

# Cray • Huber

## **Illinois Coverage Basics**

### *Continuing Conflict and Confusion in the Illinois Standard for Determining Insurers' Duty to Defend*

For several decades, Illinois courts followed the “four corners” rule for determining when liability insurers owed a duty to defend. Under the traditional “four corners” rule an insurer had a duty to defend if a complaint filed against its insured contained allegations that created a potential for coverage. The courts’ analysis under that rule was limited to an examination of the documents (i.e., the policy and the complaint), without resort to other pleadings or evidence.

#### **The Wilson Case**

The year 2010 brought major changes for Illinois’ duty to defend standard. On May 20, 2010, the Illinois Supreme Court issued its opinion in Pekin Insurance Co. v. Wilson, 237 Ill.2d 446, 930 N.E.2d 1011 (2010), which abruptly changed the duty to defend analysis for Illinois cases. While the Wilson opinion leaves some unanswered questions, it makes one point very clearly: Illinois is no longer a “four corners” jurisdiction. After Wilson, an Illinois court analyzing an insurer’s duty to defend is required to consider matters beyond the allegations of the underlying complaint, including any counterclaim filed by the insured.

The Wilson Court focused on the following question: “whether the duty to defend the insured may be triggered by the allegations of self-defense alleged in the insured’s counterclaim ... where the policy contains both an exclusion for intentional acts and a self-defense exception to that exclusion?” The Court acknowledged that “a court *ordinarily* looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy.” However, the Court warned that this was only a *general* rule. The Wilson Court ruled that the source of an insurer’s duty to defend should not be limited to the content of the claimant’s complaint in all cases. Rather, “a circuit court may, under certain circumstances, look beyond the underlying complaint in order to determine an insurer’s duty to defend.”

Unfortunately, the Wilson Court did not explain how far beyond the underlying complaint a circuit court should look when analyzing a duty to defend issue. Some of the intermediate Appellate Court opinions that were cited in the Illinois Supreme Court’s Wilson opinion limited their analysis to other pleadings in the case; others looked outside the pleadings to extrinsic evidence relating to the claim.

#### **The Roszak/ADC Case**

Only weeks after the Illinois Supreme Court issued its opinion in Wilson, the Sixth Division of the Illinois First District Appellate Court added a clarification. In Pekin Insurance Co. v.

Rozzak/ADC, LLC, 402 Ill.App.3d 1055, 1058, 931 N.E.2d 799, 802 (1st Dist. 2010), the Sixth Division ruled that, to the extent a court's duty to defend analysis is based on the allegations of a complaint filed against its insured, the analysis must focus on the facts that are actually pleaded - not on facts that could possibly be pleaded in the future. The Rozzak/ADC court held: "A theory cannot be 'supported by the complaint' if the complaint does not allege facts to support the elements of that theory."

In Rozzak/ADC, a general contractor tendered to a subcontractor's policy that provided coverage for liability arising from the subcontractor's acts or omissions. Although the underlying complaint contained no allegations of vicarious liability against the general contractor, the general contractor argued that the underlying complaint did not rule out the possibility of an agency relationship between the general contractor and the subcontractor, which could potentially support a theory of vicarious liability. The Appellate Court in Rozzak/ADC rejected the general contractor's argument, stating "We cannot read into the complaint something that is not there." The message of the Appellate Court in Rozzak/ADC appeared to be that, while a duty to defend analysis may consider facts outside the underlying complaint, there can be no duty to defend unless facts within the complaint itself support a potential for coverage.

### **The Pulte Home Case**

In August 2010, a sister Division of the First District Appellate Court added a contrary view, which has thrown Illinois' law on the duty to defend into conflict and confusion. In Pekin Insurance Co. v. Pulte Home Corp., \_\_ Ill.App.3d \_\_, 935 N.E.2d 1058 (1st Dist. 2010), the Third Division of the First District Appellate Court considered the proper duty to defend standard in light of Wilson and Rozzak/ADC. Yet, the Appellate Court in Pulte Home could not find a way to reconcile Wilson and Rozzak/ADC; instead it held that Rozzak/ADC "runs counter to" the Illinois Supreme Court's opinion in Wilson, and as a result it declined to follow the standard articulated by the Sixth Division in Rozzak/ADC.

The Court in Pulte Home found that although the allegations of the claimant's underlying complaint did not in themselves establish a potential coverage, neither did they preclude the possibility that the jury might make a finding liability that would fall within the scope of coverage. It then looked beyond the allegations of the underlying complaint and examined the contracts between the parties to evaluate potential bases for liability. It found a duty to defend based upon the materials that it considered outside the allegations of the underlying complaint.

The duty to defend analysis followed by the Appellate Court in Pulte Home is in direct conflict with the analysis followed by the Appellate Court in Rozzak/ADC. Under the applicable procedural rules, neither ruling has priority. The insurer in Pulte Home has asked the Illinois Supreme Court to resolve this conflict in authority on the proper standard to be applied to determine a duty to defend, but the Supreme Court has not yet decided whether it will do so.

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This newsletter provides information on recent legal developments. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. If you have questions, please feel free to contact Jim Horstman (312.332.8494; jkh@crayhuber.com).