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## *Palsgraf*-ian Proximate Cause and Insurance Law: The State of New York Additional Insured Coverage Following *Burlington Insurance Co. v. NYC Transit Authority*

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## ***Palsgraf*-ian Proximate Cause and Insurance Law: The State of New York Additional Insured Coverage Following *Burlington Insurance Co. v. NYC Transit Authority***

RYAN P. MAXWELL<sup>†</sup>

### INTRODUCTION

This Comment is a study of construction accident litigation and, in particular, of the insurance coverage available to additional insureds under endorsements permitted in the state of New York. Specifically, the discussion will center around the scope of coverage permitted in New York State under the most common additional insured endorsements used by insurance companies that provide coverage for “liability caused, in whole or in part, by” the acts or omissions of the named insured.

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Serving as a catalyst to the commentary that follows is the evolution of additional insured precedent currently unfolding in New York, and in particular a recent decision handed down by the New York Court of Appeals, *Burlington Insurance Co. v. NYC Transit Authority*.<sup>1</sup> It is well-understood that an entity with “additional insured” status “enjoy[s] the same protection as the named insured” under a policy of insurance.<sup>2</sup> However, one must initially determine the threshold matter of whether an entity qualifies as an “additional insured” under a policy before the insurer owes that entity any obligations under its policy. Although the exact degree to which additional insured status may be extended to general contractors and property owners in New York under *Burlington* remains unclear, the intent of this piece is to show that the invocation of “proximate cause,” as that term was used by Justice Andrews in his dissent in *Palsgraf v. Long Island Railroad Co.*,<sup>3</sup> carries a certain connotation that allows courts to assign financial liability to insurers based upon the blameworthiness of individual insureds.<sup>4</sup> Since additional insured status is arguably contingent upon the blameworthiness or level of fault attributed to the named insured under a policy of insurance, this view would allow *Palsgraf*-ian proximate cause to sever the causal connection necessary to trigger coverage under an insurance policy for an entity claiming additional insured status as the blameworthy party primarily—and substantially—at fault.

To provide a roadmap, I will approach my analysis of the

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1. 79 N.E.3d 477 (N.Y. 2017).

2. *Pecker Iron Works of N.Y., Inc. v. Traveler's Ins. Co.*, 786 N.E.2d 863, 864 (N.Y. 2003); *see also* *Jefferson Ins. Co. of N.Y. v. Travelers Indem. Co.*, 703 N.E.2d 1221, 1226 (N.Y. 1998) (“The [insurance] policy . . . was designed to provide primary insurance for [the named insured] and thus, after finding that [the owner/lessor] was an additional insured under this policy, it would naturally follow that coverage of [the additional insured] was also primary.”).

3. 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

4. Throughout this piece, I will refer to this concept as “*Palsgraf*-ian proximate cause.”

scope of *Palsgraf*-ian proximate cause in the realm of New York insurance law in four distinct parts. Part I consists of a brief overview regarding the role that additional insured endorsements play in commercial general liability (CGL) policies issued to “downstream” entities or subcontractors, as well as the evolution of such endorsements and how courts have interpreted the language included therein. Part II discusses the proximate cause limitations that this language imposes upon coverage for general contractors and property owners ultimately held solely liable for the injuries and damages incurred following construction accidents. At the opposite extreme, Part III addresses the broad application of additional insured status in regards to an insurer’s duty to defend, where liability has yet to be established and the allegations in the complaint raise potential liability on behalf of the “downstream” subcontractor. Finally, Part IV attempts to bridge the divide between an insurer’s broad duty to defend, and the lack of additional insured status without fault on behalf of the named insured. This final Part advances my theory in which the “*Palsgraf*-ian” proximate cause requirement imposed on “liability caused, in whole or in part” language in *Burlington* could potentially sever the chain of causation where a subcontractor was tenuously at fault.

#### I. THE ROLE AND EVOLUTION OF THE ADDITIONAL INSURED ENDORSEMENT IN CONSTRUCTION CONTRACTS

In this Part, I will briefly explore the basics of risk transfer in the complex and often dangerous area of large-scale construction projects, including the contractual risk transfer provisions between parties and the insurance requirements frequently accompanying such contractual relationships. Additionally, this Part will dissect the most recent changes in the area of standardized additional insured provisions and how such provisions have been applied by the courts.

Visit any big city in the world today and you will

unavoidably encounter massive, large-scale construction projects and real estate development, commercial or otherwise. Active worksites are beehives of activity, with heavy machines in operation and the use of high-powered tools as far as the eye can see. Indeed,

[c]onstruction is an inherently complex business. Even casual observers of the construction process are struck by the enormous amount of information required to construct a project. Hundreds, even thousands, of detailed drawings are required. Hundreds of thousands of technical specifications, requests for information, and other documents are needed. Complex calculations are used to produce the design. For years, this complexity dictated a labor-intensive, highly redundant methodology for doing the work. Projects were fragmented and broken into many parts. Different entities undertook different parts of a project, both for design and construction. Therefore, the construction industry became exceptionally fragmented. On a project of even average complexity, there may have been from 5 to 15 firms involved in design. From 40 to 100 companies may have been engaged in construction. Many more companies supplied materials, professional services, and other elements necessary for completion of the project.<sup>5</sup>

Although pre-planned and heavily choreographed, these complex projects, many times comprising the moving of earth and iron, occasionally have unexpected consequences. And when such consequences arise, insurance carriers ultimately pay the price. But which insurance policy or insurer should provide coverage for the accident, injuries, and damages that result? Should the subcontractor ultimately be held accountable? Was the general contractor solely at fault? Were both responsible, either in whole or in part? Should it matter?

In the middle of the twentieth century, the evolution of tort law led many to increasingly look beyond fault and some courts began concerning themselves with “who was best able to reduce the number and cost of injuries, insure against them, or redistribute costs in order to spread the burden

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5. 1 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 1:2 (2002) (citing John W. Hinchey, *Visions for the Next Millennium*, in 1 CONSTRUCTION LAW HANDBOOK § 2.01 [A] (1999)).

among all those connected to an enterprise.”<sup>6</sup> Among the purposes of modern tort law is the imposition of liability on those in the best position to secure insurance and provide for loss distribution across a broader population, relieving the injured party from shouldering the burden themselves.<sup>7</sup> But this raises an interesting question: To what extent can fault be ignored when assigning financial blame for the purposes of tort law? Since the financial compensation for injuries resulting from accidents does not occur within a vacuum and, in many cases, overlapping insurance companies are on the hook for ultimate payment of a settlement or monetary judgment following litigation, the line for who should be held at fault must be drawn somewhere.<sup>8</sup>

This approach to modern tort law became increasingly relevant after the expansion of tort law during the Industrial Revolution. The increase in efficiency through the use of dangerous machines during the Industrial Revolution sparked significant changes to the modern tort law system; chief among them was concern for the safety of the American worker. The construction industry with its complexities is but one example of an area where such changes to the system of tort law and worker safety were deemed necessary.<sup>9</sup>

In response to the changes protecting workers, many property owners, contractors, and their contractual partners sought their own protections from liability in the form of insurance coverage and the concept of risk transfer.<sup>10</sup> The

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6. DAVID M. ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY* 10 (John M. Conley & Lynn Mather eds., 2016).

7. *Id.* at 15.

8. For a theoretical discussion as to where a line could potentially be drawn, see discussion *infra* Part IV.

9. Philip L. Bruner, *The Historical Emergence of Construction Law*, 34 WM. MITCHELL L. REV. 1, 12 (2007) (“Construction’s complexity has created recognized public safety risks, which in turn has led to increased governmental regulation of the construction process through legislative imposition of licensing laws, safety regulations, and building codes.”).

10. See MARSHALL WILSON REAVIS III, *INSURANCE: CONCEPTS & COVERAGE* 66

risk transfer concept dictates that “[a] risk of economic loss that could be caused by a particular loss exposure can be transferred to another party through a provision in a contract.”<sup>11</sup> Specifically, within the construction industry,

[property] owners will compel general contractors to provide trade contract indemnity via hold harmless agreements and, perhaps more importantly, insurance protection through the requirement that the owners be added as additional insureds under identified policies of insurance issued to the general contractors. General contractors then continue to pass risk down by compelling their subcontractors to do the same, naming the general contractor as an additional insured in policies where the subcontractor is the named insured.<sup>12</sup>

Under this model, many, if not most, contractual relationships between property owners, general contractors, and subcontractors require liability insurance that covers defense, settlement, and judgment costs arising from injuries on a worksite and shifting liability risks “downstream.”<sup>13</sup>

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(2012).

11. *Id.*

12. Dan D. Kohane & Jennifer A. Ehman, *Insurance Law*, 68 SYRACUSE L. REV. 914, 930 (2018) (footnote omitted). I am grateful to Dan and Jennifer for allowing me to contribute to their New York State Insurance Law Survey spanning July 1, 2016, through June 30, 2017. Although not a focus of this piece, “[a] hold harmless agreement is an example where a [downstream] contractor assumes the liability of a building owner [or other contractor] for any loss that might occur while the contractor is working on the building.” REAVIS, *supra* note 10, at 66.

13. See Nicholas N. Nierengarten, *New ISO Additional Insured Endorsements*, 44 BRIEF 30, 31 (2014); Trisha Strode, *From the Bottom of the Food Chain Looking Up: Subcontractors Are Finding That Additional Insured Endorsements Are Giving Them Much More Than They Bargained For*, 23 ST. LOUIS U. PUB. L. REV. 697, 702 (2004); see also Terry J. Galganski et al., *A Construction Lawyer’s Top 10 Additional-Insured Considerations*, 30 CONSTRUCTION LAW. 5, 14 (2010) (“When drafting a contract provision to ensure your client is properly named as an additional insured, the following basic rules should be followed: (1) as part of the contract negotiating process, the party seeking additional-insured status should request a copy of the additional-insured endorsement that provides such coverage from the other party, (2) assure the most important coverage for an additional insured is obtained through the other party’s primary CGL policy, and (3) the contract and the additional-insured endorsement should provide that the underlying insurance is primary.”).

It is clear that contractual relationships often require a “downstream” subcontractor to list its “upstream” general contractor(s) and property owner(s) as additional insureds under its CGL insurance policy.<sup>14</sup> What is less clear of these relationships is the extent to which coverage must be afforded absent fault on behalf of the subordinate entity. An additional insured’s coverage “is typically limited to liability arising out of the named insured’s work or operations . . . [and] does not provide coverage to an additional insured for the additional insured’s own work or operations.”<sup>15</sup> Most often, CGL policies utilize additional insured endorsements published by the Insurance Services Office, Inc. (ISO), “an association of approximately 1,400 domestic property and casualty insurers . . . [and] the almost exclusive source of support services in this country for CGL insurance,” which “develops standard policy forms and files or lodges them with each State’s insurance regulators.”<sup>16</sup>

In no sense are additional insured endorsements a new concept. The ISO first introduced such additional insured endorsements in 1973, originally in two separate varieties known as “Form A” and “Form B.”<sup>17</sup> These forms were developed to fill a need with respect to the extension of

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14. See Strode, *supra* note 13, at 702; Ellen Chappelle, *The Evolution of Additional Insured Endorsements*, 23 CONSTRUCTION LITIG. 10, 10 (2014).

15. 3 STEVEN PLITT ET AL., COUCH ON INSURANCE § 40:26 (3d ed. 2017).

16. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772 (1993); *see also* First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc., 48 F. Supp. 3d 158, 173 n.17 (D. Conn. 2014); BILL WILSON, WHEN WORDS COLLIDE: RESOLVING INSURANCE COVERAGE AND CLAIMS DISPUTES 49 (2018) (stating that, except for inland marine insurance forms, “ISO forms tend to dominate the marketplace, especially in commercial lines”); Steven G.M. Stein & Jean Gallo Wine, *The Illusions of Additional Insured Coverage*, 34 CONSTRUCTION LAW. 14, 14 (2014) (“The influence of the ISO on the language contained in CGL policies cannot be overstated, and the majority of CGL policies either follow the ISO forms to the letter or draw heavily on language issued by the ISO.”); Strode, *supra* note 13, at 703. Not to be forgotten, many insurers issuing property and casualty insurance policies use forms issued by the American Association of Insurance Services (AAIS) as well.

17. James D. O’Connor, *Additional Insured Coverage: The Why, The What & The Wherefore*, 11 J. AM. COLL. CONSTR. LAW. 69, 69 (2017).



liability from worksite injuries to property owners and/or developers.<sup>18</sup> At that point in time, the scope of coverage under these forms was significantly limited, with the more expansive Form B granting additional insured status to a covered entity only with respect to claims reasonably tied to the work the named insured was providing the additional insured, protecting only direct liability exposure for the owner.<sup>19</sup> The intended niche that additional insured coverage originally sought to fill was readily apparent in the ISO's use of the phrase "owners and lessees," with "contractors" only added several years later in 1985.<sup>20</sup>

Since 1973, there have been several iterations of these ISO forms, and the application of additional insurance provisions, including whether they extend to "direct liability, vicarious liability, or something in between," is dependent upon the wording of the particular endorsement used.<sup>21</sup> Some commentators have cautioned that "[i]t is, of course, the language of the endorsements which controls, not self-serving notions circulated in the insurance industry as to

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18. *Id.*

19. *Id.*

20. *Id.*

21. Nierengarten, *supra* note 13, at 32; *see also* 4 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 11:338 (2018) ("Twenty years ago, additional insured endorsements came in two flavors: the short form and the long form. Today there are more flavors than found in a Baskin-Robbins ice cream shop. There are endorsements that limit coverage to ongoing operations; whereas others cover completed operations. Many endorsements have a written agreement requirement, but this also can vary from an enforceable written agreement to an 'insured contract' as defined by the policy. Some policies apply only to liability the additional insured incurs as a result of the sole negligence of the named insured. Others are characterized by 'caused in whole or in part' language."); JOHN H. MATHIAS, JR. ET AL., INSURANCE COVERAGE DISPUTES § 1.01 (2017) ("The form of the endorsement extending 'additional insured' status may determine whether coverage is extended to additional insureds for liabilities resulting from their own acts or omissions or only for their vicarious liability for the acts of the named insured. Thus, care must be used in assessing the extent of coverage afforded by virtue of an 'additional insured' endorsement.").

what the forms were intended to do.”<sup>22</sup> In essence, although the purpose and intent behind the ISO’s choice of language may be relevant to the meaning of the endorsement that is crafted, it is the courts that will ultimately determine whether the legal interpretations of the policy language are all that different than previous iterations used.

