MONTHLY LUNCHTIME SEMINAR SERIES

64TH Session:

WHAT ABOUT ME? INSURANCE COVERAGE FOR ADDITIONAL INSUREDS

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Publications:

The School of Medicine Doctrine in Illinois, DCBA Brief, 11 (December, 1989) reprinted in The School of Medicine Doctrine as a Defense to Chiropractic Malpractice Litigation, ACA Journal of Chiropractic, 51 (Aug. 1991); Purchased Testimony: The Problem of Professional Expert Witnesses, 57 Defense Counsel Journal, 525 (October 1990); The Uniform Premarital Agreement Act: An Ill-Reasoned Retreat From The Unconscionability Analysis, 4 American Journal of Family Law, 267 (Fall 1990); The Preemption of State Claims Under ERISA, Illinois Bar Journal, 550 (November 1990); When The Insured Is Notified Of An Environmental Claim . . . Is There A Duty To Defend?, 20 The Brief, 30 (ABA Fall 1990); The Spoilation of Evidence Doctrine In Illinois, Ill. Assoc. Def. Tr. Csl. Monograph, (Fall 1990); Superfund Defense: Extra Steps Necessary With Environmental Claims, Claims, 54 (January 1991); DRI Monograph, Selected Issues In Insurance Coverage, The Contemporary View of the Pollution Exclusion -- A Provincial Approach, 97 (Defense Research Institute, vol. 1990, no. 4, December 1990); The Lost Chance Doctrine Could Bring Recovery For The Increased Risk of Harm, Chi. Bar Assn. Record, 27 (April/May 1991); Insurance Coverage For Sexual Assaults Upon Minors, IDC Quarterly, 8 (Vol. 1, 1991); The Inadvertent Waiver of Privilege, Tort and Insurance Law Journal, 637 (Spring 1991); Environmental Law for Transactional Attorneys, Environmental Litigation, ch. 7 (Ill. Inst. for

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Unpublished Monographs:

The Insurance Coverage Aspects of Environmental Claims (1991); Insurance Claims And The Construction Industry (1992); The Illinois Structural Work Act Claims Manual (1993); The Defense of Lead Poisoning Claims (1995); Risk Shifting Under Construction Contracts (1995); The Construction Delay Litigation Manual (1996); Construction Defect Claims Manual (1996); Risk Shifting In Construction Litigation, Illinois CPA Foundation (1996); Illinois Construction Litigation Following the Repeal of the Structural Work Act, Builders Association of Greater Chicago (1996); Professional Liability Insurance for Architects and Engineers (1996); Insurance Coverage for Construction Claims (1996); Property Insurance and the Construction Industry (1996); The Completed Operations Clause of a General Liability Insurance Policy as a Defense to Construction Defect Claims (Am. Contractors. Ins. Group, 1997); Insurance Bad Faith, (Amer.

Rail Labor Attys, 2000); The Right To Privacy and Remedies Under HIPAA, (Am. Contractors Ins. Co. (2002); Construction Risk Shifting in Illinois, (Chgo. Bar. Assoc., 2007); Indemnity and Risk Shifting, (Am. Contractors Ins. Co. (2010).

Appeals/Published Opinions:

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Appellate Court of Illinois: *Snow v. Power Construction Company*, 2017 Il App (1st) 151226 (1st Dist. 2017); *Empress Casino Joliet Corporation v. W.E. O'Neil Construction Co.*, 2016 Il App (1st) 151166, 68 N.E.3d 856 (1st Dist. 2016); *Lederer v. Exec. Constr., Inc.*, 18 N.E.3d 112; 385 Ill. Dec. 112 (1st Dist. 2014); *Mockbee v. Humphrey Manlift Co.*, 973 N.E.2d 376, 362 Ill. Dec. 276 (1st Dist. 2012); *Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 956 N.E.2d 524 (1st Dist. 2011); 353 Ill. Dec. 662 (2011); *Dowe v. Birmingham Steel Corp.*, 963 N.E.2d 344; 357 Ill. Dec. 391 (1st Dist. 2011); *Am. Econ. Ins. Co. v. DePaul Univ.*, 383 Ill.App.3d 172, 890 N.E.2d 582, 321 Ill.Dec. 860 (1st Dist. 2008); *Argonaut Ins. Co. v. Safway Steel Products, Inc.*, 355 Ill.App.3d 1, 822 N.E.2d 79, 290 Ill.Dec. 797, Ill.App. (1st Dist. 2004); *American Country Ins. Co. v. James McHugh Const. Co.*, 344 Ill.App.3d 960, 801 N.E.2d 1031, 280 Ill.Dec. 86 (1st Dist. 2003); *Insura Property and Cas. Co. v. Steele*, 344 Ill.App.3d 466, 800 N.E.2d 91, 279 Ill.Dec. 249 (5th Dist. 2003); *Brock v. Anderson Road Associates*, 301 Ill.App.3d 168, 703 N.E.2d 568, 234 Ill.Dec. 707 (2nd Dist. 1998); *In re Marriage of Campbell*, 261 Ill.App.3d 483, 633 N.E.2d 797, 199 Ill.Dec. 1 (1st Dist. 1993); *In re Marriage of Kane*, 249 Ill.App.3d 412, 618 N.E.2d 977, 188 Ill.Dec. 407 (1st Dist. 1993); *Harris v. St. Paul Fire & Marine Ins. Co.*, 248 Ill.App.3d 52, 618 N.E.2d 330, 187 Ill.Dec. 739 (1st Dist. 1993); *Kim v. Evanston Hosp.*, 240 Ill.App.3d 881, 608 N.E.2d 371, 181 Ill.Dec. 298 (1st Dist. 1992); *Milz v. M.J. Meadows, Inc.*, 234 Ill.App.3d 281, 599 N.E.2d 1290, 175 Ill.Dec. 276 (1st Dist. 1992); *Ure v. Wangler Const. Co.*, Inc., 232 Ill.App.3d 492, 597 N.E.2d 759, 173

