

# Alert

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## PA Supreme Court Holds General Contractor Overhead and Profit Can be Withheld From ACV Payments

On August 18, 2020, the Supreme Court of Pennsylvania held, in a 4-3 decision<sup>[1]</sup>, that insurer, Truck Insurance Exchange, was entitled to withhold general contractor overhead and profit expenses (GCOP) from its actual cash value (ACV) payments to its insureds where the insureds did not undertake the repairs of the damaged property and, therefore, never incurred the GCOP costs. See *Kurach v. Truck Ins. Exch.*, 2020 Pa. LEXIS 4405 (Pa. August 18, 2020).

### Underlying Facts

Konrad Kurach and Mark Wintersteen, the plaintiffs/insureds, each purchased an identical “Farmers Next Generation” homeowners insurance policy from Truck Insurance Exchange, the defendant/insurer. Both insureds sustained covered water damage losses to their homes in excess of \$2,500, and submitted claims for their losses under the Truck policies.

The policies’ loss settlement provision provides for replacement cost value without depreciation. However, where the cost to repair the damaged property exceeds \$2,500, the policies permit the insurer to pay no more than ACV until actual repair or replacement of the damage is completed. The policies define ACV as “the reasonable replacement cost at time of loss less deduction for depreciation and both economic and functional obsolescence,” and do not define the term “replacement cost.” With regard to GCOP expenses, Section 5(e) of the policies’ loss settlement provision provides as follows:

e. General contractor fees and charges will only be included in the estimated reasonable replacement costs if it is reasonably likely that the services of a general contractor will be required to manage, supervise and coordinate repairs. *However, actual cash value settlements will not include estimated general contractor fees or charges for general contractor’s services unless and until you actually incur and pay such fees and charges, unless the law of your state requires such fees and charges be paid with the actual cash value settlement.* (Emphasis supplied).

The insurer did not dispute that the services of a general contractor would be necessary to complete the repairs to the insureds’ homes. However, the insurer’s ACV payments to the insureds did not include any amount for GCOP. The insurer took the position that the policy language supports withholding GCOP until the insureds repair the damage to the homes and actually incur the costs. Neither of the insureds ever repaired the damage to their homes.

### Procedural Background

The insureds separately filed suit against the insurer in Pennsylvania state court alleging breach of contract for the insurer’s failure to include GCOP expenses as part of its ACV payment. The actions were consolidated and the parties agreed to file cross-motions for summary judgment on the issue of whether the insurer was allowed to withhold GCOP expenses from ACV payments where it was undisputed that the general contractor services would be reasonably necessary.

The lower court granted the insureds’ motion, holding that Pennsylvania law required estimated



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### Related Practice Areas

- Insurance Coverage

GCOP to be included in ACV payments when the use of a general contractor to repair damage is reasonably likely. The lower court found that the Pennsylvania Superior Court decisions in *Gilderman v. State Farm Ins. Co.*, 649 A.2d 941 (Pa. Super. 1994) and *Mee v. Safeco*, 908 A.2d 344 (Pa. Super. 2006) required GCOP be included in ACV settlements. The lower court also held that the phrase “unless the law of your state requires” in Section 5(e) of the policies is ambiguous and unenforceable.

The insurer appealed to the Pennsylvania Superior Court, which reversed the lower court decision. *Kurach v. Truck Ins. Exch.*, 195 A.3d 1024, 2018 Pa. Super. Unpub. LEXIS 3099 (Pa. Sup. 2018). The Superior Court distinguished *Gilderman* on the basis that the policy at issue in that case did not define ACV and the term therefore had to be defined based on the intent of the parties. The Superior Court held that the more specific definition of ACV in the Truck policies controls and clearly provides that GCOP will not be paid until the insureds actually incurred the cost, unless Pennsylvania state law requires that GCOP be included. The Superior Court found that the insureds failed to identify any Pennsylvania public policy that ACV settlements must include GCOP.

The insureds appealed to the Pennsylvania Supreme Court.

### **GCOP Can Be Withheld from ACV Payments**

The Pennsylvania Supreme Court affirmed the Superior Court decision, holding that Pennsylvania law does not require payment of GCOP before repairs begin and that the insurer was permitted to withhold GCOP from its ACV payments to the insureds under the terms of the Truck policies. The court found that, by their plain terms, the Truck policies guarantee that the insured will be paid the ACV of the damaged property at the time of the loss and that payment of GCOP is conditional, i.e., payment of GCOP need not be made unless and until the insured actually incurs such costs by commencing the repair process, unless Pennsylvania law requires GCOP be included in the ACV payment. *Kurach*, 2020 Pa. LEXIS at \*21. Further, the court held that Pennsylvania law does not require that GCOP be included in ACV in every claim made under a replacement cost insurance policy as the court’s review of the law revealed no such requirement in statute, regulation, or caselaw. *Id.* In reaching its decision, the court found that *Gilderman* and *Mee* were not applicable because the insurance policies at issue in both cases were silent as to whether GCOP could be withheld. The court held that the *Gilderman* and *Mee* decisions were based on the interpretation of unique language in the specific policies at issue, and that those cases, therefore, could not “be construed as establishing a general mandate that ACV includes GCOP.” *Id.* at \*23.

### **Conclusion**

The Pennsylvania Supreme Court opinion in *Kurach* is significant because it reinforces that the clear and unambiguous terms of insurance policies will be interpreted as written and reinforces the principle that unambiguous policy language expressly excluding general contractor overhead and profit expenses from actual cash value payments is valid and enforceable. That said, insurers in Pennsylvania should be cautious in determining whether general contractor overhead and profit expenses can be withheld where the policy language is silent or vague regarding such payments.

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[1] Justice Todd authored the majority opinion and was joined by Chief Justice Saylor and Justices Baer and Donohue. Justice Wecht and Justice Mundy each filed a concurring and dissenting opinion, with Justice Dougherty joining with Justice Mundy. Of note, both Justices Wecht and Mundy’s concurring and dissenting opinions agreed with the majority that Pennsylvania law does not require that GCOP be included as a component of the ACV payments. The dissenting opinions took the position that because the court had not yet decided this question when the Truck policies were issued, the insureds could not have known what Pennsylvania law required, and due to this, the policy phrase “unless the law of [Pennsylvania] requires such fees and charges be paid with the actual cash value settlement” was ambiguous and must therefore be construed against the insurer.