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Southern District of New York Extends Additional Insured Coverage When the Named Insured Under an Insurance Policy Is at Least 1% at Fault

Publication:

Riker Danzig Insurance Alert March 2, 2021

On February 1, 2021, the Southern District of New York applied the "in for a penny, in for a pound rule" to additional insured endorsements that provide coverage to the additional insured where it bears liability for injury or damage "caused, in whole or in part, by" the named insured. In Starr Indemnity & Liability Company v. Excelsior Insurance Company, No. 19 Civ. 3747 (KPF), 2021 WL 326209 (S.D.N.Y. Feb. 1, 2021), the court held that "where liability is not attributed to… [the] sole negligence [of the additionally insured defendants in an underlying action], and where the named insured is more than 0% liable for the underlying plaintiff's injuries, additional insured coverage is triggered" because "in such circumstances, the plaintiff's damages are caused, in part, by the named insured's operations." This holding addressed an issue left unanswered in the landmark opinion of Burlington Ins. Co. v. NYC Transit Auth., 29 N.Y.3d 313 (2017), where the New York Court of Appeals determined that additional insured coverage for liability for an injury "caused, in whole or in part, by" the conduct of the named insured does not extend to the purported additional insured's sole negligence.

In Starr Indemnity, the insurer of a drywall and ceiling subcontractor, Starr Indemnity Insurance Company ("Starr"), sought a declaratory judgment that the insurer of a flooring subcontractor, Excelsior Insurance Company ("Excelsior"), was obligated to indemnify defendants in an underlying personal injury action, asserting that they were additional insureds under the Excelsior policy. The additional insured provision provided, in relevant part, that coverage extended to liability for injury "arising out of…[the flooring subcontractor's] ongoing operations" and that was caused "in whole or in part by [the flooring subcontractor]."

Excelsior's insured was found to be 35% at fault for the accident and asserted that it satisfied its coverage obligations to the additional insureds through its payment of 35% of the underlying settlement. The court rejected this argument, finding that, since the flooring subcontractor was more than 0% at fault for the underlying injury, the liability of the additional insureds was due to an injury that was "caused in part by [the flooring contractor's] operations," triggering full coverage for the additional insureds.

As New York lower courts continue to address the "in for a penny, in for a pound" principle left open by the Court of Appeals ruling in Burlington, see also E.E. Cruz & Co., Inc. v. Axis Surplus Ins. Co., 87 N.Y.S.3d 173 (1st Dep't 2018), carriers should monitor the development of the law to assess risk transfer outcomes for New York claims involving additional insured endorsements that provide coverage for liability for injury or damage "caused in whole or in part by" the named insured. A careful evaluation of the facts and other coverage issues, including priority of coverage, is often required in these cases.

If you have any questions about this Alert, please contact any member of the Insurance Group below.

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