

# ADDITIONAL INSURED COVERAGE

## MAXIMIZING COVERAGE IN A POST-BURLINGTON WORLD

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# Additional Insured Coverage

## Maximizing Coverage in a Post-Burlington World

- Privity
- Priority of Coverage
- The Right to Independent Counsel
- Causation: *Burlington v. NYCTA* and the Proximate Cause Standard



# Privity of Contract in AI Endorsements: “You and Such Person”

## ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

A. SECTION II – WHO IS AN INSURED is amended to include as an additional insured any person or organization for whom you are performing operations **when you and such person or organization have agreed in a written contract or agreement** that such person or organization be added as an additional insured on your policy.

The portion of operations for which the additional insured under this endorsement ends when your operations for that additional insured are completed.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to:

work, or the portion of work, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

b. That portion of “your work” out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 33 07 04

# Privity of Contract in AI Endorsements: “Work Performed For”

**Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

CG 20 37 07 04

**A. Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

CG 20 10 07 04

# Privity of Contract in AI Endorsements: New York

*Cincinnati Ins. Co. v. Harleysville Ins. Co., No. 16-3929-CV, 2017 WL 4417604 (2d Cir. 2017, Applying NY law)*

- The University of Roschester Medical Center (owner) hired LeChase Construction Corp. (GC), who contracted with J.T. Mauro Co. Inc. (Sub), who subcontracted that work to The Kimmell Company, Inc. (Sub-Sub).
- A Sub-Sub employee was injured and sued Owner, GC, and Sub.
- There was no direct contact between Owner or GC and Sub-Sub.
- Sub-Sub's CGL policy with Harleysville contained CG 20 33: "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."
- **Holding: No AI coverage because direct privity was required;** that is, the named insured must have contracted directly with the additional insured in order for the endorsement to apply.

COMMERCIAL GENERAL LIABILITY  
CG 20 33 07 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

This endorsement modifies insurance provided under the following:

### COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. Section II – Who Is An Insured** is amended to include as an additional insured 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. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
1. Your acts or omissions; or
  2. The acts or omissions of those acting on your behalf;
- in the performance of your ongoing operations for the additional insured.
- A person's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed.
- B.** With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:
- This insurance does not apply to:
1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of, or the failure to render, any professional architectural, engineering or surveying services, including:
    - a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
    - b. Supervisory, inspection, architectural or engineering activities.
  2. "Bodily injury" or "property damage" occurring after:
    - a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
    - b. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

# Privity of Contract in AI Endorsements: 2013 ISO Changes

## ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS FOR OTHER PARTIES WHEN REQUIRED IN WRITTEN CONSTRUCTION AGREEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Section II – Who Is An Insured is amended to include as an additional insured . . .

2. Any other person or organization you are required to add as an additional insured under the contract or agreement

. . . .

the additional insured.

However, the insurance afforded to such additional insured described above:

- a. Only applies to the extent permitted by law; and
- b. Will not be broader than that which you are required by the contract or agreement to provide for such additional insured.

A person's or organization's status as an additional insured under this endorsement ends when your operations for the person or organization described in Paragraph 1. above are completed.

occurrence which caused the bodily injury or "property damage", or the offense which caused the "personal and advertising injury", involved the rendering of, or the failure to render, any professional architectural, engineering or surveying services.

2. "Bodily injury" or "property damage" occurring after:

- a. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

CG 20 38 04 13

# Privity of Contract in AI Endorsements: Practice Pointers



- ✓ Ensure subcontracts require Owner, GC & CM to be AI's on a primary and non-contributory basis.
- ✓ Beware form 20 33 ("when you and such person") & manuscript forms.
- ✓ Review language included in endorsement schedules for problematic privity wording.



**Hot Tip**

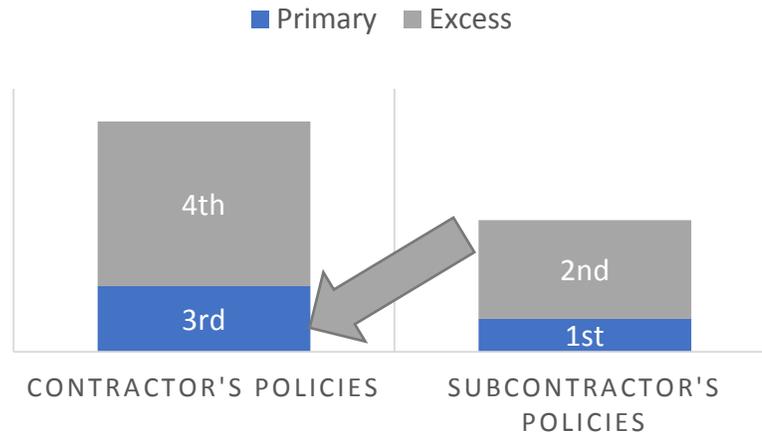
*Pay special attention to excess policies. Just because the policy follows form does not mean that AI's on the primary are automatically AI's on the excess!*