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Substantive United States District Court Decisions: *Tonicstar Ltd. v. Lovegreen Turbine Servs.*, 2006 U.S. Dist. LEXIS 60750 (D. Minn. 2006); *Faur v. Sirius International Insurance Corporation, et al.*, 391 F. Supp. 2d 650 (N.D. Ill. 2005); *Great Lakes Dredge & Dock Co. v. Commer. Union Assur. Co.*, Case No. 94 C 2579 (N.D. Il. 2002); 2002 U.S. Dist. LEXIS 18500; The *Bourbonnais Amtrak* Litigation. See, *e.g., GE Corp. v. Dowe*, 2001 U.S. Dist. LEXIS 9367 (N.D. Ill. 2001); *Roberts & Schaefer Co. v. Merit Contracting, Inc.*, 901 F.Supp. 1349 (N.D. Ill. 1995); *Roberts & Schaefer Company v. San-Con, Inc.*, 898 F.Supp. 356 (S.D. W.V. 1995); *Ranger Ins. Co. v. Safety-Kleen Corp.*, 814 F.Supp. 744 (N.D. Ill. 1993); *American Centennial Ins. Co. v. American Home Assur. Co.* 729 F.Supp. 1228 (N.D. Ill. 1990); *Peach Tree Bancard Corp. v. Peachtree Bancard Network, Inc.* 706 F.Supp. 639 (N.D. Ill. 1989).

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SECTION A

- Outline & "*Topics on Target Tender and Coverage For Additional Insureds*" by Mr. Robert Marc Chemers, May 2018.

Topics for Presentation on Target Tender and Coverage for Additional Insureds

Target Tender

I. Background of the target tender rule in Illinois

II. Horizontal Exhaustion, namely, the need to exhaust the limits of the policy of the targeted insurer before moving onto the limits of any other carrier

III. Competing "other insurance" provisions and the effect of a targeted tender to one insurer over the other

IV. Public policy-based challenge to policy conditions that require an insured to tender its defense to its other carriers if that provision is used to preclude the insured from target tendering its defense

Coverage for Additional Insureds

I. Threshold to trigger coverage under an additional insured endorsement

II. Duty to defend v. duty to indemnify under the additional insured endorsement

III. "Eight-corners rule" and additional documents that may be taken into account to determine coverage for a putative additional insured

IV. When a third-party complaint which includes direct allegations against the putative additional insured may be taken into consideration

V. General contractor as additional insured under a policy to a subcontractor who employs the plaintiff

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Topics on Target Tender and Coverage for Additional Insureds[1]

Target Tender

I. Background of the target tender rule in Illinois

Prior to the targeted tender rule, "other insurance" clauses determined the scope of liability between multiple insurers for the same insured under the same claim. These "other insurance" clauses fall within one of three categories: (1) *pro rata*; (2) excess; or (3) escape.

In *Institute of London Underwriters v. Hartford Fire Insurance Company*, Hartford provided comprehensive liability insurance to its insured. 234 Ill.App.3d 70, 71 (1st Dist. 1992). The insured was named as an additional insured under a policy issued by the Institute. *Id.* The Hartford policy contained an "other insurance" *pro rata* clause, while the Institute's policy had no such clause. *Id.* The insured never requested Hartford to defend or indemnify it with respect to the underlying action. *Id.* at 72.

The issue before the Court was whether an insured may select which of its two insurers should provide coverage and thus foreclose the selected insurer from obtaining contribution from the other insurer. *Id.* at 73. The Court held that the insured's refusal or failure to tender the defense of the action to Hartford excused Hartford's duty to perform

[1] Mr. Chemers and Mr. Franco extend their appreciation and gratitude to Paula K. Villela, Philip G. Brandt and Jonathan L. Federman, associates at Pretzel & Stouffer, Chartered, for their valuable assistance in preparing this outline. In addition, the views expressed by the presenters are their own and do not necessarily reflect those of their clients or firms.

under the policy or contribute to settlement. *Id.* at 76. The Institute argued that the "other insurance" clause in Hartford's policy required Hartford to contribute to the settlement. *Id.* at 77. The Court held that, as the policy was never triggered, the issue of liability under the "other insurance" clause did not arise. *Id.* The Court also noted that the insured negotiated to be added as an additional insured under the Institute's policy and could select the Institute as its insurer due to the fear of a rise in premiums or cancellation of the Hartford policy. *Id.* at 78-79. Thus, *Institute of London* is credited as the first decision in Illinois related to the target tender doctrine.

In *Cincinnati Co. v. West American Insurance Company*, the insured was an insured under a policy issued by West American and was an additional insured under a policy issued by Cincinnati. 183 Ill.2d 317, 319 (1998). The insured tendered its defense to West American, which then tendered the defense to Cincinnati. *Id.* The underlying case settled, with both West American and Cincinnati paying a portion of the settlement. *Id.* at 320. Cincinnati filed a declaratory judgment action claiming that West American was liable for the costs and settlement which Cincinnati paid. *Id.* The Illinois Supreme Court cited *Institute of London*, noting that it was true an insured may choose to forgo an insurer's assistance for various reasons, including the insured's fear that premiums would be increased, or that the policy may be cancelled. *Id.* at 326. The Court noted that the insurer's duty to defend could be discharged by contacting the insured, provided the insured indicates it does not want the insurer's assistance or is unresponsive or uncooperative. *Id.* Yet the Court held that actual notice was sufficient to trigger a duty to defend, unless the insured has knowingly forgone the insurer's assistance. *Id.* at 328.

