

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2010

4 (Argued: October 8, 2010

Decided: December 23, 2010

5 Amended: December 28, 2010

6 Amended: January 31, 2011)

7 Docket No. 10-0799-CV

8 -----
9 10 ELLICOTT SQUARE COURT CORPORATION and 5182 GROUP, LLC,

10 Plaintiffs-Appellees,

11 - v -

12 MOUNTAIN VALLEY INDEMNITY COMPANY,

13 Defendant-Appellant.

14 -----
15 Before: SACK and RAGGI, Circuit Judges, and KOELTL, District
16 Judge.*

17 Appeal by the defendant from a summary judgment entered
18 in the United States District Court for the Western District of
19 New York (William M. Skretny, Chief Judge) in favor of the
20 plaintiffs. The district court's judgment rested on three
21 grounds relevant to this appeal: first, that a contract that had
22 not been signed on behalf of the parties to it nonetheless had
23 been "executed" within the meaning of the primary insurance
24 policy in issue and New York law; second, that the defendant was

* The Honorable John G. Koeltl of the United States District Court for the Southern District of New York, sitting by designation.

1 bound to provide insurance coverage to the plaintiffs under an
2 umbrella policy; and third, that in any event the defendant was
3 estopped from denying insurance coverage to the plaintiffs by
4 having issued a certificate of insurance identifying the
5 plaintiffs as additional insureds. We reverse the district
6 court's determination on the first issue, affirm on the second,
7 and certify to the New York Court of Appeals a question of New
8 York law necessary to our resolution of the third.

9 Affirmed in part, reversed in part, question certified
10 to the New York Court of Appeals in part, decision reserved in
11 part.

12 MAX GERSHWEIR, Hurwitz & Fine,
13 P.C. (Katherine A. Fijal, Esq., of
14 counsel), Buffalo, New York, for
15 Defendant-Appellant.

16 JUDITH TREGGER SHELTON, Kenney
17 Shelton Liptak Nowak LLP, Buffalo,
18 New York, for Plaintiffs-
19 Appellees.

20 SACK, Circuit Judge:

21 The plaintiffs in this action, 5182 Group, LLC, and 10
22 Ellicott Square Court Corporation, were, respectively, the owner
23 of and construction manager for a commercial building in Buffalo,
24 New York. They contracted with a third firm, Ellicott
25 Maintenance, Inc., for the building's partial interior
26 demolition.

27 The construction agreement between the plaintiffs and
28 Ellicott Maintenance required the latter to secure insurance to

1 cover the former for any legal liability arising out of the
2 demolition project. Ellicott Maintenance therefore purchased two
3 policies--one primary, the other "umbrella"--from the defendant
4 Mountain Valley Indemnity Company. The defendant, by its agent
5 LRMP, Inc., issued a certificate of insurance evidencing the
6 policies and the status of the plaintiffs as additional insureds,
7 after receipt of which Ellicott Maintenance began the demolition
8 work.

9 The primary insurance policy required that the
10 underlying written construction agreement between the named
11 insured, Ellicott Maintenance, and the additional insureds, the
12 plaintiffs in this action, be "executed" in order for any injury
13 for which the plaintiffs sought defense and indemnification to be
14 covered by the policy. Before anyone on behalf of either
15 Ellicott Maintenance or the plaintiffs signed the construction
16 agreement, a worker on the demolition project was injured. When
17 the worker brought suit in New York State court in an attempt to
18 recover for his injuries, the plaintiffs sought defense and
19 indemnification from the defendant insurance company. The
20 defendant declined coverage, arguing that because the
21 construction agreement was neither signed on behalf of the
22 parties nor fully performed prior to the worker's injury, it had
23 not been "executed" under the primary insurance policy issued by
24 the defendant to Ellicott Maintenance, and therefore the
25 plaintiffs did not qualify as additional insureds under either of
26 the policies. The plaintiffs then brought this action in the

1 United States District Court for the Western District of New York
2 seeking a declaratory judgment to the contrary.

3 The district court (William M. Skretny, Chief Judge)
4 agreed with the plaintiffs, concluding that the construction
5 agreement was "executed" even though it had not been signed or
6 fully performed, and that the plaintiffs therefore were entitled
7 to coverage under both the primary and the umbrella policies.
8 The court also decided that even if the plaintiffs were not
9 entitled to coverage under the terms of the policies, the
10 defendant was estopped from denying coverage because its agent
11 had issued a certificate of insurance to Ellicott Maintenance
12 that listed the plaintiffs as additional insureds. The defendant
13 appeals.

14 We disagree with the district court's view that under
15 New York law, a contract has been "executed" despite the absence
16 of either a signature by or on behalf of both parties or full
17 performance. Therefore, under its terms, the primary insurance
18 policy's additional insured coverage did not become effective
19 prior to the accident in question. We conclude, however, that
20 the plaintiffs nonetheless were covered under the terms of the
21 umbrella policy because that policy did not require "execution"
22 of an underlying written agreement to take effect.

23 New York's intermediate appellate courts are divided as
24 to whether, despite the fact that an insurance policy's
25 additional-insured coverage is not in effect under its express
26 terms, a certificate of insurance issued by an agent of the

1 insurer nonetheless may estop the insurer from denying coverage
2 to a party identified as an additional insured on the
3 certificate, even where the certificate contains various
4 disclaimers, such as that it is "for informational purposes
5 only." We therefore certify the following question to the New
6 York Court of Appeals:

7 In a case brought against an insurer in which
8 a plaintiff seeks a declaration that it is
9 covered under an insurance policy issued by
10 that insurer, does a certificate of insurance
11 issued by an agent of the insurer that states
12 that the policy is in force but also bears
13 language that the certificate is not evidence
14 of coverage, is for informational purposes
15 only, or other similar disclaimers, estop the
16 insurer from denying coverage under the
17 policy?¹

¹ Subsequent to our decision to submit this certified question to the New York Court of Appeals but before the submission was actually made or that Court could act upon it, the parties settled the underlying litigation. We therefore withdrew our certification. We construed the parties' stipulation as abandoning the defendant's appeal from the district court's estoppel ruling, and accordingly dismissed the appeal of that issue with prejudice. See 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., - -- F.3d ----, 2011 WL 223602, 2011 U.S. App. LEXIS 1565 (2d Cir. Jan. 26, 2011) (per curiam). Despite the parties' settlement of the case, the other parts of this decision stand. See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994) ("Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur." (internal quotation marks omitted)).

