ADDITIONAL INSURANCE AND PROXIMATE CAUSE AFTER BURLINGTON

In Burlington Insurance Company v. NYC Transit Authority, the New York State Court of Appeals addressed the additional insured endorsement ISO CG20 10 07 04 and found surprisingly, that this endorsement – which provides additional insurance coverage for liability for bodily injury "caused in whole or in part" by the acts or omissions of the named insured - has a proximate cause requirement. This ruling has the potential to turn additional insurance coverage on its head.

BACKGROUND

The additional insured endorsement at issue was revised by ISO in 2004. The original language provided additional insurance for liability "arising out of the acts or omissions" of the named insured. It was replaced by "liability caused in whole or in part" by the acts or omissions of the named insured.

The words "arising out of" have been liberally interpreted by Courts throughout the United States. The Courts have held that the "arising out of" language has been satisfied if there is some causal relationship between the injury and the covered risk.

In New York, the majority of the Court of Appeals in Burlington examined the history and ISO's intent in putting together the new endorsement. The Burlington Court found that this change was intended "to provide coverage for an additional insured's vicarious or contributory negligence and to prevent coverage for the additional insured's sole negligence." ISO noted that Courts have interpreted the phrase "arising out of" to cover instances where the additional insured was solely negligent. The amended language was an attempt by ISO to exclude coverage where the named insured did not have any negligence. The facts of Burlington made for the perfect opportunity to test the new ISO endorsement.

BURLINGTON

NYCTA contracted with the Burlington named insured Breaking Solutions, Inc. ("BSI") to perform work at an excavation project. BSI's policy of insurance with Burlington provided additional insurance for NYCTA, but "only with respect to liability for bodily injury,…caused in whole or in part, by the named insured's acts or omissions."

An MTA employee was injured by an explosion and fire caused when a BSI excavating machine made contact with a live electrical cable. The evidence was clear that NYCTA failed to mark and protect the cable in order to shut off power to the electrical cable and never warned BSI of the location of the cable. BSI was operating its machinery properly at the time of the explosion.

Burlington denied coverage to NYCTA claiming that it was not an additional insured as NYCTA was solely responsible for the accident that gave rise to the injuries by the plaintiff. Burlington further argued that BSI was not at fault and that the accident was the sole proximate cause of NYCTA.

NYCTA claimed that the endorsement applied to any act or omission by BSI that resulted in injury. NYCTA further added that regardless of whether BSI was negligent, the excavation work certainly "caused" the injury.

The Trial Court granted summary judgment to Burlington, holding that the additional insurance coverage was limited to instances where BSI was negligent. The Appellate Division reversed stating that although BSI's actions were not negligent, the work triggered the explosion which caused his injuries.

The New York Court of Appeals had to decide the definitions of the phrase "caused by." Did this mean that the named insured had to legally cause the plaintiff's accident? Did "cause by" simply mean arising out of the work as the earlier ISO endorsement stated? Did it mean that "but for" BSI's work, the accident would not have occurred? One of the problems was that there was no modifier describing the words "caused by."

The majority of the New York Court of Appeals held that an additional insured that is attempting to enforce this language must show more than a "causal link" between the named insured's conduct and the injury. The Court found that the named insured's acts or omissions must be the "proximate cause" of the injury.

The Court rejected NYCTA's argument that the decision should be a "but for" test. The Court noted that "but for" BSI's machine coming into contact with the cable that the explosion would not have occurred and that the employee would not have been injured. The Court ruled that this triggering act was not the proximate cause of the employee's injuries. The Court found that "by its terms, [Burlington's] policy endorsement is limited to those injuries proximately caused by BSI." (*emphasis supplied*).

The Court noted that the ISO language "used words that convey the legal doctrine of proximate causation. The fact that the parties could have used different language to communicate that legal concept is not fatal to Burlington's argument. Giving the words chosen by the parties their plain and ordinary meaning, the endorsement described proximate cause. …The endorsement expresses in lay terms what the Courts have long defined as 'proximate causation.'"

The Court of Appeals also rejected the defendant's invitation to adopt the conclusion that "caused by" does not materially differ from the phrase "arising out of" and results in coverage even in the absence of the named insured's negligence. The Court found that arising out of is not the functional equivalent of "proximately caused by." The Court's interpretation of "caused in whole or in part" means more than "but for" causation. "Our interpretation, coupled with the endorsements applicable to acts or omissions that result in liability, supports our conclusion that proximate cause is required here." The Court also noted that other jurisdictions, such as Texas and Pennsylvania, have defined "caused by" as being equivalent to proximate cause.

The dissent found that the majority had three main flaws in its analysis. First, there was no basis to apply a legal meaning, rather than a plain and ordinary meaning to the word "cause." Second, as there was an ambiguity in the phrase "caused by," that ambiguity should be resolved against the insurance carrier and in favor of the party seeking coverage. Finally, the word "liability" does not modify the word "cause." The actual language in the endorsement is "liability for bodily injury caused, in whole or in part, by the named insured's acts or omissions." The dissent found that the phrase "liability for bodily injury" merely "articulates one of the classes of risks covered by that part of the policy whereas the phrase "caused by" speaks to the circumstances that trigger that coverage. It was noted that if Burlington "wanted the endorsement to limit coverage to circumstances in which the named insured was not negligent, then it should have written the policy to say as much."

Finally, the dissent addressed the effect of the majority's ruling. The dissent noted that New York law frequently is chosen as the governing law based on its ability and predictability. Insurance coverage disputes should be resolved through law that is "certain and clear" and the majority's approach "could threaten the stability and sureness of our bedrock rules of insurance policy interpretation. It is the benefit of certainty in our rules and interpretation, not concerned with the occasional unanticipated result to which application of those rules may lead, which should be of paramount importance here."

CONCLUSION

The Burlington decision has resulted, at least in New York, in a huge uptick in reservation of rights and/or coverage letters. Although a carrier will still most likely have to provide a defense under this endorsement, a carrier will contest providing indemnification for additional insureds. The carrier's position will be that without a determination of whether the named insured proximately caused the accident, which usually does not occur until there is a jury verdict, there will be no indemnification for the additional insured.

This can leave the additional insured twisting in the wind. The insurance company providing the additional insurance will take the position that it is not contributing to any settlement or that it is only contributing a certain percentage of its own insurance policy to settle the case. The additional insured will demand that this entire policy be tendered before contribution is made from its own policy. These positions will force more trials. It will also cause an insurance carrier, which believed that it had a cushion of an additional insurance policy limit, to consider whether or not it will have to contribute to a settlement before the additional insurance is exhausted. These positions could also result in the insurance companies settling the underlying personal injury case and reserving their rights to contest coverage in a subsequent declaratory judgment action.

Obviously, it is still too early to determine how this will all play out, although almost all of the insurance companies that I deal with have reassessed their coverage stances and have sent out new reservation of rights/coverage position letters based on the Burlington case. We will also have to see if other states will follow New York's lead. Clearly, this is a case which will have quite an impact on future coverage issues in the construction arena.

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