

CONSTRUCTION LAW IN ILLINOIS

A PRIMER

by:

Joseph B. Carini, III
Johnson & Bell, Ltd.
33 W. Monroe Street
Suite 2700
Chicago, Illinois 60603
312.372.0770
email: carinij@jbltd.com
website: www.johnsonandbell.com

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Introduction

The purpose of this paper is to alert the reader to concepts used in the defense of construction related personal injury lawsuits in Illinois. The paper looks at third party liability suits, typically filed by injured workmen engaged in construction against those contractors involved in the construction process. The first section focuses on the theories under which third party liability claims are pursued, and the tactics of cross-claims and contribution claims among party defendants. The second section analyzes tender of defense issues in Illinois. Although this is not an exhaustive paper, we are hopeful that this will alert contractors and their insurance carriers alike, to the situations they can foresee arising when accidents occur on their Illinois jobs during the course of construction. Hopefully, by being aware of these issues the carriers, and contractors, can best protect themselves with appropriate coverage's and defense tactics.

Pursuit of Third Party Liability Claims in Illinois

Ever since the Illinois legislature repealed the Illinois Structural Work Act on February 14, 1995, lawsuits arising out of construction related accidents have been pursued under common law negligence theories. In Illinois, in order to establish liability under common law negligence, an injured party must establish that a defendant owed a duty to the injured party, that the defendant breached that duty, that the plaintiff was injured as a result of the breach, and that the plaintiff suffered damages as a result of the injury. Mt. Zion State Bank & Trust v. Consolidated Communications, Inc., 169 Ill. 2d 110, 660 N.E.2d 863 (1995). Plaintiffs are not allowed to file lawsuits against their employers. Injured parties can recover from their employers without liability under the Illinois Worker's Compensation Act. The interplay between the Illinois Worker's Compensation Act and third party claims will be addressed later in this article.

The types of cases that we typically see when defending personal injury suits arising out of construction in Illinois, are those involving injuries to a subcontractor's employee who in turn files a third party suit against the owner, architect and/or engineer, and the general contractor for the injuries sustained. Where the accident arose out of some other subcontractor's work, the subcontractors are also named in the case. In road construction cases where accidents are incurred by drivers confused by signage or barricades, the Illinois State Toll Highway Authority, and its contractors and consultants, are often named in litigation. Illinois law recognizes the right to bring these suits. Suits by a subcontractor's employee are not limited by worker's compensation claims, and plaintiffs can recover the full extent of his injury without a jury ever knowing that plaintiff has also recovered under the Illinois Worker's Compensation Act.

Establishing the element of duty

In the standard construction case, the plaintiff looks to the contract between an owner and a general contractor, and between the general contractor and its subcontractors to establish the

duty element of his negligence cause of action. The language in standard AIA contracts between owners and general contractors, require that the general contractor assume complete responsibility for the means, manners and methods of the work on site, and requires the contractor to assume all responsibility for safety. The AIA contract is good at insulating an owner from liability by placing responsibility for the means, manners and methods of construction, and all safety aspects on the general contractor. In turn, the general contractor typically has a contract with the subcontractor which requests that the subcontractor step into the shoes of the general contractor. Although this is helpful to establishing liability of a subcontractor, including the injured party's employer, the fact that the main contract between the owner and general contractor imputes certain obligations upon the general contractor means that the general contractor typically is not able to be dismissed from cases based on a summary pleading, and often times cannot escape exposure for liability in these cases.

Illinois common law recognizes that one is not responsible for the acts of an independent contractor, and contracts often try to establish that the contracting parties are independent contractors in an effort to insulate one's liability from the conduct of said independent contractor. However, under Illinois law, plaintiff's attorneys are presently having success circumventing the common law rule by relying upon Section 414 of the Restatement of Torts, 2d, recognized and adopted as Illinois law. Section 414 of the Restatement provides:

Negligence In Exercising Control Retained By Employer

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Typically, the contract language mentioned above is relied upon to try and establish the "control" element set forth in Section 414. Because a general contractor almost always has the right to control safety on a job site, inspect for safety, inspect for contract compliance, reject non-conforming work, stop unsafe practices and procedures, correct inappropriate equipment and materials found on site, and under AIA contracts has assumed all responsibility for means manners and methods of the work, the plaintiff's attorney is often capable of showing that there is sufficient control over a subcontractor such that a duty should be imposed upon the general contractor that circumvents the independent contractor rule. The defendant's only saving grace with respect to defending suits such as these, is that comment (c) to the Restatement 414 states:

the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendation which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such retention of the right of supervision that the contractor is not entirely free to do the work in his own way.

