New York High Court Declines to Extend Coverage to Additional Insured who was the Sole Cause of the Accident Giving Rise to the Claim

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Requiring a subcontractor to name an owner and prime contractor as "additional insureds" under the subcontractor's liability policy is a common method to transfer risk on a construction project. When a subcontractor comes onto a project, an owner and prime contractor are potentially exposed to liability risks for that subcontractor's negligence and additional insured endorsements represent a way to apportion these risks. The rationale is to make the party with the most control over the risk responsible for suffering the financial loss should it fail to prevent the loss. But is an insurance company required to afford such additional insured coverage when the additional insured is found to be the sole cause of the incident giving rise to the claim?

In *The Burlington Insurance Company v. NYC Transit Authority, et al.*, (N.Y. June 6, 2017), New York's highest court held when an insurance policy states that additional insured coverage applies to bodily injury "caused, in whole or in part" by the "acts or omissions" of the named insured, the coverage applies to injury "proximately caused by the named insured." The Court rejected the argument that an additional insured obligation is owed under this language even when the named insured is without fault.

The case arose from a February 2009 construction accident in a Brooklyn subway tunnel. The New York City Transit Authority (NYCTA) contracted with BSI to perform excavation work in the tunnel. Pursuant to the contract, BSI purchased general liability insurance from Burlington Insurance with an endorsement that listed NYCTA, MTA New York City Transit (MTA), and the City of New York (City) as additional insureds. The policy restricted the additional insured coverage to "… liability for bodily injury 'caused, in whole or in part,' by 'acts or omissions'" of BSI, the named insured.

While performing its work, BSI struck a live electrical line causing an explosion. The blast caused an MTA employee working on the project to fall from a platform and sustain injuries. The MTA employee and his wife sued BSI, NYCTA and the City. The NYCTA and City tendered the defense of the action to Burlington which accepted the defense.

During the course of discovery, it was established NYCTA was supposed to identify electrical lines and shut them off before the work. NYCTA documents further established the BSI machine operator could not have known about the location of the line or the fact that it was electrified.

Based on this information, Burlington disclaimed all coverage for the NYCTA and the City contending, since BSI was not at fault for the accident, Burlington did not own any coverage pursuant to the additional insured endorsement. Burlington subsequently settled with the underlying plaintiffs for $950,000 but then filed a declaratory relief action against the NYCTA, seeking, among other things, reimbursement of the $950,000 paid to the underlying plaintiffs. Burlington was granted summary judgment against the NYCTA and the NYCTA appealed.

On appeal, Burlington argued that under the plain meaning of the endorsement the NYCTA was not an additional insured because the acts or omissions of the named insured, BSI, were not a proximate cause of the injury. Put another way, Burlington argued the coverage does not apply where the additional

insured was the sole proximate cause of the injury.

New York's highest court agreed. Despite the fact BSI struck the line triggering the blast, the High Court stated: "Here, BSI was not at fault. The employee's injury was due to NYCTA's sole negligence in failing to identify, mark, or deenergize the cable. Although but for BSI's machine coming into contact with the live cable, the explosion would not have occurred and the employee would not have fallen or been injured, that triggering act was not the proximate cause of the employee's injuries since BSI was not at fault in operating the machine in the manner that led it to touch the live cable."

The High Court continued, "…to extend coverage to the additional insureds under the circumstances of this case may frustrate the clear purpose of obtaining additional insured insurance in the first place…'coverage for an additional insured is typically limited to liability arising out of the named insured's work or operations' and 'additional insured status does not provide coverage to an additional insured for the additional insured's own work or operations.' It would allow NYCTA to compel a subcontractor to pay for injuries to its employee which NYCTA proximately caused - an outcome not intended by the parties and contrary to the plain language of the endorsement."

Although the decision comes from New York, it could have implications in other states as well since it discusses and rules on an ISO endorsement commonly made a part of general liability policies.

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