Montana Law Review Online

Volume 83 Article 2

2-28-2022

PREVIEW; Daniels v. Gallatin County: *Increased Liability as a Result of Excess Insurance*

Samuel Doxzon
University of Montana, samuel.doxzon@umontana.edu

PREVIEW; Daniels v. Gallatin County: *Increased Liability as a Result of Excess Insurance*

Sam Doxzon[*]

The Montana Supreme Court will hear oral argument in *Daniels v. Gallatin County* on Thursday, March 3, 2022 at 9:30 a.m. via Zoom.[1] John Harkins and James Zadick are expected to appear on behalf of appellants Atlantis Specialty Insurance Company and Gallatin County. Martha Sheehy and Jonathan Cok are expected to appear on behalf of appellee Don Daniels.

I. INTRODUCTION

The main issue in this case is whether Gallatin County's insurance policy exposed its insurer, Atlantic Specialty Insurance Company (ASIC), to liability beyond statutorily capped government liability limits. Determination of this issue is largely a tale of two statutes:

> **Montana Code Annotated § 2-9-108**
>
> (1) The state, a county, municipality, taxing district, or any other political subdivision of the state is not liable in tort action for damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $750,000 for each claim and $1.5 million for each occurrence.
>
> [. . .]
>
> (3) An insurer is not liable for excess damages unless the insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.[2]

> **Montana Code Annotated § 33-15-302**
>
> The policy, when issued, shall contain the entire contract between the parties, and neither the insurer or any insurance producer or representative thereof nor any person insured thereunder shall make any agreement as to the insurance which is not plainly expressed in the policy.[3]

---

[*] J.D. Candidate, Alexander Blewett III School of Law at the University of Montana, Class of 2022.

[1] The argument will be live-streamed on the Court's website at: http://stream.vision.net/MT-JUD/.

[2] MONT. CODE ANN. § 2-9-108.

[3] *Id.* § 33-15-302.

Based on these statutes, two key questions present themselves:

1) Does § 33-15-302 preclude ASIC from relying on the liability limitations in § 2-9-108(1) because ASIC's policy with Gallatin County never invokes § 2-9-108(1), its language, or its $750,000 liability limit?

2) Does ASIC's inclusion of excess coverage in Gallatin County's policy constitute a "specific agreement by written endorsement" such that ASIC waived the statutory cap in accordance with § 2-9-108(3)?

II. FACTUAL AND PROCEDURAL BACKGROUND

On January 12, 2017, a Gallatin County snowplow operator ran a stop sign and collided with Sarah Daniels's vehicle.[4] Daniels was severely injured in the collision and now suffers from life-long debilitating injuries.[5] Don Daniels, as conservator of Sarah's estate, subsequently sued Gallatin County for negligence and sought damages in excess of the $750,000 statutory cap.[6] Gallatin County has conceded that it is liable for the actions of its employee and that Daniels's damages exceed the $750,000 statutory cap.[7]

At the time of the collision, Atlantic Specialty Insurance Company ("ASIC") insured Gallatin County under Policy Number 791000853-0001 (the "Policy").[8] According to the Policy, Gallatin County was insured for up to $1,500,000 for automobile accidents.[9] Additionally, the Policy provided "Excess Liability Coverage" up to $5,000,000 on top of the automobile liability coverage.[10] At no point does the Policy limit liability to $750,000 per claim, nor does it ever reference § 2-9-108 or any other statutory liability cap.[11]

To clarify whether the statutory cap limited ASIC's liability in this incident, Daniels filed a motion for partial summary judgment with the Montana Eighteenth Judicial District Court to declare that § 2-9-108(1) did not apply.[12] Upon review, the district court granted Daniels's motion

---

[4] Appellant's Opening Brief, Tab 5 at 1–2, *Daniels v. Gallatin Cty.*, No. DA-21-0321 (Mont. Oct. 18, 2021), https://perma.cc/2GGH-X3L7.
[5] Appellant's Opening Brief, *supra* note 4, Tab 5 at 3–10.
[6] Appellant's Opening Brief, *supra* note 4, Tab 5 at 11–14.
[7] Appellant's Opening Brief, *supra* note 4, Tab 5 at 2.
[8] Appellant's Opening Brief, *supra* note 4, Tab 2 at 2.
[9] Appellant's Opening Brief, *supra* note 4, Tab 2 at 2.
[10] Appellant's Opening Brief, *supra* note 4, Tab 2 at 2–3.
[11] Appellant's Opening Brief, *supra* note 4, Tab 2 at 2.
[12] Appellant's Opening Brief, *supra* note 4, Tab 2 at 1.