Whether a general contractor/owner/project manager, has retained sufficient control to give rise to a duty of reasonable care to a third party is a question of fact to be decided by a jury. Bokodi v. Foster-Wheeler Robbins, Inc., 782 N.E.2d 726 (2000).

In Martens v. MCL Construction Corporation, 347 Ill. App. 3rd 303, 807 N.E.2d 480 (1st District 2004), the Illinois Appellate Court gives a detailed interpretation of the Restatement 2nd of Torts, Section 414, and stated that in order to establish a claim for negligence under that section, the plaintiff must allege that the defendant owed him a duty and breached that duty, and that the plaintiff's injury was proximately caused thereby. The Martens court first looked to the control set forth within the construction contract as a basis for determining the duty owed to the employee of the third party subcontractor. Relying upon the case of Shaughnessy v. Skender Construction Co., 342 Ill. App. 3rd 730, 794 N.E.2d 937 (2003), the court stated that a general statement of control inferred upon a general contractor in contract between the owner and the general contractor did not mean that independent contractors were controlled as to methods of work, and that, therefore, such general contract language alone was not sufficient to trigger a duty under Section 414.

Next, the Martens court looked to supervisory and operative control to determine whether in practice, the general contractor exercised supervisory control over the workers in the field, and whether, if said control was exercised, it was exercised with reasonable care. When the court did not find that the general contractor had retained or exercised authority over the work of the particular subcontractor, the court found that they had not retained sufficient control to be held accountable under Section 414. Further, the court looked to operational control to see whether the subcontractor was free to perform its work in its own way. The facts of the case before it indicate that the subcontractor was, in fact, free to perform its work in the manner it saw fit, and the court found that there was insufficient control by the general contractor over the subcontractor, to impose liability on the contractor.

Typically during the course of discovery, the plaintiff's attorney tries to establish the measure and degree of control that a contractor, through its on-site superintendents, inspectors or project engineers, has over the work being done in the field. Typically a plaintiff's co-workers will testify that there is a constant presence of the general contractor/superintendent in the field, and they will assert that the superintendents have the right to control safety, to correct unsafe acts, and to dictate that the means and methods followed by the workmen are safe. Conversely, defense attorneys should be establishing the testimony of the workmen in the field that the general contractor did not control the incidental aspects of the work, i.e., the operative detail, or method of the work to such a degree that the contractor was not entirely free to do the work in his own way. If it can be established that the methods of work and operative detail of completing that work were not so controlled by the general contractor or owner, then the defense posture is strengthened, and possibly summary judgment could be obtained. This is one of the more contested aspects of the suit and typically requires detailed deposition testimony in order to create the factual scenario that best supports the defense posture. One can expect that documents exchanged, including contracts, daily work reports, progress records and the like, will all be analyzed by the parties to try and establish the duty element of a negligence cause of action under 414. These matters need to be reviewed in detail in order to correctly gauge the impact of same on the liability picture.

Further, it is important when engaging in construction in Illinois that the contracts are accurately reviewed and carefully understood. Superfluous or inapplicable language should be deleted. If a general contractor intends to make each subcontractor responsible for the means, manners or methods of their work, and all safety obligations pertinent to it, then contracts need to specifically say that. If an owner expects that a sub-contractor is going to have those responsibilities, then the contract between the owner and general should recognize that. Understandably, owners like to use AIA contracts, and oftentimes a general contractor is not in a position to argue with the choice of contract chosen by the employer. However, general contractors need to make sure that their subcontracts mirror the AIA language, so as to pass off as much exposure for control of the work as they can, so as to avail themselves of Illinois' laws relative to independent contractors.

