

# Cray • Huber

## **Illinois Coverage Basics**

### *Fighting a Coverage Battle in Two States at the Same Time: When it Can Happen and When it Cannot*

Coverage litigation is slow and expensive, even under the best of circumstances. Just imagine the delay and cost that would result if a policyholder who was doing poorly in an ongoing coverage case could simply file a duplicate coverage action in another jurisdiction to shop for a better result. Is this a possible scenario? The answer is “yes.”

With growing frequency, insureds engaged in coverage litigation with their insurers are hedging their bets by filing concurrent coverage cases in other jurisdictions. Sometimes they do it to secure the benefits of a second jurisdiction’s more favorable laws. Sometimes they may do it to avoid the adverse effects of the first jurisdiction’s laws. Regardless of which law applies, they may do it simply to get a second judge to rule on the issues. It is an expensive forum-shopping tactic, but it can be an effective tactic when a party senses defeat in an ongoing coverage action.

If coverage cases are filed in two states involving the same parties and the same issues, common sense would seem to dictate that one of the two courts should step back and defer to the other court to avoid duplication and needless waste. However, common sense is not the governing rule in these situations. Even in large multi-party coverage litigation, identical cases may proceed on parallel courses in two different jurisdictions concurrently, all the way to judgment and through final appeals. (See, for example, Allianz Insurance Co. v. Guidant Corp., 387 Ill.App.3d 1008, 900 N.E.2d 1218 (2nd Dist. 2008) and Allianz Insurance Co. v. Guidant Corp., 884 N.E.2d 405, 420 (Ind.App. 2008).)

#### **Procedural Devices to Resist Fighting the Same Coverage Case in Two States**

The usual procedural response to an insured’s filing of a second coverage action is to file a motion to dismiss, or, in the alternative, to stay the second-filed action. Such a motion is filed in the later-filed case, where the court has direct jurisdiction to dismiss or stay the action.

In addition, a motion to enjoin the maintenance of the second-filed case can be presented to the court in the first-filed action. While the court in the first-filed action lacks direct jurisdiction to enter rulings in the later-filed case, it does have jurisdiction over the parties and can enter orders directing the parties to take action or desist from actions that may indirectly affect another case. Such motions typically request the court to enjoin the insured from maintaining the later-filed action and/or to affirmatively order the insured to dismiss the later-filed action.

These procedural devices are cumulative and can be undertaken at the same time, urging the courts in both cases to enter orders eliminating the burden of duplicative litigation.

## **Standards that Govern When Courts Will Allow Two Cases to Proceed Concurrently**

In Illinois, efforts by policyholders to maintain parallel coverage actions in other states has become common enough that the courts have developed specific guidelines to determine when such duplicative suits will be allowed. Whether to allow a second coverage action to go forward on the same issues in another jurisdiction rests in the sound discretion of the trial court. John Crane, Inc. v. Admiral Insurance Co., 2009 WL 1475509 at \*6 (1<sup>st</sup> Dist. 2009). Somewhat surprisingly, priority in the filing of the coverage actions is one factor to be considered in the court's determination, but it is not necessarily a controlling consideration. Id. at \*5. Similarly, the inconvenience and expense of litigating in two jurisdictions will be considered by the court, but inconvenience and expense are not controlling factors in the analysis. Id.

The Illinois Supreme Court has instructed that there is no precise rule for deciding when a duplicative action that is filed in another jurisdiction should be allowed or prohibited. Pfaff v. Chrysler Corp., 155 Ill.2d 35, 58, 610 N.E.2d 51, 61 (1992). The question is whether, under the specific circumstances, the equitable considerations weighing against duplicative litigation outweigh the legal right of a party to institute the foreign action. Id. The criteria encompassed within that question are the prevention of multiplicity, vexation and harassment, the likelihood of obtaining complete relief in the foreign jurisdiction and the *res judicata* effect of the judgment entered in the foreign jurisdiction. John Crane, 2009 WL 1475509 at \*5.

The Appellate Court has prohibited parties from filing or proceeding with actions in other courts where (a) either the parties or the legal issues are the same, or the legal issues are of the type that can and should ordinarily be disposed of in the course of the original action; and (b) there does not appear to be any proper purpose for the maintenance of the later-filed action. Id. Two actions may be found to be "substantially similar," even though a later-filed case includes other additional issues. Id. at \*7. The courts have found that it is an abuse of discretion to allow a second action to be maintained if "an aroma of legal harassment" can be detected. Id. at \*6.

Importantly, when an injunction is sought to prohibit a party from maintaining a coverage suit in a second jurisdiction, the traditional elements for injunctive relief do not apply. Thus, a party seeking to enjoin a later-filed action is not required to establish the absence of an adequate legal remedy, irreparable harm if injunctive relief is not granted, likelihood of success on the merits or a clearly ascertained right to recovery. Id. at \*5. Accordingly, a court may grant an injunction to preclude a foreign coverage action based upon a discretionary evaluation of the equities.

When such efforts fail and parallel coverage actions move forward in two jurisdictions at the same time, a race to secure final judgment ensues in both cases. See, e.g., the Allianz Insurance cases cited above. In such instances, the first final judgment to be entered is regarded to be determinative because only final judgments are entitled to *res judicata*, comity and full faith and credit. Therefore, the goal of such dual-jurisdiction coverage litigation for each party is to advance a favorable ruling to final judgment as soon as possible.

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If you have questions or would like to discuss the implications of this report further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.