GVK LEGAL ALERT

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New Court of Appeals Decision Creates a Seismic Shift in New York Additional Insured Jurisprudence on "Acts or Omissions" Trigger

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On June 6, 2017, the Court of Appeals (New York's highest court) made new law holding that an Additional Insured endorsement (such as CG 2033 07/04) affording coverage for liability "caused, in whole or in part by the 'acts or omissions' of the named insured" only apply when the named insured is the proximate cause of the liability to the additional insured.

This holding rejected a few years worth of intermediate court decisions holding that the endorsement was triggered when the named insured was a "but for" cause of the liability, and does not provide clear guidance on the law in situations involving injuries to employees of the named insured. And although this holding is more in line with both the language and the intent of the ISO endorsement, it will be difficult to implement because additional insured coverage will not be determined until after a jury verdict on proximate cause. In addition, it did not directly address duty to defend issues.

The decision arises from an underlying matter commenced in which the plaintiff, a New York City Transit Authority ("NYCTA") employee, fell off of an elevated platform as he tried to avoid an explosion after a Breaking Solutions, Inc. ("BSI") machine touched a live electrical cable buried in concrete at the excavation site.

The Burlington Insurance Company ("Burlington"), issued an insurance policy to BSI listing the New York City Transit Authority (NYCTA) and MTA New York City Transit (MTA) as additional insureds: ". . . only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused, in whole or in part, by: 1) Your acts or omissions; or 2) The acts or omissions of those acting on your behalf."

Following discovery in the underlying matter, BSI was judicially determined to be free from fault and that the explosion was due to NYCTA's negligence. It was determined NYCTA failed to identify, mark, or protect the electric cable, and also failed to turn off the cable power, and as a result the BSI machine operator could not have known about the location of the cable or the fact that it was electrified. As a result,

Burlington sought a declaration that it did not owe NYCTA and MTA coverage as additional insureds under BSI's policy on the grounds the accident was not caused BSI's acts or omissions. The Supreme Court granted Burlington's motion for summary judgment in the declaratory judgment action, holding that NYCTA and MTA were not additional insureds because the policy limited liability to instances where BSI, as the named insured, was negligent.

The Appellate Division reversed, denying plaintiff's motion for summary judgment and to amend the complaint, and granting defendants' cross motion for summary judgment, declaring that defendants were entitled to coverage as additional insureds under the Burlington policy. The court concluded that even though the named insured was not negligent, "the act of triggering the explosion . . . was a cause of [the employee's] injury" within the meaning of the Additional Insured endorsement requirement that the accident be caused, in whole or in party, by BSI acts or omissions. The court also determined that as a consequence, it "necessarily follows that the anti-subrogation rule bars Burlington from recovering, as the City's subrogee."

The Court of Appeals agreed with Burlington's argument that under the plain meaning of the endorsement, NYCTA and MTA are not additional insureds because the acts or omissions of the named insured, BSI, were not a proximate cause of the injury, i.e., the additional insured was the sole proximate cause of the injury. The court concluded that there is no coverage because, by its terms, the policy endorsement is limited to those injuries proximately caused by BSI, as it unambiguously states that an entity is "an additional insured only with respect to liability for 'bodily injury' caused, in whole or in part, by [BSI's] acts or omissions."

The Court rejected the defendants' argument that the terms "caused, in whole or in part" means "but for" causation, holding that "these words require proximate causation since 'but for' causation cannot be partial." The Court also rejected defendants' argument that the phrase "'caused by' does not materially differ from the phrase, 'arising out of' and results in coverage even in the absence of the insured's negligence. See *Regal Construction v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 N.Y.3d 34, 38 (2010) (the phrase "arising out of" is "ordinarily understood to mean originating from, incident to, or having connection with"). The court concluded that BSI was not at fault, the employee's injury was due to NYCTA's sole negligence in failing to identify, mark, or deenergize the cable, and therefore was not caused, in whole or in part, by BSI's acts or omissions.

Justice Fahey, dissenting, wrote that the "bedrock principles of insurance contract interpretation demand that we conclude that defendants are entitled to coverage with respect to the underlying matter as additional insureds under the policy of insurance issued BSI." He further wrote the endorsement confers additional insured status where the "mere acts of the named insured cause the bodily injury complained of. If the drafter meant for such status to be contingent upon a negligent act or acts of the named insured, acts or omissions, then the policy easily could have said as much…. Similarly, if the drafter intended that coverage under the endorsement be contingent upon a showing of proximate cause, then the policy easily could have been written to contain that condition.... [therefore] there is no basis to apply a legal meaning, rather than a plain and ordinary meaning, to the word 'cause' in this context."

While the effect of the Court's decision in *Burlington* remains to be seen, the decision will likely require a judicial determination as to liability in the underlying bodily injury action before a declaratory judgment action involving similarly worded Additional Insured endorsements can be decided. Furthermore, it is possible courts will limit the holding in *Burlington* to apply only where the injured person is an employee of the party seeking additional insured coverage, as opposed to an employee of the named insured.