Establishing a Breach of Duty

In order to establish a breach of duty, it is typical for plaintiff's attorneys to rely upon expert testimony. Again, most contracts include within the four corners of the contract the requirement that all OSHA rules and similar state and federal laws be followed with respect to the project. There are numerous experts in Illinois who are intimately familiar with OSHA and who will contend that one act or another in the field was a violation of OSHA, and thus showed a failure to comply with one's contractual obligations, and in fact constituted a breach of the standard of care applicable in the field. When a plaintiff falls off a ladder, has material or equipment dropped on them, is placed in awkward position resulting in a strained limb or a fall, where housekeeping results in tripping and slipping hazards, experts will typically find an OSHA violation as evidence of a breach of the standard of care. Therefore, one can expect that in most litigated matters in Illinois, there is going to be an exchange of expert testimony, both for and against, the plaintiff and defendant cases. Again, being familiar with OSHA, knowing how the construction industry works, and pursuing the appropriate testimony from the parties to the case in order to allow the experts to evaluate that testimony and apply OSHA to the facts of the case, is of the utmost importance.

Establishing Proximate Cause

Whether or not one's conduct proximately caused an injury is usually a question of fact for a jury to decide. The proximate cause argument rarely lends itself to a motion for summary judgment on behalf of the defendants. However, there are situations where the facts of the case will allow one to attack the viability of the negligence claim based upon the failure to establish a proximate relation between the defendant's conduct and the plaintiff's injury. Illinois recognizes an exception to the proximate cause rule called the "condition vs. causation" argument. Where one's conduct does nothing more than furnish a condition, which condition does not cause the accident itself, but presents the scenario under which someone else's conduct intervenes and causes the accident, one can avail itself of this defense, arguing plaintiff cannot establish a proximate relation between defendant's conduct and plaintiff's injury.

An example of this is in the following case: plaintiff was working at elevation without a tie-off and without guardrails. A sub-contractor was operating a welding machine below. Fumes

from the welding machine caused the plaintiff to get lightheaded, plaintiff fell from the work platform to the ground below sustaining serious injuries. The subcontractor operating the welding machine had no contractual relationship with the plaintiff or his employer, and had no duty to provide any safety equipment to plaintiff or his employer. The generation of fumes was merely a condition that allowed for the accident to occur. The actual cause of the accident was plaintiff's failure to have tie-off and guardrails. The general contractor who allowed work to proceed in the face of violations for failure to tie-off and guardrails was exposed to liability in this case. However, the sued subcontractor could argue that his conduct was merely a condition and not a cause, and potentially escape liability. Again, this is a question of fact for a jury to decide, and some Illinois courts are reluctant to make that determination. Further, there can be more than one cause of an accident, and plaintiff's often argue that no party should be let out that may have caused or contributed to cause an accident. Carefully crafted questions at deposition can aid in presenting a defense to proximate cause.

General Contractor Liable Under Premises Liability Theory

As defense attorneys have whittled away at the opportunity of the plaintiffs to pursue general contractor for the fault based upon control over independent contractors, new theories of liability have been arising to provide additional basis upon which to pursue general contractors. In the case of Clifford v. Wharton Business Group, LLC, 353 Ill. App. 3d 34, 817 N.E.2d 1207 (1st District 2004), the Illinois Appellate Court for the First District granted a general contractor's motion for summary judgment on the 414 issue, but did not dismiss the case in its entirety based upon a theory of premises liability.

The Illinois Restatement of Torts at Sections 343 and 343(A) provide that:
A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger, however "a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement 2nd of Torts, 343(A)(1).

