SURVEY OF ILLINOIS LAW: INSURANCE LAW

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I. INTRODUCTION

This survey of Illinois insurance law examines when an insurance carrier owes a duty to defend. Organized by stage of litigation, the survey focuses on significant appellate court cases decided in 2010. The survey was written on behalf of the Illinois State Bar Association Insurance Law Council in collaboration with Southern Illinois University Law Journal and is authored by Kelly Izzo.

II. COMPLAINT

A. Specificity

Lorenzo suffered food poisoning after eating at Persian Foods, Inc., doing business as Reza's Restaurants (Reza's).[1] Lorenzo sued Reza's for damages.[2] Reza's tendered the complaint to Persian Foods' commercial general liability insurer, Capitol Indemnity Corporation (Capitol).[3]

The relevant portion of the complaint alleged:

> 2. That at all times relevant herein, Defendant REZA'S, was engaged in the preparation, production and processing of certain foods, including chicken, for consumption at a certain restaurant known as Reza's Restaurant and Catering, located at or near *40 N. Tower Road, in the Village of Oak Brook, County of Cook, State of Illinois.*
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> 3. That on and prior to March 28, 2006, Defendant REZA'S did process, prepare, distribute, sell and/or otherwise place into the stream of

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1. Lorenzo v. Capitol Indem. Corp., 401 Ill. App. 3d 616, 619, 928 N.E.2d 1274, 1276 (1st Dist. 2010).
2. *Id*. at 617–18, 928 N.E.2d at 1276.
3. *Id*. at 618, 928 N.E.2d at 1276.

> commerce certain foods, including a family style platter which included chicken, for purchase by the consumer public.
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> 4. That on March 28, 2006, Defendant REZA'S did distribute, process and/or sell the aforementioned family style platter, including chicken, to the Plaintiff Nancy Lorenzo in the *Village of Oak Brook, County of Cook, State of Illinois.*[4]

Capitol refused to defend Reza's because the Persian Foods policy limited defense to injuries arising out of locations provided for in the policy's location schedule.[5] Persian foods had 15 locations listed in the policy's schedule, but Reza's was not one of them.[6]

Lorenzo claimed the complaint was broad enough to include numerous Persian Foods locations, including those listed in the location schedule of the policy.[7] Citing paragraph two of the complaint, "On and prior to" language did not limit injury to the date Lorenzo was served.[8] Thus any step prior to stream of commerce, including "process[ing]" and "distribu[tion]" may have occurred at a Persian Foods location within the policy schedule.[9]

Illinois law requires an insurer to defend its insured if facts alleged in the complaint potentially fall within policy coverage.[10] An insurer does not have to defend if it is clear from the complaint that exclusion applies.[11] Any ambiguity in obligation to defend requires an insurer to defend.[12]

In deciding whether Capitol justifiably refused to defend, the court examined precedent established by *Chandler v. Doherty*.[13] In that case, the Insured made a vehicle out of parts of other vehicles and tried to add it to an existing policy schedule.[14] Insurer refused to add the vehicle, claiming it uninsurable due to the modifications.[15] Subsequently, Insured was in an auto accident with that vehicle.[16] Claimant brought a negligence suit for

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4. *Id*. at 621, 928 N.E.2d at 1279.
5. *Id*. at 620, 928 N.E.2d at 1278.
6. *Id*. at 618, 928 N.E.2d at 1277.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*. at 619, 928 N.E.2d at 1278 (citing Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co., 215 Ill.2d 146, 154–55, 828 N.E.2d 1092, 1092 (2005)).
11. *Id*. at 620, 928 N.E.2d at 1278 (citing *Gen. Agents*, 215 Ill.2d at 154, 828 N.E.2d at 1092).
12. *Id*. at 619, 928 N.E.2d at 1278 (citing Chandler v. Doherty, 299 Ill. App. 3d 797, 802, 702 N.E.2d 634, 638 (4th Dist. 1998)).
13. *Id*. at 622, 928 N.E.2d at 1280.
14. *Chandler*, 299 Ill. App. 3d at 799, 702 N.E.2d at 636.
15. *Id*.
16. *Id*.

