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COURT OF APPEALS

STATE OF NEW YORK

GILBANE BUILDING CO./TDX CONSTRUCTION
CORP., A JOINT VENTURE, ET AL.,

Appellants,
-against-

NO. 22

ST. PAUL FIRE And MARINE INSURANCE
CO., ET AL.

Defendants,

- and -

LIBERTY INSURANCE UNDERWRITERS,

Respondent.

20 Eagle Street
Albany, New York
February 7, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first matter on this afternoon's calendar is appeal
3 number 22, Gilbane v. St. Paul Fire and Marine Insurance.
4 Counsel?

5 MR. BROWN: May it - - - may it please the court,
6 Richard Brown on behalf of appellants. Good afternoon.
7 I'd like to reserve three minutes.

8 CHIEF JUDGE DIFIORE: Three, sir?

9 MR. BROWN: Yes.

10 CHIEF JUDGE DIFIORE: You may.

11 MR. BROWN: Yes, Your Honor. Thank you.

12 Appellants have - - - have proffered three
13 alternative arguments for relief here, each sufficient on
14 its own, to warrant the order of the Appellate Division
15 vacated, the first of which is that a plain reading of the
16 Liberty endorsement language itself, requires only that the
17 named insured enter into a written agreement or written
18 contract in which it agreed to provide appellants coverage.
19 And we have that here.

20 JUDGE STEIN: So what does "with whom" mean?
21 What is the meaning of "with whom"? I mean, you agree it's
22 - - - it's an awkward sentence?

23 MR. BROWN: It is. It is. The - - - the
24 language that's actually employed here - - - and it is a
25 manuscript endorsement by - - - used by Liberty here - - -



1 the language that's employed is - - - is cumbersome, as
2 Your Honor states.

3 The language "with whom", in and of itself,
4 although it implies an agreement - - - direct agreement,
5 that language in and of itself, does not create the express
6 requirement that both parties - - - the party seeking
7 additional insured coverage, having entered into a direct
8 contract with the named insured - - -

9 JUDGE STEIN: Does it have any meaning at all in
10 the sentence, under your reading?

11 MR. BROWN: Of course. "With whom" seemingly - -
12 - seemingly pertains to both the named insured as well as
13 the additional insured, and that they - - - they come to an
14 agreement, which we do have here by the terms - - -

15 JUDGE WILSON: Well, if we - - - if we struck the
16 word "with", wouldn't it then mean exactly what you're
17 saying?

18 MR. BROWN: Yes, Your Honor. I believe so.

19 JUDGE WILSON: So you're ascribing - - -

20 MR. BROWN: It's - - -

21 JUDGE WILSON: - - - no meaning to the word
22 "with"?

23 MR. BROWN: Not necessarily. What I do believe
24 is that without the word "with" the language actually
25 employed is - - - is more precise and actually effectuates



1 the meaning - - -

2 JUDGE RIVERA: But - - -

3 MR. BROWN: - - - the meaning of the - - -

4 JUDGE RIVERA: - - - but it seems like you're
5 equating what you consider to be bad grammar with
6 ambiguity. I don't think we've ever said that.

7 MR. BROWN: I don't believe that bad grammar
8 itself creates an ambiguity. What we have here are
9 essentially the Appellate Division has taken the phrase
10 "with whom" - - -

11 JUDGE RIVERA: Um-hum.

12 MR. BROWN: - - - and the remote phrase of "by
13 written contract" and read together, created by
14 implication, this condition that both parties have entered
15 into a direct written contract.

16 JUDGE GARCIA: So is there any limitation on who
17 you could enter the written contract with? I mean, could
18 it be anyone, and you just agree with some third party to
19 provide insurance? So that's how you would read this.

20 MR. BROWN: In fact, that's how such blanket
21 additional insured endorsements typically operate.

22 JUDGE GARCIA: So any third party I can enter
23 into an agreement, and I say I'm going to - - - Party C, I
24 have a written agreement with Party C, I'm going to insure
25 Party A, and that's enough under here; even though Party A



1 may not even know it.