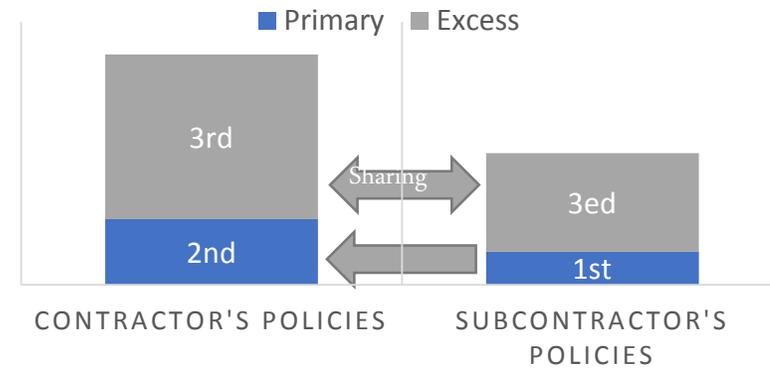
**Hot Tip**

# Priority of Coverage: Which Policy Responds Second?

## VERTICAL EXHAUSTION



## HORIZONTAL EXHAUSTION



# Horizontal vs. Vertical Exhaustion

## Horizontal

- Based on strict interpretation of policy terms.
  - THUS: Amending policies to reflect party intent should overcome case law.
- Contractual indemnification: downstream party still obligated to indemnify upstream party.
  - In some instances, this may persuade the downstream party's excess insurer to pick up the AI claim.
  - "Circuitry of litigation"
- Horizontal Exhaustion may leave downstream party exposed to a breach of contract claim by upstream party.

## Vertical

- Vertical exhaustion considers risk transfer holistically – insurance and indemnity.
- Greater emphasis on intent of parties.
- Good idea to address this issue in every state. Just because a state has applied vertical exhaustion, doesn't mean you are "safe."

# Advent, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA

211 Cal. Rptr. 3d 685 (Ct. App. 2016)

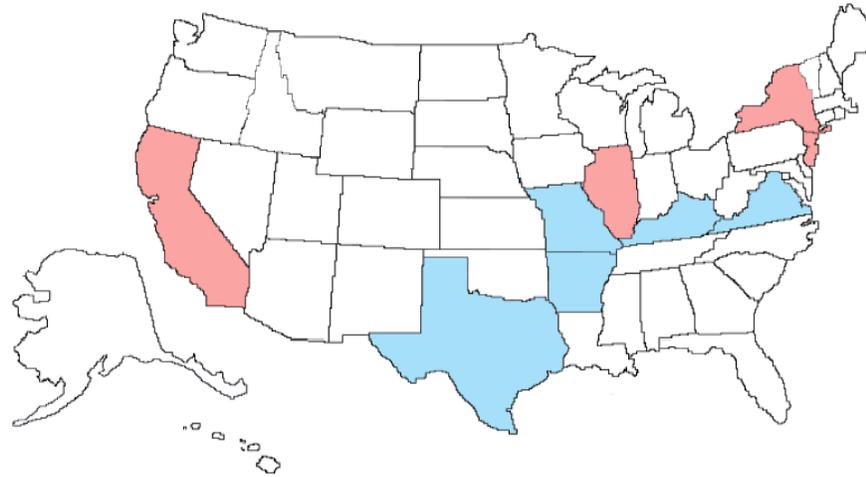
- Horizontal Exhaustion Case
- Advent (GC) contracts with Pacific (sub) who subcontracts with Johnson (sub-sub).
- Sub-sub was covered by National Union primary and excess policies.
- Sub-sub employee was seriously injured and sued CG; settled for \$10M.
- National Union contributed to the settlement, under the primary policy, but denied coverage under its excess policy.
- GC sought a declaration that it was an “additional insured” under excess policy; its insurer intervened, seeking equitable contribution from National Union.
- National Union won on summary judgment and court of appeal affirmed because National Union’s excess policy stated that coverage would not apply until “the total applicable limits of Scheduled Underlying Insurance have been exhausted by the payment of Loss to which this policy applies and any applicable, Other Insurance have been exhausted by the payment of Loss.”



