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Illinois Coverage Basics

The Continuing Revolution of Illinois' Duty to Defend Rule: Courts Struggle to Find a More Workable Standard

For many years, Illinois courts followed the “four corners” rule to determine when liability insurers owed a duty to defend. That rule was simple: under the “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. But in recent years, Illinois courts have moved away from the “four corners” rule.

As reported in this newsletter last month, the Illinois Supreme Court recently ruled that Illinois is no longer a “four corners” jurisdiction. Illinois’ new rule seems to be that a court analyzing a liability insurer’s duty to defend may consider matters beyond the allegations of the underlying complaint. The problem at this point is that the courts have not yet told us how far beyond the allegations of an underlying complaint insurers should look.

Understanding the current status of Illinois’ duty to defend rule is essential for liability insurers to avoid the pitfalls of Illinois’ estoppel rule, which is a threat whenever there is a duty to defend.

Developments in Illinois’ Duty to Defend Rule

Although the Illinois courts have traditionally subscribed to the “four corners” rule, significant exceptions have long been recognized. *See Fidelity & Casualty Company of New York v. Envirodyne Engineers, Inc.*, 122 Ill.App.3d 301, 304-305 (1st Dist. 1983). Nonetheless, a full scale assault on the vitality of the “four corners” rule began only within the last couple of years.

The assault on the “four corners” rule began in 2008, with the opinion of the Sixth Division of the Illinois First District Appellate Court in *American Economy Insurance Company v. Holabird and Root*, 382 Ill.App.3d 1017 (1st Dist. 2008). In *Holabird and Root*, the Appellate Court held that a duty to defend analysis should not be limited to the allegations of the underlying complaint; rather, a court should be free to consider all the relevant facts contained in the pleadings filed in the case, including third-party complaints. The Sixth Division acknowledged that there was precedent to the contrary, but it simply declined to follow that precedent. In *dicta*, the *Holabird and Root* opinion suggested that a court deciding a duty to defend issue could also properly consider evidence outside the pleadings, such as depositions and photographs.

The Sixth Division reaffirmed its “beyond the four corners rule” in series of opinions in 2008 and 2009. *See American Economy Insurance Company v. De Paul University*, 383 Ill.App.3d 172 (1st Dist. 2008); *Clarendon American Insurance Company v. B.G.K. Security Services, Inc.*, 387 Ill.App.3d 697 (1st Dist. 2008); *Mota Construction Company v. Westfield Insurance*

Company, 2009 WL 1606723 (1st Dist. 2009). Soon, other courts also adopted the Sixth Division's duty to defend standard. See National Fire Insurance of Hartford v. Walsh Construction Company, 392 Ill.App.3d 312 (1st Dist. 2009); Cincinnati Insurance Company v. American Hardware Manufacturers Association, 387 Ill.App.3d 85 (1st Dist. 2008) and Firemen's Fund Insurance Company v. Amstek Metal, LLC, 2008 WL 4066096 (N.D. Ill. 2008).

On May 20, 2010, the Illinois Supreme Court made it official in Pekin Insurance Company v. Wilson (No. 108799). The Court ruled that while a circuit court should look first to the allegations in the underlying complaint and compare those allegations to the provisions of the insurance policy, an insurer's duty to defend should not be limited by the content of the claimant's complaint in all cases. Under the Court's ruling a court may now look beyond the allegations of the underlying complaint to determine an insurer's duty to defend.

The Most Recent Development on the Duty to Defend Standard

Barely a month after the Illinois Supreme Court issued its opinion in Pekin Insurance Company v. Wilson, the Sixth Division of the First District Appellate Court added a significant clarification. In Pekin Insurance Company v. Roszak/ADC (No. 1-09-1709), the Sixth Division ruled that, to the extent a court's duty to defend analysis is based on the allegations of a complaint 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.

In Rozsak/ADC, a general contractor tendered its defense to a subcontractor's liability insurer under an additional insured endorsement granting coverage to the general contractor 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 might give rise to a theory of vicarious liability. However, the Appellate Court in Rozsak/ADC rejected the general contractor's argument, stating "We cannot read into the complaint something that is not there."

The Illinois Supreme Court's opinion in Pekin Insurance Company v. Wilson changed the legal landscape when it opened the door for courts to consider facts outside an underlying complaint when analyzing an insurer's duty to defend. Nevertheless, Rozsak/ADC offers hope for the integrity of the duty to defend standard in Illinois.

Rozsak/ADC clarifies that, to the extent a court's duty to defend analysis is based upon the allegations of a claimant's complaint, the analysis must be governed by the facts that are actually pleaded rather than facts that might or could be pleaded. The Rozsak/ADC opinion expresses this common sense truth with clarity and simplicity: "A theory cannot be 'supported by the complaint' if the complaint does not allege facts to support the elements of that theory."

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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.