1 **BACKGROUND**

2 The defendant Mountain Valley Indemnity Company
3 ("Mountain Valley") issued a commercial general liability
4 insurance policy, effective March 15, 2003 to March 15, 2004,
5 (the "Primary Policy") to non-party Ellicott Maintenance, Inc., a
6 general contractor in Buffalo, New York.² As amended by an
7 additional-insured endorsement, the Primary Policy covered not
8 only Ellicott Maintenance but also any "person or organization
9 with whom [Ellicott Maintenance] agreed, because of a written
10 contract[,] . . . to provide insurance such as is afforded under
11 [the Primary Policy], but only with respect to liability arising
12 out of [Ellicott Maintenance's] operations," and only when "the
13 written contract or agreement [between Ellicott Maintenance and
14 the additional insured] ha[d] been executed . . . prior to the
15 'bodily injury.'" Mountain Valley Indemnity Co. Commercial
16 Policy No. 331-0013567, Issued to Ellicott Maintenance, Inc.,
17 Gen. Liability Extension Endorsement ¶ 11, Decl. of Katherine A.
18 Fijal in Supp. of Mountain Valley's Mot. for Summ. J. ("Fijal
19 Decl.") Ex. J., 10 Ellicott Square Court Corp. v. Mountain Valley

² In identifying the terms of the Primary Policy, the parties refer the Court to a Renewal Declaration contained in the joint appendix reflecting an insurance policy effective from March 15, 2004, to March 15, 2005. The policy at issue in this litigation, however, was effective from March 15, 2003 to March 15, 2004, the same dates listed on the Certificate of Insurance. Because the parties do not dispute that the Primary Policy was issued, that it was effective from 2003 to 2004, and that it was subject to the same terms and endorsements as are contained in the Renewal Declaration, we rely upon the terms of the Renewal Declaration as evidence of the contents of the Primary Policy.

1 Indem. Co., No. 07-CV-0053 (W.D.N.Y. June 13, 2008). The Primary
2 Policy limited Mountain Valley's liability to one million dollars
3 "per occurrence" of bodily injury, and defined "occurrence" to
4 "mean[] an accident"

5 In addition to the Primary Policy, Mountain Valley
6 issued to Ellicott Maintenance an umbrella policy (the "Umbrella
7 Policy") bearing the same effective dates as the Primary Policy.
8 The Umbrella Policy limited Mountain Valley's liability per
9 occurrence to two million dollars "in excess of" the coverage
10 provided by the Primary Policy and stipulated that the Umbrella
11 Policy's general aggregate limit for each annual period was two
12 million dollars. Like the Primary Policy, the Umbrella Policy
13 guaranteed coverage for bodily injury resulting from an
14 occurrence, which it defined as "an accident," and
15 extended coverage to additional insureds with whom Ellicott
16 Maintenance had "agreed in writing prior to any [injury] . . . to
17 provide insurance such as is afforded" by the Umbrella Policy.
18 Mountain Valley Indem. Co. Commercial Umbrella Policy No. X31-
19 0013568, Issued to Ellicott Maintenance, Inc. at 8, Fijal Decl.
20 Ex. K (the "Umbrella Policy"). Unlike the Primary Policy, the
21 Umbrella Policy did not provide that its coverage of additional
22 insureds was effective only if the written agreement between
23 Ellicott Maintenance and any additional insureds had been
24 "executed."

25 On or about August 14, 2003, Ellicott Maintenance
26 contracted with plaintiffs 5182 Group, LLC, and 10 Ellicott

1 Square Court Corporation d/b/a Ellicott Development Company
2 ("EDC"), to perform interior demolition work at the Graystone
3 Building in Buffalo, New York, owned by plaintiff 5182 Group, and
4 managed by EDC. The agreement between Ellicott Maintenance and
5 the plaintiffs (the "Construction Agreement") obligated Ellicott
6 Maintenance to procure insurance coverage protecting both itself
7 and the plaintiffs against claims by employees or subcontractors
8 for, inter alia, damages resulting from bodily injury. The
9 Construction Agreement required that the insurance be "primary,
10 rather than concurrent with or secondary to [the] Owner's own
11 liability insurance," that it provide coverage of no less than
12 five million dollars,³ and that Ellicott Maintenance obtain,
13 prior to the commencement of work, "Certificates of Insurance
14 naming [the plaintiffs] as additional insureds." Agreement for
15 Construction, dated Sept. 12, 2003, at 10-11, Fijal Decl. Ex. G.
16 No one signed the Construction Agreement on behalf of either the
17 plaintiffs or Ellicott Maintenance until September 12, 2003.

18 Some three weeks earlier, on August 19, 2003, Mountain
19 Valley's agent, LRMP, Inc., had issued a certificate of insurance
20 (the "COI") identifying Mountain Valley as the issuer of the
21 Primary Policy and the Umbrella Policy, Ellicott Maintenance as
22 the named insured, and the plaintiffs as "additional insured with

³ While the Primary and Umbrella Policies, each of which limited liability to two million dollars for each annual period, did not together provide the five million dollars in coverage required by the construction agreement, that fact does not affect our resolution of the issues on appeal.

1 respect to project: Graystone." Certificate of Liability
2 Insurance, dated August 19, 2003, Fijal Decl. Ex. L. The COI
3 listed the limits of liability described above--one million
4 dollars per occurrence under the Primary Policy and two million
5 dollars under the Umbrella Policy. The following language
6 appeared in the upper right-hand quadrant of the front of the
7 COI: "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY
8 AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS
9 CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED
10 BY THE POLICIES BELOW." Id. (capitalization in original). The
11 COI also provided that "THE INSURANCE AFFORDED BY THE POLICIES
12 DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND
13 CONDITIONS OF SUCH POLICIES." Id. (capitalization in original).
14 The reverse side of the COI bore similar language under the
15 heading "DISCLAIMER": "The Certificate of Insurance . . . does
16 not constitute a contract between the issuing insurer . . . and
17 the certificate holder, nor does it affirmatively or negatively
18 amend, extend or alter the coverage afforded by the policies
19 listed thereon." Id. Ellicott Maintenance began work the day
20 after it received the COI.

