

NOS. 2-97-0606 and 2-97-0901
IN THE
APPELLATE COURT OF ILLINOIS
FOR THE SECOND DISTRICT

EMPLOYERS INSURANCE OF WAUSAU A MUTUAL)
COMPANY (formerly EMPLOYERS MUTUAL)
LIABILITY INSURANCE COMPANY OF WISCONSIN))
Plaintiff-Appellee)

v.)

CITY OF WAUKEGAN, ILLINOIS)
Defendant-Appellant)
and)

INTERNATIONAL INSURANCE COMPANY and)
AMERICAN EMPLOYERS' INSURANCE COMPANY)
Defendants-Appellees)
and)

) From the Circuit Court
) of the 19th Judicial
) Circuit, Lake County

) Cir.Ct.No. 95 MR 588

UNITED STATES FIDELITY AND GUARANTY)
COMPANY; TRAVELERS INDEMNITY)
COMPANY and CENTURY INDEMNITY)
COMPANY)

) Judge Charles F. Scott

Defendants)

TRAVELERS INDEMNITY COMPANY)
Counter-Plaintiff-Appellee)

v.)

CITY OF WAUKEGAN, ILLINOIS)
Counter-Defendant-Appellant)

JEFFREY R. DIVER)
Contemnor-Appellant)

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS

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ATTORNEYS FOR AMICUS CURIAE

NATURE OF THE ACTIONS

United Policyholders respectfully adopts the statements of the Nature of the Actions of Appellant, City of Waukegan ("the City"), and Jeffrey R. Diver, Contemnor-Appellant.

ISSUES PRESENTED FOR REVIEW

United Policyholders respectfully adopts the statements of the Issues Presented for Review of Appellant, City of Waukegan, and Jeffrey R. Diver, Contemnor-Appellant.

JURISDICTION

United Policyholders respectfully adopts the statements of Jurisdiction of Appellant, City of Waukegan, and Jeffrey R. Diver, Contemnor-Appellant.

STATUTES INVOLVED

United Policyholders respectfully adopts the statements of the Issues Presented for Review of Appellant, City of Waukegan, and Jeffrey R. Diver, Contemnor-Appellant.

STATEMENT OF FACTS

United Policyholders respectfully adopts the Statements of Facts of Appellant, City of Waukegan, and Jeffrey R. Diver, Contemnor-Appellant.

ARGUMENT

I. THE TRIAL COURT'S ORDERING OF THE DISCOVERY ON THE LATE NOTICE ISSUE WAS IMPROPER AT THE DUTY TO DEFEND STAGE

The trial court considered the issue of discovery related to the late notice issues in relation to the issue of the insurance companies' duty to defend. The trial court recognized that it could not address the late notice issue with respect to the insurance companies' duty to indemnify the City.

The trial court should not have considered the late notice issue notice at this time nor ordered discovery thereon because: 1) the duty to defend is determined solely from the pleadings; and, 2) the discovery that the trial court ordered on the late notice issue involved facts that are inextricably bound to central issues in the underlying litigation.

A. The Duty to Defend Is Solely Determined By the Allegations of the Complaint

Under Illinois law, the determination of whether an insurance company has a duty to defend is to be determined solely from the allegations appearing on the face of the complaint:

[T]he duty of an insurer to defend an action brought against the insured is to be determined solely from the allegations of the complaint. If the complaint alleges facts within or potentially within policy coverage, the insurer is obliged to defend even if the allegations are groundless, false, or fraudulent.

Thorton v. Paul, 74 Ill.2d 132, 142, 384 N.E.2d 335, 339-40 (1978) (citing Maryland Cas. Co. v. Peppers, 64 Ill.2d 187 (1976); 7A J. Appleman, Insurance § 4683 (Supp. 1974)). The duty to defend the allegations in the complaint exists even if the insurance company has knowledge that the allegations are incorrect. Id.

B. In Determining the Duty to Defend, The Trial Court Cannot Examine Testimony, Depositions, Affidavits, or Any Documents Other Than the Complaint.

It is well-established that in determining the duty to defend, the court can only look to the four corners of the complaint alleged against the policyholder. United States Fidelity & Guar. Co. v. Wilkin Insulation Co., 144 Ill.2d 64, 578 N.E.2d 926, 930 (1991). In determining the duty to defend, the

court is not allowed to examine testimony, depositions, affidavits, or documents other than the complaint itself. See Allstate Ins. Co. v. Gleason, 50 Ill. App.2d 207, 214, 200 N.E.2d 383, 387 (1st. Dist 1964); Bituminous Cas. Corp. v. Fulkerson, 212 Ill. App.3d 556, 561, 571 N.E.2d 256, 260 (5th Dist. 1991) (reversing circuit court's grant of summary judgment on duty to defend to insurance company because the court improperly considered "deposition testimony and affidavits").¹

Furthermore, an insurance company can not escape defending the underlying lawsuit by conducting an independent investigation of the facts at issue in the underlying litigation and then relying on those facts to assert that there is no duty to defend.

Fragman Constr. Co. v. Preston Constr. Co., Inc., 1 Ill. App. 3d 1002, 1007, 274 N.E.2d 614, 617 (2d Dist. 1971).

It is clear that the trial court's April 3, 1997, Order was improper and an abuse of discretion to the extent that it was premised, as it was, upon discovery allegedly needed to resolve the insurance companies' duties to defend the City. The determination of the insurance companies' duties to defend the City must be made solely from the complaint and the trial court should not have ordered the City to produce any documents or

1. There is a limited exception to this rule that is not applicable here. A court may look beyond the allegations of the complaint only to address ancillary matters as to whether the premiums have been paid for the policy or whether the person seeking rights under the policy is an "insured under the policy." Bituminous Cas. Corp., 212 Ill. App. 3d 556, 561, 571 N.E.2d 256, 261 (5th Dist. 1991); West Amer. Ins. Co. v. Vago, 197 Ill. App. 3d 131, 136, 553 N.E. 2d 1181, 1184 (1990).