HINSHAW

Alerts

Second Circuit Rules Indemnity Provision in Construction Contract Trumps "Other Insurance" Clause in Determining Priority of Coverage

October 27, 2021
Insights for Insurers

A recent decision by a panel of the U.S. District Court of Appeals for the Second Circuit serves as a reminder that sometimes insurers and policyholders must look outside the insurance policies to determine the priority of coverage among insurance contracts.

We have previously discussed how, in some instances, legal doctrines or precedent may supersede "other insurance" clauses to determine priority of coverage among insurance policies. The most notable example is Illinois' limited "targeted tender" or "selective tender" doctrine. *See* S.M. Seaman & J.R. Schulze, *Allocation of Losses in Complex Insurance Coverage Claims* (Thomson Reuters 9th Ed. 2020-21) at Chapter 16. Another instance may be where the parties have assigned the risk among themselves in underlying contracts through "additional insured" and "indemnity" provisions. Like the targeted tender doctrine, this often takes place in the context of construction agreements. In some instances, the indemnity provision and "other insurance" clause point in the same direction, but in others they conflict.

Earlier this month, the Second Circuit weighed in on the issue in *Cent. Sur. Co. v. Metro. Transit Auth., No. 20-1474-CV, 2021 WL 4538633, at *1 (2d Cir. Oct. 5, 2021)* (applying New York law). In this case, the Second Circuit determined that the underlying construction contract, rather than an excess "other insurance" provision controlled. More specifically, the panel ruled that an indemnity agreement in a contract between a contractor and subcontractor determined the priority of coverage for the contractor as an additional insured under the subcontractor's commercial general liability policy, rather than the "other insurance" provision in the policy. The underlying claim was a negligence claim brought by an employee of the subcontractor who was injured during the construction project.

The Second Circuit observed that the New York Court of Appeals has not ruled on the issue and noted that there was conflicting lower court authority. In determining that the indemnity provision trumped the "other insurance" clause, the court relied upon *Indem. Ins. Co. of N. America v. St. Paul Mercury Ins. Co.*, 74 A.D.3d 21 (1st Dep't 2010) and *Arch Ins. Co. v. Nationwide Prop. & Cas. Ins. Co.*, 175 A.D.3d 437 (1st Dep't 2019). It acknowledged conflicting law on the issue. *See Bovis Lend Lease LMB, Inc. v. Great American Insurance Co.*, 53 A. D.3d 140 (1st Dep't 2008) and *Tishman Construction Corp. of New York v. Great*

Attorneys

Scott M. Seaman

American Insurance Co., 53 A.D.3d 416 (1st Dep't 2008). The court predicted the New York high court would follow the more recent New York appellate court decisions. The court also cited Fourth, Fifth, and Eighth U.S. Circuit Court of Appeals decisions in support of its ruling. *St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 365 F.3d 263, 272, 277 (4th Cir. 2004) (applying Virginia law"); *Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429, 436 (5th Cir. 2003) (applying Texas law); and *Wal-Mart Stores, Inc. v. RLI Ins. Co.*, 292 F.3d 583, 587 (8th Cir. 2002) (predicting Arkansas law). Chapter 16 of the allocation book contains a more detailed discussion of this issue.