# Priority of Coverage: State by State

Jurisdictions  
applying  
horizontal  
exhaustion:

- California
- Illinois
- New Jersey
- New York



Jurisdictions  
applying  
vertical  
exhaustion:

- Arkansas
- Kentucky
- Missouri
- Texas
- Virginia

# ISO's First Attempt at Solution Primary CGL - CG 20 01 04 13

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

## **Primary And Noncontributory Insurance**

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

- (1) The additional insured is a Named Insured under such other insurance; and
- (2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

CG 20 01 04 13

*But does endorsing  
primary policy really  
help?*

# ISO's Second Attempt at Solution

## Excess - CX 24 33 11 16

Paragraph 8. of **Section III -- Conditions** is replaced by the following:

### 8. Other Insurance

a. This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. **However:**

**(1) This condition will not apply to other insurance specifically written as excess over this Coverage Part.**

**(2) The insurance provided under this Coverage Part will not seek contribution from any other insurance available to an additional insured, provided that:**

**(a) The additional insured is a Named Insured under such other insurance;**

**(b) The additional insured is shown in the Schedule; and**

**(c) You have agreed in writing in a contract or agreement that this insurance would not seek contribution from any other insurance available to the additional insured.**

When this insurance is excess, if no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

CX 24 33 11 16

*“Noncontributory”  
doesn't quite get  
us there.*

# ISO's Second Attempt at Solution

## Umbrella - CU 24 78 11 16

Paragraph 5. of Section IV – Conditions is replaced by the following:

### 5. Other Insurance

a. This insurance is excess over, and shall not contribute with any of the other insurance, whether primary, excess, contingent or on any other basis. However,

(1) This condition will not apply to other insurance specifically written as excess over this Coverage Part.

(2) The insurance provided under this Coverage Part will not seek contribution from any other insurance available to an additional insured, provided that:

(a) The additional insured is a Named Insured under such other insurance;

(b) The additional insured is shown in the Schedule, and

(c) You have agreed in writing in a contract or agreement that this insurance would not seek contribution from any other insurance available to the additional insured

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

b. When this insurance is excess over other insurance, we will pay only our share of the "ultimate net loss" that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of the insurance provided under this Coverage Part; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

"Noncontributory"  
doesn't quite get  
us there.

CU 24 78 11 16

# Beware: "Follow Form" Excess Policies

Policies may be "follow form" – but that is not enough to ensure proper exhaustion of additional insured coverage.

## INSURING AGREEMENTS

### I. COVERAGE

We will pay on behalf of the insured the amount of "loss" covered by this insurance in excess of the "underlying limits of insurance" subject to the LIMITS OF INSURANCE Section. This policy will follow form to the terms, conditions, definitions, and exclusions of the "first underlying insurance" in effect the first day of the Policy Period, except to the extent that the terms, conditions, definitions, and exclusions of this policy differ from the "first underlying insurance." In no event shall this policy provide broader coverage than is provided by any policy in the "underlying insurance" shown in Item 5. of the Declarations, except if specifically provided otherwise by endorsement.

Look! The conditions differ!



### E. Other Insurance

If other insurance applies to a "loss" that is also covered by this policy, this policy will apply excess of the other insurance. However, this provision will not apply if the other insurance is specifically written to be excess of this policy. Other insurance includes any type of self-insurance or other mechanism by which an insured arranges for funding of legal liabilities.

# SDV's Solution

## Contract Solution + Policy Solution = Coverage

### Contract Solution

“Each policy, including umbrella/excess, shall state that the insurance provided to the additional insureds is primary and non-contributory to any other insurance (including primary, excess, self-insurance, or on any other basis) available to the additional insureds.”

### Policy Solution

#### Endorsement – Excess Liability Policy Priority of Coverage

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

Any entity qualifying as an additional insured on the insurance stated in the Schedule of Underlying Insurance shall be an additional insured on this policy.

This insurance shall apply immediately upon exhaustion of the insurance stated in the Schedule of Underlying Insurance as respects the coverage afforded to any additional insured. This insurance shall apply before any other insurance available to the additional insured, on which the additional insured is a named insured, whether such other insurance is primary, excess, contingent, or on any other basis, and we will not seek contribution from such insurance for defense or indemnity.

