

NY Ruling Curtails Contractors' Additional Insured Coverage

By **Jeff Sistrunk**

Law360, Los Angeles (June 7, 2017, 10:46 PM EDT) -- New York's highest court ruled this week that a common insurance policy endorsement extends coverage to additional insureds only when an injury is proximately caused by the named insured's conduct, a ruling that substantially limits the protection available to general contractors whose subcontractors have purchased such policies.

In an opinion issued Tuesday, a split New York Court of Appeals upended a state appellate panel's ruling that the New York City Transit Authority and Metropolitan Transit Authority are entitled to additional insured coverage under an endorsement in a subcontractor's policy with Burlington Insurance Co. for claims over a subway worker's injury.

Contrary to the panel's decision, the New York high court said the policy's additional insured coverage is available only when an injury is proximately caused by the named insured's conduct, which wasn't the case here. In fact, it was determined that the NYCTA was solely at fault for the worker's injury.

"The Appellate Division erroneously interpreted this policy language as extending coverage broadly to any injury causally linked to the named insured, and wrongly concluded that an additional insured may collect for an injury caused solely by its own negligence, even where the named insured bears no legal fault for the underlying harm," Justice Jenny Rivera wrote for the high court majority.

According to attorneys, the Court of Appeals' decision essentially stamps out general contractors' ability to seek coverage under identical or similar additional insured endorsements for claims stemming from their own negligence.

"Large general contractors or owners that thought they were getting additional insured coverage for their own fault under this endorsement are no longer going to get that in New York," said Barnes & Thornburg LLP partner David Wood, who represents policyholders. "Now, there is only coverage if the downstream subcontractor is actually at fault."

Hinshaw & Culbertson LLP partner Larry Golub, who represents insurance carriers, said the Court of Appeals' ruling is consistent with the policy language, given how additional insured endorsements have evolved over the years.

"This is, after all, the named insured's policy, and the only way one is supposed to obtain additional insured coverage is if there is actual liability on the part of the named insured," Golub said.

Breaking Solutions Inc., the excavation subcontractor on a project in a Brooklyn subway tunnel, had obtained a commercial general liability policy with Burlington designating the NYCTA, the MTA and New York City as additional insureds. The policy restricts the additional insured coverage “to, in pertinent part, liability for bodily injury 'caused, in whole or in part,' by 'acts or omissions'” of BSI.

During litigation over the 2009 injury of a worker on the project, it came to light that the NYCTA was responsible for the incident because it had failed to shut off power to an electrical cable that later triggered an explosion when it was hit by a BSI excavator, according to court papers. Burlington denied coverage to the transportation authorities and later sued them to recover the settlement and defense expenses it incurred in the worker's suit.

A New York state judge in December 2013 granted summary judgment to the insurer, finding that the Burlington policy limited additional insured coverage to instances where BSI had acted negligently. An Appellate Division panel reversed the lower court in August 2015, holding that although BSI wasn't negligent, the company's actions triggering the explosion were a cause of the worker's injury.

The Court of Appeals' decision significantly narrows the scope of additional insured coverage for companies doing business in New York, and will have a broad impact on construction insurance disputes statewide, attorneys say.

“Before, if the subcontractor was involved with the loss in a more tenuous way, there was a general understanding that [additional insured] coverage would likely be triggered,” said Suzanne Whitehead, a senior associate at Zelle McDonough & Cohen LLP. “Going forward, that won't be the case. Everyone will be pointing fingers to make sure they get that coverage, which will inform their litigation strategies.”

Attorneys who represent policyholders said the majority's decision to interpret the additional insured endorsement as requiring a proximate cause standard, even though those exact words don't appear in the provision, marks a departure from well-established policy interpretation principles. Those concerns were also raised by the two-justice dissent.

“For the court to put 'proximately' in there, it added a word to a contract that was already written and, not only that, it is a word with great legal significance,” said Anderson Kill PC shareholder Allen R. Wolff.

Carl A. Salisbury, head of Bramnick Rodriguez Grabas Arnold & Mangan LLC's insurance recovery and commercial litigation department, said it seemed counterintuitive that the majority of the New York high court imported intricate legal terminology into the endorsement despite acknowledging that words in a policy should be given their ordinary meaning.

“How an ordinary layperson is supposed to read the words of the policy and discern that hypertechnical legal meaning is a question the majority leaves unanswered,” Salisbury said.

According to Barnes & Thornburg's Wood, the Court of Appeals' decision could negatively impact the business prospects of subcontractors carrying policies with the same language as the Burlington policy endorsement.

“The subcontractor wants to provide the contractor or owner who hired it with the coverage they want: coverage for claims having to do with the subcontractor's work,” Wood said. “With this language, the subcontractor can't do so. This can only disrupt the contractual relationship with the contractor or owner in the future.”

Wood also pointed out that general contractors often require subcontractors to indemnify them for liabilities associated with the subcontractor's work.

"The less coverage the general contractor gets from the subcontractor's carrier, the more the general must chase the [subcontractor] for indemnity — which comes out of the [subcontractor]'s pocket and could wipe out its profit on the project," he said.

In reaching its conclusion, the majority noted how the standard forms for additional insured coverage, which are developed by the Insurance Services Office, have evolved over the past several decades. The limitation that coverage applies only when an injury is "caused, in whole or in part" by the named insured's conduct was introduced in a form released in 2004. Before that, the standard form allowed for additional insured coverage for injuries "arising out of" the named insured's actions.

According to the opinion, the ISO decided to replace the "arising out of" language because too many courts were interpreting that phrase to allow companies designated as additional insureds to obtain coverage for their own negligence.

"At the heart of the amendment, therefore, was 'the preclusion of coverage for an additional insured's sole negligence,'" Justice Rivera wrote.

Zelle McDonough's Whitehead said the Court of Appeals' decision may prompt another call for ISO to update the additional insured form "to either include proximate cause language or to make it clear that proximate cause was not intended by the current language."

In the meantime, attorneys say, general contractors and others may change their contracts to require the earlier ISO form or another form that doesn't include the same language as Burlington's endorsement.

"It will be interesting to see what type of language they use and how the courts interpret that language," Whitehead said.

The NYCTA and MTA are represented by Charles R. Strugatz of Shein & Associates PC.

Burlington is represented by Joseph D'Ambrosio of Ford Marrin Esposito Wiltmeyer & Gleser LLP.

The case is *The Burlington Insurance Co. v. NYC Transit Authority et al.*, case number 57, in the New York Court of Appeals.

--Editing by Mark Lebetkin and Pamela Wilkinson.