

## *'Burlington' and the Recoupment of Defense Costs by Insurers, New York Law Journal*

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*While much paper and ink has been dedicated to the core differentiation between “caused by” and “arising out of,” less attention has been paid to that aspect of the 'Burlington' decision which provides for an insurer’s ability to recoup defense costs upon a determination that the purported additional insured does not, in fact, qualify as an additional insured.*

*In June 2017, the New York Court of Appeals issued its decision in Burlington Ins. Co. v. NYC Tr. Auth., 29 N.Y.3d 313 (2017), which significantly impacted the insurance industry and forever changed the way in which insurers must assess their duties to provide coverage to purported additional insureds. The core holding of Burlington is that an additional insured provision in an insurance policy—which provides coverage to additional insureds for claims “caused in whole or in part” by the “acts or omissions” of the named insured—are more limited than those which provide additional insured coverage for claims “arising out of” the acts or operations of the named insured. In this regard, the Court of Appeals held that to qualify as an additional insured under the “caused by” trigger, the purported additional insured must establish a proximate link between the acts or omissions of the named insured and the alleged accident or occurrence. This differs substantially from the older “arising out of” standard, which only required a causative link. While much paper and ink has been dedicated to this core differentiation between “caused by” and “arising out of,” less attention has been paid to that aspect of the Burlington decision which provides for an insurer’s ability to recoup defense costs upon a determination that the purported additional insured does not, in fact, qualify as an additional insured.*

*Generally, New York law provides that where coverage is disputed, and a liability policy includes the payment of defense costs, “insurers are required to make contemporaneous interim advances of defense expenses ..., subject to recoupment in the event it is ultimately determined no coverage was afforded.” Axis Reinsurance Co. v. Bennett, No. 07-CV-10302 (GEL), 2008 U.S. Dist. LEXIS 53921 (S.D.N.Y. June 27, 2008) (quoting Nat’l Union Fire Ins. Co. of Pittsburgh, PA. v. Ambassador Grp., 157 A.D.2d 293, 299 (1st Dep’t 1990)). Maxum Index. Co. v. VLK Constr., No. 14-CV-1616 (RRM) (LB), 2016 U.S. Dist. LEXIS 121476, at \*16-17 (E.D.N.Y. Sept. 8, 2016); Century Sr. Co. v. Franchise Const., 14-CV 277, 2016 U.S. Dist. LEXIS 31271 (S.D.N.Y. 2016).*