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Alert

New York Court of Appeals Hears Argument Regarding "Caused By" Language

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On April 26, 2017, the New York Court of Appeals heard oral argument in the Burlington Insurance Co. v. New York City Transit Auth. matter. At issue in Burlington is the appropriate interpretation of the "caused, in whole or in part," language that is contained in many additional insured endorsements. The Court was reviewing an Appellate Decision that, following First Department precedent, held the "caused by" language to mean the same as "arising out of."

In Burlington, Thomas Kenny, a New York City Transit Authority ("Transit Authority") employee, was injured during the excavation of a subway tunnel when he tripped on debris while trying to flee the subway after an explosion. It was undisputed that the Transit Authority 's negligence was the sole cause of the explosion, although Burlington's policyholder, Breaking Solutions', excavation machine triggered the explosion. The Burlington policy included an endorsement providing the Transit Authority with additional insured coverage for liability that was limited to liability "caused, in whole or in part, by" Breaking Solutions' "acts or omissions; or the acts or omissions of those acting on its behalf."

Although the Transit Authority was solely at fault, the Appellate Division, First Department held that the Transit Authority's liability was caused by Breaking Solutions acts or omissions because a Breaking Solutions employee operated the machine that set off the explosion. In reaching that conclusion, the First Department reinforced its prior holdings that the phrase "caused by" does not materially differ from the phrase "arising out of," and should be interpreted to require no more than "some causal relationship" between the injury and the risk covered.

At oral argument, Judge Jenny Rivera questioned Burlington as to why the endorsement should be interpreted to require negligence on behalf of the policyholder or that its acts or omissions be a proximate cause when such specific language is absent from the endorsement. Judge Eugene Fahey suggested that interpreting the policy in that manner would be a "stretch of basic rules" of insurance policy interpretation. On the other hand, Judge Rivera also acknowledged that the endorsement was "clearly intended" to require proximate cause and inquired why the Insurance Services Office modified the "arising out of" language to "caused by" if those phrases were intended to have the

same meaning. In fact, Judge Rivera suggested a possible compromise: that “caused by” could be interpreted more narrowly than “arising out of” but not necessarily require proximate cause. Judge Leslie Stein appeared receptive to Burlington’s arguments, commenting that the proximate cause standard seemed reasonable. Lastly, Judge Michael Garcia inquired of the Transit Authority whether interpreting the endorsement to mean “arising out of” would lead to “absurd results,” such as where an additional insured is covered for an act or omission that it is solely responsible for causing. The other three Judges on the Court of Appeals were quiet during oral argument. In short, of the four Judges who commented during argument, two (Stein and Garcia) seemed to favor Burlington’s argument for a narrow interpretation, one (Fahey) did not and one (Rivera) seemed to play devil’s advocate to both sides.

We anticipate that the Court will render a decision in the next few months. Should anyone have questions or need additional information regarding this issue, please do not hesitate to contact us.