This Edition’s Contributors:

Nicole M. Nowlin & Ashleigh Edwards
COSGRAVE VERGEER KESTER LLP | Portland, OR
503.323.9000
nnowlin@cosgravelaw.com
aedwards@cosgravelaw.com

Lisa F. Mickley, Esq.
HALL & EVANS, LLC | Denver, CO
303.628.3325
mickleyl@hallevans.com

David J. Rock & William K. McVisk
JOHNSON & BELL, LTD. | Chicago, IL
312.372.0770
rockd@jbltd.com
mcviskw@jbltd.com

Kenneth C. Newa
PLUNKETT COONEY | Detroit, MI
313.983.4848
knewa@plunkettcooney.com

Joshua C. Zimring & Jonathan Glasser
LESTER SCHWAB KATZ & DWYER | New York, NY
212.964.6611
jzimring@LSKDnylaw.com
jglasser@lskdnylaw.com

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Oregon Plaintiffs Entitled to Attorney Fees for Actions on Insurance Contracts – But Insurers can Prevent Recovery by Complying with the

Oregon allows a plaintiff to recover attorney fees from a plaintiff’s insurer if plaintiff’s recovery exceeds the amount tendered and if the insurer fails to settle a claim “within six months from the date proof of loss is filed.” Or. Rev. Stat. § 742.061. Additionally, the statute provides a “safe harbor” for insurers. A plaintiff is not entitled to attorney fees if (1) plaintiff is seeking the recovery of Personal Injury Protection Benefits or Under- or Uninsured Motorist Benefits; and (2) the insurer complies with the safe harbor requirements. Recently, the Oregon appellate courts expanded on what constitutes “recovery,” which claims are subject to Or. Rev. Stat. § 742.061, and which actions fall within the safe harbor provisions.

A “proof of loss,” which starts the six-month period in Or. Rev. Stat. § 742.061, is “[a]ny event or submission that would permit an insurer to estimate its obligations (taking into account the insurer’s obligation to investigate and clarify uncertain claims).” Dockins v. State Farm Ins. Co., 329 Or. 20, 29, 985 P.2d 796, 801 (1999). The Oregon Supreme Court clarified that this is a “pragmatic and functional inquiry that “depends on the nature of the insurance coverage at issue.” Zimmerman v. Allstate Property & Casualty Insurance Co., 354 Or. 271, 286-91, 311 P.3d 497, 505-08 (2013). It emphasized the importance of the insurer’s duty to investigate. Id. Zimmerman involved a first-party claim for underinsured motorist (UIM) insurance coverage. The court found that a report notifying the insurer that an accident had occurred – without information as to the tortfeasor’s policy limits – was insufficient “proof of loss” and thus insufficient to trigger the insurer’s duty to investigate a UIM claim, because an insurer has no UIM liability until its insured exhausts the limits of the underinsured tortfeasor’s insurance coverage. Id. at 288, 291.

What is included as part of the “recovery” calculation?

In Long v. Farmers Ins. Co. of Oregon, the Oregon Supreme Court held that “recovery” is not limited to judgments or awards and includes the insurer’s mid-litigation payments and settlement payments. 360 Or. 791, 803–04, 388 P.3d 312, 318–19 (2017). If the aggregate of the insurer’s post-filing payments exceeds the amount of the pre-suit tender, then the insurer is liable for attorney fees under Or. Rev. Stat. § 742.061. Id. at 803–04, 388 P.3d at 318. Thus, settlement payments may result in an attorney fee award for plaintiff.

Types of claims covered

In a recent court of appeals case, West Hills Development Co. v. Chartis Claims, Inc., plaintiff was listed as an additional insured with a self-insured retention on its primary policy and sued defendant insurer for defense costs in an underlying construction defect action. 284 Or. App. 133, 391 P.3d 851 (2017). Plaintiff alleged three claims: breach of the insurance policy, equitable contribution, and equitable subrogation. The trial court entered a general judgment for plaintiff on its claims. Plaintiff sought its attorney fees under Or. Rev. Stat. § 742.061. On appeal, defendant argued that plaintiff was not entitled to attorney fees under the statute because the self-insured retention essentially created an action between two insurers. Defendant also argued that the crux of the action was the equitable contribution and equitable subrogation claims, and, therefore, they were not actions on an insurance policy and outside the scope of Or. Rev. Stat. § 742.061.

