Are courts narrowing access to coverage in the construction industry?

BY DENNIS J. ARTESE, ALLEN R. WOLFF

OVER THE last decade and a half, construction industry policyholders have struggled against multiple attempts to narrow access to additional insured coverage in standard form commercial general liability (CGL) policies.

Meanwhile, court decisions reflect that some courts are taking a more narrow view of the scope of "insured contract" coverage available to policyholders.

These two developments warrant caution for the construction industry, which depends on additional insured status and the ability to access insurance coverage for contractually assumed liabilities for damage, injury or harm to another person (tort liabilities) as standard risk-management practices.

Last year, in Gilbane Bldg. Co./ TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co. (NY App. Div. 2016), an insurance company used loose language in its own policy endorsement to dispute the additional insured coverage that was sought by a participant in the construction industry.

The endorsement in the Gilbane case specifically extended additional insured coverage when 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. In its construction contract, the prime contractor did in fact agree to provide such coverage.

'WITH WHOM' VS. 'FOR WHOM'

The prime contractor even supplied a certificate of insurance evidencing that such insurance was in place. Yet the insurance company later 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.

Grammarians of the world, unite! 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. Indeed, the dissenting opinion in the case explored this very issue and noted how off-base it was. The construction industry is replete with contracts and other agreements under which both parties to the contract fully expect that insurance coverage will be extended, irrespective of the preposition that may have been used in a policy endorsement issued by the insurance company.

'ASSUMED' LIABILITIES

A smattering of other recent court decisions have taken a narrow view of insured contract coverage under standard form CGL policies. Insured contract coverage issues typically arise when, 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 specifically excluded under CGL policies. But those same policies usually have an exception, among others, by which coverage is available for contracts or agreements in which the policyholder assumes the tort liability of another party for bodily injury or property damage to a third person or organization. Insurance companies have sought a more narrow interpretation, arguing that coverage for the tort liability of the other party should only extend to the other party to the contract. This interpretation was rejected in Colony National Insurance Co v. Manitex, LLC (5th Cir. 2012). In that case, the court took a more expansive view: "[A]n 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." (Emphasis in original.)

ANTI-INDEMNITY STATUTES

More recently, a sister court to the Manitex court ruled that insured contract coverage applies only when the policyholder agrees to assume the "other contracting party's" tort liability to a third party. [APL Co. Pte. Ltd. v. Valley Forge Ins. Co (9th Cir. 2013).] The APL court's interpretation of "another party" is at odds with several rules of insurance policy construction, including the rule that the plain language of a policy should be enforced as written and the rule that ambiguous words in a policy should be interpreted in favor of finding coverage. It's also at odds with a law found in almost every state.

Most states have enacted anti-indemnity statutes that prohibit agreements in which one party to a construction contract agrees to indemnify the other for that other party's own negligence. Thus, if "another party" meant, as the APL court found, only the other party to the contract, then insured contract coverage sold to construction industry participants would be virtually illusory, because the policyholder's contractual counterparties could never seek to hold the policyholder responsible for such counterparties' own tort liability to a third person or organization. In the construction context, the Manitex court's interpretation is the only one that makes sense.

The cautions for both policyholders and insurance companies are clear. Policyholders should make sure they're actually getting the coverage needed for the risks they are undertaking and the contractual commitments they are making. It might require closer inspection of the additional insured endorsements and the insured contract clauses in the policies sold by the insurance company. Watch out for those prepositions!

The insurance industry also should take caution: aggressive rejections of coverage that are inconsistent with industry practice will drive industry participants to innovate new methods that could affect your bottom line.

Dennis J. Artese is a shareholder in the New York office of Anderson Kill. His practice emphasizes securing coverage for property and business interruption losses and first-party property and third-party liability claims resulting from construction accidents. He can be reached at dartese@andersonkill.com.

Allen R. Wolff is a shareholder in Anderson Kill's New York office. His practice concentrates in construction litigation, insurance recovery, and the nexus between the two, as well as in complex commercial litigation. He can be reached at awolff@andersonkill.com.