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The newsletter of the ISBA's Section on Insurance Law

State Automobile Mutual Insurance Company v. Habitat Construction Company:

Illinois Appellate Court holds that subcontractor's insurer wrongfully rejected General Contractor's tender of defense for suit filed by subcontractor's employee

By Bruce Lichtcsien; Cozen O'Connor; Chicago

I. Introduction

Construction accidents have historically provided fertile ground for civil litigation. An inherently hazardous and sometimes dangerous work environment makes injuries at construction sites all too common. Illinois law has generally provided injured construction workers with numerous remedies to seek compensation for their injuries. Because Illinois prohibits employees from filing suits directly against their employers, injured workers, as a first avenue of recovery,

often exercise their rights under the Illinois Workers' Compensation Act. The Structural Work Act, repealed in 1995, formerly provided injured workers with another statutory basis of recovery in the construction setting.

Injured workers have not been left without a civil remedy since the repeal of the Structural Work Act, however. Illinois courts still permit suits against third parties under general principles of negligence. The Restatement (Second) of Torts ("Restatement") codifies many of these principles of negligence which Illinois courts have recognized as valid authority in many cases. See, e.g., *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174 (1st Dist. 1999)(applying Section § 414 of the Restatement). Under the Restatement, injured construction workers can seek to hold third parties civilly liable if a third party's conduct caused or contributed to the injury.

Construction litigation lends itself to a predictable pattern. In a large commercial project, typically a property owner will hire a general contractor to perform the construction work. The contract between the owner and a single general contractor simplifies the process for the owner who, in theory,

only has to deal with the general contractor. The general contractor, however, does not usually perform all of the construction. The general contractor will, in turn, enter into subcontracts with various subcontractors to perform specialized work such as electrical, glazing, plumbing and general labor.

The usual scenario involving a personal injury lawsuit in the construction context arises when an employee of one of the subcontractors suffers an injury on the job. Because Illinois law does not permit him to sue his employer, an injured worker will seek to hold the general contractor liable for causing the worker's injuries. Theories against general contractors usually allege that the general contractor controlled the site but failed to provide a safe place for the injured worker to perform his job.

When an injured worker files suit against the general contractor, the general contractor usually has a couple of options regarding who will pay for its defense of the lawsuit. A general contractor can first turn to its own commercial general liability ("CGL") insurer. A second option is the possibility of a tender of the defense to the CGL insurer for the subcontractor whose employee was injured. As consideration to win the

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bid for the subcontract, the subcontractor will often agree to obtain insurance for the general contractor that names the general contractor as an additional insured on the subcontractor's CGL policy. In that case, the general contractor can request the subcontractor's insurer to defend the lawsuit and "deselect" or avoid triggering the general contractor's own insurance. This scenario is referred to as a "targeted tender." See *John Burns Constr. Co. v. Indiana Ins. Co.*, 189 Ill.2d 570, 727 N.E.2d 211 (2000).

II. Habitat - Facts

In *State Automobile Mutual Insurance Co. v. Habitat Construction Co.*, ___ Ill.App.3d ___, 875 N.E.2d 1159 (1st Dist. 2007), the First District Appellate Court clarified the propriety of tendering the defense of a personal injury lawsuit in construction cases. *Habitat* arose in the typical fashion. Habitat Construction Company ("Habitat"), the general contractor for a construction project, hired Central Building & Preservation ("Central") as a subcontractor for the job. The written subcontract between Habitat and Central required Central to add Habitat as an additional insured to Central's CGL policy (the "State Auto Policy") with State Automobile Mutual Insurance Company ("State Auto"). Habitat also had its own CGL policy with Pennsylvania General Insurance Company ("Pennsylvania General").

The State Auto Policy contained a blanket additional insured endorsement which defined an Insured as "any person or organization whom you are required to name as an additional insured on this policy under a written contract or agreement." The State Auto Policy limited the insurance for all additional insureds to "liability arising out of: (b) 'Your work' for that additional insured for or by you." The State Auto Policy further defined "Your work" as "Work or operations performed by you or on your behalf; and . . . [m]aterials, parts or equipment furnished in connection with such work or operations."

