

No. 64712-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NATIONAL SURETY CORPORATION,

Respondent/Cross-Appellant,

v.

IMMUNEX CORPORATION,

Appellant/Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE STEVEN GONZALEZ

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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BAILEY PC

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& GOODFRIEND, P.S.

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I. REPLY STATEMENT OF FACTS

Immunex recasts itself as an innocent and vulnerable insured left to fend for itself in the AWP lawsuits in arguing that even though as a matter of law National Surety had no duty to defend, it should be obligated to pay Immunex's costs in defending uncovered claims. The indisputable reality is very different:

Immunex defended itself in the AWP claims, without tender to its insurer National Surety, for at least six years. (See Nat'l Surety Resp. 5-7) It first tendered defense of the AWP suits to National Surety, under policies in effect between 2000 and 2002,¹ on October 3, 2006, after Immunex (and its obligations) were purchased by Amgen. (CP 1059) In its October 2006 "tender" letter, Amgen announced that it was close to finalizing a settlement of the California AWP litigation against Immunex, identified nine (of the 23 suits for which it now claims coverage) other lawsuits in which Immunex had been sued on similar fraudulent misrepresentation claims, and demanded payment of "reasonable defense expenditures incurred, and to fund reasonable settlements. . . ." (CP 1059-60)

¹ Immunex later expanded its claim for coverage to policies dating back to 1997, and identified a dozen more lawsuits for which it demanded indemnity and defense costs. (CP 4, 15, 33-36, 620, 1206, 1276)

National Surety responded less than a month later, asking that any suit papers be submitted for review – a request National Surety had first made over five years earlier, when Immunex, before its acquisition by Amgen, had notified (but not tendered defense to) National Surety of related qui tam lawsuits. (CP 1062-63) Immunex first forwarded copies of complaints, motions, and orders, in only some of the cases for which it now seeks reimbursement of defense costs, in December 2006. (CP 1065)

By that time, Amgen and Immunex had been defending the AWP litigation, employing counsel of its own choosing at multiple law firms, for almost six years. After many months of negotiating access to information about the AWP complaints Immunex alleged it was obligated to defend and indemnify, National Surety finally obtained sufficient information to make a determination that the AWP claims were not covered by its CGL policy on March 31, 2008. (CP 1067)

National Surety's reservation of rights set out in detail the basis for denial of coverage that the trial court later relied upon in concluding that National Surety had no duty to defend the AWP complaints. (CP 1071) In denying coverage, National Surety offered to reimburse reasonable defense fees and costs from

October 3, 2006, the date of Immunex's tender, subject to a right to recoup any amounts paid when a court determined that there was no coverage or duty to defend. (CP 1074-75)

National Surety commenced this action for a declaratory judgment on March 28, 2008, simultaneous with issuing its reservation of rights. (CP 1-9) Immunex resisted resolution of the coverage dispute, claiming it was "inappropriate" for National Surety to attempt to establish whether it had a duty to defend the belatedly tendered AWP suits until the underlying litigation was finally concluded, and that this declaratory judgment action would prejudice Immunex's control of the defense of those underlying lawsuits. (CP 590, 592)

The stay Immunex obtained of this declaratory judgment action was lifted – solely to permit the parties to present motions on the issue of National Surety's duty to defend – only on December 16, 2008, and then over Immunex's objection. (CP 1025) Despite demanding reimbursement of millions of dollars in defense costs and unilaterally negotiated settlement amounts (see CP 607), Amgen continued to assert that communications concerning Immunex defense expenditures could not be revealed to National Surety absent a confidentiality agreement even after the trial court

ruled that National Surety had no duty to defend. (See CP 1199-1200) Nevertheless, the trial court held that National Surety could be liable for defense costs incurred before the trial court's determination that the AWP claims were not covered by the policies unless prejudice from late notice could be proven at trial. (CP 1359)

Neither these undisputed facts, nor the relevant law, justify Immunex's demands, or the trial court's order on summary judgment that National Surety could be liable for payment of Immunex's independently incurred defense costs from the inception of these cases in the absence of either a tender or a duty to defend.

