



ATTORNEYS AT LAW

## **Protecting Your Insurance Protection:**

### **Whose Insurance Coverage is Really Primary? - *Don't Rely on Your Subcontract.***

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In many commercial transactions, a party to a contract (here called Party A) agrees to provide insurance coverage under its policy (most often as an additional insured) to the other party to the contract (here called Party B). One example is when a lower tier subcontractor agrees to provide insurance coverage under its policy to the contractor or higher tier subcontractor for any claim or loss that arises out of or in connection with the lower tier subcontractor's work on a particular project.

When Party A agrees to provide this insurance coverage in these instances, it also agrees that its policies, whether primary or excess/umbrella, will be the primary coverage for Party B for the particular claim or loss. This means that the insurance policies belonging Party B (whether primary or excess/umbrella) are not supposed to be triggered until the policy limits of all of Party A's policies are exceeded. This is what your contract clearly states, so everything is perfect, right? Not necessarily.

In several recent decisions from the New York appellate courts, it has been held that the scope of insurance coverage obtained by such contractual promises is determined by the terms of the various policies belonging to Party A and Party B, and not simply by the terms of their contract.

In one case, an employee of a subcontractor was injured while working on a construction project and brought a claim against the general contractor, who then sought indemnification and coverage from the subcontractor. The general contractor had a commercial general liability ("CGL") insurance policy (primary coverage), but pursuant to the subcontract, the subcontractor agreed to procure its own CGL policy naming the general contractor as an additional insured and providing the primary coverage for the occurrence at issue. The general contractor sought a declaration from the court that it was covered under the subcontractor's CGL policy and that such policy provided primary coverage, with the general contractor's CGL policy, in essence, providing excess coverage if the policy limits of the subcontractor's CGL policy were exceeded. While the court in that case agreed with the general contractor, it did not do so based upon the language of the subcontract, but rather based upon a comparison of the various terms and conditions of the general contractor's and subcontractor's insurance policies.

In other decisions by the appellate courts, the comparison of the terms of the individual policies resulted in findings that Party B's insurance was actually primary to the

additional insured coverage procured for Party B under Party A's policy, meaning that Party B's policy afforded the primary coverage for the occurrence at hand, exactly the opposite of what the parties had agreed in their contract.

For instance, in one recent case, a general contractor had a CGL policy with policy limits of \$1 million per occurrence and \$2 million in the aggregate. Its subcontractor procured two policies, a CGL policy with limits of \$1 million per occurrence and \$2 million in aggregate, and an umbrella policy with a limit of \$25,000,000. The general contractor and owner were both named as additional insureds under the subcontractor's CGL and umbrella policies.

Two employees of the subcontractor were injured on the job, both of whom commenced actions against the general contractor and owner. The general contractor and owner commenced an action against the subcontractor and its insurance company seeking a declaration that, after the subcontractor's CGL policy limits were exhausted, the subcontractor's umbrella policy would provide the primary coverage before the general contractor's CGL policy. Although this is what the subcontract stated, the court held otherwise. The court looked to particular factors concerning the policies (i.e., the subcontractor's umbrella policy stated that it was a pure excess policy, the premium for this policy was only \$60,000 compared to its policy limit of up to \$25,000,000) and found that the subcontractor's umbrella policy had to be enforced, by its terms, as a true excess policy, meaning that its coverage was only triggered after all other potentially applicable primary (CGL) policies, like the one belonging to the general contractor, were exhausted. Here, then, the general contractor's policy would provide coverage before the subcontractor's umbrella policy, a result contrary to the language of their contract.

### **G&C Commentary:**

The cost of insurance coverage, which includes the very important issue of providing and paying for a lawyer to defend any claim, is an important benefit sought and included in many commercial contracts. This bargained-for-benefit must be protected. It is not enough to simply include the appropriate language in your contract. You also must ensure that your competent and trusted legal and/or insurance advisors review the terms of the various policies procured by the other party before the contract is signed. If the interpretation of the terms of the insurance policies do not result in particular policies providing the primary coverage, such policies will not be applied as the primary coverage, no matter what your contract with the holder of such policies might otherwise state. The bargain of coverage you so carefully sought in your contract will be meaningless if the relevant policies are not consistent with the intent of the contract. The cost later for not doing so will far outweigh the cost of taking the time to address this issue before you sign your contract.

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