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Defense Lawyers Beware: Failure to Supplement Answers to Interrogatories Estopped Insurer from Relying on Coverage Limitation

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How often do you hear defense attorneys say, “I’m not interested in anything related to coverage. That’s not my concern.” From a coverage lawyer’s perspective, this is a dangerous position, both ethically and legally. Recently, an Illinois appellate court agreed that the defense lawyer needs to be aware of the insurer’s coverage position. In *Harwell v. Fireman’s Fund, et al.*, 2016 IL App (1st) 152036, the defense lawyer’s failure to supplement answers to interrogatories reflecting the limits of liability of the defendant’s insurance policy constituted a waiver of the insurer’s right to assert a lower limit of liability.

Harwell, a service technician, was injured when the stairs leading from the first floor to the basement collapsed at a construction project where Kipling Development Corporation was the general contractor. Harwell sued Kipling, alleging it negligently failed to properly supervise and direct the construction site and failed to ensure a safe workplace. Kipling tendered its defense of the lawsuit to its CGL insurer, Fireman’s Fund, which agreed to defend Kipling under a reservation of rights. Fireman’s Fund retained defense counsel for Kipling.

In answering Harwell’s interrogatories in September 2007, Kipling, through the Fireman’s Fund’s retained defense counsel, stated it maintained a Fireman’s Fund policy with a maximum limit of $1 million. In 2008, however, Fireman’s Fund asserted that a $50,000 sublimit applied because Kipling had failed to obtain certificates of insurance and hold harmless agreements from its subcontractors, as required by a policy endorsement. Kipling’s defense lawyer never supplemented its answers to interrogatories or otherwise notified Harwell that a sublimit might apply.

A jury awarded Harwell more than $200,000, but Fireman’s Fund contended that its liability was limited to the $50,000 sublimit. The parties filed cross-motions for summary judgment, and the trial court granted summary judgment in favor of Fireman’s Fund.

The Illinois Appellate Court reversed, citing Supreme Court Rule 213(i), which requires a party to a lawsuit to seasonably supplement its answers when new information becomes known. The appellate court found defense counsel violated the rule, but held Fireman’s Fund responsible for the failure to supplement.

> Fireman's Fund's agenda seems clear: deny coverage to Kipling, control the flow of information to Harwell, fight Harwell tooth and nail through the original case, and after losing the trial–reveal the endorsement. This smacks of sandbagging, which we do not condone. *Id*, at Par. 15.

The appellate court applied the equitable principle of estoppel "when dealing with improper discovery disclosures–a party should not be permitted to take advantage of a wrong, which he or she has committed." The court attributed the representation to Harwell in the answer to interrogatories that Kipling's insurance policy had a liability limit of $1 million to Fireman's Fund. Because Fireman's Fund changed its position on the liability limit but did not tell Harwell, who was relying on Fireman's Fund's truthful representations while it was handling Kipling's defense, Fireman's Fund prevented Harwell from collecting his damages.

It may seem harsh to conflate the defense lawyer's duty to supplement answers to interrogatories with Fireman's Fund's assertion of a coverage position, but it is not without precedent. The appellate court summed up its reasoning on this issue as follows:

> Typically, this doctrine of estoppel attaches when an insurance company withholds information from, or misleads, the insured party. See, e.g., *RLI Insurance Co. v. Illinois National Insurance Co.*, 335 Ill. App. 3d 633, 645 (2002). Here, Kipling was the insured and Farmer's Fund informed Kipling early on about the endorsement's effect on the liability limit. But Kipling went out of business at some point in the litigation and in any event seemed to play no role in either suit. It was Harwell who needed to know about the endorsement and the liability limit to make informed decisions about the litigation, and Harwell to whom Kipling's attorneys–the ones paid for by Fireman's Fund–owed a duty to supplement the interrogatory under supreme court rules. Broad principles of equity–the desire to prevent fraud and injustice—dictate that Fireman's Fund should not benefit from its attempted ruse. *Id.*, at par. 17.

Illinois appellate courts have historically viewed the insurer as being the responsible party to disclose a conflict of interest, even though it is the ethical obligation of the defense lawyer to advise mutual clients of a conflict of interest and to seek a waiver of the conflict and consent to proceed to represent the insured. See *Royal Insurance Company v. Process Design Associates*, 221 Ill.App.3d 966, 582 N.E.2d 1234, 164 Ill. Dec. 290 (1st dist. 2nd div. 1991) (failure to disclose the conflict of interest estopped insurer from raising coverage defenses) .

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