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ANTHONY J. SCALISE *v.* AMERICAN EMPLOYERS INSURANCE COMPANY
(AC 20928)

Foti, Dranginis and Flynn, Js.

Argued October 23, 2001—officially released January 29, 2002

Michael A. Catalano, for the appellant (plaintiff).

Frederick L. Murolo, with whom, on the brief, were *Karen T. Gerber* and *Marc J. Ubaldi*, for the appellee (defendant).

Opinion

FOTI, J. The plaintiff, Anthony J. Scalise, appeals from the judgment of the trial court denying his application for an order to compel the defendant, American Employers Insurance Company, to proceed with arbitration of his underinsured motorist claim as set forth in his automobile insurance policy with the defendant. On appeal, the plaintiff argues that the court improperly concluded that he failed to make a written demand for arbitration before the running of the statute of limitations, General Statutes § 52-576. We affirm the judgment of the trial court.

The relevant facts underlying the plaintiff's appeal are not disputed. The defendant issued an automobile

insurance policy to the plaintiff that included an underinsured motorist provision. That provision provided that in the event that the defendant and the plaintiff did not agree as to either an insured's entitlement to damages or the amount of such damages, the insured may make a written demand for arbitration. Neither the underinsured motorist provision nor the policy as a whole adopted a specific time limitation for submitting an arbitration demand. On April 1, 1989, the plaintiff was involved in an automobile accident caused by the negligence of another operator. USAA General Indemnity Company (General Indemnity) insured the operator of the other automobile.

On April 10, 1991, General Indemnity offered to settle the plaintiff's claim for damages against its insured for $20,000, the policy limit. On April 18, 1991, the plaintiff signed a release in favor of General Indemnity's insured. On April 23, 1991, General Indemnity issued an uncertified check to the plaintiff for $20,000. On April 26, 1991, the plaintiff's counsel received and deposited the check on the plaintiff's behalf.

In a letter dated April 29, 1997, the plaintiff made a demand against the defendant to arbitrate his still pending underinsured motorist claim. The defendant refused. On May 2, 1997, the plaintiff filed an application in the Superior Court for an order to compel the defendant to proceed with arbitration.[1] The defendant thereafter pleaded, as a special defense, that the statute of limitations on the plaintiff's claim had expired and that this fact precluded the plaintiff's demand for arbitration. The court conducted an evidentiary hearing and, on May 24, 2000, issued a memorandum of decision denying the plaintiff's application. The court held that the statute of limitations began to run on April 26, 1991, the date on which the plaintiff's attorney received the check from General Indemnity. The court further reasoned that because the plaintiff did not demand arbitration until April 29, 1997, his demand was barred by the statute of limitations.

This appeal presents an issue concerning the interaction of two statutes, one dealing with an insurer's obligation to make underinsured motorist payments to its insured and another that establishes the time frame in which an insured may bring an action to recover such payments. ''Statutory interpretation is a matter of law over which this court's review is plenary.'' (Internal quotation marks omitted.) *Wallerstein* v. *Stew Leonard's Dairy*, 258 Conn. 299, 302, 780 A.2d 916 (2001). Likewise, ''[t]he question of whether a party's claim is

barred by the statute of limitations is a question of law, which this court reviews de novo.'' *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 833, A.2d , cert. granted on other grounds, 258 Conn. 946, A.2d (2001).

Because the plaintiff's policy was silent as to the time period in which he could exercise his right to demand arbitration of his underinsured motorist claim, the statute of limitations set forth in § 52-576 applied to his right to do so. See *Coelho* v. *ITT Hartford*, 251 Conn. 106, 107, 752 A.2d 1063 (1999) (noting that ''in the absence of a contrary provision in the claimant's motor vehicle policy, an action for underinsured benefits can be brought at any time prior to the expiration of the time limitation of that statute''); *Wynn* v. *Metropolitan Property & Casualty Ins. Co.*, 30 Conn. App. 803, 807, 623 A.2d. 66, aff'd, 228 Conn. 436, 635 A.2d 814 (1993) Section 52-576 (a) provides that ''[n]o action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section.'' Our Supreme Court has explained that ''because the statute of limitations under § 52-576 is based on the accrual of a cause of action for underinsured motorist benefits, and accrual is dependent upon enforcement, the time for commencing such an action begins to run on the date of exhaustion of the tortfeasor's liability limits.'' *Coelho* v. *ITT Hartford*, supra, 112.

