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From *Envirodyne* and Beyond: The Use of Extrinsic Evidence to Defeat and Create a Duty to Defend in Illinois

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A commercial general liability insurer must defend any suit seeking covered damages, regardless of the likelihood that the insured ultimately will be held liable for such damages based on adjudicated facts. The standard for determining when the duty to defend arises is well-established in Illinois: An insurer must defend if any allegations of fact in the underlying complaint are "potentially within" the scope of coverage, even if such factual allegations are "groundless, false or fraudulent."[1] An insurer may not refuse to defend "unless it is *clear* from the face of the underlying complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage."[2]

The duty to defend arises as soon as the insurer has notice that damages are sought and, once triggered, continues "as long as any questions remained concerning whether the underlying claims were covered by the policies."[3] In other words, an insurer with a duty to defend must continue to defend until the underlying action is completely resolved or until a court enters a declaratory judgment in favor of the insurer finding no further duty to defend.[4] Although the duty to defend analysis always starts with the allegations of the underlying complaint, Illinois courts often will consider certain types of evidence not pleaded in the underlying complaint in a declaratory judgment action regarding the duty to defend.

Illinois courts recognize two exceptions to the general rule that the duty to defend is based solely on the allegations of the underlying complaint. First, an insurer that learns of true but unpleaded facts not alleged in the underlying complaint must defend if those facts, when considered with the allegations in the complaint, indicate that the claim

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is potentially covered.[5] In other words, an insured can use extrinsic evidence to create the duty to defend even if the allegations of the underlying complaint were insufficient to do so. Second, an insurer that brings a timely declaratory judgment action may attempt to terminate its duty to defend with extrinsic evidence of non-liability facts.[6] For example, a defending insurer may seek a declaratory judgment holding that even though the allegations of the underlying complaint triggered the duty to defend, nonliability facts (*e.g.*, the insured failed to pay premium on the policy) permit the insurer to stop defending.

Given how broadly Illinois courts interpret the scope of the duty to defend to ensure that insureds receive the full benefit of their "litigation insurance,"[7] as the duty to defend sometimes is called, these two exceptions make sense. If an insurer is aware of true but unpleaded facts indicating that an underlying claim is potentially covered, the insurer should not be able to avoid its duty to defend simply because those facts were not pleaded in the underlying complaint. Conversely, there is no reason why an insurer with knowledge of nonliability facts not pleaded in the underlying complaint should not be able to use those facts to terminate its duty to defend, as long as an adjudication in a declaratory judgment action based on nonliability facts would have no effect on the underlying case against the insured.

As Illinois courts consider different fact patterns, Illinois law regarding the role that extrinsic evidence plays in the duty to defend analysis continues to be refined. This article is intended to assist Illinois attorneys in understanding when and how extrinsic evidence can be used to create or terminate the duty to defend. This article also provides an overview of the history of Illinois law on determining the duty to defend, the current state of the law on this issue, and the practical application and implications of this evolving body of case law.

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An Insurer's Knowledge of Facts Showing That a Claim is Not Covered Do Not Permit the Insurer to Refuse to Defend a Potentially Covered Claim

As in many states, Illinois courts have consistently held that, when determining the duty to defend, the court must look to the allegations of the complaint, compare those allegations with the terms of the insurance policy, and use only the information contained within those "eight corners" to determine whether the insurer has a duty to defend.[8] If the allegations state a potentially covered claim, the insurer must defend, and that "duty to defend is not annulled by the knowledge on the part of the insurer the allegations are untrue or incorrect or the true facts will ultimately exclude coverage."[9] As the court in *Sims v. Illinois National Casualty Co.* stated, "[t]he fact that the insurer is possessed of information, whether obtained from its insured or from other sources, which may show the claim against the insured ... [is] outside the coverage of the policy is ... of no consequence" for purposes of determining the duty to defend.[10] Thus, when an insurer refuses to defend based on evidence not alleged in the underlying complaint, a court in a breach of contract action brought by the insured will only consider facts alleged in the underlying complaint in evaluating whether the insurer breached its duty to defend.

For example, the court in *Clemmons v. Travelers Insurance Co.*[11] held than an insurer improperly refused to defend its insured when it relied on facts not alleged in the underlying complaint. In *Clemmons*, Travelers refused to defend its insured, Dennis Reed, against an underlying lawsuit brought by Anthony Clemmons for injuries caused by an automobile accident.[12] The vehicle was owned by Reed's employer and insured by Travelers. During Travelers' investigation of the claim, Reed provided Travelers with an unsworn accident report stating that he was driving the vehicle outside business hours.[13] Based on this report, Travelers denied coverage, asserting that Reed was not a permissive user of the vehicle at the time of the accident.

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In ruling in favor of the insured, the court further noted that, in giving his unsworn statements as part of the accident report, Reed, as a layman, was likely unaware of the legal principals governing concepts like "permission" in the context of vehicle use, and his interpretation of "permission" as included in the accident report was "not enough to dispel the potential for coverage raised by Clemmons' complaint.

After a default judgment was entered against Reed, Clemmons sued Travelers to collect the judgment. In that lawsuit, Clemmons alleged that Travelers' failure to defend was a breach of contract. In support of his argument, Clemmons stated that his underlying complaint against Reed had alleged that Reed was the driver of the vehicle, and that Reed's employer owned the vehicle. The court found that those allegations triggered the duty to defend because they created a clear possibility that Reed had permission to drive the vehicle at the time of the accident.[14] The court refused to allow Travelers to rely on the unsworn report to deny coverage, stating that "the duty to defend must be determined solely from the language of the complaint and the policy."[15] In ruling in favor of the insured, the court further noted that, in giving his unsworn statements as part of the accident report, Reed, as a layman, was likely unaware of the legal principals governing concepts like "permission" in the context of vehicle use, and his interpretation of "permission" as included in the accident report was "not enough to dispel the potential for coverage raised by Clemmons' complaint.[16]

The court in *National Union Fire Insurance Co. v. Glenview Park District*[17] similarly refused to allow an insurer to rely on information outside the four corners of complaint to support a refusal to defend its insured. Unlike *Clemmons*, the insurer in *Glenview Park District* wanted to use an Illinois statute that the insurer, National Union, claimed should be used when interpreting language in its policy endorsement. The endorsement at issue was used to add a third party as an additional insured, and contained a clause that excluded coverage for "damages arising out of the negligence of the insured." Glenview Park District, the additional insured under the policy, was sued by an employee of the named insured, NDS, following that employee's injury on the Park District's property. The employee asserted claims under both common law negligence and the Structural Work Act. National Union filed a declaratory judgment action in which it denied that it had a duty to defend or indemnify the Park District, claiming that the employee's allegations of the Park District's negligence precluded coverage based on the endorsement's exclusionary language. National Union argued that the language of the Structural Work Act should be considered when interpreting the word "negligence" in the exclusionary phrase to find that the Structural Work Act claim was simply another form of a negligence claim excluded by the endorsement. The court disagreed, however, stating that the plain language of the endorsement excluded only common law negligence claims, and not statutory claims.[18] Again, the court emphasized that the duty to defend can be determine only through consideration of the policy and complaint, and not extrinsic information like a statute.

