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Alert

First Department Holds That Additional Insured Is Not Subject to Self-Insured Retention

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On June 13, 2017, New York's Appellate Division, First Department, issued its much awaited opinion in *Arch Insurance Company v. Old Republic Insurance Company*. The Appellate Division affirmed the trial court's holding that an additional insured is not subject to a self-insured retention ("SIR") due to a conflict with the policy's other insurance language.

The fact pattern is familiar. Arch Insurance Company ("Arch") filed a declaratory judgment lawsuit against Old Republic Insurance Company ("Old Republic") seeking a declaration that Old Republic was obligated to defend and indemnify Bovis Lend Lease, LMB, Inc. ("Bovis"), an owner and Arch's Named Insured, as an additional insured under Old Republic's policyin connection with a construction site accident. The Old Republic policy contained an SIR endorsement providing that Old Republic's obligation to pay "damages . . . apply in excess of" the a $1 million SIR and, separately, that "this insurance is excess over" the SIR. After having been issued, an endorsement was added to the Old Republic policy that stated that the insurance is primary and non-contributory ("PNC") for an additional insured when required by contract.

On motion for summary judgment, Arch argued that the terms of the PNC endorsement were met based on the terms of the underlying contract, which required Old Republic's Named Insured to procure primary, non-contributory general liability insurance naming Bovis as an additional insured thereunder. Arch argued that the terms of the PNC endorsement conflicted with and overrode the SIR endorsement. The First Department agreed, holding that the PNC endorsement, which was added to the policy, controlled and applied based on the terms of the underlying contract. Importantly, the Court observed that "nothing in the contract between Bovis and the named insured supports the conclusion that Bovis consented to a self-insured retention." According to the First Department, the PNC endorsement "is, on its face, inconsistent with, and therefore overrides, the original policy's $1,000,000 SIR provision." Therefore, the Court held that the SIR did not apply to an additional insured like Bovis.

Although the *Arch* decision is at odds with the typical application of an SIR endorsement and New York courts' enforcement of such endorsements, the policy language in that case was somewhat

unique: the SIR endorsement did not identify who must (or who could) pay the SIR, and there was no clause conditioning attachment of the policy upon payment of the SIR. In addition, the primary and non-contributory endorsement had been added to the policy after its issuance. Given the importance of enforcing clear policy language to New York courts, these distinctions were likely very significant to the Court.

Should you have any questions about this decision, please feel free to contact us.