21 On September 9, 2003, three days before Ellicott
22 Maintenance owner Theodore S. DiRienzo and EDC owner Carl P.
23 Paladino signed the construction agreement on behalf of the
24 parties to it, David DelPrince, an employee of S&A Rubbish and
25 Debris Removal--a subcontractor hired by Ellicott Maintenance--
26 was injured when a roof collapsed at the Graystone site.

1 The plaintiffs notified Mountain Valley's agent, LRMP,
2 of DelPrince's injury and potential claim by letter dated October
3 22, 2003, requesting that Mountain Valley defend and indemnify
4 them in any suit brought by DelPrince. Some six months later, by
5 letter dated April 13, 2004, Mountain Valley informed the
6 plaintiffs that it would not defend or indemnify them because,
7 inasmuch as the Construction Agreement had not been signed on
8 behalf of the parties before DelPrince was injured, "there was
9 not in existence on the date of loss a written contract executed
10 prior to the bodily injury," as required by the terms of the
11 Primary Policy. Letter from Susan Gabriele to 10 Ellicott Square
12 [Court] Corp., dated April 13, 2004, App. to Pls.' Local R. 56.1
13 Statement of Material Facts in Supp. of Pls.' Mot. for Summ. J.
14 Ex. 10, 10 Ellicott Square Court Corp. v. Mountain Valley Indem.
15 Co., No. 07-CV-0053 (W.D.N.Y. June 13, 2008). The letter further
16 stated that even if the plaintiffs qualified as additional
17 insureds under the Primary Policy as of the date of the accident,
18 Mountain Valley would deny coverage because the plaintiffs had
19 failed to timely notify Mountain Valley of DelPrince's injury and
20 possible claim, as required by the Primary Policy.

21 DelPrince filed suit against EDC, 5182 Group, and
22 Ellicott Maintenance in New York State Supreme Court, Erie
23 County, on October 28, 2004, alleging negligence and violations

1 of the New York Labor Law, and seeking to recover damages for the
2 injuries he sustained.⁴

3 The plaintiffs filed this declaratory judgment action
4 in the United States District Court for the Western District of
5 New York on January 30, 2007. They alleged that they were
6 additional insureds under the Primary Policy and therefore were
7 entitled to coverage by Mountain Valley in DelPrince's suit. The
8 plaintiffs further alleged that the COI bound Mountain Valley to
9 provide coverage despite the absence of a signed agreement
10 between EDC and Ellicott Maintenance. Finally, the plaintiffs
11 alleged that Mountain Valley should be precluded from relying on
12 the defense of untimely notice because Mountain Valley's response
13 disclaiming coverage was itself untimely. The plaintiffs later
14 amended their complaint to add a claim alleging entitlement to
15 indemnification and defense as additional insureds under the
16 terms of the Umbrella Policy.

17 The district court (Richard J. Arcara, Judge⁵) referred
18 the case to Magistrate Judge Leslie G. Foschio. In June 2008,
19 the parties brought cross-motions for summary judgment before the
20 magistrate judge. Mountain Valley's motion principally relied on
21 the same arguments made in its April 2004 letter to the
22 plaintiffs disclaiming coverage. Mountain Valley also argued

⁴ The parties represented at oral argument before this Court that DelPrince's suit has been settled.

⁵ This case was originally assigned to Judge Arcara. When, following the reference of the case to the magistrate judge, Judge Arcara recused himself, the case was reassigned to Chief Judge William M. Skretny.

1 that it was not bound by the Umbrella Policy because (1) the
2 Construction Agreement required that the insurance provided to
3 the plaintiffs be "primary," and the Umbrella Policy was
4 secondary; and (2) the Umbrella Policy was "subject to all the
5 limitations of [the Primary Policy]," including the execution
6 requirement, and that because the Construction Agreement was not
7 executed before DelPrince's injury, the plaintiffs "[we]re not
8 insureds on the underlying insurance [and we]re not insureds"
9 under the Umbrella Policy. Mem. of Law in Supp. of Mountain
10 Valley Indem. Co.'s Mot. for Summ. J. at 20-21, 10 Ellicott
11 Square Court Corp. v. Mountain Valley Indem. Co., No. 07-CV-0053
12 (W.D.N.Y. June 13, 2008); see Umbrella Policy at 7-8. In support
13 of their cross-motion, the plaintiffs contended that even though
14 the Construction Agreement had not been signed on behalf of the
15 parties at the time of the accident, it nonetheless had been
16 "executed" for purposes of the Primary Policy because of the
17 parties' partial performance and because the parties to the
18 contract understood its signing to be ministerial. The
19 plaintiffs further argued that even if the Agreement had not been
20 executed, the COI bound Mountain Valley to provide coverage under
21 the Primary Policy because "Mountain Valley's authorized
22 representative represented that such coverage was in place."
23 Mem. of Law in Supp. of Pls.' Mot. for Summ. J. at 17, 10
24 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., No.
25 07-CV-0053 (W.D.N.Y. June 13, 2008). Finally, the plaintiffs

1 argued that the Umbrella Policy's own "blanket additional insured
2 provision" entitled them to that policy's coverage.

3 In a Report and Recommendation (the "R&R"), 10 Ellicott
4 Square Court Corp. v. Mountain Valley Indem. Co., No. 07-CV-0053
5 (W.D.N.Y. Sept. 22, 2009), the magistrate judge recommended
6 denying Mountain Valley's motion for summary judgment and
7 granting the plaintiffs'.⁶ With regard to whether the
8 Construction Agreement was "executed," the magistrate judge
9 concluded that "in light of 'common speech' and the reasonable
10 expectations of a businessperson"--and because Mountain Valley,
11 as the drafter of the policy, could have used the term "signed"
12 if it had intended to require a signature--the term "executed" as
13 used in the Primary Policy should not be interpreted to require
14 the parties' signatures to trigger coverage under that policy.
15 R&R at 12-13. On the question of whether the plaintiffs were
16 entitled to coverage based on the COI, the magistrate judge
17 recommended finding that the COI incorporated the terms of the
18 Primary and Umbrella Policies. Relying on Niagara Mohawk Power
19 Corp. v. Skibeck Pipeline Co., 271 A.D.2d 867, 705 N.Y.S.2d 459
20 (4th Dep't 2000), the magistrate judge found that Mountain
21 Valley's agent, acting within the scope of its authority, "issued
22 the certificate of insurance naming [the plaintiffs] as
23 additional insureds, upon which [the plaintiffs] were entitled to

⁶ Subject matter jurisdiction over this action is founded on diversity of citizenship. The parties do not dispute that the plaintiffs' claims are properly resolved by applying New York law.