In Some Instances, an Insurer's Knowledge of True, Potentially Covered Facts Not Pleaded in the Underlying Complaint May Create the Duty to Defend

Although an insurer's knowledge of facts outside the complaint cannot defeat the duty to defend, such knowledge can create the duty to defend. This rule is referred to in Illinois as the "true-but-unpleaded-facts doctrine," and it was first introduced in *Associated Indemnity Co. v. Insurance Co. of North America*.[19] As in *Clemmons*, the coverage dispute in *Associated Indemnity* arose from an automobile accident in which the driver of the vehicle, Robert Blond, was denied defense by INA, the insurer for the vehicle's owner, Robinson.[20] Unlike the complaint in *Clemmons*, however, the complaint filed against Blond and Robinson did

not, on its own, allege that Blond was acting as an agent of Robinson sufficient to trigger coverage for Blond under Robinson's policy.[21] At the time the case was tendered to INA, INA knew the true but unpleaded facts that Blond was acting as an agent of Robinson, which had been provided to INA through communication by Robinson immediately following the accident. The court noted the holding in *Sims* that prohibits an insurer from considering information outside the underlying complaint to deny coverage, but stated that those principals should not apply in the converse situation where the insurer knows of facts outside the complaint that would bring the claim within coverage.[22] As explained by the court:

> Even though the complaint, standing alone, may not fairly apprise the insurer that the third party is suing the putative insured on an occurrence potentially within the policy's coverage, the insurer is obligated to conduct the putative insured's defense if the insurer has knowledge of true but unpleaded facts, which, when taken together with the complaint's allegations, indicate that the claim is within or potentially within the policy's coverage.[23]

While this principle had not yet been addressed by any Illinois courts, the court noted that many other jurisdictions had already applied the doctrine.[24] The court further reasoned that, "[t]o hold otherwise would allow the insurer to construct a formal fortress of the third party's pleadings and to retreat behind its walls, thereby successfully ignoring true but unpleaded facts within its knowledge that require it, under the insurance policy, to conduct the putative insured's defense."[25]

Following *Associated Indemnity*, a clear line of cases has developed in which insurers have been required to defend insureds based on facts found in sources other than the underlying complaint, including *La Rotunda v. Royal Globe Insurance Co.*,[26] where Royal Globe was found to have a duty to defend based on facts learned in its own investigation that triggered coverage, but were not alleged in the underlying complaint. Similarly, in *West Bend Mutual Insurance Co. v. Sundance Homes, Inc.*,[27] West Bend was required to indemnify its additional insured, Sundance Homes, despite the fact that the plaintiff's complaint contained no allegations imputing liability to Sundance as a result of conduct by the named insured, a subcontractor, which was a condition for triggering Sundance's defense as an additional insured. West Bend's duty to defend was, nonetheless, triggered by statements from the plaintiff's co-workers indicating that the named insured may have been at fault, as well as Sundance's third-party complaint alleging negligence by the named insured.[28]

In the 2008 case of *American Economy Insurance Co. v. Holabird and Root*,[29] the Appellate Court, First District, reaffirmed the need for insurers to consider facts outside of the underlying plaintiff's complaint when determining the duty to defend. In *Holabird,* the underlying plaintiff sued the owner and general contractor of a building after being injured by a fluorescent light fixture, but did not allege any facts regarding the electric subcontractor who installed the fixture. The subcontractor's carrier, American Economy, denied coverage for the general contractor, asserting that the underlying complaint did not allege any negligence by its named insured, the electrical subcontractor, to trigger American Economy's duty to defend. American Economy further asserted that the general contractor's third-party compliant against the electric subcontractor should not be considered in determining the duty to defend. The court, however, disagreed, explaining that "consideration of a third-party complaint in determining a duty to defend is in line with the general rule that a trial court may consider evidence beyond the underlying complaint if in doing so the trial court does not determine an issue critical to the underlying action."[30] As the court reasoned, the trial court "need not wear judicial blinders and may look beyond the complaint at other evidence appropriate to a motion for summary judgment."[31]

In rendering its decision, the *Holabird* court expressly distinguished its situation from the 2002 ruling , *National Union Fire Insurance Co. v. R. Olson Construction Contractors, Inc.*, in which the Illinois Appellate Court, Second District, relying on the "eight-corner rule," found that only the underlying complaint and relevant policy provisions should be considered in determining the duty to defend.[32] While the *Holabird* court did identify differences in the policy language at issue to distinguish the cases, the court also simply rejected the Second District's analysis, stating that "we do not agree with the court's analysis in *National Union* that a trial court cannot consider anything other than the

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underlying complaint and policy provisions in determining a duty to defend."[33] The *Holabird* court further pointed out that American Economy had ample information available to it, in addition to the third-party complaint, for it to recognize that it's named insured's actions contributed to the underlying plaintiff's injuries, even if the underlying plaintiff was unaware of the subcontractor's role or identity.[34] The court further relied on the principals articulated in *Associated Indemnity* that an insurer should not be permitted to ignore facts known to it simply because they are not included in the underlying complaint.[35]

In the 2010 case of *Pekin Insurance Co. v. Wilson*,[36] the Illinois Supreme Court endorsed the approach outlined in *Holabird*, but suggested that *Holabird* serves only as an exception to the general "eight-corner rule." *Wilson* was before the court following the trial court's entry of judgment for Pekin on the pleadings, in its declaratory judgment action. The underlying suit at issue in *Wilson* involved allegations of assault, battery, and infliction of emotional distress by Jack Wilson, Pekin's insured. In response to that complaint, Wilson filed a counterclaim and other defenses claiming that he was acting in self-defense against the plaintiff, and Wilson tendered the suit to Pekin for defense and indemnity. Pekin's policy excluded coverage for intentional acts, but included a standard self-defense exception to that exclusion. As part of his summary judgment response in the declaratory action, Wilson included his counterclaim and affirmative defenses from the underlying suit, as well as statements taken from him by Pekin where he denied any intent to harm the plaintiff.

