Case Alert

Privity Problems Continue for Additional Insureds in the Second Circuit

On October 4, the Second Circuit held that Harleysville Insurance Company had no duty to defend or indemnify a project owner or general contractor as additional insureds under a sub-subcontractor's commercial general liability (CGL) policy due to lack of direct contractual privity.[1]

The underlying claim arose when an employee of The Kimmell Company, Inc. (Kimmell) was injured while repairing an HVAC system at a building owned by the University of Rochester Medical Center (UR). The injured employee sought damages for his injuries and filed suit against (1) UR; (2) LeChase Construction Corp. (LeChase), the general contractor for the project; and (3) J.T. Mauro Co. Inc. (Mauro), a subcontractor hired by LeChase.

Mauro hired Kimmell as a sub-subcontractor to perform HVAC services at the project. The Mauro-Kimmel contract required Kimmel to add Mauro, UR, and LeChase as additional insureds under Kimmell's CGL policy.

Kimmel's CGL policy was issued by Harleysville Insurance Company (Harleysville) and contained two additional insured endorsements – CG 20 33 (the "Privity Endorsement") and CG 20 10 (the "Declaration Endorsement"). Harleysville and Mauro's insurer, Cincinnati Insurance Company (Cincinnati), engaged in a dispute as to who was entitled to coverage under the Harleysville policy. Cincinnati argued Harleysville was required to defend and indemnify UR and LeChase based on the insurance requirements in the Mauro-Kimmel contract. Harleysville disagreed, arguing that UR and LeChase did not qualify as additional insureds under either the Privity Endorsement or the Declaration Endorsement to the Harleysville policy. At the trial level in the U.S. District Court for the Western District of New York, the court determined that UR was an additional insured on the Harleysville policy, but LeChase was not. Both parties appealed.

On appeal, the Second Circuit held that, based on the language of the two additional insured endorsements in the Harleysville policy, neither LeChase nor UR were additional insureds under the Harleysville policy.

First, the court held that the Harleysville policy's Privity Endorsement does not confer "additional insured" status on UR or LeChase. The endorsement stated that a party would be granted additional insured status "when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." Applying New York law, the court noted that identical endorsements have been held to require direct contractual privity – that is, the named insured must have contracted directly with the additional insured in order for the endorsement to apply. Because Kimmel did not enter into a contract with UR or LeChase directly, they did not meet the endorsement's privity conditions.

Second, the court held that the Harleysville policy's Declaration Endorsement does not confer additional insured status on UR or LeChase. The Declaration Endorsement stated that additional insured coverage is provided to entities identified in a schedule or, if the alternative, in the policy's declarations. The schedule of the Declaration Endorsement was blank, so the court turned to the policy declarations for instruction. Within the declarations, among other information, there was a heading that read "Additional Insured — Owners, Lessees Or Contractors — Automatic Status When Required in Construction Agreement With You."

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1. *Cincinnati Ins. Co. v. Harleysville Ins. Co.*, Nos. 16-3929-cv (L), 16-4062-cv (Con), 2017 WL 4417604 (2d Cir. Oct. 4, 2017).

Cincinnati argued that the "Automatic Status" heading negated any contractual privity requirement and automatically conferred additional insured status to owners, lessees, or contractors when required by a construction agreement. Harleysville disagreed, arguing that the heading did not designate a blanket category of unspecified additional insureds. The court agreed with Harleysville and determined that UR and LeChase were not entitled to additional insured coverage under the Declaration Endorsement.

This case is problematic for upstream parties who seek additional insured coverage from subcontractors or other parties they did not directly contract with. Under New York law, if a CGL policy requires direct contractual privity to convey additional insured status, upstream parties may face denials of coverage and be forced to seek coverage under their own commercial general liability policies. Therefore, upstream parties should consider requesting a copy of all downstream parties' policies to ensure that the additional insured endorsements do not require contractual privity.

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