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Broad Duty to Defend in IL

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A recent ruling from an Illinois intermediate appellate court confirms that an insurer's duty to defend under Illinois law is broad, extending even to cases where it is clear from the record that a policyholder is unlikely to be found liable in the underlying lawsuit. *Illinois Tool Works Inc. v. Travelers Cas. & Sur. Co.*, 26 N.E.3d 421 (Ill. App. Ct. 2015). In a unanimous panel decision, the Appellate Court of Illinois, First District, affirmed a trial court's ruling that insurers had a duty to defend a policyholder against thousands of lawsuits alleging injury from welding products that contained asbestos, benzene, and other chemicals. The appeals court held that the duty to defend attached even though there were no specific allegations in the underlying complaint that the policyholder caused injuries to underlying plaintiffs during any period covered by the policies at issue.

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Background

Policyholder Illinois Tool Works ("Illinois Tool") is an equipment manufacturer that was sued along with dozens of other companies for bodily injuries allegedly caused by toxic substances used in welding products. Illinois Tool was named in three ways in the underlying lawsuits: individually, as a successor in interest to companies it later acquired, and both individually and as a successor. Illinois Tool sought coverage under CGL policies issued between 1971 and 1987 by three of its insurers, Travelers Casualty & Surety Company, Travelers Indemnity Company, and Century Indemnity Company (the "insurers"). All of the welding lawsuits alleged exposure during and/or before the insurers' policy periods or alleged no exposure dates at all.

At the trial court, the insurers claimed they had no duty to defend because Illinois Tool successfully established in the underlying litigation that it did not enter the welding business until an acquisition in 1993, which was after the periods of the insurers' policies. Given that Illinois Tool undisputedly did not manufacturer the allegedly toxic products during the insurers' policy periods, the insurers argued they had no duty to defend because they would never have a duty to indemnify Illinois Tool in the underlying suits.

Donald R. McMinn

The trial court rejected this argument and found that the insurers owed Illinois Tool a defense, noting that the terms of the insurers' policies each included broad obligations to defend Illinois Tool — even if the allegations against the insured were "groundless, false or fraudulent." According to the court, the insurers' duty to defend did not turn on whether the underlying allegations could be proven. The allegations — whether true or not — "required [Illinois Tool] to litigate to obtain dismissal from the underlying complaints on the basis that they were not involved. They purchased 'litigation insurance' at issue here in order to do so." (Where the underlying cases for which coverage is sought are filed in federal court, the heightened pleading standards of *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* may lead to earlier dismissal of groundless claims, perhaps at the pleading stage.)

The court also rejected the insurers' argument that they had no duty to defend lawsuits that named Illinois Tool, but only involved products manufactured by companies that Illinois Tool acquired after the insurers' policy periods. The court explained that the insurers did not "insure against only the litigation defense risks inherent

in the business of the insured at the time the policy is issued" because the insurer expressly agreed to defend Illinois Tool against groundless, false, and fraudulent claims.

Illinois Appeals Court Decision

The Appellate Court of Illinois, First Circuit, affirmed the trial court's finding that the insurers must defend Illinois Tool. Although the court recognized it was unlikely the insureds ultimately would be found liable in the underlying lawsuits (because Illinois Tool's history of manufacturing the products at issue started only after corporate acquisitions in 1993), it noted that "that question is not before us." Instead, the court stated that its determination of the duty to defend must only consider whether the facts pled by the underlying plaintiffs, if true, would potentially bring the claims within coverage.

After setting forth this generally accepted principle, the court divided the underlying complaints into four categories and evaluated the insurers' duty to defend each: 1) complaints against Illinois Tool that alleged exposure during an insurer's policy period; 2) complaints against Illinois Tool that did not allege injury or exposure dates; 3) complaints against companies that were later acquired by Illinois Tool; and 4) complaints against both Illinois Tool and later-acquired companies.

With respect to the first category of claims, the court found that the insurers' "clearly" had a duty to defend. This duty applied even though the insurers possessed extrinsic evidence about Illinois Tool's relevant dates of welding product manufacturing that could have potentially been used to defeat their indemnification obligation. The court refused to consider extrinsic evidence, and instead strictly looked to allegations in the complaints that Illinois Tool produced harmful materials during the insurers' policy periods. (In this regard, Illinois differs from certain other jurisdictions, like Michigan and California, which permit consideration of extrinsic evidence in evaluating the duty to defend.) The court held the insurers owed a defense — regardless of whether Illinois Tool could ultimately be held liable — because they had agreed in their policies "to bear the cost of disproving groundless allegations on Illinois Tool's behalf."

The second category of claims alleged injury from an Illinois Tool product, but did not include a date of exposure or manifestation. The court acknowledged the "factual uncertainty" regarding these claims, but held that any ambiguity regarding time of injury must be resolved in favor of the duty to defend. Relying on an Illinois appellate decision, *American Zurich Insurance Co. v. Wilcox & Christopoulos, LLC*, 984 N.E.2d 86, 95 (Ill. App. Ct. 2013), the court stated that an insurer only can refuse to defend if the allegations in the underlying complaint preclude any possibility of coverage. Here, the insurers had a duty to defend because the bare allegations in the complaint "leave open the possibility" that the underlying plaintiffs' time of injury could fall within the insurers' policy periods. The court also rejected the insurers' argument that defense costs should be allocated on a pro rata basis, instead holding that under Illinois law any insurer with a duty to defend was jointly and severally liable for defense costs.

The third category of claims encompassed allegations that Illinois Tool was liable for the conduct of a company it acquired after expiration of the insurers' policy periods. Illinois Tool did not seek a defense for this category of cases, which alleged only "successor liability." The court accordingly held that the insurers did not have a duty to defend these claims because the underlying complaints "pled the Insurers out" of any such duty by clearly directing their allegations against: 1) predecessor companies; and 2) activities that Illinois Tool engaged in after the insurers' policy periods.

Finally, the court addressed the duty to defend underlying cases that alleged the liability of Illinois Tool directly and as a successor in interest. The court reiterated its holding earlier in the opinion that the insurers were required to defend direct claims that alleged the possibility that Illinois Tool could be liable. This obligation, in turn, also required the insurers to defend claims against Illinois Tool as a successor in interest because Illinois law requires an insurer to defend against all claims, even if certain allegations standing alone would not be covered. (Illinois has adopted the majority view on this issue. The minority view, by contrast, allows insurers to divide a suit into its component claims and seek reimbursement of those defense costs solely attributable to claims that are later determined to be outside the policy's grant of coverage. *See, e.g., Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997); *see also* Donald McMinn, The Duty to Defend Following *Buss and Domtar*: Restrictions on Insurance Carriers' Ability to Avoid Defense Costs Through Allocation, *Mealey's Lit. Rep. Ins.*, Oct. 21, 1997, at 15.

Implications

The *Illinois Tool* decision reinforces "well-settled" Illinois law regarding insurers' broad duty to defend. The decision is significant for the clarity of its holding that the facts alleged in an underlying complaint determine the duty to defend, even if underlying claims are groundless, false, or fraudulent. For most interested parties, the effect of Illinois Tool may be to streamline assessments of the duty to defend. By narrowing considerations to the "four corners" of the underlying complaint, parties may avoid protracted inquiries into extrinsic evidence to determine whether a policyholder is owed a defense.