Case Alert

New York Court of Appeals Finds a Proximate Cause Standard in Additional Insured Endorsements

In *The Burlington Insurance Company v. NYC Transit Authority, et al.*, No. 2016-00096, the New York Court of Appeals issued a landmark decision with regard to the meaning of "caused, in whole or in part, by" in the additional insured context. In a split decision, the court rejected Burlington Insurance Company's (Burlington) argument that the language implied a "negligence" standard, but held that coverage was provided to the additional insured only where the named insured's acts or omissions were the *proximate* cause of the injury.

The underlying loss occurred when the additional insured, the New York City Transit Authority (NYCTA), failed to mark a buried electrical cable on a subway project. An employee of the named insured, a subcontractor on the project, drove an excavator into the buried energized cable causing an explosion which, in turn, caused a NYCTA employee to fall from an elevated work platform and sustain injury. The Court in the underlying action found that the named insured was not negligent.

The Appellate Division found in favor of coverage, citing several First Department decisions which held that the older "arising out of" endorsement language and the newer "caused, in whole or in part, by" language did not differ materially in application. The Appellate Division also noted that under the plain meaning of "caused," the named insured was at least a partial cause of the loss, despite not being at fault. The New York Court of Appeals agreed to hear Burlington's appeal as there was no authority on this subject from New York's highest court.

Burlington argued that the "caused, in whole or in part, by" language was narrower in scope than the "arising out of" language, and contained an implicit requirement that additional insured coverage is only triggered if the named insured is, at least partially, negligent. Burlington also argued that "caused, in whole or in part, by" should be interpreted to require *proximate* causation rather than actual causation.

SDV filed an amicus brief on behalf of Turner Construction in support of a finding that the "caused, in whole or in part, by" language is substantially similar in application to the "arising out of" language and rebutting Burlington's contention that the named insured's negligence is a prerequisite for additional insured coverage.

In a split decision, the New York Court of Appeals held that the "caused, in whole or in part, by" language differed from the "arising out of" language in that it required the named insured's act to be at least a partial proximate cause of the loss. However, the court unanimously agreed with SDV that a finding of negligence on the part of the named insured is not required to trigger additional insured coverage:

> While we [the majority] agree with the dissent that interpreting the phrases differently does not compel the conclusion that the endorsement incorporates a negligence requirement (dissenting op at 17 n 9), it does compel us to interpret 'caused, in whole or in part' to mean more than 'but for' causation. That interpretation, coupled with the endorsement's application to acts or omissions that result in liability, supports our conclusion that proximate cause is required here.

The effect of this decision will likely be to eliminate additional insured coverage in cases where the additional insured is solely responsible for the loss, which describes a small minority of additional insured claims. On the other hand, the court's unanimous rejection of the negligence trigger preserves coverage in the vast majority of additional insured claims.

For more information, please contact Geoffrey J. Miller at gjm@sdvlaw.com or 203.287.2112.

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1 *Burlington Ins. Co. v. NYC Transit Auth.,* No. 57, 2017 WL 2427300 at 13-14 (internal citations and quotations omitted).