The court rejected defendant’s argument that plaintiff’s self-insured retention resulted in what was essentially an action between the insurers. The court noted that, although self-insurers are treated like insurance companies under Or. Rev. Stat. § 742.061, in this case, the self-insured retention was on a different policy, West Hills was just an insured, and thus the self-insured retention was irrelevant to defendant’s duty to defend.

The court also rejected defendant’s argument that plaintiff’s claim was an equitable claim outside of Or. Rev. Stat. § 742.061. The court noted that the trial court found plaintiff was able to recover on the contract claim for the entire amount of its damages, as well as the other claims. Since the contract claim was an action on an insurance policy and plaintiff recovered, plaintiff was entitled to all of its attorney fees without apportionment.

The “Safe Harbor” Rule

Even if plaintiff meets the requirements for attorney fees under Or. Rev. Stat. § 742.061(1), the provisions will not apply if the insurer meets what is commonly known as the “safe harbor” requirements. An insurer will avoid liability for attorney fees in actions to recover personal injury protection benefits, uninsured motorist benefits, or underinsured motorist benefits if, no
later than six months from the date proof of loss is filed, the insurer, in writing (a) accepts coverage, and the only issue is the amount of benefits owed; and (b) consents to submit the case to binding arbitration. Or. Rev. Stat. § 742.061(2) & (3); McClain v. Safeco Ins. Co. of Oregon, 284 Or. App. 410, 392 P3d 829 (2017).

In McClain, the insurer sent plaintiff a timely letter offering to arbitrate the issues of fault and damages in the plaintiff’s underinsured motorist claim. Plaintiff chose to litigate the claim instead, and the insurer admitted fault and that plaintiff was injured. The only issue for the jury was the amount of damages due. The jury awarded plaintiff damages, and plaintiff sought attorney fees under Or. Rev. Stat. § 742.061. Plaintiff argued that the safe harbor provision did not apply because the insurer added an issue of “causation” of damages. The Court of Appeals held that plaintiff was not entitled to attorney fees, because a dispute over the extent of damages is within the scope of permissible issues in Or. Rev. Stat. § 742.061(3).

In contrast, the court in Kiryuta v. County Preferred Insurance Co., 360 Or. 1, 376 P.3d 284 (2016) held that the insurer’s actions placed it outside of the safe harbor provisions in Or. Rev. Stat. § 742.061. The insurer in Kiryuta sent a safe harbor letter and the parties proceeded to arbitration. The trial court denied plaintiff’s request for attorney fees under Or. Rev. Stat. § 742.061 because of the insurer’s safe harbor letter. However, on appeal, the Oregon Appellate Court noted that the insurer raised affirmative defenses in the arbitration, thus exceeding the scope of the safe harbor provision. Therefore, the Oregon Supreme Court held that defendant was not entitled to the safe harbor protection and plaintiff was entitled to attorney fees under Or. Rev. Stat. § 742.061.

Conclusion

Recent case law has provided additional guidance on Oregon’s statute allowing an insured to recover attorney fees from the insurer when an insured submits an adequate proof of loss, the insurer fails to settle the claim within six months from the date of proof of loss, and the recovery exceeds pre-suit tender. In determining whether the insured’s recovery exceeded the pre-suit tender, recovery includes an insurer’s post-suit payments to its insured. A self-insured retention does not eliminate the insured’s ability to recover attorney fees. Finally, the statute provides a safe harbor for avoiding attorney fees in actions to recover personal injury protection benefits, uninsured motorist benefits, or underinsured motorist benefits if the insurer timely accepts coverage, only disputes the amount of benefits, and agrees to binding arbitration.