Larry Medolan, an employee of Central, allegedly sustained an injury while working at the construction site. Medolan filed a complaint against Habitat alleging that Habitat was in charge of the construction project and that he suffered his injury in furtherance of the work. Medolan also alleged that

Habitat was present during construction, coordinated the work, designed work methods and had the authority to stop the work if it was dangerous. Medolan's complaint claimed that his injury occurred when Habitat erected a concrete wall which fell on a scaffold on which Medolan was working. Medolan accused Habitat of negligence in failing to inspect the site, failing to supervise the site, failing to warn him of the dangerous condition and directing workers to cut excessive amounts of concrete. Habitat filed a third-party complaint against Central in which it alleged that Central's negligence proximately caused Medolan's injuries.

Pursuant to the terms of its subcontract with Central, Habitat tendered Medolan's complaint to Central for defense and indemnification. Central forwarded the matter to State Auto which rejected Habitat's tender and filed a declaratory judgment action seeking a declaration that the State Auto Policy did not provide any defense or indemnity coverage to Habitat for the Medolan complaint.

III. Analysis

The trial court entered summary judgment on behalf of State Auto. In reversing the trial court, the First District Appellate Court conducted a two-part analysis. First, the First District examined whether the State Auto Policy contained any exclusions specifically for the additional insured's own negligence. Next, the court considered whether the allegations in the complaint triggered coverage under the "additional insured" coverage based on liability "arising out of" Central's work.

A. The State Auto Policy Did Not Contain an Exclusion for Habitat's Own Negligence

The First District did not find any exclusions in the State Auto Policy for the additional insured's own negligence. Relying on several other Illinois decisions, the Court concluded that if the insurance policy contains an express exclusion directly applicable to the facts alleged in the complaint against the additional insured, the insurer has no duty to defend or indemnify. For example, in *National Union Fire Insurance Co. v. R. Olson Construction Contractors, Inc.*, 329 Ill.App.3d 228, 769 N.E.2d 977 (2d Dist. 2002), the Second District Appellate Court

held that an exclusion for "LIABILITY RESULTING FROM [THE ADDITIONAL INSURED'S] OWN NEGLIGENCE OR THE NEGLIGENCE OF ITS SERVANTS, AGENTS OR EMPLOYEES" operated to bar coverage to the general contractor on the subcontractor's insurance policy. See also *Am. Country Ins. Co. v. James McHugh Constr. Co.*, 344 Ill.App.3d 960, 801 N.E.2d 1031 (1st Dist. 2003) (barring coverage where policy excluded coverage for liability "arising out of any act or omission of the additional insured or any of their employees").

In contrast to policies that contain an express exclusion, the court concluded that a policy containing a provision that simply limits the insurer's coverage to liability "arising from your [subcontractor's] work" is insufficient to remove the complaint from the terms of coverage. Here again, the First District relied on what it considered controlling precedent in *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill. App.3d 946, 846 N.E.2d 974 (2d Dist. 2006). Importantly, the policy at issue in *Kingsport* was identical to the policy at issue in *Habitat*. The First District adopted the reasoning of *Kingsport* in wholesale fashion. Construing the same policy terms, *Kingsport* distinguished those cases involving an express exclusion on the grounds that the State Auto Policy required "only that the liability arise out of [subcontractor's] work and [did] not require a more detailed examination of whose acts and omissions are alleged to have caused the injury." Id. at 1166.

B. "But For" Central's Work, Medolan Would Not Have Been Injured

After concluding that the State Auto Policy did not bar coverage based on an exclusion for the additional insured's own negligence, the court next addressed whether a "but for" analysis should be the test employed to determine coverage under the "arising out of" language. Once again, the court found *Kingsport* authoritative. *Kingsport* determined the "but for" analysis to be the appropriate standard and "held that the allegations in the injured employee's complaint established that but for his work for [subcontractor] and [subcontractor's] presence on the construction site, he would not have been injured." Id. at 1167. Likewise, the First District determined that because the policy in *Kingsport* contained the

identical "arising out of" language as found in the State Auto Policy, it was compelled to reach the same result. The court reasoned:

When the allegations of Medolan's complaint, which establish Medolan was injured in furtherance of his work for Central Building, are liberally construed, and are compared to the relevant provisions of the State Auto policy, it is clear that Medolan's alleged injuries at least potentially arose out of Central Building's work.

Id. at 1167-68.

Thus, State Auto owed a duty to defend Habitat under the State Auto Policy.

