

Feature Article

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Vicarious Liability in Construction Negligence Cases

Misapprehension Leads to Mischief

This is the fourth in a series of articles on the evolution of construction negligence law following the demise of the Structural Work Act in 1995. Commencing with COMPLEXITIES IN CONSTRUCTION NEGLIGENCE LITIGATION (*IDC Quarterly*, Vol. 13, No. 3, p. 8), the author has traced the evolution of construction-related negligence cases under Section 414 of the Restatement (Second) of Torts and premises liability principles. As a general rule, the employer of an independent contractor is not liable for the contractor's acts or omissions which injure or damage third parties. *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19, 21, 276 N.E.2d 336 (1971). Section 414 mediates that rule in instances where the employer retains a sufficient and relevant degree of control over the contractor's activities. In that regard, it states:

One who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts, Section 414.

Previous articles have discussed the type of control, and evidence of that control, which creates a duty. RECENT DEVELOPMENTS IN CONSTRUCTION NEGLIGENCE (*IDC Quarterly*, Vol. 14, No. 2) and CONTINUING DEVELOPMENTS IN CONSTRUCTION NEGLIGENCE, (*IDC Quarterly*, Vol. 18, No. 2). Those articles also emphasize the two-step process required to establish liability. Once the requisite control is proven, liability turns on the employer's exercise of reasonable care. In other words, exposure flows from the employer's negligence in the context of dangers which were known, or of which it had reason to know, as opposed to the mere fact of control. Analogizing the relationship of "control" and the concomitant exercise of "reasonable care" under Section 414 to a pistol, the former is the hammer and the latter is the trigger.

Unfortunately, the Illinois Supreme Court has not "weighed in" on the important issue of what is required to show "retained control" under Section 414, and the appellate decisions continue to provide more shadow than light. In that respect, the factors considered and weighed, and the significance accorded to those factors, fluctuate from opinion to opinion within the same district, and in the First District, from division to division.

At this point, and until the Supreme Court decides a construction negligence case, any attempt to synthesize the disparate factorial analyses which are found in the current decisions is a fool's errand. Nonetheless, one development in the area requires critical attention due to its substantive impact upon the interpretation and application of Section 414 in *both* underlying bodily injury cases *and* coverage cases which involve "additional insured" endorsements. Commencing with *Cochran v. Sollitt Constr. Co.*, 358 Ill. App. 3d

865, 832 N.E.2d 355 (1st Dist. 2005), which was discussed previously in CONTINUING DEVELOPMENTS IN CONSTRUCTION NEGLIGENCE, (*IDC Quarterly*, Vol. 18, No. 2), a number of appellate courts have interpreted Section 414, and the common law emanating from it, as creating a vicarious or *respondeat superior* exposure on the part of contractors who retain control over the “methods” or “operative detail” of a subcontractor’s work. Those decisions also posit “direct liability” where a lesser degree of control is retained. The author submits that *Cochran v. Sollitt Constr. Co.* and its progeny do considerable mischief to the clear language of the Restatement. Inevitably, that mischief misdirects and confuses both the evolving common law which interprets Section 414 and the ancillary insurance coverage cases which parse it in comparing the language of a plaintiff’s complaint to the provisions of a liability policy which may provide additional insured coverage. These issues are the subject of this article. Of necessity, the following discussion also updates and provides insight into the various factors which recent authorities have considered in determining whether or not the requisite control is present to create a legal duty and, if so, whether the defendant knew or had reason to know of the hazard.

While a number of cases have recognized the potential for both vicarious and direct liability exposures under Section 414, no decision has applied the former to hold a general contractor, owner, or other employer liable for the acts or omissions of a subcontractor under *respondeat superior* or master/servant principles. Consequently, while alluding to derivative liability rules, even cases which recognize the existence of alternative theories have adhered to the “direct liability” approach. Appreciation of that legal fact is of inestimable value inasmuch as the application of *respondeat superior* rules would make the contractor liable for the acts and omissions of its subcontractor without regard to whether the former knew or had reason to know of the danger or the latter’s negligence.

Factorial Evolution

Before focusing upon the concept of vicarious liability under Section 414 it is helpful to consider the cases following *Cochran v. Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005), in the context of the various factors which have either supported or been the basis for rejecting relevant “control” under the Restatement. Consideration of those factors is particularly important as the law appears to be moving in the direction of using the “manner, means and methods” or “operative detail” approach to define vicarious liability, which leaves lesser control as the subject for “direct liability” under Section 414.