personal injury.[17] The Insurer knew the car was not scheduled in its policy and refused to defend.[18] However, the complaint only alleged "motor vehicle" and did not specify the vehicle.[19] Ambiguity in the complaint required Insurer to defend.[20]

In the case at hand, the court refused to find ambiguity since the complaint specifically identified Reza's by name and address as the location where the injury occurred.[21] The policy did not provide Reza's in its schedule at the time of injury.[22] Thus from the complaint it was clear that there was an applicable exclusion to defend the underlying lawsuit.[23] Capitol did not owe a duty to defend.[24]

B. Allegations

Hastings filed a personal injury suit against Roszak, the general contractor at the worksite where she was injured.[25] Roszak was an additional insured under a commercial general liability policy through Pekin.[26] Roszak tendered its defense to Pekin, and Pekin declined to defend. The trial court found duty to defend.[27] The appellate court reversed.[28]

The policy provided coverage for Roszak as an additional insured but "only with respect to liability incurred solely as a result of some act or omission of the named insured and not for its own independent negligence or statutory violation."[29] The underlying complaint alleged "as a direct and proximate result of the negligence of [Roszak], plaintiff was struck by a load of structural steel."[30] The court found the "direct and proximate result of the negligence of [Roszak]" language specific enough to establish that the cause of action alleged was not the "result of some act or omission of the named insured" but rather was the "act or omission" of the additional named insured, Roszak.[31] The complaint unambiguously identified

17. *Id*.
18. *Id*. at 800, 702 N.E.2d at 636.
19. *Id*. at 799, 702 N.E.2d at 636.
20. *Id*. at 802, 702 N.E.2d at 638.
21. Lorenzo v. Capitol Indem. Corp., 401 Ill. App. 3d 616, 622, 928 N.E.2d 1274, 1280 (1st Dist. 2010).
22. *Id*.
23. *Id*.
24. *Id*.
25. Pekin Ins. Co. v. Roszak, 402 Ill. App. 3d 1055, 1056, 931 N.E.2d 799, 800 (1st Dist. 2010).
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*. at 1058, 931 N.E.2d at 801.
30. *Id*. at 1061, 931 N.E.2d at 804.
31. *Id*.

Roszak's negligent acts as the source of personal injury.[32] If there were multiple allegations within the complaint, even if one allegation created potential coverage, and even if that allegation were false, Pekin would have owed Roszak a duty to defend.[33] Here, the only allegation was a policy exclusion.[34] Pekin did not owe Roszak a duty to defend because there were no allegations within the complaint that potentially would require Pekin to defend.[35]

C. Amended Pleadings

Feltes, an employee of Alter Scrap Co., drove a work truck to Konstant Products to pick up a load of scrap iron.[36] While next to the dumpster of scrap iron, the work truck slid forward, pinning Feltes between the dumpster and the truck.[37] A Konstant Products' employee, Meyers, heard screams for help and entered the work truck against Feltes' request.[38] While trying to save Feltes, Meyers accidentally drove Feltes' work truck forward, instead of reverse, three times.[39] Each time Meyers crushed Feltes.[40] Feltes sued.[41]

St. Paul, Konstant Products' commercial general liability insurer, initially accepted defense for Konstant Products and its employee, Meyers.[42] Then St. Paul tried to tender defense to Liberty Mutual, Alter Scrap's auto insurer.[43] Liberty Mutual refused to defend because Meyers was not an authorized user of the Alter Scrap Co. work truck according to the original verified complaint.[44] The original verified complaint alleged Feltes instructed Meyers not to operate the truck, and then Meyers drove the truck into the dumpster, pinning and smashing Feltes three times.[45] Subsequently, a revised complaint was filed.[46] It was identical to the

32. *Id*.
33. *Id*. at 1059, 931 N.E.2d at 802 (citing U.S. Fid. & Guar. Co. v. Wilson Insulation Co., 144 Ill.2d 64, 73–74, 578 N.E.2d 926, 930, 930 (1991)).
34. *Id*. at 1061, 931 N.E.2d at 804.
35. *Id*.
36. Konstant Prods., Inc. v. Liberty Mut. Fire Ins. Co., 401 Ill. App. 3d 83, 85, 929 N.E.2d 1200, 1202 (1st Dist. 2010).
37. *Id*.
38. *Id*. at 86, 929 N.E.2d at 1203.
39. *Id*.
40. *Id*. at 85, 929 N.E.2d at 1202.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*. at 86, 929 N.E.2d at 1203.
46. *Id*.

