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Courts Chip Away at Significant Construction Industry Coverage

By Dennis J. Artese and Allen R. Wolff

Over the last decade and a half, construction industry policyholders have had to contend with the insurance industry's multiple attempts to narrow access to additional insured coverage in standard form CGL policies. At the same time, a number of court decisions have taken a narrow and seemingly unsupported view of the scope of "insured contract" coverage available to such policyholders. These two developments are alarming for the construction industry, which depends on additional insured status and the ability to access insurance coverage for contractually assumed tort liabilities as standard risk management practices.

Recently, in *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 2016 NY Slip Op 06052, 38 N.Y.S.3d 1 (App. Div. 2016), an insurance company used loose language in its own policy endorsement to dispute additional insured coverage sought by a participant in the construction industry. The endorsement in the *Gilbane* case specifically extended additional insured coverage where required by written contract, a practice common in the construction industry. The construction manager's agreement with the project's financier required any prime contractor to name the construction manager as an additional insured to the prime contractor's insurance, and the prime contractor did in fact agree to provide such coverage in its contract with the financier and even issued a certificate of insurance evidencing that such insurance was in place. Yet the insurance company denied coverage, pointing to language that required additional insured status be extended to someone "*with whom* you have agreed to add as an additional insured." The insurance company successfully argued that this was different from a requirement to give such status to someone "*for whom*" the primary policyholder had agreed to extend additional insured coverage.

The case was decided because of the preposition used in the insurance company's own endorsement ("with" versus "for"), even though it was widely understood that such an interpretation was inconsistent with the custom and practice of the construction industry.

Making matters worse, a smattering of other court decisions over the last several years have taken a narrow view of insured contract coverage under standard form CGL policies. Insured contract coverage typically arises where,

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for example, a project owner asserts a claim for contractual indemnity against a general contractor for losses the owner incurs because of bodily injury or property damage caused by the negligence of the general contractor or its subcontractors.

Many contractually assumed liabilities are excluded under CGL policies, but the insured contract exception recognizes coverage for contracts or agreements under which the policyholder assumes the tort liability of *another party* to pay for bodily injury or property damage to a third person or organization. Despite the broad and unqualified nature of the term "another party," some courts considering this language have concluded that insured contract coverage applies only where the policyholder agrees to assume the "other contracting party's" tort liability to a third party. *See, e.g., APL Co. Pte. Ltd. v. Valley Forge Ins. Co.*, 541 F. App'x 770 (9th Cir. 2013). Thus, under this view, there would be no coverage for the general contractor's liability to the owner stemming from the negligence of its subcontractors, even if the general contractor assumed such liability in its contract with the owner, as owners typically demand.

The *APL* court's interpretation of "another party" is at odds with several widely accepted rules of insurance policy construction, including that the plain language of a policy should be enforced as written. Indeed, at least one court has applied the plain meaning of "another party," finding that the term plainly is not limited to the other contracting party. S*ee Colony National Insurance Co v. Manitex, LLC*, 461 F. App'x 401, 405 n.1 (5th Cir. 2012) ("*Manitex* is correct that an insured contract could be one in which the insured assumed the tort liability of any other person or entity, not just the other party to the contract.").

In the construction context, the *Manitex* court's interpretation is the only one that makes sense, since most states have enacted anti-indemnity statutes that render unenforceable any agreement whereby one party to a construction contract agrees to indemnify another for that other party's own negligence. Thus, if "another party" meant the other party to the contract, insured contract coverage sold to construction industry participants would be virtually illusory.

The cautions for both policyholders and insurance companies are clear. Policyholders should carefully examine their insurance policies and make sure they are getting the coverage necessary for the risks they are undertaking. The insurance industry also should take caution: Aggressive rejections of coverage that are contrary to industry practice will drive the industry participants to innovate methods that could cut you out of the process, along with the premium dollars that you collect.

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