The supreme court found that Pekin *did* have a duty to defend Wilson, despite the fact that the underlying complaint would, on its face, be outside the scope of Pekin's policy. Instead, the court found that the case presented the type of "unusual or compelling circumstances" that required the trial court to look beyond the plaintiff's complaint in determining the duty to defend. The court reasoned that the underlying plaintiff would have no reason to allege that Wilson's actions were in self-defense.[37] Instead, the policy's self-defense exception could only be triggered, and given meaning, by looking beyond the complaint to Wilson's own pleadings, however self-serving Pekin argued them to be.[38]

In *Pekin Insurance Co. v. Pulte Home Corp.*,[39] the Appellate Court, First District, again considered additional information contained in documents other than the underlying complaint and insurance policy in determining the insurer's duty to defend. As in *Sundance Homes*, the coverage dispute in *Pulte* centered on whether Pekin, the insurer for a subcontractor, had a duty to defend Pulte Home Corp., a general contractor, as an additional insured. Pekin's policy only covered Pulte as an additional insured for claims arising solely from the negligence of the named insured subcontractor, and the underlying complaint alleged that all of the defendants, including Pulte, were negligent in causing the plaintiff's injury.

In ruling that Pekin did have a duty to defend Pulte, the court looked at the plaintiff's answers to requests to admit, the named insured's answers to Pulte's counterclaim against it, and the contract between Pulte and the named insured subcontractor. As the court explained, while the allegations of the underlying complaint could result in Pulte being independently liable, and therefore not entitled to coverage from Pekin, the allegations did not *preclude* the possibility that Pulte could be found liable solely as a result of the acts or omissions of the named insured subcontractor.[40] The court noted that the additional documents and facts it considered raised the possibility and, in fact, made it appear more likely, that the named insured subcontractor would be found solely liable to the plaintiff, bringing the claims against Pulte squarely within coverage.[41] Thus, the outcome in *Pulte* may have been the same even if the court's analysis was limited to the underlying complaint, but

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Limits of the True-But-Unpleaded-Facts Doctrine

The "true-but-unpleaded-facts" doctrine does not require insurers or courts to consider all information provided by the insured, as seen in the 2002 case of *Shriver Insurance Agency v. Utica Mutual Insurance Co.*[42] At issue in *Shriver* was an affidavit and letter that the insured, Shriver Insurance Agency, included as an exhibit to its summary judgment motion in its declaratory judgment action. The affidavit was from Shriver's President, and the attached letter was the President's letter tendering the case to the insurer, Utica, and outlining Shriver's factual disagreements and defenses to the allegations set forth in the underlying complaint.[43] The court found that the "true-but-unpleaded facts" doctrine did not warrant consideration of the Affidavit and letter submitted by Shriver. As the court explained, it "[did] not believe that the doctrine was meant to be applied to situations ... where the only extraneous facts the insurer possessed were supplied by the insured."[44] The court reasoned that the insurer would have no way of knowing whether the facts offered by the insured were true unless it conducts an independent investigation. Rather, according to the *Shriver* court, the doctrine should be applied where the insurer not only possesses the extraneous facts, but also knows them to be true.[45] Ultimately, the court determined that, even if the facts alleged in Shriver's submission were presumed true, those facts did not change the coverage analysis and Utica still had no duty to defend or indemnify Shriver.

[T]he appellate court asserted that Illinois remains an "eight-corner state," and the general rule in Illinois requires coverage determinations to be based solely on the four corners of the underlying complaint and the four corners of the insurance policy.

More recently, in the 2012 case of *Pekin v. Precision Dose, Inc.*,[46] the Second District held that the trial court was not required to consider facts set forth in an affidavit submitted by the insured in determining the insurer's duty to defend. Like *Shriver*, the underlying complaint in *Precision Dose* involved legal theories and factual allegations that were outside the scope of Pekin's policy. Pekin denied coverage and the insured, Precision Dose, filed a declaratory judgment action. As part of its summary judgment motion in the declaratory action, Precision Dose, for the first time, submitted an affidavit from its president setting forth facts that it believed triggered coverage. That affidavit was stricken by the trial court, and judgment was entered in favor of Pekin.

The appellate court went through a four-part analysis in affirming the trial court's decision to strike the insured's affidavit from the evidence considered during summary judgment in the declaratory judgment action. First, the appellate court asserted that Illinois remains an "eight-corner state," and the general rule in Illinois requires coverage determinations to be based solely on the four corners of the underlying complaint and the four corners of the insurance policy.[47] Cases like *Wilson*, according to the *Precision Dose* case, demonstrate that the "eight-corner" rule is a "general rule," and the "true-but-unpleaded-facts doctrine" is an exception that permits a court ruling on summary judgment in a declaratory judgment action to consider evidence usually considered in a summary judgment motion, so long as such evidence does not tend to determine an issue critical to the determination of the underlying suit.[48]

The court then looked at the true-but-unpleaded facts doctrine, and noted that the rule in *Wilson* merely permits, but does not require, consideration of any material outside the underlying pleadings by the trial court.[49] Relying heavily on *Shriver*, the *Precision Dose* court explained that an insurer must defend an insured only if the facts in the underlying complaint give rise to coverage, unless "the insurer *possesses knowledge* of true but unpleaded facts that . . . indicate the claim is within or potentially within coverage."[50] The *Precision Dose* court emphasized the *Shiver* court's proclamation that the doctrine should not apply in situations where the only extraneous facts possessed by the insurer

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were supplied by the insured, and the insurer has no way of verifying the truth of those facts without conducting its own investigation.[51] The *Precision Dose* court went further, stating that "*Shriver* teaches that unpleaded facts that the insured gives the insurer should be viewed with suspicion when determining the duty to defend."[52] The court found that Pekin's decision to deny coverage was made without any awareness of the facts in the affidavit and that the insured knew those facts but failed to disclose them to Pekin until the summary judgment phase of the declaratory judgment action.[53] The court explained the "eight-corner" rule must focus on the complaint and the policy because the insurer has to determine its duty to defend at the outset of litigation.[54]