II. REPLY ARGUMENT

A. **Immunex, Not National Surety, Seeks To Rewrite The Parties' Insurance Contract.**

Immunex argues that National Surety cannot rewrite the parties' insurance contract. But it is Immunex, not National Surety, that would do so. Under the policy, National Surety had "the right and duty to . . . defend any **Insured** against any **Suit**, seeking damages . . . to which Coverage B applies." (CP 1094-95) (emphasis in original). National Surety had no other obligation to defend its insured Immunex, or to pay defense costs, under the

terms of their contract. Immunex itself was obligated not only to provide prompt notice of a claim but to refrain from incurring “any expense, except first aid,” to “assume no obligation” without the permission of National Surety, and to “cooperate with [the insurer] in . . . defense of any **Insured** against any **Suit.**” (CP 1103) (emphasis in original). See *also* RCW 48.01.030 (“The business of insurance . . . [requires] that all persons be actuated by good faith . . . Upon the insurer [and] the insured . . . rests the duty of preserving inviolate the integrity of insurance.”).

What Immunex sought, and the trial court’s summary judgment order gave it here instead, however, was the right to control the defense of the AWP lawsuits for almost a decade, without tender to National Surety, and then to present a multi-million dollar bill for fees incurred in its own defense on the eve of its independent settlement of many of the claims. The trial court allowed Immunex to pursue this claim for reimbursement of defense costs at trial even though the trial court (correctly) held that the AWP claims were not covered, and that National Surety had no obligation to defend them, under the terms of the parties’ insurance contract.

Immunex argues that this decision is correct because National Surety “knew how to write a policy that would allow it to avoid paying for defense costs that ultimately are determined not to be covered by its policy.” (Immunex Resp. 20) Indeed it did, as the provisions of National Surety’s CGL policy quoted above demonstrate. The D&O policy quoted by Immunex as an example of when an insurer can seek recoupment of defense expenses (Immunex Resp. 20-21) does affirmatively provide a right to recoup defense payments. But that right arose in the policy as to defense expenses actually advanced by the insurer. (CP 1429) Significantly, the D&O policy quoted by Immunex, unlike the CGL policy here, leaves the control of the defense with the insured, includes “Defense Expense” within the \$5,000,000 limit of insurance, and expressly provides that “the insurer does not assume any duty to defend under this policy.” (CP 1422, 1429)

Here, unlike in the D&O policy quoted by Immunex, National Surety did not agree to reimburse defense costs. National Surety did not agree to pay costs Immunex incurred to defend claims that, if proved true, would not be covered. Instead, National Surety agreed to undertake – and had the right to control – the defense of claims that, if proved true, would be covered.

National Surety did not “expressly say in its policies that it does not have to pay defense fees incurred before a court decides its duty to defend” (Immunex Resp. 27) because its policy did not obligate it to pay its insured’s defense fees, but rather gave the insurer the right, and obligation, to provide its insured a defense. National Surety did not “use its reservation of rights letter to change its obligations to Immunex” (Immunex Resp. 27) because its obligations under the policy never included an obligation to defend claims that, if proved true, would not be covered.

Rather, National Surety’s reservation of rights letter reserved its right to rely upon the express terms of its contract with Immunex. It is Immunex, not National Surety, that attempted to “change its obligation” with National Surety’s March 2008 reservation of rights letter (Immunex Resp. 24-27), asserting a right to reimbursement of defense expenses based on National Surety’s offer to pay reasonable defense fees and costs from October 3, 2006, the date of Immunex’s tender, pending resolution of the coverage dispute. (CP 1075) In making that offer, however, National Surety expressly reserved its right to recoup any amounts paid when the court determined that there was no coverage or duty to defend – as the

trial court correctly did in this declaratory judgment action. (CP 1067-75)

Nothing in the parties' insurance contract, or elsewhere, prevented National Surety from offering to pay defense costs without waiving its right to recoup any payments made once a court determined that National Surety had no duty to defend. Nothing in the parties' insurance contract, or elsewhere, prevented National Surety from limiting its offer to pay defense expenses to those incurred after tender.² To the extent Immunex attempts to rely on National Surety's offer to pay defense costs in this reservation of rights to claim a right to reimbursement, Immunex's claim must be limited by the terms of that offer as set out in the reservation of rights letter.

