New York's Highest Court Requires Direct Privity of Contract Between Named Insured and Purported Additional Insured

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On March 27, 2018, the New York Court of Appeals strictly interpreted the language of a policy's additional insured endorsement and held that the construction manager, a joint venture between Gilbane Building Co. and TDX Construction Corp. (Gilbane JV), was not an additional insured under prime contractor Samson Construction Co.'s commercial general liability policy issued by Liberty Insurance Underwriters (LIU). Specifically, in affirming the appellate court's decision, the Court in *Gilbane Building Co./TDX Construction Corp., et al. v. St. Paul Fire and Marine Ins. Co, et al.,* 2018 N.Y. LEXIS 490, found that the "Additional Insured-By Written Contract" endorsement of LIU's policy was "facially clear and does not provide coverage unless Gilbane JV is an organization 'with whom' Samson has a written contract." In other words, to be successful on a claim for additional insured coverage pursuant to the endorsement's language, the purported additional insured must have a direct written contract with the named insured.

This coverage dispute arose out of underlying litigation related to a construction project. Samson, as the prime contractor for the foundation and excavation work on the project, entered in to a contract with the project's financier, the Dormitory Authority of the State of New York (DASNY) and agreed to acquire additional insured coverage for the construction manager and others. DASNY also contracted with Gilbane JV, to serve as the construction manager for the project.

In 2006, DASNY sued Samson and the project architect Perkins Eastman Architects PC, alleging that Samson's negligent excavation and foundation work resulted in structural damage to adjacent buildings. Subsequently, Perkins filed a third-party action against Gilbane JV. Gilbane JV sought additional insured coverage under the LIU policy issued to Samson. LIU denied coverage and Gilbane JV filed this action in 2012 seeking a declaration that LIU had to defend and indemnify it as an additional insured in the underlying litigation.

The additional insured endorsement in LIU's policy extends additional insured coverage to "any person or organization with whom you [the Named Insured/Samson] have agreed to add as an additional insured by written contract." (emphasis added).

In May 2014, the trial court denied LIU's motion for summary judgment and held that Gilbane JV qualified as an additional insured under the LIU policy because Samson's written contract with DASNY, which obligated it to obtain insurance naming construction manager [Gilbane JV] as an additional insured, fulfilled the policy's requirements. In September 2016, the Appellate Division's First Department reversed and granted LIU's motion on the basis that the clear and unambiguous language of the endorsement required that the named insured execute a contract with the party seeking coverage as an additional insured. Gilbane JV appealed to the Court of Appeals, which affirmed in a 5-2 decision, succinctly dispensing with Gilbane JV's argument that the endorsement language is ambiguous and must be construed against LIU. The Court also disagreed with Gilbane JV's argument that no written contract is

necessary because such requirement would conflict with the plain meaning of the LIU endorsement, with "well-settled rules of policy interpretation", and with the parties' reasonable expectations.

In finding that the endorsement requires a direct written contract between Gilbane JV and Samson, the Court focused on the preposition "with". The Court held that in this endorsement, the "with" can only mean that the written contract must be "with" the additional insured. The Court stated that the "endorsement's meaning is plain and unambiguous". Accordingly, the Court would not consider Gilbane JV's extrinsic evidence (i.e. certificate of insurance and contract between DASNY and Samson which required Samson to name Gilbane JV as an additional insured on policies obtained by Samson) because "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide."

In this decision, the Court of Appeals continues its trend of resolving insurance disputes by applying principles of strict contract interpretation of the policy language as written. A strongly-worded dissent asserts that the majority opinion undermines public policy considerations aimed at transferring/allocating risk among entities involved in construction projects.

This decision is significant as it limits the additional insured coverage afforded by the "Additional Insured-By Written Contract" endorsement to a narrow group of entities that have directly contracted with the Named Insured. Accordingly, insurers have a clearly delineated basis to deny additional insured coverage based on this ruling. However, this decision will also significantly impact those insurers of upstream owners, general contractors and other entities attempting to transfer the risk to downstream contractors.

The case is Gilbane Building Co./TDX Construction Corp., et al. v. St. Paul Fire and Marine Ins. Co., et al., 2018 N.Y. LEXIS 490 (March 27, 2018).