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Insurer must defend for vicarious liability even though not alleged

The 1st District Appellate Court recently held that an additional insured whose coverage encompassed only vicarious liability could be entitled to a defense by the additional insurer even though the underlying complaint alleged neither vicarious liability nor negligence by the named insured.

The case is *Pekin Insurance Co. v. Centex Homes*, 2017 IL App (1st) 153601. The insurer, Pekin, was represented by Pretzel & Stouffer Chtd. Swanson Martin & Bell LLP represented the entities seeking additional insured coverage, Centex Homes, a partnership, and Centex Real Estate Corp.

Centex Homes, as owner, entered into a construction contract with McGreal Construction Co. pursuant to which McGreal was to perform construction work up on issuance of purchase orders.

A representative of Centex Real Estate, managing partner of Centex Homes, signed the contract as representative of the partnership. The contract provided that McGreal was to include Centex Homes as an additional insured on McGreal's liability policy.

The underlying plaintiff, Scott Nowak, was an employee of McGreal. He was injured while working on a building owned by the Centex entities, but apparently not pursuant to a purchase order. He brought suit against both Centex entities claiming that they, through their agents, were present at the site and were negligent in their supervision and control of the work being performed.

McGreal had coverage through Pekin. Pekin's policy contained a blanket additional insured endorsement that covered only the additional insured's vicarious liability and excluded coverage for direct liability. Following tender by the two Centex entities, Pekin brought this declaratory action.

It sought a determination that Centex Real Estate was not an additional insured because McGreal had no contract with that entity. It also sought a determination that Centex Homes did not qualify as an additional insured because, at the time of the injury, McGreal was not performing

work under the contract with Centex Homes.

And even if Centex Homes was an additional insured, Pekin claimed no coverage was due because the underlying complaint sought recovery for Centex Home's direct liability, not vicarious liability.

On cross-motions for summary judgment, the trial court found that Centex Real Estate was not an additional insured, that Centex Homes was, but that Pekin owed no coverage based on the underlying complaint. The Centex entities appealed.

Additional insured status

In an opinion by Justice Mary Lane Mikva, the 1st District affirmed in part and reversed in part. She initially addressed the status of Centex Real Estate and found that it was not an additional insured. She reached that conclusion because Centex Real Estate signed the McGreal contract on behalf of Centex Homes and an agent signing a contract for a disclosed principal is not a party to the contract.

She also rejected the argument that Centex Real Estate should be regarded as an additional insured by virtue of its role as a partner in the Centex Homes partnership. She did so apparently based on the requirement in Pekin's additional insured endorsement requiring that the additional insured have a contract with the additional insured, and Centex Real Estate did not.

Mikva then turned to Centex Homes and found that it qualified as an additional insured.

She acknowledged that its contract with McGreal contemplated the issuance of purchase orders pursuant to which work would be performed, which was not the case here at the time of the injury.

Nevertheless, under Pekin's additional insured endorsement, the issuance of a purchase order was not a condition precedent to there being an effective contract in place between Centex Homes and McGreal. And that contract, according to Mikva, triggered Centex Homes' additional insured status.

Duty to defend

Concerning Pekin's duty to defend Centex Homes, Mikva started with the proposition that the duty

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to defend is much broader than the duty to indemnify. She further observed that, to trigger the duty to defend based on an insured's vicarious liability, two components are necessary. One is that there must be a potential for finding that the named insured was negligent. The second is that there must be a potential for finding that the additional insured is vicariously liable for that negligence.

She then noted that the court in *Pekin Insurance Co. v. CSR Roofing Contractors Inc.*, 2015 IL App (1st) 142473, held that, to meet the first requirement, the underlying complaint need not expressly allege that the named insured was negligent. In fact, silence in the underlying complaint concerning the named insured, where the named insured is the plaintiff's employer, according to Mikva, could be the result of the tort immunity for employers under the workers' compensation laws.

Mikva said the question here then became whether — despite the absence of direct allegations against McGreal — the underlying complaint alleged sufficient facts to support a theory of recovery against Centex Homes based on McGreal's acts or omissions. She concluded there were, based on allegations that McGreal was charged with the specific project on which Nowak was working at the time of his injury.

She then discussed whether the allegations were sufficient to support a claim that Centex Homes would be vicariously liable for McGreal's negligence. Mikva noted in-

consistency in the case law concerning the type or level of control an entity needs to have to incur vicarious, versus direct, liability.

Ultimately, however, she decided on the *CSR Roofing* approach of "not parsing the underlying complaint for allegations of a specific amount or level or type of control" that the additional insured might have.

She noted several reasons for this approach. These included the broad nature of the duty to defend; the necessity of resolving that duty without deciding any significant issues in the underlying case; the fact that the same kind of allegations that would support direct liability might also support vicarious liability; and that in many cases the underlying complaint will offer little real guidance on the issue of vicarious liability.

Mikva concluded that where, as here, the underlying complaint alleges that the additional insured had control of operations and was liable for the actions of its agents, a sufficient "potential" basis for vicarious liability exists such that an insurer is required to provide a defense.

The court therefore affirmed the trial court's rulings that Centex Real Estate was not an additional insured and that Centex Homes was. It reversed the trial court on Pekin's duty to defend Centex Homes, finding that such a duty existed.

Key points

- According to this court, a partner in a partnership might not be an additional insured, even though the partnership is an additional insured.

- An additional insured having coverage limited to vicarious liability may be entitled to a defense by the additional insurer even though the underlying complaint contains no allegations of negligence by the named insured or vicarious liability of the additional insured.

- Allegations in an underlying complaint that the additional insured has control of operations and is liable for the actions of its agents, provide a sufficient basis to impose a defense obligation on an insurer providing vicarious liability coverage for the additional insured.