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CONSTRUCTION LAW ALERT

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Is Being Named As An "Additional Insured" On An Insurance Endorsement Sufficient To Provide Coverage?

by: Henry L. Goldberg & Michael J. Hogan

The New York Court of Appeals (New York's highest court) recently held that being named as an additional insured on a Certificate of Insurance might not, by itself, provide any coverage for additional insureds.

The Dormitory Authority of the State of New York ("DASNY") contracted with general contractor Samson Construction Company ("Samson") for construction of a new forensic laboratory for New York City. DASNY also contracted with a joint venture between Gilbane Building Company and TDX Construction Corporation (hereinafter, "Gilbane JV") for Gilbane JV to be the construction manager on the project. DASNY's contract with Samson provided that Samson would obtain general liability insurance for the job, with an endorsement naming as additional insureds as follows: "DASNY, the State of New York, the Construction Manager, Gilbane JV, and other entities specified on the Sample Certificate of Insurance provided by DASNY." The Sample Certificate of Insurance listed as Additional Insureds under General Liability with respect to this project: … Gilbane/TDX Construction Joint Venture." Samson obtained general liability insurance coverage from Liberty Insurance Underwriters ("Liberty").

DASNY sued Samson and Perkins Eastman, Architects, P.C. (Perkins) (the project architect), alleging that Samson damaged the excavation support system in August of 2003 by negligently removing a section of steel plating which caused the foundation of the neighboring building to settle several inches. Perkins then commenced an action against Gilbane JV. Gilbane JV provided notice to Liberty, seeking defense and indemnity under the Liberty policy. Liberty denied coverage. Gilbane JV commenced a lawsuit, alleging that it qualified for coverage under the Liberty policy as "an additional insured." The lower court denied Liberty's motion for summary judgment, holding that Gilbane JV was an additional insured under the policy. The Appellate Division subsequently reversed the decision, granting Liberty's motion for summary judgment, and the matter was appealed to the Court of Appeals.

The critical portion of the Liberty policy was the "Additional Insured-By Written Contract" provision, which read:

> "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."

Gilbane JV had no written contract with Samson naming Gilbane JV an additional insured, but argued that no such contract is necessary as that requirement would conflict with the plain meaning of the Liberty endorsement, as well as "well-settled rules of policy interpretation" and the parties' reasonable expectations. The Court of Appeals concluded that Gilbane JV's argument was meritless; the endorsement is facially clear and does not provide for coverage unless Gilbane JV is an organization "with whom" Samson has a written contract.

The Court of Appeals found that the endorsement would have the meaning Gilbane JV desired if the word "with" had been omitted. Omitting "with", the phrase would read: "… any person or organization whom you have agreed by written contract to add …" and Gilbane JV's position would have had merit. But, the Court of Appeals pointed out Samson and Liberty included the "with" in the contract between them, and it must be given its ordinary meaning. The "with", in the Court's opinion, can only mean that the written contract must be "with" the additional insured. The Court of Appeals found the endorsement's meaning to be plain and unambiguous.

Gilbane JV attempted to offer extrinsic materials, including the sample certificate of insurance, in support of its argument that it reasonably expected to be covered by the policy, and relied heavily on the contract between DASNY and Gilbane JV, which required Samson (as the prime contractor) to name Gilbane JV as an additional insured on all liability policies obtained by Samson. This approach was rejected by the Court of Appeals, holding that "[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." The Court of Appeals concluded that Gilbane JV might have a claim against Samson for failing to obtain additional insured status for Gilbane JV, but that breach would not permit the Court to rewrite Samson's contract with Liberty.

MH&H Commentary

Clearly, based upon the foregoing Court of Appeals decision, being named as an additional insured on an Insurance Certificate does not convey coverage to the named insureds in all instances. In order to guarantee coverage, the "additional

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insurance" provision or endorsement itself must be obtained and reviewed. If such provision or endorsement contains the controversial "with" (as the Liberty provision did) there must be a written contract between the additional insured and the contract holder (insured) of the General Liability Policy for coverage to exist.

Any issues raised in this Alert may be addressed to Mr. Goldberg or Mr. Hogan who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com or mhogan@moritthock.com.

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