By: Nicole Nowlin
Ashleigh Edwards
Cosgrave Vergeer Kester LLP
Portland, Oregon

Surface Water Exclusions in Colorado


Martinez suffered water intrusion after a storm in which hail and rainwater collected in his window wells. Because the hail prevented the water from percolating into the ground, it overflowed the basement windows causing significant water intrusion damage. American Family denied the claim on the basis of its surface water exclusion and the claimant sued for breach of contract and extra contractual damages.

The Court’s analysis turned on an earlier decision by the Colorado Supreme Court which interpreted the undefined term ‘surface water:

“Surface water is water from melted snow, falling rain, or rising springs, lying or flowing naturally on the earth’s surface, not gathering into or forming any more definite body of water than a mere bog, swamp, slough, or marsh, and lost by percolation, evaporation or natural drainage. Surface water is distinguished from the water of a natural stream, lake, or pond, is not of a substantial or permanent existence, has no banks, and follows no defined course or channel.”

Heller v. Fire Ins. Exch., 800 P.2d 1006, 1008-09 (1990). The Heller case involved a claim of water damage caused when snowmelt had gathered in large man-made trenches, lined with an impermeable layer which prevented seepage into the ground and altered the natural path of the water and directed it onto the claimants’ property. The Supreme Court held that under those circumstances, the water did not constitute surface water, as defined above,
Martinez argued that his loss did not meet the _Heller_ definition of “surface water” for several reasons, including that the rain landed on his roof and drained off into the window wells so it was not on the earth’s surface, and that melting hail is not surface water. He also argued that even if the rain was surface water, its character changed when it pooled in the window wells, like the trenches in _Heller_. The Court rejected each of these theories, distinguishing the man-made impermeable trenches at issue in the _Heller_ case by noting that the trenches essentially created a watercourse or “defined channel” for the water. In contrast, the Court held that a window well does not change the character of the water naturally collected within it.

By: Lisa Mickley, Esq.
Hal & Evans, LLC
Denver, Colorado

Can The Underlying Plaintiff Collect More than the Amount of the Underlying Judgment in Third Party Failure to Settle Cases?

In the typical third party bad faith case, the underlying plaintiff’s attorney makes a policy limits settlement demand, the insurer does not agree to pay its limits, or does not do so in the time the plaintiff’s attorney thinks it should, and the plaintiff then obtains a verdict substantially in excess of the policy limits. In cases where the defendant is a major corporation, the plaintiff can collect the judgment from the defendant, and the defendant can then sue the insurer to recover the amount in excess of its policy, alleging breach of the duty to settle. But in most cases, the defendant has few if any assets other than the insurance policy. So, when the plaintiff executes on the judgment, the court will order the defendant to assign the defendant’s action for bad faith against the insurer to the underlying plaintiff. In exchange, the underlying plaintiff may, or may not, agree to release the insured/defendant from the judgment. In either case, the underlying plaintiff will then sue the insurer, and will typically seek to recover the unsatisfied portion of the judgment along with damages for the economic harm suffered by the insured/defendant and punitive damages.

This raises the question, though, of whether the forced assignment of the insured/defendant’s bad faith action really gives standing to the underlying plaintiff to recover any more than the amount of the underlying judgment plus post-judgment interest. After all, the insurer did not owe a duty of good faith to the underlying plaintiff. The underlying plaintiff did not suffer any economic damages from the failure to settle. And, in many cases, all the underlying plaintiff has is an assignment of an action to enable the underlying plaintiff to fully collect the underlying judgment. If the insured/defendant does not join in the bad faith action against the carrier, there is no reason the underlying plaintiff should be allowed to recover anything other than the amount of the judgment lien.

