

Additional Insured Coverage Cannot be a Blanket Endorsement

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A recent court decision has changed the landscape of additional insured coverage and it will have a major impact on the construction industry.

Traditionally, the owner of a project requires its general contractor/construction manager to name the owner (its lenders and any other individual and/or entity with an interest in the property) as additional insureds on the general contractor/construction manager's commercial general liability (CGL) policy. The owner will also require that all of the general contractor/construction manager's subcontractors (and further lower tier subcontractors) to name the owner (and other additional insureds) as additional insureds on their respective CGL policies. To effect this demand, the general contractor/construction manager includes provisions in all of its subcontracts requiring the subcontractors to provide such additional insured coverage. The subcontractors, believing that they are satisfying the requirement, will obtain an additional insured blanket endorsement that states that it provides additional insured coverage to any person or entity with whom the subcontractor has agreed to add as an additional insured by written contract. This blanket endorsement has worked and, when an insured event occurred, additional insured coverage was provided.

The Appellate Division First Department has now held that this blanket endorsement in a CGL policy will no longer provide additional insured coverage to any entity with whom the policy holder does not have a written contract. Where the additional insured endorsement states that the additional insured coverage will be provided to "any person or organization with whom you have agreed to add as an additional insured by written contract," the court has now interpreted this to mean that only those individuals and entities with whom the named insured has a written contract, additional insured coverage will be provided.

In this recent case, the construction manager on a public improvement project commenced an action seeking a declaration that the insurer of the foundation contractor was required to provide the construction manager with additional insured coverage for the alleged structural damage caused during the foundation contractor's operations. The construction manager claimed that it was entitled to additional insured coverage because all of the contractors separately agreed, in writing with the owner, that they would provide additional insured coverage to the owner's other contractors. Based upon the mutual agreement to provide additional insured coverage to the owner's other contractors, after the alleged property damage occurred, the construction manager sought coverage from the foundation contractor's insurer. The foundation contractor's insurer denied coverage.

In reviewing the relevant additional insured endorsement to the foundation contractor's CGL policy, the Court held that the foundation contractor's policy clearly and unambiguously required the named insured (the foundation contractor) to execute a

contract with the party seeking coverage as an additional insured (in this case, the construction manager). Therefore, because the construction manager did not have a written agreement with the foundation contractor to provide it with additional insured coverage, the foundation contractor's insurer was not required to defend the construction manager.

Commentary

All owners, construction managers, general contractors and subcontractors must immediately review their own policies and the policies of their lower tier contractors to determine whether those policies contain the blanket additional insured coverage outlined in this case. If this is the case, you may not be providing and you may not have additional insured coverage. The endorsements must be immediately updated to specifically name each and every individual and/or entity to whom you are contractually required to provide additional insured coverage. Going forward, you must make sure that your company, and any other entity that you are required by contract to provide additional insured coverage, is specifically named on the additional insured endorsement.

The failure to specifically name the required entities as additional insureds on the additional insured endorsement may result in non-coverage for those entities and may result in the upper tier contractor and, in the proper instance, the owner, making claims against your company for breach of contract and contractual indemnification. This means that the owner and upper tier contractors will seek to recoup any losses and damages, including, but not limited to, settlement costs, attorneys' fees and/or consultant fees based upon your failure to obtain the proper insured coverage. Again, this is a cost that cannot be covered by insurance and your company may be obligated to pay these losses and damages, which could be costly based upon the severity of the claimed personal injury or damage to property.

Feel free to contact me to discuss insurance coverage and making sure that you are obtaining the proper insurance coverage.