



NY Court of Appeals Issues Game-Changing Decision: Additional Insureds Must Show Injury Proximately Caused by the Named Insured To Gain Coverage Under Standard ISO Endorsements

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In a 4-2 decision, the New York Court of Appeals yesterday issued a landmark decision concerning the interpretation of language commonly used in additional insured endorsements, and in so doing, altered the risk transfer analysis for New York claims. In Burlington Ins. Co. v. NYC Transit Authority, 2017 NY Slip Op 04384 (June 6, 2017), the Court of Appeals reversed the decision of the lower court and held that the phrase “caused, in whole or in part” by the “acts or omissions” of the named insured provides coverage to an additional insured only for injury proximately caused by the named insured, and does ***not*** apply to any injury that is merely “causally linked” to the named insured.

In Burlington, an employee of the New York City Transit Authority (NYCTA) was injured when he fell off an elevated platform as he tried to avoid an explosion caused when an employee of named insured, Breaking Solutions, Inc. (BSI) touched a live electrical cable buried in concrete at an excavation site on a New York City subway construction project. The NYCTA was named as an additional insured on a policy issued by Burlington Insurance Company (Burlington) to the named insured BSI. Burlington defended the NYCTA under reservation, but when discovery revealed that NYCTA did not identify or mark the electrical cable, and acknowledged its sole responsibility for the accident, Burlington disclaimed coverage to NYCTA based on the conclusion that BSI was not at fault for the injuries.

Burlington relied on the standard ISO language contained in many additional insured endorsements, such as the CG 2033, which provides that the additional insured is entitled to coverage “only with respect to liability for ‘bodily injury, ‘property damage’ or ‘personal and advertising injury’ caused, in whole or in part, by: 1. Your acts or omissions; or 2. The acts or omissions of those acting on your behalf.” Burlington argued that NYCTA was not entitled to coverage because BSI was not at fault and NYCTA was solely responsible for the injuries, and therefore the NYCTA was not entitled to coverage.

The Court held that the phrase “caused, in whole or in part, by” the named insured’s acts or omissions implies a proximate cause connection between the named insured and the injury. Therefore, in situations where the additional insured, like NYCTA, is solely negligent, it is not entitled to coverage. The Court explicitly rejected the view of lower courts, including the First Department, which have held that the phrase “caused, in whole or in part, by” requires only “but-for” causation, which is much broader and affords coverage to the additional insured in situations where the named insured is only remotely involved in the circumstances leading to the injury.

Because the Court of Appeals reversed existing precedent in the First Department (often relied on by other Departments), we recommend that carriers re-evaluate their positions in existing New York additional insured claims. The Burlington decision, however, addresses the duty to indemnify. As a result, questions still remain concerning the scope of the duty to defend an additional insured in circumstances where there are no allegations of

negligence asserted against the named insured, as may occur, for example, in cases where the named insured cannot be sued pursuant to the worker's compensation bar. In addition, it remains an open question as to whether the language of the additional insured endorsement provides indemnity coverage for the independent negligence of an additional insured that is not solely negligent, where the named insured bears some responsibility for the injury. Carriers should also be mindful that these coverage questions must be analyzed in conjunction with the named insured's potential contractual indemnity obligation to the additional insured, which may place different obligations upon the carrier than the scope of coverage afforded by the additional insured endorsement.

Feel free to call any member of our team if you have questions concerning this case or its effect on your New York claims.

A copy of the decision is available [here](#)

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