² In particular, any right to reimbursement should be limited to post-tender defense expenses, as argued in National Surety's opening cross-appeal brief. (Nat'l Surety Resp. 40-45) Immunex's argument that this limitation is argued for the first time on appeal (Immunex Resp. 38) ignores not only the language of National Surety's reservation of rights but the fact that National Surety has consistently argued that it can have no obligation to reimburse any defense expenses (CP 1181), clearly encompassing its argument that Immunex cannot seek reimbursement of defense expenses it independently incurred prior to tender. See ***Mutual of Enumclaw Ins. Co. v. USF Ins. Co.***, 164 Wn.2d 411, 421 ¶15, 191 P.3d 866 (2008) ("the duties to defend and indemnify do not become *legal obligations* until a claim for defense or indemnity is tendered") (emphasis in original); ***Unigard Ins. Co. v. Leven***, 97 Wn. App. 417, 426-27, 983 P.2d 1155 (1999) ("the insured must affirmatively inform the insurer that its participation is desired"), *rev. denied*, 140 Wn.2d 1009 (2000).

No Washington law, and no public policy, supports imposing upon an insurer a duty to reimburse costs the insured incurred in defending claims that do not invoke the insurer's contractual duty to defend. This court should reverse the trial court's determination that National Surety might have a duty to reimburse defense costs incurred until the court confirmed there was no coverage.

B. Immunex Wrongly Asserts A Right To Control Its Defense At National Surety's Cost, Claiming All The Reward But None Of The Risk Of Delaying Tender.

It is Immunex, not National Surety, that seeks all the reward, and none of the risk, of its untimely tender of defense. (Immunex Resp. 22) For over six years, Immunex controlled the defense, and settlement, of AWP claims that the trial court correctly determined were not covered by the National Surety policy. Had National Surety paid defense costs, it would under its reservation of rights, and the admitted majority rule, have been entitled to recoup those advances following the trial court's determination that it owed its insured no duty to defend. See *General Agents Ins. Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill.2d 146, 828 N.E.2d 1092, 1100-01 (2005) (adopting "minority" view) (Immunex Resp. 28-30). But this case does not require the court to address the circumstances under which an insurer has the right of

recoupment, because here, Immunex did not give National Surety the opportunity to exercise its right to provide a defense. National Surety has no obligation to now pay for Immunex's defense of uncovered claims in the absence of a duty to defend, and even more so not defense costs incurred before Immunex actually tendered defense.

Washington law clearly encourages insurers to defend under a reservation of rights if there is a question of coverage. National Surety does not argue otherwise. In this, Washington differs from Wyoming and other states, which in the cases cited by Immunex express a preferred policy of forcing the insurance carrier to deny "its insured a defense at the beginning" if it believes a claim is not covered. *Shoshone First Bank v. Pacific Employers Ins. Co.*, 2 P.3d 510, 516 (Wyo. 2000), *cited in Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1175-78 (10th Cir. 2010) (both Immunex Resp. 30). As the Pennsylvania court noted in *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 2 A.3d 526, 542 (Pa. 2010) (Immunex Resp. 32-33), *citing Shoshone First Bank*, 2 P.3d at 510, "this would allow the insured to control its own defense without breaching its contractual obligation to be defended by the insurer."

By contrast, Washington law authorizes defense under a reservation of rights in order to safeguard the contractual right of an insured to a defense, which would be forfeited if the insurer does not undertake the obligation to defend. See **Woo v. Fireman's Fund Ins. Co.**, 161 Wn.2d 43, 54 ¶19, 164 P.3d 454 (2007) (insurer's defense is "one of the principal benefits" of the insurance policy). This is clear from all the cases cited by the parties where the insurer, unlike here, breached its contractual duty to defend and consequently was obligated to pay the reasonable costs incurred by the insured in defending itself. See, e.g., **Truck Ins. Exchange v. VanPort Homes, Inc.**, 147 Wn.2d 751, 58 P.3d 276 (2002) (Immunex App. 18-19; Nat'l Surety Resp. 15, 36-37, 43-45; Immunex Resp. 22); **Kirk v. Mt. Airy Ins. Co.**, 134 Wn.2d 558, 561, 951 P.2d 1124 (1998) (Nat'l Surety Resp. 14-15, 44); **Griffin v. Allstate Ins. Co.**, 108 Wn. App. 133, 139-42, 29 P.3d 777, 36 P.3d 552 (2001), *rev. denied*, 146 Wn.2d 1005 (2002) (Nat'l Surety Resp. 35-36, 42-43; Immunex Resp. 39-40, 43).