C. A Final, Critical Wrinkle

In theory, Habitat seemingly emerged with a complete victory from the litigation based on the Court's holding that State Auto owed a duty, as a matter of law, to defend Habitat against the Medolan complaint. As a practical matter, however, the decision did not leave Habitat without a few remaining problems. In fact, based on the final section of the Court's decision, Habitat may have notched only a pyrrhic victory.

Among the terms of the State Auto Policy was an "other insurance" clause which provided:

Any coverage provided hereunder shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent, or on any other basis unless a contract specifically requires that this insurance be non-contributory and or primary or you [Central Building] request that it apply on a non-contributory and or primary basis.

Id. at 1168-69.

State Auto contended that because the "other insurance" clause made the State Auto Policy excess, State Auto did not owe a duty to defend or indemnify Habitat until Habitat exhausted all of its primary insurance. Recognizing Habitat's right under *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill.2d 570, 727 N.E.2d 211 (2000) and its progeny to make a "targeted tender" to State Auto, the First District tempered Habitat's

apparent victory with a reference to the Court's decision in *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 368 Ill.App.3d 665, 856 N.E.2d 453 (1st Dist. 2006), in which the First District held that an insured cannot make a targeted tender to an excess insurer until the insured's primary coverage is exhausted. In other words, under *Kajima*, horizontal exhaustion trumps a targeted tender.

Habitat carried a CGL policy with Pennsylvania General. However, the court did not have any information about the terms of the Pennsylvania General policy to determine whether the primary limits of the policy were exhausted such that the Medolan complaint would trigger the State Auto Policy. Consequently, the Court remanded the case to the trial court to decide whether Habitat had any other primary insurance and, if so, whether Habitat's primary policy(ies) would be exhausted to the extent that State Auto would be obligated to provide a defense or indemnity under the State Auto Policy.

IV. Conclusion

Habitat teaches an important and cautionary lesson. In the current landscape of targeted tenders in construction cases, insurers for subcontractors often provide "additional insured" coverage to general contractors pursuant to the subcontractor's contractual obligation to furnish insurance naming the general contractor as an additional insured on the subcontractor's CGL policy. Under *Habitat* and *Kingsport*, in the absence of a specific exclusion barring coverage for liability resulting from the additional insured's own negligence, the general contractor may make a valid tender of defense to the subcontractor's insurer. Terms in the subcontractor's policy which merely limit the coverage to liability "arising out of" the subcontractor's work are not enough to avoid coverage. The policy must contain a specific exclusion.

Whether *Habitat*'s and *Kingsport*'s expansion of the targeted tender rule amounts to an increase in insurance coverage remains in doubt. In light of *Kajima*, many targeted tenders may be short-circuited if the subcontractor's policy contains an "other insurance" clause and the general contractor has other primary insurance which it has yet to exhaust.

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Legislative and regulatory update

In January, the Illinois Department of Financial and Professional Regulation, Division of Insurance, notified all multi-peril crop insurance agents of increased efforts to eliminate rebating schemes by several entities involved in the sale of Federal Crop Insurance. Insurance producers who are found to participate in illegal rebating activities will lose their licenses and crop producers will lose not only their crop insurance coverage but will also lose eligibility in all USDA programs.

In March, Illinois Insurance Director Michael McRaith announced a state-wide effort to enforce Illinois' statutes regarding Certificates of Insurance and warned producers and insurers that violations can result in significant penalties. "The issue of amending or altering certificates of insurance that do not represent actual policy language has been increasing and is a misrepresentation to commercial insureds of coverages purchased," said McRaith. According to the memorandum, "Certificates of Insurance must clearly

and accurately state the insurance coverage provided. Any certificate issued by an insurer, broker or producer that obscures or misrepresents the insurance coverage provided under the insurance policy is a violation of the Illinois Insurance code and may subject the issuer to administrative penalties and/or license suspension or revocation."

The General Assembly scheduled May 31 as adjournment date; however, it looks like the legislative session will go well into the summer.

Selected insurance legislation in the 95th General Assembly

HB 2094 –Fritchey. Construction Safety Act of 2008, aka, "Structural Work Act Reenactment." Opposed by both the construction and insurance industries which have engaged a massive lobbying effort to kill it. The bill remains on 2nd reading in the House.