2 MR. BROWN: That - - - that's typically the
3 circumstances under which these blanket additional assured
4 endorsements - - -

5 JUDGE GARCIA: Or - - -

6 MR. BROWN: - - - operate.

7 JUDGE GARCIA: That's one interpretation. Or it
8 seems - - - and I think what these questions have been
9 saying is it seems pretty clear on its face that a much
10 more logical reading of the plain language of this is:
11 with whom you have agreed by written contract; which would
12 mean you have an obligation to go out and contract with
13 this third-party insured, which doesn't that seem to make a
14 lot more commercial sense and actually fit with the plain
15 language of the contract here?

16 MR. BROWN: I agree, Your Honor. However, that's
17 not what the language says. And what we do have here is a
18 situation where Liberty took it upon themselves
19 unilaterally, to draft this language. And the case law
20 clearly states that under these circumstances, it needs to
21 be construed against the drafter - - -

22 JUDGE WILSON: Well, not if it's clear.

23 JUDGE STEIN: And isn't it - - - isn't - - - I'm
24 sorry. Isn't it your - - - your argument that there's no
25 requirement - - - no matter how we read this, there's no



1 requirement that the insurer know who - - - who was
2 contracted with? In other words, even if - - - even if the
3 - - - the insurer - - - right - - -

4 MR. BROWN: Um-hum.

5 JUDGE STEIN: I'm sorry. Even if the insured had
6 contracted with the purported uninsured, right - - -

7 MR. BROWN: Um-hum.

8 JUDGE STEIN: - - - there's no requirement that -
9 - - that the insurer be notified of that in any way.
10 That's what you mean by - - -

11 MR. BROWN: Correct, Your Honor.

12 JUDGE STEIN: - - - a blanket provision.

13 MR. BROWN: And - - - and the next step in that -
14 - - in that statement there is there's no further analysis
15 of risk or further premium charged, even if we accept the
16 carrier's and the Appellate Division's interpretation.
17 There would be no further notification that goes to the
18 insurer regarding any of these parties that are - - - are
19 added as additional insureds.

20 JUDGE STEIN: There could be 1 or there could be
21 10 or there could be 500 - - -

22 MR. BROWN: Correct.

23 JUDGE STEIN: - - - it - - - it's covered no
24 matter who the contract's with.

25 MR. BROWN: And what's typically done is an



1 insurer will do their risk assessment based on the volume
2 of work typically done by their insured. They'll do their
3 risk assessment at the time. They'll - - - they'll
4 calculate the associated premium, and they'll issue a
5 blanked additional insured endorsement. This is - - - this
6 is - - -

7 JUDGE RIVERA: So they never request to see the
8 agreements?

9 MR. BROWN: No, Your Honor. No, Your Honor, not
10 in typical course.

11 JUDGE GARCIA: But isn't it something of a check
12 for the insurance company to require the insured to enter a
13 written contract with each person that they intend to
14 extend this insurance towards? I mean, isn't that arguably
15 how you would read what they're bargaining for here; so
16 that you don't have situations where you have a third-party
17 contract insuring somebody else? At least there's a clear-
18 cut relationship between their insured and the third-party
19 insured.

20 So you may not have to notify them, and it may be
21 a limited number of people who could fall within this
22 clause, but at least the primary insurer has some control
23 in terms of you, the insured, must contract individually
24 with the people that you want covered by this contract.

25 MR. BROWN: Well, Your Honor, essentially the



1 insurer is at the control at all points, as far as the
2 coverage, the scope of coverage, and - - - and those
3 limitations.

4 And - - - and particularly in this case, Liberty
5 had the opportunity to use the 20 33 form which is, you
6 know, arguably courts have found that it expressly requires
7 a direct written contract. This form was available at the
8 time. Liberty chose not to use it. Instead they chose to
9 draft this manuscript language and include it on the
10 policy.

11 So again, going back to your point, it's - - -
12 it's well within a carrier's right and ability to limit
13 that coverage. In this circumstance, they did not.

14 CHIEF JUDGE DIFIORE: Counsel, each of you have
15 asked us to consider cases in which similar endorsements
16 were used. Is there a particular case that you think
17 points up your argument?

18 MR. BROWN: I believe the - - - the more recent
19 case, it's actually a Southern District case, Liberty
20 Mutual Fire Insurance v. Zurich; extremely on-point in
21 terms of the factual underpinnings of the case itself and
22 the - - - the particular endorsement at issue.

23 And basically what the endorsement said there was
24 any person or organization with whom you have agreed,
25 through written contract, agreement, or permit to provide



1 additional insured coverage. Very similar to what we have
2 here: any person or organization with whom you have agreed
3 to add as an additional insured by written contract.

