JUNE, 2010

McKenna Storer

McKENNA
LAW UPDATE & NEWS

www.mckenna-law.com

ILLINOIS SUPREME COURT LOOKS BEYOND FOUR CORNERS OF THE COMPLAINT WHEN DETERMINING DUTY TO DEFEND

For many years Illinois has followed the four corners rule for determining a liability insurer's duty to defend an insured. The four corners rule states that an insurer's duty to defend must be determined solely by comparing the terms of an insurance policy and the four corners of a complaint filed against an insured. However, in recent years some Appellate Courts have expanded the four corners rule and held that some materials outside the allegations of an underlying complaint may be considered when analyzing whether an insurer has a duty to defend. [For example, *American Economy Insurance Company v. Holabird & Root*, 382 Ill.App.3d 1017, 886 N.E.2d 1166 (1st Dist. 2008); *West Bend Insurance Company v. Sundance Homes, Inc., 238 Ill.App.3d 335, 606 N.E.2d 326 (1st Dist. 1992)*; *Fidelity & Casualty Company of New York v. Envirodyne Engineers, Inc.*, 122 Ill.App.3d 301, 461 N.E.2d 471 (1st Dist. 1983)]. Notably, these opinions did not provide clear guidance as to what materials outside the underlying complaint should be considered for the duty to defend analysis. Now, on May 20, 2010, the Illinois Supreme Court issued its opinion in *Pekin Insurance Company v. Wilson*, which will impact the duty to defend determination in Illinois.

In *Pekin*, the Illinois Supreme Court affirmed the holding of the appellate court finding that, "if an insurance company has a right to present evidence beyond the complaint in the underlying lawsuit to show that it has no duty to defend, the insured has the same right to present evidence to show that there is a duty to defend."

The facts of the underlying case are that Johnson filed suit against Wilson, alleging assault and battery from two incidents occurring two years apart. As part of his answer, Wilson filed a counterclaim against Johnson, alleging that Johnson was the aggressor and Wilson was only defending himself. Wilson tendered the defense of the *Johnson* suit to Pekin which had issued a Commercial General Liability policy, which covered Wilson as the insured for bodily injury. However, the policy contained an exclusion for bodily injury expected or intended from the standpoint of the insured, subject to an exception: "[T]his exclusion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property."

Pekin filed a Declaratory Judgment action seeking a determination that coverage was precluded based on the intentional acts exclusion of its policy. Pekin proceeded with its motion for judgment on the pleadings, and the trial court granted judgment on the

pleadings in favor of Pekin. However, on appeal, the Appellate Court reversed the judgment, and the Illinois Supreme Court subsequently granted Pekin leave to appeal. Pekin argued that sole consideration of the allegations of the underlying complaint was proper even when the self-defense exception to the intentional act exclusion may be involved. Denying that the source of an insurer's duty to defend should be limited to the content of the underlying complaint, the Supreme Court stated that a court may, under certain circumstances, look beyond the underlying complaint in order to determine an insurer's duty to defend.

The Supreme Court stated that it is only the "general rule" that the duty to defend is determined solely from the complaint. The Court allowed extrinsic evidence in this case because Pekin had moved for judgment on the pleadings which required examination of all of the pleadings including Wilson's counterclaim. In addition, the Court noted there were "compelling circumstances" present in this case because it was unlikely that any underlying complaint would ever allege facts sufficient to permit the insured to invoke the self-defense exception to the intentional act exclusion. Therefore, if Pekin could rely solely on the complaint, the coverage it had sold to Wilson with the reasonable force exception would have been illusory.

In arriving at its decision, the Court did not address two recent appellate court opinions, *National Fire Insurance of Hartford v. Walsh Construction Company*, 392 Ill.App.3d 312, 909 N.E.2d 285 (1st Dist. 2009) and *American Economy Insurance Company v. DePaul University*, 383 Ill.App.3d 172, 890 N.E.2d 582 (1st Dist. 2008). In these cases the First District Court held that the court may not consider extrinsic evidence provided by an insured or the allegations of a counterclaim filed by the insured. However, the *Pekin* decision must be considered now in any determination as to the duty to defend. In addition, since the duty in *Pekin* was triggered by the filing of a *counterclaim*, there may need to be an ongoing evaluation of the duty as the case progresses and any significant events occur.

UNLICENSED DRIVER NOT ENTITLED TO COVERAGE AS NO "REASONABLE BELIEF" EXISTS AS TO RIGHT TO DRIVE

The same day that the Supreme Court issued its opinion in *Pekin Insurance Company v. Wilson*, the Supreme Court issued an opinion in *Founders Insurance Company v. Munoz*, which addressed the frequently recurring question of whether an unlicensed driver is covered under an auto liability insurance policy which excludes coverage for "use by any person of a vehicle without a reasonable belief that the person is entitled to do so".