The ISO’s “CG 20 33 07 04” standard form additional insured endorsement modifies who is considered an insured under a CGL policy, reading in pertinent part:

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

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22. SCOTT C. TURNER, *INSURANCE COVERAGE OF CONSTRUCTION DISPUTES* § 42:4 (2d ed. 2017). This is not a new concept when it comes to interpreting the language in insurance policies, and insurance industry intent is often viewed as but one factor in the equation. *See, e.g., Tri-Star Theme Builders, Inc. v. OneBeacon Ins. Co.*, 426 F. App’x 506, 512 (9th Cir. 2011) (“The intent of the insurance industry draftsmen . . . is not controlling. . . . Such evidence ‘might be persuasive if the controversy . . . were between two insurers,’ or if it suggested that the language reflected the *mutual intent* of the parties.”); Randy Maniloff, *Additional Insured Endorsements: ISO’s Revisions*, PUB. LIABILITY, May 2004, at M.23-2 (“It is often said—and for good reason—that the analysis of any insurance coverage issue must begin with the policy language itself.”); *id.* at M.23-6 (“The real test, of course, is not whether insurers can convince themselves that their policy language achieves their drafting intent, but courts. After all, insurers were no doubt certain that the predecessors to form CG 20 10 07 04 were perfectly suited to achieve the intended result concerning the extent of coverage available for additional insureds. And then the black robes had their say.”). *But see* WILSON, *supra* note 16, at 69 (noting that ISO forms filings can be invaluable extrinsic information when interpreting “the intent of policy language”); *id.* at 101.

behalf . . . .<sup>23</sup>

As with many areas of business, the insurance industry tends to react as relevant precedent is formulated by the courts that modifies the risks involved in “doing an insurance business.”<sup>24</sup> In accordance with this industry-wide trend, the most commonly used “additional insured endorsement[s]” have evolved over time from broad coverage for the owner’s own negligence to narrow coverage for exactly what is specified in the construction contract.<sup>25</sup> The “caused, in whole or in part, by” language included in the July 2004 version of the ISO standard form above reflects the ISO’s acknowledgement that its prior “arising out of” phrasing had been interpreted by courts too broadly.<sup>26</sup> Beyond what the

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23. ISO PROPERTIES, INC., ISO COMMERCIAL GENERAL LIABILITY FORM CG 20 33 07 04 (2004).

24. See generally WILSON, *supra* note 16, at 42 (“[I]nsurers, or form standards organizations like the Insurance Services Office, Inc. (ISO) . . . do not write policies for insureds, but rather they craft and then modify policies for the courts that are the ultimate arbiters of coverage. Many policy provisions have already been interpreted by the courts, in particular precedent-setting appeals courts. . . . [W]hen these appellate courts render interpretations that are either unexpected or unintended from the standpoint of the insurance industry, endorsements may be issued to tweak a policy term to better clarify the policy language.”). For more information regarding the scope of what it means to be conducting a business of insurance in New York State, see N.Y. INS. LAW § 1101 (McKinney 2018).

25. Chappelle, *supra* note 14, at 12.

26. See Maniloff, *supra* note 22, at M.23-2 to M.23-5. Although the “ISO’s filing memorandum does not mention by name any of the cases that have construed the phrase ‘arising out of’ broadly,” *id.* at M.23-2, cases like *Regal Constr. Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 930 N.E.2d 259 (N.Y. 2010) and *Maroney v. New York Cent. Mut. Fire Ins. Co.*, 839 N.E.2d 886 (N.Y. 2005) are two such examples in New York State, albeit decided subsequent to the ISO revisions, since existing insurance policies still contained the outmoded endorsements. Interestingly enough, the ISO’s intentions with these revisions seem to suggest that they sought to *have their cake and eat it too*. See Maniloff, *supra* note 22, at M.23-2 (“Ironically, while ISO laments a broad construction of the phrase ‘arising out of’ in its additional insured endorsements, insurers have benefited from the broad construction that courts have given to the phrase ‘arising out of’ when it appears in a policy exclusion. Many courts have held that, when used in a policy exclusion, the phrase ‘arising out of’ means ‘but for.’ As a result, policy-holders have sometimes been left to believe that coverage has been improperly denied because of exclusions that have painted with too broad a

ISO intended, the broad interpretation by the majority of courts was that the phrase “arising out of” extended the scope of coverage to encompass an additional insured’s sole negligence, so long as the injury was causally connected to the business relationship of the named insured and additional insureds.<sup>27</sup> In an industry where the predictability of future risks occurring is central and foundational, such a broad interpretation reduced the accuracy of the valuation and pricing of coverage premiums:

Many courts interpreted “arising out of” to be a simple causation test and, therefore, afforded direct primary coverage to the additional insured. The ISO hope[d] that, by substituting “caused by” for “arising out of,” a narrower coverage interpretation will be afforded. Moreover, the revised language specific[d] that coverage is afforded the additional insured for liability arising out of the named insured’s “acts or omissions,” not simply the named insured’s operations. Arguably, the absence of fault on behalf of the named insured results in a finding of no coverage for the additional insured.<sup>28</sup>

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brush. It seems that what the phrase ‘arising out of’ giveth to insurers in exclusions, it taketh away in additional insured endorsements.”).

27. Jack P. Gibson & W. Jeffrey Woodward, *The 2004 ISO Additional Insured Endorsement Revisions*, 25 CONSTRUCTION LAW. 5, 5–6 (2005); see also Nierengarten, *supra* note 13, at 32 (“Most courts have held that the phrase ‘arising out of’ covers both direct and vicarious liability.”); O’Connor, *supra* note 17, at 101 (“Courts . . . rejected vicarious liability end-run attempts, reasoning that the change in the ‘standard’ form language only sought to put an end to AI ‘sole negligence’ coverage.”). In fact, many states have statutory provisions rejecting any indemnity for the sole negligence of the potential indemnitee, often leaving questions pertaining to the enforceability of additional insured endorsements that arguably provide such coverage. See generally Allen Holt Gwyn & Paul E. Davis, *Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law*, 23 CONSTR. LAW. 26, 28–33 (2003) (providing a grid summarizing the anti-indemnity statutes and related case law in all fifty states).

28. BRUNER & O’CONNOR, *supra* note 21, § 11:338; see also Patrick J. O’Connor, Jr., *Recent Developments in Insurance Law*, 7 J. AM. C. CONSTRUCTION LAW. 1 (2013) (“The insurance industry developed additional insured endorsements that did away with the ‘arising out of’ the named insured’s operations and replaced it with ‘caused, in whole or in part, by’ the named insured. This was done to avoid the ‘fault-free interpretation’ that many courts had given the ‘arising out of’ language. On the one hand, the ‘caused, in whole or in part, by’ standard is not remarkably more stringent than a fault-free trigger for additional insured coverage. If the named insured is arguably one percent at

Other commentators and practitioners have shared this view, given that “[t]his is, after all, the named insured’s policy, and the only way one is supposed to obtain additional insured coverage is if there is actual liability on the part of the named insured . . . .”<sup>29</sup> Generally, the ISO’s CG 20 10 07 04 form is thought to cover concurrent liability on behalf of both the named and additional insureds.<sup>30</sup> Additionally, the inclusion of “in part” limits coverage for the additional insured’s own liability to scenarios in which “the acts or omissions of the named insured (or those acting on its behalf, such as subcontractors) played at least some *part* in causing the injury or damage at issue[]”:<sup>31</sup>

The clear intent of the 2004 modification of both new AI forms was to reduce the scope of coverage to the AI and expressly link AI coverage to the Named Insured’s own involvement in the acts giving rise to the claim against the AI. By conditioning coverage to the AI upon the Named Insured’s “causal” behaviors, the new endorsement closed the “sole negligence” loophole that had bedeviled the

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fault, then coverage, at least a defense obligation, is made out. In practice, however, this trigger presents some problems . . . .”); BRUNER & O’CONNOR, *supra* note 21, § 11:334 (same); John Liner Organization, *Using Additional Insured Endorsements*, THE JOHN LINER LETTER, Aug. 2004, at 1 (“This filing continues a decade-old trend in which ISO and insurers have *eroded* the value of additional insured endorsements. More and more, insurers are making it clear that you cannot use an additional insured endorsement as your own insurance policy to cover costs *unrelated* to the negligence of the named insured.”).

29. Jeff Sistrunk, *NY Ruling Curtails Contractors’ Additional Insured Coverage*, LAW 360 (June 7, 2017, 10:46 PM), <https://www.law360.com/articles/932049/ny-ruling-curtails-contractors-additional-insured-coverage> (quoting Larry Golub, Partner at Hinshaw & Culbertson LLP).

30. Nierengarten, *supra* note 13, at 32 (“The objective was to eliminate coverage for the AI’s sole negligence but continue to provide coverage for the AI’s own liability even if the AI’s fault was a major cause, provided that the named insured’s activities played some part in the injuries or damages.”); *see also* Maniloff, *supra* note 22, at M.23-6 (“[W]hile it is accurate to say in general terms that form CG 20 10 07 04 provides coverage for an additional insured for its *contributory negligence*, a review of the policy language reveals that there is an important qualification to this intended grant of coverage.”).

31. Roberta Anderson, *ISO’s 2013 “Additional Insured” Endorsement Changes Merit Close Attention*, 23 INS. COVERAGE LITIG., May-June 2013, at 33, 35 (2013).

construction industry.<sup>32</sup>

To help frame the discussion that follows, it is important to understand that the question of whether or not an entity is an additional insured under a policy is critical. Unlike non-coverage by way of a policy exclusion, the lack of additional insured status serves to negate the policy's grant of coverage to said entity altogether.<sup>33</sup> At the very least, a "complaint may need to allege some negligence on the part of the named insured to trigger coverage for the additional insured" under the ISO's July 2004 revisions.<sup>34</sup> However, such a minimum standard of pleading does not answer the full scope of coverage to be afforded, if any coverage is to be afforded at all.

As early as May 2006, courts began interpreting the "caused, in whole or in part, by" language in additional insured endorsement language.<sup>35</sup> In *American Empire*

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32. O'Connor, *supra* note 17; *see also* John Liner Organization, *supra* note 28, at 2-3 ("ISO and insurers contend that the intent is to primarily cover the additional insured's *vicarious liability*.").

33. Harco Constr., LLC v. First Mercury Ins. Co., 49 N.Y.S.3d 495, 497-98 (App. Div. 2017). As an aside, I credit University at Buffalo School of Law Adjunct Professor and Legal Practitioner, Dan Kohane, for sharing his aptly named "Kohane Coverage Formula," which establishes that an insurance policy's Coverage = [(WI) - WO] + CPC, where WI stands for what is initially within the coverage of the four corners of the policy (i.e., "what's in"), WO stands for what has been excluded from such initial coverage by the terms of the policy (i.e., "what's out"), and CPC stands for compliance with policy conditions for which non-compliance (i.e., a value of zero) may eliminate coverage altogether. Thus, a lack of additional insured status would never reach WI, as opposed to being removed from coverage by way of an exclusion under WO. *See* Hurwitz & Fine, P.C., *Coverage Pointers - Volume IX, No. 24* (May 29, 2008), <https://www.hurwitzfine.com/news/coverage-pointers-volume-ix-no-24>.

34. Galganski et al., *supra* note 13, at 7; *see also* Maniloff, *supra* note 22, at M.23-6 ("[I]f an additional insured is [alleged to have been] contributorily negligent in conjunction with certain parties, but none of which are the named insured, then the policy provision requiring that injury or damage be caused *in part by the named insured* (or one acting on its behalf) would not appear to be satisfied.").

35. *See* Am. Empire Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co., No. Civ. H-06-0004, 2006 WL 1441854, at \*6 (S.D. Tex. May 23, 2006); *see also* Bruce Smith, *Insurance Coverage for Construction Projects*, NEB. LAW., April

*Surplus Lines Insurance Co. v. Crum & Forster Specialty Insurance Co.*,<sup>36</sup> the general contractor for a residential construction project, Finger Companies (Finger), subcontracted the framing work for the project to Multi Building Inc. (Multi).<sup>37</sup> As part of their contract, Multi agreed to obtain a CGL policy naming Finger as an additional insured.<sup>38</sup> Crum & Forster Specialty Insurance Company (Crum) issued Multi a policy of insurance naming as an additional insured “persons or organizations as required by written contract [with Multi].”<sup>39</sup> The inclusion of “as required by written contract” language is common practice for CGL policies that are issued in the construction industry, making it possible for a single policy of insurance to encompass multiple construction contracts and projects efficiently, without the need to modify or reissue insurance policies for each.

Unfortunately, the residential construction project was not without its share of tragedy. In September 2004, Jose Ricardo Romero was killed and Angel Martinez was injured when they fell from a makeshift aerial lift comprised of a “trash box” affixed to a forklift.<sup>40</sup> Suit was filed by Romero’s spouse and children in the Southern District of Texas.<sup>41</sup> Subsequently, Romero’s spouse and children amended their Petition to allege that both Finger and Multi were negligent.<sup>42</sup> The outcome of two opposing motions for

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2006, at 16, 20 (noting that as of April 2006, no case law had yet interpreted the “caused, in whole or in part, by” endorsement revisions).

36. 2006 WL 1441854 (S.D. Tex. May 23, 2006).

37. *Id.* at \*1.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at \*2.

42. *Id.* I note that in this case the Crum policy included the ISO’s CG 20 10 01 04 that clearly establishes “[t]here is no coverage for the additional insured for ‘bodily injury’ . . . arising out of the sole negligence of the additional insured or by those acting on behalf of the additional insured.” *See* American Empire’s

summary judgment rested on the meaning of the phrase “whole or in part” included in the additional insured endorsement of the Crum policy.<sup>43</sup> Thus, the district court was presented with a question as to whether the “whole or in part” language obligated Crum to provide a defense for Finger following the plaintiff’s filing of the First Amended Petition.<sup>44</sup>

The Southern District of Texas was unpersuaded by Crum’s interpretation of the endorsement as requiring vicarious or derivative liability prior to the extension of additional insured status to Finger.<sup>45</sup> A reasonable interpretation of the language as written indicated that additional insured coverage should be afforded where Finger and Multi were found jointly liable or negligent.<sup>46</sup> The absence of the terms “derivative” or “vicarious” meant that the liability to which the additional insured endorsement applied was based entirely upon the conduct of the named

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Memorandum of Law, *Am. Empire*, 2006 WL 1441854 app. at 85 (No. 4:06-cv-00004). As the court correctly points out, the “sole negligence” provision is inapplicable where the allegations in a petition suggest multiple negligent parties throughout its various theories of negligence. *Am. Empire*, 2006 WL 1441854, at \*4 n. 6; *see also*, Maniloff, *supra* note 22, at M.23-6 (“An interesting footnote to form CG 20 10 07 04 is what it does not state. Form CG 20 10 06 04, a predecessor to form CG 20 10 07 04, was filed by ISO and then quickly withdrawn. The 06 04 version of form CG 20 10 included the following additional language: ‘There is no coverage for the additional insured for “bodily injury,” “property damage” or “personal and advertising injury” arising out of the sole negligence of the additional insured or by those acting on behalf of the additional insured.’ Thus, for coverage geneticists, the 06 04 thousand dollar question is what gave ISO a problem with including this language in its final revision to form CG 20 10 10 01. This writer has a few ideas. However, there is enough to be said about the policy language that was ultimately adopted without spending time discussing the contents of ISO’s cutting room floor.” (citing *Revisions to Additional Insured Endorsements*, ISO COMMERCIAL GENERAL LIABILITY FORMS FILING GL-2004-OFGLA, at 3 (2004))).

43. *Am. Empire*, 2006 WL 1441854, at \*4.

44. *Id.* at \*6.

45. *Id.* at \*6–7.

