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Illinois Coverage Basics

Illinois Appellate Court Adds Further Refinements to the Duty to Defend Additional Insureds

In *Pekin Ins. Co. v. Centex Homes, et al.*, 2017 IL App (1st) 153601, the Illinois appellate court handed down its most recent in a series of opinions fleshing out, and arguably expanding, the scope of an insurer's duty to defend an additional insured. The decision makes it clear that insurers can no longer assume that if their named insured is not sued, they are automatically relieved of their duty to defend a party which otherwise qualifies as an additional insured.

Pekin issued a commercial general liability insurance policy to McGreal Construction. Scott Nowak, an employee of McGreal, was injured while working on the construction of a building owned by Centex Homes and Centex Real Estate Corporation. Nowak sued both Centex entities, which tendered their defense to Pekin as additional insureds. Nowak's complaint did not name McGreal. Pekin's additional insured endorsement stated that additional insureds were covered "only with respect to vicarious liability…imputed" from McGreal to the additional insured. Pekin refused the tender and filed a declaratory judgment action. The trial court granted Pekin's motion for summary judgment and denied the Centex parties' cross-motion. The Centex parties appealed.

The First District Illinois appellate court reversed. First, the court found that Centex Homes, but not Centex Real Estate, qualified as an additional insured under the Pekin policy. The Pekin additional insured endorsement stated that any person or organization for whom McGreal was performing operations was an additional insured, provided the parties had "agreed in a written contract" to add such party as an additional insured. Centex Real Estate signed the construction contract with McGreal, but only as the managing partner of Centex Homes. The court found Centex Real Estate was the agent of a disclosed principal and was not liable on the contract in its own right. Centex Homes, but not Centex Real Estate, was thus the only party to the "written contract" within the meaning of Pekin's additional insured endorsement.

Second, the court found Pekin had a duty to defend Centex Homes as an additional insured. The court began by acknowledging that because of the workers compensation act, the plaintiff is barred from naming the employer as a defendant. Nevertheless, the court found the underlying complaint should be read "with the understanding that the employer may be the negligent actor even where the complaint does not include allegations against that employer." The court outlined a two-part test for determining whether Pekin owed a duty to defend: first, there must be a potential for finding the named insured was negligent, and second, there must be a potential for holding the additional insured vicariously liable for that negligence.

The court found the first requirement was met. Relying on *Pekin Ins. Co. v. CSR Roofing*, 2015 IL App (1st) 142473, the court stated it was not necessary that the underlying complaint expressly

allege the named insured was negligent in order to meet this requirement. Rather, "the question is whether the Nowak complaint alleges facts to support a theory of recovery under which McGreal's acts or omissions were the cause of Mr. Nowak's injuries."

The court found the complaint did allege such facts, namely that McGreal was charged with the erection of the balloon wall that allegedly fell on Nowak, and that Nowak was working as a carpenter for McGreal on wall when the wall and its supports fell on him. The court stated: "It makes no difference that the underlying complaint in this case could also support a theory of direct liability against Centex Homes or that there are no direct allegations against McGreal."

The court then proceeded to the second prong of the two-part test. Here, the court noted that several cases had based their analysis on section 414 of the Restatement (Second) of Torts. However, the court rejected those cases, relying instead on *Pekin v. CSR Roofing* and *Illinois Emcasco Ins. Co. v. Waukegan Steel*, 2013 IL App (1st) 120735. The court declined to parse the underlying complaint to identify allegations of a specific amount or type of control by the additional insured over the named insured. The court gave several reasons for declining to do so, including recent cases in which vicarious liability was imposed on general contractors or owners based on the negligence of subcontractors under allegations similar to the "boiler plate allegations" present in the Nowak complaint.

The court concluded by stating: "…where the complaint alleges that the additional insured had control of operations and was liable for the actions of its agents, there is a 'potential' basis for vicarious liability." Thus, Pekin had a duty to defend because the complaint alleged Centex Homes was liable because of conduct undertaken "by and through its agents, servants and employees," and also alleged that defendants "participated in coordinating the work being done and designated various work methods," and had the duty to "operate, manage, supervise and control" the construction site and activities. Most significantly, the complaint alleged that Centex Homes "failed to properly control and supervise the work of its subcontractor, McGreal Construction, in the erection of the building and in particular the balloon wall…"

These allegations, according to the court, created the potential a jury could find McGreal negligent in the erection of the balloon wall, that Centex Homes retained sufficient operative control over the construction that McGreal was its agent, and therefore that Centex Homes was vicariously liable for the negligence of its agent. The court stated: "It does not matter whether this is likely; it is a potentiality." Because of this potentiality, Pekin owed a duty to defend.

Many, if not most, complaints in construction accident cases contain allegations similar or identical to the allegations at issue in *Pekin v. Centex Homes.* The case makes it clear that Illinois courts will consider such allegations to obligate the subcontractor's insurer to defend even under restrictive additional insured language. If the complaint contains facts which could support a theory of recovery based on the named insured's negligence -- even though the named insured is not sued -- there may be a duty to defend.

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