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REAL ESTATE ADVISORY

Are You Really Covered as an Additional Insured?

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For your next construction project in New York, securing commercial general liability coverage as an additional insured may not be as simple as it would appear. Recent court rulings have interpreted the terms of insurance policies, where additional insured parties are intended to be covered pursuant to a "blanket" endorsement (i.e., the additional insureds are not explicitly named in the body of the endorsement or the underlying insurance policy), to provide coverage only to those persons or entities that the named insured has agreed to add as additional insureds in writing.

As a result of the rulings described below, when drafting construction contracts, it is important to be unambiguously clear as to which parties are intended to be additional insureds under any insurance policies required to be obtained under such contracts. In order to protect against the risks of non-coverage highlighted below, any party entering into a construction contract or subcontract should take the following actions when additional insureds are added to an insurance policy pursuant to a "blanket" endorsement:

(a) (i) require by direct written agreement between the applicable named insured and each proposed additional insured that such named insured must include such proposed additional insureds as additional insureds under its insurance policy, together with a contractual indemnity by the named insured in favor of such proposed additional insureds, or preferably (where feasible) (ii) require that any insurance policy required under such construction contract should expressly name each and every party that is intended to be included as an additional insured thereunder; and

(b) review the underlying insurance policies (i.e., not just the applicable certificates of insurance, which are informational only and do not supersede or modify the actual policy terms) to confirm exactly what persons or entities are covered as additional insureds thereunder and to confirm whether coverage as an additional insured is primary or excess to other coverage available to such additional insured.

In 2018, the New York Court of Appeals upended market norms in affirming a ruling limiting coverage for additional insureds to those in contractual privity. *Gilbane Bldg. Co. v. St. Paul Fire & Marine Ins. Co.*, 31 N.Y.3d 131 (2018). In Gilbane, the court found that a project's construction manager was not covered as an additional insured by the insurance purchased by the general contractor (GC Policy), because the GC Policy included a "blanket" additional insured endorsement and the construction manager did not have privity of contract with the general contractor, the named insured under the GC Policy. The court specifically and exclusively relied on the language of such "blanket" endorsement, which read "WHO IS AN INSURED (Section II) 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*** … " (with emphasis added). The court specified that the language "with whom" clearly required a written agreement between the named insured and any proposed additional insured, in which the named insured agreed to add such person or entity as an additional insured in order to effectuate coverage for the proposed additional insured.

This approach was reinforced in a recent decision in the New York Supreme Court, Appellate Division, Second Department, *New York City Hous. Auth. v. Harleysville Worcester Ins. Co.*, 226 A.D.3d 804 (2024). In that case, an owner contracted with a general contractor who subsequently contracted with a subcontractor for construction work. The subcontractor obtained insurance coverage for the project and was later sued by its own employee in a lawsuit that also named as defendants the owner, general contractor and other parties whom the subcontractor had agreed to include in its insurance policy as additional insureds. The court determined that, apart from the general contractor, none of the other parties were entitled to coverage, relying on the language of the subcontractor's insurance policy: "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"*** (with emphasis added). The court interpreted this language as limiting coverage to those with whom the named insured (the subcontractor) had contracted directly to do work, thereby finding that the general contractor qualified as an additional insured under the terms of the policy, but that no other parties seeking additional insured status were covered.

The court also held that language in the subcontract between the general contractor and the subcontractor, incorporating the terms of the prime contract between the owner and the general contractor that required the general contractor to add the owner as an additional insured under the general contractor's policy, was "insufficient to confer additional insured status on [the owner] with respect to the subcontractor's policy." Finally, after comparing the terms of the respective policies issued to the general contractor and the subcontractor, the court determined that the subcontractor's policy was excess to the general contractor's policy, so coverage for the general contractor — the one party the court determined was entitled to coverage under the subcontractor's policy as an additional insured — would be triggered only if and when the liability limits of the general contractor's own policy were exhausted. As a result, the general contractor would first have to pursue any applicable claim under its own insurance policy, and only after policy limits under its own policy were exhausted could the general contractor seek coverage as an additional insured under the subcontractor's policy.

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