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New York – Contractual Privity Requirement In Additional Insured Endorsement May Be Satisfied By Assignment

BY:

The Appellate Division, First Department had occasion to consider New York's strict contractual privity requirement in what has become the standard ISO additional insured endorsement applicable to construction operations, within the context of an assignment agreement. The operative policy language confers additional insured status to "any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy." The New York State Court of Appeals in *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 31 N.Y.3d 131 (2018) held that this language requires strict contractual privity and even if the named insured agreed to name a non-party to the contract as an additional insured, such non-contracting party was not entitled to additional insured status.

In *Travelers Property Casualty Company of American v. Burlington Insurance Company*, 2020 WL 889764 (1st Dept.), the court held that in the event of an assignment of a construction contract, the assignee satisfied the privity requirement set forth in *Gilbane*. The insurer for the named insured argued that it was not bound by the assignment, but the court disagreed. The court found that the defendant insurer "may" be obligated to insure the tendering party but there were issues of fact as to whether the assignment was made prior to the date of the underlying plaintiff's accident. The assignment expressly stated that it was "effective as of the date of this Assignment." However, the assignment was not dated, and the evidence submitted failed to establish prima facie the effective date.

Although not stated in the decision, implicit is the notion that an assignment must occur prior to the date of loss to be effective. Nonetheless, this decision presents an interesting application of the *Gilbane* holding.