and ruled that § 2-9-108(1)'s liability cap did not apply.[13] The district court held that: (1) ASIC could not rely on § 2-9-108(1)'s cap because the policy did not reference it; and (2) ASIC's inclusion of "Excess Liability Coverage" up to $5,000,000 in the Policy constituted a waiver of the $750,000 cap in accordance with § 2-9-108(3).[14] Following a three-day bench trial, the district court subsequently entered judgment against Gallatin County, finding that Daniels is entitled to $12,410,016.11.[15] ASIC appealed.[16]

III. SUMMARY OF THE ARGUMENTS

A. Appellee's Arguments

Daniels offers a two-pronged argument: (1) that § 33-15-302 prevents ASIC from relying on § 2-9-108(1) to limit its liability; and (2) that under § 2-9-108(3), ASIC's voluntary inclusion of optional excess coverage in the Policy constitutes a waiver of the § 2-9-108(1) liability cap. Additionally, Daniels emphasizes that either argument is dispositive.[17]

The crux of Daniels's first argument is that Montana's Insurance Code forbids ASIC from relying on § 2-9-108(1)'s liability cap because the Policy references no aspect of the statute. § 33-15-302 and other parts of Montana's Insurance Code require insurance policies to contain the entirety of the contract between insured and insurer to ensure proper notice for involved parties.[18] Montana courts have also held that insurance policies must be enforced as written—provided their terms are clear.[19] Montana courts, therefore, cannot impute outside language.[20] Consequently, Daniels argues that the Policy cannot be interpreted to include § 2-9-108(1)'s liability limits because the language of the Policy clearly extends coverage up to $6.5 million and never references the statute or the $750,000 cap.[21]

The second prong of Daniels's argument asserts that even if ASIC can invoke § 2-9-108, the liability cap is moot because ASIC waived it by providing Gallatin County with excess coverage.[22] According to Daniels, the plain language of § 2-9-108(3) establishes the "cause-effect" that when

---

[13] Appellant's Opening Brief, *supra* note 4, Tab 2 at 10–11.
[14] Appellant's Opening Brief, *supra* note 4, Tab 2 at 11.
[15] Appellant's Opening Brief, *supra* note 4, Tab 7 at 2.
[16] Appellant's Opening Brief, *supra* note 4, at 1.
[17] Appellee's Reply Brief at 37, *Daniels v. Gallatin Cty.*, No. DA-21-0321, (Mont. Oct. 18, 2021), https://perma.cc/WF9U-KVNE.
[18] MONT. CODE ANN. §§ 33-15-302, 33-15-303, 33-15-337.
[19] Steadele v. Colony Ins. Co., 260 P.3d 145, 149 (Mont. 2011); Grimsrud v. Hagel, 119 P.3d 47, 150 (Mont. 2005).
[20] *Id*.
[21] Appellee's Reply Brief, *supra* note 17, at 21–23.
[22] Appellee's Reply Brief, *supra* note 17, at 37.

an insurer provides a government agency with excess insurance, they waive the protections of § 2-9-108(1).[23] Daniels does not view § 2-9-108(3) as requiring a "specific waiver" of the liability cap.[24]

Instead, Daniels bases their argument on the interpretation that ASIC's inclusion of optional excess coverage constitutes ASIC's specific agreement by written endorsement.[25] Daniels relies on a definition of "endorsement" from ASIC's Brief, defining an endorsement as a "written modification of the coverage of an insurance policy."[26] Using this definition, Daniels reasons that the addition of the optional excess insurance to Gallatin County's policy constitutes an "endorsement;" and, consequently, that ASIC satisfied § 2-9-108(3)'s waiver requirements.[27]

B. Appellant's Arguments

Following a similar two-prong approach, ASIC begins its argument that it can rely on § 2-9-108(1) to limit its liability by observing that under the plain language of the Policy they are only liable for what the county "legally must pay as damages."[28] ASIC concedes that its policy never references § 2-9-108(1),[29] and ASIC also never mentions § 33-15-302 or the Insurance Code in the entirety of its argument.