General Statutes § 38a-336 (b) provides in relevant part that ''[a]n insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured and underinsured motorist coverage after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements . . . .'' The purpose underlying underinsured motorist coverage is to protect a victim from ''suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile.'' (Internal quotation marks omitted.) *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, 252 Conn. 79, 88, 743 A.2d 156 (1999). The plaintiff's underinsured motorist coverage became necessary when the amount of his claimed damages from the accident exceeded General Indemnity's settlement payment in the amount of its insured's policy limit. The outcome of this appeal turns on our resolution of the issue of when General Indemnity exhausted by payment its insured's policy

limit because the plaintiff could not have successfully maintained a cause of action against the defendant until that time. See *Wynn* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 30 Conn. App. 807–808.

The plaintiff argues that General Indemnity did not exhaust its insured's liability limit until it ''satisfied'' its settlement with the plaintiff. He posits that the term ''exhaustion by payment'' means that ''the check must be honored, it must be paid by the bank on which it was drawn.'' His argument rests on the premise that he could not have withdrawn the deposited funds from General Indemnity's check from his account on the date on which he received and deposited the settlement check, April 26, 1991. The plaintiff refers us to the fact that state law defined the latest date on which a bank must make deposited funds available for withdrawal. See General Statutes (Rev. to 1991) § 36-9v, now § 36a-302. It follows, he argues, that because he deposited General Indemnity's check on Friday, April 26, 1991, the *earliest* that the check could have cleared and the funds could have been available for his withdrawal would have been Monday, April 29, 1991.[2] Applying that analysis, the plaintiff reasons that the six year statute of limitations set forth in § 52-576 did not bar his April 29, 1997 demand for arbitration.

Application of § 52-576 requires us to determine the precise time at which General Indemnity ''exhausted by payment'' its settlement with the plaintiff. We begin our analysis by interpreting that statutory term to determine when exhaustion by payment occurs if payment is in the form of an uncertified check. That is an issue that no appellate court in this state has yet resolved. We undertake that exercise mindful that our interpretation should be faithful to the legislative intent behind the statute's enactment and give effect to that legislative action. *Gelinas* v. *West Hartford*, 65 Conn. App. 265, 275, 782 A.2d 679, cert. denied, 258 Conn. 926, 783 A.2d 1028 (2001). As in any exercise of statutory interpretation, we accord the words and phrases of a statute their commonly approved usage and their ordinary meaning, mindful that legislative intent is usually apparent in the words that the legislature used. Id., General Statutes § 1-1 (a).

The legislature did not define exactly when exhaustion by payment occurs. ''Exhaust'' is defined as ''to empty . . . to consume entirely. . . .'' Merriam-Webster's Collegiate Dictionary (10th Ed. 1999). ''Payment'' is defined as ''the act of paying . . . something that is paid.'' Id. The word is also defined as ''[a] discharge in

money or its equivalent of an obligation or debt owing by one person to another, and is made by debtor's delivery to creditor of money or some other valuable thing, and creditor's receipt thereof, for purpose of extinguishing debt.'' Black's Law Dictionary (6th Ed. 1990). Our Supreme Court has stated in a similar context that a policy is exhausted ''only when the limit of coverage actually has been paid to the claimant.'' *Ciarelli* v. *Commercial Union Ins. Cos.*, 234 Conn. 807, 811, 663 A.2d 377 (1995).

Those definitions do not shed light on the issue of when payment occurs if a party makes payment, as here, by delivering an uncertified check. Although the payment by check in the present case was made for the purpose of settling an insurance claim, we are able to garner guidance from the analogous context of payment by check for the payment of an obligation or debt.

''[T]he giving of a draft by a debtor to his creditor does not discharge the debt itself until the draft is paid, it being a means adopted to enable the creditor to obtain payment of the debt and remaining, until honored or paid, *but evidence of the indebtedness* . . . .'' (Emphasis in original; internal quotation marks omitted.) *Huybrechts* v. *Huybrechts*, 4 Conn. App. 319, 321, 494 A.2d 593 (1985). In that light, we have recognized that the delivery of a note or an uncertified check suspends an obligation to pay ''until dishonor of the note [or uncertified check] or until [either] is paid.'' (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *DaSilva*, 231 Conn. 441, 447, 650 A.2d 551 (1994); see also General Statutes (Rev. to 1991) § 42a-3-802 (''where an instrument is taken for an underlying obligation . . . the obligation is suspended pro tanto until the instrument is due or if it is payable upon demand until its presentment. . . .'')

