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Illinois Coverage Basics

Continuing Inconsistency in Appellate Court Additional Insured Rulings Plagues Insurers in Illinois

Courts demand consistency from liability insurers. When liability insurers do not act consistently in their coverage determinations and treatment of insureds, courts may rule against insurers on debatable coverage questions, impose estoppel as a sanction, and award monetary penalties for "bad faith." The underlying assumption in Illinois is that the requirements of the law are clear, and insurers who refuse to obey the law should pay the price.

The problem is that the Illinois courts of review are not holding up their end of the bargain. With increasing frequency liability insurers are faced with inconsistent statements of the law from the Illinois Appellate Court, and the Illinois Supreme Court is not timely resolving those conflicts. As a result, insurers are left to guess at what law they are supposed to follow.

Case in Point: The Pekin Additional Insured Decisions

Pekin Insurance Company has one of the tightest additional insured endorsements in use in Illinois, and the company has been busy litigating the applicability of the endorsement. The Pekin endorsement amends the "Who Is An Insured" section of its Commercial General Liability policy to include as an insured any person whom the named insured has agreed in writing to insure, but "only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation."

All of the Pekin additional insured cases address the applicability of the same limiting language in the Pekin additional insured endorsement: whether the alleged liability of a potential additional insured is "solely" the result of acts or omissions of the named insured. The claimants' pleadings in these cases typically allege identical negligent acts and omissions against both the named insured and the potential additional insured, with no allegations of vicarious liability. The results in these cases should be the same, but they are not.

While one group of appellate rulings has enforced the limiting language of the Pekin additional insured endorsement under these common circumstances, another group of rulings has gone the other way. The rationale of the courts that have enforced the limiting language of the Pekin endorsement is that when an underlying complaint alleges only independent negligence against a potential additional insured, it is clear that the alleged liability of the potential additional insured cannot be "solely" the result of acts and omissions of the named insured. Consequently, under such common allegations, additional insured coverage will be denied. (*See*, e.g., Pekin Insurance Company v. Roszak/ADC, LLC, __ Ill.App.3d __, 931 N.E.2d 799 (1st Dist. 2010).)

Another group of appellate rulings has declined to enforce the limiting language of the Pekin endorsement based on identical complaint allegations. The rationale of those courts is that an underlying complaint containing identical allegations of negligence against the named insured and a potential additional insured still creates a potential that liability found against the potential additional insured will be based solely on the negligence of the named insured, even if no allegations of vicarious liability appear in the complaint. (*See*, e.g., Pekin Insurance Company v. Hallmark Homes, 392 Ill.App.3d 589, 912 N.E.2d 250 (2nd Dist. 2009).

The most recent appellate opinion construing the Pekin additional insured endorsement is Pekin Insurance Company v. Pulte Home Corporation (1st District No. 1-09-1708, filed 8/25/10). In the Pulte Home case, the plaintiff was a Commonwealth Edison employee who was injured when he fell into an open sewer on a construction site. He sued the developer and the sewer subcontractor based on identical allegations that they each negligently failed to inspect, guard and warn against the uncovered sewer opening. The developer then tendered its defense to the sewer subcontractor's liability insurer, which was Pekin Insurance Company.

Pekin denied the tender on grounds that the additional insured endorsement did not provide coverage to the developer for the developer's own negligence. Nonetheless, the Appellate Court found that Pekin owed the developer a duty to defend. First, the Appellate Court found that even though the claimant's complaint pleaded identical allegations of independent negligence against the developer and the sewer subcontractor, the complaint allegations did not preclude the possibility that the developer would be found liable solely as a result of the acts and omissions of the sewer subcontractor. This is a complete reversal of the traditional duty to defend standard, which focuses on whether the affirmative allegations of an underlying complaint trigger the coverage of a policy. In contrast, the Pulte Homes court presumed that a duty to defend existed unless the allegations of the complaint affirmatively precluded the potential for coverage.

Second, the Pulte Homes court relied upon the requirements of the contract between the developer and the sewer subcontractor to find that Pekin owed a duty to defend. Under that contract, the sewer subcontractor agreed to defend and indemnify the developer "unless such claims have been specifically determined by the trier of fact to be the sole negligence of" the developer. The Appellate Court ruled that the insurer must defend the developer under these circumstances, because a finding as to whether the developer was solely liable could not be made until after a trial had been held and a determination of liability had been made.

The Pulte Homes court acknowledged that its duty to defend analysis was directly at odds with the duty to defend analysis of another First District Appellate Court panel recently construing the same Pekin additional insured endorsement (see, Pekin Insurance Company v. Roszak/ADC, LLC, supra). However, the Pulte Homes court made no attempt to reconcile these inconsistent decisions, and Illinois law remains in flux.

Bottom line: tenders from additional insureds should be given close scrutiny, because Illinois' law on additional insureds is highly unstable and unpredictable at this point.

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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.