Competing "Other Insurance Clauses": Can One Trump the Other?

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TD General Insurance Company v. Intact Insurance Company, 2019 ONCA 5, the Court of Appeal considered whether one insurer's "other insurance clause" could trump the other's. Both policies provided coverage for the loss and contained identically worded clauses making their policies excess to any other insurance which applied to the loss. The Court found that the identical clauses made the two policies irreconcilable and so the two insurers must share the burden equally under a coordinate obligation to make good the loss.

The Loss, Policies and Lower Court's Decision

The loss in this case arose out of a boating accident. The injured passenger sued the driver of the boat who was covered by two policies of insurance — the boat owner's TD policy and the driver's own homeowner's policy, issued by Intact. Both policies contained an "other insurance clause" that provided:

If you have other insurance which applies to a loss or claim, or would have applied if this policy did not exist, this policy will be considered excess insurance and we will not pay any loss or claim until the amount of such other insurance is used up.

TD brought an application seeking an order that both insurance companies were on an equal footing and had to share equally in the defence and indemnity of the driver.

In the lower court decision, the court found that although both policies provided coverage for this loss, TD exhibited a clear intention to treat its policy as the primary insurance due to its specific reference to the boat in question thus making it the "closest to the risk".

The Court Of Appeal Disagrees and Sets Out the Framework

The Court of Appeal disagreed with this approach. In applying the principles of the Supreme Court's decision in *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48, the Panel set out the following two-part analysis:

1. Is there overlapping coverage?

It must first be confirmed that both policies provide coverage for the loss at issue. If a policy does not provide coverage, then there is no need to consider competing "other insurance clauses." In this case, both policies provided coverage.

1. Did the insurers intended to limit their obligation to contribute, by what method, and in what circumstances vis-à-vis the insured?

The focus in answering this question is on the excess insurance clauses. Both policies, by their terms, afforded primary coverage to the driver for the loss, and both policies provided that they were excess to other insurance that covered the loss thus the limiting obligations in the policies were irreconcilable.

The Panel ultimately concluded that the two insurers must share the burden of defence and indemnity of the driver equally.

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