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Priority of Coverage. Changing Law.

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Is priority of coverage among policies of insurance covering the same insureds and the same risk governed by the "Other Insurance" clauses of the policies or by the indemnification provision of the underlying contract? Due to a shift in the law, there is good news for non-negligent owners and general contractors who can now rely on their indemnity provisions in their contracts in establishing risk transfer to subcontractors' insurers without regard to "Other Insurance" provisions.

Until recently, priority of coverage among various policies of insurance affording coverage to the same insured or additional insured for the same risk was determined solely by examination of the "Other Insurance" provisions and endorsements of the applicable policies of insurance without regard to the contractual indemnification obligations of the underlying trade contract. The courts previously drew a clear line between enforcement of insurance policy provisions between and among insurers and the contractual indemnification obligations in the trade contract. That has now changed. Recent decisions, discussed below, now take the indemnity obligations of the trade contractor to the owner and/or general contractor into consideration when determining priority of coverage among insurers. Owners and general contractors should now be able to establish entitlement to coverage from subcontractors' insurance on the strength of their indemnity agreement despite excess "Other Insurance" clauses in subcontractor primary policies.

In a seminal case on priority of coverage, *Bovis Lend Lease v. Great American Insurance Co*, 53 A.D.3d 140 [1st Dept 2008] ("*Bovis*"), a wrongful death action, the Appellate Division examined the various primary, excess and umbrella policies of several contractors, each of which afforded the owner and general contractor additional insured coverage. The *Bovis* court concluded that priority of coverage is determined by the language of the various applicable policies vis-à-vis other policies. The *Bovis* court rejected the holding of the lower court and held that the extent of coverage, including a given policy's priority vis-à-vis other policies, was controlled by the relevant policy terms, not by the terms of the underlying trade contract that required the named insured to purchase coverage for the additional insureds. The *Bovis* court held that the insurers were entitled to rely on the language of their own policies – their own contracts of insurance – between them and their named insured. The *Bovis* court left the contractual indemnity issue between the owner and general contractor and trade contractors to be determined in the underlying personal injury action.

In a recent decision, however, *Century Sur. Co v. Metro Transit Auth*., 20-1474-CV, 2021 WL 4538633 [2d Cir Oct. 5, 2021], ("*Century*") the federal Second Circuit Court of Appeals decided the issue of which relevant contractual terms governs priority of coverage – the indemnity agreement in the underlying trade contract or the insurance provision in the plaintiff Century Surety's policy—and opined on cases decided after *Bovis* that the New York

Court of Appeals would resolve the ambiguity in New York's law on priority of coverage differently. The Century court examined the New York State Appellate Division decisions in *Indemnity Insurance Co. of North America v. St. Paul Mercury Insurance Co.*, 74 A.D.3d 21 (1st Dep't 2010), (Indemnity) and *Arch Insurance Co. v. Nationwide Property & Casualty Insurance Co.*, 175 A.D.3d 437 (1st Dep't 2019) (Arch). Those cases involved a contractor who was hired to perform a construction project under the terms of a trade contract that contained an indemnity agreement in which the contractor agreed to indemnify the owner of the construction project. As in *Century*, the effect of the indemnity agreement was at odds with the terms of the contractor's insurance policy, which purportedly provided that the insurance was excess to any other available insurance policy. The *Indemnity* court concluded that "priority of coverage" as determined by the wording of the insurance policy was irrelevant because of the existence of an underlying indemnity agreement in the trade contract between the insureds. The Indemnity court ruled the contractor's insurance would pay first because "the [owner's] liability still would pass through to [the contractor] and its insurers." *Indemnity*, 74 A.D.3d at 26 The *Arch* court held that, "[s]ince [o]wners were entitled to contractual indemnification from [the contractor] and a complete pass through of liability, the [contractor's insurer] must respond before the [owner's insurer] issued to [o]wners." *Arch*, 175 A.D.3d at 438. The *Century* court predicted that if presented with the issue, the New York Court of Appeals would find the reasoning in *Bovis* unpersuasive and would follow the reasoning of I*ndemnity* and *Arch*. As such, the *Century* court concluded the trade contractor's policy was primary to that of the owner's policy, notwithstanding the "Other Insurance" provision in the Century Surety policy that purports to qualify the policy as a "true excess policy" because the indemnity agreement in the underlying trade contract between Rukh and LIRR governs the resolution of this case." *Century Sur. Co. v Metro. Tr. Auth.,* 20-1474-CV, 2021 WL 4538633, at *5 [2d Cir Oct. 5, 2021].

At least where primary general liability policies are concerned, in light of *Century, Indemnity* and *Arch*, there is now a confluence between the language of the policies and the indemnity agreements in trade contract. *Bovis* involved both the owner and general contractor seeking indemnity from several trade contractors, all of which potentially had some role in the accident that resulted in the loss. *Century, Indemnity* and *Arch* seemingly involved owners seeking to have the contractor's policy primary to their own coverage. *Century, Indemnity* and *Arch* involved the subcontractors' primary policies. We believe that on the strength of these decisions we have a basis to push excess carriers to a primacy position as well. It is not clear whether the *Century* court or for that matter, the New York Court of Appeals, would reach the same conclusion where there are multiple trade contractors involved and/or where an owner or general contractor seeking to force the subcontractor's coverage primary to their own, would in fact be rendered primary if some degree of fault could be attributed to the owner or general contractor. One thing is for certain in light of the *Century* decision is that the priority of coverage among insurers is now uncertain despite the policy language and owners and general contractors are in a stronger position to transfer risk earlier by virtue of the indemnity provisions in their contracts triggering primary coverage under the subcontractors' policies regardless of the "Other Insurance" provisions in policies.

If you have questions, feel free to contact Olivia M. Gross at (212) 732-2000 or OGross@cullenllp.com.

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Practices

- Construction Litigation

Attorneys

- Olivia M. Gross