In the Clifford decision, the court held that a general contractor was a "possessor" of land subject to the provisions of 343 and 343(A) of the Restatement. It further held that the employee of a subcontractor was an invitee on the land that was entitled to protection under the Restatement 343/343(A). Further, they stated that Sections 343 and 414 of the Restatement are not mutually exclusive and that the duty of reasonable care imposed on the general contractor as the owner or possessor of the premises is independent of his duty to exercise reasonable care where it retains control of the work entrusted to an independent contractor. In addition, the court indicated that despite the fact that the dangerous condition on the property was arguably an open

and obvious danger to the subcontractor employee, the court extended an exception to the general rule that one is not responsible for open and obvious dangers on the basis of a so-called “distraction exception.” This exception allows a situation where a possessor of land should anticipate the harm because there was reason to expect that the invitees attention may be distracted so that the invitee would not discover or guard against the obvious condition. In this case, the subcontractor fell through a floor opening that was an obvious hazard, as a result of his being distracted by the work he was performing in proximity to the floor opening.

Obviously, general contractors who are sued for liability in negligence in Illinois need to be cognizant of this line of cases so that appropriate testimony can be elicited in an effort to insulate them from liability being imposed upon them under Section 343 and 343(A).

Cross Claims and Third Party Practice

Illinois recognizes that more than one party can be jointly responsible for causing or contributing to cause an accident. Under Illinois law, any party is jointly and severally liable with any other party for causing an accident. That is to say, that if a general contractor is 25% at fault, and a co-defendant is 75% at fault, both parties are responsible for paying 100% of a judgment entered against them. Should a co-defendant be uninsured, bankrupt, or have no assets, a viable defendant can be exposed for sizable verdicts despite the fact that their liability may be limited. Illinois law makes an exception to this rule for those parties whose fault is less than 25% of all fault attributable to causing the accident, as between the plaintiff, the party defendants, and any party that could have been sued as a defendant who, for whatever reason, was not sued as a defendant. Presently Illinois excludes a plaintiff’s employer from being considered when assessing percentages of fault attributed to an injury. (735 ILCS 5/2-1117, *effective date June 4, 2003*.) However, this statute is not retroactive and based upon the interpretation of 735 ILCS 5/2-1117 prior to June 4, 2003, an employer’s fault can be considered in those cases in which an accident arose before the effective date of the above statute.

In those cases where one is less than 25% at fault for causing or contributing to cause an accident, that defendant would be jointly liable for all past and future medical bills but is severally liable only for all other damages. (Although this present interpretation of the law may be subject to question as arguably unconstitutional.) Further, Illinois recognizes that if a plaintiff is more than 50% at fault for causing his/her own injury, then he/she is barred from any recovery whatsoever. Juries are advised of this fact and therefore it is very rare that a jury assesses liability against a plaintiff in excess of 50%.

Because of the potential for harsh results as listed above, the Illinois legislature enacted the Illinois Contribution Among Joint Tortfeasor Act, 740 ILCS 100, et seq.. Under this Act, if more than one party is responsible for causing an injury, but one party pays more than his fair share of a judgment based on his percentage of fault, that party is entitled to pursue a cause of action over against any other defendant that caused or contributed to cause the accident, that did not pay his fair share of the verdict or settlement. This rule results in multiple cross claims being filed against all parties in a case to avoid the potential situation where plaintiff elects to recover an entire judgment from one party despite, his liability being less than 100% of the total liability for the injury. Failure to file such a cross-claim could result in a party paying more than his fair

share of a judgment without recourse against any of the co-defendants. In addition, because plaintiff cannot sue the employer, and Illinois case law supports the argument that an employer's fault should not be considered in determining joint and several liability among co-defendants, employers are usually sued for contribution. For instance, if a general contractor is sued for an injury to a subcontractor's employee, the employer may well be primarily responsible for causing that accident. The general contractor would be well motivated to file a lawsuit against the employer to try to recover as much money as he should be required to pay above his fair share of any judgment.

Kotecki

Under Illinois law, where an employer is sued in a contribution action such as that described above, a judgment against that employer cannot exceed the amount of the employer's liability in worker's compensation to its injured employee. Kotecki v. Cyclops Welding, 146 Ill. 2d. 155, 585 N.E.2d 1023 (1991). However, courts have also stated the right to a limitation on recovery in contribution under Kotecki can be contractually waived. An explanation of how the courts have reached that determination is set forth in the following paragraph.