1 rely, regardless of the absence of a signing of the construction
2 contract at that time." R&R at 15. The magistrate judge
3 therefore recommended estopping Mountain Valley from denying
4 coverage to the plaintiffs. Finally, the magistrate judge
5 rejected Mountain Valley's argument that the plaintiffs had not
6 provided timely notice of DelPrince's injury.⁷

7 Mountain Valley filed written objections to the entire
8 R&R making essentially the same arguments it had presented to the
9 magistrate judge. Upon de novo review, the district court
10 adopted the R&R in its entirety and without further written
11 analysis. 10 Ellicott Square Court Corp. v. Mountain Valley
12 Indem. Co., No. 07-CV-0053, 2010 WL 681284, 2010 U.S. Dist. LEXIS
13 14556 (W.D.N.Y. Feb. 19, 2010).

14 Mountain Valley appeals.

15 DISCUSSION

16 I. Standard of Review

17 We review the district court's grant of summary
18 judgment de novo, "construing the evidence in the light most
19 favorable to the non-moving party and drawing all reasonable
20 inferences in its favor." Fincher v. Depository Trust & Clearing
21 Corp., 604 F.3d 712, 720 (2d Cir. 2010). "Summary judgment is
22 appropriate where there exists no genuine issue of material fact
23 and, based on the undisputed facts, the moving party is entitled
24 to judgment as a matter of law." O & G Indus., Inc. v. Nat'l

⁷ Mountain Valley does not challenge this conclusion on appeal.

1 R.R. Passenger Corp., 537 F.3d 153, 159 (2d Cir. 2008), cert.
2 denied, 129 S. Ct. 2043 (2009) (brackets and internal quotation
3 marks omitted); see also Fed. R. Civ. P. 56(a) ("The court shall
4 grant summary judgment if the movant shows that there is no
5 genuine dispute as to any material fact and the movant is
6 entitled to judgment as a matter of law. The court should state
7 on the record the reasons for granting or denying the motion.").

8 II. Execution of the Construction Agreement

9 The plaintiffs argue, and the district court concluded,
10 that although no one on behalf of them or Ellicott Maintenance
11 had signed the Construction Agreement before DelPrince was
12 injured, the contract nevertheless was "executed" for purposes of
13 the Primary Policy. We disagree.

14 We must give "unambiguous provisions of an insurance
15 contract . . . their plain and ordinary meaning." Essex Ins. Co.
16 v. Laruccia Constr., Inc., 71 A.D.3d 818, 819, 898 N.Y.S.2d 558,
17 559 (2d Dep't 2010) (internal quotation marks omitted). We
18 cannot disregard "the plain meaning of the policy's
19 language . . . in order to find an ambiguity where none exists."⁸

⁸ The plaintiffs appear to argue that the term "executed" is ambiguous. Whether a contract term is ambiguous is a threshold question of law. Morgan Stanley Grp. Inc. v. New Eng. Ins. Co., 225 F.3d 270, 275 (2d Cir. 2000). "An ambiguity exists where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person" who is aware of trade terminology and of the context of the entire contract. Id. (internal quotation marks omitted). As we will discuss below, we conclude that the term "executed" is not ambiguous.

1 Empire Fire & Marine Ins. Co. v. Eveready Ins. Co., 48 A.D.3d
2 406, 407, 851 N.Y.S.2d 647, 648 (2d Dep't 2008).

3 "[I]t is common practice for the courts of this State
4 to refer to the dictionary to determine the plain and ordinary
5 meaning of words to a contract." Mazzola v. Cnty. of Suffolk,
6 143 A.D.2d 734, 735, 533 N.Y.S.2d 297, 297 (2d Dep't 1988)
7 (citation omitted). The New York Court of Appeals recently did
8 just that in determining the meaning of New York State statutory
9 language. Giordano v. Market Am., Inc., --- N.Y.3d ----, ----, -
10 -- N.E.2d ----, ----, --- N.Y.S.2d ----, ----, 2010 WL 4642451,
11 2010 N.Y. LEXIS 3284, at *10 (Nov. 18, 2010) (adopting a
12 dictionary definition of the word "latent" for purposes of N.Y.
13 C.P.L.R. 214-c(4)).

14 Black's Law Dictionary defines "executed" as: "1. (Of a
15 document) that has been signed <an executed will>. 2. That has
16 been done, given, or performed <executed consideration>."
17 Black's Law Dictionary 650 (9th ed. 2009).⁹ A note to the
18 definition warns that "[t]he term 'executed' is a slippery
19 word. . . . A contract is frequently said to be executed when
20 the document has been signed, or has been signed, sealed, and
21 delivered. Further, by executed contract is frequently meant one
22 that has been fully performed by both parties." Id. (quoting
23 William R. Anson, Principles of the Law of Contract 26 n.*

⁹ Black's Law Dictionary defines "execute" as, inter alia: "To perform or complete (a contract or duty)"; and "To make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." Black's Law Dictionary, supra, at 649.

1 (Arthur L. Corbin ed., 3d Am. ed. 1919)) (brackets and internal
2 quotation marks omitted, emphasis in original).