original complaint except that it removed the portion where Feltes expressly instructed Meyers not to drive the truck.[47]

After defending, St. Paul sued Liberty Mutual for reimbursement.[48] Each carrier filed for summary judgment.[49] Once the revised complaint was filed, St. Paul asserted Liberty Mutual had a duty to defend.[50] Liberty Mutual maintained no duty to defend due to admission that Meyers was not an authorized user of the truck, as admitted in the original verified complaint.[51] The circuit court granted Liberty Mutual's motion and St. Paul appealed.[52] On appeal, St. Paul alleged the circuit court erred when it found a binding judicial admission excluded Liberty Mutual's duty to defend.[53]

The appellate court affirmed the circuit court's decision.[54] Illinois law provides that verified pleadings remain binding admissions even when superseded by a later pleading, unless they are mistakenly made.[55] To determine if there is a duty to defend, an insurer must compare the four corners of the underlying complaint against the four corners of the insurance policy.[56] When comparing the original verified complaint, which alleged Feltes instructed Meyers not to use the truck, against the Liberty Mutual insurance policy, which only provides coverage for permitted users, it was evident that Liberty Mutual did not have a duty to defend.[57] It was not alleged that any portion of the original verified complaint was made in error.[58] Liberty Mutual was not required to defend.[59]

III. CONTRACT CLAUSE

Founders Insurance Company (Founders) won its motion for summary judgment finding it owed no duty to its Insured, Shaikh, to defend or indemnify an $11,000 judgment in favor of Kahn.[60] Kahn was awarded the judgment as a result of personal injuries, lost wages, and property damage

47. *Id*.
48. *Id*. at 85, 929 N.E.2d at 1202–03.
49. *Id*. at 85, 929 N.E.2d at 1203.
50. *Id*. at 85, 929 N.E.2d at 1202.
51. *Id*.
52. *Id*. at 85, 929 N.E.2d at 1203.
53. *Id*. at 86, 929 N.E.2d at 1203.
54. *Id*. at 89, 929 N.E.2d at 1206.
55. *Id*. at 86, 929 N.E.2d at 1203 (citing Yarc v. Am. Hosp. Supply Corp., 17 Ill. App. 3d 667, 670, 307 N.E.2d 749, 752 (1st Dist. 1984)).
56. *Id*. at 86-87, 929 N.E.2d at 1203 (citing Valley Forge Ins. Co. v. Swiderski Elec., Inc., 223 Ill.2d 352, 363, 860 N.E.2d 307, 314–15 (2006)).
57. *Id*.
58. *Id*.
59. *Id*. at 89, 929 N.E.2d at 1206.
60. Founders Ins. Co. v. Shaikh, 405 Ill. App. 3d 367, 368, 937 N.E.2d 1186, 1188 (1st Dist. 2010).

sustained as a result of an automobile collision with Shaikh.[61] Founders insured Shaikh at the time of the accident.[62] Kahn, unable to locate and hence collect from Shaikh, appealed the circuit court's decision in hopes of collecting directly from Founders.[63] On appeal, Kahn contended that summary judgment was inappropriate because Founders acted in bad faith toward its Insured, Shaikh, by delaying settlement negotiations and claimed Founders could not invoke a contract clause requiring its Insured's full cooperation because Founders was not substantially prejudiced.[64]

In review of Kahn's bad faith argument the appellate court turned to the decision in *Haddick v. Valors Insurance Company*.[65] In determining whether or not to settle "the insurer must give the interest of the policyholder consideration at least equal to its own."[66] This standard is applicable when there is potential that lack of settlement will expose the insured to damages in excess of the policy limit.[67] The court found the duty to settle inapplicable in the case at hand because the damages Khan claimed were within the policy limits.[68] Thus, even if Kahn was awarded the full amount of claimed damages, the policy would still fully respond, leaving no personal liability for Shaikh.

