

CONSTRUCTION LAW

Ensuring Additional Insured Status in Construction Agreements



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Owners of construction projects face a myriad of risks, including personal injury, physical damage to the project during and after construction, and damage to neighboring property, and commonly protect from such risks through the contractors' insurance programs. Owners contractually require their contractors to maintain insurance policies at certain coverage levels, and require that the owner be named as an additional insured on such policies, which protects the owner from claims by third parties for property damage or personal injury. However, a recent case out of the First Department decided that a common insurance policy endorsement that is issued for such purpose may not be providing owners with the protection they are expecting. *Gilbane Building Co./TDX Construction Corp. v. St. Paul Fire and Marine Insurance Company*, No.

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653199/11, 2016 WL 4837454 (1st Dept., Sept. 15, 2016).

Risk Allocation

A standard insurance policy that is issued to businesses to protect against liability claims is the commercial general liability policy (CGL policy). CGL policies cover three basic areas: bodily injury and property damage, personal and advertising injury (including libel, slander, false arrest and copyright and

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trademark infringement), and medical coverage. In the context of construction projects, the CGL policy covers legal liability and defense costs which arise out of an accidental occurrence that causes bodily injury or property damage during the performance of the contractor's work.

To fully tap into the contractor's CGL policy, owners commonly require

the contractor to name the owner and other entities as additional insureds under the contractor's CGL policy. An owner that is named as an additional insured on the CGL policy is afforded the same protection under the contractor's policy as the contractor itself. In most cases, in order for the contractor to name the owner and other entities as additional insureds, the insurance carrier must issue an endorsement to the policy that identifies the entities with additional insured status.

To understand the holding in *Gilbane*, it is important to understand that the endorsements issued by insurance carriers are categorized as either (1) blanket endorsements or (2) specific endorsements. Blanket endorsements contain generic language that can provide automatic additional insured status to a person or entity that the named insured is contractually required to add. For instance, the blanket endorsement may state that the insurance policy will include as an insured "any person or organization whom you [the contractor] are required to add as an additional insured under a written contract." This

broad language captures any entity that the owner requires by the express provisions of the construction contract.

In contrast, specific endorsements actually name the entities and provide additional insured status to only those entities. Although specific endorsements provide a sense of security by unambiguously naming the entities that are to be afforded additional insured status, blanket endorsements are beneficial because a project owner and its contractor can include additional insureds on the contractor's policy without any action necessary on the part of the insurance carrier. However, the recent decision in *Gilbane* has made the use of one common form of blanket endorsement much riskier.

'Gilbane'

Gilbane involved the construction of a 15-story building to use as a DNA lab for the chief medical examiner of New York City at the Bellevue Hospital campus located in Manhattan. The owner of the project was the Dormitory Authority of the State of New York (DASNY), which contracted with a joint venture formed by Gilbane and TDX Construction Corp. (Gilbane) to serve as construction manager. The agreement between DASNY and Gilbane provided that any prime contractor retained by DASNY must name Gilbane as an additional insured under that contractor's liability policies.

Under a separate agreement, DASNY retained Samson Construction Company to perform services as prime contractor for foundation and excavation work. As required, the agreement between DASNY and Samson obligated Samson to name

Gilbane, along with DASNY, the State of New York, and others, as additional insureds under its CGL policy. To satisfy this requirement, Samson obtained a blanket endorsement using ISO Form CG 20 33 04 13, a commonly used form in the construction industry that reads in relevant part:

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.

During the course of the project, Samson's excavation and foundation work allegedly caused damage to the neighboring building, and DASNY commenced an action against Samson and the project architect. By way of a third-party claim by the architect, Gilbane became a party to the lawsuit, and subsequently tendered that claim to Samson's insurance carrier, believing that it was an additional insured under Samson's policy by way of the blanket endorsement.