The court next considered whether the underlying complaint and pleadings were ambiguous, and, therefore, warranted consideration of extrinsic evidence as a valid exception to the "eight-corner" rule. The court ultimately determined, however, that the affidavit proffered by the insured only served to broaden the scope of the underlying allegations, and not to clarify a confused pleading. Consequently, the "true but unpleaded facts doctrine" could not apply.[55]

Finally, the court looked to the notice provisions of the Pekin policy, which required the insured to promptly notify Pekin of any occurrence, the nature and location of the injury, and other facts pertinent to the suit. The court found that, by failing to provide the facts contained in the affidavit to Pekin as required by the notice provision, the insured breach the policy requirements and that, alone, warranted striking the affidavit.[56]

Though a circuit court may "under certain circumstances, look beyond the underlying complaint in order to determine an insurer's duty to defend," . . . the Illinois Supreme Court has cautioned that extrinsic evidence may not be considered if "it tends to determine an issue crucial to the determination of the underlying lawsuit."

An Insurer May Introduce Non-Liability Facts in a Declaratory Judgment Action to Terminate Its Duty to Defend

When allegations in a complaint trigger the duty to defend, the insurer cannot properly refuse to defend based on extrinsic evidence. However, an insurer may file a declaratory judgment action and ask a court to find that extrinsic evidence relieves it of a further defense obligation. Though a circuit court may "under certain circumstances, look beyond the underlying complaint in order to determine an insurer's duty to defend," as noted above, the Illinois Supreme Court has cautioned that extrinsic evidence may not be considered if "it tends to determine an issue crucial to the determination of the underlying lawsuit."[57] In other words, a court may only "consider evidence beyond the underlying complaint if in doing so the trial court does not determine an issue critical to the underlying action."[58]

The reason for which a court cannot resolve issues in a declaratory judgment action that overlap with questions of liability in the underlying case derives from the Illinois Supreme Court's decision in *Maryland Casualty Company v. Peppers*.[59] In *Peppers*, the underlying complaint alleged in one count that the insured intentionally shot the injured claimant and in another count that he negligently shot the injured claimant.[60] The insurer denied coverage and filed a declaratory judgment action seeking a finding that there was no coverage based on an "intentional injury" exclusion.[61] The trial court found the insured had intentionally injured the injured claimant and entered a judgment of no coverage.[62]

The Illinois Supreme Court reversed. "By virtue of the interrelation" of the various issues in the underlying and declaratory judgment actions, the *Peppers* court held that such a finding by the trial court in the insurance coverage action was premature and an abuse of discretion.[63] The court reasoned that the application of the intentional acts exclusion raised "one of the ultimate facts upon which recovery is predicated in the [underlying] personal injury action against Peppers,"—that is, whether the acts complained of were intentional or negligent—and, therefore, "[u]nder the principle of collateral estoppel, the finding in the declaratory judgment action could possibly establish the allegations

of the assault count in the complaint and might preclude [the underlying plaintiff's] right to recover under the other theories alleged."[64]

Under the "*Peppers* doctrine," as it has come to be known, "it is generally inappropriate for a court considering a declaratory judgment action to decide issues of ultimate fact that could bind the parties to the underlying litigation."[65] An "ultimate fact" is one that "'would estop the plaintiff in the underlying case from pursuing one of his theories of recovery' or one in which 'an issue crucial to the insured's liability' in the underlying case is determined.'"[66] The rationale for the *Peppers* doctrine is based on the recognition that "[i]n a declaratory judgment action, injured claimants are proper and necessary parties and the judgment in such an action is binding under the doctrine of collateral estoppel as to the facts determined by the judgment and would preclude parties to the action from relitigating them."[67] Thus, where the resolution of an issue in the declaratory judgment action would require the court to decide "ultimate facts upon which recovery is predicated" in the underlying case, the declaratory judgment action should be dismissed as premature.[68] Put another way, "a declaratory judgment should not be used to force the parties to have a 'dress rehearsal' of an important issue expected to be tried in the underlying action."[69]

One of the leading Illinois cases to discuss when an insurer can eliminate its duty to defend in a declaratory judgment action based on non-liability facts is *Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc.*[70] In *Envirodyne*, a defending insurer brought a declaratory judgment action in which it asked the court to enter a ruling permitting it to withdraw from the defense of its insured based on facts learned by the insurer that were not part of the underlying complaint. In *Envirodyne*, the insurer's policy included coverage for Envirodyne if it was part of the physical construction of the building at issue, but excluded coverage if Envirodyne had acted only as a consulting engineer. In the underlying complaint, the plaintiff generally alleged that Envirodyne and its co-defendant were both involved in construction. Envirodyne's contract for the project, however, and testimony by an Envirodyne employee, made clear that Envirodyne had acted only as a consultant and did not actually participate in construction.

In *Envirodyne*, a defending insurer brought a declaratory judgment action in which it asked the court to enter a ruling permitting it to withdraw from the defense of its insured based on facts learned by the insurer that were not part of the underlying complaint.

Ruling in favor of the insurer, the *Envirodyne* court explained that while the duty to defend flows from the allegations of the underlying complaint, if an insurer opts to file a declaratory judgment action, that insurer "may properly challenge the existence of such a duty by offering evidence to prove that the insured's actions fell within the limitations of one of the policy's exclusions."[71] The court further noted that, "the only time such evidence should not be permitted is when it tends to determine an issue crucial to the determination of the underlying lawsuit."[72] Indeed, the *Envirodyne* court considered extrinsic evidence relating to the insured's role at the worksite only after confirming that whether the insured performed engineering services at the jobsite was neither an issue of "ultimate fact" nor an "issue crucial to [the insured's] liability in the underlying case."[73] The *Envirodyne* court limited its holding to cases where an insurer files a declaratory action, and stated that an insurer who fails to either defend its insured or file a declaratory action is still estopped from raising non-coverage as a defense and is bound to the allegations of the underlying complaint only.[74]

Similarly, in *Millers Mutual Insurance Association v. Ainsworth Seed Co.*[75] an insurer was allowed to rely on extrinsic evidence to defeat its duty to defend when relying on a "completed operations" exclusion. In *Ainsworth*, Millers Mutual Insurance Association

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(Millers) issued a general liability policy to Ainsworth Seed Company (ASC) that also covered ASC employees. ASC and its employee were sued and Millers argued that the completed operations exclusion barred coverage. In the subsequent declaratory proceeding, both parties filed motions for summary judgment and the trial court found in favor of ASC.