**Assignment of Bad Faith Claims in Illinois**

It is well-established in Illinois, like in most states, that an insured’s action for bad faith can be assigned to the underlying plaintiff. See _e.g._ _Phelan v. State Farm Mut. Auto. Ins. Co._, 114 Ill.App.3d 96, 102 (1st Dist. 1983) (“We do not find a sound basis to preclude a court, in a citation-to-discover-assets proceeding, from ordering the cited judgment-debtor to assign to the judgment-creditor a bad-faith cause of action against the judgment debtor’s insurer....”). Additionally, punitive damages are assignable under Illinois law. _Kleinwort Benson N. Am. v. Quantum Fin. Servs._, 181 Ill.2d 214, 224-227 (1998). Thus, when the plaintiff in an excess judgment case brings a citation to discover assets proceeding against the insured/judgment debtor, Illinois courts routinely require the insured/judgment debtor to assign its bad faith case against the insurer to the underlying plaintiff. When the plaintiff has then, stepping into the shoes of the insured, brought a bad faith claim against the insurer, the plaintiff has been able to recover the full amount of the excess judgment, and in some cases has also been allowed to recover punitive damages against the insurer.

For instance, in _O’Neill v. Gallant Ins. Co._, 329 Ill.App.3d 1166 (5th Dist. 2002), a judge compelled the insured to assign her claim against Gallant Insurance Company to the underlying plaintiff, Margarette O’Neill. The court found that the statutory language in 735 ILCS 5/2-1402(c)(5) provided the court authority to require assignment of the insured’s bad faith claim to the underlying plaintiff. _O’Neill_, 329 Ill.App.3d at 1185-86. The court in _O’Neill_ laid out seven factors for courts to consider in evaluating bad faith claims and ultimately upheld a jury award for the full amount of the underlying judgment plus significant punitive damages.

The insurer in _O’Neill_ argued that punitive damages could not be awarded in bad faith cases. However, it based its argument on policy grounds, arguing that no previous Illinois courts had approved an award of punitive damages in a bad faith failure to settle case. 329 Ill.App.3d at 1176. The court easily rejected this argument, noting that while “punitive damages are not the law’s favorite, Illinois has traditionally authorized punitive damages in tort cases involving intentional misconduct or a breach of fiduciary duty.” _Id._ at 1177. The court then
noted that “there was ample evidence…” that Gallant deliberately chose to gamble with [the insured’s] financial security, in the hope of merely delaying the payment of minimal policy limits.” Id. at 1179 (emphasis in original). Thus, the court held that “where the insurer’s conduct exceeds mere negligence and, like here, demonstrates to a jury’s satisfaction that the refusal to settle within policy limits was engaged in with utter indifference and reckless disregard for its policyholder’s financial welfare, punitive damages can be awarded.” Id. at 1177.

Notably, one argument that the insurer did not raise, and the court did not address, was the issue of whether the fact that the underlying plaintiff was standing in the shoes of the insured through a forced assignment of the insured’s action against the insurer should have limited the recovery of the underlying plaintiff to the amount of the judgment lien.

Illinois procedure for the enforcement of judgments is set forth in 735 ILCS 5/2-1402, which is entitled “Supplementary Proceedings.” Sections 2-1402(c)(5) and 2-1402(c)(6) allow the assignment of “any chose in action” to enforce payment of a judgment, and authorize the judgment creditor to maintain an action against any person or corporation indebted to the judgment debtor:

“When assets or income of the judgment debtor not exempt from the satisfaction of a judgment, a deduction order or garnishment are discovered, the court may, by appropriate order or judgment:

“* * * * *”

“(5) Compel any person cited to execute an assignment of any chose in action or a conveyance of title to real or personal property or resign memberships in exchanges, clubs, or other entities in the same manner and to the same extent as a court could do in any proceeding by a judgment creditor to enforce payment of a judgment or in aid of enforcement of a judgment.

“(6) Authorize the judgment creditor to maintain an action against any person or corporation that, it appears upon proof satisfactory to the court, is indebted to the judgment debtor, for the recovery of the debt, forbid the transfer or other disposition of the debt until an action can be commenced and prosecuted to judgment, direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of the action be delivered to the creditor or impounded in court, and provide for the disposition of any moneys in excess of the sum required to pay the judgment creditor’s judgment and costs allowed by the court.”