Previous articles in this series, starting with COMPLEXITIES IN CONSTRUCTION NEGLIGENCE LITIGATION (*IDC Quarterly*, Vol. 13, No. 3, p. 8) have discussed the adherence of most courts to a “methods of work” or “operative detail” analysis as the “trigger” for control under the Restatement. See, e.g., *Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 923-25, 627 N.E.2d 1265 (3rd Dist. 1994), *Rangel v. Brookhaven Constructors*, 307 Ill. App. 3d 835, 838-39, 719 N.E.2d 174 (1st Dist. 1999), *Brooks v. Midwest Grain Products Co.*, 311 Ill. App. 3d 871, 874-85, 726 N.E.2d 153 (3rd Dist. 2000), *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill. App. 3d 1051, 1061-63, 728 N.E.2d 726 (1st Dist. 2000), and *Bieruta v. Klein Creek Corp.*, 331 Ill. App. 3d 269, 274-79, 770 N.E.2d 1175 (2d Dist. 2002). Subsequent decisions found the requisite retention of control over “manner, means and methods” in the prime contract between the general contractor and the owner, *Moss v. Rowe Constr.*, 344 Ill. App. 3d 772, 801 N.E.2d 614 (4th Dist. 2003), and *Moorehead v. Mustang Constr. Co.*, 354 Ill. App. 3d 456, 821 N.E.2d 358 (3rd Dist. 2004), and the subcontract between the general contractor and the subcontractor, *Downs v. Steel & Craft Builders, Inc.*, 358 Ill. App. 3d 201, 831 N.E.2d 92 (2d Dist. 2005), in which the court stated, “[t]he best indicator of whether a contractor has retained over a subcontractor’s work is the party’s contract, if one exists.” *Downs*, 358 Ill. App. 3d at 205.

Other courts have considered contractual covenants involving a defendant as but one of the pertinent factors bearing upon the retention of requisite control. See *Martens v. MCL Constr. Corp.*, 347 Ill. App. 3d 303, 807 N.E.2d 480 (1st Dist. 2004); *Shaughnessy v. Skender Constr. Co.*, 342 Ill. App. 3d 730, 794 N.E.2d 937 (1st Dist. 2003). However, the general theme in each decision was retention of control over the “operative

detail” or “manner, means and methods” of the work sufficient to differentiate the defendant’s supervisory authority from the general relationship and rights which are insufficient under Section 414 to create a duty, *i.e.* “the general right to order the work stopped ... or to make recommendations or suggestions which need not necessarily be followed.” Restatement (Second) of Torts, Section 414, *comment c*.

Decisions since the last article in 2008 have generally adhered to the same “operative detail” approach with an emphasis upon the general contractor’s retention of authority over safety on the jobsite.^{1*} Also significant in the recent decisions is the onsite presence of supervisory employees of the general contractor who have safety responsibilities and authority.

In *Moorehead v. Mustang Constr. Co.*, 354 Ill. App. 3d 456, 821 N.E.2d 358 (3rd Dist. 2005), the plaintiff, an employee of a subcontractor, fell from an unfooted extension ladder while installing a “drip pan system” under stadium bleachers. The general contractor was sued under the negligence rules articulated by Section 414. Summary judgment in favor of the defendant was reversed with the court considering the following factors as significant:

- (1) Under the prime contract the defendant agreed to be . . . fully and solely responsible for job safety” including the means, methods and techniques of construction. The agreement also required Mustang to designate a safety director to help prevent accidents and to “take reasonable precautions for the safety of the employees and equipment under the control or custody of the subcontractors. . . .”
- (2) Implementing that authority the general contractor had an onsite project manager who inspected the work on a daily basis . . . to insure that it was in compliance with the drafted plans and that the work was being performed in a safe manner. . . .”

Moorehead v. Mustang Constr. Co., 354 Ill. App. 3d at 457-58.

Those factors were deemed sufficient to create a question of fact as to whether the defendant had sufficient “control” over the work to give rise to a duty under the Restatement.

Also significant is that *Moorehead* recognized that the subcontract between the defendant and the plaintiff’s employer required the latter “to provide sufficient safeguards against all injuries and to comply with all safety requirements” in addition to binding the subcontractor to the terms of the general contract “including the safety specifications” *Moorehead v. Mustang Constr. Co.*, 354 Ill. App. 3d at 458. Despite those covenants, the appellate court implied a non-delegable duty *vis a vis* the contract between the defendant, which is contrary to the decisions of the Second District in *Downs v. Steel & Kraft Builders, Inc.*, 358 Ill. App. 3d 201, 831 N.E.2d 92 (2d Dist. 2005) and *Joyce v. Mastri*, 371 Ill. App. 3d 64, 861 N.E.2d 1102 (2d Dist. 2007). *Moorehead* also implies that an injured employee of the subcontractor can be considered a third party beneficiary of the safety provisions of the prime contract between the owner and the general contractor, contrary to *Wilfong v. L.J. Dodd Constr.*, 401 Ill. App. 3d 1044, 1059-60, 930 N.E.2d 511 (2d Dist. 2010).

In *Wilfong v. L.J. Dodd Constr.*, *supra*, summary judgment was affirmed in favor of the general contractor and against the employee of a “steel fabricator” on the job who “fell while walking across ruts at a construction site.” In affirming, the court found that there was no evidence that the general contractor controlled the operative details of the steel fabricator’s work, or that the plaintiff’s employer was not free to do its work in its own way. The court also held that the absence of a direct contract between Dodd and the steel fabricator mitigated against “control,” recognizing, as it did in *Downs v. Steel & Kraft Builders, Inc.*, *supra*, that, “[t]he best indicator of whether a contractor has retained control over a subcontractor’s work is the parties’ contract, if one exists.” *Wilfong*, 401 Ill. App. 3d at 1061.