On appeal, the appellate court reversed, finding the *Envirodyne* decision persuasive and carefully drafted. The *Millers* court proceeded to examine the allegations of the underlying complaint, an affidavit submitted in support of a motion for summary judgment, and the terms of the policy. The affidavit revealed that prior to the alleged injury, ASC had merged with another firm and the affidavit also established that all operations to be performed by or on behalf of ASC has been completed. Therefore, the appellate court held the completed operations exclusion relieved Millers of its defense obligation under the policy.[76]

Illinois federal courts have also allowed insurers to rely on extrinsic evidence to the defeat the duty to defend.[77] International Environmental Corporation (IEC) sought coverage from three insurers regarding their obligations to defend IEC. All four of the parties filed motions for summary judgment, and one insurer, Hartford Insurance Company (Hartford), argued the known loss doctrine precluded coverage. The trial court granted IEC's motion for summary judgment, and Hartford moved for reconsideration. The trial court reasoned the known loss doctrine more closely resembled a condition precedent than a policy exclusion, and as such known losses are rarely, if ever, evident from complaints.[78] Therefore, the best—and frequently only—way for a court to determine whether a condition has been satisfied is to engage in a factual inquiry. The court held that "an insurer will not have abrogated its duty to defend simply because it is unclear from the complaint that it has a viable known loss defense. Instead an insurer may offer extrinsic evidence on the issue for consideration before ruling on whether a duty to defend exists."[79]

The trial court reasoned the known loss doctrine more closely resembled a condition precedent than a policy exclusion, and as such known losses are rarely, if ever, evident from complaints. Therefore, the best—and frequently only—way for a court to determine whether a condition has been satisfied is to engage in a factual inquiry.

A 2005 federal decision also followed this line of reasoning when addressing the duty to defend. In *Grey Direct, Inc. v. Erie Ins. Exch.*,[80] Erie Insurance Company (Erie) issued an insurance policy to Unicomm Direct, Inc. (Unicomm Direct) with effective dates of August 25, 2003 to August 25, 2004.[81] Grey Direct, Inc. (Grey Direct) contracted with Unicomm Direct for a mailing campaign involving free travel certificates, but on September 11, 2003, Unicomm Direct inadvertently mailed the wrong number of travel certificates, resulting in Grey Direct having to honor more travel certificates than expected. Unicomm's initial policy did not contain Printers Errors and Omissions endorsement, but Unicomm obtained the endorsement and made it retroactive to August 23, 2003. Grey Direct sued Unicomm Direct and obtained a default judgment. Grey Direct, as assignee of Unicomm Direct, filed a declaratory action against Erie, arguing that Erie breached its duty to defend. Erie filed a motion for summary judgment and Grey Direct filed a motion for judgment on the pleadings, which the court in a footnote stated it would convert and treat as a motion for summary judgment because the court needed to look beyond the pleadings to determine the issues raised in the motion. The court reasoned that because the known loss doctrine goes to whether the insurance policy has been triggered, the court would look to Erie's extrinsic evidence on the issue of known loss before determining whether a duty to defend existed under the Printers Errors and Omissions endorsement. The court held that when looking at the evidence, Erie did not have a duty to defend or indemnify Unicomm Direct.

Furthermore, a recent federal decision allowed extrinsic evidence when ruling on a motion to dismiss. In *Sealtite Roofing and Construction Co.*, Sealtite

Roofing & Construction Company (Sealtite) performed roofing work and was later sued by the owner.[82] Its insurer, Atlantic Casualty Insurance Company (Atlantic), defended Sealtite under a reservation of rights and also filed a declaratory action. Atlantic argued coverage was not afforded because of a Roofing Limitation endorsement, which excluded coverage in part for "property damage" resulting from use of a hot membrane roofing system. Sealtite moved to dismiss the duty to defend claim for failure to state a cause of action. It was undisputed the underlying complaint did not include any allegations that Sealtite installed a hot torch applied membrane system. Nevertheless, the court noted the insurer could use extrinsic evidence if it did not determine an issue crucial to the determination of the underlying lawsuit.[83] The court also noted the policy via endorsement expressly allowed Atlantic to make a determination regarding a defense obligation on evidence or information extrinsic to any complaint or pleading. The court determined there was no impediment to resolving the question of whether Sealtite installed a hot torch membrane roof system, as the answer to that question was not material to whether Sealtite was liable in the underlying lawsuit, and therefore Atlantic could present extrinsic evidence. Based on the presence of a fact dispute concerning the application of an exclusion, the court denied Sealtite's motion to dismiss.

Recently, the court in *Illinois Tool Works v. Travelers Casualty & Surety Co*. affirmed that an insurer cannot rely on extrinsic evidence of liability facts to defeat the duty to defend.[84] The coverage in that case dispute arose from multiple suits brought by multiple plaintiffs against the insured, Illinois Tool Works, involving injuries arising from exposure to chemicals during welding operations, ranging from the 1950s to the early 2000s. Travelers issued insurance policies to Illinois Tool Works for the years 1971 to 1987. Evidence developed in Illinois Tools Works' defense demonstrated that Illinois Tool Works had no involvement in welding until 1993, when it purchased another company. In the suits, Illinois Tool Works was sometimes named individually, sometimes as successor-in-interest to the welding companies it acquired, and sometimes as both. Travelers claimed that it had no duty to defend Illinois Tool Works in any of the suits, even if the plaintiffs claimed to have been injured during Traveler's coverage period, because the true facts demonstrated that Illinois Tool Works should have no liability for injuries that occurred before 1993.

> The court held that "an insurer will not have abrogated its duty to defend simply because it is unclear from the complaint that it has a viable known loss defense. Instead an insurer may offer extrinsic evidence on the issue for consideration before ruling on whether a duty to defend exists."