735 ILCS 5/2-1402(c)(5)-(6) (2017).

The O’Neill court did not address whether the statutory assignment allows an underlying plaintiff to collect amounts in excess of the amount of the underlying judgment against the judgment debtor. The court simply awarded the underlying plaintiff amounts well in excess of the amount of her underlying judgment against Gallant’s insured. Yet, under Illinois case law, there is no basis for an underlying plaintiff who is successful in litigating an assigned bad faith law suit to receive any amount in excess of the amount of its judgment.

Recovery for Underlying Plaintiffs Involuntarily Assigned Bad Faith Claims in Supplementary Proceedings Should Be Capped at the Amount of the Underlying Judgment

The purpose of supplementary proceedings under 735 ILCS 5/2-1402 is to provide an efficient and expeditious procedure to discover assets of a judgment debtor and to apply them to payment of the judgment. Bank of Aspen v. Fox Cartage, Inc., 141 Ill.App.3d 369 (2d Dist. 1986). Several other cases have likewise held that the purpose of the section is to apply the discovered assets to “satisfaction of a judgment.” Foluke v. Peoples Gas Light & Coke Co., 38 B.R. 298 (Bankr. N.D. Ill. 1984); T.M. Sweeney & Sons, LTL Servs. v. Crawford, 120 B.R. 101 (Bankr. N.D. Ill. 1990); Froehlich v. J.R. Froehlich Mfg. Co., 93 Ill.App.3d 179 (1st Dist. 1981); Vendo Co. v. Stoner Insus. Inc., 7 B.R. 240 (Bankr. N.D. Ill. 1980).

In Pessin v. State, 49 Ill. Ct. Cl. 42 (1987), the court held that “satisfaction” is defined as “paying a party what is due him or awarded to him by the judgment of a Court or otherwise.” More recently, in an unpublished opinion, the court cited Black’s Law Dictionary defining “satisfaction” as “the fulfillment of an obligation; esp., the payment in full of a debt.” Summitbridge Credit Inv., LLC v. 4432-4444 W. West End, LLC, 2013 Ill. App. (1st) 121562-U, citing Black’s Law Dictionary, 1460 (9th ed. 2009). Under either definition of “satisfaction,” the purpose of 735 ILCS 5/2-1402 would simply be to fulfill the obligation imposed by the underlying judgment. This suggests that any amounts in excess of the amount of the judgment would not be recoverable by the underlying plaintiff, since those amounts would not be utilized to “satisfy” the underlying plaintiff’s judgment. This effectively caps the amount of damages collectible by the underlying plaintiff, who is the judgment creditor, in a bad faith proceeding against the judgment debtor’s insurer at the amount of the underlying judgment, plus interest and costs.
Implications of Capping the Underlying Plaintiff’s Damages at the Amount of the Underlying Judgment

Since the underlying plaintiff’s damages should be capped at the amount of the judgment, plus interest and costs, pursuant to the supplementary proceedings statute, counsel for the underlying plaintiff in a bad faith action may attempt to recruit the insured judgment debtor to pursue potential damages in excess of the judgment that may have been caused by the insurer’s alleged bad faith. For instance, in a case where the underlying judgment bankrupts or otherwise harms the insured’s business, the insured could potentially join the suit to seek to recover these amounts in excess of the underlying judgment.

Additionally, to the extent the insurer’s conduct is so vexatious and unreasonable that punitive damages may be awarded, if the insured judgment debtor joins the lawsuit against the insurer, the judgment debtor could recover punitive damages exceeding the amount of the judgment, even though the underlying plaintiff would not be entitled to such a recovery. Thus, even where the insured involuntarily assigns its claims against its insurer, it could cooperate with the underlying plaintiff to the detriment of the insurer and become a co-plaintiff in the bad faith action. However, in many of these cases, the insured and the insurer have reasonably good relationships, and the insured may view the excess verdict as a gross miscarriage of justice, which the insured blames on the greed of the underlying plaintiff and the plaintiff’s attorney. In these cases, an insurer could work with the insured to keep the insured from joining the action against the insurer. For example, an insurer concerned about entry of an award of punitive damages may want to affirmatively address this issue by attempting to settle with the insured for amounts in excess of the underlying plaintiff’s judgment, to the extent the insured is willing to engage with the insurer in such discussions.

