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NY Court Imposes Strict Construction on Additional Insureds in Construction

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Everyone in construction loves OPI—other people's insurance. The most common and direct way to access OPI is to require it in your construction contracts, usually via additional insured status. But in recent years, insurance companies have successfully narrowed access to additional insured coverage through litigation and policy drafting. If you want to be an additional insured to OPI these days, then get your contracts right and make sure your insurance is right!

Construction projects commonly transfer the risk of third-party claims through indemnification and additional insured coverage under commercial general liability (CGL) policies. The objective is to transfer the risk to the party in the best position to control the risk and for that party to have appropriate insurance. As is well known, if a subcontractor causes bodily injury or property damage at the project, the general contractor and property owner will almost certainly also be named as defendants against the claim. Done correctly, additional insured coverage will provide upstream parties, like the general contractor and owner, enormous protection. But many things can go wrong in this area, frustrating the entire risk transfer plan.

In recent years, insurance companies have turned to clever wording in their insurance policies to limit additional insured coverage that usually has been available to owners or other contractors. In 2018, New York's Court of Appeals affirmed the First Department and held that a particular additional insured endorsement required contractual privity, i.e., a direct written contract between those parties. See *Gilbane Building Co./TDX Construction v. St. Paul Fire & Marine Insurance,* 31 N.Y.3d 131 (2018). One of us, Allen Wolff, wrote about this *Gilbane* decision with colleague Dennis Artese following the First Department's 2016 decision, noting that it was a hyper-technical reading of policy language at odds with common usage in the industry. See Dennis J. Artese & Allen R. Wolff, "Courts Chip Away at Significant Construction Industry Coverage," Anderson Kill Policyholder Advisor (Nov./Dec. 2016).


Courtesy photos

L-R: Allen R. Wolff, Ethan W. Middlebrooks and Kathleen Gatti of Anderson Kill.

In *Gilbane*, the Court of Appeals cited the insurance company's additional insured endorsement language from the policy stating: "Who is an insured … is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you." 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 court interpreted the phrase "with whom" to necessitate contractual privity. This was problematic because such an interpretation was inconsistent with the custom and practice of the construction industry, where there was an understanding that upstream contracting parties and owners were to be additional insureds to each subcontractor's insurance policy regardless of privity.

A decision out of the Second Department in New York's appellate courts recently further restricted access to additional insured coverage by imposing a privity requirement on "for whom" language. In April, the court in *New York City Housing Authority v. Harleysville Worcester Insurance* interpreted an additional insured endorsement to require privity of contract between the named insured and the party seeking additional insured status. 226 A.D.3d 804, 807 (2d Dep't 2024). The relevant policy endorsement stated: "Who is an insured is amended to include as an insured any person or organization for whom you are performing operations only as specified under a written contract … that requires that such person or organization be added as an additional insured on your policy."

Site owner Oceanhill, LLC had entered into a contract with general contractor Blue Sea Construction. Subsequently, the general contractor entered into a contract with A&R Electrical Maintenance, a subcontractor, to perform electrical services in connection with the project. Under the subcontract, A&R agreed to provide all materials and labor necessary for the electrical services, as well as to defend, indemnify, and hold the general contractor and site owner harmless for any claims arising from the negligence or omission of A&R. The subcontractor A&R also agreed to procure and maintain a general liability policy naming the site owner, general contractor, and another defendant as additional insureds. A&R had purchased a CGL policy from Harleysville Worcester Insurance Co.

An individual was injured while working for the subcontractor. He brought an action for bodily injury against A&R, Blue Sea Construction, and Oceanhill, among other "noncontractor" parties. Id. at 806. Subsequently, Oceanhill, Blue Sea Construction, and the noncontractor parties brought an insurance coverage action seeking a ruling that Harleysville was obligated to defend and indemnify them as additional insureds in the underlying action. The trial court had ruled against the insurance company, but on appeal the Second Department reversed the trial court and determined that only the general contractor qualified for additional insured status because only the general contractor directly contracted with the named insured. Contractual privity was required, and without it, the other plaintiffs were unable to achieve additional insured status.

The Court of Appeals' 2018 decision in *Gilbane* imposed a requirement for contractual privity due to the use of the words "with whom" in the policy's additional insured clause. The decision out of the Second Department in *NYCHA v. Harleysville* now seems to impose that same requirement when the words «for whom» have been used in the policy›s additional insured clause. Previously, the use of «for whom» was considered a broader grant of additional insured status regardless of contractual privity. See, e.g., *Travelers Property Casualty Company of America v. Harleysville Worcester Insurance*, 685 F. Supp. 3d 187, 203 (S.D.N.Y. 2023) (construing similar additional insured language as in NYCHA but determining that use of «for whom» means direct contractual privity is not required to receive additional insured coverage). Now, the Second Department's narrowing of access to coverage will further hinder construction industry practices and complicate the contracting process.

The additional insured endorsement in *New York City Housing Authority* was a non-ISO form used by the insurance company. (ISO is the Insurance Services Office, which publishes standard coverage forms and endorsements). Nonetheless, the language in the endorsements in the case is similar to that contained in ISO Form CG 20330704, which is written to be a blanket additional insured endorsement adding «any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured to your policy." The insurance industry is likely to seek to extend the Second Department's ruling to the standard ISO form additional insured language for that form. That leaves policyholders facing potential additional hurdles, needing to seek direct privity of contract with each retained contractor and subcontractor, and needing to scrutinize the insurance policies of retained contractors and subcontractors before the commencement of work. Owners and contractors should mandate the use of particular additional insured endorsement forms that do not contain a prepositional phrase relating to privity of contract (for example, one that includes a schedule for a designated location where the policyholder is performing or has performed work "for that additional insured," without regarding to the need for a written contract).

Ten years ago, privity of contract was not relevant to getting additional insured coverage. Then a court required it for an endorsement saying "with whom." Now a court has required privity for an endorsement saying "for whom." Combined with other recent rulings calling for "proximate," rather than "but for," causation in order to trigger additional insured coverage, courts in New York have narrowed access to additional insured coverage in construction. See, e.g. *Burlington Insurance v. New York City Transit Authority,* 29 N.Y.3d 313 (2017). Court decisions such as these will require contractors and owners to revisit the language in their contracts as well as the number of written contractual relationships they will need to formalize on their construction projects. Good risk management custom and practice would counsel that bodily injury and property damage claims be transferred to the OPI of the party in the best position to control the risk. When courts narrow access to the OPI of that party, it disrupts the construction industry's custom and practice.

Court decisions that are not consistent with established custom and practice can create massive coverage issues. Owners and contractors should check their policy language, check their contract language, and have a written contract with every party providing them additional insured coverage! In addition, require and review copies of relevant additional insured endorsements from subcontractors' insurance policies to confirm the policy language contained in such endorsements offers the broadest possible protections. Knowing what the documents say prior to construction is essential to ensuring that proper risk transfer is achieved before an accident happens.

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