

# Cray • Huber

## **Illinois Coverage Basics**

### *One Year After: How Pekin v. Wilson Has Changed the Duty to Defend Analysis in Illinois*

Just a little over one year ago, the Illinois Supreme Court issued its opinion in Pekin Insurance Co. v. Wilson, 237 Ill.2d 446 (2010) (“Pekin v. Wilson”), which changed the rules in Illinois for determining whether a liability insurer owes a duty to defend. The traditional Illinois rule had been that a duty to defend existed if the allegations of a claimant’s complaint stated a cause of action potentially within the coverage of the liability policy. However, in Pekin v. Wilson the Illinois Supreme Court ruled that a court need not be limited to the allegations of a claimant’s complaint when evaluating an insurer’s duty to defend. That put an end to Illinois’ traditional “four corners” rule.

An important question left unanswered by Pekin v. Wilson was how far beyond the four corners of an underlying complaint a court should look to determine a duty to defend issue. In the Pekin v. Wilson case itself, the Illinois Supreme Court considered the allegations of pleadings other than the claimant’s complaint (specifically, a third party complaint) to decide the defense issue. However, the Supreme Court’s rationale for the new rule reached even further.

As precedent for its conclusion that a court may look beyond the allegations of an underlying complaint to determine an insurer’s duty to defend, the Illinois Supreme Court made special reference to two Illinois Appellate Court cases: American Economy Insurance Co. v. Holabird & Root, 382 Ill.App.3d 1017 (1<sup>st</sup> Dist. 2008) and Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc., 122 Ill.App.3d 301 (1<sup>st</sup> Dist. 1983). In Holabird & Root, the Appellate Court analyzed the allegations of a third party complaint to determine the duty to defend issue. Envirodyne Engineers went much further. The Appellate Court in Envirodyne Engineers evaluated (a) the terms of the insured’s construction contract, (b) deposition testimony from an officer of the insured company and (c) judicial notice of certain facts relating to construction site practices, to decide the defense issue. Although the Supreme Court considered only pleadings in Pekin v. Wilson (no extrinsic evidence was presented to the court in that case), the Supreme Court’s citation to Envirodyne Engineers as precedent for its ruling suggested the Court’s approval for the concept that extrinsic evidence should be considered on a duty to defend issue.

In the year following the publication of the landmark Pekin v. Wilson opinion, courts across the State have struggled to understand the scope of the Pekin v. Wilson ruling, in particular the question of whether a court may look to extrinsic evidence beyond the pleadings in a case to decide an insurer’s duty to defend. Only a handful of these cases have yet reached the publication stage, but the early indications suggest that courts may be taking an expansive view

of the Pekin v. Wilson ruling, showing a willingness to consider extrinsic evidence beyond the pleadings to determine insurers' defense obligations.

For example, in Pekin Insurance Co. v. Pulte Home Corp., 404 Ill.App.3d 336 (1<sup>st</sup> Dist. 2010), the Appellate Court considered whether Pekin owed a defense to a homebuilder (Pulte) under a policy issued by Pekin to a subcontractor. A provision in the policy recognized Pulte as an insured by description, 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." Citing the Supreme Court's opinion in Pekin v. Wilson, the Appellate Court found that in order to decide the duty to defend issue it could consider the allegations of the claimant's complaint, as well as "the other relevant pleadings and documents, including the contract between Pulte and [Pekin's insured subcontractor]." Following an analysis of the complaint, the plaintiff's answers to requests to admit, the subcontractor's answer to Pulte's counterclaim and the substantive provisions of the contract, the Appellate Court held that Pekin owed Pulte a duty to defend.

In United Construction v. American Contractors Insurance Group, 2011 WL 1258557 (S.D. Ill. 2011), the federal District Court addressed a similar issue of whether an insurer owed a defense to an additional insured. Basing its analysis on Pekin v. Wilson, the District Court found that "the court may look to the underlying [construction] contract to determine an insurer's duty to defend, so long as the court does not determine an issue critical to the underlying litigation." Following a detailed analysis of the construction contract, the District Court held that the insurer did not owe a duty to defend because the liability alleged against United Contractors was not causally related to the work of the named insured, as the scope of that work was defined by the terms of the construction contract.

The Seventh Circuit Court of Appeals has addressed Pekin v. Wilson only in *dicta* thus far, but in a manner that may reveal the Seventh Circuit's inclinations regarding the scope of the duty to defend analysis in light of Pekin v. Wilson. In General Insurance Co. v. Clark Mall Corporation, 2011 WL 1663374 (7<sup>th</sup> Cir. 2011), the Seventh Circuit did not decide the duty to defend issue because it dismissed the appeal on jurisdictional grounds, but before dismissing the appeal the Court stated its understanding that Pekin v. Wilson authorizes an insurer to present evidence to demonstrate that it owes no duty to defend with respect to a given loss.

The duty to defend standard authorized by Pekin v. Wilson will work against insurers in some cases, but it will present opportunities for insurers in other cases. When the bare allegations of a claimant's complaint create a potential for coverage (and, consequently, create a duty to defend), Pekin v. Wilson provides an insurer with the opportunity to defeat the duty to defend if evidence can be brought forth to negate the potential for coverage. To fully take advantage of that opportunity, insurers may now need to identify potential coverage defenses at an earlier point in a file and to develop facts through early investigation to support those defenses. Under the traditional "four corners" rule there was little that insurers could do to avoid a defense obligation created by the allegations of a claimant's complaint. Pekin v. Wilson potentially levels the playing field to the extent that an insurer can now develop facts to negate a duty to defend.

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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).