The court refused to allow Travelers to rely upon the facts as to when Illinois Tool Works joined the welding market in any case where a plaintiff alleged direct liability against Illinois Tool Works with exposure dates during Travelers' policy periods, or if the plaintiff failed to state his or her injury or exposure dates. The court held that, even if the facts alleged in those cases proved to be false or groundless, on their face, the complaints stated claims against Illinois Tool Works that were potentially within Travelers' coverage.[85] Further, the bare allegations of the underlying complaints left open the possibility that the plaintiff's exposure or injury occurred during the policy periods, and the court reasoned that the insurer should bear the burden of the plaintiff's broad drafting.[86] Travelers was only permitted to avoid defending Illinois Tool Works in those cases where the plaintiff alleged purely successor-in-interest claims based on the acts of the after-acquired welding companies because it found that Illinois Tool Works did not bargain for a defense from Travelers for claims made against it by way of after-acquired companies when it secured the insurance policies at issue.[87]

Other Illinois cases similarly have refused to permit an insurer to terminate its duty to defend in a declaratory judgment action with extrinsic evidence relating to "ultimate facts" or "issues crucial to the insured's liability in the underlying case." For example, one court

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refused to consider extrinsic evidence that could relate to causation in a medical malpractice case,[88] and another refused to consider an insured's "Joint Venture Agreement" in holding that a joint venture policy exclusion did not defeat the duty to defend because a finding that the insured was part of a joint venture could impact the insured's liability in the underlying negligence action.[89]

An Insurer That Believes Extrinsic Evidence Terminates Its Duty to Defend Must File a Declaratory Judgment Before the Underlying Suit is Resolved

The duty to defend arises when the insurer first becomes aware of a potentially covered complaint against its insured.[90] "An insurer that believes an insured is not covered under a policy cannot simply refuse to defend the insured."[91] Instead, it must either: (1) defend the suit under a reservation of rights; or (2) seek a timely declaratory judgment that there is no coverage.[92] "If the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage."[93]

Although Illinois law permits an insurer to seek a declaratory judgment when it "is in doubt regarding its duty to defend,"[94] a declaratory judgment regarding the duty to defend is not available for claims that have been dismissed or resolved.[95] The reason why a declaratory judgment action is untimely after the underlying claim is resolved is that the purpose of the declaratory judgment action is "settling and fixing the rights of the parties."[96] A declaratory judgment is unnecessary as to a resolved claim "because, at that point, the refusal to pay either is or is not a breach of contract and there is no future action to guide."[97] Put differently, an insurer that refuses to defend based on extrinsic evidence that does not file a declaratory judgment action will lose the right to deny coverage for a settlement or judgment and also will lose the right to rely on extrinsic evidence as an excuse for its failure to defend.

As noted above, the duty to defend in *Envirodyne* was determined at the summary judgment stage of the proceedings, and the court relied upon the timing to allow the extrinsic evidence because this type of evidence would generally be accorded to a party during a summary judgment proceeding. While estoppel was not an issue in *Envirodyne* because Fidelity defended Envirodyne pursuant to a reservation of rights, the appellate court in a footnote cautioned that a situation may arise when an insurer defends its insured in the underlying action but does not either defend under a reservation of rights or file a declaratory judgment proceeding, and if that insurer later contested the issue of coverage, it may be estopped from denying its own liability under the policy. The *National Union* court also, in a footnote, cautioned that in refusing a tendered defense without simultaneously seeking a declaratory judgment or defending under a reservation of rights, an insurer runs the risk that a court will find that a duty to defend exists and by failing to honor the duty, the insurer has sacrificed its right to deny liability on the policy.

A Declaratory Judgment Finding No Duty to Defend Has No Retroactive Effect

When an insurer becomes aware of a potentially covered complaint, it must defend. The duty to defend arises as soon as the insurer has notice that damages are sought and, once triggered, continues "as long as any questions remained concerning whether the underlying claims were covered by the policies."[98] As discussed above, an insurer's knowledge of extrinsic nonliability facts that could defeat the duty to defend is not a valid reason to refuse to defend. Extrinsic evidence does not terminate the duty to defend, thereby permitting an insurer to stop defending, until those facts are proven in a declaratory judgment action. Until the facts are proven, the duty to defend continues.[99]

An Insured May Introduce Extrinsic Evidence in a Declaratory Judgment Action to Create a Duty to Defend But It is Still Questionable Whether This Includes An Insured's Own Third-Party Complaint

Illinois courts have permitted insureds to rely on allegations contained in outside pleadings besides the underlying the plaintiff's complaint and other extrinsic evidence in order to create a duty to defend. As noted above, in *Holabird*,[100] the court held that it could consider the third-party complaint filed by a co-defendant to determine whether American Economy was required to defend Holabird as an additional insured under its policy. The court explained that "consideration of a third-party complaint

in determining a duty to defend is in line with the general rule that a trial court may consider evidence beyond the underlying complaint if in doing so the trial court does not determine an issue critical to the underlying action."[101] There, the court ultimately held that the allegations contained in both the underlying complaint and the third-party complaint, along with the relevant language contained in the American Economy policy, triggered American Economy's obligation to defend Holabird in the underlying lawsuit. Additionally, as noted above, in *Wilson*[102] the Illinois Supreme Court endorsed the approach outlined in *Holabird* in holding that it could consider the counterclaim and affirmative defenses filed by the insured from the underlying lawsuit, as well as statements taken from him by Pekin, in determining that a self-defense exception in the Pekin policy applied to an exclusion for intentional acts, thus triggering Pekin's duty to defend.

Insureds have successfully relied upon *Holabird* and *Wilson* in other decisions in order to utilize additional information contained in documents other than the underlying complaint and insurance policy in determining the insurer's duty to defend. As noted above, in *Pulte Home Corp.*,[103] the court looked at the plaintiff's answers to requests to admit, the named insured's answers to Pulte's counterclaim against it, and the contract between Pulte and the named insured subcontractor in finding that Pekin had a duty to defend Pulte in connection with the underlying lawsuit. Additionally, in *Pekin Insurance Co. v. Equilon Enterprises LLC*,[104] the court looked to franchise agreements attached to Equilon Enterprises, d/b/a Shell Oil Products US, and Shell Oil Company's (collectively Shell) response to Pekin's summary judgment motion in determining that Pekin had a duty to defend Shell in connection with the underlying lawsuit.[105]

One exception carved out by the courts with respect to this issue is where the outside evidence that the insured is attempting to rely upon in order to trigger a duty to defend is its own third-party complaint. In *American Economy Insurance Co. v. DePaul University*,[106] the companion case to *Holabird*, the court rejected consideration of the third-party complaint because it was prepared and filed by the property owner, the party seeking coverage in that case. The court declined to allow a putative additional insured to bolster its claim of coverage by referencing its own third-party complaint.[107] *National Fire Insurance of Hartford v. Walsh Construction Company*,[108] similarly relied upon *DePaul* to hold that Walsh could not rely upon the allegations contained in Walsh's third-party complaint to support its claim of coverage under the National Fire policy. The *National Fire* court further noted that Walsh's third-party complaint faced an "additional strike" against its consideration as it was filed after National Fire brought the declaratory judgment action therefore suggesting that the "third-party complaint sought to add what the underlying construction negligence complaint did not state[.]"[109]

