

Illinois Appellate Court Holds Insurer Not Required to Advance Defense Costs While Coverage Action Is Stayed

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An Illinois intermediate appellate court, applying Illinois law, has affirmed a trial court's ruling that denied a law firm's motion to require its professional liability insurer to advance defense costs while a coverage declaratory judgment action was stayed pending resolution of the underlying legal malpractice action. *TIG Insurance Co. v. Canel*, 2009 WL 804145 (Ill. App. Ct. March 24, 2009).

The underlying plaintiff alleged that the insured lawyers and firm committed legal malpractice by failing to disclose a conflict of interest and failing to provide a necessary easement during the purchase of land. The insureds filed an answer in the underlying suit, denying that they were acting as the underlying plaintiff's attorneys at the time of the transaction at issue. The firm then tendered the defense of the underlying suit to the insurer.

The insurer subsequently filed a six-count declaratory judgment action seeking a declaration that it did not owe a duty to defend or indemnify. The trial court dismissed four of the counts but denied the firm's motion for judgment on the pleadings as to the counts that alleged: (1) that the policy was not triggered because the insured had a reasonable basis to foresee that a claim would be made prior to the inception of the policy because the insured "knew or should have known that a wrongful act, error or omission or personal injury had occurred in the transactions" before the policy incepted and (2) that the underlying claim arose out of "an obligation assumed by contract other than an obligation to perform professional services." The court also directed the insurer to name the underlying plaintiff as a party. When the insurer filed an amended complaint naming the underlying plaintiff as a necessary party to the action, the underlying plaintiff filed a motion to dismiss or stay the coverage action on the basis that resolution of that action involved key issues to be decided in the underlying malpractice suit. The trial court agreed. However, in granting a stay of the declaratory judgment proceeding, the trial court denied the firm's request that the insurer advance defense costs in the underlying action pending resolution of the coverage action.

On interlocutory appeal, the Illinois Court of Appeals affirmed the trial court's ruling, holding that the trial court did not abuse its discretion in either granting the stay or refusing to require the insurer to advance

defense costs during the stay. Relying on *Maryland Casualty Co. v. Peppers*, 355 N.E.2d 24 (Ill. 1976), the appellate court agreed with the trial court that "the basis [of] the two remaining counts of [the insurer's] declaratory judgment action [requires] factual determinations that go to the heart of the underlying legal malpractice action." The court stated that "[d]eciding whether [the insured] committed legal malpractice is one of the ultimate facts upon which recovery is predicated in the underlying action against [the insured], and thus, resolution of [that count] in the declaratory judgment action would violate the *Peppers* doctrine because it would require a premature factual determination of [the insured's] knowledge of any act or omission that had occurred in relation to the transaction prior to the inception of the [insurance] policy, a result that would usurp the fact-finders' role in the underlying action." Likewise, the court held that "whether [the lawyers were] acting as [the underlying plaintiff's] attorneys at the time of the transaction is one of the ultimate facts in the underlying action," and possibly determinative of whether the obligation was assumed under contract as alleged in the declaratory judgment action. Based on these conclusions, the court held that the trial court did not abuse its discretion in granting the stay. The appellate court also held that it was within the trial court's discretion to refuse the lawyers an opportunity to brief the issue of whether the insurer was obligated to advance defense cost during the pendency of the stay.