3 New York courts employ the standard indicated by the
4 definition in Black's, requiring that a contract be either signed
5 or fully performed before it can be considered executed.¹⁰ For
6 example, in Burlington Insurance Co. v. Utica First Insurance
7 Co., 71 A.D.3d 712, 896 N.Y.S.2d 433 (2d Dep't 2010),¹¹ a case
8 with facts remarkably similar to those of the case before us, a
9 construction manager contracted with a subcontractor to perform
10 work at a site in Manhattan. The agreement was memorialized in a
11 purchase order that required the subcontractor "to obtain
12 insurance in specified minimum amounts, and to name [the
13 construction manager] as an additional insured on the Certificate
14 of Insurance." Id. at 712, 896 N.Y.S.2d at 434. The policy's
15 additional insured endorsement provided, inter alia, that the
16 written contract or agreement between the manager and

¹⁰ The parties have not pointed to, nor have we ourselves discovered, an opinion of the New York Court of Appeals addressing the definition of "executed" as it relates to contracts. Because there is no disagreement among the Departments of the Appellate Division in this regard, however, we will apply the decisions of those courts. "[W]e are bound to apply the law as interpreted by New York's intermediate appellate courts unless we find persuasive evidence that the New York Court of Appeals, which has not ruled on this issue, would reach a different conclusion." Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 344 F.3d 211, 221 (2d Cir. 2003) (ellipses and internal quotation marks omitted).

¹¹ The district court relied on the Supreme Court's opinion in Burlington, which the Second Department overturned, in determining applicable New York law. We of course treat the Second Department's decision, of which the district court could not have known when it decided the case at bar, as superseding the Supreme Court's view on the matter.

1 subcontractor had to be "[c]urrently in effect or becoming
2 effective during the terms of this policy; and . . . [e]xecuted
3 prior to the 'bodily injury' [or] 'personal injury'." Id. at
4 713, 896 N.Y.S.2d at 434.

5 Before the purchase order was signed on behalf of
6 either party, and before work at the site was completed, a man
7 was injured when he fell through a sidewalk cellar door at the
8 construction site. Id. The injured man filed a personal injury
9 action against the construction manager and the subcontractor,
10 both of whom in turn sought coverage from the defendant insurance
11 company. Id. The defendant declined coverage "on the ground
12 that [the construction manager] was not an additional insured
13 pursuant to the terms of the policy's additional insured
14 endorsement" because "the purchase order was not signed at the
15 time of the underlying plaintiff's alleged injury and, therefore,
16 had not been 'executed' as of that time," as required by the
17 endorsement. Id. The plaintiffs argued that the contract had
18 been executed by virtue of their partial performance of their
19 duties thereunder.

20 The Appellate Division, Second Department, agreed with
21 the insurer, concluding that "the defendant demonstrated that the
22 contract was not 'executed' at the time of the alleged
23 accident . . . since it was both unsigned and had not been fully
24 performed at that time." Id. at 714, 896 N.Y.S.2d at 435. The
25 court found "no support for the plaintiffs' contention that the
26 condition in the additional insured endorsement that the contract

1 be 'executed' prior to the bodily injury or personal injury could
2 be satisfied by partial performance." Id.

3 In this case, the plaintiffs assert that although the
4 Construction Agreement was not signed, the "underlying contract"
5 requiring Ellicott Maintenance to procure insurance had been
6 fully performed in that Ellicott Maintenance had "obtained
7 insurance in favor of EDC/5182 Group by purchasing policies with
8 a blanket additional insured endorsement," and "delivered proof
9 of coverage in the form of" the COI. Appellees' Br. 20. But the
10 Construction Agreement was not comprised of many individual
11 contracts, as the plaintiffs' argument implies. Rather,
12 fulfilling the insurance procurement provision constituted
13 partial performance of the Construction Agreement--satisfaction
14 of one of the duties required of Ellicott Maintenance thereunder.
15 And as the district court correctly noted, partial performance
16 does not constitute execution.

17 The plaintiffs also argue that Burlington "appears to
18 be premised on a legal fallacy," Appellees' Br. 14, i.e., that
19 the Second Department's acknowledgment that the word "executed"
20 can have more than one meaning cannot be reconciled with its
21 conclusion that this "does not render the contract uncertain or
22 ambiguous," Burlington, 71 A.D.3d at 713, 896 N.Y.S.2d at 435
23 (internal quotation marks omitted). But the Burlington court
24 concluded that the contract before it had not been executed
25 because it had neither been signed nor fully performed.
26 Therefore, neither method of execution had been met. Id. at 714,

1 896 N.Y.S.2d at 435. One cannot conclude from the fact that a
2 contract requirement can be satisfied in more than one way that
3 the contract for that reason alone "lack[s] a definite and
4 precise meaning." SUS, Inc. v. St. Paul Travelers Grp., 75
5 A.D.3d 740, 742, 905 N.Y.S.2d 321, 324 (3d Dep't 2010). Neither
6 does it render the term ambiguous, nor create a triable issue of
7 material fact.

8 Because New York law unambiguously requires either the
9 signing of a contract or its full performance for it to be
10 "executed" within the meaning of an insurance policy requiring
11 such prior execution, and because neither occurred here, the
12 Construction Agreement was not executed as of the date of
13 DelPrince's injury. The district court's finding that it was and
14 its conclusion that for that reason the Primary Policy was in
15 effect at the time of the accident, are therefore in error.

16 III. Estoppel under the Certificate of Insurance

17 The plaintiffs contend that Mountain Valley is
18 nonetheless estopped from denying coverage to the plaintiffs
19 under the Primary Policy¹² because Mountain Valley's agent issued,
20 and the plaintiffs relied upon, the COI. The district court
21 agreed. New York's intermediate appellate courts are divided on
22 the question.

¹² The plaintiffs make the same argument regarding the Umbrella Policy, but because we conclude in Part IV below that the Umbrella Policy was in any event in effect as to the plaintiffs for other reasons, we need not reach the question of estoppel with respect to that policy.

1 New York contract law instructs that, as a general
2 matter, "[a] certificate of insurance is merely evidence of a
3 contract for insurance, not conclusive proof that the contract
4 exists, and not, in and of itself, a contract to insure." Horn
5 Maint. Corp. v. Aetna Cas. & Sur. Co., 225 A.D.2d 443, 444, 639
6 N.Y.S.2d 355, 356 (1st Dep't 1996); see also Sevenson Envtl.
7 Servs., Inc. v. Sirius Am. Ins. Co., 74 A.D.3d 1751, 1753, 902
8 N.Y.S.2d 279, 280 (4th Dep't 2010); Tribeca Broadway Assocs., LLC
9 v. Mount Vernon Fire Ins. Co., 5 A.D.3d 198, 200, 774 N.Y.S.2d
10 11, 13 (1st Dep't 2004). While a certificate "may be sufficient
11 to raise an issue of fact" on summary judgment, "it is not
12 sufficient, standing alone . . . , to prove coverage as a matter
13 of law." Id.

