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HIDDEN IN PLAIN SIGHT: NEW YORK HOLDING ON PHRASE IN ADDITIONAL INSURED ENDORSEMENT RESULTS IN FAILED CONSTRUCTION PROJECT RISK TRANSFER

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The New York Appellate Division, First Department held in *Gilbane Building Co. v. St. Paul Fire & Marine Ins. Co., et al.*, ___ N.Y.S.3d ___, 2016 WL 4837454 (1st Dep't, Sept. 15, 2016) that only those parties that had directly contracted with the named insured qualified as additional insureds under the policy language at issue.

In *Gilbane*, a foundation contractor contractually agreed with the Dormitory Authority of the State of New York (DASNY) to provide additional insured coverage to DASNY and the construction manager for the contractor's work at a construction project. After a collapse, DASNY sued the foundation contractor, and a third-party action was brought against the construction manager. The construction manager sought additional insured coverage from the foundation contractor's insurer, which disclaimed.

Although "Blanket" Additional Insured endorsements commonly provide additional insured coverage "where required by contract," or "as required by written contract executed prior to a loss," in *Gilbane* the foundation contractor's policy included as an additional insured "any person or organization *with whom* you have agreed to add as an additional insured by written contract…" [Italics added] *Gilbane* held that the plain language of the endorsement – and specifically the phrase "with whom" - clearly and unambiguously required that the foundation contractor have a contract with the construction manager for the latter to qualify as an additional insured. The court rejected the arguments that the DASNY's contract with the foundation contractor could satisfy this requirement, or that "with whom" could include those "for whom" the foundation contractor was required to provide additional insured coverage.

The dissent in *Gilbane* characterized the endorsement as "poorly drafted" but asserted that the intent was clearly to provide additional insurance to the construction manager, and at least one other New York court has refused to enforce similar language. *See*, *QBE Ins. Corp. v. Adjo Contracting Corp.*, 32 Misc.3d 1231(A) (Sup. Ct. Nassau Co. 2011). However, *Gilbane* is the latest word in what appears to be an increasingly well-settled body of law that will literally apply additional insured language restricting the scope of coverage to those in privity of contract with the named insured. Other additional insured language found to require privity has been addressed

in *Linarello v. City University of New York*, 774 N.Y.S.2d 517 (1st Dep't 2004)("when you and such…organization have agreed in a contract or agreement that such…organization be added as an additional insured…"); *Best Buy Co., Inc. v. Sage Electrical Contracting, Inc.*, 2009 WL 289675 (Sup. Ct. N.Y. Co. Jan. 29, 2009)("any person or organization with whom you have entered into a written contract…requiring you to provide insurance…"); *AB Green Gansevoort, LLC v. Peter Scalamandre & Sons, Inc.*, 961 N.Y.S.2d 3 (1st Dep't 2013)(same as *Linarello*); and *Zoological Society of Buffalo v. Carvedrock, LLC*, 2014 WL 3748545 (W.D.N.Y. July 29, 2014)("any person or organization with whom you have agreed, in a written contract, that such person or organization should be added as an insured…").

The Takeaway

Claims professionals confronting demands for additional insurance under New York law, particularly in the construction context, should carefully review the language of the endorsement(s) granting such coverage to determine if a direct contractual relationship with the additional insured is required. Similarly, insurers evaluating the efficacy of their insureds' risk transfer efforts should be aware that various forms may impose such a requirement, and consider how such forms could impact their insureds' potential exposure.

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