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INSURANCE LAW

What Does It Mean to 'Execute' an Insured Contract?

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Contractual liability exclusions are frequently found in commercial general liability policies. These exclusions prevent coverage for "bodily injury" or "property damage," which the insured is obligated to pay — not because it has some tort-based liability, but because the relevant risk is assumed by the insured in a separate contract.

However, these policies often contain an exception to the contractual liability exclusion, in which the risk is assumed in an "insured contract." An insured contract is, among other things, a contract or agreement pertaining to the insured's business, in which the signor assumes the tort liability of another for bodily injury or property damage to a third party. While this may sound complicated, it is, in essence, referring to a classic indemnification agreement.

There is a catch, however. For there to be coverage under an insured contract, the "bodily injury" or "property damage" must occur "subsequent to the execution of the [insured] contract." The requirement that an insured contract be executed before an injury or property damage makes sense. It prevents parties to an accident from colluding after the fact in order to maximize insurance recovery by shifting liability to the entity with the greatest amount of coverage. However, figuring out when a contract was "executed" is not always easy. This article addresses the jurisdictional split in interpreting the requirement that an injury occur subsequent to the "execution" of the insured contract.

Black's Law Dictionary defines the word "execute" as "1. To perform or complete (a contract or duty) … 3. To make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." Black's Law Dictionary (10th ed. 2009). Most of the time when people talk about executing a contract, they are referring to signing it. Looked at through that lens, it should be easy to determine whether a document was signed before the occurrence of bodily injury or property damage.

However, not all contracts or agreements need to be signed in order to be legally enforceable. Section 2-206 of the

Uniform Commercial Code states that "Unless otherwise ambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance in any manner or by any medium reasonable in the circumstances." See also Restatement (Second) Contracts §53(1) ("An offer can be accepted by the rendering of a performance … if the offer invites such an acceptance"). For example, a purchase order may only require the signature of the person or business entity doing the purchasing. Rather than sign the agreement, the seller may just deliver the goods. The same can be seen in many residential home improvement contracts. For instance, a homeowner might sign a contract for a chimney repair but the chimney mason does not. His agreement to the terms is evident in that it is his form (a contract of adhesion) and he performs pursuant to that contract by actually repairing the chimney.

If the word "execute" means signed by both parties, can a contract containing an indemnity provision that only requires a signature from one of the parties ever be "executed" for purposes of insured contract coverage? What about an oral agreement where neither party signs the contract? Connecticut courts have not answered these questions. Other courts appear split, with California adopting a narrow reading of the word "execute," while other jurisdictions adopt a broader definition favoring coverage.

In *Am. Guarantee and Liab. Ins. v. Lexington Ins.*, a California District Court concluded that "[i]n the strictest sense, the contract is executed when all parties to the agreement have signed it." No. C 10-03009 RS, 2011 WL 3240511, at *3 (N.D. Cal. Jul. 29, 2011), rev'd on other grounds 517 Fed. Appx. 599 (9th Cir. 2013). In that case, a subcontractor's employee was injured on a job site and sued the general contractor. The court held that because the subcontract containing the indemnification provision was not signed by both parties before the accident, there was no coverage under the insured contract provision. Notably, it was irrelevant to the court when and whether the parties reached an agreement or intended to contract. Instead, the court relied on a mechanical analysis of whether the subcontract had been signed by both parties before the accident.

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The California court's approach appears to be in the minority, however, with other courts giving the word "execute" a broader meaning. For example, the Texas Supreme Court held that a contract was "executed" for purposes of the insured contract provision without having been signed by both parties. "There is no language in the policies requiring both parties to sign the insured contract, and there was no evidence raising a fact issue of the parties' intent to require that all parties to the subcontract sign it as a condition precedent to the subcontract's validity." *Mid-Continent Cas. v. Global Enercom Mgmt.*, 323 S.W.3d 151, 158 (Tex. 2010). In *Bernal v. TK Stanley*, the court noted that under the policy, the language at issue stated that an insured contract could either be a written or oral agreement. Because the policy explicitly recognized the possibility of an oral contract, the word "execute" necessarily could not be read to require signatures by both parties. No. CIV-12-392-R, 2014 WL 5317907 (W.D. Okla. Oct. 16, 2014).

A more liberal approach to interpreting the word "execute" in an insured contract provision is also in accordance with the general principle that ambiguities in an insurance policy must be construed in favor of coverage. That was the reasoning relied on by the court in *Frankenmuth Mut. Ins. v. Anolick* in holding that either the date of acceptance or the start of performance soon thereafter determined the date of "execution," as opposed to the date the parties signed the agreement. No. 218392, 2001 WL 716803 (Mich. App. Ct. Mar. 9, 2001).

When it comes to defining the word "execute," the broader reading is probably the correct one. If insurance companies want to require signatures by both parties in order to create an insured contract, they clearly and unambiguously should state as much. In the absence of clarifying language, it is likely that courts, including Connecticut's, will continue to apply the broader reading and find that there is coverage so long as the contract is legally binding under state law, even if that means that one (or both) parties failed to sign it. ■