An insurer is not required to accept a settlement offer from the defendant.[69] Founders rightfully sought to protect its interest by investigating Kahn before determining if it would accept Kahn's settlement offer. Investigations revealed that Kahn, during a four year span, claimed ten additional personal injury claims against insurance companies.[70] Founders countered Kahn's offer with a much lower settlement offer.[71] The arbitrator and circuit court awarded judgment along the lines of Founders' counter, approximately half the settlement offer proposed by Kahn.[72] Founders did not act in bad faith by protecting its interest without harming the Insured.

The appellate court next reviewed Kahn's contention that Founders did not have the right to invoke the contract clause requiring its Insured's

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61. *Id*. at 369, 937 N.E.2d at 1188–89.
62. *Id*. at 368, 937 N.E.2d at 1188.
63. *Id*.
64. *Id*.
65. *Id*. at 373, 937 N.E.2d at 1191–92 (citing Haddick v. Valor Ins. Co., 315 Ill. App. 3d 752, 755, N.E.2d 132, 134 (3d Dist. 2000)).
66. *Id*. at 373, 937 N.E.2d at 1192 (citing Cernocky v. Indem. Ins. Co., 69 Ill. App. 2d 196, 206, 216 N.E.2d 198, 204 (2d Dist. 1966)).
67. *Id*.
68. *Id*.
69. *Id*. at 373, 937 N.E.2d at 1191–92.
70. *Id*. at 373, 937 N.E.2d at 1192.
71. *Id*.
72. *Id*.

cooperation because Founders was not substantially prejudiced.[73] A third party's claim never precludes an insurer from claiming its contractual policy rights against an insured.[74] Founders had the right to invoke its Insured's assistance in resolving Khan's third party claim. The policy stated:

> **CONDITIONS . . . .**
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> . . . .
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> **5. Assistance and Cooperation of the Insured—Parts I [Liability], III [Physical Damage] and IV [Uninsured Motorist Coverage].** As a condition precedent to the Company's duty of indemnity with respect to suits against an insured, the insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured . . . and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses . . . . The insured must cooperate with us in the investigation, settlement or defense of any claim or suit, failure to cooperate fully will be deemed a breach of contract.[75]

Condition precedent clauses such as this require an insured's cooperation and are upheld to prevent collusion between the insured and the third party and for fairness to the insurance carrier who is dependent on the insured for disclosure of events.[76] The carrier has the burden to establish breach of cooperation.[77] Breach is defined as an insured's refusal to cooperate after the carrier exercises a "reasonable degree of diligence in seeking the insured's participation."[78] Since liability policies are not just for the insured's protection but are also for the protection of society, who may be injured by negligence, the carrier must establish substantial prejudice to uphold a cooperation clause.[79]

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73. *Id*.
74. *Id*. at 375, 937 N.E.2d at 1193.
75. *Id*. at 370–71, 937 N.E.2d at 1190.
76. *Id*. at 374, 937 N.E.2d at 1192 (citing Waste Mgmt. Inc. v. Int'l Surplus Lines Ins. Co., 144 Ill.2d 178, 204, 579 N.E.2d 322, 333 (1991)).
77. *Id*. at 374, 937 N.E.2d at 1193.
78. *Id*. (citing Mazzuca v. Eatmon, 45 Ill. App. 3d 929, 932, 360 N.E.2d 454, 456 (1st Dist. 1977)).
79. *Id*. (citing PA Threshermen & Farmer's Mut. Cas. Ins. Co. v. Owens, 238 F.2d 549, 550 (4th Cir. 1956)).

Courts have interpreted a carrier's constructive notice of insured noncooperation to negate a carrier's claim of substantial prejudice.[80] For example, in *Johnson v. Wade*, one month prior to upcoming trial, the Carrier mailed a letter to the Insured requesting the Insured immediately contact the Carrier.[81] The Insured did not respond to the letter and made no contact with the Carrier.[82] The Carrier claimed it also tried to call the Insured on the eve of the trial.[83] The Carrier alleged the Insured's lack of cooperation was unprecedented and hence unanticipated.[84] The appellate court disagreed, holding that non-responsiveness to the letter put the Carrier on notice that the Insured may not cooperate, and at that point the Carrier should have made every reasonable effort to have the Insured attend the trial.[85] Because the Carrier did not make such efforts, the court held the Carrier liable for the judgment against the Insured.[86]