If the insured is not a party to the litigation, an insurer should move for partial summary judgment to cap the damages plaintiff can recover at the amount of the judgment lien based on the application of 735 ILCS 5/2-1402. No court has yet to analyze this issue under Illinois law, but, as detailed above, the plain language and purpose of the statute indicate that a plaintiff’s recovery would be limited to the “satisfaction” of its judgment, in addition to interest and costs to which the plaintiff would be entitled.

Ultimately, this analysis of Illinois law regarding involuntary assignments leads to the conclusion that an underlying plaintiff who receives an assignment of a cause of action for bad faith against an insurer pursuant to 735 ILCS 5/2-1402 should not be entitled to recover an amount greater than the judgment entered in its favor in the underlying case, plus interest and costs. The insurer in the O’Neill case never challenged the plaintiff’s right to pursue punitive damages in excess of the amount of the judgment, so plaintiffs are likely to attempt to seek punitive damages in these cases of involuntary assignments. Yet, as demonstrated by the analysis above, these plaintiffs should be satisfied with collecting the amount of their judgment, plus interest and costs.

By: Bill McVisk
David J. Rack
Johnson & Bell LLP
Chicago, Illinois

Sixth Circuit Rules on Coverage Claim Arising from “Implied Disparagement”

In Vitamin Health Inc. v. Hartford Cas. Ins. Co., -- Fed. Appx. --., 2017 WL 1325263 (6th Cir. Apr. 11, 2017), the insured, Vitamin Health, manufactured products intended to reduce the risk of developing age-related macular degeneration. It marketed its products as AREDS 2-compliant, indicating to consumers that the products contained the combination of vitamins recommended by a study conducted by the National Eye Institute for the National Institutes of Health.

Baush & Lomb, a competitor of Vitamin Health, filed a complaint against it, alleging patent infringement and false advertising. Vitamin Health tendered that suit to its insurer, Hartford, asserting that the false advertising claim fell within the policy’s definition of “personal and advertising injury.” Hartford disagreed and denied any defense obligation.

Vitamin Health filed a declaratory judgment action in federal court in Michigan, seeking defense and indemnity solely for the false advertising claim. The parties cross-moved for summary judgment. The relevant insuring agreement provided coverage for “personal and advertising injury” offenses that arise out of “[f]oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.” Vitamin Health argued that Baush & Lomb’s action against it arguably fell within this coverage, because Baush & Lomb claimed that Vitamin Health’s mislabeling of its products injured Baush & Lomb. In other words, Vitamin Health argued that it was alleged to have disparaged Baush & Lomb by implication. The District Court found that the false advertising claim was not covered, ruling that there can be no disparagement where the insured is alleged to have misrepresented the content of its own product, and not its competitor’s.
The U.S. Court of Appeals for the Sixth Circuit agreed, finding that the word “disparagement” did not appear in the Amended Complaint in the underlying action. The Court found that, under Michigan law, a disparagement claim requires a company to make false or misleading or disparaging statements about a competitor’s product. By contrast, Bausch & Lomb had simply alleged that Vitamin Health had made false statements about its own products. While specifically refraining from making a determination regarding whether Michigan law recognizes “disparagement by implication” claims, the Court ultimately ruled that “[s]imply put, the gravamen of [the underlying] claim against [the insured] is for false advertising, not product disparagement” and the policies do not require the insurer to defend or indemnify the insured for false advertising claims.

By: Kenneth Newa
Plunkett Cooney
Bloomfield Hills, Michigan

Developments Affecting Additional Insured Coverage in New York

“Blanket” additional insured endorsements in CGL policies are commonly triggered by a separate trade agreement containing a promise by the named insured to procure insurance for the benefit of the additional insured. Most blanket additional insured endorsements require that the agreement be in writing. For example:

- ISO’s CG 20 33 07 04 states that the policy includes 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.”