Illinois courts do not recognize indemnity agreements in construction cases. Attempts at indemnification as among parties set forth in contracts for construction work are void in violation of the Illinois Anti-Indemnity Act, 740 ILCS 35/1. Because almost all construction contracts, including AIA contracts, continue to contain indemnity provisions in them, the courts have stated that these clauses were intended to bind the parties to unlimited contribution, and thus are interpreted as a waiver of a Kotecki cap on damages. Braye v. Archer-Daniels Midland Co. at p. 217; Liccardi v. Stolt Terminals, 178 Ill. 2d 540, 687 N.E.2d 968 (1997). Thus, the indemnity language in a contract can expose an employer to unlimited contribution to the full extent that an employer is responsible for causing or contributing to cause an accident to his employee. These provisions have also been interpreted as valid agreements to provide defenses for parties in litigation. These indemnity agreements are often looked to in cases where an insurer has failed to assume a defense pursuant to a tender of defense.

Accordingly, general contractors oftentimes sue employers in contribution. The employer's assert the Kotecki cap limitation on their exposure, and litigation ensues wherein the general contractor seeks to have the indemnification agreement contained within their contract interpreted as an express agreement to waive any limitation on the right of contribution against the employer. Even judges within Cook County have differences of opinion as to whether a waiver as to one party defendant constitutes as a waiver as to all party defendants. Some judges believe that the waiver entitles all co-defendants to pursue unlimited contribution against an employer despite no direct contractual relationship between those entities and the employer. Others believe that the right of unlimited contribution runs only to the contracting party. In any event, this can be an extremely important element of the case wherein a sub-contractor employee is primarily responsible for causing an accident, and can allow a direct defendant to pass off as much exposure in a case as possible through the indemnification language in their contract.

Illinois courts have recognized in the *Briseno v. Chicago Union Station Company*, 197 Ill.App.3d 902, 557 N.E.2d 196 (1st Dist. 1990) decision, that where two entities contract for the

provision of insurance, (most typically a general contractor requiring each of his subcontractors to procure insurance naming it as an additional insured); should that insurance in fact be purchased, a tender accepted and a defense and indemnification provided to the general contractor (or owner, engineer etc.), then the subcontractor can be protected from a third party contribution lawsuit filed against them by the contractor. The Briseno court indicated that where a contract specifically requires the providing of insurance, if that insurance is provided and inures to the benefit of the contracting parties, then that is the sole right of recovery as between the two entities, and one cannot also sue that party for additional damages in excess of the insurance. Unfortunately, in most instances a party such as a contractor does not know whether they are fully protected and indemnified until the case is resolved. Therefore, courts often let the third party suit stand until said time as the case is resolved. Once it is resolved to the benefit of the contractor within the limits of insurance provided by the subcontractor, the third party suit is dismissed.

Insurance

The issues raised above are important because they have significant insurance implications, they come in almost every construction case that is pending in Illinois, and they have a major impact on the manner in which cases are defended, and ultimately resolved. The following section addresses the insurance implications of the matters set forth above.

Every owner and general contractor should require their lower tiered contractors to provide insurance naming them as an additional insured and protecting them to the full amount of the policy limits procured. The only exception to this rule would be under a wrap-up insurance policy wherein all parties are covered and protected under one large insurance program. Wrap-ups will be addressed later in this paper.

When a plaintiff files suit against a general contractor or owner, the first course of action should be to alert one's own insurance carrier to the fact that the suit has been filed, and then to alert all lower tiered contractors on whose policies you have been named as an additional insured, seeking their involvement in the defense and indemnification of your company in the lawsuit. It is important that tenders of defense be issued immediately as defense costs are picked up from date of tender. To best protect oneself from incurring legal fees or other potential exposures, tenders of defense should be made promptly. Under the case of *John Burns Const. Co. v. Indiana Ins. Co.* 189 Ill 2d. 570, 727 N.E.2d. 211 (2000), the Illinois Supreme Court recognized that an insured, who is named as an insured on multiple insurance policies, can select which policy or policies they wish to invoke coverage under to the exclusion of other policy or policies on which they are named as an insured, thus allowing a "targeted tender." Accordingly, a general contractor can tender the defense to a subcontractor's insurance company on which the general contractor has been named as an additional insured on a policy. The general contractor can require that the subcontractor's insurance company pick up the defense exclusively, and not invoke any of the general contractor's own coverage in defending or indemnifying the litigation. "Other insurance" clauses do not come into play in these scenarios when an insured has specifically dictated the policy on which it wishes to be defended and indemnified to the exclusion of others. One can protect one's loss ratings by properly tendering the defense and protecting one's own insurance company from defense costs and indemnification exposure by

