CONSTRUCTION INSURANCE

Additional Insured Endorsement ("AI")

"Arising Out Of" v. "In Whole Or In Part"

The following is a brief explanation of the additional insurance language "arising out of" contrasted with "in whole or in part."

The current broadest AI language in New York is "arising out of."

The distinction between the insurance purchase requirement in a construction contract and the additional insured coverage in an insurance policy is important. The construction contract must require purchase of the correct type of additional insured coverage, but the insurance company is only required to provide the additional insured coverage described in its policy. One level of confusion arose from a failure to distinguish what may have been required in a construction contract from what was provided in an insurance contract. Obligation in a construction contract are obligations limited to the parties of the construction contract. Obligations of an insurer in an insurance policy are limited to the wording of the policy.

Therefore, it is necessary to analyze both the insurance purchase obligation in the subcontract and the AI Endorsement in the policy purchased by the contractor/subcontractor. While a claim against a contractor/subcontractor or contractor may be appropriate for not purchasing the contractually specified type of AI coverage, an insurer is always only obligated to provide the insurance coverage set forth in the insurance contract.

As a result of the 2017 New York high court decision in Burlington, "arising out of" is the only indisputable AI broad form language enforced in New York State. Burlington dealt with "in whole or in part" language, and Burlington for the first time separated the broad interpretation of "in whole or in part" from the AI wording "arising out of." The Burlington decision does not change the duty to defend obligation, but it has serious implications for indemnity. Many people mistake these indemnity implications as altering the duty to defend.

Essentially, the Burlington court held that enforcement of the "in whole or in part" language required an analysis of the proximate cause of the underlying case facts. The decision has caused confusion. However, as matters currently stand, the decision can be broken into two parts. The analysis required for a defense and the analysis required for indemnity.

All analysis begins with the courts view of indemnity. Under Burlington, indemnity is only required for the additional insured if it has been proven that the proximate cause of the accident was not 100% the fault of the additional insured seeking AI coverage. Obviously, such a determination cannot be made with certainty until a trial verdict is rendered. This ambiguity allows an insurer to extract settlement concession from an AI at any time prior to a jury verdict.

The Defense obligation is determined from an assessment of the potential Indemnity analysis. Since defense is broader than the duty to indemnify, the lower courts have interpreted Burlington as requiring an AI defense if there is "a reasonable possibility" that the named insured (contractor/subcontractor owing insurance purchase) has some percent proximate cause responsibility. Thus, where the accident arises out of the contractor's/subcontractor's employee accident, the lower courts have found there is some reasonable possibility that the contractor/subcontractor has some proximate cause. Since if the contractor/subcontractor is reasonably likely to have some percentage fault, under Burlington the AI could not be 100% at fault and, therefore, the AI is entitled to a defense.