However, ASIC emphatically argues that the definitional meaning of indemnification means that insurers cannot be held liable for damages that the insured is not obligated to pay.[30] ASIC reasons that because § 2-9-108(1) specifically limits the amount the County must pay to $750,000, then ASIC's duty to indemnify the County cannot be construed to provide funds beyond that cap.[31] ASIC invokes *Winter v. State Farm Mutual Automotive Insurance Co.*,[32] to explain that insurers are not liable to the injured party directly; rather, the insured is liable to the injured party, and the insurer simply relieves the insured of the incurred liability.[33] Essentially, because the Policy's indemnification clause limits ASIC's liability to Gallatin County's liability, ASIC's liability is limited by § 2-9-108(1) regardless of its exclusion from the Policy.

Moving to the second prong, ASIC also takes issue with the district court's finding that ASIC waived the statutory liability cap in accordance

---

[23] Appellee's Reply Brief, *supra* note 17, at 38.
[24] Appellee's Reply Brief, *supra* note 17, at 47.
[25] Appellee's Reply Brief, *supra* note 17, at 42.
[26] Appellee's Reply Brief, *supra* note 17, at 42.
[27] Appellee's Reply Brief, *supra* note 17, at 43–44.
[28] Appellant's Opening Brief, *supra* note 4, at 12.
[29] Appellant's Opening Brief, *supra* note 4, at 19.
[30] Appellant's Opening Brief, *supra* note 4, at 14–16.
[31] Appellant's Opening Brief, *supra* note 4, at 12–16.
[32] 328 P.3d 665, 670 (Mont. 2014).
[33] *Id*. at 17.

with § 2-9-108(3).[34] ASIC argues that, as the insurer of a government agency, it automatically benefits from § 2-9-108(1)'s liability cap, and that § 2-9-108(3) serves as an "opt-out provision" that requires a "specific agreement by written endorsement" to trigger.[35] Accordingly, ASIC argues that neither the Policy's omission of any reference to § 2-9-108 nor its inclusion of excess coverage beyond the cap, qualify as a "specific agreement by written endorsement."[36] Indeed, ASIC asserts that because the Policy fails to mention § 2-9-108, the Policy cannot be interpreted to *specifically* waive the statute's protections.[37]

Further, ASIC disputes on multiple fronts the district court's finding that ASIC waived § 2-9-108(1)'s protections by insuring Gallatin County above $750,000. First, ASIC observes that the language of § 2-9-108(3) necessitates that it refers only to insurers who have provided excess coverage; otherwise, there would be no question that the insurer is not liable for damages above $750,000 because policy itself of cap the liability.[38] Second, ASIC contends that policy limits delineated in an insurance policy do not constitute a "written endorsement."[39] And lastly, ASIC points to the enforcement of similar statutes in other states as evidence that Montana's statute cannot be interpreted such that excess coverage provisions waive the statutory caps because the statute does not explicitly state this, as Idaho's does.[40]

IV. ANALYSIS

When reviewing both parties' briefs together, there are two main takeaways: (1) the briefs largely talk past each other, and (2) neither party includes convincing legal support for their key arguments. Both arguments are predominantly comprised of either definitional logic or only vaguely supported legal assertions. That said, it is critical to note that both issues are dispositive for ASIC: should the Court agree with Daniels on either point, ASIC will be held liable for the $12 million judgment. Given this burden, it seems unlikely that ASIC succeeds on appeal despite both its arguments being slightly more robust.