HB 4941 –Mautino. Creates the

Viatical Settlements Act of 2008 and would restrict the sale of stranger-originated life insurance (STOLI). Contains provisions of the National Association of Insurance Commissioners (NAIC) model act, including the five-year moratorium on the settlement of life insurance policies that are identified as STOLI. Provides for the regulation of viatical settlement providers, brokers,

and life insurance producers acting as brokers who enter into viatical settlements.

SB 2358 –Haine. Creates the Life Settlements Act. NCOIL (National Conference of Insurance Legislators) Model Act provides for the regulation of providers and brokers who enter into life settlement contracts with insureds.

Case names and holdings

American Family Mutual Insurance Company v. Connie Roth, 2008 WL 919635 (Ill.App.1 Dist., March 31, 2008). HOLDING: Insurer that sued two of its former agents for breach of contract and tortious interference arising out of agents' solicitation of former customers after termination of the agency using confidential information extracted from insurer's computers, filed declaratory judgment action seeking to establish whether it had a duty to defend agent pursuant to personal and advertising injury coverage in a business owners liability policy. The appellate court

affirmed the Circuit Court's award of summary judgment to the insurer finding no duty to defend as the claims were outside the scope of coverage.

Barth v. State Farm Fire and Casualty Company, 2008 WL 733897 (Supreme Court of Illinois, March 20, 2008). HOLDING: Insurance company that relied on "concealment or fraud" provision voiding policy in event of material misrepresentation before or after loss, was not required to prove common law fraud elements of reasonable reliance and injury.

Central Illinois Public Service Company v. Agricultural Insurance Company, 378 Ill.App.3d 728, 880 N.E.2d 1172, 317 Ill.Dec. 180 (Ill.App. 5 Dist., 2008). HOLDING: An excess carrier may be able to bring a claim for bad faith in the settlement process against another excess carrier if the lower-tiered carrier had control over the litigation process.

DOD Technologies v. Mesirow Insurance Services, Inc. 2008 WL 423444 (Ill.App. 1 Dist., 2008). HOLDING: Producer misappropriates premiums within the meaning of 735 ILCS 5/2-2201 when it directs

a premium to an insurer, the price or coverage is not in the customer's best interest, and the placement earns the producer undisclosed contingent incentives.

Farmers Automobile Insurance Assoc. v. Rowland, 883 N.E.2d 625, 318 Ill. Dec. 394 (Ill.App. 2 Dist., 2008). HOLDING: Ambiguity did not exist in automobile policy between "owned but not insured" clause and "other insurance" clause.

Greenwich Insurance Company v. RPS Products, Inc., 882 N.E.2d 1202, 318 Ill. Dec. 79 (2008). HOLDING: An insurer may properly refuse to defend when it is clear from the face of the complaint that the allegations

fail to state facts that bring the case within, or potentially within, the policy's coverage.

Industrial Enclosure Corp. v. Glenview Insurance Agency, Inc., 2008 WL 375572 (Ill.App., 1 Dist., 2008).

HOLDING: Agency was properly granted judgment notwithstanding the verdict where there was no evidence that agency breached its duty to procure property insurance for the insured, nor any evidence that agency proximately caused any damages incurred by insured.

Pekin Insurance Company v. Harvey, 377 Ill.App.3d 611, 879 N.E.2d 540, 316 Ill. Dec. 473, (Ill.App., 5 Dist., 2007). HOLDING: An insurer's

written notice of cancellation of an insurance policy for nonpayment of premium was effective on the 10th day after mailed even though technically 9 2/3 days notice was provided.

Standard Mutual Insurance Company v. Jimmie Rogers, 2008 WL 795294 (Ill.App.3 Dist., March 20, 2008).

HOLDING: Insurer brought declaratory judgment action against insured, alleging that it had no duty to provide uninsured motorist benefits to insured for accident involving a bicyclist. Appellate court held that a bicycle was not considered a motor vehicle for purposes of uninsured motorist coverage.

Case summaries

American Family Mutual Insurance Company v. Connie Roth, 2008 WL 919635 (Ill.App.1 Dist., March 31, 2008)

HOLDING: Insurer that sued two of its former agents for breach of contract and tortious interference arising out of agents' solicitation of former customers after termination of the agency using confidential information extracted from insurer's computers, filed declaratory judgment action seeking to establish whether it had a duty to defend agent pursuant to personal and advertising injury coverage in a business owners liability policy. The Appellate Court affirmed the Circuit Court's award of summary judgment to the insurer finding no duty to defend as the claims were outside the scope of coverage.