targeting the defense to subcontractor's carriers. Where a lawsuit provides a claim against multiple subcontractors, it is suggested that all of the subcontractor's insurance companies be targeted. In that situation, all of the subcontractor's insurance carriers can use the "other insurance" provisions of their individual policies to share defense costs and indemnification dollars among them, again, to the exclusion of the general contractor's own insurance policy. This is, and should be, the typical course of pursuit of coverage in cases where there is not a wrap-up insurance program. Insurers interested in insuring lower tiered subcontractors should be aware of the fact that their blanket additional insured endorsement could expose them to significant litigation defense and indemnification costs. Further, additional insured's such as a General Contractor, are entitled to be offered a defense by their insurers, and the insurer's failure to do so can result in a waiver of policy defenses. The recent case of Legion Ins. Co. v. Empire Fire & Marine Ins. Co., 2004 WL 2998536 (1st District, 2004), provides a detailed discussion of the "selective tender rule" set forth in the John Burns case, and how that selective tender rule effects other insurance in a given case.

In wrap-up insurance programs, the most beneficial aspect of such a program is that it prevents the need for cross-claims as among party defendants and employers. The purpose of entering in a wrap-up is precisely this. However, there are certain pitfalls in wrap-up insurance programs that we have seen over the years that need to be addressed at the time that the wrap-up insurance program is put into place. Significantly, it is our feeling that the worker's compensation, 1B, and general liability insurance needs to be placed with the same company. If you do not have them all with the same insurance company, you can run into problems. Any worker's compensation benefits paid out are recoverable to the worker's compensation carrier if the plaintiff is successful in obtaining a settlement or verdict from a third party defendant. The only exception to this rule is under a third party complaint for contribution as described above. In a wrap-up program, because one is avoiding cross-claims and contribution claims, the general contractor would not be suing the plaintiff's employers. Therefore, in every case there would be a lien that would be recoverable to the insurance company who pays those benefits. If, the worker's compensation carrier is different than the general liability carrier, that company would always want to recover its lien and there would be little incentive to waive the right to recover, because with the wrap up the employer is not being sued and therefore there can be no contribution exposure to the employer. If settlement is contemplated, the general liability carrier will have to pay the plaintiff the value of the case. In addition, they will have to pay back the worker's compensation carrier the amount of money that they spent in worker's compensation benefits. Therefore, settlement can become very difficult because general liability carriers are paying more than the value of the case in order to resolve a case because they are paying back the worker's compensation benefits to another company. When the wrap-up system is put into place, if the worker's compensation carrier and general liability carrier are the same, they can agree to pay each other, or waive portions of the lien, thus controlling the settlement aspects of the case and the litigation in total, without the need for any cross party litigation. If the worker's compensation carrier must be a different entity than the general liability carrier in wrap up, some agreement should be made as to what is going to happen to worker's compensation liens when third party litigation arises from accidents. This would prevent the compensation carrier dictating whether a case gets tried or not because they want their money back on the worker's compensation lien, and they are mandating that the general liability carrier pay it, and it ends up

costing much more than is usually necessary to resolve the case and unnecessarily exposes the general liability carrier to litigation and adverse jury verdicts.