When, as here, however, the tendered claims are not within the policy's coverage, the insurer has no contractual duty to defend. The **Woo** duty to defend before it is determined whether there is a legal obligation to defend is not a contractual obligation. It follows,

then, that if a defense is provided, an insurer should be entitled to recoupment when it is ultimately determined that it had no duty to defend under the terms of its contract. Otherwise, the court would be reading into the policy new language requiring an insurer to defend any claims, regardless whether they are covered or not, contrary to the principle, relied upon by Immunex, that the court will not rewrite the parties' contract. See Arg. § C, *infra* at 17-18.

Instead, the duty to defend before it is determined whether there is a legal obligation to defend is imposed as a matter of public policy, to protect the vulnerable insured who cannot mount a defense if its insurer refuses to provide one. In some cases, such as ***VanPort***, 147 Wn.2d at 758, where the insured was forced into bankruptcy, the consequence of an insurer's refusal or delay in providing a defense may be the insured's inability to defend itself. This is indisputably not the case here, however, where Immunex chose not to tender its claim, as was its right, see ***Mutual of Enumclaw Ins. Co. v. USF Ins. Co.***, 164 Wn.2d 411, 421-22, 191 P.3d 866 (2008) (Nat'l Surety Resp. 46-47), yet mounted a vigorous, multi-million dollar defense of multiple claims, throughout the country, without assistance from its insurer National Surety.

Instead of tendering defense to its insurer, Immunex chose to control its defense for many years without tender to National Surety, and only sought reimbursement of defense costs after it had reached a settlement, on its own terms, in significant portions of the AWP litigation. Immunex's actions demonstrate not only why it does not need protection as an insured, but how it prejudiced its insurer National Surety as a matter of law by delaying tender. (See Nat'l Surety Resp. 45-49) Had Immunex tendered the AWP claims, National Surety years earlier could have evaluated and obtained a judicial determination of its obligations under the policies, while providing a defense under a reservation of rights.

In the insurance treatise extensively cited by Immunex, Harris explains why an insurer's defense under a reservation of rights protects not only the insured, but the insurer's right to control the defense: "An insurer's *duty* to defend is one of the 'main benefits' that an insured receives when he purchases a policy. Because of its duty to pay covered losses, the *right to control* the defense is equally important to an insurer." Harris, *Washington Insurance Law* § 17.1 at 17-4 (2001) (emphasis in original). Harris subsequently explains why recoupment of expenses actually paid by an insurer controlling the defense of a claim is inappropriate

when the insurer has had the opportunity to provide a defense, because “[p]rior to withdrawing its defense, an insurer has managed and controlled the defense, selected counsel, agreed to counsel’s billing rate, made all decisions regarding the proportionality of attorney fees to the amounts at issue, and decided whether or not to seek early settlement rather than incur disproportionate fees and defense costs.” Harris, § 17.1 (Supp. 2009).

The premise of Harris’ argument that “retroactive reimbursement for attorney fees and defense costs already incurred by the insurer” should not be allowed, Harris, §17.1 (Supp. 2009), is that the insurer has exercised its contractual right to control the defense. That was the case in ***Holly Mountain Resources, Ltd. v. Westport Insurance Corp.***, 130 Wn. App. 635, 652 n.8, 104 P.3d 725 (2005), the case criticized by Harris for suggesting that a conditional defense was “subject to potential reimbursement by the insured upon later discovery that there was no duty to defend,” 30 Wn. App. at 652 n.8, where the insurer apparently defended under a reservation of rights that did not reserve the right to seek recoupment in its reservation of rights. Harris, §17.1, n.1.5 (Supp. 2009). This rationale is also apparent in

Harris' characterization of recoupment as "retroactive reimbursement," which presumes that the insurer has paid for a defense that it controlled. Thus, although an insurer's duty to defend pending resolution of a coverage dispute may not be contractual, denial of recoupment is premised on the insurer's exercise of its contractual right to control defense.

