

## Lawyer Insights

### Priority Of Coverage Lessons From 2nd Circ. Insurance Ruling

By Syed Ahmad and Yaniel Abreu  
Published in Law360 | November 8, 2021



Priority of coverage disputes can arise where different insurers for different insureds cover the same claim. Generally, competing insurers will compare the "other insurance" clauses of their policies to decide who should cover the claim first. But where one of the insureds owes contractual indemnity to the other, the indemnity obligation may govern.

Thus, the insurer for the insured who owes indemnity may cover the claim first, even if it would have been excess per the "other insurance" clauses. Such was the case in the [U.S. Court of Appeals for the Second Circuit's](#) Oct. 5 [decision](#) in *Century Surety Co. v. Metropolitan Transit Authority*.<sup>1</sup>

In *Century Surety*, the Metropolitan Transit Authority, or MTA, and the Long Island Railroad contracted Rukh Enterprises Inc. as general contractor for a project. In turn, Rukh subcontracted East Coast Painting & Maintenance to complete lead-related work. During the project, an employee of subcontractor East Coast was injured. The employee sued Rukh and Metropolitan for negligence.

The lawsuit eventually settled. Three of the four implicated insurance companies — [Admiral Insurance Co.](#), for the MTA; [Arch Insurance Co.](#), for Rukh; and Harleysville Preferred Insurance Co., for East Coast — agreed to contribute to the settlement. Century Surety Co., an excess insurer for Rukh, disclaimed coverage.

Before the settlement, Century Surety filed a complaint seeking a declaration that it owed no coverage for the employee's injury claim. Admiral filed a separate complaint asking the court to require Century Surety to defend and indemnify the MTA, and rule that Admiral's policy was excess over Century Surety's policy. The district court consolidated the actions. It granted Century Surety's motion for summary judgment.

The district court found that the "other insurance" provision of the Century Surety policy made it a true excess policy that did not have to pay until the limits of the other policies had been exhausted.<sup>2</sup>

On appeal, Admiral did not dispute that the Century Surety policy was a true excess policy. Rather, Admiral argued that the district court erred in failing to recognize the legal effect of the indemnity provision in the general contractor agreement between Rukh and Metropolitan. The indemnity provision of the contract required Rukh to indemnify Metropolitan for liability arising out of the project.

According to Admiral, the indemnity requirement trumped the "other insurance" language of the policies and, therefore, Century Surety had to exhaust its policy limits before the Admiral policy.

The court agreed with Admiral that the trial court erred in concluding that Admiral's policy applied before

## Priority Of Coverage Lessons From 2<sup>nd</sup> Circ. Insurance Ruling

By Syed Ahmad and Yaniel Abreu  
Law360 | November 8, 2021

the policy issued by Century Surety. The court explained that the principal issue on appeal was whether the indemnity provision in the general contractor agreement governed over the "other insurance" provision in the Century Surety policy.

The court reasoned that if the indemnity provision requiring Century Surety's insured to indemnify Admiral's insured controls, then Century Surety must pay before Admiral.<sup>3</sup> Alternatively, if the "other insurance" provision controls, then Admiral must pay into the settlement before Century Surety because the Century Surety policy would be excess to any other applicable insurance, including over the Admiral policy.<sup>4</sup>

The parties agreed that New York law governed the dispute. Because the New York Court of Appeals had not addressed this issue, the Second Circuit court had to predict how it would rule.

The court found the 2010 and 2019 decisions from the Supreme Court of the State of New York, Appellate Division, First Judicial Department in *Indemnity Insurance Co. of North America v. St. Paul Mercury Insurance Co.* and *Arch Insurance Co. v. Nationwide Property & Casualty Insurance Co.*, respectively, instructive.<sup>5</sup>

Although there was an earlier case to the contrary, the court found *St. Paul Mercury* and *Arch* more probative of how the New York Court of Appeals would decide the issue.

The court explained that both *St. Paul Mercury* and *Arch* involved contractors who entered into contracts with indemnity provisions like the one between the MTA and Rukh.

In those cases, the indemnity provisions also conflicted with the terms of the "other insurance" clauses in the insurance policies. The court provided that, in *St. Paul Mercury*, that court found the "other insurance" provision irrelevant because of the existence of the indemnity agreement between the insureds.<sup>6</sup>

Specifically, in *St. Paul Mercury*, the court reasoned that even if the contractor's insurance were excess, it would pay first because, through the indemnity obligation, the owner's liability would "pass through" to the contractor and its insurers.<sup>7</sup> Likewise, the court explained that in *Arch*, since the owner was entitled to indemnification from the contractor and, therefore, a complete pass through of liability, then the contractor's insurer must respond first.<sup>8</sup>

Based on those decisions, the court determined that New York's highest court would adopt the holdings in *St. Paul Mercury* and *Arch* — that an indemnity agreement in the underlying contract between insureds governs over the terms of an insurance policy when determining priority of coverage.