Another problem with wrap-ups can be the interplay of policy limits in a wrap-up program. Excess carriers need to have an obligation to assume a defense, even in a wrap-up program. Where the primary carrier's aggregate has been exhausted, and thus the primary carrier is no longer required to defend cases but there was no provision in the excess policy for the provision of defense and thus the excess carrier has no obligation to pay those costs, there can be a gap in defense costs payment that could fall back to the insured. Further, the problems concerning payment of liens can come into play when the excess carrier is different than the primary/workers compensation carrier. Control of worker's compensation liens needs to be thought out beyond aggregate policy limits such that if a primary policy carrier has general liability and worker's compensation benefits responsibility, once that aggregate is exhausted, they can then hold onto their liens and require excess carriers to pay the money back, again interfering with potential case resolution because there is no third party action against the plaintiff's employer and no basis upon which the excess carrier can pressure the worker's compensation carrier to waive their liens in an effort to try and resolve cases, this can lead to difficulties in resolving suits.

Tenders of Defense

Under Illinois law, the propriety of a tender of defense is reviewed based upon the four corners of a complaint. The duty to defend is broader than the duty to indemnify. If there is any potential that coverage applies based upon a tender, then the defense has to be accepted. Tenders of defense can be accepted outright without reservation or can be accepted with a reservation of rights. They cannot be ignored or denied without pursuit of a declaratory judgment action, unless it is clear from the allegations of the complaint that there is no coverage (i.e. the accident occurred before the policy inception). Failure to properly respond to a tender of defense can result in waivers of insurance policy defenses. The term "arising out of," that is commonly utilized in insurance policies on additional insured endorsements, have been interpreted in Illinois as simply the sub-contractors being on the job site. Courts have stated that but for a company being on the job site, the plaintiff would not have been injured and, therefore, such a broad description of "arising out of" invoked insurance coverage under an additional insured endorsement. Even if it seems like the activities or conduct that occurred on the project had nothing to do with the work of your particular insured, if your insured's employee was injured by his mere presence at the facility, then it is most likely that you have a duty to defend the party named as an additional insured. On a case-by-case basis these types of tenuous tenders should be reviewed for the propriety of immediate pursuit of a declaratory judgment action. Under Illinois law where a reservation of rights letter is issued, the insured may have a right to choose counsel, and the insurance company may have an obligation to pay those counsel's bills. Oftentimes insurance companies are faced with the prospect of paying for multiple attorneys in a lawsuit, and again the implication of doing so should be contemplated early on in the case so that benefits of pursuit of a declaratory judgment action can be considered and assessed.

The United States District Court for the Northern District of Illinois, Eastern Division, recently decided the case of Utica Mutual Ins. Co. v. David Agency Ins. Inc., 327 F. Supp. 2d

922 (2004), and in it discusses the insurers duty to defend, the proper response to a tender of defense, and the perils of an improper reservation of rights estopping an insurer from raising policy defenses to coverage due to an inadequate disclosure of conflict of interests in a reservation of rights letter. The Utica case stated that where there was a conflict of interest between the insurer and its insured, a reservation of rights letter must identify the policy defenses that the insurer may assert, and the insurer has the duty to adequately disclose the nature of the conflict of interest and must adequately advise the insured of its right to independent counsel to defend them at the expense of the insurer. The insurer's statement that an insured "may, at your own expense, hire a personal attorney" to protect their interests, failed to satisfy the requirements for a proper reservation of rights, and resulted in a finding that the insurer was estopped from raising policy defenses against its insured.

One of the more unique cases in Illinois law, as pertains to insurance coverage is one in which Illinois courts have found that an additional insured need not issue a tender of defense in order to invoke coverage. *Cincinnati Companies v. West American Ins. Co.* 183 Ill. 2d. 499, 701 N.E.2d 499 (1998). Notice to an insurance company of a claim against an additional insured requires that insurance company to seek out the additional insured, alert them to the fact that they are named as additional insured, and offer them the coverage afforded under the policy without ever having a tender of defense letter sent to them. See *Cincinnati Companies v. West American Insurance Co.*, 183 Ill. 2d 499 (1998).

