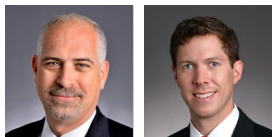


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## Policyholder Alert

# Additional Insured Coverage Could Help Targets of Scaffold Law [N.Y. Labor Law §§ 240 and 241] Claims



By **Allen R. Wolff** and **Ethan W. Middlebrooks**

In a recent decision from the United States District Court for the Eastern District of New York, a general contractor was found to be entitled to defense coverage as an additional insured to a subcontractor's liability insurance. One of the significant pro-policyholder aspects of this case is that the original lawsuit was not even brought against the subcontractor. The case is *Axis Constr. Corp. v. Travelers Indem. Co. of Am.*, 2:20-cv-01125 (DRH) (ARL) (E.D.N.Y. Sep. 1, 2021)

The original lawsuit sought compensation for a jobsite injury suffered by an employee of the subcontractor. The employee was prevented from suing his employer due to worker's compensation laws. Instead, as is commonly seen, the employee sued the general contractor, the property owner, and the property manager, asserting claims for an unsafe workplace under New York's Scaffold Law [N.Y. Labor Law §§ 240 and 241], among others.

This scenario presents a serious problem for projects located in New York: the state not only has worker's comp laws that prevent a



subcontractor's employee from suing the subcontractor for a jobsite injury, but also has laws that incentivize suits against property owners and general contractors by imposing nearly inescapable liability on them for jobsite injuries.

In the *Axis* fact pattern, after being sued by the subcontractor's employee in state court, the general contractor initiated a third party complaint against the subcontractor alleging that the employee's injuries arose from the acts or omissions of the subcontractor. Even though the employee had not made such allegations in the original complaint, the general contractor's third party complaint against the subcontractor

### Key points:

**A federal court in New York finds defense coverage for a general contractor as an additional insured to a subcontractor's policy, even though the subcontractor was not sued by the victim**

**Beware of "No Action Over" exclusions that would negate such additional insured coverage**

**Prohibit such exclusions in policies held by any participants in a construction project**

did make those allegations. On that basis, the federal court noted that the insurance company's duty to defend the general contractor had been triggered because the allegations in the general contractor's third party complaint established the possibility that the general contractor's liability to the employee, if any, might have been caused, in whole or in part, by the acts or omissions of the subcontractor, and the subcontractor itself faced potential liability through that third party complaint. In its ruling, the federal court stated an appreciation for the "realities of New York litigation practice."

New York policyholders facing similar situations should consider the availability of third-party complaints against the injured worker's employer as a way to trigger additional insured status that could protect them. But special caution is also needed: beware of the "No Action Over" exclusion, added to some policies, which excludes coverage for bodily injury to an employee of the insured, even if such liability is assumed under a contract. Your contract should prohibit this exclusion from being in any insurance policy on the project and you should not rely on certificates of insurance alone. Instead, you should inspect policies to ensure that bad exclusions do not frustrate the risk transfer that is intended by your contract.

This "No Action Over" exclusion could prevent a general contractor or owner from tendering the defense of an employee claim back to the subcontractor, even when the subcontractor is contractually obligated to indemnify them. In such circumstances, the target of the employee's lawsuit may still have recourse against the subcontractor for

breach of contract, but there may be no insurance backing it up.

Policyholders who have concerns they would like to discuss should contact their Anderson Kill attorney or either of the authors Allen Wolff ([awolff@andersonkill.com](mailto:awolff@andersonkill.com) / 212-278-1379) or Ethan Middlebrooks ([emiddlebrooks@andersonkill.com](mailto:emiddlebrooks@andersonkill.com) / 212-278-1324). ▲

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***A "No Action Over" exclusion could prevent a general contractor or owner from tendering the defense of an employee claim back to the subcontractor.***

## ***About Anderson Kill***

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