Beyond *St. Paul Mercury* and *Arch*, the court cited decisions from other circuit courts for support including the [U.S. Court of Appeals for the Fourth Circuit's](#) 2004 decision in *Accord St. Paul Fire & Marine Insurance Co. v. American International Specialty Lines Insurance Co.*, the [U.S. Court of Appeals for the Fifth Circuit's](#) 2003 decision in *American Indemnity Lloyds v. Travelers Property & Casualty Insurance Co.*, and the [U.S. Court of Appeals for the Eighth Circuit's](#) 2002 decision in *Wal-Mart Stores Inc. v. RLI Insurance Co.*<sup>9</sup>

Based on *St. Paul Mercury* and *Arch*, as well as on persuasive authority, the court held that the indemnity requirement between the insureds governed over the "other insurance" clause of the Century Surety policy. Thus, "under New York law, Century Surety, as Rukh's insurer, is liable to pay into the underlying

## Priority Of Coverage Lessons From 2<sup>nd</sup> Circ. Insurance Ruling

By Syed Ahmad and Yaniel Abreu  
Law360 | November 8, 2021

settlement and exhaust its policy limits before Admiral, [Metropolitan's] insurer." <sup>10</sup>

Century Surety exemplifies the importance of companies understanding not only the terms of their commercial contracts but also how they interact with the insurance potentially available to them.

Understanding the dynamics between commercial contracts and insurance policies may help a company conserve the limits of insurance under its policies by shifting liability to, for example, a vendor who may owe contractual indemnity obligations.

Under those circumstances, the vendor's insurer might have an obligation to cover a claim against the company. Thus, the company can tap into the vendor's insurance coverage and avoid exhausting its own limits.

While the rights and obligations of the policyholder and the insurer are generally determined by the terms of the insurance policy, Century Surety is an example of an instance where matters beyond the terms of the policy govern an insurer's obligations. There are other instances where insurers have to consider matters outside the plain language of the insurance policy to determine their obligations to policyholders.

The targeted tender rule under Illinois law is an example. Under that rule, if more than one policy covers the same loss, then the insured may select the insurer that will cover the claim — even if, for example, the insured simply enjoys additional insured status under the policy of a vendor. This is another avenue to shifting risk to a vendor's insurer. In a targeted-tender scenario, the full extent of an insurer's obligations is not dictated by the terms of the policy but rather by operation of law.

Unlike in Century Surety, however, where indemnity obligations trumped "other insurance" clauses, an insurer may be able to avoid the targeted tender rule if the "other insurance" clause in its policy makes it excess over the coverage provided by another insurer. <sup>11</sup>

In sum, policyholders have rights outside the policy. Those rights may be by virtue of contractual requirements such as indemnity obligations from a vendor. They may also arise purely out of operation of law such as under the targeted tender rule. No two claims are the same. Thus, it is critical for policyholders to understand the specific coverage scenario so that they can make informed decisions on a claim-by-claim basis.

### Notes

1. [Cent. Sur. Co. v. Metro. Transit Auth., et al.](#) 
2. Id. at \*2.
3. Id. at \*2.
4. Id.
5. [Indemnity Insurance Co. of North America v. St. Paul Mercury Insurance Co.](#)   
[Arch Ins. Co. v. Nationwide Prop. & Cas. Ins. Co.](#) 

## Priority Of Coverage Lessons From 2<sup>nd</sup> Circ. Insurance Ruling

By Syed Ahmad and Yaniel Abreu  
Law360 | November 8, 2021

6. Id. at \*3.

7. Id.

8. Id.

9. Id. at \*4 (citing [Accord St. Paul Fire & Marine Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.](#), 365 F.3d 263, 272, 277 (4th Cir. 2004) ("Virginia would conclude that the indemnification obligations set forth in the [underlying agreement] need not be set aside for a separate proceeding but should be considered in this case before allocating responsibility for the settlement liability according to the terms of the relevant policies"); [Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co.](#), 335 F.3d 429, 436 (5th Cir. 2003) ("the clear majority of jurisdictions . . . gives controlling effect to the indemnity obligation of one insured to the other insured over 'other insurance' or similar clauses in the policies of the insurers[.]"); and [Wal-Mart Stores, Inc. v. RLI Ins. Co.](#), 292 F.3d 583, 587 (8th Cir. 2002) ("[U]nnecessary to resolve these issues about the 'other insurance' clauses because the indemnity agreement controls the outcome").

10. Id. at \*5.

11. See, e.g., *River Village I, LLC v. C. Ins. Companies*, 919 N.E.2d 426, 432 (Ill. App. 1st Dist. 2009) ("[O]ur courts have clearly held that an insured cannot use his targeted tender right to choose to impose a coverage duty on an insurer with an 'other insurance' excess provision in its policy to the exclusion of other co-insurers with which he holds primary policies.").

**Syed Ahmad** is a partner in the firm's Insurance Coverage group in the firm's Washington D.C. office. Syed represents clients in connection with insurance coverage, reinsurance matters and other business litigation. He can be reached at +1 (202) 955-1656 or [sahmad@HuntonAK.com](mailto:sahmad@HuntonAK.com).

**Yaniel Abreu** is an associate in the firm's insurance coverage group in the firm's Miami office. Yaniel advises companies in complex insurance coverage matters by analyzing the company's risk profile to limit exposure and maximize recovery. He can be reached at +1 (305) 810-2504 or [yabreu@HuntonAK.com](mailto:yabreu@HuntonAK.com).

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*