The following is an example of the impact of the Cincinnati decision. General contracting company, ABC Corp., hired plaintiff's employer, Subcontractor Corp., to work on their construction project. Subcontractor Corp. obtained its general liability, and employer's liability/worker's compensation insurance, from one company, Insurance Company A. Insurance Company A named ABC Corp. as additional insured on its general liability policy. Subcontractor Corp.'s employee was injured at work. Subcontractor Corp.'s employee sued general contractor ABC. ABC Corp. in turn filed a contribution claim against Subcontractor Corp. The suit dragged on in Cook County for three years. Defense costs were incurred by ABC Corp.'s own general liability carrier, and ultimately it looked as though the case were approaching settlement. General contractor, ABC Corp. contacts Insurance Company A, and indicates to them that they need to pay all defense costs, and indemnification dollars for resolution of the case. Insurance Company A objects on the basis that they have never had a tender of defense issued to them. However, through their worker's compensation/ employer liability policy, they had notice of this case from the date that ABC Corp. sued Subcontractor Corp. Accordingly, under the Cincinnati case cited above, their insurance coverage was invoked from the date the employer liability/worker's compensation case was filed. They, therefore, had an obligation to seek out ABC Corp. and offer a defense from day one. ABC Corp. was entitled to rely upon the additional insured endorsement and place responsibility for the defense and indemnity on Insurance Company A.

Finally, there are a couple of loose end issues that exist in Illinois that carriers need to be cognizant of. Under Section 1 of this paper, we address the issue of the Kotecki liability waiver. Again, in summary, a general contractor sued a sub-contractor employer for contribution. The employer asserted that his liability in contribution should be limited to the amount paid in worker's compensation benefits. The contractor, relying upon the indemnification paragraph of

his sub-contract asserted that the employer had waived his right to a limit on contribution and the courts agreed, thereby exposing the employer to unlimited contribution. Illinois courts have not clearly ascertained who is responsible for defending an unlimited contribution claim. A general contractor would assert that contribution against the employer should be paid under the 1B policy, and that everything in excess of that should be paid by employer or his GL policy. Some GL carriers have argued that they do not cover 1B liability, and that a contribution claim such as this is, in fact, just excess employer liability that is not covered. Further, some 1B carriers have asserted that they do not cover damages “assumed by contract” and because any amount paid over the amount paid in worker’s compensation liability is arguably “assumed by contract” *vis a vis* the indemnity provisions that resulted in the waiver of the limitation on liability, 1B carriers have argued that they do not owe that amount of money. In such a scenario, an employer can be left exposed, or at a minimum, in a position of having to pursue litigation in order to ascertain who pays an unlimited contribution claim. Illinois case law is not particularly clear as to who ultimately has to pay such claims. It would appear however, that once a Kotecki cap waiver has been found to exist, given the broad duty to defend in Illinois, the GL carrier may have a duty to participate in the defense of the claim.

Illustrative of the issues raised here is the Michael Nicholas v. The Royal Ins. Co., 321 Ill. App. 3d 909, 748 N.E.2d 786 (2nd District 2001); Westbend Mutual Ins. Co. v. Mulligan Masonry Co., 337 Ill. App. 3d 698, 786 N.E.2d 1078 (2nd District 2003), and the previously referenced Legion Ins. Co. v. Empire Fire & Marine Ins. Co., 2004 WL 2998536 (1st District 2004).

Conclusion

We think that it is important for companies engaged in construction in Illinois to understand the theories of liability under which they are being exposed, and the applications of case law effecting their insurance coverage so that they can fully ascertain the exposures that they have, and attempt to protect themselves by procuring the appropriate insurance coverage. Similarly, it is important for insurance companies to know the different ways that they can be exposed in the construction industry, and the different limits of those exposures which might effect the way that they ascertain the companies which they wish to insure. Insuring lower tier sub-contractors exposes insurance companies to various liabilities and defense costs that they might not have otherwise contemplated. These exposures, and the insurance implications of same, need to be thoroughly thought out at the planning stages of construction projects so that the companies and their carriers know what to expect down the road so that they can be appropriately planned for.

Joseph B. Carini, III
Johnson & Bell, Ltd.
33 W. Monroe Street
Suite 2700
Chicago, Illinois 60603
312/372-0770
email: carinj@jbltd.com
website: www.johnsonandbell.com