46. *Id.* at \*7 & n.13 (adopting this interpretation and acknowledging in footnote thirteen the same reasoning used by Gibson & Woodward, *supra* note 27, at 5–6).



insured, Multi, and whether or not it was at least partially responsible for the injuries sustained.<sup>47</sup> Because the allegations in the Petition alleged negligence on the part of Finger “and/or” Multi, the additional insured endorsement was triggered, requiring Crum to honor its defense obligation to Finger.<sup>48</sup>

Beyond the Southern District of Texas 2006 decision in *American Empire*, the trend of various courts across the country has been to restrict independent coverage of additional insureds.<sup>49</sup> Subsequent to 2006, the language “caused, in whole or in part, by” has

typically [been] interpreted to restrict coverage for additional insureds to situations in which the injury was caused, at least in part, by the primary policyholder. For example, courts in Pennsylvania, Texas, Maine, Maryland, North Carolina, and New Hampshire have held that the “caused by” language in an ISO-template insurance policy necessitates liability on the part of the primary policyholder in order to trigger coverage for the additional insured.<sup>50</sup>

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47. *Id.* But see John Liner Organization, *supra* note 28, at 4 (stating that “[t]he revised ISO endorsements do not mention ‘vicarious liability,’ but the intent is to limit coverage to the additional insured’s exposure to vicarious liability and liability from contributory negligence. Some insurers have taken this one step further, covering an additional insured *only* for its vicarious liability.”).

48. *Am. Empire*, 2006 WL 1441854, at \*7–8. Interestingly, the Petition in this case explicitly alleges that the acts or omissions of Finger “and/or” Multi “taken separately and/or collectively, singularly and/or cumulatively, constitute a direct and proximate cause of [Romero’s] death.” American Empire’s Memorandum of Law, *supra* note 42, at 219. Since the time of this decision, courts have required the establishment of proximate cause before coverage is afforded under an additional insured endorsement containing the exact same “caused, in whole or in part, by” language. See discussion *infra* Part II.

49. Gary Thompson & Elizabeth Leavy, *Your Contract Requires You To Be Named as an Additional Insured: Are You?*, LEXOLOGY (June 13, 2017), <https://www.globalregulatoryenforcementlawblog.com/2017/06/articles/government-contracts/your-contract-requires-you-to-be-named-as-an-additional-insured-are-you/>.

50. *Id.*

II. ADDITIONAL INSURED STATUS IN THE  
VACUUM OF NON-LIABILITY

There are benefits to exploring questions of critical importance in a controlled environment. However, such exploration has its limits. Probably the most important of all limitations involves the unlikelihood of arriving within such a controlled environment in actual practice. And this unlikelihood tends to raise more questions than answers regarding the application of the resulting precedent.

This Part introduces the crux of the incursion of *Palsgraf*-ian proximate cause from tort law to the world of insurance coverage litigation. The “vacuum of non-liability” created in light of a faultless named insured gives rise to the heart of my thesis. Although this Part will show how simplistic the application of *Palsgraf*-ian proximate cause is where the named insured was not even minimally at fault, it is this faultless environment that has catalyzed the implementation of this tort concept in the insurance context in the first place and has led primarily to this discussion regarding just how far the concept can be extended.

Many of the construction industry lawsuits in New York State occur within Manhattan and the Bronx, where job-related accidents are frequently litigated in New York’s First Department.<sup>51</sup> The questions that arise in construction accident litigation are rarely limited to what adequate compensation for an injury will be. Rather, the question is usually what combination of entities will be responsible for paying such sum upon a finding that compensation is warranted. In the world of construction litigation, with the layering of contracts and parties, variables such as liability are rarely certain—except when they are. A recent New York case, *Burlington Insurance Co. v. NYC Transit Authority*,<sup>52</sup> sheds some interesting light on exactly how the ISO’s “caused, in whole or in part, by” language should be

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51. Kohane & Ehman, *supra* note 12, at 930.

52. 79 N.E.3d 477 (N.Y. 2017).

interpreted for providing coverage to an additional insured. However, it simultaneously raises additional questions.

Prior to the New York State Court of Appeals' interpretation in *Burlington*, New York's First Department had interpreted identical additional insured endorsements in a series of cases, determining that

an insurer who agreed to provide additional insured protection was obligated to afford such coverage, irrespective of the named insured's negligence, so long as there was some tangential relationship between the work performed by the named insured and the accident that led to the lawsuit. That was the case even though the additional insured endorsements provided that coverage would only be provided if the accident was "caused in whole or in part" by the acts or omissions of the named insured.<sup>53</sup>

Generally, in pre-*Burlington* New York construction law cases, "if [a] subcontractor was involved with [a] loss in a more tenuous way, there was a general understanding that [additional insured] coverage would likely be triggered . . ."<sup>54</sup> Owners and general contractors relied upon the adequacy of coverage provided by the "downstream" subcontractor's insurer, and subcontractors merely relayed the level of coverage required contractually in its "upstream" agreements to its insurer.

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53. Kohane & Ehman, *supra* note 12, at 930 (footnote omitted); *see also* Nova Cas. v. Harleysville Worchester Ins. Co., 50 N.Y.S.3d 1, 1–2 (App. Div. 2017) ("Harleysville is obligated to provide a defense and indemnity for [the additional insured], even if Coastal is ultimately found to have no liability in the underlying action."); Aspen Specialty Ins. Co. v. Ironshore Indem. Inc., 42 N.Y.S.3d 121, 122 (App. Div. 2016) ("While the policy issued by Ironshore to [the named insured] refers, with respect to coverage for additional insureds, to 'losses "caused by" [the named insured's] "acts or omissions" or "operations," the existence of coverage does not depend upon a showing that [the named insured's] causal conduct was negligent or otherwise at fault."); *Burlington Ins. Co. v. NYC Transit Auth.*, 14 N.Y.S.3d 377, 384 (App. Div. 2015) ("The loss . . . resulted, at least in part, from 'the acts or omissions' of the [named insured] . . . , regardless of whether the [named insured] was negligent or otherwise at fault for his mishap." (quoting *Kel-Mar Designs, Inc. v. Harleysville Ins. Co. of N.Y.*, 8 N.Y.S.3d 304 (App. Div. 2015))).

54. Sistrunk, *supra* note 29 (third alteration in original) (quoting Suzanne Whitehead, Senior Associate at Zelle McDonough & Cohen LLP).

That all changed when *Burlington* reached the New York State Court of Appeals. On one particularly unfortunate Valentine's Day in 2009, an employee of the New York City Transit Authority (NYCTA), Thomas Kenny, attempted to avoid an explosion and fell from an elevated bench wall.<sup>55</sup> At the time, Kenny had been working around the active excavation of a subway tunnel near the Nostrand Avenue Subway Station in Brooklyn, New York.<sup>56</sup> The explosion occurred when an excavation machine operated by Breaking Solutions, Inc. (Breaking) struck a live electrical wire that was embedded in concrete.<sup>57</sup> At all relevant times surrounding the accident, NYCTA was leasing the premises from the City of New York, and had contracted with Breaking to perform demolition work in the subway tunnels.<sup>58</sup>

Following his fall, Thomas Kenny and his wife, Patricia, sued the City of New York and Breaking, seeking compensation for his injuries.<sup>59</sup> However, in February 2011, Breaking filed a Motion to Dismiss, claiming that Breaking bore “no liability for [Kenny’s] accident whatsoever” and that

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55. *Burlington*, 79 N.E.3d at 479.

56. *Id.*; Complaint at 2–3, *Kenny v. City of New York*, 2011 WL 4460598 (E.D.N.Y. 2011) (No. 09-cv-1422) [hereinafter *Kenny Complaint*].

57. *Burlington*, 79 N.E.3d at 479.

58. *Kenny*, 2011 WL 4460598, at \*1.

59. *Id.* For a description of the types of injuries (and their extent) which one may experience at a construction site, see *Kenny Complaint*, *supra* note 56, at 4 (“[P]laintiff . . . sustained injuries to his limbs and body, and injuries to his nervous system, and other systems of his body, shock to his nervous system, anxiety, stress, and suffering; has suffered, suffers and will suffer physical pain, mental anguish, and the loss of the enjoyment of the pursuits and pleasures of life, disruption of the activities of daily living, and other personal injuries; some of which are and will be permanent in nature; that plaintiff has received, receives and will receive medical, surgical, hospital and health care treatment and care, and has and will incur expenses for medical, surgical, hospital, and health care providers and health care treatment; and has been, is and will be confined to hospital, bed and/or home as a result thereof; plaintiff has lost, and will lose time from employment, employment earnings, and/or employment perquisites; all to his damage, in a sum, . . . however, not exceeding \$10,000,000.00.”).

“[t]he true culprit [was] third-party defendant, [NYCTA].”<sup>60</sup> Breaking’s letter indicated that NYCTA had conducted an undisputed accident investigation, revealing that during NYCTA’s “pre-work inspection of the subject work area, NYCTA failed to identify and/or mark-off the subject power cables.”<sup>61</sup> Moreover, “during [its] pre-work walk-through, the NYCTA failed to use electrical detection equipment to locate buried power cables. Furthermore, . . . the power cables were improperly installed by NYCTA and were not included in any power/electrical schematics maintained by NYCTA.”<sup>62</sup> A separate report prepared by NYCTA indicated that Breaking was “operating the equipment properly and had no way of knowing that the cables were submerged in the [concrete] invert.”<sup>63</sup> In response, the Kennys moved to discontinue the action against Breaking, and the court dismissed the action against Breaking with prejudice by way of stipulation.<sup>64</sup> Accordingly, both the City of New York and Breaking Solutions, Inc. stipulated to withdraw their cross-claims against one another, which were each subsequently dismissed by the court.<sup>65</sup>

Breaking was afforded reprieve in the underlying action, but as with the bulk of insurance litigation, found its insurer, Burlington Insurance Company (Burlington), dragged into subsequent litigation regarding who would be financially responsible for Mr. Kenny’s injuries.<sup>66</sup> Breaking, in accordance with NYCTA’s contractual insurance requirements, purchased a CGL insurance policy from

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60. Breaking Solutions, Inc. Motion to Dismiss at 1, *Kenny*, 2011 WL 4460598 (No. 09-cv-1422).

61. *Id.* at 2.

62. *Id.*

63. *Id.*

64. *Kenny*, 2011 WL 4460598, at \*4; see also Plaintiff Motion for Discontinuance at 1, *Kenny*, 2011 WL 4460598 (No. 09-cv-1422).

65. *Kenny*, 2011 WL 4460598, at \*1 n.1, \*4.

66. See *Burlington Ins. Co. v. NYC Transit Auth.*, 79 N.E.3d 477, 478 (N.Y. 2017).

Burlington that included NYCTA and the City of New York as additional insureds under certain conditions.<sup>67</sup> As agreed to by NYCTA and Breaking, the Burlington policy included endorsement language from the latest form issued by the ISO, providing that NYCTA and the City of New York were additional insureds:

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.<sup>68</sup>

The City of New York, following Thomas Kenny’s filing of suit, impleaded NYCTA in the underlying action, asserting third-party indemnification and contribution claims pursuant to their lease agreement.<sup>69</sup> NYCTA tendered its defense to Burlington, asserting that it was an additional insured under the CGL policy issued to Breaking.<sup>70</sup> Burlington accepted the defense, but reserved its rights to withdraw should NYCTA fail to qualify as an additional insured.<sup>71</sup>

As stated above, discovery in the underlying lawsuit revealed that it was NYCTA’s failure “to identify, mark, or protect the electric cable” that ultimately led to the employee’s injuries.<sup>72</sup> The stipulation leading to the dismissal of Kenny’s lawsuit against Breaking with prejudice prompted Burlington’s disclaimer of coverage for NYCTA, asserting that without fault on behalf of its named insured, Breaking, NYCTA was not an additional insured under the

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67. *Id.* at 479.

68. *Id.*

69. *Id.* (“Under article VI, § 6.8 of that lease agreement, NYCTA agreed to indemnify the City for liability ‘arising out of or in connection with the operation, management[,] and control by the [NYCTA]’ of the leased property.”).

70. *Id.*

71. *Id.* at 479–80.

72. *Id.* at 480.

policy.<sup>73</sup> In other words, “Burlington denied coverage to NYCTA . . . on the grounds that [it] w[as] not [an] additional insured[] within the meaning of the policy because NYCTA was solely responsible for the accident that caused the injury.”<sup>74</sup> Regardless of such findings, under previous iterations of the ISO’s additional insured endorsements, such fault would be irrelevant, as the incident had occurred within the course of Breaking’s ongoing operations for the NYCTA project. However, this was not your father’s CGL policy,<sup>75</sup> but rather the most recent iteration which included the “caused, in whole or in part, by” terminology.

In this significant New York insurance decision, Burlington commenced a declaratory judgment action against NYCTA, seeking a judicial determination that NYCTA was not owed coverage as an additional insured under the CGL policy issued to Breaking.<sup>76</sup> The New York State Supreme Court granted Burlington’s motion for summary judgment, agreeing that NYCTA could not be an additional insured unless the named insured, Breaking, was negligent.<sup>77</sup> The New York State Appellate Division, First Department, reversed, concluding that “the named insured was not negligent, but ‘the act of triggering the explosion . . . was a cause of [the employee’s] injury’ within the meaning of the policy.”<sup>78</sup> The New York State Court of Appeals granted Burlington leave to appeal.<sup>79</sup>

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73. *Id.*

74. *Id.* at 478–79.

75. This pays homage to Oldsmobile’s (in)famous ad slogan “not your father’s Oldsmobile.” Coincidentally, the year 2004 marked the end for both General Motors’ Oldsmobile and the ISO’s “arising out of” version of additional insured endorsement.

76. *Burlington*, 79 N.E.3d at 480.

77. *Id.*

78. *Id.* (quoting *Burlington Ins. Co. v. NYC Transit Auth.*, 14 N.Y.S.3d 377, 382 (App. Div. 2015)).

79. *Id.*; *see also Burlington Ins. Co. v. NYC Transit Auth.*, 56 N.E.3d 898 (N.Y. 2016) (granting leave to appeal).

Burlington maintained that “under the plain meaning of the endorsement NYCTA . . . [is] not [an] additional insured[] because the acts or omissions of the named insured, [Breaking], were not a proximate cause of the injury” and thus “the coverage does not apply where, as here, the additional insured was the sole proximate cause of the injury.”<sup>80</sup> In opposition, NYCTA asserted that the express terms of the endorsement applied to “*any* act or omission by [Breaking] that resulted in injury, regardless of the additional insured’s negligence” and “that [Breaking’s] operation of its excavation machine provided the requisite causal nexus between injury and act to trigger coverage under the policy.”<sup>81</sup>

The Court of Appeals at length dissected the differences between “but for” causation, or causation in fact, and “proximate” or “legal” cause.<sup>82</sup> Where “but for” causation is “[t]he cause without which the event could not have occurred,”<sup>83</sup> liability only extends as far as it is assigned by the Court, and “because of convenience, . . . public policy, [and] a rough sense of justice, the law arbitrarily declines to trace a series of events beyond [its proximate cause].”<sup>84</sup>

Interestingly, the New York Court of Appeals used proximate cause language from *Palsgraf v. Long Is. Railroad Co.*<sup>85</sup> This “*Palsgraf*-ian” style proximate cause, famously included in the dissenting opinion of Justice Andrews, legally severs the chain of liability without regard to the possibility

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80. *Burlington*, 79 N.E.3d at 480–81.