The minority cases relied upon by Immunex, declining recoupment of an insurer's previously expended defense costs, similarly reason that when "an insurer voluntarily undertook the defense for its own interest," recoupment should be denied as inconsistent with the broad duty to defend. ***Jerry's Sport Center***, 2 A.3d at 539 (insurer provided (and controlled) defense under a reservation of rights). "[The insurer] had not only the duty to defend, but the right to defend under the insurance contract. . . . The duty to defend benefited [the] Insured to protect it from the cost of defense, while the right to defend allowed [the insurer] to control the defense to protect itself against potential indemnity exposure." ***Jerry's Sport Center***, 2 A.3d at 545. Nevertheless, these cases, including ***Midwest Sporting Goods***, 828 N.E.2d at 1101, also recognize the majority rule allowing recoupment – as does, for instance, ***Cincinnati Ins. Co. v. Grand Pointe, LLC***, 501

F.Supp.2d 1145, 1161-66 (E. D. Tenn. 2007), where after surveying the state of the law the court ordered recoupment of expenses actually incurred by the insurer in defending an uncovered claim. See also **Valley Forge Ins. Co. v. Health Care Management Partners, Ltd.**, 616 F.3d 1086 (10th Cir. 2010) (applying Colorado law to allow insurer to recoup costs of defending uncovered claim under reservation of rights).

Here, however, none of the litigation decisions important to the *right* to defend were left to National Surety, nor did it actually incur the expenses Immunex expects it to retroactively reimburse. National Surety did not pay these expenses not because it refused to defend its insured, but because Immunex did not tender, and retained control of its defense, until the eve of settlement of (uncovered) claims, which it only then demanded National Surety pay. Thus it is Immunex, not National Surety, that improperly seeks “retroactive reimbursement” of uncovered defense costs.

Immunex wrongly seeks to divorce National Surety’s *obligation* to defend from its insurer’s *right* to control the defense – a right that is the underpinning of the cases cited by Immunex restricting an insurer’s right to seek recoupment of the costs of a defense provided by the insurer once a court determines that a

claim is not covered by the policy. This court should reject Immunex's attempt to claim all the reward but none of the risk of delaying tender, and reverse the trial court's determination that National Surety might have a duty to reimburse defense costs incurred before the court confirmed there was no coverage.

C. Cases Addressing Policy Language Establishing The Scope Of Coverage Are Irrelevant To Immunex's Claim For Retroactive Reimbursement. Neither The Parties' Contract Nor Social Utility Support An Award Of Uncovered Defense Costs Against National Surety.

Immunex recites at great length boiler plate affirmations in the Washington case law of the established principle that the court will not rewrite the parties' contract: "It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties." ***Agnew v. Lacey Co-Ply***, 33 Wn. App. 283, 288, 654 P.2d 712 (1982), *rev. denied*, 99 Wn.2d 1006 (1983) (*quoted at* Immunex Resp. 17; *see generally* Immunex Resp. 17-22, 25-27). National Surety agrees. The language of the policy at issue here gave National Surety the right to defend, not the obligation to reimburse Immunex for defense costs the insured independently and voluntarily incurred without notice or tender to its insurer.

None of the cases cited by Immunex that prohibit rewriting the parties' contract to impose obligations different from those in the policy addresses an insurer's duty to defend, or to reimburse an insured for independently incurred defense expenditures. Our Supreme Court reversed the Court of Appeals' award of sums beyond what the insurer had agreed to pay in the policy in **Hess v. N. Pac. Ins. Co.**, 67 Wn. App. 783, 841 P.2d 767 (1992), which Immunex extensively quotes for the proposition that Washington courts "time and again" have required insurers "to set forth any limitations on its liability clearly enough for a common layperson to understand." **Hess**, 67 Wn. App. 783 at 788 n.5 (quoted at Immunex Resp. 21), *rev'd* 122 Wn.2d 180, 859 P.2d 586 (1993). The other cases cited by Immunex, considering the definition of covered "automobiles," **Farmers Ins. Co. of Wash. v. Miller**, 87 Wn.2d 70, 549 P.2d 9 (1976) (Immunex Resp. 20), or "damages," **Boeing Co. v. Aetna Cas. and Sur. Co.**, 113 Wn.2d 869, 784 P.2d 507 (1990) (Immunex Resp. 22), or various exclusions from coverage, **Willing v. Cmty. Ass'n Underwriters, Inc.**, 2007 WL 1991038 (W.D. Wash. 2007), **Emter v. Columbia Health Servs.**, 63 Wn. App. 378, 819 P.2d 390 (1991), *rev. denied*, 119 Wn.2d 1005 (1992) (denying coverage) (both Immunex Resp. 21), are not

relevant to Immunex's claim for reimbursement of defense costs independently incurred in the absence of any contractual obligation by the insurer to pay those costs.

