

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 13, 2012

Before

JOEL M. FLAUM, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 11-1345

BMD CONTRACTORS, INC.,
Plaintiff-Appellant,

v.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
Defendant-Appellee.

Appeal from the
United States District Court for the
Southern District of Indiana,
Indianapolis Division.

No. 1:09-cv-0121-TWP-DML

Tanya Walton Pratt,
Judge.

ORDER

We hereby amend our opinion to add the following paragraph on p. 16, before the paragraph beginning “Finally, . . .”

The Third Circuit shares our skepticism of the district court’s analysis in *Sloan*. See *Sloan & Co. v. Liberty Mut. Ins. Co.*, 653 F.3d 175, 180-82 (3d Cir. Aug. 1, 2011). The Third Circuit reversed in part, and its reasoning reinforces our conclusion that “condition precedent” language will generally be sufficient to create a pay-if-paid clause. *Id.* at 181 (“The first subparagraph . . . states unequivocally that IOC’s payment to Shoemaker is a condition precedent to Shoemaker’s obligation to pay Sloan. We do not imagine that the parties intended otherwise merely because they did not use additional language to underscore their intent to create a pay-if-paid clause . . .”). The Third Circuit ultimately concluded that other contractual language modified the pay-if-paid clause at issue in *Sloan*, *id.* at 182, but it rejected the district

court's initial interpretation for essentially the same reasons we have explained above.¹

¹We regret having omitted the subsequent history in *Sloan* from our initial opinion. The Third Circuit's decision escaped our notice based on an error in West's KeyCite system. The parties also overlooked the Third Circuit's decision in *Sloan*, apparently for the same reason. We thank Attorney Robert L. Byer, Duane Morris LLP, for alerting us to the omission and for notifying West, which has now corrected the error in its system.