It is well settled, however, that a debtor's delivery of an uncertified check as payment for an obligation not only suspends his obligation to pay until such check is, upon its presentment, either honored or dishonored, but that once the check is honored, the obligation to pay no longer exists. Our legislature codified that principle in General Statutes § 42a-3-310 (b), which provides in relevant part: ''[I]f a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and . . . [i]n the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Pay-

ment or certification of the check results in discharge of the obligation to the extent of the amount of the check. . . .''[3]

It is not disputed that General Indemnity was free to satisfy its settlement by paying the plaintiff with a check, a customary practice. We also recognize that payment by check is ordinarily understood to constitute payment for an obligation as of the moment of delivery of the check, provided that the check is honored upon its presentment. ''[W]here a check delivered to a creditor . . . is in fact paid in due course, the debt is discharged pro tanto, *as of the time at which the check was received* . . . . A check is . . . often referred to as conditional payment, the condition being its collectability from the bank on which it is drawn. On fulfillment of the condition by payment of the check on presentation, the payment, which was previously conditional, becomes absolute.'' (Emphasis added.) 70 C.J.S., Payment § 18 (1987); see also 60 Am. Jur. 2d, Payment § 18 (1987) (''time of payment of the obligation relates back to the time when the check was delivered to the obligee'').

As one court explained, that rule recognizes the realities of modern day commerce and yields a sensible result, for ''[i]f the check is dishonored on presentment to the drawee, no timely 'payment' has been made.'' *Duke* v. *Sun Oil Company*, 320 F.2d 853, 862 (5th Cir. 1963).[4] Another court noted that if a party's act of delivering a check as payment for an obligation ''is not the sending of money in discharge of the debt it is hard to figure out what a payment can be.'' (Internal quotation marks omitted.) *Staff Builders of Philadelphia, Inc.* v. *Koschitzki*, 989 F.2d 692, 694 (3rd Cir. 1993). We find such authority to be persuasive. Accordingly, we hold that if an uncertified check is honored and paid on presentment, its conditional nature ends and it becomes absolute payment at that time. The date of the payment for the underlying obligation relates back to the date of the delivery of the check. We believe that this ''conditional payment'' rule is fair and that it reflects the common understanding of the practice of paying by check. By interpreting § 38a-336 (b) harmoniously with that rule, we fulfill our duty of interpreting the statute to achieve a rational and sensible result. See *Interlude, Inc.* v. *Skurat*, 253 Conn. 531, 539, 754 A.2d 153 (2000).

Having reached that point in our analysis, we conclude that General Indemnity exhausted by payment its settlement with the plaintiff on April 26, 1991. Pursuant to § 38a-336 (b), the plaintiff could have maintained a

cause of action against its insurer for underinsured motorist benefits on that date. The six year statute of limitations set forth in § 52-576 permitted the plaintiff to bring a claim against the defendant, if he so desired, within six years. The plaintiff did not do so. Instead, he filed his written demand for arbitration on April 29, 1997. Accordingly, the plaintiff's application for an order to compel the defendant to proceed with arbitration is barred.

The judgment is affirmed.

In this opinion DRANGINIS, J., concurred.

[1] General Statutes § 52-410 (a) provides in relevant part: "A party to a written agreement for arbitration claiming the neglect or refusal of another to proceed with an arbitration thereunder may make application to the superior court . . . for an order directing the parties to proceed with the arbitration in compliance with their agreement. . . ."

[2] The plaintiff did not submit evidence to the trial court as to when exactly the check cleared. He argues that this is of no consequence because April 29, 1991, was the *earliest* date on which the check could have cleared, thereby enabling him to draw upon the deposited funds, and that if the court had used that date as the date of payment it also would have had to conclude that his demand for arbitration was timely.

[3] An uncertified check is a negotiable instrument. As such, its use is governed by the provisions of article III of Connecticut's Uniform Commercial Code, General Statutes § 42a-1-101 et seq. The provisions therein do not define when payment occurs if a note or an uncertified check is taken as payment for an obligation.

[4] Our legislature intended the provisions of Connecticut's Uniform Commercial Code, General Statutes § 42a-1-101 et seq., to be construed liberally so as "to simplify, clarify and modernize the law governing commercial transactions . . . ." General Statutes § 42a-1-102 (2) (a).