4 JUDGE FAHEY: Could I just follow up on - - - on
5 one point, Judge?

6 CHIEF JUDGE DIFIORE: Yes.

7 JUDGE FAHEY: Thank you.

8 The certificate of insurance listed the joint
9 venture on it, didn't it?

10 MR. BROWN: That is correct.

11 JUDGE FAHEY: Okay, so if the - - - is it
12 material if the plain language is clear, does the
13 certificate of insurance matter, or does it only matter in
14 cases where there's an ambiguity? So in other words, does
15 - - - does our analysis just go back to a plain-language
16 analysis and we ignore the - - - and if we say plain
17 language is you lose, and you lose; or are we required to
18 read them together?

19 MR. BROWN: I - - - there's - - - there's a few
20 different issues - - -

21 JUDGE FAHEY: Go ahead.

22 MR. BROWN: - - - involved there. If - - - if
23 the court does see that the language itself is plain on its
24 face - - -

25 JUDGE FAHEY: Um-hum.



1 MR. BROWN: - - - as requiring a direct contract,
2 I would say that there is another argument that involves
3 the certificate of insurance.

4 JUDGE FAHEY: But how do we get to that if
5 there's no ambiguity?

6 MR. BROWN: Because what the court would then be
7 saying is that a direct written contract would be
8 necessary.

9 JUDGE FAHEY: Um-hum.

10 MR. BROWN: So my following argument would be
11 that there was writing that was - - - that was sent to
12 Samson requiring that their certificate of insurance
13 indicating that the JV itself be added as an additional
14 insured be updated. And there is a subsequent writing
15 going back to the JV from Samson's CEO saying: as
16 requested, please find attached our updated certificates of
17 insurance indicating the JV as an additional insured.

18 JUDGE FAHEY: I see.

19 MR. BROWN: So the argument would follow that
20 these writings combined with the underlying contracts
21 entered into with DASNY, together form the written contract
22 required by the endorsement itself.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 JUDGE FAHEY: Thank you.

25 THE COURT: Counsel?



1 MR. HARDIN: Thank you, Your Honor. George
2 Hardin for the respondent, Liberty Internat - - - Liberty
3 Insurance Underwriters, LIU.

4 CHIEF JUDGE DIFIORE: Counsel, your position in
5 Zurich that you took in the Southern District?

6 MR. HARDIN: Well, that was a parent and
7 affiliate, and that position, if I might add, did not
8 really result in any discussion whatsoever by the court.
9 It is a different company, Your Honor. And the positions
10 ascribed in that case, as you know, we do not ascribe to
11 here. We are a different company.

12 That decision, as well as the other two decisions
13 in Plaza Construction and American Home, do not discuss
14 whatsoever the significance or the meaning of "with whom
15 you have agreed". There is no appreciation and no
16 acknowledgement that "with whom you have agreed" is
17 descriptive of the person or organization who is to be
18 added as an additional insured.

19 JUDGE GARCIA: What about appellant - - - counsel
20 for the appellant's argument that you could have used clear
21 language in a form that would have gotten this done for you
22 and you chose not to do it?

23 MR. HARDIN: I find this language quite clear.
24 You look at the dissent's criticism of this language. They
25 criticize syntax and the use of the infinitive. When you



1 look at the syntax, which is the position of the words,
2 they would suggest that it would be clearer or somehow
3 different if you took the phrase "in a written contract"
4 and juxtaposed it in the sentence to follow "agreed".

5 JUDGE STEIN: Well, isn't the question, though,
6 what an average insured would think? And when I think
7 about this, I think okay, there are these - - - these big
8 companies that are involved in this project in this
9 particular case, right, but this - - - this will also - - -
10 what we decide here will also apply to, you know, the
11 little one-person subcontractor, right?

12 So - - - so - - - and anything in between. And
13 so what - - - it is that clear - - - to me it doesn't seem
14 like it would be that clear to the average insured.