Samson's insurance carrier denied the claim and Gilbane commenced a declaratory judgment for coverage under Samson's policy. Samson's carrier thereafter moved for summary judgment based on the fact that the plain language of the blanket endorsement did not provide Gilbane with additional insured status. Gilbane argued that the blanket endorsement merely required that the additional insureds be identified in a written contract, and since Samson was required to name Gilbane as an

additional insured in its written contract with DASNY, Gilbane was afforded the additional insured status.

The trial court denied the carrier's motion for summary judgment, but the First Department reversed, holding that the language of the blanket endorsement named only the project owner as an additional insured. The court held that the endorsement clearly and unambiguously required that Samson execute a contract with the party seeking coverage. The court analyzed the language of the endorsement, which named as an additional insured "any person or organization with whom [the contractor has] agreed to add as an additional insured by written contract," and noted that the phrase "with whom" limited the additional insured status to the sole party, i.e. DASNY, with whom Samson contracted. Since Samson did not have a written contract with Gilbane, Gilbane was not afforded additional insured status under the policy.

Although *Gilbane* concerned a contractor's failure to properly name a construction manager as an additional insured under its policy, the same issue can arise when a subcontractor fails to properly name the project owner as an additional insured on its policy. Owners typically require prime contractors to ensure that their subcontractors name the owner (and other entities) as an additional insured on its policy.

Since the owner does not directly contract with the subcontractor, any subcontractor using the blanket endorsement form at issue in *Gilbane* is not in conformity with the contractual obligation. Owners of current projects

in which subcontractors are issuing the endorsement at issue in *Gilbane* are therefore unprotected.

Remedies

As the First Department noted, the extent of coverage of a policy “is controlled by the relevant policy terms, not by the terms of the underlying trade contract.” (*Gilbane* at 8, citing *Bovis Lend Lease LMB, Inc. v. Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept., 2008]). Even though Samson was contractually required to name Gilbane as an additional insured, the express terms of the insurance policy endorsement did not provide Gilbane with that status. The sole remedy for Gilbane, and for owners who find themselves to be without additional insured coverage despite such a contractual provision, is to recover damages against the contractor for breach of contract. In some instances, the owner could claim that it is a third-party beneficiary of the agreement between the contractor and the subcontractor, and commence an action against both the contractor and the subcontractor for the subcontractor’s failure to name the owner as an additional insured. A well-drafted agreement between the contractor and its subcontractor could preserve such right.

Of course, it is critical for counsel representing owners to undertake a careful review of the additional insured endorsements of both the contractor and its subcontractors before commencement of the project. Blanket endorsements should be read for the limiting language that identifies the additional insured as only “the party with

whom” the policyholder has a contract. To be sure, obtaining specific additional insured endorsements that actually specify the owner (and other entities) would provide greater security.

ISO Endorsement Forms

The endorsement that was at issue in *Gilbane* (CG 20 33 04 13) should be avoided unless the contracting party is the only entity required to be named as an additional insured. Instead, parties should consider obtaining additional insured status using ISO blanket form CG 20 38 04 13, which is a commonly used form in the construction industry

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and, although it uses the same language that was at issue in *Gilbane*, it includes another category that will properly capture all entities that are required in a written contract. The relevant language of the endorsement is as follows:

WHO IS AN Insured is amended to include as an additional insured:

1. Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be

added as an additional insured on your policy; and 2. Any other person or organization you are required to add as an additional insured under the contract or agreement described in Paragraph 1.

Alternatively, owners can also require specific additional insured endorsements such as the CG 20 10 07 04 or the CG 20 37 07 04, both of which specifically identify the entities that are afforded the additional insured status.

Conclusion

In summary, the recent *Gilbane* ruling heightens uncertainty among those who believe they are protected by their status as an additional insured under a policy. Owners and their counsel are best advised to either review the language of the blanket additional insured endorsements carefully or require that any necessary entities be clearly named in specific additional insured endorsements. The endorsements of all significant parties, including the project architects, engineers, construction managers, contractors and subcontractors, should be collected and reviewed with the *Gilbane* holding in mind.