14 However, the Third and Fourth Departments have held
15 that a certificate of insurance can estop an insurance provider
16 from denying coverage where the parties intended to provide
17 coverage to the party seeking it if the certificate was issued by
18 an agent within the scope of its authority, and if the party
19 seeking coverage reasonably relied on the certificate of
20 insurance by, for example, beginning construction work. See
21 Niagara Mohawk Power Corp. v. Skibeck Pipeline Co., 270 A.D.2d
22 867, 868-69, 705 N.Y.S.2d 459, 460-61 (4th Dep't 2000)
23 (concluding that insurer was bound by certificate of insurance
24 listing the plaintiff as an additional insured, even though
25 another certificate, under which the plaintiff sought coverage,
26 did not list the plaintiff); Bucon, Inc. v. Pa. Mfg. Ass'n Ins.

1 Co., 151 A.D.2d 207, 210-11, 547 N.Y.S.2d 925, 927-28 (3d Dep't
2 1989) (estopping the defendant insurer from denying coverage to
3 the plaintiff where the plaintiff reasonably relied on a
4 certificate of insurance in commencing construction work). But
5 the Second Department has declined to conclude that an insurer
6 was estopped from denying coverage to a party that was
7 erroneously named on a certificate of insurance. See Am. Ref-
8 Fuel Co. of Hempstead v. Res. Recycling, Inc., 248 A.D.2d 420,
9 423-24, 671 N.Y.S.2d 93, 96 (2d Dep't 1998) (rejecting estoppel
10 arising from a certificate of insurance where the certificate
11 stated that it was "a matter of information only and confer[red]
12 no rights upon" the plaintiff, and holding that "the doctrine of
13 estoppel may not be invoked to create coverage where none exists
14 under the policy").¹³ The First Department, too, has been
15 reluctant to find estoppel based on a certificate of insurance.
16 See Nicotra Grp., LLC v. Am. Safety Indem. Co., 48 A.D.3d 253,
17 254, 850 N.Y.S.2d 455, 457 (1st Dep't 2008) ("Nor did the

¹³ The plaintiffs attempt to distinguish American Ref-Fuel. In that case, the alleged additional insured was named in the certificate of insurance but was never named--and was not intended to be named--as an additional insured under the terms of the insurance contract. Id., 248 A.D.2d at 423-24, 671 N.Y.S.2d at 96. However, the court's rejection of estoppel appears to have been grounded in the plain language of the certificate itself, which, like the certificate at issue in the instant case, warned that it was for informational purposes only. Id. Mountain Valley's effort to distinguish Bucon is similarly unpersuasive, as is its reliance on Taylor v. Kinsella, 742 F.2d 709 (2d Cir. 1984), a case in which we declined to require coverage by virtue of a certificate because, inter alia, in order to provide the coverage sought, the certificate would have had to expand the scope of the policy it referenced. See id. at 711-12.

1 certificate of insurance confer additional insured status.");
2 Rodless Props., L.P. v. Westchester Fire Ins. Co., 40 A.D.3d 253,
3 254-55, 835 N.Y.S.2d 154, 155 (1st Dep't 2007) ("We agree . . .
4 that since the certificate of insurance was issued as a matter of
5 information only . . . it is neither proof of insurance nor proof
6 of an oral contract."); Moleon v. Kreisler Borg Florman Gen.
7 Constr. Co., 304 A.D.2d 337, 339, 758 N.Y.S.2d 621, 623 (1st
8 Dep't 2003) (deciding, without reference to estoppel, that
9 certificate of insurance is "insufficient to establish that [the
10 plaintiff] is an additional insured under a policy especially
11 where, as here, the policy itself makes no provision for
12 coverage").

13 There is reason to conclude that the primary insured--
14 here, Ellicott Maintenance--should bear the burden of ensuring
15 that all the conditions of providing "additional insured" status
16 to those with whom it contracts to provide that status have been
17 met. At oral argument, counsel for both sides acknowledged that
18 it is not customary for an insurer or for the insurer's agent to
19 see the contract ostensibly requiring a contractor to procure
20 insurance; rather, a certificate of insurance naming the
21 additional insured is issued as a matter of course upon the
22 request of the primary insured. Nor is there evidence in the
23 record of which we are aware that the plaintiffs ever saw the
24 policy issued to Ellicott Maintenance, or that a party in the
25 plaintiffs' position would typically see such a policy. The
26 additional insureds did not have a relationship with the insurer

1 that would have given them the right to obtain or question the
2 accuracy of a certificate of insurance. It is, after all, the
3 primary insured which has explicitly agreed to the execution of
4 the underlying contract as a condition of coverage for additional
5 insureds, which has the ability to seek to obtain that execution
6 prior to the beginning of work pursuant to the contract, and
7 which is otherwise best positioned to assure compliance with the
8 conditions of its insurance.

9 On the other hand, there is a reasonable argument to be
10 made that, disclaimers notwithstanding, an insurer has an
11 obligation not to issue false or potentially misleading
12 certificates of insurance--or to permit an agent to issue them--
13 if it or the agent is aware the parties may rely upon the
14 certificate despite disclaimers to the contrary. "[A]n
15 estoppel rests upon the word or deed of one [party] upon which
16 another party rightfully relies and so relying changes his
17 position to his injury." Nassau Trust Co. v. Montrose Concrete
18 Prods. Corp., 56 N.Y.2d 175, 184, 436 N.E.2d 1265, 1269, 451
19 N.Y.S.2d 663, 667 (1982) (citation and internal quotation marks
20 omitted). That formulation may well correctly describe the facts
21 here. Moreover, insurers typically have greater control over the
22 terms of insurance contracts and certificates of insurance than
23 their insureds, along with greater knowledge of the applicable
24 law; estoppel therefore may be appropriate for much the same
25 reason that ambiguities in insurance contracts are construed
26 against insurers. Cf. Thomas J. Lipton, Inc. v. Liberty Mut.