15 MR. HARDIN: Respectfully, Your Honor, if I said
16 to the averaged insured, so this is the person or
17 organization that we're going to add as an additional
18 insured, we're going to add the person or organization with
19 whom you have agreed to add as an additional insured in a
20 written contract, everything that follows "person or
21 organization" are phrases - - - descriptive phrases
22 identifying who the additional insured is to be. And
23 whether you take - - -

24 JUDGE STEIN: But - - - but given - - - given the
25 practice in the industry, as it's been explained to us,



1 what is - - - what is the purpose of - - - of requiring the
2 writing to be between the insured and - - - with this
3 blanket type of - - -

4 MR. HARDIN: As His Honor has suggested, it is
5 underwriting control. The underwriter has to manage the
6 risk and confine the risk to those entities with whom the
7 named insured has a legitimate business interest and a
8 business relationship. It's to prevent - - -

9 JUDGE STEIN: But isn't that - - -

10 MR. HARDIN: - - - them from - - -

11 JUDGE STEIN: - - - can't that - - -

12 MR. HARDIN: - - - naming 500 people.

13 JUDGE STEIN: - - - can't that be established
14 here with Samson?

15 MR. HARDIN: I'm sorry, Your Honor?

16 JUDGE STEIN: Can't that be established here with
17 DASNY and Samson? I mean, doesn't that establish that it's
18 a legitimate business relationship?

19 MR. HARDIN: But that's not suggestive that
20 anybody that DASNY wants to be added to our policy should
21 be added.

22 We respond and explain to the court in our reply
23 brief to the Turner Construction public policy arguments,
24 the other endorsements that were available if Samson and
25 its broker wanted coverage for insureds beyond those with



1 whom it contracted. Those endorsements were not requested
2 here.

3 Our underwriter was not told what other - - -

4 JUDGE STEIN: But how does that change the risk?

5 I mean - - -

6 MR. HARDIN: If the underwriter's not told - - -

7 JUDGE STEIN: No. No, no, no.

8 MR. HARDIN: - - - who else to be insured?

9 JUDGE STEIN: If you - - - if you have a blanket
10 endorsement that says anybody that you contract with, okay,
11 to - - - to provide this insurance, we're going to cover;
12 you don't have to tell us who it is, it could be 1 person,
13 it could be 10, it could be 500; it doesn't matter, okay -
14 - -

15 MR. HARDIN: But the underwriter asks what the
16 project is, always, when you apply for a policy like that.

17 JUDGE STEIN: Well, of course. Of course. So
18 here's a project and but - - - how does - - - I don't
19 understand how having that contract between those two
20 parties specifically changes the analysis of your risk?

21 MR. HARDIN: I see. So in that instance, the
22 underwriter naturally, from the application, knows the
23 business of the insured, knows the type of work that they
24 do. And so when they have that information, they can
25 assess what the risk factors would be for adding an



1 upstream entity that will retain the named insured for that
2 type of work.

3 JUDGE STEIN: There's no question here that that
4 - - -

5 MR. HARDIN: But it can't - - -

6 JUDGE STEIN: - - - that's who you have here. I
7 mean, you have an upstream entity, right?

8 MR. HARDIN: Gilbane is a construction manager.
9 They have liability beyond the excavation foundation
10 contractor. They have liability whether they acknowledge
11 it or not, for all of the other contractors on that site.
12 The construction manager has to schedule the work. It has
13 to - - - whether they realize it or not - - - oversee the
14 work.

15 JUDGE STEIN: But isn't that always true of
16 upstream folks?

17 MR. HARDIN: But that's not something my
18 underwriter should undertake the coverage for.

19 JUDGE STEIN: Oh, so you're saying that you only
20 want to cover downstream contracts?

21 MR. HARDIN: I only want to cover DASNY. That's
22 the entity with whom I contracted. And according to the
23 wording of the endorsement, I cover them only for liability
24 arising out of my operations.

25 JUDGE STEIN: But you don't know how many people



1 - - -

2 MR. HARDIN: So the risk is my operation - - -

3 JUDGE STEIN: - - - contract - - - you don't know
4 how many people contracted.

5 JUDGE RIVERA: Is that - - - is that your
6 practice, not - - -

7 MR. HARDIN: No, I know - - - I asked those - - -
8 I asked those questions as an underwriter - - -

9 JUDGE FAHEY: Why wouldn't you make the contract
10 - - - why have a blanket endorsement, then? Why not just -
11 - - why not just have it for DASNY? Won't - - - did - - -

12 MR. HARDIN: That would be - - - that would be
13 wonderful. We could have done that.

14 JUDGE FAHEY: Um-hum.

15 MR. HARDIN: In fact, before ISO started
16 developing these endorsements, Your Honor, that's how
17 business was done. And you'll find today many times in the
18 construction industry and elsewhere, endorsements that
19 specifically identify the entities to be added as an
20 additional insured. So that's really something that we
21 could have accomplished if had - - - if we had been asked.

