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Client Alert

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Court Finds Broad Coverage Under Additional Insured Endorsement

Additional insured endorsements play a large role in a wide variety of business arrangements. They often are used to insure manufacturers, landlords, general contractors and other "upstream" parties under a "downstream" party's commercial general liability policy. A recent decision by a New York State appellate court construed a typical additional insured clause to provide a broad scope of additional insured coverage for claims arising out of a construction project. In *Regal Constr. Corp. v. Nat'l Union Fire Ins. Co.*, 2009 WL 2015419, *2 (1st Dep't 2009), the court found that the clause extended coverage to an additional insured for an accident that arose out of the general scope of the named insured's operations on the project, even though it was not alleged that the named insured's negligence contributed to the injury in any way.

Facts of the Case

The *Regal* decision involved a typical contractual arrangement for a construction project involving the demolition and rebuilding of a modular building on Rikers Island. The City of New York hired URS Corporation ("URS") to serve as construction manager for the project, and URS, in turn, hired Regal Construction Corporation ("Regal") to serve as prime contractor. Regal's responsibilities included all demolition and renovation work on the project. Regal procured a comprehensive general liability ("CGL") insurance policy from The Insurance Corporation of New York ("INSCORP") that included additional insured coverage for URS "only with respect to liability arising out of [Regal's] ongoing operations performed for that [additional] insured." *Id.* at *2.

In March 2001, Ronald LeClair, Regal Project Manager for the Rikers project, slipped and fell when he stepped from temporary plywood flooring onto a steel floor joist to point to a wall to be demolished. Unbeknownst to LeClair, the joist recently had been painted and was slippery.

LeClair sued the City and URS in 2003. The complaint alleged that injury resulted from negligence of the City and URS and lacked any allegation that Regal's conduct was responsible for the accident. LeClair testified at his deposition that he had heard that a URS employee had painted the joist.

URS demanded that Regal and/or INSCORP defend and indemnify it, basing its demand on its status as an additional insured under the INSCORP policy. Although INSCORP accepted URS's tender of the defense, Regal and INSCORP subsequently commenced a declaratory judgment action against URS and its insurer, National Union, seeking a determination that they were not obligated to defend and indemnify URS and to recover the defense costs that INSCORP had incurred in defending URS. National Union cross-moved for summary judgment.

The pivotal issue on appeal was interpretation of the additional insured clause – specifically, was URS covered as an additional insured for LeClair's injury under the terms of Regal's policy with INSCORP? The trial court granted URS's motion and found that INSCORP was obligated to defend and indemnify URS in the *LeClair* action.

The Appellate Court Decision

On appeal, the Supreme Court of New York, Appellate Division, First Department affirmed the lower court decision and found that INSCORP was obligated to defend and indemnify URS in the *LeClair* action.

The court began its analysis by distinguishing the case before it from a recent decision of the Court of Appeals in *Worth Constr. Co., Inc. v. Admiral Ins. Co.*,

888 N.E.2d 1043 (N.Y. 2008), which had denied additional insured coverage under a similarly worded clause.

In *Worth*, Pacific Steel, Inc. ("Pacific"), a subcontractor on the project, was the named insured under the insurance policy and Worth, the general contractor, was an additional insured but only for "liability arising out of [Pacific's] operations." However, unlike Regal, which was responsible for all of the demolition and construction at the Rikers' project, Pacific's responsibility was limited to fabrication and installation of a specific staircase. After Pacific had installed the staircase, a worker was injured when he slipped on fireproofing that had been applied to the stairs by another subcontractor, Central Enterprises. Pacific did not have any relationship with the worker who was injured and Pacific had no role in contracting for or applying the fireproofing. Moreover, Worth admitted that there was no significant connection between Pacific's work and the accident. Under these circumstances, the Court of Appeals found that Pacific's policy did not cover Worth because there was "no connection between the accident itself and Pacific's work, the risk for which coverage was intended." *Id.* at 1046.

In contrast, in *Regal*, the court found that "there was a causal connection between LeClair's injury and Regal's work as a prime contractor, the risk for which coverage was provided." *Regal*, 2009 WL 2015419 at *2. The court construed the "arising out of" language of the INSCORP insurance policy broadly, stressing that a court's focus in evaluating an additional insured clause should not be on "the precise cause of the accident but the general nature of the operation" in which the injury was sustained. *Id.* at *2. Under this approach, an additional insured would be deemed covered so long as the injury occurred within the "general nature of the operations" performed by the named insured for the additional insured – a broad (but not limitless) category. Inasmuch as the accident in question arose out of demolition-related work, although it was not alleged that the named insured's conduct was responsible for the injury, the court found that additional insured coverage applied.

A dissenting opinion in the case focused on INSCORP's contention that LeClaire's injuries, and any resulting liability, resulted not from Regal's operations but from those of URS. The dissent noted that, although the Court of Appeals, in *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 871 N.E.2d 1128, 1132-33 (N.Y. 2007), had rejected the contention that the liability of the named insured had to be determined before an additional insured was entitled to a defense, it "does not follow that the potential liability of the named insured is irrelevant." *Id.* at *4 (McGuire, J., dissenting). The dissent further argued that if LeClaire's complaint had alleged that he tripped and fell on a banana peel carelessly left on the joist by a URS employee, it would be hard to see how INSCORP could be required to defend and thereby confer a "windfall" on URS and its insurer, National Union. Yet, in the dissent's view, that was essentially what the majority had done.

Conclusion

The *Regal* decision provides an expansive interpretation of a typical additional insured clause. The decision is beneficial to additional insureds in that it focuses on whether the incident occurred within the general scope of the named insured's operations, rather than the connection between the named insured's acts and the injury. Thus, under *Regal*, an additional insured would be entitled to coverage for an accident that occurred within the general scope of the named insured's operations, even if the accident was entirely the additional insured's fault. However, not all additional insured endorsements are alike, and broader or narrower wording could affect the outcome. Parties providing coverage to third parties under such endorsements, or relying on the coverage provided under such endorsements, should be aware of how such endorsements have been construed by the courts and review the wording to ensure that their coverage expectations will be met.

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For more information, please contact:

Seth B. Schafler
212.969.3660 – sschafler@proskauer.com

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