Holding that the exclusion was not ambiguous and was not in violation of public policy, the Supreme Court in *Munoz* stated that a person who does not have a valid license cannot have a "reasonable belief" that he is entitled to drive, and this exclusion applies even if the person owns the vehicle or is permitted to use it. The *Munoz* opinion supports the position that auto liability insurers may limit their risk by excluding insureds and permissive users who do not have a valid driver's license.

For more information on these cases, contact **Sumi Yang** at 312.558.8306 or syang@mckenna-law.com.

IN RESPONDING TO REQUESTS TO ADMIT, FIRST DISTRICT REQUIRES DEFENDANTS' INSURERS TO DETERMINE IF PLAINTIFF'S MEDICAL EXPENSES WERE REASONABLE

In *Oelze v. Score Sports Venture*, the plaintiff alleged that she had fallen at defendant's tennis club, injuring her elbow and rotator cuff. During discovery she filed a Request to Admit asking the defendant to admit that the plaintiff incurred particular medical expenses as a result of the accident, that the expenses were for reasonable and necessary treatments, and the expenses were reasonable and fair charges. She attached a summary of her medical bills and a copy of each bill. In response, the Defendant stated that "having made reasonable inquiry and the information known or readily available within defendant's control being insufficient to admit or deny", and not being a physician and having no training in medical billing and practice rates or treatments, she could not admit or deny the request.

Although the defendant had used the language approved in *Szczeblewski v. Gossett,* 342, Ill. App. 3d 344 (2003) the Appellate Court held that the responses were mere boilerplate responses and the defendant had not explained why its resources were so lacking that it could not answer the requests. The Court stated that the plaintiff had provided defendant with her medical records, defendant knew what the injuries were, and with its access to its insurance company and the insurer's databases of claims and necessary treatments and expenses, she *could make a pretty good guess* at the reasonableness of the expenses. Further, the defendant could have filed an objection if she considered the requests to be inadequate. Therefore, the court deemed the requests admitted. The Court focused on the statute's purpose of saving time and expense in litigation by eliminating the necessity of proof regarding facts within the knowledge of a party.

THORNTON UPDATE

On April 22, 2010, the Illinois Supreme Court modified *Thornton v. Garcini* clarifying the issue of whether a formal counterclaim was required to be filed in order to protect a non-settling defendant's right to claim a set-off of any amounts paid by a settling defendant. The Supreme Court recognized that there are different types of set-offs and stated that the type of set-off based on a co-defendant's settlement is the type of set-off that "may be raised at any time" and it is "not forfeited simply because it was not raised in the pleadings."

The day after the Supreme Court's modification of *Thornton*, Judge Donald O'Brien, who had been overseeing any case in Cook County in which a *Thornton* counterclaim was filed but challenged, held that all cases where a counterclaim had been filed where settlements had not yet been reached were moot and, therefore, stricken. In Cook County, the plaintiff is now under an obligation to advise all parties within 10 days of reaching a settlement with any party. Once this occurs, a *Thornton* counterclaim is ripe for filing.

TRIALS AND CASE DISPOSITIONS

Paul Steinhofer prevailed in a summary judgment motion he filed in an asbestos case before the Presiding Judge in the Law Division. The plaintiff had claimed that invoices showing insulation being delivered to our client (an insulation contractor) at a refinery where the plaintiff was working was enough evidence to show that he was exposed to asbestos fibers from the work being performed by our client's employees. Paul argued that the plaintiff did not satisfy the frequency, regularity, and proximity test for asbestos cases which requires that a plaintiff demonstrate that he regularly worked in an area where the defendant's product was frequently used and that he worked sufficiently close to the area where the product was used.

MCKENNA NEWS

An article by **Kristin Tauras** was published in the April IDC Employment Law newsletter. Kristin's article was entitled "The Rehabilitation Act – Does it Extend to Independent Contractors?" It discussed whether the Rehabilitation Act of 1973 which was designed to protect the rights of individuals with disabilities also covered non-employee independent contractors. She discussed two recent federal cases which came to different conclusions.

WELCOME!!

McKenna Storer is happy to welcome our newest associate, **Timothy Hayes**. Prior to joining McKenna Storer, Tim worked for two years at the law firm of Nisen & Elliott, LLC. In that position, he handled general corporate, estate planning, and probate matters. He also worked closely with clients who were defendants in complex asbestos litigation. He is a 2004 graduate of Purdue University with a B.A. in Political Science. He received his J.D. from The John Marshall Law School in 2007. He is admitted to practice in Illinois.

McKenna Storer has offices located at:

33 N. LaSalle Street
Suite 1400
Chicago, IL 60602
(312) 558-3900

666 Russel Court
Suite 303
Woodstock, IL 60098
(815) 334-9690

*This Law Update and News is intended to provide information of general interest and does not constitute legal advice. Readers should consult with their counsel before taking any action based on the information in this publication. All rights reserved. Copyright 2010, McKenna Storer. For information, contact the specific attorney or **Dawn Ehrenberg** at 312.558.3933*