In *John Burns Construction Company v. Indiana Insurance Company*, the insured was covered by two separate policies, its own issued by Royal, and as an additional insured issued by Indiana. 189 Ill.2d 570, 574 (2000). The Indiana policy contained an "other insurance" *pro rata* clause. *Id.* at 573. The issue before the Supreme Court was whether an insurer with an "other insurance" clause could seek contribution from another insurer whose policy was in existence, but whose coverage the insured refused to invoke. *Id.* at 574. Our Supreme Court formally adopted the target tender rule, holding that an "other insurance" clause does not by itself trigger coverage or overcome the right of an insured to tender defense of an action to one insurer alone. *Id.* at 578.

Only the insured may deselect an insurer. In *AMCO Ins. Co. v. Cincinnati Ins. Co.*, the Court rejected an insurer's claim that it could deselect itself. 2014 IL App (1st) 122856, ¶ 25. Rather, the Court held that the point of the doctrine was to allow the insured to select which insure it wants to target for defense, and the purpose of the doctrine would be eviscerated if the targeted insurer could itself target other insurers. *Id.*

II. Horizontal Exhaustion, namely, the need to exhaust the limits of the policy of the targeted insurer before moving onto the limits of any other carrier

In *United States Gypsum Co. v. Admiral Insurance Co.*, the Court considered whether the insured was required to exhaust all available primary insurance before seeking coverage from any excess policy. 268 Ill.App.3d 598, 652 (1st Dist. 1994). The excess policies in question contained an "other insurance" clause delineating that the policies were excess to any other policy. *Id.* at 653. The Court held a plain reading of the

"other insurance" provision required the insured to exhaust all triggered primary insurance before pursuing coverage under the excess policies. *Id.* at 655.

In *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, the Court considered vertical exhaustion and the target tender rule. 369 Ill.App.3d 563, 568 (1st Dist. 2006). The Court explained that horizontal exhaustion "requires an insured who has multiple primary and excess policies covering a common risk to exhaust all primary policy coverage before invoking excess coverage." *Id.* at 569. In contrast, "vertical exhaustion allows an insured to seek coverage from an excess insurer as long as the insurance policies immediately beneath that excess policy, as identified in the excess policy's declaration page, have been exhausted, regardless of whether other primary insurance may apply." *Id.* The Court rejected the contention that perfecting a targeted tender allowed an insured to vertically exhaust consecutive coverage before exhausting all available primary policies. *Id.*

In *Kajima Construction Services, Inc. v. St. Paul Fire and Marine Insurance Co.*, the Supreme Court considered horizontal exhaustion in light of the target tender rule. 227 Ill.2d 102 (2007). The insured made a targeted tender to St. Paul. *Id.* at 104. St. Paul had a $2 million general liability policy and $5 million umbrella coverage. *Id.* After St. Paul did not accept the tender, the insured asked its insurer, Tokio, to handle the matter and pursue the defense and indemnity owed by St. Paul. *Id.* Tokio demanded that St. Paul settle the lawsuit using both its primary and excess coverage. *Id.* The case ultimately settled with St. Paul contributing its primary policy limits and Tokio contributing its

primary policy limits. Tokio and the insured sought reimbursement from St. Paul of the $1 million Tokio contributed. *Id.* at 105.

The issue before the Supreme Court was whether the targeted tender doctrine prevails over horizontal exhaustion. *Id.* at 114. The Court noted that excess insurance coverage only attaches after primary insurance has been exhausted. *Id.* The Court declined to extend the target tender doctrine to require an insurer to vertically exhaust its primary and excess coverage limits before all primary insurance available to the insured has been exhausted, noting the clear distinctions between primary and excess coverage. *Id.* at 116. The alternative would "eviscerate the distinction between primary and excess insurance." *Id.* Thus, all primary insurance coverage must be exhausted before an insured may target its excess coverage carriers.

III. Competing "other insurance" provisions and the effect of a targeted tender to one insurer over the other

In *River Village One, LLC v. Central Insurance Cos.*, the insured had its own policy of insurance and was named as an additional insured under a policy issued by Central. 396 Ill.App.3d 480, 482 (1st Dist. 2009). The Central policy contained an "other insurance" excess clause. *Id.* Excess "other insurance" clauses "attempt to render otherwise primary insurance as excess over any other collectible insurance, most often with statements in the policy that declare the insurer's coverage to be excess over any other valid and collectible insurance available to the insured." *Id.* at 487. The Court held that the "other insurance" excess clause demonstrated that the policies were not concurrent primary insurers, but rather primary and excess insurers. *Id.* at 490. Thus, the

Court held that the Central policy required the insured to exhaust its primary insurance before it could trigger the Central excess coverage and the insured's attempt to target tender Central's policy failed. *Id.* at 492.

In *Vedder v. Cont'l Western Ins. Co.*, the insured was driving a personally owned vehicle while acting as a volunteer for an organization. 2012 IL App (5th) 110583, ¶ 2. The driver had an insurance policy, and the organization he volunteered for had a policy issued by Continental which provided coverage for volunteers, but also contained an "other insurance" excess clause. *Id.* at ¶ 4. The Court held that, by the plain language of the policies, the insured's policy provided primary coverage while Continental only provided excess coverage. *Id.* at ¶ 18.