81. *Id.* at 481 (emphasis in original).

82. *Id.*

83. *Id.* (alteration in original) (quoting *But-For Cause*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

84. *Id.* (citing *Ventricelli v. Kinney Sys. Rent A Car*, 383 N.E.2d 1149, 1149–50 (N.Y. 1978) (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting))).

85. *Id.*



of an actual causal connection or actual fault.<sup>86</sup> In theory, such an application of “*Palsgraf*-ian” proximate cause in the context of additional insured coverage may allow for the possibility of the elimination of coverage where the named insured is even one-percent at fault.<sup>87</sup>

Continuing on these principles, Burlington’s use of the language “caused, in whole or in part’ [by Breaking]” in the policy endorsement required the Court to distinguish between mere “but-for” causes and the “proximate,” legal cause of the injuries sustained, “since ‘but for’ causation cannot be partial.”<sup>88</sup> The Court determined that the “words—‘in whole or in part’—can only modify ‘proximate cause.’”<sup>89</sup> Moreover, with Burlington’s use of the term “liability,” that requires a showing of fault, the Court of Appeals concluded that if additional insured coverage is afforded “only with respect to liability,” then the language “caused, in whole or in part, by” restricts such coverage to damage caused by the negligent or otherwise actionable “acts or omissions” of

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86. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

87. See Peter N. Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal Causation “Riddles”*, 43 TORT TRIAL & INS. PRAC. L.J. 1, 34 (2007). However, in practice, such a legal determination that would allow for the denial of coverage on behalf of any insured is asking a lot, given the public policy concerns of compensating the injured and rejecting unnecessary forfeiture of coverage. I stress that such a determination would need to be made under the right factual scenario, and caution that in selecting just such a scenario, one must remember the old adage that “bad facts make bad law.” This is especially true in an insurance industry and context that is, at its core, concerned with the predictability of the happening of covered risks.

88. *Burlington*, 79 N.E.3d at 482.

89. *Id.* But cf. Sistrunk, *supra* note 29 (“Attorneys who represent policyholders said the majority’s decision to interpret the additional insured endorsement as requiring a proximate cause standard, even though those exact words don’t appear in the provision, marks a departure from well-established policy interpretation principles. . . . ‘For the court to put “proximately” in there, it added a word to a contract that was already written and, not only that, it is a word with great legal significance,’ said Anderson Kill PC shareholder Allen R. Wolff.”).

Breaking.<sup>90</sup> Applying the facts at issue to these causation principles, the Court held that

[Breaking] was not at fault. The employee's injury was due to NYCTA's sole negligence in failing to identify, mark, or deenergize the cable. Although but for [Breaking's] machine coming into contact with the live cable, the explosion would not have occurred and the employee would not have fallen or been injured, that triggering act was not the proximate cause of the employee's injuries since [Breaking] was not at fault in operating the machine in the manner that led it to touch the live cable.<sup>91</sup>

Without fault on behalf of the named insured, Breaking, the Court of Appeals reversed the First Department and granted Burlington's motion for summary judgment, agreeing that the insurer did not owe NYCTA coverage as an additional insured under the policy.<sup>92</sup>

The holding in *Burlington* was indeed consistent with the goal of the ISO to eliminate a fault-free interpretation of coverage.<sup>93</sup> Following the Court of Appeals decision in *Burlington*, it was anticipated by those involved in insurance litigation that construction contracting and insurance in the state of New York would be significantly impacted. As a

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90. *Burlington*, 79 N.E.3d at 482. *But see id.* at 483 (agreeing with the dissent that the language "caused . . . by" does not necessitate negligence on behalf of the named insured before additional insured coverage is to be afforded). Interestingly, the Court of Appeals neglected to decide that "negligence" must be found on behalf of the named insured. Some commentators have suggested that the ISO's lack of use of the term "negligence" in relation to the "acts or omissions" that must give rise to liability may have been on purpose, so as to prevent the exclusion of "intentional" acts giving rise to liability and fault on behalf of the named insured. DONALD S. MALECKI ET AL., *THE ADDITIONAL INSURED BOOK* 200 n.2 (6th ed. 2011) ("The reference to *acts* rather than *negligent acts* of the named insured is necessary because endorsement CG 20 10 applies to personal and advertising injury as well as bodily injury and property damage. Personal and advertising injury offenses may constitute volitional or intentional conduct where no negligence is involved. For the same reason, coverage exists for the additional insured with respect to bodily injury and property damage, even if that injury or damage results from the named insured's intentional (rather than negligent) act.").

91. *Burlington*, 79 N.E.3d at 484.

92. *Id.* at 485–86.

93. BRUNER & O'CONNOR, *supra* note 21, § 11:338.

result of the decision, “[l]arge general contractors or owners that thought they were getting additional insured coverage for their own fault under this endorsement are no longer going to get that in New York,” and instead, “there is only [additional insured] coverage if the downstream subcontractor is actually at fault.”<sup>94</sup> Many of those “upstream” in this new, post-*Burlington*, reality have considered adjusting contracted insurance requirements to explicitly provide the broadly interpreted “arising out of” language of additional insured coverage afforded in the ISO’s 10 01 form that had allowed for mere “but for” causal connection arising under the ongoing operations of the “downstream” subcontractor.<sup>95</sup>

Under the same “caused, in whole or in part, by” language, other courts have confronted questions similar to those faced by the New York Court of Appeals in *Burlington*. But again, how frequently is the issue of liability readily eliminated for the named insured at the outset of litigation following a construction accident and lawsuit? Interestingly, the Superior Court of Massachusetts in *Leahy v. Lighthouse Masonry, Inc.*<sup>96</sup> confronted a very similar scenario to that in *Burlington*, where all liability for the named insured had been ruled out, and the court was left to interpret “caused, in whole or in part, by” language in a vacuum.

In *Leahy*, an employee of General Mechanical Contractors, Inc. (GMC), Vincent Leahy, was seriously injured by a large limestone panel that fell off a building.<sup>97</sup> The general contractor for the construction project, Daniel

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94. Sistrunk, *supra* note 29 (quoting David Wood, partner at Barnes & Throngburg LLP).

95. Julian D. Ehrlich, *Reaction and Overreaction to 'Burlington v. NYC Transit Auth.'*, N.Y.L.J. (Feb. 27, 2018, 02:30 PM), <https://www.law.com/newyorklawjournal/2018/02/27/reaction-and-overreaction-to-burlington-v-nyc-transit-auth/>.

96. No. MICV201100151, 2014 WL 7405931 (Mass. Super. Ct. June 2, 2014).

97. *Id.* at \*1. All parties involved no doubt found themselves between the proverbial rock and a hard place.

O’Connell’s Sons, Inc. (O’Connell), had contracted with GMC to install the heating, ventilation, and air conditioning on site.<sup>98</sup> The contract required GMC to obtain a CGL policy that named O’Connell as an additional insured, and GMC obtained such a policy from Peerless Insurance Company (Peerless).<sup>99</sup>

Lighthouse Masonry, Inc. (Lighthouse), another subcontractor, was responsible for installing limestone panels on the exterior wall of the building.<sup>100</sup> While Mr. Leahy was on break below, a Lighthouse foreman accidentally dislodged a limestone panel installed days earlier, which subsequently fell and seriously injured Mr. Leahy.<sup>101</sup> O’Connell’s site superintendent had personally walked through the area of the accident two or three times that morning and believed that it was a safe place for employees to take their break since no overhead work was being performed there.<sup>102</sup> The undisputed facts of the case show that Mr. Leahy’s injuries were caused by Lighthouse, or at the very least not by GMC.<sup>103</sup> Lighthouse ultimately settled claims covered by its CGL and excess liability insurers for \$7,250,000.<sup>104</sup>

The Peerless CGL policy provided that additional insured coverage should be afforded to “O’Connell for any liability that is ‘caused, in whole or in part, by . . . acts or omissions’ of GMC.”<sup>105</sup> The court acknowledged that the phrase “caused by” in an insurance policy “embodies the concept of proximate causation.”<sup>106</sup> In the insurance context,

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98. *Id.* at \*3.

99. *Id.* at \*5.

100. *Id.* at \*3.

101. *Id.* at \*4.

102. *Id.* at \*3.

103. *Id.* at \*8.

104. *Id.* at \*4.

105. *Id.* at \*8.

106. *Id.*; *see also* United Nat’l Ins. v. Parish, 717 N.E.2d 1016, 1018 (Mass. App.

the court explained,

[w]hen an insurance policy covers and indemnifies an insured for losses “caused by” a certain category of events, the scope of coverage must be determined based on whether “the efficient proximate cause of the loss” is within that category of events. Under such an insurance provision, a loss is “caused by” the event “that sets in motion a train of events which brings about a result without the intervention of any force stated and working actively from a new and independent source,” which in legal jargon we call “the direct and proximate cause” of the loss. “Remote causes of causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings.”<sup>107</sup>

Since it was undisputed that Mr. Leahy’s injuries were caused by the acts or omissions of Lighthouse, rather than GMC, the court held that Peerless had no obligation to indemnify under either its CGL policy or umbrella liability policy, where the umbrella liability policy was wholly contingent upon the existence of CGL coverage.<sup>108</sup>

### III. “CAUSED, IN WHOLE OR IN PART, BY” AND THE BROAD DUTY TO DEFEND

In both *Burlington* and *Leahy*, the determination of liability for the named insured had been made prior to any need for the courts to analyze the insurer’s duty to indemnify any potential additional insureds under the policy, because no entity qualified without fault on behalf of the named insured. Since the insurer’s duty to indemnify was clearly non-existent for the general contractor and property owner, the insurer was also not required to provide any defense for litigation, simply because they were not insured under the policy. But outside of such “controlled environment” litigation, where the named insured is even one-percent at

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Div. 1999) (determining that “arising out of” has a broader meaning than “caused by”).

107. *Leahy*, 2014 WL 7405931 at \*8 (citations omitted).

108. *Id.*

fault, how should courts handle an insurer's broad duty to defend?

In this Part, practitioners are reminded to evaluate coverage disputes responsibly. For every evaluation of an insurer's duty to indemnify, it is necessary to evaluate an insurer's duty to defend. The limitations of *Palsgraf*-ian proximate cause are further clouded by the breadth of disparity between the two.

When purchasing an insurance policy that provides coverage for certain risks, the insured actually purchases both "liability insurance" and "litigation insurance."<sup>109</sup> Both coverages extend to any person or entity that meets the policy's definition of an "insured," including an additional insured.<sup>110</sup> Generally, the duty of an insurer to pay for the defense costs of its insured is broader than any obligation that the insurer may have to indemnify that insured.<sup>111</sup> It is well understood in insurance litigation that courts look to the allegations levied against an insured in making a determination regarding the insurer's duty to defend.<sup>112</sup> Specifically, "[t]he duty to defend is measured against the allegations of pleadings but the duty to pay is determined by

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109. *See* *Auto. Ins. Co. of Hartford v. Cook*, 850 N.E.2d 1152, 1155 (N.Y. 2006); *Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272, 274–75 (N.Y. 1984); *Int'l Paper Co. v. Cont'l Cas. Co.*, 320 N.E.2d 619, 621 (N.Y. 1974) ("While policy coverage . . . is often referred to as 'liability insurance' it is clear that it is, in fact, 'litigation insurance' as well.").

110. *PLITT ET AL.*, *supra* note 15, § 40:29.

111. *Goldberg v. Lumber Mut. Cas. Ins. Co.*, 77 N.E.2d 131, 133 (N.Y. 1948) ("[E]ven in cases where the policies do not render the allegations by the injured party controlling, it has been said: 'The distinction between liability and coverage must be kept in mind. So far as concerns the obligation of the insurer to defend the question is not whether the injured party can maintain a cause of action against the insured but whether he can state facts which bring the injury within the coverage. If he states such facts the policy requires the insurer to defend irrespective of the insured's ultimate liability.'").

112. *Prashker v. U.S. Guarantee Co.*, 136 N.E.2d 871, 875 (N.Y. 1956) ("The circumstance that some grounds are alleged in the complaints in the negligence actions which would involve the insurance company in liability is enough to call upon it to defend these actions."); *see also* *Doyle v. Allstate Ins. Co.*, 136 N.E.2d 484, 486–87 (N.Y. 1956).

the actual basis for the insured's liability to a third person."<sup>113</sup> This defense obligation encompasses allegations no matter how "groundless, false or fraudulent."<sup>114</sup> Because of these vastly different thresholds to the defense and indemnity obligations, a court would relieve an insurer of its duty to defend "only if it could be concluded as a matter of law that there [was] no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify . . . under any provision of the insurance policy . . ."<sup>115</sup> An example pertinent to our analysis would be a finding that an entity was neither a named, nor additional insured under the policy, whereby no coverage or indemnity obligation would exist under the policy as a matter of law.<sup>116</sup>

Although cases like *Burlington, Leahy* and their kin

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113. *Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford*, 477 N.E.2d 441, 444 (N.Y. 1985).

114. *BP Air Conditioning Corp. v. OneBeacon Ins. Grp.*, 871 N.E.2d 1128, 1132 (N.Y. 2007) (quoting *Servidone Constr. Corp.*, 477 N.E.2d at 444); see also *James G. Davis Constr. Corp. v. Erie Ins. Exch.*, 126 A.3d 753, 762 (Md. Ct. Spec. App. 2015) ("[T]he underlying tort suit need only *allege* action that is *potentially covered* by the policy, no matter how attenuated, frivolous, or illogical that allegation may be.").

115. *Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 352 N.E.2d 139, 140 (N.Y. 1976); see also *MATHIAS ET AL.*, *supra* note 21, § 8.01 ("By definition, an insurer need indemnify its policyholder *only for those claims that actually are covered* by the policy. In contrast, any action asserting claims that may *potentially* fall within the coverage of the policy gives rise to the duty to defend. The same standard for determining the duty to defend applies to additional insureds as to the primary named insured." (first emphasis added)).