A. The Court will likely find that § 2-9-108 is applicable in determining ASIC's liability.

The dispute over whether ASIC can rely on § 2-9-108 to limit its liability, despite never incorporating the statute's language into the Policy,

---

[34] *Id*. at 18.
[35] *Id*. at 18.
[36] *Id*. at 18.
[37] *Id*. at 20–21.
[38] *Id*. at 23–24.
[39] *Id*. at 24.
[40] *Id*. at 31–35.

depends primarily on how the Policy's indemnification clause is interpreted. As a contract, the language of an insurance policy must govern its interpretation if the language is clear and explicit.[41] An ambiguity exists only if, when taken as a whole, the policy has more than one reasonable interpretation.[42] An ambiguous provision must be construed against the insurer.[43] A mere disagreement over the meaning of a provision, however, does not constitute an ambiguity.[44]

Here, the ASIC's policy with Gallatin County does not contain any ambiguities; the dispute about § 2-9-108's applicability is merely a disagreement over the meaning of the Policy's indemnification clause. As § 33-15-302 requires, an insurance policy must include the entirety of the contract. In the case of the Policy, its indemnification clause states: "[ASIC] will pay all sums [Gallatin County] legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto."[45] This provision clearly outlines the degree to which ASIC is obligated to indemnify Gallatin County. Daniels's agreement that "ASIC is legally obligated to pay the judgment entered against the County" evidences the clarity of this provision.[46] Thus, there is no ambiguity about the extent of ASIC's indemnification that the Court could interpret in favor of Daniels.

Instead, the Court must resolve the disagreement between Daniels and ASIC about what amount the County is obligated to pay. This is how ASIC incorporates § 2-9-108's cap into its policy. In accordance with § 33-15-302 and based on the plain meaning of the Policy's language, the Policy's indemnification clause only allows ASIC to be liable for the amount that Gallatin County legally must pay: an amount that § 2-9-108(1) caps at $750,000. ASIC argues, with considerable legal support, that the district court's judgment against Gallatin County is improper because it exceeds the clearly defined statutory limit.[47] And if the judgment entered against the County is conformed to § 2-9-108(1)'s cap, then Daniels's own reasoning would conclude that ASIC is only liable for $750,000.

---

[41] Heggem v. Capitol Indem. Corp., 154 P.3d 1189, 1193 (Mont. 2007) (*citing* MONT. CODE ANN. § 28-3-401).
[42] *Id*. at 1193.
[43] Leibrand v. Natl. Farmers Union Prop. and Cas. Co., 898 P.2d 1220, 1223 (Mont. 1995).
[44] *Heggem*, 154 P.3d at 1195.
[45] Appellee's Reply Brief, *supra* note 17, at 22 (internal quotations omitted).
[46] Appellee's Reply Brief, *supra* note 17, at 24.
[47] Appellant's Opening Brief, *supra* note 4, at 34–39. (citing Zauflik v. Pennsbury School District, 104 A.3d 1096 (Pa. 2014); Siebert v. Okun, 485 P.3d 1265 (N.M. 2021)).

Even if the $12 million judgment is deemed proper, Daniels misses the distinction between the sum of final judgment and the sum of the remedy available against the government. In *Mackin v. State*, a case that Daniels cites, the Montana Supreme Court interpreted a predecessor statute to § 2-9-108 to determine the implications of its liability cap.[48] The Court held that the effect of the statute was to "limit the remedy available against the state or governmental entity after its liability has been determined by final judgment."[49] A claimant like Daniels can therefore receive a full judgment against the government, but the amount actually paid out is limited to the statutory cap.

B. The Court will likely find that ASIC has not waived § 2-9-108(1)'s liability cap.

As for whether ASIC waived the statutory cap, the plain language of § 2-9-108(3) states that an insurer waives the protections of § 2-9-108(1) only if the insurer "specifically agrees by written endorsement to provide coverage [. . .] in excess of [the cap], in which case the insurer may not claim the benefits on the limitation *specifically waived*."[50] Given this language, ASIC views § 2-9-108(3) as requiring a "specific waiver;" a provision that cannot exist in the Policy because the Policy never references § 2-9-108.[51] Daniels counterargues that the plain language of the statute does not actually require a specific waiver, and steers the Court towards the generic legal standard for waiver of rights.[52] Neither party offers any legal support for their stances on this stage of interpretation. And without any legal precedent on the specific language of § 2-9-108(3), it is difficult to assess which interpretation is proper.