The distinction between reimbursement of costs an insured chose to pay before tender to its insurer, and recoupment of expenses actually paid by an insurer, is apparent from an analysis of the true holding in the only case cited by Immunex in its contractual analysis that does not deal with coverage or exclusions. ***Minnesota Mutual Life Ins. Co. v. Fraser***, 128 Wash. 171, 222 P. 228 (1924) (Immunex Resp. 19). In ***Fraser***, the Court held that a life insurance company that had hired defendant as an agent had no right to recoup advances made to the agent because the parties' contract made no provision for recoupment. The case has nothing to do with the duty to defend or an insurer's obligations to its insured. Instead, the issue before the Court was whether advances made by an insurer to its agent were "mere prepayments not recoverable, or were loans for the recovery of which an action will lie." ***Minnesota Mutual Life Ins. Co. v. Fraser***, 128 Wash. at 171.

Further, in ***Fraser***, unlike here, the insurer/employer had actually paid out the sums it sought to recoup. Here, National Surety had paid nothing before this action was commenced – not

because it had refused to defend, but because Immunex had not earlier tendered the defense, and because once it did tender, Immunex resisted providing information that would have allowed National Surety to promptly determine the reasonable costs of defense it had offered to advance in its reservation of rights, independent of its contractual duty.

In fact, the Court's analysis in *Fraser* reflects reasoning similar to that of Harris in explaining why recoupment of defense costs may be inappropriate, but only when the insurer has had the benefit of exercising its contractual right to control and pay for the defense. See Arg. § B, *supra* at 12-13. The Court rejected the insurer's claim for repayment in *Fraser* because the insurer's advances to its agent "were such as benefited the company generally, promoted its welfare, tended to increase its business, and in the absence of some provision in the contract from which such intent can be clearly inferred, such as that such advances were distinctly for the benefit of the agent, they were not loans" *Fraser*, 128 Wash. at 175. Thus, just as Harris rejects "retroactive reimbursement" of defense costs incurred by an insurer exercising (and benefiting from) its right to control the defense, the Court in *Fraser* relied upon the benefit to the insurer/employer in

rejecting its claim for repayment of advances that “promoted its welfare.”

In *Fraser*, the Court left the parties where they were, rejecting the insurer’s claim for repayment under the terms of their contract. The trial court’s order on summary judgment here is very different, potentially obligating National Surety to pay Immunex’s independently incurred defense costs in the absence of either a contractual duty to defend or timely tender. Here, it is Immunex, not National Surety, that seeks “retroactive reimbursement” of defense costs National Surety had no contractual obligation to pay. No principle of law or social utility supports an award against an insurer for defense costs previously incurred by the insured that the insurer was not contractually obligated to pay. This court should reverse the trial court’s determination that National Surety nevertheless might have a duty to reimburse defense costs incurred until the court confirmed there was no coverage.

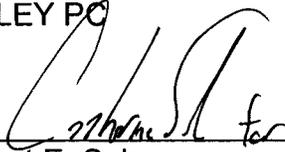
III. CONCLUSION

This court should reverse the trial court’s determination that National Surety might have a duty to reimburse defense costs until the court confirmed there was no coverage because National

Surety had no duty to defend or indemnify the AWP claims against Immunex.

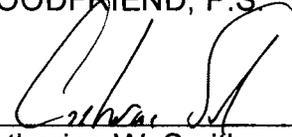
Dated this 16th day of December, 2010.

BULLIVANT HOUSER
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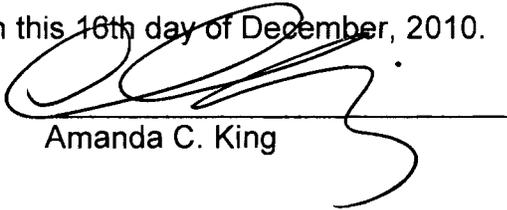
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 16, 2010, I arranged for service of the foregoing Cross-Reply Brief of Respondent/Cross-Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of December, 2010.


Amanda C. King