116. See, e.g., *Worth Constr. Co. v. Admiral Ins. Co.*, 888 N.E.2d 1043, 1045–46 (N.Y. 2008) (declining to afford a general contractor additional insured status under a subcontractor's insurance policy where the injured party conceded claims of negligence against the subcontractor were without factual merit); see also *MATHIAS ET AL.*, *supra* note 21, § 8.01 ("If an insurer can show that there clearly would be no coverage for the ultimate liability, or that the claim is subject to a clear policy exclusion, no duty to defend exists."); Alan J. Pierce, *Insurance Law*, 59 SYRACUSE L. REV. 887, 891 (2009) ("[A]dditional insured coverage does not extend to circumstances where the additional insured concedes, or it has been determined that the named insured was not negligent and the named insured is not on the work site at the time of the injury."). Although *Worth* involved the pre-2004 ISO language "arising out of," it establishes that without insured status of some kind, there is no defense obligation.

appear to convey a definitive rule for interpreting the language “caused, in whole or in part, by,” they fail to address how courts apply proximate cause where liability is less certain. On the opposite extreme, where courts have been asked to determine whether an insurer must defend an entity under an additional insured endorsement and the named insured’s liability remains uncertain, courts are often reluctant to eliminate an insurer’s broad defense obligation.<sup>117</sup>

In *Pro Con, Inc. v. Interstate Fire & Casualty Co.*, a construction company, Pro Con, Inc. (Pro Con), was the general contractor for the construction of a college hockey rink.<sup>118</sup> After subcontracting with Canatal Industries Inc. (Canatal) for structural steel work, Canatal, in turn, subcontracted with CCS Constructors, LLC (CCS) for the actual steel erection.<sup>119</sup> Pursuant to the terms of the contract between the subcontractors, CCS was required to (and ultimately did) procure a CGL policy from Interstate Fire and Casualty Company (Interstate) under which Canatal, Pro Con, and Bowdoin College were named as additional

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117. See *First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc.*, 48 F. Supp. 3d 158 (D. Conn. 2014); *Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 794 F. Supp. 2d 242 (D. Me. 2011); *Gilbane Bldg. Co. v. Empire Steel Erectors*, No. H-08-1707, 2010 WL 4791493, at \*6–7 (S.D. Tex. Nov. 16, 2010); see also Maniloff, *supra* note 22, at M.23-8 (“As a result of a sue-first-and-gather-the-facts-later pleading strategy, the underlying plaintiff’s suit is likely to name several potentially negligent parties, in addition to the actually negligent party (the additional insured). Thus, even if it is ultimately determined that the additional insured was solely responsible for the injuries, or contributorily negligent—but not in conjunction with the named insured, the additional insured will likely secure a defense. This will likely be accomplished by the additional insured citing the duty to defend standard and pointing to the allegations in the underlying complaint that the plaintiff’s injury was caused in whole or in part by the named insured’s acts or omissions, or of those acting on its behalf, as required by form CG 20 10 07 04. And as insurers know all too well—especially those involved in construction losses—the duty to defend is frequently far more costly than the duty to indemnify.”).

118. *Pro Con*, 794 F. Supp. 2d at 245.

119. *Id.*



insureds.<sup>120</sup>

In the dead of winter, a CCS crane operator, Stephen E. Williams, fell and was injured after he slipped on snow-covered plastic insulating blankets installed by Pro Con at the Bowdoin College construction site.<sup>121</sup> Although the accident occurred in the course of Mr. Williams' work for CCS, Pro Con may have been advised prior to his fall that frost blankets were dangerous.<sup>122</sup> Mr. Williams filed suit against Pro Con, alleging negligent failure to maintain reasonably safe working conditions on site.<sup>123</sup> Pro Con responded by alleging Mr. Williams was comparatively negligent, filing a third-party action against Canatal for contractual and common law indemnity, and filing a fourth-party suit against CCS alleging that CCS was obligated to indemnify Canatal.<sup>124</sup>

Subsequently, Pro Con's insurer, American International Group, Inc. (AIG) tendered Pro Con's defense and indemnity to CCS and its insurer, Interstate,<sup>125</sup> which was rejected.<sup>126</sup> Interstate's investigation indicated that

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120. *Id.* at 245–46.

121. *Id.* at 248.

122. *See id.* (“Following Williams’ accident, on December 10, 2007, Terry Carpenter, CCS’s superintendent on the Bowdoin Project, sent Pro Con a letter reiterating what he characterized as a prior request that the frost blankets covering the building perimeter in CCS’s work area be removed in order to prevent further injuries.” (emphasis added)).

123. *Id.*

124. *Id.*

125. *Id.* at 248–49; *see also* Blecker Aff. Ex. B, *Pro Con*, 794 F. Supp. 2d 242 (No. 21-3) (tendering Pro Con’s defense and indemnity to Interstate via certified letter). As an aside, AIG’s tender letter on behalf of Pro Con solely relies upon Mr. Williams’ employment by CCS as the basis for the assertion that “the incident arose out of CCS’ work.” *Id.* However, the language “arising out of” in the ISO’s standard additional insured endorsement was modified to “caused, in whole or in part, by” in 2004 specifically to create more stringent standards of causation that must apply before coverage is afforded under a policy. Maniloff, *supra* note 22, at M.23-5; *see also* discussion *infra* Part IV (regarding *Pioneer Cent. Sch. Dist. v. Preferred Mut. Ins. Co.*).

126. *Pro Con*, 794 F. Supp. 2d at 249; *see also* Blecker Aff. Ex. F, *Pro Con*, 794

Mr. Williams slipped and fell while exiting the crane he was operating. The fall was due to the fact that Pro Con had placed, or requested to be placed, insulated blanket ground cover around the job site work area which was then covered with snow. This created the slippery condition that was the cause of the accident.<sup>127</sup>

Thus, relying upon its investigation, Interstate rejected the tender because the accident was confirmed not to have been “caused in whole or in part by” the CCS’s acts or omissions.<sup>128</sup>

In assessing whether Interstate had a duty to defend Pro Con, the District of Maine interpreted the policy’s additional insured endorsement as “plainly requir[ing] that there be some connection between the operations on behalf of the Additional Insured (i.e., Pro Con) and the Named Insured (i.e., CCS).”<sup>129</sup> Relying on this interpretation and reviewing the language in the underlying complaint, the court determined that Mr. Williams “was performing work within the scope and course of his employment with CCS when he was injured,” and thus Pro Con’s potential for liability arose out of CCS’s operations.<sup>130</sup> Combined with the fact that the complaint was void of reference to Pro Con’s installation of the tarps, the court held that “[f]rom these allegations, there . . . is certainly the potential that . . . the fact finder [might] determin[e] that Williams’ bodily injuries were caused, at least in part by, the acts or omissions of CCS (or its agents) in the performance of these operations.”<sup>131</sup>

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F. Supp. 2d 242 (No. 21-7) (notifying AIG via certified letter of Interstate’s rejection of AIG’s tender of defense and indemnity on behalf of Pro Con).

127. Blecker Aff. Ex. F, *supra* note 126, at 1.

128. *Pro Con*, 794 F. Supp. 2d at 249; *see also* Blecker Aff. Ex. F, *supra* note 126, at 2.

129. *Pro Con*, 794 F. Supp. 2d at 254. *But see* Cincinnati Ins. Co. v. Mo. Highways & Transp. Comm’n, No. 4:12-CV-01484-NKL, 2014 WL 4594207, at \*12 (W.D. Mo. 2014) (acknowledging that the use of “caused by” language in an endorsement requires more than the establishment of a “simple causal relationship” between the injury and the activity of the insured, but rather something more closely resembling proximate cause in general tort law).

130. *Pro Con*, 794 F. Supp. 2d at 254.

131. *Id.* at 257.

The analysis in *Pro Con* is but one example of the problem courts have in interpreting “caused, in whole or in part, by” language in the context of the broad duty to defend. Similarly, the District of Connecticut in *First Mercury Insurance Co. v. Shawmut Woodworking & Supply, Inc.*<sup>132</sup> encountered the application of an additional insured endorsement to an insurer’s duty to defend. In *First Mercury*, the catastrophic collapse of a steel web structure during its installation at Yale University’s Science Area Chilled Water Plant Shell caused injuries to several Fast Trek Steel (Fast Trek) employees, including the death of Robert F. Adrian.<sup>133</sup> The general contractor for the project, Shawmut Woodworking & Supply, Inc. (Shawmut), had subcontracted the steel fabrication and construction work to Shepard Steel Company (Shepard).<sup>134</sup> Shepard, in turn, subcontracted the steel erection portion of work to Fast Trek.<sup>135</sup> As required by contract, Fast Trek obtained a CGL insurance policy from First Mercury that included both Shawmut and Shepard as “additional insureds.”<sup>136</sup>

Following the collapse and injuries, the injured Fast Trek employees and Mr. Adrian’s estate filed suit against Shawmut and Shepard, who tendered their defenses to First Mercury and demanded indemnity pursuant to the Additional Insured Endorsement in its policy issued to Fast

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132. 48 F. Supp. 3d 158 (D. Conn. 2014), *aff’d*, 660 F. App’x 30 (2d Cir. 2016). I note the important distinction between the New York Court of Appeals decision in *Burlington*, which solely addresses an insurer’s duty to indemnify, and the *First Mercury* decision, pertaining only to an insurer’s broad duty to defend. However, *First Mercury* provides an interesting discussion of the “caused, in whole or in part, by” language in relation to both “proximate cause” and “vicarious liability,” and is included for this purpose.

133. *Id.* at 160. See generally Egidio DiBenedetto, *1 Dead, 3 Injured in Science Park Construction Accident*, YALE DAILY NEWS (Sept. 14, 2010, 2:18 AM), <https://yaledailynews.com/blog/2010/09/14/1-dead-3-injured-in-science-park-construction-accident/> (detailed description of incident).

134. *First Mercury*, 48 F. Supp. 3d at 160.

135. *Id.*

136. *Id.*

Trek.<sup>137</sup> The endorsement in the First Mercury Policy provides coverage for

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.<sup>138</sup>

First Mercury contended, *inter alia*, that the language “only with respect to liability for ‘. . . injury’ caused, in whole or in part, by,” required it to provide a defense to Shawmut and Shepard “only for instances where vicarious liability is imputed to [Shawmut and/or Shepard] as a result of acts or omissions of Fast Trek, apart from their own independent acts or omissions.”<sup>139</sup> However, the district court declined to add language to First Mercury’s policy endorsement that was not included in the express language of the policy, refusing to modify “liability” to “vicarious liability.”<sup>140</sup>

Moreover, the district court noted that the limitation to “liability” proposed by First Mercury would fail to give effect to the phrase “in whole or in part.”<sup>141</sup> “Vicarious liability”

137. *Id.* at 160–61 (“Liberty Mutual is . . . providing a defense to Shepard and Shawmut under a reservation of rights and has made demand upon First Mercury to assume that defense, . . . maintaining that First Mercury has a duty to defend Shawmut and Shepard as additional insureds under the policy issued by First Mercury.”).

138. *Id.* at 163–64; *see also* Liberty Mutual Memorandum of Law in Support of Cross Motion for Summary Judgment, Ex. F at 3–4, *First Mercury*, 48 F. Supp. 3d 158 (No. 3:12-cv-01096) (adopting the 2004 version of the ISO’s standard CGL Additional Insured Endorsement, CG 20 33 07 04).

139. *First Mercury*, 48 F. Supp. 3d at 172.

140. *See id.* at 172–73.

141. *Id.* at 172.

would be incompatible with the “caused, in whole or in part, by” language, because “vicarious liability is an all or nothing proposition and thus a party could not be vicariously liable ‘in part’ for Fast Trek’s acts.”<sup>142</sup> Relying on the District of Maine’s reasoning in *Pro Con*, which interpreted identical endorsement language, the District of Connecticut agreed that “the insurer, ‘by including the language “in whole or in part” in [the additional insured provision], specifically intended coverage for additional insureds to extend to occurrences attributable in part to acts or omissions by both the named insured *and* the additional insured.”<sup>143</sup>

The District of Connecticut in *First Mercury* continued by addressing the history of modifications to the ISO’s additional insured endorsement.<sup>144</sup> Reacting to a history of additional insured status extensions to entities for their sole negligence, the ISO in 2004 replaced the language “arising out of the named insured’s acts or omissions” in its standard additional insured endorsement with the language “caused, in whole or in part, by” the named insured’s acts or omissions.<sup>145</sup> The change to the “caused . . . by” language eliminated coverage for the sole negligence of an additional insured, and was interpreted to “require proximate causation by the insured rather than simply but-for causation.”<sup>146</sup> Since “liability” was included in both versions of the endorsement, it was interpreted to be a factor in the causation determination, contrary to *First Mercury*’s “vicarious liability” contention.<sup>147</sup>

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142. *Id.* at 173.

143. *Id.* (alteration in original) (quoting *Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 794 F. Supp. 2d 242, 256–57 (D. Me. 2011)).

144. *Id.* at 173–74.

145. *Id.*

146. *Id.* at 174.

147. *Id.*; see also *Royal Indem. Co. v. Terra Firma, Inc.*, 948 A.2d 1101 (Conn. Super. Ct. 2006) (interpreting “liability” in the same manner, as a piece of the causation question), *aff’d and adopted by* 947 A.2d 913 (Conn. 2008).

The District of Connecticut consulted the *Pro Con, Inc.* decision, which had conducted a similar discussion regarding variations in the exact additional insured endorsement language utilized and, more specifically, the impact when “caused, in whole or in part, by” language was included.<sup>148</sup> Whereas the express language included in endorsements analyzed in the recent past had plainly called for “vicarious liability”<sup>149</sup> or excluding coverage for claims based on the sole negligence of the additional insured,<sup>150</sup> such cases did not include “caused, in whole or in part, by” language. The District of Maine instead relied upon recent federal court decisions analyzing that language in particular, requiring that the named insured be at least a proximate cause of the injuries.<sup>151</sup>

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148. *See Pro Con, Inc. v. Interstate Fire & Cas. Co.*, 794 F. Supp. 2d 242, 255–58 (D. Me. 2011).

149. *See MacArthur v. O’Connor Corp.*, 635 F. Supp. 2d 112, 116 (D.R.I. 2009) (“Vicarious liability by definition is ‘liability that a supervisory party . . . bears for the actionable conduct of a subordinate or associate . . . based on the relationship between the two parties.’ This definition comports exactly with the language of the additional insured endorsement because [the additional insured] is only covered in those instances when they are liable for the conduct of [the named insured], their subordinate.” (citation omitted)).

150. *Boise Cascade Corp. v. Reliance Nat’l Indem. Co.*, 129 F. Supp. 2d 41, 48 (D. Me. 2001) (“Based on the certificate [providing that the general contractor] was an additional insured but only with respect to liability arising out of the negligent acts or omissions of the [named insured], . . . in no event would [the general contractor] be entitled to coverage under the [insurance policy] for bodily injury arising out of [the general contractor’s] own acts or omissions.”).

151. *Pro Con*, 794 F. Supp. 2d at 256–57; *see also Dale Corp. v. Cumberland Mut. Fire Ins. Co.*, No. 09-1115, 2010 WL 4909600, at \*7 (E.D. Pa. Nov. 30, 2010) (finding that the allegations in the underlying complaint did not “trigger [the insurer’s] duty to defend because they do not in any way implicate [the named insured] as required by the additional insured endorsement,” which required a showing that the injuries were caused “in whole or in part” by the named insured’s negligence); *Gilbane Bldg. Co. v. Empire Steel Erectors, L.P.*, No. H-08-1707, 2010 WL 4791493, at \*6–7 (S.D. Tex. Nov. 16, 2010) (“The new . . . additional insured endorsement requires the injury to be ‘caused, in whole or in part, by’ the named insured in order for coverage to be triggered. Thus, in the absence of fault of the named insured, there should be no coverage for an additional insured. . . . The inference [in the underlying state petition] that [the employee] was at least partly at fault in causing his own injuries is sufficient to trigger the duty to defend under the [insurer’s] policy.” (citations omitted)).

