

WHO'S TO PAY? TRADE CONTRACT RATHER THAN INSURANCE POLICY CONTROLS PRIORITY OF INSURANCE COVERAGE UNDER NEW YORK LAW

Date: 15 October 2021

U.S. Litigation and Dispute Resolution Alert

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On 5 October 2021, a three-judge panel of the United States Court of Appeals for the Second Circuit unanimously held that, under New York law, the indemnity agreement in a contract between a contractor and subcontractor governs the priority of coverage for the contractor as an additional insured on the subcontractor's commercial general liability policy, rather than the "Other Insurance" clause of the policy. This decision provides clarity to project owners, contractors, subcontractors, and their respective insurers regarding the order in which additional insured coverage applies.

In *Century Surety Co. v. Metropolitan Transit Authority, Long Island Railroad, Admiral Insurance Co.*,¹ defendant Long Island Railroad (LIRR) contracted with Rukh Enterprises (Rukh) to remove lead paint from the Cypress Bridge in Queens. In the contract, Rukh agreed to indemnify LIRR against liabilities arising out of the Cypress Bridge project.² Rukh also named LIRR as an additional insured on Rukh's insurance policies. Rukh hired East Coast Painting and Maintenance (East Coast), a non-party subcontractor, to perform the lead-related work.³ In September of 2013, an employee of the subcontractor suffered an injury while working on the Cyprus Bridge and brought action against Rukh and LIRR in state court.⁴

In January 2017, Century Surety Company (Century), the excess liability insurer for Rukh, filed a complaint in the Southern District of New York seeking a declaratory judgment that it had no duty to defend or indemnify any party in the state court action.⁵ In April 2017, Admiral Insurance Company (Admiral), the protective liability insurer of LIRR, filed a separate suit against Century seeking a declaratory judgment that: (1) Century was obligated to defend and indemnify LIRR; and (2) Century's policy must exhaust before Admiral's policy would respond.⁶ Those two cases were subsequently consolidated and all parties motioned for summary judgment.⁷ On 29 January 2019, the district court granted summary judgment in favor of Century because the language in the "Other Insurance" provision of the Century policy was a "true excess policy" and Century, therefore, was not liable to contribute until all available insurance policies, including Admiral's, had been exhausted.⁸ Century appealed.⁹

On appeal, Admiral did not dispute that Century's "Other Insurance" provision made the Century policy a "true excess" policy.¹⁰ Admiral instead argued that the indemnity agreement in the construction contract between Rukh and LIRR controlled and required Century to pay before Admiral.¹¹ When faced with the issue of whether the terms of the indemnity agreement in the contract between Rukh and LIRR or Century's "Other Insurance" provision governed, the court concluded that the indemnity agreement controlled.¹² The Second Circuit found two New York Appellate Division cases that were "particularly instructive"-- *Indemnity Insurance Co. of North America v. St. Paul Mercury Insurance Co.*¹³ and *Arch Insurance Co. v. Nationwide Property & Casualty Insurance*

Co.¹⁴ Both cases involved an indemnity agreement by which the contractor agreed to indemnify the project owner that was “at odds with the terms of the contractor’s insurance policy,” which also contained “true excess” provisions.¹⁵ Indemnity and Arch reasoned that even if the contractor’s insurance was excess to the owner’s insurance, the owner was entitled to indemnification from the contractor because the owner’s liability would pass through to the contractor and its insurers.¹⁶

Additionally, the Second Circuit distinguished *Bovis Lend Lease LMB, Inc. v. Great American Insurance Company*¹⁷, an earlier Appellate Division case, which held, contrary to *Indemnity* and *Arch* that an insurance policy’s provisions pertaining to priority of coverage govern over an underlying indemnity agreement.¹⁸ Because *Bovis* was decided before *Indemnity* and *Arch*, the court reasoned that the latter cases were more indicative of the approach the New York Court of Appeals would adopt now.¹⁹ Moreover, the court rejected the traditional procedural formalities of *Bovis*, which calls for a separate action to enforce the indemnity agreement.²⁰ Instead, the Second Circuit anticipated that New York’s highest court would determine the parties’ rights and obligations in one action, lessening any further litigation.²¹ The court reasoned that even if an Other Insurance clause might not require an indemnitee’s insurer to pay in the first instance, the indemnity agreement ultimately could require that insurer to pay, such that both obligations should be determined in one action. In bolstering its position, the court cited to other federal courts across the country that have reached the same conclusion—that an indemnity agreement is controlling, not Other Insurance clauses.²² In sum, the Second Circuit’s decision in *Century* continues the trend in New York caselaw that an indemnity agreement in an underlying trade contract, rather than a policy’s Other Insurance clause, governs the priority of coverage for an additional insured. This holding provides significant insight to owners, developers, builders and their insurers regarding priority of coverage in connection with their liabilities to pay into a settlement.

FOOTNOTES

¹ *Century Sur. Co. v. Metro. Transit Auth.*, 20-1474-cv, 2021 U.S. App. LEXIS (2nd Cir. Oct. 5, 2021).

² *Id.* at *1, *6.

³ *Id.* at *2.

⁴ *Id.*

⁵ *Id.* at *3.

⁶ *Id.*

⁷ *Id.* at *4.

⁸ *Id.*

⁹ *Id.* at *5.

¹⁰ *Id.* at *5–6.

¹¹ *Id.*

¹² *Id.* at *6.

¹³ *Indem. Ins. Co. of No. Am. v. St. Paul Mercury Ins. Co. (Indemnity)*, 74 A.D.3d 21 (1st Dep't 2010).

¹⁴ *Arch Ins. Co. v. Nationwide Prop. & Cas. Ins. Co. (Arch)*, 175 A.D.3d 437 (1st Dep't 2019).

¹⁵ *Century Sur. Co.*, 2021 U.S. App. LEXIS at *8.

¹⁶ See *Indem. Ins. Co.*, 74 A.D.3d at 26; see also *Arch Ins. Co.*, 175 A.D.3d at 438.

¹⁷ *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co. (Bovis)*, 53 A.D.3d 140 (1st Dep't 2008).

¹⁸ *Id.*

¹⁹ *Century Sur. Co.*, 2021 U.S. App. LEXIS at *9.

²⁰ *Id.* at *11-12.

²¹ *Id.*

²² *Accord St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 272, 277 (4th Cir. 2004); *Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429, 436 (5th Cir. 2003); *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 587 (8th Cir. 2002).

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