American Family terminated an agent agreement with the Defendants, Bonnie and Connie Roth. American Family demanded the return of its property, including policyholder records. The Roths solicited American Family customers following the agency termination. The appellate court examined the allegations within the underlying complaint for breach of contract and tortious interference and when applied to the policy language covering "personal and advertising injury," found that because the Defendants' actions were

done knowingly, the claims within the underlying action are not covered.

Barth v. State Farm Fire and Casualty Company, 2008 WL 733897 (Supreme Court of Illinois, March 20, 2008)

HOLDING: Insurance company that relied on "concealment or fraud" provision voiding policy in event of material misrepresentation before or after loss, was not required to prove common law fraud elements of reasonable reliance and injury.

A fire destroyed the Plaintiff, Rodney Barth's home and he filed a claim for the loss with his insurer, State Farm. State Farm denied the claim under an exclusion voiding coverage if the insured intentionally concealed or misrepresented a material fact impacting coverage. The central issue before the Court was whether the exclusionary clause on misrepresentation includes the common law fraud elements of (1) reasonable reliance and (2) prejudice or injury by the insurer even though the policy does not expressly include those elements. The exclusionary clause within this policy precluded coverage when an insured concealed or misrepresented material facts relating to the insurance but did not require a showing of reasonable reliance or prejudice. The trial court rejected the jury instruction

offered by Barth to include the common law fraud elements of reasonable reliance and prejudice. The jury rendered a special verdict in favor of the insurer, State Farm, finding that it proved its second affirmative defense, the exclusionary clause, by clear and convincing evidence. The appellate court affirmed, with the dissenting justice stating that a showing of reasonable reliance and prejudice is required to establish the insurer's second affirmative defense. The Supreme Court agreed with the majority and affirmed that portion of the appellate court's judgment.

Central Illinois Public Service Company v. Agricultural Insurance Company, 378 Ill.App.3d 728, 880 N.E.2d 1172, 317 Ill. Dec. 180 (Ill. App. 5 Dist., 2008)

HOLDING: An excess carrier may be able to bring a claim for bad faith in the settlement process against another excess carrier if the lower-tiered carrier had control over the litigation process.

An elevator at the Central Illinois Public Service Company (CIPS) power plant dropped 15 floors, injuring 23 boilermakers. The boilermakers brought suit against CIPS and Dover Elevator Company (Dover). The parties in this appeal were excess insurers of CIPS. Seaboard Surety (Seaboard) had primary coverage for \$5 million,

Steadfast Insurance (Steadfast) was the first-level excess carrier for \$10 million, Great American (formerly Agricultural Insurance) was the second-level excess carrier for \$15 million and American International (AISLIC) was the third-level excess carrier and provided the final \$25 million of coverage.

CIPS and Dover settled with the first 10 plaintiffs for approximately \$20 million. Dover's insurer paid \$5 million on Dover's behalf and Seaboard and Steadfast provided the limits of their coverage totaling \$15 million. CIPS requested Great American and AISLIC to consent to an additional \$29 million to settle the remaining 13 claims and the both agreed to fund the settlement. The parties agreed that the liability for the \$29 million settlement would be decided in an allocation trial between Dover and CIPS.

A jury found CIPS 95 percent liable and CIPS was responsible for \$27.5 million of the \$29 million settlement. After post trial motions, the trial court reduced CIPS's share, with Great American still responsible for its limits of \$15 million and AISLIC responsible for \$10.325 million.

CIPS filed a declaratory action against its insurers prior to the allocation trial and AISLIC filed a counterclaim against Great American alleging negligence and bad faith under theories of direct duty and equitable subrogation. AISLIC also alleged in an amended complaint that the allocation trial could have been resolved with Dover on a 50/50 basis or above Great American's policy limits on a percentage basis better than 95 percent/5 percent. Great American filed a 2-615 motion to strike or dismiss the counterclaim for failure to state a claim under Illinois law. The trial court dismissed the counterclaim and denied AISLIC's motion to reconsider.