Following this interpretation of “caused, in whole or in part, by” as requiring proximate cause, the District of Connecticut concluded

that Shawmut’s and Shepard’s “liability” must be “caused, in whole or in part” by Fast Trek’s acts or omissions means that coverage under the Additional Insured Endorsement is not limited to Shawmut’s and Shepard’s vicarious liability for Fast Trek’s acts or omissions but instead refers more broadly to liability that is caused, at least in part, by Fast Trek, but excludes situations involving only the independent acts of negligence of the additional insureds.<sup>152</sup>

Contrary to the insurer in *Burlington*, whose insured was found without fault following NYCTA internal reports on the incident, First Mercury was on notice from an Occupational Safety and Health Administration report that Fast Trek was at least partially at fault for the accident.<sup>153</sup> Thus, First Mercury was responsible for providing a defense for Shawmut and Shepard.<sup>154</sup>

Other jurisdictions have followed similar reasoning. The Southern District of Texas in *Gilbane Building Co. v. Empire Steel Erectors, L.P.*<sup>155</sup> couched its discussion of the duty to defend under “caused, in whole or in part, by” language in the concept of fault:

The new [2004 ISO] CG 20 10 additional insured endorsement requires the injury to be “caused, in whole or in part, by” the named insured in order for coverage to be triggered. Thus, in the absence of fault of the named insured, there should be no coverage for an additional insured.<sup>156</sup>

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152. *First Mercury*, 48 F. Supp. 3d at 174.

153. *First Mercury Ins. Co. v. Shawmut Woodworking & Supply, Inc.*, 660 F. App’x. 30, 35 (2d Cir. 2016), *aff’g* 48 F. Supp. 3d 158 (D. Conn. 2014). I again note that the court in *Burlington* confronted the question of the insurer’s duty to indemnify, rather than defend, although the concept of partial fault is pertinent to each.

154. *First Mercury*, 48 F. Supp. 3d at 175.

155. No. H-08-1707, 2010 WL 4791493 (S.D. Tex. Nov. 16, 2010).

156. *Id.* at \*6 (citing PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER AND O’CONNOR ON CONSTRUCTION LAW § 11:63.50 (2010)).

The underlying suit arose when Michael Parr, an employee of Empire Steel Erectors, L.P. (Empire Steel) fell off a ladder at a muddy construction site and was injured.<sup>157</sup> Mr. Parr sued the general contractor, Gilbane Building Company (Gilbane), alleging negligence.<sup>158</sup> Under their contract, Empire Steel was required to secure a CGL insurance policy naming Gilbane as an additional insured, which was obtained from Admiral Insurance Company (Admiral).<sup>159</sup>

Gilbane tendered its defense and indemnification to Empire Steel and Admiral.<sup>160</sup> Admiral denied the tender and disclaimed coverage, asserting that Gilbane was not an additional insured under the policy, and that, even assuming *arguendo* that Gilbane were an additional insured, the complaint failed to explicitly allege that Empire Steel was at fault, and in fact alleged that Mr. Parr’s “injuries were brought about to occur, directly and proximately by reason of the negligence of [Gilbane].”<sup>161</sup>

Again, the Southern District of Texas discussed the general contractor’s additional insured status under a lens of fault, declaring that where fault may exist on behalf of the named insured, an insurer’s duty to defend is triggered.<sup>162</sup> Although Parr’s complaint alleged that Gilbane was directly and proximately at fault for failing to provide working elevators at all times despite heavy rainfall and muddy conditions, the petition also stated Mr. Parr was indeed employed by Empire Steel and performing work under a

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157. *Id.* at \*1.

158. *Id.* Gilbane ultimately settled with Parr for \$165,000. *Id.*

159. *Id.*

160. *Id.* at \*2.

161. Admiral Disclaimer Letter at 4, *Gilbane Bldg. Co.*, 2010 WL 4791493 (S.D. Tex. Nov. 16, 2010) (No. H-08-1707) (modification in original) (quoting Parr Complaint, *Gilbane Bldg. Co.*, 2010 WL 4791493 (S.D. Tex. Nov. 16, 2010)); see also *Gilbane Bldg. Co.*, 2010 WL 4791493, at \*2, 6.

162. See *Gilbane Bldg. Co.*, 2010 WL 4791493, at \*6–7.



contract with Gilbane, and that Mr. Parr's injuries occurred while he was walking down the ladder in muddy boots.<sup>163</sup> Thus, Admiral's duty to defend Gilbane as an additional insured was triggered where an inference could be drawn that Parr was at least partly at fault for causing his own injuries by failing to clean his boots prior to his descent.<sup>164</sup>

In *James G. Davis Construction Corp. v. Erie Insurance Exchange*,<sup>165</sup> the Maryland Court of Special Appeals confronted the ISO's 2004 additional insured endorsement language in this context of an insurer's duty to defend as an issue of first impression. On a home construction project in Washington, D.C., James G. Davis Construction Corporation (Davis) was hired as the general contractor.<sup>166</sup> Davis enlisted the help of several subcontractors for the project, including Tricon Construction, Inc. (Tricon) to install drywall, insulation, and fireplaces on site,<sup>167</sup> as well as American Mechanical Services, who in turn sub-subcontracted with Frost Fire Insulation (Frost Fire) to perform air conditioning and insulation work.<sup>168</sup> As per the subcontract agreement between Tricon and Davis, Tricon was required to obtain a CGL policy of insurance naming Davis as an additional insured.<sup>169</sup>

With a general contractor, several subcontractors, and even sub-subcontractors, *James G. Davis Construction Corp.* is a reminder of the overlapping liabilities and responsibilities involved in construction litigation and the intricate insurance coverage scenarios that logically follow. The underlying tort litigation arose from injuries sustained by two Frost Fire employees when a scaffold, owned and

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163. *Id.* at \*6.

164. *Id.* at \*7.

165. 126 A.3d 753 (Md. Ct. Spec. App. 2015).

166. *Id.* at 755.

167. *Id.*

168. *Id.* at 756.

169. *Id.* at 755.

installed by Tricon, collapsed while they were performing their work.<sup>170</sup> The injured employees alleged one count of negligence against Tricon and another against Davis, contending that they had Davis' assurance that the scaffolding was safe and secure, and were in fact authorized to use Tricon's scaffold at the time of collapse.<sup>171</sup> Davis tendered its defense to Erie Insurance Exchange (Erie), who had provided Tricon with the insurance required under the subcontract agreement.<sup>172</sup> Erie declined to provide Davis with a defense, arguing that Davis was not an additional insured where the claims arose from its own negligence.<sup>173</sup>

With Maryland courts yet to construe an interpretation of the "caused, in whole or in part, by" language included in the Erie policy, the Court of Special Appeals relied on a relatively contemporaneous interpretation of such language by the Fourth Circuit Court of Appeals.<sup>174</sup> The Fourth Circuit, relying upon the persuasive authority in *Gilbane Building Co.*, concluded that "the language is quite clear that coverage is provided for the real estate development company, an additional insured, for 'property damages . . . caused in whole or in part by' the subcontractor."<sup>175</sup> Thus, as was the case in *Gilbane Bldg. Co.*, the Fourth Circuit held that identical language to that at issue in this matter "mean[t] that an insurer has a duty to defend an additional insured 'only if the underlying pleadings allege that' the named insured, 'or someone acting on its behalf, proximately

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170. *Id.*

171. *Id.* at 756–57.

172. *Id.* at 757.

173. *Id.*

174. *Id.* at 761 (citing *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London*, Subscribing to Policy Number: ARTE018240, 788 F.3d 375, 379–380 (4th Cir. 2015)).

175. *Id.* at 761–62 (citing *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London*, Subscribing to Policy Number: ARTE018240, 788 F.3d 375, 379–380 (4th Cir. 2015)).

caused' the injury or damage."<sup>176</sup>

Again, as had been reasoned by the Fifth Circuit in *Gilbane Building Co.*, the Fourth Circuit shared in the conclusion that the phrase "liability . . . caused, in whole or in part, by" included in the additional insured endorsement indicated coverage afforded to Davis

[could not] be limited exclusively to claims of vicarious liability for Tricon's acts. . . . [I]t is unreasonable to interpret the term "liability" as used in the 2004 version of the ISO standard form additional insured endorsement as referring to "vicarious liability" because vicarious liability is an all or nothing proposition and thus a party could not be vicariously liable 'in part' for the [named insured's] acts.

. . . .

Indeed, because vicarious liability is used to impute liability to "an innocent third party," such liability cannot be caused merely "in part." The third party to whom liability is imputed would not be "innocent" unless the wrongdoer's acts caused the liability "in whole." We, therefore, hold that the word liability in the policy at issue relates to proximate causation and not vicarious liability.<sup>177</sup>

Determining that Davis was indeed an additional insured under the Erie policy for liability caused either in whole or in part by Tricon's acts, the Fourth Circuit analyzed whether the allegations in the complaint triggered Erie's duty to defend its additional insured.<sup>178</sup> Under Maryland law, in order for an insurer's defense obligation to be triggered, "the underlying tort suit need only *allege* action that is *potentially covered* by the policy, no matter how attenuated, frivolous, or illogical that allegation may be."<sup>179</sup>

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176. *Id.* at 762 (citing *Capital City Real Estate, LLC v. Certain Underwriters at Lloyd's London, Subscribing to Policy Number: ARTE018240*, 788 F.3d 375, 379–380 (4th Cir. 2015) (quoting *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 598 (5th Cir. 2011))).

177. *Id.* at 762.

178. *Id.* at 762–63.

179. *Id.* at 762 (quoting *Sheets v. Brethren Mut. Ins. Co.*, 679 A.2d 540 (Md. 1996)). This language closely relates to the language followed in many states, including New York, which provides coverage if allegations in the complaint raise matters which may be covered, no matter if they are "groundless, false or fraudulent." See, e.g., *Utica Mutual Ins. Co. v. Cherry*, 343 N.E.2d 758, 758 (N.Y.

Thus, Erie was required to defend Davis if the allegations in the complaint potentially triggered coverage under the Erie policy by alleging that Tricon proximately caused the Frost Fire employees' injuries.<sup>180</sup>

The complaint in the underlying action asserted that both Tricon and Davis fell short of the requisite reasonable care "in erecting, positioning, and maintaining the scaffolding," leading to the Frost Fire employees' injuries.<sup>181</sup> Moreover, both Tricon and Davis were alleged to have been the "controlling employer at the construction site" and "had general supervisory authority over the construction site including the authority to correct safety violations."<sup>182</sup> The complaint, in fact, alleged negligence on behalf of Tricon alone, Davis alone, and Tricon and Davis together, in generating liability for the injuries of the Frost Fire employees.<sup>183</sup>

In reversing the trial court, the Court of Special Appeals of Maryland concluded that had the lower court analyzed whether Davis's liability was alleged to have arisen out of Tricon's ongoing operations, it would have concluded that Davis's liability was alleged to be "caused in whole, or in part" by the acts or omissions of Tricon while performing its "ongoing operations" for Davis.<sup>184</sup> Thus, such a finding would have compelled the conclusion that Davis had been sued for "liability arising out of Tricon's 'ongoing operations performed for' Davis," triggering the duty to defend Davis as an additional insured.<sup>185</sup>

Amidst uncertainty on the question of the named insured's potential liability, with the duty to defend granted

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1975).

180. *James G. Davis Construction Corp.*, 126 A.3d at 763.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 764.

185. *Id.*

such a breadth of application, the case law above suggests that the insurer may be without recourse. However, potential recourse for insurance companies may rest where torts and insurance law overlaps, an area courts are reluctant to discuss explicitly.

#### IV. POST-*BURLINGTON* REALITY AND *PALSGRAF*-IAN STYLE PROXIMATE CAUSE ENTERING THE REALM OF INSURANCE LAW

Despite understandable commentary expressing the view that the realms of tort and insurance law should be kept separate during the course of litigation, Part IV attempts to dispel such legal-fiction in light of *Burlington* and the infiltration of *Palsgraf*-ian proximate cause across this eroding no-man's land. Recent caselaw in New York discussed in this Part has not foreclosed the extension of *Palsgraf*-ian proximate cause beyond the "vacuum of non-liability," and it is foreseeable that *Burlington* may invoke sweeping change in the area of risk transfer under construction contracts.

Scholars in insurance law caution of the dangers of analogizing to the tort-based conceptions of but-for and proximate causation, claiming such comparisons are "unhelpful and often extremely misleading in an insurance law context."<sup>186</sup> The concept of legal or proximate causation in the realm of tort may foreclose liability against actors or entities without responsibility for a loss, distribute responsibility among various potential causal agents, and sever liability for consequences tenuously related to remote causes.<sup>187</sup> Tools such as proximate cause in tort law

were created specifically for fault-based inquiry. Using those same tools in insurance settings changes the contractual analysis in a fundamental way. It opens the door for morality-based decision patterns which produce illogical and unpredictable results in a

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186. Erik S. Knutsen, *Confusion about Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957, 970 (2010).

187. Banks McDowell, *Causation in Contracts and Insurance*, 20 CONN. L. REV. 569, 570 (1988).

contractual sphere. The proximate or dominant cause approach to insurance causation . . . advocates choosing the most “blameworthy” cause. It borrows heavily from proximate cause analysis in tort. There is a marked tendency in cases that adopt a dominant cause approach to implicitly assess relative “blame” or “fault” to a certain cause of a loss in a way other than as one of a faultless series of potential insurance coverage triggers. Coverage decisions then get made with reference, implicitly or explicitly, to the cause with the greatest relative blameworthiness. Read any insurance policy. No clause grants an insured coverage rights based on which loss trigger was most at fault in the moral sense of the word. The policies grant coverage based on the mere existence of a causal event that brought about a “happening” in reality. That is as lofty as “cause” is put in the insurance world.<sup>188</sup>

It is this dichotomy of insurance and tort that must be navigated for every case that calls for insurance coverage to ultimately indemnify an insured. However, “[w]hile causation is a pervasive problem in torts and not an important one in contracts, actions on insurance policies lie somewhere between the two.”<sup>189</sup> Although the question we have analyzed thus far can be viewed as a trigger of coverage for defense and indemnity costs in contract law, the trigger for additional insured status under “liability caused, in whole or in part” language following *Burlington* is, in practice, one of fault or blameworthiness firmly entrenched between these spheres.<sup>190</sup> As was the case in *Burlington*, although a named insured can undisputedly be the cause-in-fact that generates a loss, should the named insured’s conduct be less at fault, if at all, the blameworthy party and its insurer should bear the loss.<sup>191</sup>

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188. Knutsen, *supra* note 186, at 971 (footnotes omitted).

189. McDowell, *supra* note 187, at 571.

190. Usually a determination as to whether coverage exists or is excluded for the named insured’s liability under a policy consists of determining whether the behavioral trigger occurred within the language of the policy, and is a question not of “who is to blame and why” but merely “what happened.” Knutsen, *supra* note 186, at 969. However, the New York Court of Appeals requirement of fault on behalf of the named insured in *Burlington* prior to assigning additional insured status indicates that such a determination is more similar to a question of “who is to blame and why?”