Where an entity qualifies as an additional insured on insurance stated in the Schedule of Underlying Insurance based on a written agreement to provide liability insurance, the limits of insurance provided by this policy shall not exceed the limits of insurance required by such written agreement.

# Right to Independent Counsel

## What happens when insurer agrees to defend under a ROR but insists on selecting counsel?

At this time, please be advised we hereby accept your tender of defense. As such, defense counsel Crumb E. Attorney of Moe, Larry & Curly, LLC, 55 East 54th Street, New York, NY 10128, telephone number (555) 555-5555 has been retained to defend these parties in the direct action. Thus, **Insurer agrees to continue to defend and indemnify your client in this action through the law firm of Moe, Larry & Curly, LLC.**

It is the intent of this letter to preserve all rights of Insurer, as it relates to our coverage position . . . No act on behalf of Insurer shall be construed as an admission of liability or coverage. The above stated condition is not intended in any way to be exhaustive or exclusive, and **we are expressly reserving our rights under the policy**, including, but not limited to, the right to raise additional policy terms, definitions or conditions as defenses of coverage as appropriate. Our failure to recite other policy language at this time does not preclude us from raising other defenses in the future . . .



# States Vary on What Triggers the Right to Independent Counsel



- The majority of states require some level of demonstrable conflict of interest.
- California, Georgia & Illinois: Reservations of rights letters raising issues, which may be determinative of tort liability, create a conflict of interest between insurer and insured requiring independent counsel.
- Washington does not recognize a right to independent counsel at all.

# What constitutes a conflict of interest?

- Accusations in the complaint that can create to a conflict:
  - Insured is accused of intentional conduct and negligence – New York
  - Claim for punitive damages – Louisiana
- Insurer Defenses that can create a conflict
  - Disputing whether loss “arises out of” insured’s acts or omissions – North Carolina
  - When insurer claims insured failed to cooperate – Kentucky
  - Date of Loss/Policy Period Defense to coverage – Illinois
  - Insurer claims late notice defense – Pennsylvania
- Other Conflicts
  - Insurer covers multiple insureds with conflicting interests in the same case – Arizona
  - Insurer reserves the right to seek reimbursement of indemnity payments – Arizona



*If the result of the underlying case will determine whether the loss was covered, you should fight for independent counsel!*



# Burlington v. NYCTA and the Proximate Cause Standard



# Causation Trigger in AI Endorsements: "Arising out of"

POLICY NUMBER: COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – (FORM B)**

“... but only with respect to liability **arising out of** ‘your work’ for that insured by or for you”

as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.

CG 20 10 11 85

POLICY NUMBER: COMMERCIAL GENERAL LIABILITY  
CG 20 10 10 01

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION**

This endorsement changes the policy to provide that the named insured is an insured under this policy with respect to liability **arising out of** your ongoing operations performed for that insured.”

Name (if no applicable)

A. Section 2.1  
B. Wadsworth

operations as parts or ion with er than i) to be re addi- he cov- pleted, f which is been rson or or cong- ed in performing operations for a principal as a part of the same project.

CG 20 10 10 01

# Causation Trigger in AI Endorsements: “Caused, in whole or in part, by”

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT WITH YOU

“...only with respect to liability for ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’ **caused, in whole or in part, by:**

1. Your acts or omissions; or
  2. The acts or omissions of those acting on your behalf;
- in the performance of your ongoing operations for the additional insured.”

apply:

This insurance does not apply to:

- d. That portion of “your work” out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

CG 20 33 07 04

# New York Before Burlington

*Hotels AB, LLC v. Permasteelisa, CS* (New York trial court)



**Background:** Pavarini retained as GC on a hotel construction project for Hotels AB, LLC. Pavarini and Hotels added as AIs on subcontractor Permasteelisa's CGL policy ("caused, in whole or in part, by" language). Permasteelisa employee injured on the job when a steel channel fell on his foot.

**Holding:** "Caused, in whole or in part, by" equivalent to "arising out of." Where employee of named insured injured performing named insured's work, there is a sufficient causal connection between the work and injury to trigger AI coverage.

