TRAUB LIEBERMAN

INSURANCE LAW BLOG

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Western District of New York Addresses Agency Prong of Additional Insured Coverage

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On June 5, 2020, the United States District Court for the Western District of New York decided *Firemen's Insurance Company of Washington, D.C. v. ACE American Insurance Company*, Case No. 19-cv-6413-FPG, applying a 2017 New York Court of Appeals precedent to determine whether an employee's acts or omissions were on his employer's behalf as required to trigger additional insured coverage based on a proximate causation nexus.

Plaintiff in the underlying lawsuit was a mason engaged in construction of a new Wegmans supermarket. His employer, MP Masonry, contracted directly with Wegmans, agreeing to procure insurance and to indemnify Wegmans for injury to MP Masonry's employees.

The site foreman, Mr. Story, was working under a staffing agreement pursuant to which Aerotek provided Wegmans with workers for the project. The agreement specified that Mr. Story was an employee of Aerotek and an independent contractor of Wegmans. Aerotek agreed to indemnify and to procure "additional insured" coverage for Wegmans.

MP Masonry's insurer assumed Wegmans' defense in the underlying action but sued Aerotek's insurer, seeking a declaration that Wegmans was owed a defense and indemnity pursuant to the staffing agreement. Aerotek's insurer counterclaimed, alleging that Mr. Story was owed a defense an indemnity as an "employee, agent, or representative" of Wegmans. The court rejected this argument, reasoning that indemnity agreements are strictly construed under New York law and the intention to indemnify an Aerotek employee was not unambiguously expressed in the masonry contract, particularly as it could not be determined from the face of the staffing agreement that Mr. Story qualified as an "employee, agent or representative" of Wegmans entitled to indemnity as such.

With respect to MP Masonry's claim, the court found that Wegmans could qualify as an additional insured under Aerotek's policy only with respect to "liability for 'bodily injury' . . . caused, in whole or in part, by" Aerotek's acts or omissions or the acts or omissions of those acting on Aerotek's behalf. Citing the seminal New York Court of Appeals decision in *Burlington Ins. Co. v. NYC Transit Auth.*, 79 N.E.3d 477 (N.Y. 2017), the court recognized that proximate causation by Aerotek or its agent was required to invoke coverage under this wording. In this regard, the court held that while Mr. Story was ostensibly an employee of Aerotek whose negligence was alleged, the court in the underlying case had dismissed the theory that Mr. Story was acting as Aerotek's agent in performing his work at the site. Rather, it was determined that Mr. Story was acting as Wegmans' agent. Accordingly, the court held that proximate causation by Aerotek was not established, and Aerotek's insurer had no duty to defend Wegmans.

As illustrated by the *Fireman's Insurance* case, the *Burlington* decision, which marked a sea change in New York "additional insured" law, continues to resonate in novel scenarios.