22 JUDGE WILSON: Can you address counsel's argument
23 about the certificate of insurance?

24 MR. HARDIN: About, I'm sorry?

25 JUDGE WILSON: About the certificate of



1 insurance?

2 MR. HARDIN: Yes. The certificate of insurance,
3 first of all, was not issued to Gilbane. The certificate
4 of insurance was issued to DASNY. And the certificate of
5 insurance was sent to Gilbane at their request. They said,
6 can you send us the certificate of insurance.

7 The - - - if I may just impose on the court - - -
8 the forwarding letter simply says: "Per your request,
9 here's the current certificate of insurance." I'm
10 referring to the record at 914 and 915 and 916 and 917.

11 JUDGE FAHEY: I thought at 917 the JV was
12 identified as an additional insured.

13 MR. HARDIN: That's correct. But look what this
14 certificate says, Your Honor, that was sent to Gilbane.

15 JUDGE FAHEY: I don't have it in front of me. Go
16 ahead, you tell me.

17 MR. HARDIN: "This certificate is issued as a
18 matter of information only and confers no rights upon the
19 certificate holder. This certificate does not amend,
20 extend, or alter the coverage afforded by the policies
21 below."

22 JUDGE FAHEY: So - - - so then this is - - - this
23 is - - - so then what was referred to in the dissent is not
24 an actual certificate of insurance; is that what you're
25 saying?



1 MR. HARDIN: And was not issued by LIU.

2 JUDGE FAHEY: I see.

3 MR. HARDIN: Typically in the industry, almost
4 always, brokers issue this. And a broker, under the case
5 law, is the agent of the insured. So if Samson's broker
6 did not look at the endorsement and did not look at the
7 policy when it was issued, and decides to issue this type
8 of document, they have an issue.

9 JUDGE RIVERA: I'm sorry, just to be clear, so
10 when - - - when you issued the policy, you didn't know at
11 that time how many additional insureds there were, because
12 you didn't know how many, if any, entities the insured had
13 entered an agreement with?

14 MR. HARDIN: That's correct. But we would know
15 the project.

16 JUDGE RIVERA: Okay. So you're saying that - - -
17 I understand that back-and-forth with Judge Stein. That is
18 how you assess risk. You know the project and you base it
19 on the project.

20 MR. HARDIN: And - - - and the - - - and the
21 business of the insured applying for coverage.

22 JUDGE RIVERA: So - - -

23 MR. HARDIN: We know they're an excavation
24 contractor.

25 JUDGE RIVERA: So could - - - could the insured



1 have entered one of these agreements after the policy was
2 entered into or it's only what exists at the time you enter
3 the policy with DASNY?

4 MR. HARDIN: No, it's conceivable they could have
5 entered a contract after the issuance - - -

6 JUDGE RIVERA: So if that changes - - -

7 MR. HARDIN: - - - during the effective period of
8 this policy. I acknowledge what the court says, but again,
9 the underwriters - - -

10 JUDGE RIVERA: But you're saying that wouldn't
11 change the scope - - -

12 MR. HARDIN: - - - the underwriters - - -

13 JUDGE RIVERA: - - - of the project, because
14 you've insured the project, and somehow that - - -

15 MR. HARDIN: Well, we - - -

16 JUDGE RIVERA: - - - can't change with the - - -

17 MR. HARDIN: - - - the wording - - -

18 JUDGE RIVERA: - - - addition of someone?

19 MR. HARDIN: It's the wording that says but only
20 for liability arising out of your operations.

21 JUDGE RIVERA: I see.

22 MR. HARDIN: So - - -

23 JUDGE RIVERA: Um-hum.

24 MR. HARDIN: - - - that would be whatever project
25 that Samson contracted for with - - -



1 JUDGE RIVERA: Um-hum.

2 MR. HARDIN: - - - whatever additional insured.
3 But understand that this certificate is not a contract.
4 This letter is sent a year later after that contract was
5 entered. And I only read one segment of this certificate.
6 There are three other places where it says this does not
7 convey coverage and - - - and this is not in any way
8 indicative of what the policy says.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 MR. HARDIN: Thank you, all.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MR. BROWN: I just wanted to make - - - excuse me
13 - - - a few additional points.