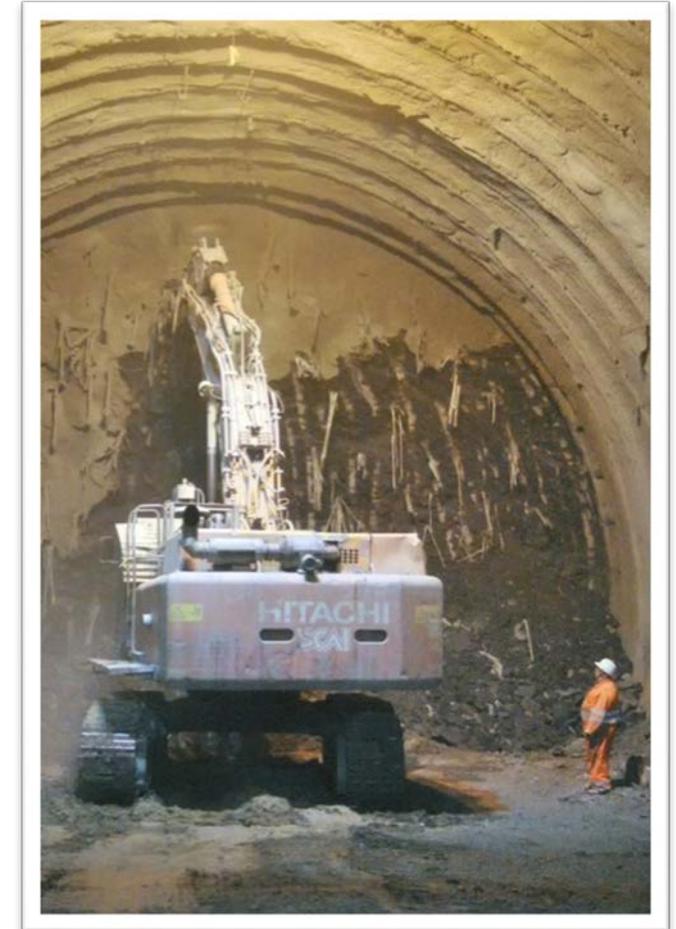
*"As used in insurance policies ['caused by' and 'arising out of'] do not have significantly different meanings."*

# New York After Burlington

## *Burlington Ins. Co. v. NYC Transit Auth.*, (NY Court of Appeals)

- First time NY Court of Appeals addressed “caused, in whole or in part, by” language of ISO standard AI endorsement
- Held that language required the named insured’s act to be at least a partial proximate (or foreseeable) cause.
- Unanimously rejected argument that endorsement requires a negligent act or omission of the named insured in order to trigger coverage:

*“While we [the majority] agree with the dissent that interpreting the phrases differently does not compel the conclusion that the endorsement incorporates a negligence requirement (dissenting op at 17 n 9), it does compel us to interpret ‘caused, in whole or in part’ to mean more than ‘but for’ causation. That interpretation, coupled with the endorsement’s application to acts or omissions that result in liability, supports our conclusion that proximate cause is required here.”*



# Role of Extrinsic Evidence: 3 Views



- **Majority:** The insured can use extrinsic evidence to establish the duty to defend
  - California: “[E]vidence extrinsic to the underlying complaint can defeat as well as generate a defense duty.” *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 291 (Cal. 1993).
- **Minority: 8 Corners Rule**
  - Texas: “Under the eight-corners rule, the duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy... [I]n deciding the duty to defend, the court should not consider extrinsic evidence from either the insurer or the insured that contradicts the allegations of the underlying petition.” *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 654-655 (Tex. 2009).
- **Best of Both Worlds:** A few states allow use of extrinsic evidence by the policyholder to *support* finding coverage, but not by insurer to *deny* the duty to defend.
  - New York: “[A]lthough extrinsic evidence may be used to expand the insurer's duty to defend . . . courts of this State have refused to permit insurers to look beyond the complaint's allegations to avoid their obligation to defend.” *Fitzpatrick v. Am. Honda Motor Co., Inc.*, 575 N.E.2d 90, 92 (N.Y. 1991).

# Takeaways from Burlington

1. “Caused, in whole or in part, by” is not considered functionally equivalent to “arising out of” in New York (overruling several years of precedent);
2. The new test for “caused, in whole or in part, by” is a proximate cause test; and
3. Named insured’s negligence is not required to trigger additional insured coverage (despite reports to the contrary).



*When tendering to an AI carrier, be sure to include as many facts as possible that tie the named insured to the loss.*



# Questions?

THANK YOU!

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