In *Certain Underwriters at Lloyd's v. Cent. Mut. Ins. Co.*, the Court again considered whether a policy containing an "other insurance" excess clause could limit the targeted tender doctrine. 2014 IL App (1st) 133145, ¶ 9. The Underwriters policy contained an "other insurance" excess clause, if other primary insurance is available. *Id.* at ¶ 10. The Central policy contained an excess "other insurance" clause as well, unless a contract required Central to be the primary insurer existed. *Id.* at ¶¶ 11-12. The Court held the condition precedent in the Central policy was not satisfied and thus Central only provided excess coverage. *Id.* at 14. The Court then held, as the Underwriters policy was only excess if other primary insurance was available, the Underwriters policy was primary, because no other primary insurance was available. *Id.*

IV. Public policy-based challenge to policy conditions that require an insured to tender its defense to its other carriers if that provision is used to preclude the insured from target tendering its defense

Under Illinois public policy, the insured has a "paramount right" to target an insurer. The Supreme Court formally adopted the target tender rule in *John Burns Constr. Co. v. Ind. Ins. Co.*, 189 Ill. 2d 570, 574-76 (2000). There, the Court held that an insured has the "paramount right" to choose or knowingly forego an insurer's participation in a claim. *John Burns Constr. Co. v. Ind. Ins. Co.*, 189 Ill. 2d 570, 574-76 (2000). Illinois Courts have also recognized the insured's right to select a carrier to provide coverage encompasses the right to deactivate coverage with an insurer previously selected for purposes of invoking exclusive coverage with another insurer. *Alcan United, Inc. v. West Bend Mut. Ins. Co.*, 303 Ill. App. 3d 72, 83 (1999).

The key point is that it is the *insured's* paramount right to choose, not its carrier's. That is because the insured either paid a premium for the competing policies or bargained for coverage as an additional insured under another's policy. Shortly after the Supreme Court adopted the targeted tender, Justice Quinn, in his concurrence in *Chicago Hospital Risk-Pooling Program*, 325 Ill. App. 3d at 983-87 and again in *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 343 Ill. App. 3d 93, 106-09 (1st Dist. 2003), expressed concern that targeted tender made it harder for insurers to determine the extent of their insured risks, blurred the distinction between primary and excess coverage, and possibly even violated the state constitution by interfering with freedom of contract. He recommended limiting the target tender rule, at most, to cases where parties were additional insureds under concurrent primary policies, as commonly seen in construction cases. He explained that subcontractors' insurers could

increase premiums for the risk of the additional insured's liability, so a targeted tender would not "blindside" the insurer. *Id.* at 109.

It appears that most decisions, if not all, allowing an additional insured to target tender to a policy on which it is not the named insured, occurs when a general bargained for coverage under its subcontractor's policy of insurance. See, *e.g.*, *Burns*, 189 Ill. 2d 570, *Legion Ins. Co. v. Empire Fire & Marine Ins. Co.*, 354 Ill. App. 3d 699, 704-05 (1st Dist. 2004). For instance, in *Vedder v. Continental W. Ins. Co.*, 2012 IL App (5th) 110583, the Fifth District held that "because Vedder neither paid a premium for nor bargained for coverage under the Continental policy, she cannot target tender her defense to Continental." *Id.* at ¶22. In so holding the *Vedder* Court relied on *Pekin Ins. Co. v. Fid. & Guar. Ins. Co.*, 357 Ill. App. 3d 891, 902-03 (5th Dist. 2005), in which the Court held that an insured does not have a paramount right to deselect its own insurer in favor of another where the insured is not named as an insured or additional insured on the selected policy and did not pay a premium for or bargain for coverage under the selected policy.

The *Vedder* Court also relied on *State Auto Prop. & Cas. Ins. Co. v. Springfield Fire & Cas. Co.*, 394 Ill. App. 3d 41424 (4th Dist. 2009). In that case, the Court explained that whether an individual is a named insured is significant because the rationale for allowing an insured to deselect coverage is that it vests the named insured with the right to choose between two policies for which the named insured has either paid the premium or negotiated for the right to be on the policy. In contrast, when a party has only contracted with, and paid the premium for, one policy and attempts to deselect its

policy in favor of a policy on which it has not paid the premium or negotiated to be the named insured, this rationale is inapplicable. *Id.* at 419.

Coverage for Additional Insureds

I. Threshold to trigger coverage under an additional insured endorsement

If the underlying complaint alleges facts within or potentially within the policy coverage, the insurer is obliged to defend its insured even if the allegations are groundless, false or fraudulent. *U.S. Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill.2d 64 (1991); *Chandler v. Doherty*, 299 Ill.App.3d 797 (4th Dist. 1998). An insurer may not justifiably refuse to defend an action against its insured 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. The Court must resolve all doubts concerning the scope of coverage in favor of the insured. *Id.* at 74. However, the insurer may refuse to defend if the insurance policy cannot possibly cover the liability arising from the facts alleged, and the contract cannot possibly cover that liability when the terms of the policy clearly preclude the possibility of coverage. *Illinois Emcasco Ins. Co. v. Northwestern Nat'l. Cas. Co.*, 337 Ill.App.3d 356 (1st Dist. 2003); *Hankins v. Pekin Ins. Co.*, 305 Ill.App.3d 1088, 1092 (5th Dist. 1999).

Notably, where the facts alleged support multiple theories of recovery, there is a duty to defend if any one of those theories potentially falls within policy coverage. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 363 (2006). It is "the alleged conduct, rather than the labeling of the claim in the complaint, [that] determines

whether the insurer has a duty to defend." *Pekin Insurance Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 1059 (1st Dist. 2010).

The Appellate Court recently ruled that in determining that an insurer owes a duty to defend an additional insured based on that additional insured's potential vicarious liability, two components must be present, namely:

1. "First, there must be a potential for finding that the named insured was negligent and,
2. Second, there must be a potential for holding the additional insured vicariously liable for that negligence." *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601, ¶ 37.