Since *Wilson*, it is questionable whether this distinction some courts have drawn between pleadings filed by the party seeking coverage is still significant. In *Scottsdale Insurance Co. v. Walsh Construction Co.*,[110] the U.S. District Court for the Northern District of Illinois refused to look to Walsh's third-party complaint and other testimonial evidence in order to determine the duty to defend stating that *Wilson* restricted the ability of the court to review such additional documents outside the four corners of the underlying lawsuit to situations where there are "unusual and compelling circumstances" necessitating the court to do so.[111] However, this precise argument was rejected by the court in *Illinois Emcasco Insurance Co. v. Waukegan Steel Sales, Inc.*,[112] where it stated as follows:

> Emcasco seeks to restrict the ability of the court to review such additional documents by focusing on the phrase "unusual and compelling" as used in *Zurich Insurance Company v. Raymark Industries, Inc.*[citation omitted], but rejected in *National Union Fire Insurance Co. of Pittsburgh v. R. Olson Construction Contractors, Inc*., [citation omitted]. However, our supreme court in *Wilson*, [citation omitted], followed Illinois cases which did not require such circumstances and did not limit a court's review only to the underlying complaint. [citations omitted.] Furthermore, the First District has not followed *Zurich* in restricting review of third-party complaints to situations where there are unusual and compelling circumstances. In neither *Pulte*, [citation omitted], nor *Roszak*, [citation omitted], did the court's decision rest upon whether the situation was so unusual and compelling as to require the court to look at additional material. Thus, *Zurich*,

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> if applied in a situation such as this, would run contrary to our supreme court's decision in *Wilson* as well as our decisions in *Pulte* and *Roszak*.[113]

Moreover, post-*Illinois Emcasco*, another division of the First District noted in an unpublished Rule 23 order that the authority discussed in *Wilson* placed limitations on whether the trial court must necessarily consider a third-party complaint prepared by the additional insured seeking coverage, thus implicitly recognizing that the distinction with respect to pleadings filed by the party seeking coverage has survived *Wilson*.[114]

An Insured That Believes Extrinsic Evidence Creates the Duty to Defend is Not Obligated To Bring a Declaratory Judgment Action

Although an insurer may not refuse to defend based on its knowledge of extrinsic facts until such facts are proven in a declaratory judgment action, there is no requirement that an insured procure a declaratory judgment to trigger the duty to defend with extrinsic evidence. To require otherwise would be inconsistent with the potential-for-coverage duty to defend standard.

Conclusion

In summary, while the duty to defend standard is well-established in Illinois, it has evolved over time from a strict "eight corners" test to a more liberal standard that allows litigants to offer evidence outside of the complaint's allegations to trigger or avoid the duty to defend. Illinois courts have attempted to balance the insured's expectation of a defense with the insurer's right to investigate the true facts behind the complaint's allegations. While the current standard is correctly balanced in favor of the insured, it promotes fairness by allowing insurers who have defended under reservation of rights or filed declaratory judgment actions to rely upon extrinsic evidence to attempt to avoid the duty to defend, at least where consideration of the extrinsic evidence does not determine an issue crucial to the underlying lawsuit.

(Endnotes)

1 *Valley Forge Ins. Co v. Swiderski Elecs., Inc.*, 223 Ill. 2d 352, 363 (2006).

2 *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 153 (1999) (emphasis in original).

3 *General Agents Ins. Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 165 (2005).

4 *Id.* at 165-166

5 *Associated Indem. Co. v. Insurance Co. of North America*, 68 Ill. App. 3d 807, 816 (1st Dist. 1979).

6 *Fidelity & Casualty Co. of New York v. Envirodyne Eng'r., Inc.*, 122 Ill. App. 3d 301, 308 (1st Dist. 1983).

7 *Illinois Tool Works, Inc. v. Travelers Cas. & Sur. Co.*, 2015 IL App (1st) 132350, ¶ 46.

8 *Farmers Elevator Mut. Ins. Co. v. Burch*, 38 Ill. App. 2d 249, 253 (Dist. 1962); *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 193 (1976); *Zurich Ins. Co. v. Raymark Indus., Inc.*, 118 Ill. 2d 23, 52 (1987); *Crum & Forester Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384 (1993). *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997); *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010).

9 *Chandler v. Doherty*, 299 Ill. App. 3d 797, 802 (4th Dist. 1998)

10 *Sims v. Illinois National Cas. Co.*, 43 Ill. App. 2d 184, 193 (3d Dist. 1963).

11 *Clemmons v. Travelers Ins. Co.*, 88 Ill. 2d 469, 471 (1981).

12 *Clemmons*, 88 Ill. 2d at 471.

13 *Id.* at 476.

14 *Id.*

15 *Id.*

[16] *Id.*

[17] *National Union Fire Ins. Co. of Pittsburgh, Penn. v. Glenview Park Dist.,* 158 Ill. 2d 116, 124 (1994).

[18] *Glenview Park Dist.*, 158 Ill. 2d at 123.

[19] 68 Ill. App. 3d 807 (1st Dist. 1979).

[20] *Id.* at 813. The relationship between Blond and Robinson with respect to ownership and use of the vehicle at issue was more complex than describe here, but those additional facts are not relevant to the coverage question discussed here.

[21] *Id.* at 818.

[22] *Id*.

[23] *Id.* at 816.

[24] *Id.*

[25] *Id.* at 816-817.

[26] 87 Ill. App. 3d 446, 452 (1st Dist. 1980).

[27] 238 Ill. App. 3d 335, 337-38 (1st Dist. 1992).

[28] *Id.* at 337.

[29] 382 Ill. App. 3d 1017 (1st Dist. 2008).

[30] *Id.* at 1031.

[31] *Id.* at 1032.

[32] *National Union Fire Ins. Co. v. R. Olson Const. Contractors, Inc.*, 329 Ill. App. 3d 228 (2d Dist. 2002).

[33] *National Union Fire Ins. Co.*, 329 Ill. App. 3d at 1034.

[34] *Id.* at 1034-35.

[35] *Id.* at 1035.