- ISO’s CG 72 54 12 10, a more recent version of the same endorsement, similarly requires a “written contract” but also includes an exclusion stating that coverage does not apply “if the ‘written contract’ was not executed by the ‘Named Insured’ prior to the ‘occurrence’ giving rise to the additional insured’s potential liability.”

There has been some dispute among New York courts regarding what sort of document constitutes a “written contract or agreement” for this purpose. The cases tend to involve unsigned contracts, proposals and purchase orders.

Unsigned Agreement to Procure Insurance

There has been a split in authority between the First and Fourth Departments of the New York Supreme Court, Appellate Division. In LMIII Realty, LLC v. Gemini Ins. Co., 90 A.D.3d 1520, 1521, 935 N.Y.S.2d 412, 414 (4th Dept. 2011) (“LMIII Realty”), the Fourth Department reviewed evidence of the parties’ intent to be bound by a purchase order, and if there was such intent, a signed document was not essential to trigger a blanket additional insured endorsement:

“We reject defendant's contention . . . that there was no written agreement in this case. Indeed, the purchase order constituted a written agreement obligating Shaffer to add LMIII as an additional insured to the policy [citations omitted]. The purchase order was an enforceable agreement despite the fact that it was unsigned because the evidence in the record establishes that the parties intended to be bound by it [citations omitted].”

Note, however, where there was only an oral agreement memorialized almost four years after the loss, the Fourth Department found insufficient evidence of a written agreement at the time of the accident and granted the insurer’s motion for summary judgment. See Landsman Dev. Corp. v. RLJ Ins. Co., 2017 NY Slip Op 03294 (4th Dep’t April 28, 2017).

The First Department has been stricter in its interpretation, holding that an unexecuted contract, purchase order or proposal is not a “written contract” within the meaning of an additional insured endorsement in a CGL policy. In Casumano v. Extell Rock, LLC, 86 A.D.3d 448, 449, 927 N.Y.S.2d 627, 628-29 (1st Dep’t 2011), the court addressed an unsigned construction agreement and concluded that such an agreement was not a “written” contract and therefore no additional insured coverage attached. Casumano relied on two earlier cases, Nicotra Grp., LLC v. Am. Safety Indem. Co., 48 A.D.3d 253, 253-54, 850 N.Y.S.2d 455, 457 (1st Dep’t 2008) (“The only document relating to the work to be performed by the construction manager was a letter proposal, which was never signed by Nicotra and therefore does not qualify as a ‘written contract’ that was ‘executed’ prior to the ‘bodily injury,’ within the meaning of the policies”), and Nad’l Abatement Corp. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA, 33 A.D.3d 570, 571, 824 N.Y.S.2d 230, 232 (1st Dep’t 2006) (unsigned “contract” was a written job proposal and purported subsequent oral agreement to honor it; “Contrary to plaintiffs' understanding, the fact that an unsigned contract may be enforceable if there is objective evidence the parties intended to be bound or the eventual writing was intended to be valid retroactively . . . has no bearing on whether there is a ‘written contract’ pursuant to the policy endorsement”).
More recently, in December 2016, the First Department took a step toward liberalizing its interpretation of the written contract requirement. In *Zurich Am. Ins. Co. v. Endurance Am. Specialty Ins. Co.*, 145 A.D.3d 502, 43 N.Y.S.3d 40 (1st Dep’t 2016), the First Department, citing the Fourth Department’s *LMIII Realty* case, *supra*, held that the unsigned purchase order in that case constituted a written contract, triggering additional insured coverage. It distinguished *Casunato* because the insurance policy in *Casunato* required that the contract be signed as well, since it stated that the injury had to occur subsequent to execution of the trade agreement, unlike the additional insured endorsement in *Zurich*. Moreover, the intent to be bound was clear because (1) the purchase order in *Zurich* contained no signature lines and stated that by accepting the purchase order, the vendor agreed to be bound by its terms; and (2) the named insured did not dispute that it agreed to the insurance procurement requirements in the purchase order.