While the underlying complaint does not need to expressly allege direct negligence by the named insured to meet the first requirement, the facts in the underlying complaint must still "support a theory of recovery for the underlying plaintiff based on the negligence of the named insured." *Id.* at ¶ 39.

In *Centex*, the claimant alleged that he was injured while working "on or around a balloon wall and wall bracing," and that the named insured was in charge of the erection of that wall. 2017 IL App (1st) 153601, ¶ 43. In finding that the underlying complaint supported a theory of recovery based on the vicarious liability of the named insured, the Court reasoned that, while the named insured was not a defendant, the underlying complaint "makes clear that [the named insured] was the party responsible for building the balloon wall and that [the claimant] was injured when the wall fell and struck him." *Id.*

In reaching that conclusion, the Court in *Centex* found that its holding was consistent with, albeit distinguishable from, the holdings in *Pekin Insurance Co. v. Illinois Cement Co.*, 2016 IL App (3d) 140469; *Pekin Insurance Co. v. United Contractor Midwest, Inc.*, 2013 IL App (3d) 120803; and *Pekin Insurance Co. v. United Parcel Service, Inc.*, 381 Ill. App. 3d 98 (1st Dist. 2008). In *Illinois Cement*, no duty to defend existed because, while the underlying claimant was also an employee of the named insured, his injuries were allegedly caused by the negligence of the putative additional insured's own employees. 2016 IL App (3d) 140469, ¶¶ 38-40. The claimant in that case was working on the installation of trash pumps on the additional insured's premises, where the additional insured, through its own employees and agents, allegedly provided a stairway to be used during renovations, on which the claimant slipped and fell due to the accumulation of cement and debris. 2016 IL App (3d) 140469, ¶ 11. In finding that there was no duty to defend, the Court found that the underlying complaint was "based solely on the direct negligence of ICC regarding the erection, construction, placement, or operation of a stairway on ICC's commercial property and the condition of that stairway during ICC's commercial operations." *Id.*, at ¶ 36.

Similarly in *United Contractor*, the underlying claimant was allegedly injured when he struck overhead power lines while removing trees. 2013 IL App (3d) 120803, ¶ 6. While the claimant was an employee of the named insured, hired by the putative additional insured, none of his allégations supported a theory of vicarious liability by the named insured. In fact, as recognized by the Court in *Centex*, in distinguishing its facts from those in *United Contractor*, the underlying complaint "focused entirely on the additional insured's own negligence in failing to supervise or warn persons working on the construction site that there were live overhead power lines, which ultimately caused the worker's injury. None of the allegations supported a

theory of recovery based on negligence of the named insured or even suggested negligence by the named insured." *Centex*, 2017 IL App (1st) 153601, ¶ 40, citing *United Contractor*, 2013 IL App (3d) 120803, ¶ 10 [internal citations omitted]; see also *United Parcel Service, Inc.*, 381 Ill. App. 3d 98, 98-99 (underlying complaint by employee of named insured did not support a theory of recovery based solely on vicarious liability because the alleged cause of his injuries was a defective ladder provided by the putative additional insured).

In contrast, those cases were distinguished from *Pekin Insurance Co. v. CSR Roofing Contractors, Inc.*, where the underlying claimant alleged that, while working for the named insured, he was injured because he did not have appropriate safety devices. 2015 IL App (1st) 142473, ¶ 50. The allegations of direct negligence by the general contractor, the putative additional insured, was that it "[a]llowed its subcontractors to not be competent in violation of OSHA regulations" and "[f]ailed to require the subcontractor [named insured] to comply with OSHA regulations." *Id.* Under those circumstances, the allegations raised the possibility that the general contractor could be found liable solely because of the acts or omissions of the named insured, because at the "core" of the complaint, the claimant was alleging that it was the named insured that failed to be competent. *Id.*

II. Duty to defend v. duty to indemnify under the additional insured endorsement

An insurer's duty to defend is broader than its duty to indemnify. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 125 (1992). An insurer's duty to indemnify is narrower than its duty to defend. See, *e.g.*, *Conway v. Country Casualty Ins. Co.*, 92 Ill. 2d 388, 394 (1982); *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.* 168 Ill. App. 3d 361, 366 (1st Dist. 1988). Unlike the

duty to defend, the duty to indemnify "'will not be defined until the adjudication of the very action which [the insurer] should have defended.'" *Maryland Casualty Co. v. Chicago & North Western Transportation Co.*, 126 Ill. App. 3d 150, 156 (1984), *quoting Centennial Insurance Co. v. Applied Health Care Systems, Inc.*, 710 F.2d 1288, 1291 n.6 (7th Cir. 1983); see also *Wilkin*, 144 Ill. 2d at 73.

The question of whether the insurer has a duty to indemnify an insured (or additional insured) for a particular liability is only ripe for consideration if that liability has already been incurred in the underlying action. See, e.g., *Wilkin*, 144 Ill. 2d at 73; *Zurich Ins. Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 52 (1987). If so, the duty to indemnify arises only if that insured's activity and the resulting loss or damage actually fall within the CGL policy's coverage. *Cf. Willett Truck Leasing Co.*, 88 Ill. App. 3d at 139.

Because the duty to defend is broader than the duty to indemnify, the duty to defend an additional insured can arise where the underlying complaint alleges direct negligence by the putative additional insured, as long as it also supports an alternative theory where negligence is imputed by the actions of the named insured. See, *e.g.*, *Centex Homes*, 2017 IL App (1st) 153601, ¶ 42. The duty to indemnify, however, would not arise until there is a finding of liability against the additional insured, and even then, only if that finding is based solely on the negligence of the named insured.