14 Regarding the certificate itself, the
15 significance really arises out of the letter that it's sent
16 with from Samson to the JV, and that letter, again, is in
17 response to a request for an updated certificate indicating
18 that the JV itself has additional insured coverage.

19 The same day, Samson responds with the letter
20 with the accompanying COI attached. The letter itself
21 recognizes its obligation. And again, what the
22 significance is, is that it - - - it establishes, as
23 discussed previously, that there is, in fact, a written
24 contract between the parties, between the named insured and
25 the JV. I just wanted to clarify that point.



1 Also, with respect to any contracts that could be
2 entered into after the policy is issued, that's very much
3 the case. It goes on all the time. This policy was not
4 limited to this particular project at all. It just so
5 happens that we had the contract itself pre-existing the
6 policy here.

7 JUDGE WILSON: And in that circumstance, where
8 there's a late-added additional insured, does the coverage
9 run from the moment of the addition, or it dates back to
10 the beginning of the insurance policy?

11 MR. BROWN: The - - - the additional insured
12 coverage would run back to the date that that contract in
13 which the named insured promised that coverage was
14 effectively created.

15 JUDGE WILSON: So you could enter into a written
16 contract now, today, and it would run back to the beginning
17 of the project; that's your view?

18 MR. BROWN: Well, there are other time
19 limitations associated with - - - with the policy itself
20 that would limit that coverage, limit the risk to the
21 insured.

22 JUDGE WILSON: But halfway through the job, you
23 could've?

24 MR. BROWN: Very much so. Enter into a
25 completely separate contract related to a wholly separate



1 project.

2 JUDGE RIVERA: If we disagree with you, there is
3 recourse, is there not?

4 MR. BROWN: Excuse me, Your Honor?

5 JUDGE RIVERA: If we disagree with you, is there
6 not some other form of recourse available?

7 MR. BROWN: Contrary - - -

8 JUDGE RIVERA: Someone else that can be sued?

9 MR. BROWN: Contrary to - - - contrary to the
10 majority's opinion, I don't do - - - I do not believe so.

11 JUDGE RIVERA: Why not?

12 MR. BROWN: Because what we have here is a
13 situation that the named insured, Samson, effectively
14 carried out and - - - and - - - and sought to obtain the
15 coverage and understood the coverage that was being
16 provided actually fulfilled its contractual obligations.
17 And practically speaking, what - - - what occurs is you
18 have an entity such as Samson or another contractor that is
19 not financially viable in those situations to cover the
20 risk associated with such projects.

21 JUDGE STEIN: But assuming Samson is viable, the
22 fact that - - - that - - - if we disagree with you, which
23 means that Samson didn't fulfill its duty because it didn't
24 provide you with that coverage, isn't that - - - isn't that
25 the case?



1 MR. BROWN: Another issue - - - another issue
2 arises that, you know, within the construction industry
3 itself, this is - - - this is often what - - - what occurs
4 in terms of contracts and the allocation of risk.

5 What the intent is to really shift that risk to
6 the party that is actually performing the work not the
7 owner or, in this case, the construction manager.

8 So in - - - in this case in particular, we have
9 numerous different prime - - - prime subcontractors that
10 are involved, and a situation where, again, the owner was
11 actually contracting with these parties. And if - - - if
12 the court were to disagree with - - - with appellants'
13 interpretation, what they would need to do in that
14 situation is effectively enter into an endless amount of
15 contracts which would completely frustrate the risk-
16 transfer process and almost eliminate parties' - - -
17 upstream parties' ability to do so.

18 One other point that I wanted to make regarding
19 the - - - the Zurich case itself. Counsel stated that the
20 - - - the language that we have here employed in the AI
21 endorsement wasn't actually considered.

22 I just wanted to quickly read an excerpt from
23 that decision. The court states that "while other courts
24 have reached a contrary interpretation of similar policy
25 language, the court declines to follow them because they



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had a requirement of direct contractual privity between the named insured and the purported additional insured, that does not exist in the policy language."

And again, we have nearly identical policy language here, as in this Zurich decision.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. BROWN: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Gilbane Building Co./TDX Construction Corp., a Joint Venture, et al. v. Liberty Insurance Underwriters, No. 22 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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