While recent trends seem to indicate that the “written contract” requirement can be satisfied by an unsigned agreement, litigants must be vigilant and marshal uncontroverted, objective evidence that there was a meeting of the minds prior to the accident.

**Unsigned Agreement to Indemnify**

Unlike the additional insured cases, which interpret the meaning of the term “written contract” in an insurance policy, cases deciding whether an unsigned agreement to indemnify is binding look to the common law of contracts. *See Flores v. The Lower East Side Service Center, Inc.*, 4 N.Y.S.3d 363, 795 N.Y.S.2d 491 (2005). In *Flores*, the parties had a longstanding course of conduct in which indemnification terms were accepted. *Id.* at 495-497. Thus, under New York law, a party may be entitled to contractual indemnification based on an unsigned contract so long as the parties’ objective conduct evidences an intent to be bound. *See also Smith v. 21 W. 1 LLC Liab. Co.*, 29 A.D.3d 360, 361, 816 N.Y.S.2d 23, 24 (1st Dep’t 2006) (“the parties’ objective conduct clearly manifested an intent to be bound by the unsigned contract”); *Gilbert v. Albany Medical Center*, 21 A.D.3d 677, 678, 799 N.Y.S.2d 685, 686 (3d Dep’t 2005) (“In light of … the fact that a contract such as this one ‘may be valid even if it is not signed by the party to be charged,’ we agree with Supreme Court that there are factual issues as to whether the employer agreed to the terms on the back page as part of this contract”); *Stabile v. Vienier*, 291 A.D.2d 395, 737 N.Y.S.2d 381 (2d Dept 2002); *Podborskie v. Seventh Chelsea Assocs.*, 3 A.D.3d 361, 770 N.Y.S.2d 332 (1st Dept. 2004) (“Indemnity contract must be viewed with reference to the purpose of the entire agreement and the surrounding facts and circumstances”).

However, an indemnification agreement executed after the accident occurs will not be applied in the absence of evidence that the agreement was made as of a date prior to the occurrence or the accident and that the parties intended the contract to apply as of the date. *Vail v. 1333 Broadway Associates, L.L.C.*, 105 A.D.3d 636, 963 N.Y.S.2d 647 (1st Dep’t 2013) (no indemnification agreement in existence at the time of the accident, and no indication the terms and conditions on the back of the purchase order, which contained the indemnification clause, were to have a prior effect); *Regno v. City of New York*, 88 A.D.3d 610, 931 N.Y.S.2d 71 (1st Dep’t 2011) (same); *Temmel v. 1515 Broadway Assocs.*, L.P., 18 A.D.3d 364, 365–366, 795 N.Y.S.2d 234 (1st Dep’t 2005) (same); *Burke v. Fisher Sixth Ave. Co.*, 287 A.D.2d 410, 731 N.Y.S.2d 724 (1st Dep’t 2001) (same); *see also N.Y. Workers’ Comp. Law § 11* (McKinney) (workers compensation bar does not apply to employer’s written contract to indemnify another for liability for injuries to the employee if the agreement was “entered into” before the accident).

**Conclusion**

In sum, the question of whether an unsigned agreement to procure insurance for another entity triggers additional insured coverage under a CGL policy’s blanket additional insured endorsement is evolving. In the First Department, if the additional insured endorsement requires that the agreement be executed, the absence of a signature prevent additional insured coverage, regardless of the intent to be bound. On the other hand, the Fourth Department has essentially adopted the rule from agreements to indemnify and looks to the intent of the parties, so long as there is some writing, signed or not.

Thus, if insurers wish to limit their exposure to additional insured claims, they should require that the named insured’s trade agreements be executed and/or signed as a prerequisite to additional insured status.

*By: Joshua C. Zimring*, Esq.

Jonathan Glasser
Lester Schwab Katz & Dwyer, LLP
New York, New York