III. "Eight-corners rule" in determining duty to defend and additional documents that may be taken into account to determine coverage for a putative additional insured

1. Eight-corners Rule

It is well established Illinois law that an insurer's duty to defend an action brought against the insured is generally "'determined solely by reference to the allegations of the complaint.'" *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 457-58 (2010), quoting *Zurich Insurance Co. v. Raymark Industries, Inc.*, 118 Ill. 2d 23, 52 (1987). Illinois courts adhere to an "'eight corners' analysis when determining a carrier's duty to defend, where the Court compares the four corners of the underlying complaint with the four corners of the insurance policy to determine whether facts alleged in the underlying complaint fall within or potentially within coverage." *Pekin Insurance Co. v. Precision Dose*, 2012 IL App (2d) 110195, ¶ 36; *Farmers Automobile Insurance Ass'n. v. County Mutual*, 309 Ill. App. 3d 694, 698 (4th Dist. 2000).

2. The Right To Present Certain Evidence Beyond The Underlying Complaint

Under certain circumstances, however, Courts may look beyond the underlying complaint to determine whether a duty to defend exists. These circumstances arise often in cases involving additional insurance coverage. As our Supreme Court recognized:

> [I]f an insurer opts to file a declaratory proceeding, we believe that it 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. [Citations.] 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 [citations] ***. If a crucial issue will not be determined, we see no reason why the party seeking a declaration of rights should not have the prerogative to present evidence that is accorded generally to a party during a motion for summary judgment in a declaratory proceeding. To require the trial court to look solely to the complaint in the underlying action to determine coverage would make the declaratory proceeding little more than a useless exercise possessing no attendant benefit and would greatly diminish a declaratory action's purpose of settling and fixing the rights of the parties. [Internal quotation marks omitted].

Wilson, 237 Ill. 2d at 461, quoting *Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301, 304-05 (1st Dist. 1983).

The restriction to that rule, however, is that the 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. *Wilson*, 237 Ill. 2d at 460.

In determining coverage of claims against putative additional insureds, Courts will often take into account the written agreement between the named insured and the putative additional insured.

In *Illinois Cement*, 2016 IL App (3d) 140469, the Court looked at the written contract between the named insured and the putative additional insured in concluding that there was no duty to defend a contractor in an action by the employee of the named insured, whose injuries were allegedly caused entirely by the negligence of the contractor. The claimant in that case was working on the installation of trash pumps on the additional insured's premises, where the additional insured's, through its own employees and agents, allegedly provided a stairway to be used during renovations, on which the claimant slipped and fell due to the accumulation of cement and debris. *Illinois Cement*, 2016 IL App (3d) 140469, ¶ 11. In finding that there was no coverage, the Court noted that the "skeletal" work purchase order form did not require the named insured to provide a platform, scaffolding or a separate stairway to be used as part of the trash pump installation project. *Id.*, at ¶ 30.

In *Centex Homes*, discussed above, the Court similarly looked to the contract between named insured and putative additional insureds, to determine that the insurer had

a duty to defend one of them, but not the other. 2017 IL App (1st) 153601. In that case, the named insured subcontractor entered into an agreement with a contractor, Centex Homes, which was managed by another entity, Centex Real Estate. The policy provided additional insured coverage only when the named insured and that organization "have agreed in a written contract effective during the policy period." While there was a duty to defend the Centex Homes as explained in greater detail above, there was no such duty towards Centex Real Estate because the contract was clearly only between Centex Homes and the named insured.

As explained next, Courts may look to third-party complaints under certain circumstances to determine whether the duty to defend a putative additional insured has arisen, but only if those complaints are not self-serving attempts to bring into coverage an otherwise uncovered claim.

IV. When a third-party complaint which includes direct allegations against the putative additional insured may be taken into consideration

It is well established that in a declaratory judgment action where the issue is whether the insurer has a contractual duty to defend pursuant to an insurance policy, a Court ordinarily looks first to the allegations in the underlying complaint and compares those allegations to the relevant provisions of the insurance policy. *Wilson*, 237 Ill. 2d at 455; *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 107-08 (1992). Only under certain circumstances may a Court consider extrinsic evidence when resolving the duty to defend issue. Under those holdings, third-party complaints typically

will not fall within extrinsic evidence considered by the Court in determining whether an insurer has a duty to defend.

For instance, in *Pekin Ins. Co. v. United Contractor Midwest, Inc.*, 2013 IL App (3d) 120803, the Court found there was no reason to consider a third-party complaint in determining whether coverage existed for the purported additional insured. In that case, Cullinan was the general contractor of a construction project and Durdel was a subcontractor. 2013 IL App (3d) 120803, ¶ 5. After one of Durdel's employees was injured, he filed a complaint against Cullinan which contacted Durdel's insurer claiming it had a duty to defend Cullinan as an additional insured. Id. at ¶¶ 6-7.

The policy contained an additional insured endorsement providing coverage to the additional insured for the additional insured's vicarious liability for the acts or omissions of the named insured arising out of Durdel's work or ongoing operations performed for that Cullinan during the policy period. *Id.* at ¶ 24. Yet the complaint alleged that "Cullinan, acting alone, negligently violated Cullinan's duty of care * * * by failing to supervise and warn [the employee] of the dangers posed * * *", defeating a theory of vicarious liability. *Id.* at ¶ 28.

