POLICYHOLDERS BEWARE: NEW YORK COURT OF APPEALS RESTRICTS ADDITIONAL INSURED COVERAGE UNDER COMMON POLICY ENDORSEMENT TO INJURIES PROXIMATELY CAUSED BY NAMED INSURED

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Construction Alert

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Recently, the New York Court of Appeals, in *Burlington Insurance Company v. NYC Transit Authority*, held that a common insurance policy endorsement extending coverage to additional insureds for liability for bodily injury "caused, in whole or in part" by the "acts or omissions" of the named insured applies *only* to injury proximately caused by the named insured, and *not* to any injury causally linked to the named insured, even though the plain language of the endorsement never mentions negligence or proximate cause.[1] Policyholders should consider the implications of this decision and the impact it may have on their operations.

In July 2008, the New York City Transit Authority ("NYCTA") contracted with Breaking Solutions Inc. ("BSI") for the supply of concrete breakers and related work on an excavation project in a Brooklyn subway tunnel.[2] BSI obtained a commercial general liability policy with Burlington Insurance Company ("Burlington") designating NYCTA, MTA New York City Transit ("MTA," and collectively with NYCTA, "Defendants") and New York City as additional insureds. By operation of an additional insured endorsement, in the form drafted by Insurance Services Office ("ISO") and numbered CG 20 10 07 04, the policy provided coverage to the additional insureds ". . . only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by: 1. [BSI's] acts or omissions; or 2. the acts or omissions of those acting on [BSI's] behalf."[3] BSI obtained this form pursuant to its construction contract with NYCTA which require that BSI procure "additional insured coverage using the latest ISO 'Form CG 20 10' or equivalent."[4]

In February 2009, an MTA employee was injured by an explosion and fire caused when the drill of one of BSI's excavating machines made contact with a live electrical cable.[5] During the course of discovery, it was revealed that NYCTA failed to mark and protect the cable, and failed to shut off power to the electrical cable.[6] Burlington denied coverage to Defendants claiming that they were not additional insureds within the meaning of the policy because NYCTA itself was solely responsible for the accident that gave rise to the injuries complained of. Burlington asserted that BSI was not at fault for the injuries as NYCTA was their sole proximate cause.[7] NYCTA relied on the express terms of the policy and claimed that the endorsement applies to *any* act or omission by BSI that resulted in injury, regardless of NYCTA's negligence.[8] Furthermore, BSI's operation of its excavation machine provided the causal nexus between injury and act to trigger coverage.[9]

In December 2013, the Supreme Court granted summary judgment to Burlington, finding that its policy limited additional insured coverage to instances where BSI had acted negligently.[10] The Appellate Division reversed the trial court in August 2015, holding that although BSI was not negligent, BSI's actions triggering the explosion were a cause of the MTA employee's injuries.[11] In subsequently reversing the Appellate Division, the Court of Appeals significantly narrowed the scope of additional insured coverage by adding a proximate cause requirement entirely absent from the policy language. The Court rationalized that under the relevant endorsement, which "states that the injury must be 'caused, in whole or in part'" by the policyholder, an additional insured needs to show more than a causal link between the insured's conduct and the injury.[12] In doing so, the Court analyzed the distinction between "but for causation" and "proximate causation."[13] According to the Court, "[a]n event may not be wholly or partially connected to a result, it either is or it is not connected. Stated differently, although there may be more than one proximate cause, all 'but for' causes bear some connection to the outcome even if all do not lead to legal liability."[14] Thus, the Court concluded, the words "'in whole or in part'—can only modify 'proximate cause.'"[15] The Court further cited the endorsement's reference to "liability" caused by BSI's acts as confirmation that additional insured coverage only exists under the endorsement where the insured is the proximate cause of the injury.[16]

The dissent argued that the endorsement provided NYTCA coverage with respect to the underlying matter because the existence of coverage does not depend upon the showing of a negligent act of the named insured. According to the dissent, the plain language of the endorsement "confers additional insured status where the mere acts of the named insured cause the bodily injury complained of," and had the drafters intended coverage to be "contingent upon a negligent act. . . , then the policy easily could have said as much."[17] Likewise, if Burlington intended to make coverage "contingent upon a showing of proximate cause. . . then the policy easily could have been written to contain that condition."[18] In criticizing the majority for deviating from the "cardinal rules of policy interpretation," the dissent focused on three points: (1) the majority's application of a legal distinction between "but for" and "proximate" causation was without basis and the Court should have applied a plain and ordinary meaning to "cause" under well-established New York insurance law; (2) to the extent the majority's interpretation has merit, so too does NYCTA's interpretation rendering the endorsement ambiguous and requiring the Court to find in favor of coverage; and (3) the majority incorrectly concluded that the endorsement's reference to "liability" as modifying the "caused by" language.[19] In conclusion, the dissent voiced its concern that the majority's focus on "legalese," instead of "plain and common speech" could lead to a "disavowal of long-held precepts of policy construction."[20]

The majority relied on the endorsement's drafting history to respond to "[t]he dissent's concern that [the majority's] 'approach could threaten the stability and certainty of our bedrock rules of insurance policy interpretation…."[21] In particular, the Court emphasized that ISO revised the endorsement at issue in *NYC Transit* in 2004, four years prior to the construction contract between BSI and NYCTA. Specifically, ISO eliminated the language "arising out of" and replace it with "caused, in whole or in part." The Court concluded "[t]he change was intended to provide coverage for an additional insured's vicarious or contributory negligence, and to prevent coverage for the additional insured's sole negligence."[22] ("In describing its motivation for the 2004 amendment, ISO explained that it had 'monitored various court decisions and found that courts in many disputes between insurers and insureds have construed broadly the phrase arising out of,' and further that 'some courts have ruled that ... the current additional insured endorsements do respond to injury or damage arising from the additional insureds sole negligence'"). According to the Court, "[a]t the heart of the amendment, therefore,

was 'the preclusion of coverage for an additional insured's sole negligence.'"[23] Thus, the majority would contend that not only does the policy language support its conclusion, so too does the drafting history of the endorsement.

All parties that contractually require, or agree to provide, additional insured coverage under policies governed by New York law should be aware of the Court of Appeals' decision in *NYC Transit* and understand its potential impact on both the scope of additional insured coverage and fulfillment of contractual insurance obligations. Because New York's highest Court has interpreted the "caused by" provision to require proximate cause, insurance companies and courts likely will require a finding of negligence by the named insured to trigger coverage for an additional insured whose own actions are alleged to have caused the loss. Given that the provision itself makes no reference to either proximate cause or negligence, many named insureds and additional insureds likely rely on this endorsement to provide additional insured coverage for any liability causally linked to the named insured regardless of negligence. Other endorsements are available in the marketplace, and all interested parties should ensure that the endorsements they use satisfy all relevant insurance requirements in accordance with their expectations. In particular, parties requiring their contractual partners to provide additional insured coverage should consider requiring a specific endorsement providing the broad coverage contemplated in the contract.

Notes:

[1] 2017 WL 2427300 *1; --- N.E.3d --- (N.Y. 2017); 2017 N.Y. Slip Op. 04384

[2] *Id.* at *1

[3] *Id.*

[4] *Id.* at *5

[5] *Id.* at *6

[6] *Id.*

[7] *Id.*

[8] *Id.* at *2

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *3

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at *8

[18] *Id.*

[19] *Id*. at *8–10

[20] *Id*. at *10

[21] *Id*. at *5

[22] *Id*. at *5

[23] *Id*. at *5

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