JONES DAY

COMMENTARY

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Don't Sleep on This: New York High Court Addresses Scope of "Blanket" Additional Insured Endorsements

IN SHORT

The Situation: The issue of whether "blanket" additional insured endorsements require direct contractual privity with an insurance policy's "named insured" has received inconsistent treatment by U.S. courts.

The Development: The New York high court's recent *Gilbane* decision confirms that the requirements for "additional insured" status continue to be determined by the specific language of additional insured endorsements themselves and not by the insurance requirements of parties' underlying contracts.

Looking Ahead: Prior to a project's commencement, the actual language of additional insured endorsements should be carefully reviewed to confirm its alignment with parties' contractual intent.

SKIP TO THE FULL VERSION.

Is a contractual privity requirement lurking within the fine print of your "additional insured" coverage? As illustrated by the New York high court's recent decision in *Gilbane Building Co./TDX Constr. Corp. v. St. Paul Fire and Marine Ins. Co.* ("*Gilbane*"), the answer, if overlooked, can mean the difference between being fully insured and not covered at all.

Additional Insured Endorsements and the Contractual Privity Issue

In addition to contractual indemnification provisions, many companies require that they be added as "additional insureds" to the liability insurance policies of those with whom they do business. By conferring direct rights to coverage for third-party liabilities that arise out of the performance of others' work, additional insured status is an efficient and valuable risk transfer mechanism.

As in many large-scale construction projects, instead of using "specific" endorsements (i.e., expressly identifying every individual or entity to be added as an additional insured), parties commonly rely upon "blanket" endorsements, which generally provide additional insured status to any person or entity that the named insured is contractually required to add to the policy.

In these situations, however, the party to be added as an additional insured often is not in direct contractual privity with the policy's named insured. As *Gilbane* demonstrates, whether such arrangements are sufficient to confer additional insured status under "blanket" endorsements continues to depend on the precise language of the endorsement used.

Factual Background

Gilbane involved the construction of a 15-story building at the Bellevue Hospital Campus in Manhattan. The Dormitory Authority of the State of New York ("DASNY"), which was overseeing the project, retained a joint venture formed between Gilbane Building Company and TDX Construction Corporation (the "JV") to serve as the project's construction manager. The construction management agreement between DASNY and the JV provided that any prime contractor was required to name the JV as an additional insured under its liability insurance policies.

DASNY contracted separately with Samson Construction Company ("Samson") to serve as the prime contractor for the project's excavation and foundation work, which agreed in its prime contract with DASNY to add the JV as an additional insured to its commercial general liability ("CGL") insurance policy with Liberty Insurance Underwriters ("Liberty").

In an attempt to satisfy this requirement, Samson added a "blanket" endorsement to its CGL policy stating:

> "WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization *with whom you have agreed* to add as an additional insured *by written contract* but only with respect to liability arising out of your operations or premises owned by or rented to you." (emphasis added).

As *Gilbane* demonstrates, whether such arrangements are sufficient to confer additional insured status under "blanket" endorsements continues to depend on the precise language of the endorsement used.

During construction, Samson's excavation work allegedly caused structural damage to adjacent buildings. DASNY sued Samson and the project architect for negligence, and the project architect, in turn, commenced a third-party action against the JV.

When the JV looked to Liberty to defend and indemnify the JV against the project architect's third-party claim, Liberty denied coverage on the ground that the JV was not an additional insured under Samson's CGL policy.

New York Court of Appeals Finds a Contractual Privity Requirement

In the ensuing coverage dispute, Liberty moved for summary judgment, maintaining that its "blanket" endorsement added as additional insureds only parties with whom Samson had a direct contractual relationship. Given that Samson and the JV were not in contractual privity, Liberty argued that its "blanket" endorsement therefore did not extend coverage to the JV.

In response, the JV maintained that Liberty's "blanket" endorsement did not require direct contractual privity between the named insured and the additional insured, but instead required only that the additional insured be identified in a written contract to which the named insured is a party. Given that Samson was required to add the JV as an additional insured in its prime contract with DASNY, the JV maintained that it was therefore afforded additional insured status under Samson's CGL policy.

In a 5–2 opinion affirming the intermediate appellate court's grant of summary judgment to Liberty, the New York Court of Appeals determined that the CGL policy's "blanket" endorsement was "facially clear" and the phrase "*with* whom," when afforded its ordinary meaning, "can only mean that the [named insured's] written contract must be 'with' the additional insured."

Finding the "blanket" endorsement unambiguous, the New York high court determined that extrinsic materials such as the insurance procurement requirements of the Samson-DASNY prime contract could not be used to "rewrite" the CGL policy, and instead merely conferred the JV with potential third-party beneficiary standing under the prime contract to sue Samson for its breach.

Tips to Avoid Unintended Consequences

- Where parties to be added as additional insureds lack a direct contractual relationship with the policy's named insured, "specific" endorsements, or "blanket" endorsements that do not require direct contractual privity with the named insured, should be used.
- Parties should consider the effect of any "other insurance" provisions within their respective policies, including whether to require that additional insured coverage be provided on a "primary and noncontributory" basis.
- Parties should consider whether coverage is provided for an additional insured's sole negligence, including how the language of their additional insured endorsement has been construed under applicable state law and the effect of any applicable state anti-indemnity statutes.
- Given that many standard form additional insured endorsements provide coverage only for "ongoing operations," additional insureds seeking "completed operations" coverage should ensure these needs are adequately addressed (e.g., via a separate completed operations endorsement or a project-specific completed operations policy).
- To confirm their additional insured status, parties should not rely upon "certificates of insurance" (which neither create, nor constitute adequate proof of, coverage) and should instead, at a minimum, review the policy's declarations pages, schedule of forms, and the additional insured endorsement itself.

Conclusion

The New York high court's recent *Gilbane* decision underscores the need for parties to carefully review the scope of their additional insured coverage *prior to* a project's commencement. Doing so will help to avoid unintended consequences like those in *Gilbane* and ensure that additional insured coverage aligns with parties' contractual intent.

THREE KEY TAKEAWAYS

1. In many large-scale construction projects, parties frequently rely upon "blanket" endorsements, which generally provide additional insured status to any person or entity that the named insured is contractually required to add to the policy.
2. In these situations, however, the party to be added as an additional insured often is not in direct contractual privity with the policy's named insured. As illustrated by the *Gilbane* decision, whether such arrangements are adequate to confer additional insured status under "blanket" endorsements depends on the precise language of the endorsement used.
3. Prior to a project's commencement, the actual language of additional insured endorsements should therefore be carefully reviewed to confirm its alignment with parties' contractual intent.

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