Cullinan filed its third-party complaint after the insurer initiated the declaratory action, which brought forth the allegations. The Court observed that under the holding in *Wilson* it had the authority to consider the third-party complaint as extrinsic evidence there are limitations on whether a Court must consider a third-party complaint prepared by the additional insured seeking coverage. *Id.* citing *National Fire Insurance of Hartford v. Walsh Construction Co.*, 392 Ill. App. 3d 312, 322 (2009); *American Economy*

Insurance Co. v. DePaul University, 383 Ill. App. 3d 172, 180 (2008). The Court ultimately held that "[a] third-party complaint cannot be used bolster that same third-party plaintiff's own claim, as a putative additional insured, where the facts are deficient in the underlying negligence complaint and other extrinsic evidence to potentially fall within the policy's coverage" and found in favor of the insurer. *Id.*

In *Illinois Emcasco Insurance Co. v. Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735, the Court found an instance when third-party complaints can be considered in determining an insurer's duty to defend. Similar to *United Contractors*, Waukegan Steel was sued by an employee of its subcontractor, I-MAXX, for injuries the employee sustained while working on a construction site. *Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735, ¶¶ 1, 4. Under I-MAXX's insurance policy, Waukegan was an additional insured "'with respect to liability for "bodily injury,"'" but an exclusion limited its coverage to "'vicarious liability that is a specific and direct result of [I-MAXX's] conduct.'" *Id.* ¶ 5. Waukegan Steel tendered its defense in the underlying suit to the insurer; however, the insurer denied the tender because of "the allegations of direct negligence on Waukegan's part." Id. ¶ 6. At some point, two other companies named in the underlying action filed third-party complaints against I-MAXX alleging that its acts or omissions were the cause of the plaintiff's injuries. Id. ¶ 7. The Court affirmed summary judgment in favor of Waukegan, finding that "a duty to defend could be derived from the third-party complaints *** since they alleged direct negligence on the part of I-MAXX." *Id.* ¶ 8.

V. General contractor as additional insured under a policy issued to a subcontractor which employs the plaintiff.

General contractors regularly require a subcontractor to satisfy certain insurance requirements including having the subcontractor add the general as an "additional insured" under its liability insurance. General contractors are often provided with a Certificate of Insurance identifying their status as an "additional insured" under the subcontractors' liability policies. However, reliance on a Certificate of Insurance is misplaced.

Certificates of Insurance issued in Illinois commonly bear a disclaimer that the certificate was issued for informational purposes only and confers no rights on the putative additional insured greater than those conferred by the policy. Illinois law is clear that where the certificate includes a disclaimer, the holder may not rely on representations made in the certificate but must look to the policy itself to determine the scope of coverage. *Pekin Ins. Co. v. American Country Ins. Co.*, 213 Ill.App.3d 543, 544 (1st Dist. 1991); *National Union Fire Ins. v. Glenview Park District*, 158 Ill. 2d 116, 126 (1994).

In *United Stationers Supply Co. v. Zurich American Ins. Co.*, 386 Ill.App.3d 88 (1st Dist. 2008) the Court found that the certificate of insurance issued to a general contractor did not confer additional insured status based upon the subcontractor's agreement to indemnify the general contractor against:

> "[a]ny and all claims, actions, liabilities, losses, costs, and expenses, including, but not limited to, attorney's and consultant's fees and expenses relating to any and all losses or damages (including, without limitations, injury or death of persons and damage to property) allegedly or actually suffered by any person or persons allegedly or actually arising out of or incidental to the work, or services and activities of [subcontractor] in

> connection with any installation, job, clean-up of hazardous materials, or work under the Contract or while proceeding to or from the Site whether or not lawful or within the scope of their employment and/or whether or not allegedly or actually arising out of any statute or other law requiring a safe working place or other requirement of law."

Id. at 91-94.

The Court determined that because the certificate referred to the policy and expressly disclaimed any coverage other than that contained in the policy itself, the policy governed the extent and terms of the coverage. *United Stationers*, 386 Ill.App.3d at 105 (finding that the phrase in the disclaimer, that the certificate "does not alter, amend or extend coverage" of the underlying policy, put the general contractor on notice that coverage is governed by the terms of the insurance policy and not the certificate), citing *American Country Ins. Co. v. Kraemer Brothers, Inc.*, 298 Ill.App.3d 805 (1st Dist. 1998); *Lezak & Levy Wholesale Meats, Inc. v. Illinois Employers Ins. Co. of Wausau*, 121 Ill.App.3d 954 (1st Dist. 1984); *Pekin Ins.*, 213 Ill.App.3d at 544–48; see also generally *Clarendon America Ins. Co. v. Aargus Security Systems, Inc.*, 374 Ill.App.3d 591 (1st Dist. 2007).

Following *United Stationers*, the Court reiterated that if the certificate has a disclaimer the contractor must look to the policy, not the certificate, for the terms and conditions of coverage: "Our court has recognized two lines of cases addressing the issue of coverage where there is a certificate of insurance separate from the policy itself. Where the certificate did not refer to the policy and the terms of the certificate conflicted with the terms of the policy, the certificate language governed the extent and terms of the coverage. Where the certificate referred to the policy and expressly disclaimed any

coverage other than that contained in the policy itself, the policy governed the extent and terms of the coverage." *United Stationers*, 386 Ill. App. 3d at 102 (cases cited therein).

Contractors also need to be aware when the subcontractor hires its own sub-subcontractors and attempts to transfer its risk down the line by requiring the sub-subcontractor to assume insurance requirements the subcontractor assumed in its contract with the general contractor. For instance, in *Westfield Ins. Co. v. FCL Builders, Inc.*, 407 Ill.App.3d 730 (1st Dist. 2011), FCL was a contractor hired to work on a construction project. It subcontracted the steel fabrication work to Suburban, which in turn further subcontracted the steel erection to JAK. JAK purchased a CGL policy from Westfield which contained an additional insured endorsement. For a party to be entitled to additional insured status, the endorsement required that the named insured and the putative additional insured agree "in writing in a contract or agreement that such person or organization be added as an additional insured" on the named insured's policy. *Id.*

As there was no written contract or agreement between FCL and JAK, the Court concluded that there was no agreement in writing as required under the plain language of the endorsement for FCL to qualify as an additional insured. *Id.* at 734. Despite the contractual requirements of the Suburban-JAK contract to which FCL was a third-party beneficiary, the Court still refused to extend additional insured status to FCL. *Id.* at 734-35. The Court observed that regardless of whether JAK and Suburban had agreed that FCL should be an additional insured, it was clear that JAK and FCL did not agree in writing that FCL was an additional insured. *Id.* at 735. The Court also found irrelevant evidence in the record demonstrating that JAK and Suburban intended for FCL to be an

additional insured under the policy, namely, the deposition testimony of the owner of Suburban and the superintendent of JAK affirming their intent that FCL would be an additional insured. *Id.* at 736.

