tender of the claim by the insured had occurred.

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