On the one hand, ASIC did exactly what the statute describes as resulting in a waiver: providing coverage in excess of the cap. On the other hand, if § 2-9-108(3) effectuated a waiver whenever an insurer provided excess coverage, there would be no need for § 2-9-108(3)'s qualifying language; a policy limit would either exceed $750,000, thereby waiving the cap, or undercut $750,000, thereby creating its own ceiling on the insurer's liability. Given the interpretive imperative not to render statutory language pointless,[53] ASIC's position appears sound enough to be decisive.

---

[48] Mackin v. State, 621 P.2d 477 (Mont. 1980) (interpreting MONT. CODE ANN. § 2-9-104 which contained nearly identical statutory cap language).
[49] *Mackin*, 621 P.2d at 483.
[50] MONT. CODE ANN. § 2-9-108(3) (emphasis added).
[51] Appellant's Opening Brief, *supra* note 4, at 22.
[52] Appellee's Reply Brief, *supra* note 17, at 47.
[53] Groves v. Clark, 920 P.2d 981, 984 (Mont. 1996) (citing MONT. CODE ANN. § 1-2-101).

Beyond this interpretive issue, the remainder of both parties' arguments are essentially a wash. The strongest aspect of Daniels's argument is their effective characterization of the Policy as a written endorsement; they do not, however, convincingly establish that it qualifies as a "specific agreement."[54] Instead, Daniels replaces this requirement with a different waiver standard requiring only proof that ASIC knew of its right, acted inconsistent with it, and thereby prejudiced Daniels.[55] There is no clear and legally supported explanation of why this different standard should be used in place of § 2-9-108(3)'s language.

Additionally, Daniels routinely cites *Mackin* throughout their argument to contend that the purpose of § 2-9-108(3) is to allow "a governmental entity to provide a method of recovery in amounts in excess of the caps."[56] But as discussed previously, that was not the conclusion of the Court.[57] Daniels also misappropriates language from § 2-9-111(5), a statute relating solely to the liability of legislative members, to argue that § 2-9-108(1) should not apply to Gallatin County because government immunity does not apply to auto liability.[58]

Meanwhile, ASIC's venture into incorporating case law from other states is also unconvincing. ASIC relies heavily on *Zauflik v. Pennsbury School Dist.*,[59] but the Pennsylvania statute at issue in that case is considerably different than § 2-9-108.[60] Consequently, the Pennsylvania Supreme Court's holding that an insured's purchase of excess insurance does not waive their statutory liability cap is only somewhat applicable.[61] Further, ASIC's reference to Kansas's and Idaho's statutory equivalents to § 2-9-108 nearly undermines their own argument because both statutes use language very similar to § 2-9-108(3) to explicitly state the issuance of excess insurance constitutes a waiver of their statutory liability cap.[62]

V. CONCLUSION

In *Daniels v. Gallatin County*, the Court has the opportunity to clarify the implications of both § 33-15-302 as it relates to indemnification clauses and § 2-9-108(3) as it relates to its waiver requirement. And, while neither parties' arguments are overly convincing, ASIC's arguments are sounder on both issues and would result in less dramatic interpretive shifts.

---

[54] Appellee's Reply Brief, *supra* note 17, at 44.
[55] Appellee's Reply Brief, *supra* note 17, at 47 (citing Firestone v. Oasis Telecomm., 38 P.3d 796 (Mont. 2001)).
[56] Appellee's Reply Brief, *supra* note 17, at 46.
[57] *See supra* Part IV(A).
[58] Appellee's Reply Brief, *supra* note 17, at 45.
[59] 104 A.3d 1096.
[60] *See* 42 PA. STAT. AND CONSOL. STAT. ANN. §§ 8542, 8553.
[61] *Zauflik*, 104 A.3d at 44.
[62] IDAHO CODE ANN. § 6-926(1); KAN. STAT. ANN. § 75-6111(a).

Preventing ASIC from relying on the statutory cap because of § 33-15-302 would fundamentally contravene the implication of indemnification clauses, while finding that ASIC waived the cap under § 2-9-108(3) would render aspects of the statute's language meaningless. It bears repeating that both of these issues are dispositive for ASIC—a loss on either issue means a loss overall. Ultimately, it is apparent that ASIC failed to perform due diligence in the drafting or enforcement of its insurance policy with Gallatin County; whether that failure warrants the loss of statutory protections is now up to the Court to decide.