

## Illinois Appellate Court Finds Insurer's Failure to Sufficiently Monitor Defense Counsel Is Breach of Duty to Defend Requiring Insurer to Pay Excess Judgment

### *Delatorre v. Safeway Ins. Co.*

(Illinois Appellate Court, First District)

By: Christopher J. Bannon

In a decision that has significant implications for liability insurers and insureds in Illinois, the Illinois Appellate Court held on April 17, 2013 that an insurer breached its duty to defend when it hired defense counsel but did not take sufficient action to ensure that counsel provided an "actual defense" for the insured. Moreover, the court in *Delatorre v. Safeway Ins. Co.*, 2013 IL App. (1st), 120852 consequently found the insurer liable for damages in an amount well in excess of the policy limits.

The insurer in *Delatorre* retained counsel to defend its insured, the driver involved in an accident in which the plaintiff was injured. The retained defense counsel filed an appearance and answer, and initiated discovery, but the court found no evidence of any further action to defend the insured. The plaintiff eventually moved for sanctions, and the trial court entered an order of default for failure to comply with outstanding discovery. The plaintiff's attorney sent the default order directly to the insurer, who immediately forwarded the order to defense counsel.

A prove-up hearing on the default was held a year later, and judgment was entered against the insured for \$250,000. The plaintiff then obtained an assignment of the insured's claims against the insurer and filed suit to recover the \$250,000 judgment. However, the policy limits (\$20,000 per person and \$40,000 per accident) were already exhausted by that time in light of settlements paid to other claimants.

Affirming the trial court's entry of summary judgment against the insurer, the *Delatorre* Court declined to follow the Fourth District Illinois Appellate Court's decision in *Brocato v. Prairie State Farms Ins. Ass'n*, 166 Ill. App. 3d 986 (4th Dist. 1988). There, the appellate court found the insurer was *not* liable for negligently, willfully and wantonly, or intentionally failing to supervise or control the defense of its insured. The *Brocato* Court concluded that an insurer's defense obligation is fulfilled when it retains counsel for the insured. Otherwise, the court believed that an

insurer would be forced to control or supervise the litigation and become involved in the unauthorized practice of law.

The *Delatorre* Court concluded that *Brocato* was factually distinguishable. The defense attorney in *Brocato* provided an "actual defense" to the insured throughout trial, while the *Delatorre* Court determined that the defense attorney in its case failed to provide the insured with an "actual defense". The *Delatorre* Court also found troubling the implications of the rule announced in *Brocato* – that an insurer satisfactorily discharges its duty to defend solely by retaining an attorney for its insured. The court believed that the *Brocato* holding "...would allow an insurer to escape its legal obligation to provide good faith representation and instead freely abandon its insured to an attorney who either is unwilling or unable to undertake the defense, or who, as in this case, inexplicably deserts the client." 2013 IL App (1st), 120852 at ¶23.

The *Delatorre* Court was instead persuaded by the conclusion of the U.S. Court of Appeals for the Seventh Circuit in *Thoresen v. Roth*, 351 F. 2d 573 (7th Cir. 1965). Faced with similar facts, the Seventh Circuit rejected the insurer's argument that the mere retention of defense counsel for the insured satisfied its defense obligation, and found the insurer breached the duty to defend. 351 F.2d at 575-76.

While the insurer in *Delatorre* raised the concern noted in *Brocato* – that a finding in the plaintiff's favor would implicate the statutory prohibition on insurers practicing law – the *Delatorre* Court did not share the concern. The court noted that the Illinois Supreme Court's definition of the practice of law includes the requirement of "... the use of any degree of legal knowledge or skill" 2013 IL App (1st), 120852 at ¶28 (quoting *People ex rel. Illinois State Bar Ass'n v. Schafer*, 404 Ill. 45 (1949)). But the *Delatorre* Court failed to see how requiring an insurer to ascertain whether its insured is actually being defended necessitates the use of any legal skill or knowledge.

Having found a breach of the duty to defend, the Court then determined that the insurer was liable for the full amount of the \$250,000 default judgment, which was well in excess of the policy limits. The Court discussed several prior decisions – from the Illinois Supreme Court, Illinois Appellate Court and Seventh Circuit – that the *Delatorre* Court believed supported a finding that an insurer may be liable for damages beyond the policy limits if its breach of duty proximately caused the excess judgment. Finding that the entry of the default judgment directly flowed from what the Court believed was a breach of the duty to defend, the Court concluded that the insurer was responsible for paying the excess judgment. However, the Court placed some limitation on its ruling by stating “[w]e expressly limit our decision on the suitability of the default judgment entered against the insured as the measure of damages to the precise facts of this case, and do not decide its applicability to future cases.” 2013 IL App (1st), 120852 at ¶137.

**Comment:** The insurer in *Delatorre* contended that a decision in the plaintiff’s favor would create a conflict among Illinois Appellate Court districts with regard to the extent of an insurer’s obligations in hiring and monitoring defense counsel. The insurer has filed a petition seeking Illinois Supreme Court review to resolve the apparent conflict on this issue, and further word on this important issue may ultimately come from Illinois’ highest court. Equally significant, the decision highlights circumstances under which an Illinois court might find an insurer liable for damages in excess of its policy limits, even in the absence of “bad faith” or statutory violations.

*If you have any questions about this Insurance Coverage Update, please contact the author listed below or the Aronberg Goldgehn coverage attorney with whom you normally consult:*

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