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New York Court Rejects Owner's Bid for Additional Insured Coverage

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Tenders for additional insured coverage in construction accidents are frequently litigated in New York courts. Although the past few years have seen changes in the law regarding the causal nexus between the named insured's work and coverage for the purported additional insured, courts often find there is at least a duty to defend the additional insured where there are allegations of the employer/subcontractor's presence at the site.

An exception is the recent decision in *Gemini Insurance Company v. Certain Underwriters at Lloyd's, London*, Index No. 652669/20 in the Supreme Court of the State of New York, County of New York (Lebovits, J.). In that case, Gemini insured the owner and general contractor of a construction project, and Lloyd's insured the injured claimant's employer under a policy endorsed to provide additional insured coverage to entities who "have agreed in writing in a contract or agreement" with the named insured that they must be "added as additional insured." Although the court found that the contracts here satisfied this requirement for additional insured coverage, the court's analysis did not end there.

Noting that even where such contract exists, the Lloyd's policy would not provide additional insured coverage "*in all circumstances*" (emphasis in original), the court next considered whether the underlying injury was "caused in whole or in part by: 1. [The named insured's] acts or omissions, or 2. The acts or omissions of those acting on [the named insured's] behalf," as required under the endorsement's wording.

The court found that the causal nexus was not satisfied because the underlying complaint contained no allegations that the injured claimant's injuries were caused in whole or in part by the named insured or its agents. Moreover, the third-party complaint against the named insured alleged only that the owner and general contractor were entitled to contractual indemnification. While recognizing that the third-party allegations implied the injuries arose out of the named insured's work, the court reasoned that the mere fact the claimant was injured while performing project work for the named insured did not mean the named insured brought about the specific hazardous condition allegedly causing the injury. In this regard, the court noted underlying allegations of a "broken, cracked, misaligned and/or otherwise defective condition" of the premises and the absence of any information that such was caused by the named insured or its agents.

Based on this rationale, the court denied Gemini's motion for summary judgment with respect to both duty to indemnify and, crucially, duty to defend. The decision is a notable illustration that mere allegations of the named insured's work at the site will not always suffice to trigger a defense for the tendering party.