191. See *Burlington Ins. Co. v NYC Transit Auth.*, 79 N.E.3d 477, 484 (N.Y.

Though insurance is arguably “the backbone of the tort system, it is not the tort system.”<sup>192</sup> Instead, “[i]t is a contractually driven loss-spreading mechanism.”<sup>193</sup> Courts attempt *ad nauseam* to maintain the separation between the parallel realms of tort and insurance law,<sup>194</sup> however concepts like proximate cause inherently tend to blend them together.<sup>195</sup> One particularly poignant example is the ethical concerns surrounding third-party payment taken in conjunction with the insurer’s duty to defend in the tort sphere. Although the insurer’s duty to defend an insured requires the compensation of an attorney to defend the insured in the underlying tort, this attorney is ethically required to honor the best interests of his client—the insured—and not the carrier.<sup>196</sup> Thus, the separation of tort and insurance law exaggerates the lack of incentives for both the plaintiff and defendant in an underlying tort action to present, for example, an intentional conduct argument with any gusto, whereby coverage would not exist.<sup>197</sup> Such a

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2017) (“Although but for [the named insured’s] machine coming into contact with the live cable, the explosion would not have occurred and the employee would not have fallen or been injured, that triggering act was not the proximate cause of the employee’s injuries since [the named insured] was not at fault in operating the machine in the manner that led it to touch the live cable.”).

192. Knutsen, *supra* note 186, at 970.

193. *Id.*

194. *See, e.g.,* Kaczmarek v. Shoffstall, 119 A.D.2d 1001, 1002 (N.Y. App. Div. 1986) (holding that an insurance company’s interests in the amount of the loss from an underlying tort case “are unrelated to the subject matter of the action and can in no way be characterized as claims or defenses to the action”). Any discussion of coverage is a fiction in the underlying civil litigation, and the jury should not hear about those issues, lest it impermissibly sway the fact-finders’ decision. These issues are instead discussed in a separate declaratory judgment action brought by the insurer, or subsequent direct action by a judgment creditor.

195. Knutsen, *supra* note 186, at 971–72.

196. *See* Pub. Serv. Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810, 815 n.\* (N.Y. 1981).

197. For an interesting example of this point, see *Auto. Ins. Co. of Hartford v. Cook*, 850 N.E.2d 1152 (N.Y. 2006). The Court in *Cook* held that a defense obligation existed because of allegations in the complaint of “negligently playing with a loaded shotgun; negligently pointing that shotgun at the abdomen of the decedent; negligently discharging that shot gun [sic] into the decedent’s

finding of intentional conduct would not only limit the ability of an injured party to receive compensation from an insolvent defendant, but alternatively limit the ability of a defendant to fulfill a judgment entered against them.<sup>198</sup> Despite the existence of a broad duty to defend, the inherent lack of representation of the insurer's interests in an underlying tort action results in the insurer protecting its interest through contemporaneous or subsequent declaratory judgment actions in the insurance sphere, based upon the ultimate question of indemnity.

In the aftermath of *Burlington*, no New York court has yet foreclosed the possibility that an insurer's indemnification obligation to a potential additional insured may be eliminated on proximate cause grounds where the named insured was only tenuously at fault. The first post-*Burlington* decision in New York to directly apply its

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abdomen", despite facts consisting of the following:

[F]our individuals gathered in the kitchen where Barber began demanding money from Cook while pounding his fists on the kitchen table. Cook, alarmed, drew his gun and demanded that they leave his house. Barber apparently laughed at the small size of the pistol, at which point Cook withdrew to his bedroom for a larger weapon. He picked up a loaded, 12 gauge shotgun and stood in his living room at the far end of his pool table. Cook again ordered them to leave the house. Although Barber started to head toward the door with his companions, he stopped at the opposite end of the pool table, turned to face Cook and told his companions to take anything of value, and that he would meet them outside because he had some business to attend to. When Barber menacingly started advancing toward Cook, Cook warned him that he would shoot if he came any closer. Cook aimed his gun toward the lowest part of Barber's body that was not obscured by the pool table—his navel. When Barber was about one step away from the barrel of the gun, Cook fired a shot into Barber's abdomen. Barber died later that day at a hospital.

*Id.* at 1154. While Cook was acquitted of criminal charges involving intentional conduct, *id.*, the evidentiary standard in a civil case is much lower. However, neither Cook nor the decedent wanted to see the insurance policy removed from the equation by arguing intentional conduct. *See id.*

198. The insurer is not without recourse, however, as it can protect its own interests separately by "litigating the issue of indemnification in a subsequent [or parallel] action in the event of a judgment for plaintiff in the personal injury action." *Kaczmarek*, 119 A.D.2d at 1002.



principles to the broad duty to defend was handed down in February 2018, but what was most interesting was its position (or lack thereof) on the insurer's indemnification obligation.<sup>199</sup> New York's First Department in *Vargas v. City of New York*, although acknowledging that proximate cause is necessary to establish a duty to indemnify,<sup>200</sup> remained true to New York's *BP A.C. Corp. v. OneBeacon Insurance Group*,<sup>201</sup> and applied the same broad duty to defend in the additional insured context as had existed for a named insured.<sup>202</sup> In essence, where the allegations in the complaint raised the possibility of negligent causation by the named insured, an insurer cannot avoid its duty to defend an entity that was included in the policy as an additional insured, unless proximate causation has specifically been eliminated.<sup>203</sup>

In *Vargas*, the City of New York (the City) contracted with E.E. Cruz & Tully Construction Co., a Joint Venture, LLC (Joint Venture) as general contractor for a construction project.<sup>204</sup> Joint Venture enlisted the help of a painting subcontractor, L&L Painting Co., Inc. (L&L) for the project, contractually requiring L&L to procure insurance that named Joint Venture and the City as additional insureds.<sup>205</sup>

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199. See *Vargas v. City of New York*, 71 N.Y.S.3d 415 (App. Div. 2018).

200. *Id.* at 417 (“[I]t was premature to declare that [the insurer] is obliged to indemnify the . . . defendants. . . . It has not yet been determined if [the subcontractor] was the proximate cause of plaintiff's injury.” (citing *Burlington Ins. Co. v. NYC Transit Auth.*, 79 N.E.3d 477 (2017))).

201. 871 N.E.2d 1128 (N.Y. 2007) (holding that an insurer's defense obligation is no different for an additional insured as it exists for a named insured on a policy).

202. *Vargas*, 71 N.Y.S.3d at 417.

203. Until such time as a court severs the causal chain for an entity one-percent or more at fault, it would seem that the court's definition of “proximate cause” in this context is an all-or-nothing proposition in practice, rather than proximate cause in the “*Palsgraf*-ian” sense.

204. *Vargas*, 71 N.Y.S.3d at 417.

205. *Id.* I have focused my attention on endorsements one through three, which required causation beyond the requirement of endorsement four. *Id.*

L&L obtained a CGL policy from Liberty Insurance Underwriters Inc. (Liberty) that named Joint Venture and the City as additional insureds.<sup>206</sup> In turn, L&L subcontracted with Camabo Industries, Inc. (Camabo).<sup>207</sup>

The plaintiff, Robert Vargas, was an employee of Camabo who alleged injuries from lead dust exposure that occurred while working on the City's project.<sup>208</sup> Liberty contended that under additional insured endorsements one through three in the policy issued to L&L, the City was not considered an additional insured because Vargas's injury had not been caused by L&L or those acting on its behalf.<sup>209</sup> The New York Supreme Court held that Liberty was required to defend *and indemnify* the City defendants in the underlying action.<sup>210</sup> Taking issue with that holding, New York's First Department Appellate Division held that "it was premature to declare that Liberty is obliged to *indemnify* the City defendants" because it had "not yet been determined if L&L was the proximate cause of [Vargas's] injury."<sup>211</sup> Instead, the Appellate Division held that "[t]he limitations in [the] endorsements . . . do not vitiate Liberty's duty to defend, because the . . . complaint brings the insurance claim at least 'potentially within the protection purchased.'"<sup>212</sup> The complaint alleged "that *all* defendants—which includes L&L—operated, maintained, managed, and controlled the job site" and "also . . . that all defendants were negligent and failed to provide a safe job site."<sup>213</sup> Therefore, the court held

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206. *Id.*

207. *Vargas v. City of New York*, No. 154323/13, 2016 WL 184531, at \*1 (N.Y. Sup. Ct. Jan. 15, 2016).

208. *Id.*

209. *Vargas*, 71 N.Y.S.3d at 417.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

“it is possible that plaintiff’s injury was caused by L&L.”<sup>214</sup>

The court in *Vargas* determined that where the possibility of causation exists on the face of the pleadings, the “caused, in whole or in part, by” language requires an insurer to fulfill their defense obligation for an additional insured unless, as was the case in *Burlington*, proximate cause has been ruled out entirely. But how far exactly would a court be willing to apply the *Palsgraf*-ian brand of proximate cause adopted by the New York Court of Appeals in *Burlington*?

The fact that New York’s First Department expressly took issue with the lower court’s premature finding of a duty to indemnify is important and should not be overlooked. Although *Vargas* solidified that New York courts interpret “caused, in whole or in part, by” to require a defense obligation of a potential additional insured as the majority of jurisdictions have, the decision makes it possible<sup>215</sup> that a duty to indemnify potential additional insureds may be eliminated where the named insureds may be one-percent or more at fault.<sup>216</sup>

Following *Vargas*, New York’s First Department doubled down on its application of the *Palsgraf*-ian proximate cause

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214. *Id.*

215. Admittedly improbable, but possible, nonetheless. *See generally* DUMB AND DUMBER (New Line Cinema 1994) (“So you’re telling me there’s a chance?” (statement by Lloyd Christmas)).

216. *See* BRUNER & O’CONNOR, *supra* note 21, § 11:334 (positing that the “1%” fault of the named insured only establishes the initial broad defense obligation and admitting that, beyond that, the additional insured triggering language “caused, in whole or in part, by” poses some problems). I contend that one such problem as referred to by Bruner and O’Connor is the exact extent to which proximate cause may limit small percentages of fault of the named insured. *But see* TURNER, *supra* note 22, § 42:4 (“[F]or there to be insurance for the additional insured named in the endorsement, the named insured must be negligent at least in part. . . . Thus, if the additional insured can show that the named insured was as little as 1% of the cause of the claimant’s injury or damage, this requirement of the endorsement is met. This may not prove to be a very formidable obstacle.”). Turner, like many insurance law commentators, turns a blind eye to the realities that exist between tort and insurance law in practice. Although intended to be kept separate, there is blending and blurring of the lines between these spheres, including the concept of *Palsgraf*-ian proximate cause invading insurance law.

principles of *Burlington* in *Hanover Insurance Co. v. Philadelphia Indemnity Insurance Co.*,<sup>217</sup> this time within the vacuum of non-liability that was present in the original New York Court of Appeals *Burlington* decision.<sup>218</sup> In only the second application of *Burlington*'s holding within the New York court system, it is crystal clear that where there is no theory of liability that applies to an insurance company's named insured, there is no defense or indemnification obligation that extends to the additional insured under the "caused, in whole or in part, by" language.<sup>219</sup>

The *Hanover* case, unlike the other cases that have been discussed so far, had nothing to do with construction contracts. In *Hanover*, Michael Green was injured following a slip and fall alleged to have occurred while he was working in his capacity as a security guard employed by Protection Plus Security Consultants, Inc. (Protection Plus) at a facility owned by Manhattan School of Music.<sup>220</sup> Protection Plus contracted with the Manhattan School of Music to provide security services and, pursuant to that contract, was obligated to maintain liability insurance that provided coverage for the Manhattan School as an additional insured.<sup>221</sup> Protection Plus procured a CGL insurance policy from Philadelphia Indemnity Insurance Company (PIIC) that named Manhattan School as an additional insured, but "only with respect to liability for bodily injury caused, in whole or in part, by (1) [Protection Plus's] acts or omissions; or (2) [t]he acts or omissions of those acting on [Protection

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217. 73 N.Y.S.3d 549 (App. Div. 2018). The facts in this case are more comparable to the facts as they existed in the original *Burlington* decision, and do not shed as much light on the potential reach of *Palsgraf*-ian proximate cause in the insurance industry.

218. For more discussion regarding the vacuum of non-liability, see discussion *supra* Part II.

219. See *Hanover*, 73 N.Y.S.3d at 549.

220. Brief for Plaintiffs-Appellants at 1, *Hanover*, 73 N.Y.S.3d 549 (No. 154006/14).

221. *Id.*

Plus's] behalf; in the performance of [Protection Plus's] ongoing operations for [Manhattan School]."<sup>222</sup>

New York's First Department reversed the lower court's decision, which had held that "Philadelphia Indemnity ha[d] a duty to indemnify Manhattan School, but only to the extent that it is determined to be vicariously liable for the negligent acts of Protection Plus."<sup>223</sup> Instead, the "caused, in whole or in part" language was interpreted by the First Department to conclude that "coverage is extended to an additional insured only when the damages are the result of the named insured's negligence or some other act or omission," and "the acts or omissions of Protection Plus were not a proximate cause of the security guard's injury," but "[r]ather, the sole proximate cause of the injury was the additional insured, and thus coverage is not available to the Manhattan School under defendant's policy."<sup>224</sup>

One recent decision rendered by the Eastern District of New York, *United States Underwriters Insurance Company v. Image By J&K, LLC*, provides an interesting gloss on decisions like *Burlington* and *Hanover*, which fall within the vacuum of non-liability.<sup>225</sup> There, District Judge Margo Brodie framed the vacuum of non-liability existing in *Burlington* in terms of the necessity—or rather lack thereof—of a court's weighing of the merits.<sup>226</sup> Judge Brodie opined that "the challenge before the New York Court of Appeals [in *Burlington*] did not implicate the *merits* of the underlying action."<sup>227</sup> After all, an insurer's duty to defend

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222. *Id.* at 24 (alterations in original).

223. *Hanover Ins. Co. v. Philadelphia Indem. Ins. Co.*, No. 154006/2014, 2015 WL 6920605, at \*3 (N.Y. Sup. Ct. 2015), *rev'd*, 73 N.Y.S.3d 549 (App. Div. 2018).

224. *Hanover*, N.Y.S.3d at 549–50 (citing *Burlington Ins. Co. v. NYC Transit Auth.*, 79 N.E.3d 477 (N.Y. 2017)).

225. No. 16-CV-6176, 2018 WL 4055298, at \*5 (E.D.N.Y. Aug. 14, 2018).

226. *Id.*

227. *Id.*

exists even for those claims entirely devoid of merit.<sup>228</sup> Rather, “[a]t most, the New York Court of Appeals determined the allocation of fault between the named insured and the potential additional insureds as to any liability arising from the underlying action.”<sup>229</sup> In doing so, Judge Brodie acknowledged the weighing of fault that plays a role in *Palsgraf*-ian proximate cause determinations styled under *Burlington*. Should the balance weigh in favor of the elimination of the named insured’s liability, then there could potentially be the elimination of additional insured status for an upstream entity.

It is readily apparent that any battle involving New York courts constraining proximate cause in light of a named insured’s tenuous fault will not be fought in a case focused on this threshold question of an insurer’s duty to defend. The duty to defend an additional insured under the ISO’s 2004 language is triggered merely by allegations proffered against the named insured in the complaint.<sup>230</sup> Thus, any allegation of fault posited against the named insured triggers this defense obligation until such time as the court has deemed that either the insurer is without an obligation to indemnify for the loss, or the entity claiming additional insured status is not, in fact, an additional insured under the policy.