[36] 237 Ill. 2d 446 (2010).

[37] *Id.* at 465.

[38] *Id.* at 465-66.

[39] 404 Ill. App. 3d 336 (1st Dist. 2010).

[40] *Id.* at 342.

[41] *Id.* at 342-44.

[42] 323 Ill. App. 3d 243 (2d Dist. 2001).

[43] *Id.* at 251.

[44] *Id.*

[45] *Id.*

[46] 2012 IL App (2d) 110195.

[47] *Id.* ¶ 36.

[48] *Id.* ¶ 37.

[49] *Id.* ¶ 41.

[50] *Id.* ¶ 43.

[51] *Id.*

[52] *Id.* ¶ 44.

[53] *Id.* ¶ 45.

[54] *Id.*

[55] *Id.* ¶ 50.

[56] *Id.* ¶ 55.

[57] *Pekin Ins. Co*, 237 Ill. 2d at 459 (quoting *Fidelity & Casualty Co. v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301, 304 (1st Dist. 1983)).

[58] *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d at 459 (quoting *Am. Econ. Ins. Co. v. Holabird & Root*, 382 Ill. App. 3d at 1031).

[59] 64 Ill. 2d 187 (1976).

[60] *Id.* at 193.

[61] *Id.* at 192.

[62] *See Id.*

[63] *Id.* at 196-97.

[64] *Id.*

[65] *Allstate Insurance Co. v. Kovar*, 363 Ill. App. 3d 493, 501 (2d Dist. 2006).

[66] *Clarendon American Ins. Co. v. B.G.K. Sec. Servs.*, 387 Ill. App. 3d 697, 704 (1st Dist. 2008) (quoting *Fidelity & Casualty Co. v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301, 306-07 (1st Dist. 1983)).

[67] *Thornton v. Paul*, 74 Ill. 2d 132, 156 (1978).

[68] *Peppers*, 64 Ill. 2d at 197; accord *TIG Ins. Co. v. Canel*, 389 Ill. App. 3d 366, 374 (1st Dist. 2009) (dismissing coverage action as premature under *Peppers* doctrine); *Scottsdale Ins. Co. v. City of Waukegan*, No. 13-cv-03088, 2014 U.S. Dist. LEXIS 98432, at *8 (N.D. Ill. July 21, 2014) (same).

[69] *American Alt. Ins. Co. v. Lisle-Woodridge Fire Protection Dist*., 2014 IL App (2d) 130803-U, ¶ 21.

[70] 122 Ill. App. 3d 301 (1st Dist. 1983).

[71] *Id.* at 304.

[72] *Id.* at 304-05.

[73] *Id.* at 308.

[74] *Id.* at 305-06.

[75] 194 Ill. App. 3d 888 (4th Dist. 1989).

[76] *Id.* at 893.

[77] *International Envtl. Corp. v. National Union Fire Ins. Co.*, 860 F. Supp. 511 (N.D. Ill. 1994); *Grey Direct, Inc. v. Erie Ins. Exch.*, 2005 U.S. Dist. LEXIS 26759 (N.D. Ill. Nov. 7, 2005); *Atlantic Casualty Ins. Co. v. Sealtite Roofing & Constr. Co.*, 2014 U.S. Dist. LEXIS 160293 (N.D. Ill. Nov. 14, 2014).

[78] *International Envtl. Corp.*, 860 F. Supp. at 517.

[79] *Id.*

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[80] *Grey Direct, Inc.*, 2005 U.S. Dist. LEXIS 26759.

[81] *Id*. at *4.

[82] *Sealtite Roofing & Constr. Co.*, 2014 U.S. Dist. LEXIS 160293.

[83] *Id.*

[84] 2015 IL App (1st) 132350.

[85] *Id.* ¶¶ 20, 27.

[86] *Id.* ¶ 27.

[87] *Id.* ¶ 39.

[88] *Royal Ins. Co. of America v. Insignia Fin. Grp., Inc.*, 323 Ill. App. 3d 58, 67 (1st Dist. 2001).

[89] *Clarendon American Ins. Co. v. B.G.K. Sec. Svcs., Inc.*, 387 Ill. App. 3d 697, 704 (1st Dist. 2008)

[90] *See Cincinnati Cos. v. West American Ins. Co.*, 183 Ill. 2d 317, 324 (1998)

[91] *A-1 Roofing Co. v. Navigators Ins. Co.*, 2011 IL App (1st) 100878, ¶ 20 (citing *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150 (1999)).

[92] *Ehlco*, 186 Ill. 2d at 150.

[93] *Id.* at 150-151.

[94] *Fidelity & Casualty Co. of New York v. Envirodyne Eng'r. Inc*., 122 Ill. App. 3d 301, 304 (1st Dist. 1983) .

[95] *See Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 157 (1999) (a declaratory judgment action that is filed after the underlying action has been resolved is "untimely as a matter of law").

[96] *Id.* at 305.

[97] *Adkins Energy, LLC v. Delta-T Corp.*, 347 Ill. App. 3d 373, 378 (1st Dist. 2004).

[98] *General Agents Ins. Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 165 (2005).

[99] *Id.*

[100] 382 Ill. App. 3d 1017 (1st Dist. 2008).

[101] *Id.* at 1031.

[102] 237 Ill. 2d 446 (2010).

[103] 404 Ill. App. 3d 336 (1st Dist. 2010).

[104] 2012 IL App (1st) 111529.

[105] *Mt. Hawley Ins. Co. v. Robinette*, 2013 IL App (1st) 112874, also involved the court's consideration of extrinsic evidence in order to determine the duty to defend. There the court held that the subcontract agreement, work order for the project, and the certificate of insurance satisfied the requirement of a written contract in the additional insured endorsement.

[106] 383 Ill. App. 3d 172 (1st Dist. 2008).

[107] However, the court went on to find that American Economy owed a duty to defend DePaul under the additional insured endorsement because the record showed that "true but unpleaded facts" should have alerted it to the possibility that the underlying complaint was potentially within coverage of the policy. *Id.* at 181.

[108] 392 Ill. App. 3d 312 (1st Dist. 2009).

[109] *Id.* at 322.

[110] 2011 U.S. Dist. LEXIS 111413 (N.D. Ill. Sept. 29, 2011).

[111] *Id.* at ¶ 18.

[112] 2013 IL App (1st) 120735, at ¶ 17.

[113] *Id*.

[114] 2014 IL App (1st) 132351-U.