

JUN 11 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SENTRY SELECT INSURANCE
COMPANY,

Plaintiff - Appellee,

v.

FIDELITY & GUARANTY INSURANCE
COMPANY,

Defendant - Appellant.

No. 04-56265

D.C. No. CV-02-01055-LSP

MEMORANDUM *

Appeal from the United States District Court
for the Southern District of California
Leo S. Papas, Magistrate Judge, Presiding

Submitted June 5, 2009**
Pasadena, California

Before: HAWKINS, GRABER, and PAEZ, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We earlier issued an order, filed July 14, 2006, certifying to the Supreme Court of California the following question for which there was no clear controlling precedent in California’s judicial decisions:

What is the appropriate test for determining whether an insured is “engaged in the business of renting or leasing motor vehicles without operators” under California Insurance Code § 11580.9(b)? Compare *Travelers Indem. Co. of Ill. v. Md. Cas. Co.*, 41 Cal. App. 4th 1538, 1546-47 (1996), and *McCall v. Great Am. Ins. Co.*, 119 Cal. App. 3d 993, 998 (1981), with *W. Carriers Ins. Exch. v. Pac. Ins. Co.*, 211 Cal. App. 3d 112, 116-17 (1989), *Mission Ins. Co. v. Hartford Accident & Indem. Co.*, 160 Cal. App. 3d 97, 101 (1984), and *Transp. Indem. Co. v. Robert Alo*, 118 Cal. App. 3d 143, 148 (1981).

Sentry Select Ins. Co. v. Fid. & Guar. Ins. Co., 455 F.3d 956 (9th Cir. 2006). The Supreme Court of California accepted certification.

On May 4, 2009, the Supreme Court of California issued an opinion holding that the Fidelity & Guaranty Insurance Company (“Fidelity”) insurance policy issued to John’s Trucking, Inc. (“JTI”), for the leased semitrailers involved in the accident was excess to the Sentry Select Insurance Company (“Sentry Select”) insurance policy issued to the driver, Richard Justice, even prior to a recent legislative change

clarifying the relevant statutory text.¹ *Sentry Select Ins. Co. v. Fid. & Guar. Ins. Co.*, 46 Cal. 4th 204, 207 (2009). The Supreme Court of California held that even before the statutory revision, the extensive leasing activity conducted by JTI could not “be viewed as ‘merely incidental’ to JTI’s hauling business” and therefore “plainly qualified under former subdivision (b) for the conclusive presumption that its policy was excess to other insurance covering the loss.” *Id.*

In view of this response from the Supreme Court of California, Fidelity’s insurance policy was excess to Sentry’s insurance policy. Consequently, we reverse the district court’s grant of summary judgment for Sentry and remand.

REVERSED and REMANDED.

¹ As the Supreme Court of California noted, shortly after the Ninth Circuit requested certification, the Legislature amended the statute, deleting the ambiguous text and replacing it with the phrase “who in the course of his or her business rents or leases motor vehicles without operators.” *Sentry Select*, 46 Cal. 4th at 207 (quoting § 11580.9, subd. (b), Stats. 2006, ch. 345, § 1). Prospectively, the amendment “eliminates any ambiguity as to whether the leasing of commercial vehicles must be a ‘regular part of the insured’s business’ in order for the conclusive presumption to apply under the amended language.” *Id.* (quoting *Travelers*, 41 Cal. App. 4th at 1546).