Similarly, even when multiple notices of an upcoming court date were sent by the Carrier and the Carrier was sure that notice reached the Insured, because the Insured signed for the letter, the court held non-responsiveness served as constructive notice.[87] The court noted that the Insured spelled her own name wrong when signing for the letter and inferred the Insured may be illiterate rather than uncooperative.[88] A reasonable degree of diligence would have included trying to make in-person contact with the Insured, an attempt the Carrier never made.[89] The court ruled against the Carrier.[90]

Contrarily, a carrier may successfully claim substantial prejudice if it has the insured's initial cooperation, but then the insured cannot be found even when utilizing multiple search methods, including in-person searches.[91] In *Gallaway v. Schied*, the Insured originally cooperated with the Carrier, promptly forwarding a couple written notices to the Carrier.[92] The Insured also acknowledged receipt of the Carrier's letters.[93] The letters were mailed to the Insured at the address provided in the accident report.[94]

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80. *Id*. at 375, 937 N.E.2d at 1193–94.
81. *Id*. at 375, 937 N.E.2d at 1193 (citing Johnson v. Wade, 47 Ill. App. 3d 610, 612, 365 N.E.2d 11, 12 (1st Dist. 1977)).
82. *Id*.
83. *Johnson*, 47 Ill. App. 3d at 612, 365 N.E.2d at 12.
84. *Id*. at 615, 365 N.E.2d at 14.
85. *Id*.
86. *Id*. at 615-16, 365 N.E.2d at 14–15.
87. *Shaikh*, 405 Ill. App. 3d at 375-76, 937 N.E.2d at 1194 (citing Lappo v. Thompson, 87 Ill. App. 3d 253, 255, 409 N.E.2d 26, 28 (1st Dist. 1980)).
88. *Id*. (citing *Lappo*, 87 Ill. App. 3d at 255, 409 N.E.2d at 28).
89. *Id*. (citing *Lappo*, 87 Ill. App. 3d at 255, 409 N.E.2d at 28).
90. *Id*. (citing *Lappo*, 87 Ill. App. 3d at 255, 409 N.E.2d at 28).
91. *Id*. (citing Gallaway v. Schied, 73 Ill. App. 2d 116, 121, 219 N.E.2d 718, 721 (1st Dist. 1966)).
92. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 116, 219 N.E.2d at 718).
93. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 125, 219 N.E.2d at 722).
94. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 119, 219 N.E.2d at 719).

Then, after initial cooperation, the Insured missed two depositions.[95] The Carrier made phone contact with the Insured's mother, who advised that the Insured moved away.[96] After that point, the Insured's mail from the Carrier was all returned as undeliverable.[97] The Carrier hired a private investigator who also could not ascertain the Insured's whereabouts, even after trying to make in-person attempts.[98] Prior to the Insured missing the depositions, there was no notice that the Insured would be uncooperative.[99] In fact, the Insured cooperated with every Carrier request and did so promptly, all within a two-week or less timeframe.[100] The Carrier was substantially prejudiced.[101]

Sending letters, making telephone calls, and hiring multiple investigators to locate an insured does not necessarily establish that an insured was uncooperative.[102] In *Mazzuca v. Eatmon*, the court found when methods utilized are cursory, carrier attempts lack effort such that the court cannot conclude noncooperation.[103] The Insurer sent a letter to a known former place of the Insured's employment; called, but did not visit, a lead on the Insured's residence; made no public advertisement to look for the Insured; and did not search Social Security, Department of Motor Vehicles, or credit card reports.[104] The first of two investigators only looked for the Insured for five hours over the course of three months.[105] The second investigator did not resume the search until two years later, and, when searching, utilized previously unsuccessful leads.[106] The court concluded such attempts were cursory and not reasonably diligent.[107] The Carrier was unable to use noncooperation as basis for breach of contract.[108]

Founders originally had its Insured's cooperation.[109] The Insured reported notice of summons and complaint directly to the Carrier.[110] The Insured then faxed a copy of these items to the Carrier, per the Carrier's