1 Ins. Co., 34 N.Y.2d 356, 361, 314 N.E.2d 37, 39, 357 N.Y.S.2d
2 705, 708 (1974). And such a distribution of responsibility may
3 be particularly appropriate in cases, such as this one, where
4 enforcement of the certificate of insurance would not expand the
5 substantive scope of the insurance contemplated by the insurer,
6 but would instead require the insurer to provide the coverage to
7 which the certificate of insurance states it has agreed. See
8 Bucon, 151 A.D.2d at 210-11, 547 N.Y.S.2d at 927-28.

9 In any event, in light of this diversity of authority
10 among the Appellate Divisions, and of the underlying policy
11 choices involved, on what we think to be a significant issue of
12 state law, and acknowledging the absence of guidance from the
13 Court of Appeals, we respectfully certify to the Court the
14 following question:

15 In a case brought against an insurer in which
16 a plaintiff seeks a declaration that it is
17 covered under an insurance policy issued by
18 that insurer, does a certificate of insurance
19 by an agent of the insurer that states that
20 the policy is in force but also bears
21 language that the certificate is not evidence
22 of coverage, is for informational purposes
23 only, or other similar disclaimers, estop the
24 insurer from denying coverage under the
25 policy?

26 IV. Coverage Under the Umbrella Policy¹⁴

¹⁴ In a joint post-argument submission dated October 14, 2010, the parties confirmed that even though DelPrince's lawsuit has been settled, their dispute concerning the applicability of the Umbrella Policy is not moot because, "given the particulars of the settlement in the underlying action, a finding in this case that [the] plaintiffs are entitled to coverage under the defendant's umbrella policy would result in [the] defendant having to pay under that policy." Letter from Judith Treger Shelton, Counsel for the Pls., to the U.S. Court of Appeals for

1 The plaintiffs argue that even if they are not covered
2 as additional insureds under the Primary Policy, they are covered
3 under the Umbrella Policy.¹⁵ Mountain Valley responds that the
4 Umbrella Policy is limited by the same unfulfilled "execution"
5 requirement as the Primary Policy. A finding that the plaintiffs
6 were covered by the Umbrella Policy, Mountain Valley asserts,
7 would constitute an expansion in coverage in contravention of New
8 York law. We agree with the plaintiffs.

9 Section 3(c) of the Umbrella Policy provides: "Any
10 person or organization with whom or with which you have agreed in
11 writing prior to any loss, 'occurrence[,] or 'offense' to
12 provide insurance such as is afforded by this policy is an
13 insured" Fijal Decl. Ex. K at 8 (§ 3(c)). Pursuant to
14 Section 3(d), "Each person or organization who is an 'insured' in
15 the 'underlying insurance' is an 'insured' under this insurance
16 subject to all the limitations of such 'underlying insurance'
17 other than the limits of the underlying insurer's liability."
18 Id. (§ 3(d)).

the Second Circuit, dated Oct. 14, 2010, 10 Ellicott Square Court Corp. v. Mountain Valley Indem. Co., No. 10-0799-CV (2d Cir. Oct. 14, 2010), ECF No. 71.

¹⁵ The district court's finding that the Construction Agreement had been "executed" compelled its conclusion that the plaintiffs were covered under both the Primary and the Umbrella Policies. See 10 Ellicott Square Court Corp., 2010 WL 681284, at *2, 2010 U.S. Dist. LEXIS 14556, at *5. Because we conclude that the Construction Agreement was not "executed," we must consider whether the plaintiffs qualify for defense and indemnification under the Umbrella Policy.

1 We conclude that Section 3(c) renders the plaintiffs
2 insureds under the Umbrella Policy. The policy requires no more
3 than an agreement in writing. The New York Court of Appeals
4 "ha[s] long held that a contract may be valid even if it is not
5 signed by the party to be charged, provided its subject matter
6 does not implicate a statute . . . that imposes such a
7 requirement." Flores v. Lower E. Side Serv. Ctr., Inc., 4 N.Y.3d
8 363, 368, 828 N.E.2d 593, 596 (2005). "[A]n unsigned contract
9 may be enforceable, provided there is objective evidence
10 establishing that the parties intended to be bound." Id. at 369,
11 828 N.E.2d at 597.

12 It is undisputed that the parties intended to be bound
13 by the Construction Agreement irrespective of whether and when it
14 was signed. Under New York law, it was therefore a binding
15 agreement prior to its execution. And it is indisputable that
16 under that agreement, the general contractor was to procure
17 insurance for the plaintiffs. Nor is there any issue as to the
18 Construction Agreement's requirement that Ellicott Maintenance
19 obtain aggregate insurance coverage for at least five million
20 dollars, and that the Primary Policy had a general aggregate
21 limit of two million dollars.

22 Mountain Valley argues that the Construction Agreement
23 did not require "insurance such as is afforded" by the Umbrella
24 Policy because the Agreement required that Ellicott Maintenance's
25 insurance be in the form of a "primary policy." But the
26 Agreement required only that Ellicott Maintenance's policy be

1 primary in relation to the plaintiffs' own policies "rather than
2 concurrent" with them. Fijal Decl. Ex. G at 10 (§ 7(A)(3)).

3 Mountain Valley also contends that because the
4 Construction Agreement did not refer explicitly to umbrella
5 coverage, it did not require Ellicott Maintenance to provide
6 "such insurance as is afforded" by the Umbrella Policy.
7 Appellant's Reply. Br. at 11. We find no language in the
8 Umbrella Policy to require such specificity.