The appellate court noted that Illinois court have not directly addressed what duties an excess carrier may owe another excess carrier. The only case applying Illinois law regarding the duties of an underlying excess insurer was *Liberty Mutual Insurance Co. v. American Home Assurance Co.*, 348 F.Supp.2d 940 (N.D. Ill. 2004). The court in *Liberty* relied upon Illinois cases finding that a primary carrier owes an excess carrier the duty to act reasonably and in good faith in settling claims because the primary carrier controls the litigation. The *Liberty* court reasoned the lack of control by the underlying excess carrier precluded any

duty to the secondary excess carrier.

The Illinois Appellate Court disagreed because the *Liberty* court assumed an excess carrier's control over the litigation could not affect another carrier and failed to consider that a carrier's control in the litigation may change through certain stages of a complex litigation. The court found AISLIC's allegations that Great American had the right to control several aspects of the litigation created a question of fact that made the dismissal inappropriate and reversed and remanded the matter.

The court went on to note that the trial court's finding that an underlying carrier only has a duty if it is capable of settling the matter within its limits was incorrect. Rather, the opportunity to settle within the policy limits is just one of several factors to consider along with a refusal to negotiate, the advice of defense counsel, the prospect of an adverse verdict and the potential for damages in excess of the policy limits.

***DOD Technologies v. Mesirow Insurance Services, Inc.*, 2008 WL 423444 (Ill.App. 1 Dist., 2008)**

HOLDING: Producer misappropriates premiums within the meaning of 735 ILCS 5/2-2201 when it directs a premium to an insurer, the price or coverage is not in the customer's best interest, and the placement earns the producer undisclosed contingent incentives.

Insured brought suit against its broker in a five count complaint. The allegations were breach of fiduciary duty, consumer fraud, fraudulent concealment, unjust enrichment, and accounting. According to the Complaint, Defendant broker received "contingent commissions" from insurers, including Hartford Insurance Company, for its placement of insurance policies for the plaintiff and putative class members. These contingent commissions were paid to the broker based on three factors. This contingent commission program was not disclosed to the plaintiff, and caused the defendant to place the customer's insurance with companies providing this incentive even when the policy and rates of the insurer were not the most advantageous to the customer. The system thus created a conflict of interest that prevented the broker from acting in the best interest of its customers. Plaintiff based its claims on the Insurance Code, 215 ILCS 5/500-80(e), which requires a broker to disclose fees that are not directly attributable

to premiums, and 735 ILCS 5/2-2201, which precludes a claim for breach of fiduciary duty by a broker, but excepts claims based on wrongful retention or misappropriation of premiums. The trial court found that the exception did not apply, and granted the defendant's motion to dismiss. Reversing in part, the appellate court first noted that Illinois has historically recognized the fiduciary relationship between an insured and his broker. With the enactment of 735 ILCS 5/2-2201 in 1996, the legislature limited breach of fiduciary duty claims against insurance producers to those which involve the wrongful retention or misappropriation of premiums or claim payments. The appellate court found that plaintiff's allegations that the defendant misappropriated certain premiums by placing their insurance with an insurer when such placement was not in the customers best interest properly brought plaintiff's claim within the exception to 5/2-2201. Therefore, it reversed the trial court's rulings on the claims for breach of fiduciary duty, unjust enrichment, and accounting. It affirmed the dismissal of the counts for consumer fraud and fraudulent concealment, however, agreeing with the trial court that plaintiff had not sufficiently pled all of the elements of the claims.

***Farmers Automobile Insurance Assoc. v. Rowland*, 883 N.E.2d 625, 318 Ill. Dec. 394 (Ill.App. 2 Dist., 2008)**

HOLDING: Ambiguity did not exist in automobile policy between "owned but not insured" clause and "other insurance" clause.

After Robert Rowland was injured when his motorcycle was struck by an uninsured driver, he made a claim under his Farmers policy, which insured his cars. Farmers denied the claim, and filed this declaratory judgment action. The trial court rendered judgment for Farmers on the pleadings, finding the policy unambiguously excluded coverage for vehicles that were owned by the insured but not covered under the policy. On appeal, Rowland argued that the "other insurance" clause of the same policy created an ambiguity, which would result in coverage being found under the policy. The appellate court disagreed, and affirmed the trial court. The court explained that the "other insurance" clause, which stated that "If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that

our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance" only applies when there is coverage under the policy in the first place. Here, the "owned but not insured" clause clearly provided that there was no coverage under this policy for the motorcycle. In addition, Rowland's motorcycle was insured under another policy with a different insurance company. Under Rowland's construction of the Farmers policy, if the motorcycle had not been so insured, the Farmers policy would provide no coverage, but would provide coverage since the motorcycle was insured. The court found this to be a windfall, and an absurd result.

