

November 27, 2006

## PUT IT IN WRITING: NO ADDITIONAL INSURED COVERAGE WITHOUT A WRITTEN CONTRACT ON THE DATE OF THE LOSS

By: *Melissa Brill, Esq.*

45 Broadway Atrium, 16th Floor • New York • NY 10006

Phone: (212) 908-1257 • Fax: (866) 825-3144 • mbrill@cozen.com

By: *Emilio Boehringer, Esq.*

45 Broadway Atrium, Suite 2600 • New York • NY 10006

Phone: (212) 908-1237 • Fax: (212) 509-9492 • eboehringer@cozen.com

On October 31, 2006, the New York First Department Appellate Division issued an opinion in *National Abatement Corp. et al v. National Union Fire Insurance Company of Pittsburgh Pa.*, 2006 Slip Op. 07828 (October 31, 2006), affirming a trial court decision holding that a contractor is not entitled to additional insured coverage under a subcontractor's CGL policy when a *written contract* between the parties requiring the procurement of additional insured coverage did not exist on the date of the loss.

At the trial court level, contractors National Abatement Corp. and NAC Environmental Services Corp. (collectively "NAC") sought a declaration that they were entitled to additional insured coverage under a CGL policy issued by National Union Fire Insurance Company of Pittsburgh, PA ("National Union") to American Standard Environmental, Inc. ("ASE") for an underlying bodily injury action filed by an ASE employee who was injured when he fell off a scaffold while performing asbestos abatement work. At the time of the accident, NAC and ASE did not have a written subcontract for the asbestos abatement work that required ASE to procure additional insured coverage for NAC. ASE and NAC entered into a written contract more than one month *after* the employee's accident.

The National Union policy issued to ASE, under which NAC sought additional insured coverage, stated:

<b>Principal Office:</b> 1900 Market Street Philadelphia, PA 19103 (215) 665-2000 (800) 523-2900	<b>Cherry Hill</b> (856) 910-5000 (800) 989-0499	<b>Houston</b> (832) 214-3900 (800) 448-8502	<b>New York Downtown</b> (212) 509-9400 (800) 437-7040	<b>San Diego</b> (619) 234-1700 (800) 782-3366	<b>Trenton</b> (609) 989-8620
<b>Atlanta</b> (404) 572-2000 (800) 890-1393	<b>Chicago</b> (312) 382-3100 (877) 992-6036	<b>London</b> 011 44 20 7864 2000	<b>New York Midtown</b> (212) 509-9400 (800) 437-7040	<b>San Francisco</b> (415) 617-6100 (800) 818-0165	<b>Washington, D.C.</b> (202) 912-4800 (800) 540-1355
<b>Dallas</b> (214) 462-3000 (800) 448-1207	<b>Denver</b> (720) 479-3900 (877) 467-0305	<b>Los Angeles</b> (213) 892-7900 (800) 563-1027	<b>Newark</b> (973) 286-1200 (888) 200-9521	<b>Seattle</b> (206) 340-1000 (800) 423-1950	<b>W. Conshohocken</b> (610) 941-5000 (800) 379-0695
<b>Charlotte</b> (704) 376-3400 (800) 762-3575	<b>Miami</b> (305) 704-5940 (800) 215-2137	<b>Santa Fe</b> (505) 820-3346 (866) 231-0144	<b>Toronto</b> (416) 361-3200 (888) 727-9948	<b>Wilmington</b> (302) 295-2000 (888) 207-2440	

ADDITIONAL INSURED - DESIGNATED PERSON OR  
ORGANIZATION CG 20 26 11 85

Schedule - Name of Person or Organization:  
Project Owners, Property Managers, and Project/General Managers  
where required by written contract.

The additional insured endorsement unequivocally stated that entities were additional insureds only "where required by written contract." NAC argued that there was an oral contract with ASE at the time of the accident and that the parties intended to be retroactively bound by the contract once it was placed into writing. NAC, however, did not present any evidence which indicated that a written contract requiring ASE to procure additional insured coverage for NAC existed on the date of the employee's accident. As a result of NAC's failure to produce a written agreement requiring the procurement of additional insured coverage, the trial court held that NAC was not entitled to coverage as an additional insured under ASE's policy.

The Appellate Division, First Department, unanimously affirmed the trial court's decision. In doing so the First Department stated:

The party claiming insurance coverage bears the burden of proving entitlement [citations omitted] and is not entitled to coverage if not named as an insured or an additional insured on the face of the policy. [citations omitted.] Here, there is additional insured coverage only if such coverage is required by a "written contract," but none existed at the time of the accident . . . . [T]he 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 [citations omitted] has no bearing on whether there is a "written contract" pursuant to the policy endorsement. Interpreting the insurance contract under the same principles as any ordinary business contract, we find the subject provision unambiguous, and reasonably susceptible to only one meaning [citations omitted] leaving no occasion to consider parol evidence of the parties' course of conduct. [citations omitted.]

This opinion serves to clarify the scope of additional insured coverage in disputes between contractors and subcontractors when there is no written contract at the time of the loss.

Cozen O'Connor's **Melissa Brill** represented the prevailing insurer in this matter. To discuss any questions you may have regarding the opinion discussed in this Alert, and how it may apply to your particular circumstances please contact **Melissa Brill** at (212) 908-1257 or [mbrill@cozen.com](mailto:mbrill@cozen.com).