



## **Insurance Coverage Alert – July 2017**

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### **New York Court of Appeals Interprets The Fault Back into ISO's Fault-Based Additional Insured Endorsement**

Effectively overruling a body of case law that was becoming entrenched in New York's insurance jurisprudence, the New York Court of Appeals held in *Burlington Ins. Co. v. NYC Transit Authority*, --- N.E. ---, 2017 N.Y. Slip Op. 04384 (2017) that the phrase "caused by" in an additional insured endorsement required proximate causation, not the broader "but for" causation associated with "arising out of."

ISO introduced the additional insured endorsement at issue in 2004, as the industry's solution to broad judicial interpretations of "arising out of" which afforded coverage for the additional insured's sole negligence and other unintended transfers of risk. The endorsement replaced the phrase "arising out of" with a more restrictive requirement that the additional insured's liability be "caused, in whole or in part, by" the "acts or omissions" of the named insured.

Despite ISO's efforts to create a fault-based endorsement premised on the named insured's vicarious or contributory negligence, the First Department held that "caused by...does not materially differ from the general phrase, 'arising out of,'" *W&W Glass Sys., Inc. v. Admiral Ins. Co.*, 91 A.D.3d 530 (1st Dep't 2012), a holding that was repeatedly followed in other cases. *See e.g., National Union Fire Ins. Co. of Pittsburgh, P.A. v. Greenwich Ins. Co.*, 103 A.D.3d 473 (1st Dep't 2013); and *CNY Builders, LLC v. Fireman's Fund Ins. Co.*, 2012 WL 6090103 (N.Y. Co. Sup. Ct., Nov. 26, 2012).

In *Burlington Ins.*, the Court of Appeals concluded that "caused by, in whole or in part" required proximate causation since "but for" causation "cannot be partial...an event may not be wholly or partially connected to a result, it either is or is not." Therefore, any "but for" construction of the phrase failed to give full force and effect to "in whole or in part" language. The court further noted that the "only with respect to liability" phrase established that "caused, in whole or in part, by" limits coverage to damages resulting from negligence or some other actionable act or omission.

## The Takeaway

Claims handlers analyzing risk transfer issues or who are currently responsible for defending additional insureds under reservation where the policy contains similar “caused by” language should review their positions to consider whether their obligations are affected by *Burlington Ins.* One issue left unresolved by *Burlington Ins.* is the common construction site injury scenario where a subcontractor’s employee is injured and brings suit against the owner and general contractor. Under the “arising out of” standard and the First Department’s prior treatment of “caused by,” the mere fact the plaintiff was employed by the subcontractor was routinely sufficient to implicate additional insurance under the subcontractor’s policy. Since the subcontractor’s negligence may not be adjudicated in the tort action, *Burlington Ins.* may introduce uncertainty into the risk transfer, particularly where the owner and general contractor are seeking a defense under the subcontractor’s policy at the outset of litigation before issues of their respective negligence have been developed.

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