TARGETED TENDERS AND COVERAGE FOR ADDITIONAL INSUREDS

Robert Marc Chemers

Robert J. Franco

May 15, 2018

Construction Risk Management

- Cost of property damage and bodily injury claims:
  - High retentions.
  - Loss sensitive programs.
- Relationship of litigation expense to profit.
- Risk Management as a Profit Center.
- Other effects of litigation expense:
  - Cost of insurance.
  - Experience modifier.
  - Prequalification.
  - Future work.

Construction Risk Shifting

- Two contractual risk shifting features:
  - Indemnity.
  - Agreement to procure insurance.
- Illinois favors the agreement to procure insurance:
  - Anti-indemnity statute.
  - Insured Contract.
  - Contractual liability coverage.

Risk Shifting Theory

- Upper tier: want everything covered.
- Subcontractor: only want to cover those claims related to the subcontractor's work.
- Difference between indemnity and additional insured coverage.
- Insurance market.
- Course of Construction v. Completed Operations.

Additional Insured Endorsements

- Check the form.
- ISO v. manuscript.
- The Gold Standard for Construction Companies: CG 20 10 11 85: "arising out of." Very low standard.
- CG 20 10 10 93: "ongoing operations." Later modified.
- CG 20 37 04 14: Completed Operations.
  - "only to the extent permitted by law." – accommodates anti-indemnity Stat.
  - Cannot be broader than required by contract.
  - Extent not to exceed what is required by contract.

Additional Insured Endorsements

- Blanket additional insured endorsement.
- Regional Insurers using manuscript endorsements:
  - Tender to others.
  - Sole negligence.
  - Vicarious liability.
  - Response of the construction industry.
  - Contract requirement.
- Has the contract provision been met?

The Nature of a Targeted Tender

- Illinois is unique.
- Interplay with the indemnity provision.
- The rule in other states:
  - "Other Insurance."
  - "Equitable Subrogation."
  - "Equitable Contribution."
- The Old Rule in Illinois – "Other Insurance:"
  - Illinois Target Tender Rule Defeats Recovery/pro-ration.
    - *Pro rata.*
    - Excess.
    - Escape.

Institute of London Underwriters - 1992

- "Targeted Tenders" "Institute Tenders" or "Burns Tenders."
- Basis is the selection or targeted tender to a specific insurer by layer.
- "De-Selection."
- The effect of a targeted tender.
- Insured's paramount right to choose.

How Do The Towers of Coverage Intersect?

- Horizontal exhaustion.
- Vertical exhaustion.
- Concurrent coverage.
- *Kajima:*
  - Illinois follows the horizontal exhaustion rule - which controls over the targeted tender rule.
- Other limitations on the targeted tender rule.
- Is a "self insured retention" equal to primary insurance?

The Mechanics of an Additional Insured Claim

- Duty to Defend v. Duty to Indemnify:
  - Bodily injury context.
  - Property damage context.
- The Eight Corners Rule: analysis is based on the Complaint compared to the Policy:
  - Exception to the Eight Corners Rule: *Wilson.*
  - Additional Insured's employee.
  - American Economy/DePaul Cases – look to the Third Party Complaints.
- *Peppers* Conflict.

Practice Tips:

- Plaintiff: pleading into/out of coverage.
- Read the Endorsement.
- The Certificate of Insurance is meaningless.
- Read what the Contract Requires. Be sure to focus on the insurance attachment.
- Contractual basis for tender.
- Focus on the duty to defend.
- Timely Notice.
- Nature of the claim: course of construction vs. completed operation.
- Notice the entire tower.

Practice Tips:

- Make the appropriate tender:
  - Attach contract.
  - Attach complaint.
  - Address scope issue.
  - Identify tender targets.
- Protect the return date.
- If the tender is denied, continue to update on the case status.
- Tender made by insured itself.
- Special problems of second Tier Tenders.

Course Evaluation Form

Title of Course: **"WHAT ABOUT ME? INSURANCE COVERAGE FOR ADDITIONAL INSUREDS"**

Date of Course: May 15, 2018 Location: James R. Thompson Center Assembly Hall Auditorium

Directions: On a scale of 1 to 5, (5 being the highest or best and 1 being the lowest or worst), please rate the program:

Rate how well this course satisfied your personal objectives **5 4 3 2 1**

Comments:_____

Rate how well the environment contributed to the learning experience **5 4 3 2 1**

Comments:_____

Rate how well the written materials contributed to the learning experience **5 4 3 2 1**

Comments:_____

Rate the level of significant intellectual, educational or practical content **5 4 3 2 1**

Comments:_____

Please rate the faculty using the same 1 – 5 scale:

	Overall Teaching Effectiveness					Effectiveness of Teaching Methods					Significant Current Intellectual or Practical Content				
Name: MR. ROBERT MARC CHEMERS	5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
Comments:															
Name: MR. ROBERT J. FRANCO	5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
Comments:															

SUGGESTIONS FOR FUTURE SEMINARS:_____