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NY Additional-Insured Ruling Builds Doubt For Contractors

By **Jeff Sistrunk**

Law360, Los Angeles (September 16, 2016, 9:43 PM EDT) -- A New York appeals court recently held that a construction manager isn't entitled to coverage as an additional insured under a contractor's policy because the two companies didn't have a direct contract, a ruling that experts say deepens a judicial divide on the requirements for additional-insured coverage and exacerbates uncertainty among construction industry policyholders.

In a 4-1 decision, a panel of the state Appellate Division's First Department on Sept. 15 flipped a lower court's holding that the construction manager on a Bellevue Hospital building, a joint venture between Gilbane Building Co. and TDX Construction Corp., qualifies as an additional insured under contractor Samson Construction Co.'s commercial general liability policy with Liberty Insurance Underwriters.

According to court documents, Samson had agreed in a contract with the project's financier, the Dormitory Authority of the State of New York, to acquire additional-insured coverage for a number of entities, including the construction manager.

But the appellate panel found that, under the language of the Liberty policy's additional-insured endorsement, that agreement was insufficient to confer insured status on the joint venture. Instead, Samson was required to enter into a direct written contract with Gilbane-TDX in order for the construction manager to be entitled to additional-insured coverage under the policy, the panel said.

"Since there is no dispute that Samson did not enter into a written contract with the JV, Samson's agreement in its contract with DASNY to procure coverage for the JV is insufficient to afford the JV coverage as an additional insured under the Liberty policy," Judge Dianne T. Renwick wrote for the majority.

Attorneys say that the New York panel's opinion is the latest in a long line of divergent decisions on the prerequisites for additional-insured coverage. For instance, the Second Circuit, applying Connecticut law, ruled in late August that a direct contract wasn't required for the construction manager on a project at Yale University to qualify as an additional insured under a subcontractor's policy.

The judicial inconsistencies create a great deal of uncertainty for policyholders, particularly for companies in the construction industry, which depend on the extension of additional-insured coverage as a risk transfer mechanism, according to experts.

"Now, whether or not a company has additional-insured coverage will depend largely on which court you end up in," said Hunton & Williams LLP partner Walter Andrews. "That doesn't provide much guidance to businesses."

The Gilbane-TDX joint venture had sought coverage under Samson's policy with Liberty after it was slapped with a third-party complaint in litigation alleging that the prime contractor's shoddy foundation and excavation work on the 15-story Bellevue Hospital building had damaged surrounding properties.

When Liberty refused, the joint venture filed suit in New York state court, seeking a ruling that the insurer had to defend and indemnify it in the underlying litigation. In May 2014, the trial court held that the construction manager was an additional insured under the Liberty policy. Samson's written contract with DASNY, which obligated it to obtain insurance naming the construction manager as an additional insured, fulfilled the policy's requirements, the lower court concluded.

The majority of the appellate panel, however, said the lower court misconstrued the language of the additional-insured endorsement, which extends coverage to "any person or organization with whom you (the insured) have agreed to add as an additional insured by written contract," when it found that no direct contract was required. In essence, the majority said, the joint venture was asking to rewrite the endorsement to extend additional-insured coverage to any parties "for whom" Samson agreed to obtain insurance.

In a strongly worded dissenting opinion, Judge Marcy L. Kahn said she would have upheld the lower court's ruling, asserting that the language of Liberty's endorsement "was written so imperfectly that it is susceptible to two reasonable interpretations." Furthermore, Judge Kahn warned that the majority's "unduly narrow reading" of the Liberty endorsement "would upend the established customs and practices of the construction industry and its insurers."

Policyholder-side attorneys say that Judge Kahn's warning is apt, given how essential additional-insured coverage is to protecting companies working on large-scale construction projects.

"The majority's interpretation of this endorsement is inconsistent with the needs of the industry that the insurance product was designed to serve," said construction insurance attorney Allen Wolff, a shareholder at Anderson Kill PC.

Pillsbury Winthrop Shaw Pittman LLP partner Alexander D. Hardiman said that the Appellate Division's holding is out of step with what many courts have concluded when considering additional-insured endorsements with similar language.

"If this decision becomes the majority view of the courts, I think it could upend the way a lot of the the construction industry does business and contracts to provide insurance for significant construction projects," Hardiman said.

The potential uncertainty created by the decision could compel companies in the construction industry to look more carefully at the way they have executed their contracts requiring additional-insured coverage, according to attorneys. It may no longer be enough for the owner of a project site and the general contractor to enter into a single principal contract requiring the contractor to name other entities as additional insureds, experts say.

"Instead, general contractors and subcontractors or other additional insureds may have to ensure that

they have each executed an individual contract requiring them to be named as additional insureds under the general contractor's insurance," Hardiman said. "In an industry often burdened by multiple layers of contracts, this could lead to yet another layer of expense and contractual complications."

Hardiman also pointed out that the joint venture, Samson and DASNY had all been in agreement about the scope of additional-insured coverage under the Liberty policy. As such, Liberty would not have taken on greater risk if the lower court's holding had been affirmed, he said.

"The only change would have been that, if there was a direct contract between the contractor and the construction manager, there would have been no debate that the construction manager was an insured," Hardiman said. "Under the lower court's interpretation of the language, it was not as though Liberty was somehow being saddled with a risk that it hadn't intended to cover."

At a minimum, the divergent rulings across the country on the requirements for additional-insured coverage indicate that the policy language at issue is ambiguous, in which case courts should interpret the language in favor of insureds, policyholder attorneys say.

"The divergence of opinions across different jurisdictions is evidence in and of itself that the language is ambiguous," said Anderson Kill shareholder Dennis Artese.

However, Larry Golub of Hinshaw & Culbertson LLP, who represents insurers, said he thought the ruling appeared to be a "very straightforward contract interpretation exercise" that underscores how important it is for insureds and additional insureds to "obtain a copy of and review the additional-insured endorsement so that they will understand whether the endorsement provides the expected coverage."

"Oftentimes, there are differences between what a contractor is required to do to comply with the obligation to obtain additional insured coverage for a project and what the policy that is anticipated to provide that coverage actually provides," Golub said. "The contractor or owner that was required to obtain the additional insured coverage could still find itself on the hook to the additional insured for breach of contract if it did not obtain the correct additional-insured coverage."

Artese said that companies in the construction industry can head off problems in the future by seeking out additional-insured endorsements that do not include the potentially troublesome "with whom" language.

"There are alternative additional insured endorsements that don't have that problematic language," he said.

Indeed, following the Appellate Division's decision, contractors and their insurance brokers should have their eyes wide open when shopping for coverage, attorneys say.

As Paul Breene, a partner in Reed Smith LLP's insurance recovery group, put it, "contractors need to be aware of this case, and brokers need to get to work on endorsements to fix this one, otherwise they'll have some really unhappy clients."

Liberty is represented by George R. Hardin of Hardin Kundla McKeon & Poletto PA.

The joint venture is represented by Richard W. Brown of Saxe Doernberger & Vita PC.

Amicus curiae Greenwich Insurance Co. is represented by Michael L. Zigelman of Kaufman Dolowich & Voluck LLP.

The case is Gilbane Building Co./TDX Construction Corp. et al. v. St. Paul Fire and Marine Insurance Co. et al., case number 653199/11, in the Supreme Court of the State of New York, Appellate Division, First Department.

--Editing by Katherine Rautenberg and Mark Lebetkin.
