



# Case Alert

## Wrap-Up Exclusion Blocks Additional Insured Claim in New York

It has become quite common for large-scale construction projects to be insured under consolidated insurance (“wrap-up”) programs, where the owner, general contractor, and a majority of subcontractors are covered under the same primary and excess liability policies. However, when a wrap-up is acquired, not all parties involved in the construction project are enrolled. Accordingly, general contractors typically require the subcontractor unenrolled in the wrap-up to obtain CGL insurance, which covers the general contractor as an Additional Insured. It is generally understood that if a liability claim against the general contractor involves the work of an unenrolled subcontractor, the unenrolled subcontractor’s CGL policy would respond first (i.e. before the wrap-up coverage is implicated).

However, on July 2, 2015, the New York Appellate Division, First Department held in [\*Structure Tone, Inc. v. National Cas. Co.\*, 2015 N.Y. App. Div. LEXIS 5613, 2015 NY Slip Op 05760 \(N.Y. App. Div. 1st Dep’t July 2, 2015\)](#) that a wrap-up exclusion contained in a subcontractor’s CGL policy barred additional insured coverage for a wrap-up project’s general contractor, even though the subcontractor was not enrolled in the wrap-up. The Appellate Division’s decision circumvents the common risk transfer practices within the construction industry, and therefore, is a cause of concern for contractors seeking to obtain additional insured coverage under an unenrolled subcontractor’s CGL policy.

### Background

Kleinknecht Electric Company, Inc. (“KEC”) entered into a subcontract with Structure Tone, Inc. (“STI”) to perform electrical work at 200 Fifth Avenue, New York, New York (the “Project”). The subcontract required KEC to maintain liability insurance and to

name STI as an additional insured. Subsequently, KEC procured a policy (the “KEC Policy”) from National Casualty Company (“National”). Thereafter, STI sought coverage as an additional insured on the KEC Policy in connection with a personal injury suit against STI that arose out of KEC’s work. National denied STI’s claim in reliance upon the KEC Policy’s exclusion entitled “Exclusion-Designated Operations Covered by A Consolidated (Wrap-Up) Insurance Program” which provides:

This insurance does not apply to ‘bodily injury’ ... arising out of either your ongoing operations or operations included within the ‘products-completed operations hazard’ at the location described in the schedule of this endorsement, *as a consolidated (wrap-up) insurance program has been provided by the prime contractor/project manager or owner of the construction project in which you are involved!* (Emphasis added).

Although a wrap-up policy existed for the Project, KEC was not an enrolled party, and therefore, not entitled to coverage under the wrap-up. STI then argued that the wrap-up exclusion in the KEC Policy did not apply. The New York Supreme Court in [\*Structure Tone, Inc. v. National Cas. Co.\*, 2014 N.Y. Misc. LEXIS 862, 2014 NY Slip Op 30484\(U\) \(N.Y. Sup. Ct. Feb. 27, 2014\)](#) disagreed. It held that the terms of the wrap-up exclusion precluded STI’s additional insured coverage under the KEC Policy, notwithstanding the fact that KEC was not insured under the wrap-up: “[t]he language of the Exclusion does not require that KEC be enrolled in the wrap-up program, but that the wrap-up insurance program *exist* and cover a bodily injury that arose from KEC’s operations.” *Id.* at \*19-20 (emphasis added).

The Appellate Division, First Department, affirmed the lower court's decision stating:

[STI] conceded that they were being provided coverage in the underlying action 'pursuant to a contractor controlled insurance program,' a policy issued by another carrier, and therefore, based on the plain language of the policy the Wrap-Up exclusionary language was triggered, precluding coverage for [STI]. (Internal citation omitted).

### **Cause for Concern**

As mentioned, it is common practice for a general contractor to be named as an additional insured on its subcontractors' CGL policies, with the intent that the subcontractor's CGL policy will react first when the general contractor seeks liability coverage for injuries arising out of the subcontractor's work. However, the Appellate Division's holding in *Structure Tone, Inc.* upsets these common understandings of risk transfer, when a project involves a wrap-up program.

The Appellate Division's decision has made enrollment in a wrap-up irrelevant, and the mere existence of a wrap-up program may negate additional insured coverage from an unenrolled subcontractor. It begs the question as to why a general contractor would require an unenrolled project subcontractor to name the general contractor as an Additional Insured, if the wrap-up exclusion acts to bar any additional insured coverage for that general contractor.

### **Issues to Consider**

As a result of the *Structure Tone, Inc.* decision, general contractors who provide wrap-up insurance programs for construction projects should be concerned with

whether their unenrolled subcontractors' CGL policies contain wrap-up exclusions. Furthermore, subcontractors who promise to provide general contractors with additional insured coverage must be aware that they may be breaching their contractual obligations to general contractors if their CGL policies contain any such wrap-up exclusions.

Accordingly, general contractors who require AI coverage from unenrolled subcontractors should consider reviewing their subcontractors' CGL policies, including all endorsements to avoid being blindsided by a wrap-up exclusion. General contractors might also consider amending their subcontracts to require their subcontractors to remove any wrap-up exclusions in their CGL policies.

In the same regard, subcontractors who are contractually obligated to provide additional insured coverage should consider reviewing their insurance policies to determine whether any wrap-up exclusion exist that could create exposure to a breach of contract claim by a general contractor.

For more information regarding this issue, or if you require assistance in drafting or revising your subcontracts, or reviewing any applicable policies, please contact Jeffrey J. Vita at 203-287-2103 or [jjv@sdvlaw.com](mailto:jjv@sdvlaw.com) or Celia B. Keniry at 203-287-2126 or [cbk@sdvlaw.com](mailto:cbk@sdvlaw.com).

<sup>1</sup> Although neither court discusses the language in the schedule of the Wrap-Up Endorsement, it should be noted that the schedule does not specifically describe the Project's location, but instead describes it as "[a]ll operations that are covered under a wrap-up insurance program or any other consolidated or similar insurance program."