Instead, this battle will likely be waged in an insurer’s declaratory judgment action on facts in which the loss would be entirely covered by either the “upstream” entity’s own carrier, or the subcontractor’s carrier under a theory of additional insured status.<sup>231</sup> Although tension exists

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228. *Id.*

229. *Id.* (citing *Burlington Ins. Co. v. NYC Transit Auth.*, 79 N.E.3d 477 (N.Y. 2017) (“[I]f the parties desire a different allocation of risk, they are free to negotiate language that serves their interests.”)).

230. BRUNER & O’CONNOR, *supra* note 21, § 11:334.

231. To contrast this view, Randy Maniloff has commented that

most coverage claims are resolved without a declaratory judgment and involve determinations of coverage for underlying claims that were settled without the benefit of a trial or other fact-finding mechanism.

regarding a court's consideration of insurance coverage while in the tort sphere of litigation,<sup>232</sup> such considerations are part and parcel in insurance litigation that follows the underlying tort determination.<sup>233</sup> Thus, a determination

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Thus, the question of just who was at fault for an injury may never have an opportunity to be determined by a neutral arbiter. . . . Considering that underlying complaints are sometimes artfully drafted with insurance coverage fully in mind, these consequences of the revisions to ISO's additional insured endorsements may not be so *unintentional* after all, at least not from plaintiff's counsel's perspective. For these reasons, while ISO's newest version of form CG 20 10 is a nice effort, it may fall victim to circumstances beyond its control.

Maniloff, *supra* note 22, at M.23-9. I suggest that, in the years since Maniloff published his May 2004 piece (prior to implementation of the ISO's July 2004 revisions), the court's use of *Palsgraf*-ian proximate cause provides a reason for declaratory judgment actions to sever the chain of causation and eliminate a costly duty to defend. Maniloff's piece does not mention the concept of proximate cause. Had Maniloff been aware of the application of *Palsgraf*-ian proximate cause to this language, he may very well have thought differently of the use of declaratory judgment in such a scenario.

232. Jane Stapleton, *Tort, Insurance and Ideology*, 58 MOD. L. REV. 820, 831 (1995) ("[I]f comparative insurability is to be used as a factor influencing tort liability in all cases . . . , by what criteria are we to evaluate who is the 'better' or 'cheaper' insurer, especially given that both sides will nearly always be able to insure at some price?").

233. Courts routinely discuss the availability of coverage within the automobile accident context, where public policy in the third-party liability sphere errs on the side of providing coverage for the injuries to innocent victims. See *Motor Vehicle Accident Indem. Corp. v. Cont'l Nat'l Am. Grp.*, 319 N.E.2d 182, 184-85 (N.Y. 1974) (requiring a rental car agency's insurer to cover injuries sustained in an accident on a theory of constructive consent for a technically non-permissive user of the vehicle because of New York's public policy that "one injured by the negligent operation of a motor vehicle should have recourse to a financially responsible defendant"); *Thrasher v. U.S. Liab. Ins. Co.*, 225 N.E.2d 503, 508 (N.Y. 1967) (imposing a heavy burden on an insurer to establish lack of cooperation for denying coverage in a third-party auto liability case because "the policy of this State [is] that innocent victims of motor vehicle accidents be recompensed for the injuries inflicted upon them"). Although we confront a question as to which insurer should ultimately pay as opposed to the Hobson's choice of whether a single insurer should pay or not, it is important that in insurance law, courts routinely make these types of determinations while considering the availability of coverage. A New York court would only remove the obligations of the subcontractor's insurer through a theory of the lack of *Palsgraf*-ian proximate cause if the loss can entirely be covered by another policy. Otherwise, the court would err on keeping both policies in play, so as to either split the costs as concurrent primary coverage, or determine priority of coverage

based upon blameworthiness could potentially lead a court to favor imposing the indemnification obligation on the “upstream” entity’s carrier, where the “downstream” subcontractor was only tenuously at fault for the loss, provided the loss is fully covered by either insurer.

As an example, assume the following facts. A general contractor (General) enters into a contract with a subcontractor (Sub-C) to clear a building of its contents prior to its demolition by General. The contract requires that Sub-C obtain a CGL policy naming General as an additional insured for “liability caused, in whole or in part, by” Sub-C’s acts or omissions. General had scheduled the demolition for March 24, and informed Sub-C that it was safe to perform the task of clearing the building through March 23. On March 22, Sub-C informed General that its work was completed as of that day. Without communicating with Sub-C, General decided to proceed with demolition on March 23 instead of March 24. On March 23, Joe Employee, who was employed by Sub-C, arrived for work because Sub-C failed to inform him that the work was completed, and Joe Employee is killed when the building is imploded. Although Sub-C may be at fault for failing to communicate with Joe Employee that the work within the building was completed, no court would find such a failure to communicate as a proximate cause of the death, which was ultimately caused by General’s failure to communicate the change in the date of demolition.

The allegations of Joe Employee’s Estate in the ensuing wrongful death complaint against General<sup>234</sup> may very well

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by labelling one as primary and the other as excess coverage. *See* BP Air Conditioning Corp. v. OneBeacon Ins. Grp., 871 N.E.2d 1128, 1133 (N.Y. 2007).

234. Sub-C itself would be protected from suit by Joe Employee’s Estate under N.Y. WORKERS’ COMP. LAW §§ 10, 11 (McKinney 2018), which provides protections for employers against lawsuits brought for “death from injury arising out of and in the course of employment without regard to fault as a cause of the injury . . . .” It is extremely important to understand the ramifications of the ISO’s July 2004 revisions in light of workers’ compensation laws. *See* Maniloff, *supra* note 22, at M.23-7 (“The plaintiff in an underlying tort case giving rise to potential additional insured coverage is often an employee of the named insured. However,



imply that the death resulted from Sub-C's negligent failure to communicate to its employees that work in a building to be imploded was complete, while also including allegations, *inter alia*, of negligent failure to communicate the shift in demolition schedule on behalf of General. Under such circumstances, the insurer would initially be required to provide a defense to General as a potential additional insured, given the allegations of possible liability for both General and Sub-C<sup>235</sup> in the complaint. However, if the insurer filed a parallel declaratory judgment action<sup>236</sup> to judicially determine the issue of the general contractor's status as an additional insured, the court would be required to analyze proximate causation regarding the conduct of Sub-C.

The New York Court of Appeals in *Burlington* applied proximate cause in the *Palsgraf*-ian sense, recognizing that the law could "arbitrarily decline[] to trace a series of events beyond a certain point" for reason "of convenience, of public policy, [or] a rough sense of justice."<sup>237</sup> Under the factual

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because of the workmen's compensation bar [on recovery], the plaintiff's complaint may not allege any negligence on the part of his employer (named insured), even if it in fact existed. In this situation, because the duty to defend is typically determined based solely on the allegations contained in the underlying complaint, the additional insured may be denied a defense because the underlying complaint is devoid of any allegations that the plaintiff's injury was caused 'in whole or in part by your [named insured's] acts or omissions; or the acts or omissions of those acting on your behalf,' as required by form CG 20 10 07 04." (second alteration in original).

235. Again, N.Y. WORKERS' COMP. LAW § 11 (McKinney 2018) does not eliminate the liability of an employer, but rather replaces any underlying liability with liability as defined in N.Y. WORKERS' COMP. LAW § 10 (McKinney 2018). Thus, Sub-C may potentially have underlying liability as alleged in the complaint, despite such liability being replaced for the purposes of compensation to Joe Employee's Estate on behalf of Sub-C under New York's workers' compensation law.

236. For estoppel reasons, counsel is reminded to name the injured party as a defendant in the action as well, or else risk re-litigating the nonbinding determination with the party unrepresented in the original declaratory judgment action.

237. *Burlington Ins. Co. v. NYC Transit Auth.*, 79 N.E.3d 477, 482 (N.Y. 2017) (citing *Ventricelli v. Kinney Sys. Rent A Car*, 383 N.E.2d 1149, 1149–50 (N.Y.

scenario above, such *Palsgraf*-ian proximate cause would allow a court to judicially determine that, although Sub-C is tenuously at fault for failing to communicate with its employee, its omission was not the proximate cause of Joe Employee's death. Such a determination would mean that there was no triggering of additional insured status for General under the holding in *Burlington*, since the named insured's omission was not a proximate cause of the death as a matter of law.<sup>238</sup> Instead, General would be required to tender its defense and indemnity to its own insurer for the underlying action brought by Joe Employee's Estate. Whether the court arrived at this determination by way of a "rough sense of justice" or because of "public policy" concerns, the most blameworthy party would be held accountable through its own insurer.

Although not quite as extreme as the above hypothetical, a recent New York Fourth Department decision, *Pioneer Central School District v. Preferred Mutual Insurance Co.* helps to augment the limits placed on *Burlington*'s *Palsgraf*-ian proximate cause determination along a similar vein.<sup>239</sup> In *Pioneer Central*, J&K Kleanerz of WNY, LLC (Kleanerz), contracted with Pioneer Central School District and Pioneer Middle School (collectively, Pioneer) to provide janitorial services.<sup>240</sup> As part of that contract, Kleanerz was required to "indemnify Pioneer in actions for bodily injury 'arising or resulting from any act, omission, neglect or misconduct of

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1978) (quoting *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting))).

238. See *Burlington*, 79 N.E.3d at 483–84 ("While . . . interpreting the phrases ['arising out of' and 'caused . . . by'] differently does not compel the conclusion that the endorsement incorporates a negligence requirement (citation omitted), 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." (citations omitted)).

239. No. 1067, 2018 WL 4845825 (N.Y. App. Div. Oct. 5, 2018).

240. *Id.* at \*1.

[Kleanerz].”<sup>241</sup> Kleanerz procured an insurance policy through Preferred Mutual Insurance Company (Preferred Mutual) that named Pioneer “as an additional insured for bodily injury ‘caused, in whole or in part, by’ the ‘acts or omissions’ of Kleanerz or of those acting on Kleanerz’s behalf.”<sup>242</sup>

While leaving the Pioneer premises, a Kleanerz employee, Dawn Ayers, slipped on snow or ice in the Pioneer Middle School parking lot and sustained injuries.<sup>243</sup> After Ms. Ayers filed suit against Pioneer to recover for her injuries, Pioneer filed a third-party action against Kleanerz.<sup>244</sup> Additionally, Pioneer filed this declaratory judgment action against Preferred Mutual, asserting that the insurer was obligated to defend and indemnify them in Ms. Ayers’ underlying lawsuit.<sup>245</sup>

In concluding that Pioneer did not qualify as an additional insured under the Preferred Mutual policy, the Fourth Department noted that “it is undisputed that Kleanerz was not responsible for clearing ice and snow from the parking lot and that Ayers’s fall resulted from her slipping on the ice or snow.”<sup>246</sup> The court stated Pioneer should not be afforded the status of additional insured under the policy where Kleanerz’s instructions to exit out a certain door “merely furnished the occasion for the injury” by “fortuitously plac[ing Ayers] in a location or position in which . . . [an alleged] separate instance of negligence acted independently upon [her] to produce harm.”<sup>247</sup> Therefore,

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241. *Id.* (alteration in original).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* (quoting *Hain v. Jamison*, 68 N.E.3d 1233 (N.Y. 2016)); *see also* *Hain v. Jamison*, 68 N.E.3d 1233, 1238 (N.Y. 2016) (“Proximate cause is, at its core, a uniquely fact-specific determination, and ‘[d]epending upon the nature of the

Preferred Mutual had no indemnity obligation to Pioneer “and consequently no duty to defend [Pioneer] in the pending [Ayers] action.”<sup>248</sup>

In *Pioneer*, it is certainly noteworthy that the Fourth Department placed the duty of snow removal outside of the discussion as an undisputed fact.<sup>249</sup> However, this falls entirely short of those cases, like *Burlington* and *Hanover*, that find themselves in the vacuum of non-liability. There, it was a party’s “liability” that was undisputed. In *Pioneer*, the court, in essence, chose to weigh comparative fault between parties in similar fashion to the framing of the issue by District Judge Brodie in *United States Underwriters Insurance Company v. Image By J&K, LLC*. This was not a merit-based determination in *Pioneer*, but rather one based entirely on the comparative fault of a party merely “furnish[ing] the occasion for injury” and a party failing to clear snow and ice from a parking lot despite its duty to do so.<sup>250</sup> As caselaw continues to accumulate, it is entirely plausible to anticipate a gradual expansion of this fault-based decision-making approach to *Palsgraf*-ian proximate cause under *Burlington*.<sup>251</sup>

## V. CONCLUSION

The additional insured endorsement within any CGL

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case, a variety of factors may be relevant in assessing legal cause’. Such factors include, among other things . . . public policy considerations regarding the scope of liability.” (alteration in original) (citations omitted)).

248. *Pioneer*, 2018 WL 4845825, at \*2 (alterations in original) (quoting *Allstate Ins. Co. v. Zuk*, 574 N.E.2d 1035, 1038 (N.Y. 1991)).

249. *Id.* at \*1.

250. *Pioneer*, 2018 WL 4845825, at \*1.

251. *But see* *Indian Harbor Ins. Co. v. Alma Tower, LLC*, No. 7433, 2018 WL 5259566, at \*1 (N.Y. App. Div. Oct. 23, 2018) *aff’g*, No. 159286/2014, 2017 WL 3438141 (N.Y. Sup. Ct. Aug. 9, 2017) (contrasting with the Fourth Department in *Pioneer*, New York’s First Department holds that the mere existence of an employer/employee relationship between claimant and named insured was enough to trigger “a reasonable possibility” that the named insured “may have proximately caused the underlying injury”).

policy plays a crucial role in the construction industry. Property owners and general contractors relying upon these endorsements in policies issued to “downstream” subcontractors must be aware of the current landscape of coverage for additional insureds, and specifically that courts have interpreted the language “caused, in whole or in part, by” as requiring proximate cause. While courts have broadly applied the insurer’s defense obligation to potential additional insureds where liability on behalf of the “downstream” named insured is uncertain, the New York Court of Appeals, citing *Palsgraf*-ian proximate cause, has limited the scope of this language for purposes of an insurer’s duty to indemnify, severing the chain of causation. Although the Court of Appeals in *Burlington Insurance Co. v. NYC Transit Authority* was not required to determine the full extent to which the concept of *Palsgraf*-ian proximate cause may bleed from the tort sphere to insurance law, decisions like *Vargas v. City of New York* certainly have not foreclosed a court’s severing of legal causation in light of a named insured’s tenuous fault.

To be sure, existing insurance case law has solely used proximate cause to sever the chain of legal causation where the named insured lacked fault within the “vacuum of non-liability,” resembling a traditional contract trigger. However, cases like *Pioneer Central School District* blur the line between this vacuum of non-liability and the type of fault-based determinations required under *Palsgraf*-ian proximate cause. The invocation of *Palsgraf* in the realm of insurance raises questions as to the ultimate scope of its application. Albeit unlikely, if given the appropriate combination of facts and insurance coverage, blameworthy general contractors and property owners should take heed knowing that *Palsgraf*-ian proximate cause in the realm of insurance law may allow a court to sever the legal chain of causation beyond traditional insurance triggers.