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Carefully Review Your Insurance Policies To Confirm “Additional Insured” Status

The recent decision of the Court of Appeals of New York in *Gilbane Building Co./TDX Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, -- N.E.3d --, 2018 WL 1473553 (N.Y. March 27, 2018), underscores that construction project owners and contractors must do their due diligence and carefully review insurance policy language to make certain that additional insured coverages will be extended in the manner intended by the parties to the project agreements. Given the volume, variety, and complexity of business contracts and insurance policies that can be required, the principles addressed in *Gilbane* should be carefully noted by participants in power generation, onshore and offshore oil and gas, renewable energy, heavy industry, infrastructure, and other large-scale construction projects.

THE BUSINESS CONTRACTS

The Dormitory Authority of the State of New York (“Project Owner”) contracted with Samson Construction Company (“Contractor”) for the construction of a new forensic laboratory next to Bellevue Hospital. Project Owner entered into a separate contract with the construction manager for the project, a joint venture between Gilbane Building Company and TDX Construction Corporation (“Project Manager”). The contract between Project Owner and Contractor required that Contractor obtain general liability insurance for the job, with an endorsement naming Project Owner and Project Manager as additional insureds.

THE “ADDITIONAL INSURED” PROVISION IN THE POLICY

Contractor obtained general liability insurance from Liberty Insurance Underwriters (“Liberty”). The “Additional Insured – By Written Contract” provision in the Liberty policy read as follows:

“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 but only with respect to liability arising out of your operations or premises owned by or rented to you.”



THE CLAIM

Project Owner sued Contractor and the project architect to recover for losses arising out of damage to an excavation support system during construction. The project architect then commenced a third-party action against Project Manager. Project Manager provided notice of the claim to Liberty, and Liberty denied coverage taking the position that Project Manager did not qualify as an additional insured.

THE COURT'S RULING

The Court of Appeals ruled that Project Manager was not an additional insured and that Liberty's denial of coverage was proper. The court reasoned that the additional insured endorsement limited coverage to "any person or organization **with whom** you have agreed to add as an additional insured by written contract," and those terms require a written contract directly between the named insured and the potential additional insured. The named insured, Contractor, agreed in a written contract with Project Owner to secure additional insured status for Project Manager, but Project Manager was not a party to that contract.

KEY POINTS TO REMEMBER

If additional insured status is to be extended to a contracting counter-party, that status must be expressly extended *via* the terms of the insurance policy. In *Gilbane*, the court acknowledged that the outcome was contrary to Project Owner's and Contractor's intent, but explained that their intent does not control the insurance company's obligations. If the business contract and the insurance policy contain conflicting terms, additional insured status will be determined solely by the language of the insurance policy.

Businesses expecting to obtain additional insured status should not rely on insurance certificates to confirm their status, but instead should ask for a copy of the additional insured endorsement and examine the language carefully. In *Gilbane*, the court emphasized that the Liberty policy would have covered Project Manager if a single word – "with" – had been omitted from the phrase "with whom you have agreed":

Omitting "with," the phrase would read: ". . . any person or organization whom you have agreed by written contract to add . . .", and [Project Manager's] position would have merit. But [Contractor] and Liberty included that preposition in the contract between them, and we must give it its ordinary meaning.

Owners and/or contractors who have agreed to secure insurance coverage for project participants should work with their insurers and their brokers to make certain that the terms of the insurance policies satisfy their contractual commitments. In *Gilbane*, Project Manager was left without insurance coverage, but the court expressly noted that "[Project Manager] might have a claim against [Contractor] for failing to obtain additional insured status for [Project Manager]."



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