Editor's Note: The Return of Judicial Blinders

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The Third District's decision in *Pekin Ins. Co. v. Illinois Cement Co.*, 2016 IL App (3d) 140469 (March 29, 2016), which is summarized in this issue, is a very unsatisfactory decision concerning the scope of the pleadings or other materials to be considered by a trial court in determining whether a liability insurer has a duty to defend. This decision by the Third District follows and relies upon its prior, equally unsatisfactory decision in *Pekin Ins. Co. v. United Contractors Midwest, Inc.*, 2013 IL App (3d) 120803. In both cases, the court held that, where the underlying complaint by the injured party against the insured does not trigger the insurer's duty to defend, the trial court should not look to the insured's self-serving third-party complaint for facts that would trigger the duty.

In neither *Illinois Cement* nor *United Contractors* did the Third District distinguish the self-serving third party complaint, which it says must not be considered in the duty to defend analysis, from the self-serving counterclaim in *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 460-61 (2010), which the Illinois Supreme Court held must be considered. The two First District cases cited by the Third District involving self-serving third-party complaints, *National Fire Ins. of Hartford v. Walsh Const. Co.*, 392 Ill. App. 3d 312 (2009), and *American Economy Ins. Co. v. DePaul Univ.*, 383 Ill. App. 3d 172 (2008), were decided *before* the Illinois Supreme Court's decision in *Wilson* and provide no support for the Third District's approach.

There is no rational basis for considering a self-serving counterclaim in the duty to defend analysis but not considering a self-serving third-party complaint. This very issue was anticipated in an article in *The Policy* several years ago.

> An insurer may argue that *Walsh Construction* survives *Wilson* insofar as the former involved consideration of an underlying third-party complaint, while the latter involved consideration of an underlying counterclaim. This, however, is a distinction without a difference. In both cases, the court hearing an insurance coverage dispute is asked to consider a pleading filed by the insured against someone else in the underlying lawsuit, which the insured contends triggers coverage. It makes no substantive difference whether that pleading is filed against the underlying plaintiff/counter-defendant or an underlying third-party defendant. In either case, the insured's pleading makes it possible for the jury in the underlying lawsuit to render a verdict that falls within the scope of coverage. That "possibility" triggers coverage. The pleading therefore merits consideration in the insurance coverage dispute, regardless of whether it is styled as a counterclaim or as a third-party complaint.

Stanner, D.L., Fitzgerald, J.M., and Ryan, B. "Removing judicial blinders: Beyond the underlying complaint in insurance coverage disputes in construction site personal injury cases," *The Policy*, Vol. 57, No. 3 (January 2013).

Pekin v. Illinois Cement and *Pekin v. United Contractors* indicate the return of judicial blinders in duty to defend cases in the Third District.