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"Liability Exists Precisely Where There is Fault." New York's Top Court Declares No "Additional Insured" Coverage Unless the Named Insured "Proximately Caused" the Injury or Damage

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The New York Court of Appeals ruled this week that an "additional insured" under a standard ISO endorsement has no coverage unless the named insured "proximately caused" the injury or damage, finding in favor of an insurer that argued the additional insured contractor had no coverage because it, and not the named insured subcontractor, actually caused the injury.

The top court's 4-2 decision in *Burlington Ins. Co. v. NYC Transit Authority, et al. (2017 NY Slip Op 04384, June 6, 2017) seems to be a landmark ruling.*

The New York City Transit Authority (NYCTA) and Metropolitan Transportation Authority (MTA) hired Breaking Solutions, Inc. (BSI) to excavate a tunnel along the #3 subway line in Brooklyn. The contract required BSI to get general liability insurance naming the NYCTA and MTA as additional insureds, and BSI bought a policy from Burlington Insurance Company with ISO form CG 20 26 07 04, an endorsement that named the NYCTA and MTA as additional insureds but read:

… only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. *Your acts or omissions; or*
2. *The acts or omissions of those acting on your behalf.*

Thomas Kenney worked for the NYCTA and fell off a platform when a BSI boring machine hit a live, buried electrical cable and touched off an explosion in the subway tunnel. He sued BSI, the MTA and New York City (which owned the land where the explosion happened), and those defendants made third-party claims against Mr. Kenney's employer, the NYCTA. Burlington agreed to defend the MTA and NYCTA as additional insureds under BSI's policy, subject to a reservation of rights.

Discovery in the Kenney lawsuit turned up memos from the NYCTA which revealed the accident happened solely because the NYCTA failed to mark the utility cable, as it was responsible to do. Because those memos exonerated BSI from any fault, Burlington declined additional insured coverage to the MTA and NYCTA, contending Mr. Kenney's injury had not been "caused, in whole or in part" by any "act or omission" of the named insured, BSI.

Burlington then filed a declaratory judgment suit in New York state court, where the Supreme Court awarded Burlington summary judgment, reasoning that the policy limited additional insured coverage to situations where the named insured was negligent. On appeal, the Appellate Division First Department thought differently, ruling that the additional insured endorsement did not say it was limited only situations where the named insured was at fault. The appellate court found that, while not negligent, BSI's action of drilling into the electrical wire had some "causal link" to the injury, meaning Mr. Kenney's injury was "cause[d], in whole or in part" by BSI's "act" such that the endorsement applied and the NYCTA and MTA had coverage.

The Court of Appeals this week disagreed with the First Department's rationale, saying that having any causal link is too broad a reading of the endorsement's language. The high court concluded the stricter "proximate cause" test more closely reflects the language of the endorsement.

The court's opinion explained the difference between "proximate causation," which is a legal causation concept that is meant "to place manageable limits upon the liability that flows from negligent conduct," and "but for" causation, which by contrast is broader and could

consist of any link in the chain of events that leads to an injury. In adopting the narrower test for when the additional insured coverage could apply, the court held, "Here, the Burlington policy endorsement states that the injury must 'caused, in whole or in part' by BSI. These words require proximate causation since 'but for' causation cannot be partial."

The Court of Appeals also looked at other words in the endorsement, particularly the "only with respect to liability for" language. As the majority saw it, "The endorsement's reference to 'liability' caused by BSI's acts or omissions further confirms that coverage for additional insureds is limited to situations where the insured is the proximate cause of the injury. Liability exists precisely where there is fault."

The court also took the time to "reject [the] invitation" to adopt the First Department's previous reasoning that "caused by" is not materially different from those policies that give additional insured coverage for injuries "arising out of" an act of the named insured, whether or not negligent. The top court called the analogy "inapt" here because the parties didn't use "arising out of" in the endorsement, and in any event, "'arising out of' is not the functional equivalent of 'proximately caused by'."[1]

Justice Eugene Fahey vehemently disagreed with the majority, issuing a dissent that was slightly longer than the majority opinion. Justice Fahey had a very different read of the ISO endorsement language, but one that would give the NYCTA and MTA coverage. He wrote that "mere acts" of the named insured should trigger coverage, and "[i]f the drafter meant for such status to be contingent upon a negligent act or acts of the named insured, then the policy easily could have said as much."

As Justice Fahey put it, "The majority's decision obviously impacts the subject endorsement and similar policy language. We hope, however, that its reach will not extend more broadly and that its effect will not be destructive."

Click here to read the full decision: Burlington Decision

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[1] We discussed the First Department's thinking on the "arising out of language" in our 2012 article titled, "New York's First Department Holds That Standards Used In Additional Insured Endorsements Are Not Materially Different," found here: /news-resources/kdv-alert-new-yorks-first-department-holds-standards-used-additional-insured-endorsements-not-materially-different/.