**Greenwich Insurance Company
v. RPS Products, Inc., 882 N.E.2d
1202, 318 Ill.Dec. 79 (2008)**

HOLDING: An insurer may properly refuse to defend when it is clear from the face of the complaint that the allegations fail to state facts that bring the case within, or potentially within, the policy's coverage.

The Holmes Group (Holmes) filed suit against RPS Products, Inc. (RPS) alleging patent infringement, trademark infringement and unfair competition for manufacturing, marketing, advertising and selling a replacement filter for Holmes air purifiers. RPS tendered its defense of the Holmes suit to Greenwich Insurance (Greenwich), which denied coverage and filed a declaratory action seeking a declaration that it had no duty to defend the suit under their commercial general liability policy. RPS answered the complaint and filed a counterclaim for declaratory judgment. Both parties filed motions for summary judgment and the trial court granted Greenwich's motion.

On appeal, RPS argued for the first time that the policy provided coverage for allegations of patent infringement by virtue of the policy's "Bodily Injury and Property Damage Liability" clause. Notwithstanding the fact RPS waived the argument for appellate review, the court held that patent rights encompass intangible rights and the policy specifically defined "property damage" as "physical injury to tangible property."

RPS then argued its acts of advertising infringing products fell within the policy's "Personal and Advertising Liability" clause because it was within

the definition of advertising injury. The court relied on *Global Computing, Inc. v. Hartford Casualty Insurance Co.*, 2007 WL 844618 (N.D.Ill. March 14, 2007) that held something more than the mere advertisement of an infringing product is required to bring such action within the scope of coverage, which was not alleged in Holmes' complaint. Furthermore, patent infringement was specifically excluded from the definition of "personal and advertising injury" in the policy and the exclusionary clause was clear and free from doubt.

Lastly, RPS argued that the allegations of unfair competition and trademark infringement came within the policy's "Personal and Advertising Liability" clause. The parties agreed that coverage for advertising injury required three elements as listed in *Lexmark International, Inc. v. Transportation Insurance Co.*, 327 Ill.App.3d 128, 137, 260 Ill.Dec. 658, 761 N.E.2d 1214 (2001). (1) RPS must have been engaged in advertising activity during the policy period when the injury occurred, (2) Holmes' allegations must raise a potential for liability under one of the offenses listed in the policy and (3) there must be a causal connection between the alleged injury and the advertising activity.

The court found the allegation that RPS advertised its products for sale fell within the definition of "advertisement" in the policy but found that the allegations in Count II regarding "unfair competition did not come within any of the offenses listed in the Greenwich policy. The offenses listed in the policy included disparaging an organization's product, the use of another advertising in your advertisement and infringing upon another's copyright, trade dress or slogan in your advertisement.

Lastly, the court held that trademark infringement was not within the enumerated offenses listed in the policy and trademark infringement was specifically excluded from coverage under the policy and was clear and free from doubt. RPS argued that a policy covering trade dress advertising injuries should surely cover trademark advertising injuries but the court held the two were separate causes of action. Trade dress is the overall image used to present a product while trademarks are something more specific, like a logo.

Having determined the Holmes complaint did not come within the terms of the Greenwich policy, the court did not address the timeliness of the tender and affirmed the judgment of the circuit court.

**Industrial Enclosure Corp. v. Glenview
Insurance Agency, Inc., 2008 WL
375572 (Ill.App., 1 Dist., 2008)**

HOLDING: Agency was properly granted judgment notwithstanding the verdict where there was no evidence that agency breached its duty to procure property insurance for the insured, nor any evidence that agency proximately caused any damages incurred by insured.

