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KD Alert: New York's First Department Holds That Standards Used In Additional Insured Endorsements Are Not Materially Different

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In a decision that could substantially impact the scope of Additional Insured coverage afforded by General Liability policies, New York's First Appellate Department recently held in W&W Glass Systems, Inc. v. Admiral Insurance Co., No. 6592, 111707/09, 2010 N.Y. Misc. LEXIS 3756, at *2–3 (N.Y. App. Div. 1st Dep't Jan. 19, 2012), that the "caused by your ongoing operations performed for [the Named Insured]" trigger found in certain Additional Insured Endorsements, including the subject Endorsement at issue therein, does not "materially differ" from the more traditional "arising out of" trigger used in many Additional Insured Endorsements. "

By way of background, General Liability insurers typically limit Additional Insured coverage based on the interplay between the Additional Insured, the Named Insured, and the subject accident. As a general matter, Additional Insured coverage is not triggered under a General Liability policy's Additional Insured Endorsement unless the alleged injury was either "caused by" or "arose out of" the acts or omissions of the Named Insured on behalf of the purported Additional Insured. Traditionally, General Liability insurers used the broad "arising out of" language in their Additional Insured Endorsements, but in light of numerous cases decided in New York, wherein the "arising out of" trigger was given an extremely expansive meaning and application by the Courts, certain insurers responded by amending their Additional Insured Endorsements, replacing the "arising out of" trigger with the narrower "caused by" standard in an attempt to better adhere to the true intent and nature of the Endorsement.

While there is a dearth of case law in New York regarding the practical difference between these two standards, trial courts in New York, including the trial court that decided *W&W Glass, have held that the "caused by" language is narrower than the "arising out of" language. Compare W&W Glass Sys., Inc. v. Admiral Ins. Co., 111707/09, 2010 N.Y. Misc. LEXIS 3756, at *5 (N.Y. Sup. Ct. July 29, 2010) (noting that the "caused by" language is "more restrictive" than the "arising out of" standard), and 373 Wythe Realty, Inc. v. Indian Harbor Ins. Co., 2010 U.S. Dist. LEXIS 45947, at *8–9 (E.D.N.Y. May 10, 2010) (noting that the "caused by" language "is invoked once a lawsuit alleges that an additional insured is responsible for the conduct of named insured"), with BP Air Conditioning Corp. v. One Beacon Ins. Grp., 871 N.E.2d 1128, 1132, 8 N.Y.3d 708, 715 (N.Y. 2007) (holding that the mere "possibility" that the accident "arose out of" the Named Insured's ongoing operations for the Additional Insured was sufficient to trigger Additional Insured coverage under the "arising out of" standard).*

Now, based on the holding in W&W Glass, New York's First Department has essentially conflated the broad "arising out of" language and the more limited "caused by" language, holding that the two standards are substantially the same in meaning and as such, should be interpreted in the same manner.

We note that the First Department's decision in W&W Glass only pertains to an insurer's duty to defend, which is broader than the duty to indemnify. Accordingly, in the event that a General Liability insurer decides to provide a defense to an Additional Insured based on the broad reading of "caused by" espoused by the First Department in W&W Glass, we recommend that any coverage be provided subject to a reservation of rights, specifically reserving the right to seek past Defense Costs, to the extent it is ultimately determined that the alleged accident was not "caused by" the Named Insured.

For more information on this matter, please contact the attorneys in **KD's Insurance Coverage & Monitoring practice group or go to www.kaufmandolowich.com.**