



Advocates for Policyholders in Insurance Coverage Disputes

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Mock Summary Judgment Argument:
Priority of Coverage in Additional Insured Context

**Mealey's Insurance Coverage Disputes
Concerning Construction Defects
October 20, 2006**

Parties & Insurance Coverage Available:

General Contractor = Steady Skyscrapers, Inc.

Subcontractor = Firmly Rooted Foundation Co.

General Contractor's Insurance

Primary - Freedom Mutual (\$1 million)

Excess - St. Peter (\$5 million)

Subcontractor's Insurance

Primary - Reliable (\$2 million)

Excess- Zenith (\$10 million)

Stipulated Facts:

In 2004, Steady Skyscrapers won the contract to build a high-rise condominium complex in the state of Caesar from the owner of the real estate, Quick Hit Developers. Steady Skyscrapers hired a concrete subcontractor, Firmly Rooted Foundation, to pour the foundation for the high-rise building. Firmly Rooted Foundation agreed, in writing, to procure Commercial General Liability ("CGL") insurance in the amount of \$ 6,000,000 naming Steady Skyscrapers as an additional insured, and to hold Steady Skyscrapers harmless to the fullest extent permitted by law. Firmly Rooted Foundation named Steady Skyscrapers as an additional insured on its primary CGL policy with Reliable Insurance Company (\$2 million per occurrence limit). Firmly Rooted also named Steady Skyscrapers as an additional insured on its excess policy with Zenith Insurance Company (\$10 million per occurrence limit). Steady Skyscrapers maintained a corporate primary insurance policy with Freedom Mutual (\$1 million per occurrence limit) and an excess policy with St. Peter Insurance (\$5 million per occurrence limit).

With respect to the primary policies, the “other insurance” clauses are identical. With respect to the excess policies, Steady Skyscrapers’ excess policy contains an “excess other insurance” clause while Firmly Rooted’s excess policy contains a “pro rata other insurance” clause. Both excess policies are silent as to the method of sharing.

In the Spring of 2005 an employee of Firmly Rooted Foundation, Unfortunate John, was killed on the job site when the port-a-potty he occupied was knocked over by a strong gust of wind and fell into the recently dug 50-foot foundation ditch. John’s estate sued Quick Hit Developers and Steady Skyscrapers for \$6 million. Upon receipt of the complaint, Steady Skyscrapers tendered the suit for defense and indemnification to Reliable and Zenith and demanded contractual indemnification from Firmly Rooted. Reliable denied coverage, claiming that it was excess to Steady Skyscrapers’ insurance with Freedom Mutual. Zenith denied coverage until both Reliable and Freedom Mutual’s policies were exhausted and claimed that it would share equally with St. Peter any amount above the \$3 million dollars covered by the primary carriers.

Steady Skyscrapers has filed a declaratory judgment action in the state of Caesar against Firmly Rooted Foundation and its insurers to determine the priority of coverage. Discovery has closed and cross motions for summary judgment have been filed. The above facts have been stipulated to by all the parties, and the contract language cited below is undisputed. The state of Caesar has no statutes or case law on point, leaving the court to look to the policy language, subcontract, public policy and the reasoning of other jurisdictions to decide the issues presented.

Contract to Procure Insurance and Hold Harmless Provision:

The underlying contract between Firmly Rooted Foundation and Steady Skyscrapers contained a procurement of insurance clause and a hold harmless provision as follows:

[Firmly Rooted Foundation is to] furnish [Steady Skyscrapers] with Certificates of Insurance for Liability and Workers Compensation and name Steady Sky Scrapers, Inc. as an additional insured in an amount not less than \$6,000,000 per occurrence.

* * *

To the fullest extent permitted by law, the subcontractor shall indemnify and hold harmless the General Contractor [Steady Skyscrapers] and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney fees, arising out of or resulting from performance of the Work, but only to the extent caused in whole or in part by negligent acts or omissions of the subcontractor, his subcontractors, anyone directly or indirectly employed by them or any for whose acts they may be liable, regardless of whether or not such claim, damage loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described herein.

Subcontractor's Primary Insurance Policy:

The policy issued by Reliable to Firmly Rooted Foundation included a standard Additional Insured Endorsement which provided in pertinent part:

1. WHO IS AN INSURED (SECTION II) is amended to include as an insured any person or organization (called hereafter "additional insured") whom you have agreed in a written contract, executed prior to loss, to name as additional insured, but only with respect to liability arising out of "your work" or your ongoing operations for that additional insured performed by you or for you.

2. With respect to the insurance afforded to Additional Insureds the following conditions apply:

* * *

b. This insurance is *excess* over any valid and collectible insurance *unless you [i.e., Firmly Rooted Foundation] have agreed in a written contract for this insurance to apply on a primary or contributory basis.*

Subcontractor's Excess Insurance Policy:

Other Insurance

If the insured has other insurance against liability or loss covered by this policy, the company shall not be liable for a greater proportion of such liability or loss than the applicable limit of liability bears to the total applicable limit of liability of all collectible insurance against such liability or loss.

General Contractor's Excess Insurance Policy:

Other Insurance

This policy shall be excess over any other insurance whether prior or subsequent hereto, and by whomsoever affected, directly or indirectly covering loss or damage insured hereunder, and this Company shall be liable only for the excess of such loss or damage beyond the amount due from such other insurance, whether collectible or not, however, not exceeding the limits as set forth in the Declarations.

Issues of Law:

- 1) Whether the general contractor's policy or the subcontractor's policy provides primary coverage to the general contractor for the lawsuit commenced by Unfortunate John
- 2) In what order are the remaining policies exhausted?