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New York Law Journal

CORPORATE INSURANCE LAW

Second Circuit Weighs In on Other Insurance and Additional Insured Dispute

Thursday, June 29, 2023

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Contracts and subcontracts entered into in connection with construction projects often include insurance and additional insured requirements that create a web of obligations running between owners, general contractors, subcontractors and their insurers. These contractual provisions can lead to litigation over the right to coverage as well as priority of insurer obligations, including which insurance policy pays first. Last month, the U.S. Court of Appeals for the Second Circuit weighed in on such a dispute, providing guidance with respect to competing other insurance provisions and additional insured clauses. See *Amerisure Insurance v. Selective Insurance Group,* No. 21-1516, 2023 WL 3311879 (2d Cir. May 9, 2023). In *Amerisure v. Selective,* the Second Circuit held that the subcontract terms governed the additional insured question while the other insurance clauses in the insurance policies governed the priority dispute.

The Construction Project and the Insurance Requirements

In connection with the construction of a movie theater, the owners of the project and the property entered into a contract with a general contractor. The general contractor then entered into subcontracts, including with a subcontractor engaged to perform masonry work.

The terms of the general contract and the masonry subcontract required the general contractor and the subcontractor to each procure insurance. The general contract required the contractor to obtain commercial liability insurance that included the owners as additional insureds with respect to claims arising from the general contractor's acts and omissions. The subcontract required the subcontractor to obtain commercial general liability insurance that named the general contractor as an additional insured and that would be primary to the general contractor's own insurance, and also required the subcontractor to procure commercial umbrella liability insurance.

To comply with these insurance requirements, the contractor obtained a commercial general liability policy from Amerisure and the subcontractor obtained a commercial general liability policy and an umbrella policy from Selective.

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During construction, one of the subcontractor's employees was seriously injured in an accident involving a forklift. The employee and his wife filed suit against the owners and the general contractor seeking damages with respect to his injuries. The employee's lawsuit was ultimately resolved by settlement.

The Insurance Dispute and District Court Ruling

When the employee's lawsuit was filed, Selective agreed to defend the contractor as an additional insured but refused a tender of defense from the owners, contending that the owners were not additional insureds on the Selective policies issued to the subcontractor. Selective acknowledged that the general liability policy it had issued to the subcontractor provided coverage to the contractor that was primary to the contractor's own general liability policy (issued by Amerisure) but took the position that the Selective umbrella policy was excess to the contractor's general liability policy.

The owners filed a lawsuit against the general contractor and Amerisure in New York State Supreme Court seeking defense and indemnity with respect to the employee's lawsuit. The case was removed on diversity grounds to the U.S. District Court for the Northern District of New York and the contractor and Amerisure added the subcontractor and Selective as third-party defendants. Amerisure and Selective then each filed motions for summary judgment seeking rulings as to whether the owners were additional insureds under the Selective policies and whether or not the Selective umbrella policy was excess to the Amerisure general liability policy.

In 'Amerisure v. Selective,' the Second Circuit held that the subcontract terms governed the additional insured question while the other insurance clauses in the insurance policies governed the priority dispute.

The district court ruled in favor of Selective on both issues, granting summary judgment and holding that the owners were not additional insureds under the Selective insurance policies and the Amerisure general liability policy was primary to the Selective umbrella policy. Amerisure appealed the district court's order.

Second Circuit Affirms

On appeal, the Second Circuit affirmed the district court's ruling on both issues, first addressing the additional insured dispute. The Selective policies provided that additional insured status would be conferred on "any person or organization whom [the subcontractor] agreed in a written contract, written agreement or written permit that such person or organization be added as an additional insured on [the] policy." Therefore, under the terms of the Selective policies, in order for the owners to be considered additional insureds, the subcontract must have had a provision containing that requirement. The appellants did not, however, contend that the subcontract contained such a requirement—in fact, they acknowledged that the subcontract did not expressly require the subcontractor to name the owners as additional insureds. Rather, the appellants argued that, because the subcontract incorporated the general contractor's obligations to the owners under the general contract, the additional insured requirements were incorporated by reference.

The Second Circuit rejected this incorporation by reference argument. According to the Second Circuit, under governing Virginia law as well as under New York law, incorporation clauses in subcontracts are narrowly construed and only effective for matters that relate to the nature, scope, quality, character or manner of the work undertaken by the subcontractor. Since the additional insured provision in the general contract did not directly relate to the masonry work performed by the subcontractor, the additional insured requirements of the general contract were not binding on the subcontractor. Therefore, according to the court, the owners were not additional insureds under the Selective policies.

The Second Circuit also affirmed the district court's ruling on the priority of coverage issue, which was governed by the plain language of the other insurance provisions in the policies. The other insurance clause in the Amerisure general liability policy provided that the policy is primary except if other primary insurance is available to the contractor as an additional insured.

Therefore, it was undisputed that the Selective general liability policy was primary to the Amerisure policy, because the Selective policy was a primary policy on which the contractor was an additional insured. In contrast, the other insurance clause of the Selective umbrella policy expressly provided that the policy is excess over other insurance unless the other insurance is "specifically written as excess" over the umbrella policy. Since the Amerisure policy was not written as specifically excess and, in fact, was otherwise a primary policy, the Second Circuit affirmed the ruling that the Selective umbrella policy was excess to the Amerisure general liability policy.

The Second Circuit provided clear precedent for resolving these types of disputes in the absence of an underlying indemnification obligation that arguably alters the priority otherwise dictated by the other insurance clauses.

'Century Surety Company v. Metropolitan Transit Authority'

Notably, the appellants attempted to rely on a previous Second Circuit decision in which the court had held that the terms of an indemnity running from the subcontractor to the contractor could override the other insurance clauses of the insurance policies concerning priority of coverage. See *Century Surety Company v. Metropolitan Transit Authority,* No, 20-1474-cv, 2021 WL 4538633 (2d Cir. October 5, 2023). Citing that case, Amerisure argued that the subcontractor had an obligation to indemnify the general contractor with respect to the injured employee's claims and therefore, despite the other insurance terms of the policies, the subcontractor's insurance, including the umbrella policy issued by Selective, should pay before Amerisure's policy. The flaw in this argument, as noted by the Second Circuit, was that the general contractor had already entered into a stipulation of dismissal with respect to its indemnification claim against the subcontractor, at least in part because the indemnification clause in the subcontract was void under Virginia law due to the absence of an exception for claims arising out of the general contractor's own negligence.

In the circumstances presented, the Second Circuit rejected Amerisure's argument. Nevertheless, the Second Circuit did not disagree with the rationale applied in *Century Surety Company v. Metropolitan Transit Authority*, leaving open the distinct possibility that, in circumstances where a valid indemnification claim exists, the priority of insurance otherwise governed by the insurers' other insurance clauses could be altered.

Looking Forward

In *Amerisure Insurance v. Selective Insurance Group*, the Second Circuit relied on the clear terms of the contract language regarding additional insured status and the plain language of the other insurance clauses to affirm the District Court's ruling resolving the insurers' summary judgment motions. In doing so, the Second Circuit provided clear precedent for resolving these types of disputes in the absence of an underlying indemnification obligation that arguably alters the priority otherwise dictated by the other insurance clauses. The Second Circuit also provided a clear hint that the result could be different if there are valid indemnification obligations running between the insured contractors.