Defendant agency procured a policy of insurance for Plaintiff, IEC, through negotiations with Maryland Insurance Group/Northern Insurance Company. When IEC suffered property damage after heavy rainfalls, Maryland denied IEC's claim, basing its decision on its determination that the damage was "flood related" which was excluded under the policy. IEC disputed this finding, contending that the damage was caused by sewer backup, which was specifically covered under the policy. IEC won its federal lawsuit against Maryland, and then filed suit in state court claiming breach of contract and negligence against Glenview Insurance Agency. IEC sought attorneys fees incurred in the federal suit, and other damages not covered by the verdict against Maryland. A jury found in favor of IEC, but the trial court entered JNOV for Glenview. The appellate court affirmed. The court explained that the jury in the federal suit against Maryland conclusively determined that the damage to IEC's property was covered under the Maryland policy. Therefore, Glenview did not breach its contract with IEC to procure coverage for the loss. Rather, IEC's damages were caused by Maryland's wrongful denial of the claim. IEC also claimed that Glenview breached its duty by failing to anticipate that the flood exclusion in the Maryland policy, which included "surface water caused by flooding" would provide Maryland with a basis for denying coverage on this claim. The appellate court found that the law did not impose such a duty on agents. Rather, the insured has a duty to know "the import and meaning of the insurance contract which it accepted."

**Pekin Insurance Company v.
Harvey, 377 Ill.App.3d 611, 879
N.E.2d 540, 316 Ill.Dec. 473, (Ill.
App., 5 Dist., 2007)**

HOLDING: An insurer's written notice of cancellation of an insurance policy for nonpayment of premium was effective on the 10th day after mailed even

The Policy

though technically 9 2/3 days notice was provided.

Plaintiff, Pekin Insurance Company (Pekin), filed a declaratory judgment action that it had no duty to defend Gordon Harvey, d/b/a Anchor Enterprises (Anchor) in a negligence action because the insurance policy had been cancelled several months before the accident for nonpayment of the premium.

Anchor is in the carpentry business and it obtained a commercial liability policy from Pekin. Anchor failed to pay a premium that was due December 9, 2002 so Pekin sent a notice of cancellation on January 7, 2003 stating that the policy would be terminated on January 17, 2003 at 12:01 a.m. On June 23, 2003, Wallace, employed by a drywall company was injured on a residential construction site. Wallace sued Anchor and the lawsuit was tendered to Pekin.

Wallace filed a motion for summary judgment claiming Pekin did not give adequate notice of cancellation because it did not give at least 10 days notice prior to cancellation as required by the insurance policy. The circuit court decided Pekin did not give proper notice based on the court's finding that Pekin was required to mail notice at least 10 24-hour periods prior to the effective

date of cancellation. Since Pekin gave 9 2/3 days notice rather than a full 10 days notice, the termination was not effective.

The insurance policy and the Illinois Insurance Code state that "a notice of cancellation for the nonpayment of premium must be mailed at least ten days before the effective of the cancellation." (215 ILCS 5/143.15).

The appellate court reversed finding that "as a general rule, the law will not recognize fractions of a day unless that recognition is deemed important to the interests of justice or necessary to a decision regarding conflicting interests." For example, if an accident occurred on the date of termination fractions of a day may be necessary to determine which event occurred first. In the present case, the notice of cancellation was mailed in compliance with the policy provisions and Code and Anchor's policy had terminated more than five months before the accident date.

**Standard Mutual Insurance
Company v. Jimmie Rogers, 2008
WL 795294 (Ill.App.3 Dist., March
20, 2008)**

HOLDING: Insurer brought declaratory judgment action against insured, alleg-

ing that it had no duty to provide uninsured motorist benefits to insured for accident involving a bicyclist. Appellate Court held that a bicycle was not considered a motor vehicle for purposes of uninsured motorist coverage.

The Defendant, Jimmie Rogers, was stopped at an intersection when an uninsured individual on a bicycle rode into his vehicle causing the front passenger-side window to shatter. The Defendant's eye was injured from the broken glass. Defendant filed an uninsured motorist claim for compensation for his injury. Plaintiff, in turn, filed a declaratory judgment action. Both parties filed for summary judgment and the circuit court found for the Plaintiff. Third District, in affirming, looked at the Illinois Vehicle Code for the definition of "motor vehicle" and "bicycle" (625 ILCS 5/1-100, et seq.)(West 2004) and held that given the legislative distinctions between the two, a bicycle cannot be considered a motor vehicle for purposes of assessing uninsured motor vehicle coverage.



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