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95. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 120, 219 N.E.2d at 720).
96. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 120, 219 N.E.2d at 720).
97. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 121, 219 N.E.2d at 720).
98. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 121, 219 N.E.2d at 721).
99. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 116, 219 N.E.2d at 718).
100. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 119, 219 N.E.2d at 719).
101. *Id*. (citing *Gallaway*, 73 Ill. App. 2d at 125, 219 N.E.2d at 722–23).
102. *Id*. at 376–77, 937 N.E.2d at 1195 (citing Mazzuca v. Eatmon, 45 Ill. App. 3d 929, 930–34, 360 N.E.2d 454, 455–58 (1st Dist. 1977)).
103. *Id*. (citing *Mazzuca*, 45 Ill. App. 3d at 934, 360 N.E.2d at 458).
104. *Id*. (citing *Mazzuca*, 45 Ill. App. 3d at 930-31, 360 N.E.2d at 456–57).
105. *Id*. (citing *Mazzuca*, 45 Ill. App. 3d at 934, 360 N.E.2d at 457).
106. *Id*. (citing *Mazzuca*, 45 Ill. App. 3d at 932, 360 N.E.2d at 456).
107. *Id*. (citing *Mazzuca*, 45 Ill. App. 3d at 934, 360 N.E.2d at 458).
108. *Id*. (citing *Mazzuca*, 45 Ill. App. 3d at 934, 360 N.E.2d at 458).
109. *Id*. at 378, 937 N.E.2d at 1196.
110. *Id*. at 369, 937 N.E.2d at 1189.

request, on the same day of the call.[111] On the return date of summons, the Insured even called the Carrier to make sure there was no action required on the Insured's behalf.[112] Then the Carrier hired attorneys who tried to contact the Insured by phone and mail.[113] The phone number was disconnected, and the mail was undeliverable.[114] The case was transferred to a carrier investigative unit which pursued in-person attempts at the last two addresses the Insured provided to Carrier.[115] The first was an apartment.[116] The investigator spoke with the current resident and neighbors who knew nothing of the Insured.[117] The second address was a commercial space; nonetheless, the Carrier talked to occupants who also had no knowledge of the Insured.[118] Then professional investigators were hired who tried to make yet another in-person attempt at another address.[119] It was another business.[120] The investigator questioned the employees, but they also had no knowledge of the Insured.[121] Regular and certified letters were also mailed to potential addresses.[122] The Insured's son was located, but even he had not seen the Insured in years.[123] The Carrier went so far as to investigate a tip from the son that the Insured may be in jail.[124] The investigators' search for the Insured included contacting local departments of corrections.[125] When all these attempts failed, the Carrier tried to reach the Insured by publication.[126] The Carrier used many diligent search methods to locate the Insured. It followed every lead.[127]

Founders, like the Carrier in *Gallaway*, had the Insured's cooperation at first. Additionally, the appellate court found Founders' attempts to locate the Insured most similar to the efforts exhausted in *Gallaway*.[128] Like *Gallaway*, as soon as it became clear to Founders that the Insured could not

111. *Id*.
112. *Id*.
113. *Id*.
114. *Id*.
115. *Id*. at 369-70, 937 N.E.2d at 1189.
116. *Id*. at 370, 937 N.E.2d at 1189.
117. *Id*.
118. *Id*.
119. *Id*.
120. *Id*.
121. *Id*.
122. *Id*. at 370–71, 937 N.E.2d at 1190.
123. *Id*. at 370, 937 N.E.2d at 1189–90.
124. *Id*. at 371, 937 N.E.2d at 1190.
125. *Id*.
126. *Id*. at 372, 937 N.E.2d at 1191.
127. *Id*. at 378, 937 N.E.2d at 1195–96.
128. *Id*. at 378, 937 N.E.2d at 1196.

be located, it used every diligent search method and promptly followed all leads.[129]

Khan contended Founders should have done more to locate the Insured, speculating that the Carrier failed to ask the Insured's son if relatives knew the Insured's whereabouts.[130] However, the Carrier may have made such requests. Even if the Carrier did not ask the Insured's son if relatives knew the Insured's whereabouts, the son had already communicated he did not know where the Insured was and had no communication with him for years.[131] The Carrier did follow the lead that the Insured may be incarcerated.[132]

