

June 18, 2018

# TLSS Partner Eric D. Suben Obtains Dismissal of Claims for Additional Insured Coverage

Related Attorneys:

TLSS' client, an excess insurer, was sued by its named insured seeking a judicial declaration of excess "additional insured" coverage for entities with whom the named insured contracted in connection with a construction project. The underlying primary insurer was defending those entities. The excess insurer, however, had denied coverage based on the specific wording of the "additional insured" endorsement (to which the excess policy followed form) that such coverage would be afforded only to the extent any claim for injury was "caused, in whole or in part, by" the acts or omissions of the named insured. The underlying third-party action against the named insured was in its infancy, and there was no determination that the named insured proximately caused the injury.

TLSS partner Eric D. Suben moved to dismiss the complaint to the extent the named insured sought a declaration of excess "additional insured" coverage, arguing that the issue was premature and non-justiciable in the absence of underlying liability determinations. In this regard, Mr. Suben relied on the New York Court of Appeals' 2017 ruling in *Burlington Insurance Company v. NYC Transit Authority*, 29 N.Y.3d 313, 79 N.E.3d 477, 57 N.Y.S.3d 85 (2017), in which the Court held that the endorsement wording requires a proximate cause determination as a predicate for "additional insured" coverage.

The named insured opposed the motion, arguing that decisions after *Burlington* have found "additional insured" coverage even in the absence of underlying liability determinations. Mr. Suben replied that those cases were limited to the duty to defend, which is determined by the

allegations of the underlying pleadings, and those courts specifically reserved the issue of duty to indemnify pending determination of the named insured's liability. As the excess policy had no duty to defend, the only issue before the court was duty to indemnify, which was premature and non-justiciable in the present posture of the case.

The court agreed and granted TLSS' motion to the extent of dismissing the claims for a declaration of a duty to indemnify the purported additional insureds.

*Barone Steel, Inc. v. RSUI Indemnity Company*, Index No. 503151/18 (N.Y. Sup. Ct. Kings Cty. June 14, 2018) (slip op.)