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Insurer Failure to Pay Defense Costs Excused by Insured Failure to Prove-Up Fees

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In ***Country Mut. Ins. Co. v. Hilltop View, LLC***, 2014 IL App (4th) 140007, the appellate court reversed the trial court's order of contempt against the insurer, arising from the insurer's failure to pay the defense costs the court had ordered. In what seems like a "*Keystone Cops*" chase, the failure to pay was excused by the fact that the trial court never determined an amount to be paid, the insured never established the reasonableness of the fees sought or provided any bill showing a gross amount due nor provided time records to support their invoices, and the trial court never found the insurer's denial of coverage was vexatious and unreasonable.

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The procedural history of the case is tortured, and the motion practice in the trial court was muddled and confusing. Suffice it to say, the path chosen by the frustrated insured's counsel to pursue contempt because it could not figure out how to communicate with the insurer's attorney, turned out to be wasted effort. In fact, it would appear that the insureds were thwarted at every turn in the litigation.

Using this case as a teaching point, what can we learn about the procedure to follow in attempting to enforce the trial court ruling that the insurer owed a duty to defend in the underlying suit? The first step seemed to be reasonable, when the insured's attorney wrote to Country's attorney, demanding payment of the defense costs in the amount of $176,937. However, it was clear from the outset that Country's lawyers were not going to capitulate to the court's ruling that Country owed a duty to defend.

Country followed its own course to attack the October 2012 order, including filing a motion to vacate and reconsider the order, asserting that the insureds were not entitled to an order finding Country had a duty to defend, merely because they defeated Country's reliance on one of its coverage defenses, i.e., whether the pollution exclusion applied to the underlying suit alleging that the odors from the hog confinement farm. Country had only pursued partial summary judgment on the pollution exclusion, but it still had other coverage defenses asserted in the declaratory judgment upon which it might prevail. It asserted that whether it would ultimately be found to owe a duty to defend is "still an open question," and the insureds were not entitled to partial summary judgment regardless of whether the Court found the pollution exclusion did not apply.

Country's motion to vacate and reconsider was denied and an order was entered on January 29, 2013, pursuant to Supreme Court Rule 304(a) finding no just reason to delay enforcement of or appeal of the court's October 26, 2012 orders finding that Country must defend the insureds in the underlying suit brought by the neighbors.

In the appeal, *Country Mut. Ins. Co. v. Hilltop View, LLC*, 2013 IL App (4th) 130124 ("Hilltop I)"), decided on November 13, 2013, the court affirmed the ruling that the pollution exclusion did not apply to the odors associated with the operation of the confinement hog farm, but it agreed with Country Mutual that the trial court erred in prematurely finding Country responsible for the insureds defense because Country still had other potential coverage defenses and the parties had agreed to a 304(a) finding on the pollution exclusion ruling before resolving all the other claims or defenses.

So, what happened during the pendency of the Hilltop I appeal became the subject of the instant appeal ("Hilltop II"), which reviewed the insured's unsuccessfully attempts to get Country to reimburse it for some of its attorney

fees.

After Country filed its notice of appeal in Hilltop I, the trial court issued orders ordering a stay of the underlying case negating the need for defense costs. It also agreed not to take up the issue of past defense costs until a decision was rendered by the appellate court. However, the Court denied a stay as to the proceedings in the declaratory judgment and found Country was responsible for costs of litigation with regard to the DJ (the "February 2013 Orders"). The ruling for fees in the DJ was not the result of any ruling under Section 155, and there was no finding that Country's conduct in denying coverage was vexatious or unreasonable. Notably, there was no Rule 304(a) finding in the February 2013 Orders. Country's attempt to amend its existing notice of appeal to include the February 2013 Orders was denied by the appellate court.

If there was a point where the insureds went wrong in trying to get money from Country (as opposed to the decision to allow the appeal to go forward on a partial motion for summary judgment), it was here. The insured's counsel send Country a letter with an invoice requesting Country pay $17,000 for the insured's legal fees in the DJ for the period February 2013 and April 2013 without any itemized records. Country refused saying "even if there was (sic) any obligation," the summary was inadequate and improper. The insured's counsel then filed a verified petition for adjudication of civil contempt for willfully failing to comply with the trial court's October 2012 and February 2013 Orders. The petition alleged Country's conduct was vexatious and unreasonable and in bad faith. The trial court held a hearing on the motion for contempt and ruled that there was no question that he had ordered Country to pay the insured's attorney fees in the DJ. He suggested that "while this order might not be appealable, it is enforceable." Country protested that it had no idea how much to pay because they had not received any bills, only a summary, and there was no ruling as to what was reasonable. The Judge indicated that he intended that Country pay both the defense costs in the underlying suit "until the Appellate Court tells me, if they tell me, I was wrong" and the attorney fees incurred in the DJ. He entered an order finding that Country's conduct was vexatious, unreasonable, and in bad faith, and in order to avoid contempt, Country needed to pay $96,990.94. Country filed a notice of appeal and an appeal bond for $350,000.

The appellate court's decision is fairly predictable. Although it agreed that the October 2012 order became final in January 2013 when the trial court approved 304(a) finding, it noted that the trial court let Country off the hook in February 2013 when it ordered a stay of the underlying suit and indicated that it would not take up the issue of past costs until after the appeal was resolved. Therefore, Country's decision not to pay any money for the cost of defense in the underlying suit could not constitute contempt.

With regard to Country's failure to pay the attorney fees in the DJ, because the trial court never determined an amount to be paid and neither insured provided Country with anything other than a bill showing a summary, the Court found that Country's actions did not rise to the level of contempt.

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