Case Alert

New York Appellate Court Reinforces Broad Coverage for Additional Insureds

On August 11, a New York intermediate appellate court (Appellate Division, First Department), issued a pro-policyholder decision on additional insured coverage: Burlington Ins. Co. v NYC Tr. Auth., 2015 N.Y. App. Div. LEXIS 6349 (N.Y. App. Div. 1st Dep’t Aug. 11, 2015). The ruling is favorable to upstream parties seeking additional insured coverage and continues a New York trend of reinforcing a pro-insured stance in cases involving standard AI endorsements over the past three years.

Background

Burlington involved a construction accident in Brooklyn. The NYC Transit Authority (NYCTA) hired Breaking Solutions to perform excavation work for a subway tunnel. Breaking Solutions obtained a general liability policy from Burlington Insurance Co. for the project, and named NYC- TA, Metropolitan Transit Authority (MTA) and the City of New York (“City”) as Additional Insureds. The Additional Insured endorsement, which contained standard ISO language, applied to liability “caused in whole or in part” by the acts or omissions of Breaking Solutions.

An explosion occurred when excavator equipment operated by Breaking Solutions came into contact with an energized electrical cable buried below the concrete. As a result of the explosion, an NYCTA employee fell from an elevated work platform and was injured.

The employee sued the City and Breaking Solutions. The City instituted a third-party action against MTA and NYCTA. Burlington initially accepted tender to defend all three as additional insureds. However, discovery showed that the Breaking Solutions employee who operated the excavator had not been negligent or otherwise at fault. Instead, the explosion occurred because of NYCTA’s failure to mark the cable and to shut off the power. Once this information became available, Burlington disclaimed coverage for NYCTA and MTA. Burlington took the position that, because there was no evidence that Breaking Solutions was negligent or at fault, the injury had not been “caused, in whole or in part,” by any “act or omission” of Breaking Solutions. Said another way, Burlington interpreted “caused in whole or in part” to require that Breaking Solutions actually be at fault or negligent.

The Court’s Ruling

The trial court agreed with Burlington, but the appellate court reversed. It found that NYCTA and MTA were additional insureds under the policy even though Breaking Solutions’ causal act had not been negligent. The court explained that the employee’s injury was causally connected to an “act” of Breaking Solutions. The act was the excavator’s disturbance of the buried electrical cable, which triggered the explosion that led to the employee’s fall. Even though Breaking Solutions was faultless, its act was still a “cause” of the injury.

The Takeaway

CGL insurers providing Additional Insured coverage frequently take the position that “caused in whole or in part” by ‘acts or omissions’ of the [Named Insured]” requires a showing of negligence or fault, seeking to narrow the access to Additional Insured coverage for upstream parties.

New York courts have consistently disagreed with this position, however, and contractors pursuing Additional Insured coverage should carefully assess the insurer’s position when encountering similar resistance.

For more information about this case, or guidance on risk transfer strategies for additional insured coverage, please contact Stella Szantova Giordano at ssg@sdvlaw.com or call 203.287.2129.

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