9 Notwithstanding Section 3(c), Mountain Valley argues
10 that the plaintiffs do not qualify as additional insureds
11 because, under Section 3(d), the Umbrella Policy is "subject to
12 all the limitations" of the Primary Policy. We need not resolve
13 whether the Primary Policy's execution requirement would preclude
14 the plaintiffs from receiving coverage under Section 3(d) of the
15 Umbrella Policy, because the plaintiffs are eligible for coverage
16 pursuant to Section 3(c) irrespective of the effectiveness of the
17 Primary Policy. Sections 3(c) and 3(d) of the Umbrella Policy,
18 which define who is an insured, provide alternative grounds
19 rather than compound requirements for qualification as an
20 additional insured. We will not read "and" into the policy to
21 conclude that the plaintiffs must qualify as insureds under both
22 Section 3(c) and Section 3(d). If they come within the terms of
23 either, they are insureds. "[C]ourts may not by construction add
24 or excise terms . . . under the guise of interpreting the
25 writing." Vt. Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d
26 470, 475, 807 N.E.2d 876, 879, 775 N.Y.S.2d 765, 768 (2004)

1 (citation and internal quotation marks omitted). We therefore
2 conclude that Mountain Valley is bound to provide coverage to the
3 plaintiffs under Section 3(c) of the Umbrella Policy.

4 Although our conclusion rests on a ground not
5 considered by the district court, we may "affirm a decision on
6 any grounds supported in the record, even if it is not one on
7 which the trial court relied." Thyroff v. Nationwide Mut. Ins.
8 Co., 460 F.3d 400, 405 (2d Cir. 2006). We do so here.

9 V. Certification to the New York Court of Appeals

10 The rules of this Court provide that "[i]f state law
11 permits, the court may certify a question of state law to that
12 state's highest court." 2d Cir. Local R. 27.2; see also Penguin
13 Grp. (USA) Inc. v. Am. Buddha, 609 F.3d 30, 41-42 (2d Cir. 2010).
14 "Although the parties did not request certification, we are
15 empowered to seek certification nostra sponte." Kuhne v. Cohen &
16 Slamowitz, LLP, 579 F.3d 189, 198 (2d Cir. 2009). Whether to
17 certify is discretionary, Am. Buddha, 609 F.3d at 41, and is
18 principally guided by three factors.

19 First, "certification may be appropriate if the New
20 York Court of Appeals has not squarely addressed an issue and
21 other decisions by New York courts are insufficient to predict
22 how the Court of Appeals would resolve it." Id. at 42; see also
23 O'Mara v. Town of Wappinger, 485 F.3d 693, 698 (2d Cir. 2007);
24 Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.,
25 344 F.3d 211, 220-21 (2d Cir. 2003); N.Y. Comp. Codes R. & Regs.
26 tit. 22, § 500.27(a) (2008). As discussed above, there is a

1 "split of authority," Blue Cross, 344 F.3d at 221, regarding
2 whether a certificate of insurance can be enforced through
3 estoppel: "[T]wo competing lines of cases deal[] with the issue
4 here," and the New York Court of Appeals has not decided which is
5 correct. Am. Buddha, 609 F.3d at 42. In the absence of
6 direction from the state's highest court, we "cannot harmonize"
7 the divergent intermediate court decisions. Carney v.
8 Philippone, 332 F.3d 163, 172 (2d Cir. 2003). Nor can we predict
9 any better than the Departments of the Appellate Division how the
10 Court of Appeals would resolve the question.

11 Second, the question on which we certify must be of
12 "importance . . . to the state," O'Mara, 485 F.3d at 698, and
13 its resolution must "require[] value judgments and important
14 public policy choices that the New York Court of Appeals is
15 better situated than we to make," Am. Buddha, 609 F.3d at 42;
16 accord Bessemer Trust Co. v. Branin, 618 F.3d 76, 93 (2d Cir.
17 2010). We think that the New York Court of Appeals is better
18 positioned than we to weigh who should properly bear the burden
19 under New York law of confirming that coverage exists before
20 issuing a certificate of insurance that purports to evidence such
21 coverage.

22 Third, we may certify if the question is
23 "'determinative' of a claim before us." O'Mara, 485 F.3d at 698
24 (quoting N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a)); see
25 also Prats v. Port Auth. of N.Y. & N.J., 315 F.3d 146, 150-51 (2d
26 Cir. 2002) (certifying "unsettled" question of state law). Here,

1 whether the plaintiffs receive coverage under the Primary Policy,
2 and therefore the extent to which the plaintiffs will be
3 indemnified for their defense in DelPrince's action, rests on
4 resolution of the certified question.

5 We therefore certify a question to the New York Court
6 of Appeals and reserve decision on this point pending that
7 Court's action.

8 CONCLUSION

9 For the foregoing reasons, we certify the following
10 question to the New York Court of Appeals:

11 In a case brought against an insurer in which
12 a plaintiff seeks a declaration that it is
13 covered under an insurance policy issued by
14 that insurer, does a certificate of insurance
15 issued by an agent of the insurer that states
16 that the policy is in force but also bears
17 language that the certificate is not evidence
18 of coverage, is for informational purposes
19 only, or other similar disclaimers, estop the
20 insurer from denying coverage under the
21 policy?

22 As is our practice, we do not intend to limit the scope of the
23 Court of Appeals' analysis through the formulation of our
24 question, and we invite the Court of Appeals to expand upon or
25 alter this question as it should deem appropriate. See Am.
26 Buddha, 609 F.3d at 42-43; Kirschner v. KPMG LLP, 590 F.3d 186,
27 195 (2d Cir. 2009).

28 Pursuant to New York Court of Appeals Rule 500.17 and
29 United States Court of Appeals for the Second Circuit Rule 27.2,
30 it is hereby ORDERED that the Clerk of this Court transmit to the
31 Clerk of the Court of Appeals of New York this opinion as our

1 certificate, together with a complete set of the briefs,
2 appendix, and record filed in this Court by the parties. We
3 direct the parties to bear equally any fees and costs that may be
4 imposed by the New York Court of Appeals in connection with this
5 certification. This panel will retain jurisdiction over the
6 appeal after disposition of this certification by the New York
7 Court of Appeals.

8 We affirm the district court's grant of summary
9 judgment to the plaintiffs with respect to coverage under the
10 Umbrella Policy. We reserve decision as to the district court's
11 grant of summary judgment to the plaintiffs with respect to
12 coverage under the Primary Policy pending the New York Court of
13 Appeals' decision as to whether to answer the question we
14 certify, and if it decides to do so, until its judgment in the
15 matter is final.