In the alternative, Khan claimed the Carrier should have warned the Insured that the Insured would be personally liable for the judgment.[133] The court held the Insured had such knowledge when he was served with the lawsuit.[134]

Summary judgment was upheld.[135] The court found no genuine issue of material fact.[136]

IV. POLICY EXCLUSION

A. Employer's Liability

James McHugh Construction (McHugh), a general contractor construction company, leased its employees out to subcontractors for projects.[137] As part of this practice, McHugh required it be named as an additional insured on each subcontractor's general liability insurance policy.[138] Two of McHugh's employees, each subcontracted to separate companies, were injured at subcontractor worksites.[139] Both subcontractors were insured by Zurich American Insurance Company (Zurich).[140] The employees filed personal injury lawsuits against the subcontractors.[141] The subcontractors, in separate suits, each sued McHugh for third-party

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129. *Id*.
130. *Id*.
131. *Id*. at 378–79, 937 N.E.2d at 1196.
132. *Id*. at 378, 937 N.E.2d at 1196.
133. *Id*. at 379, 937 N.E.2d at 1196.
134. *Id*.
135. *Id*. at 379, 937 N.E.2d at 1197.
136. *Id*. at 379, 937 N.E.2d at 1196.
137. James McHugh Constr. Co. v. Zurich Am. Ins. Co., 401 Ill. App. 3d 127, 128, 927 N.E.2d 247, 249 (1st Dist. 2010).
138. *Id*.
139. *Id*. at 128, 927 N.E.2d at 249–50.
140. *Id*. at 128, 927 N.E.2d at 249.
141. *Id*.

contribution.[142] McHugh sought defense against the contribution claims from Zurich.[143] Zurich denied, citing no duty to defend, as stipulated in the policies' employer's liability exclusion (exclusion).[144] The exclusion provided the policies would not respond to bodily injury to "[a]n 'employee' of the insured arising out of and in the course of: (a) Employment by the insured; or (b) Performing duties related to the conduct of the insured's business."[145]

Zurich interpreted the exclusion to provide no duty to defend McHugh since McHugh's employees were injured while employed by McHugh.[146] The circuit court agreed.[147]

On appeal, McHugh contended the exclusion was inapplicable to it because it was not "the insured" but rather "an insured."[148] According to McHugh's interpretation, the exclusion would be applicable to each subcontractor for its respective employees but inapplicable to McHugh.[149]

"The insured" was not defined within the policies.[150] Both parties stipulated that "an insured" meant both named insured and additional named insureds.[151] The court found no reason to interpret "the insured" differently than "an insured" since evidence was not provided that a contrary meaning was intended.[152] Applying the plain and ordinary meaning of "the insured" throughout the policy as a whole the court found the parties must have intended for "the insured" to include McHugh.[153] The commercial general liability form provides coverage to "the insured" for "bodily injury" and "property damage."[154] If McHugh was not "the insured," coverage would never need to be afforded and there would be no useful purpose in listing McHugh as an additional insured.[155] Such interpretation could not be what the parties intended.[156]

The appellate court found in favor of Zurich affirming the circuit court's decision.[157]

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142. *Id*.
143. *Id*.
144. *Id*.
145. *Id*.
146. *Id*.
147. *Id*.
148. *Id*. at 129, 927 N.E.2d at 250.
149. *Id*.
150. *Id*. at 130, 927 N.E.2d at 251.
151. *Id*. at 131, 927 N.E.2d at 251.
152. *Id*. at 132, 927 N.E.2d at 252.
153. *Id*. at 132, 927 N.E.2d at 253.
154. *Id*.
155. *Id*.
156. *Id*.
157. *Id*.

V. CONCLUSION

The appellate cases from 2010 are instructive in determining when there is a duty to defend. In summary, the court seeks to liberally construe complaints and find coverage through rules of construction in case of ambiguity; however, the underlying complaint must support potential for coverage for there to be a duty to defend. The underlying policy is the contractual basis for coverage. Coverage is not absolute. Insureds are required to comply with policy terms and provisions. Insurance companies may refuse to defend when there is no potential for coverage, but they face the burden of establishing the exclusion.