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Illinois – Appellate Court Finds That Damages in Excess of Policy Limits Does Not Trigger Right to Independent Counsel

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Under Illinois law, an insurer's duty to defend includes the right to control the defense, which allows insurers to protect their financial interest in the outcome of the litigation. However, where a conflict exists, the insured, rather than the insurer, is entitled to assume control of the defense of the underlying action. If this occurs, the insurer satisfies its obligation to defend by reimbursing the insured for the cost of defense provided by independent counsel selected by the insured. What circumstances and situations rise to the level of an actual conflict of interest between the insurer and insured are often grounds for dispute.

In *Joseph T. Ryerson & Son, Inc. v. Travelers Indemnity Co. of America*, 2020 IL App (1st) 182491 (Apr. 7, 2020), the Illinois Appellate Court addressed whether damages in excess of the policy limits were sufficient to trigger a right to independent counsel. According to the Illinois Appellate Court, at least under the facts of *Ryerson*, the answer is "no."

In *Ryerson*, Nancy Hoffman sued Ryerson for injuries sustained in a tractor-trailer accident. Ryerson tendered the suit to its primary insurer, Travelers, and its umbrella insurer, Illinois National. The policy limits were $2 million and $25 million, respectively. A jury found in favor of Hoffman for over $27.6 million in damages, and Ryerson appealed.

In the months that followed the verdict, the two insurers were engaged in discussions regarding which insurer would control the defense on appeal and how an appeal bond or other security would be paid. Ryerson alleged that after the verdict it "could not get straight answers" from Travelers or Illinois National about which insurer controlled its defense, which law firm would be handling its defense, the insurers' respective responsibilities for post-judgment interest, the insurers' respective responsibilities for securing an appeal bond, or how Ryerson was being protected by the two insurance companies while they were engaged in disputes between themselves. Ultimately, the adversity between the two insurers lead Ryerson to hire independent counsel in an effort to mitigate its exposure, liability, and loss in the event that the appeal bond or other security was not provided by Travelers or Illinois National.

Ryerson filed a lawsuit against Travelers and Illinois National alleging a variety of claims including a breach of contract claim against Travelers, and sought reimbursement of its independent counsel fees. Ryerson alleged that it retained independent counsel to protect its interests post-judgment and during the appeal while the insurers were in a dispute over defense rights and obligations. Ryerson cited *Perma-Pipe, Inc. v. Liberty Surplus Insurance Corp.*, 38 F. Supp. 3d 890 (N.D. Ill. 2014), a Federal Court decision that previously held that a "conflict arises from the relation of the policy limit to the insured's potential liability including any 'non-trivial probability' of exposure to the insured" in excess of the insured's policy limits. Ryerson alleged that Travelers' defense of Ryerson was ineffective because Travelers was essentially defending only its own $2 million policy limits and its "very large book of business" on other agency accounts while leaving Ryerson exposed for over $25 million excess of Travelers' policy limits and to attachment proceedings on its assets under the judgment. Ryerson alleged that Travelers failure to tender its $2 million policy limit or cede control to Illinois National made Ryerson a "guinea pig" for purposes of Travelers' other business interests while simultaneously attempting to insulate Travelers from the adverse consequences or have Ryerson improperly bear the huge financial payout.

The Illinois Appellate Court held that Travelers did not breach its contractual duty to the insured. The court explained that conflicts exist giving rise to a right for independent counsel paid for by the insurer in instances where the insurer is providing defenses to multiple insureds with adverse interests or where an insurer would have the opportunity to shift facts to place the issues outside of the scope of coverage. Neither of those situations were present in *Ryerson*. The Appellate Court also recognized that as a federal district court decision, *Perma-Pipe*, was not binding authority. According to the Appellate Court, "[t]o the extent it stands for the proposition that 'a conflict exists when there is "a nontrivial probability" of an excess judgment in the underlying suit,' thereby entitling an insured to retain independent defense counsel at the insurer's expense, we do not agree."

The *Ryerson* court reasoned that many cases involve a "nontrivial probability" of a judgment in excess of the applicable policy limits that the insured could be personally responsible to pay. This fact alone, however, does not trigger a conflict of interest entitling the insured to hire an independent defense attorney paid for by the insurer. According to the Appellate Court, although it is appropriate and proper to inform the insured of the possibility of an excess judgment and to advise the insured to consult independent counsel regarding excess liability, it would not be at the insurer's expense.

The Appellate Court also distinguished *R.C. Wegman*, the Seventh Circuit case upon which the district court in *Perma-Pipe* relied. The decision in *Wegman*, according to the court, was premised primarily on the carrier's failure to inform the insured of the possibility of a judgment in excess of policy limits. The *Ryerson* case, however, did not involve concerns similar to those involved in *Wegman*. For example, the insured was aware that the potential verdict and settlement value of the case exceeded the limits of Travelers's $2 million primary policy. Ryerson's excess insurer, Illinois National, was timely notified of the case and participated in Ryerson's defense. And, by the time the alleged conflict arose, Ryerson was aware that the amount of the verdict exceeded the limits of Travelers' policy. Therefore, the Appellate Court reasoned that Travelers was not "gambling" on reducing Ryerson's damages at trial or appeal to an amount within the primary policy limits without informing Ryerson about the possibility that the verdict amount could exceed those limits and that Ryerson could be responsible for paying any excess amount.

In the end, the insured's liability in excess of the primary policy limits did not give rise to a conflict of interest entitling the insured to independent counsel to be paid for by Travelers.