Similarly, the court in *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 885 N.E.2d 1138 (1st Dist. 2008), affirmed summary judgment in favor of the general contractor. There, the employee of a roofing subcontractor fell off a ladder while carrying a 60-pound bundle of shingles to the roof. The general contractor had an on-site superintendent who daily checked the progress of the work and who testified that “he could stop a laborer from working if he saw him performing a dangerous task.” *Calderon*, 381 Ill. App. 3d at

338. Despite that authority, the court emphasized that the subcontract was the “best indicator” of control, and in that respect found that the subcontract placed the responsibility for compliance with “safety standards” upon the roofing subcontractor. Nor did it find that provisions which specified adherence to the general contractor’s “safety program” sufficiently affected the contractor’s means and methods of doing its work to justify a finding of control.

Wilkerson v. Schwendener, 379 Ill. App. 3d 491, 884 N.E.2d 208 (2008) involved the employee of a carpentry subcontractor who fell when he was “working without fall protection by balancing on top of wall frames that were less than six inches wide at a height of nine feet above the ground.” There, summary judgment in favor of the general contractor was reversed where the subcontract required the plaintiff’s employer to comply with stringent safety regulations prepared by the defendant which had three supervisory employees on the site with discretionary authority to stop the work of subcontractors “if the work was being performed in a dangerous manner.” The court also found that the defendant had actual knowledge of the unsafe practice which caused the injury and did nothing to enforce its own safety regulations.

Madden v. Paschen, 395 Ill. App. 3d 362, 916 N.E.2d 1203 (1st Dist. 2009) involved the same legal principles but a slightly different cast of characters. A school maintenance worker fell into an uncovered orchestra pit and sued defendants including the construction manager and design consultant. Summary judgment was entered in favor of those defendants and the plaintiff appealed. In affirming the court found: (1) there was no entrustment relationship between the defendants and the plaintiff’s employer which gave the latter the right to control the work of the former and (2) neither defendant exercised any control over the plaintiff’s work.

Each of the preceding cases illustrates that the question of control is significant only as it relates to the existence of a legal duty on the part of the defendant to the plaintiff. Liability requires a breach of that duty in the setting of a dangerous condition of which the defendant knew or had reason to know. In *Madden*, *Calderon*, and *Wilfong*, in addition to absence of the requisite control, the court also found that the defendants lacked actual or imputed knowledge of the hazard. Similarly, in *Wilkerson* and *Moorehead*, the court reversed summary judgment *inter alia* because the defendant knew of the unsafe practice.

Vicarious Liability Under Section 414

Consideration of Section 414 as a basis for both vicarious and direct liability began with *Cochran v. Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005), in which the plaintiff, an employee of the HVAC subcontractor, was working on overhead ductwork when he fell from a ladder which was positioned on a plywood board that was resting on two milk crates. He sued the general contractor on premises liability and construction negligence theories. In furtherance of the latter, he claimed that the general contractor had “control” over the work by virtue of the prime contract with the owner which made Sollitt solely responsible for safety on the job, including compliance with all applicable state and federal laws and regulations. Using that language, the plaintiff contended that Sollitt had “control,” even though it was never exercised, and even though the subcontract delegated that responsibility to the plaintiff’s employer.

The court held that the concept of “retained control” involved numerous factors; only one of which was the contract between the owner and the general contractor. In discussing the proper analysis, it held that Section 414 poses two possible theories for liability. The first is mentioned in *comment a* when the “operative detail” which is retained by the defendant is so extensive that the law of agency applies and the independent contractor is therefore viewed as the agent of the general contractor. Alternatively, Section 414 deals with “direct liability” in which the level of control is not so comprehensive as to establish vicarious liability, but is sufficiently extensive to give rise to a duty on the part of the general contractor to exercise reasonable care for the safety of the independent contractor’s employees.

Since *Cochran*, some courts have likewise indulged a construction of Section 414 which presupposes that it addresses both *respondeat superior* and direct liability in construction negligence cases. See, e.g., *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 341, 885 N.E.2d 1138 (1st Dist. 2008), *Wilfong v.*

L.J. Dodd Constr., 401 Ill. App. 3d 1044, 1060, 930 N.E.2d 511 (2d Dist. 2010) and *Madden v. Paschen*, 395 Ill. App. 3d 362, 379-84, 916 N.E.2d 1203 (1st Dist. 2009) As discussed in *Cochran*, the basis for that assumption is the reference in *comment a* to “the relation of master and servant” in the context of retention of “control over the operative detail of doing any part of the work.” *Cochran v. Sollitt Constr. Co.*, 358 Ill. App. 3d at 874. Flowing from that assumption is the further thought that references in *comment c* to control over “methods of work or as to operative detail” apply to vicarious liability, leaving a lesser degree of control for the imposition of “direct liability,” under that Section. Correspondingly, *comment b* with its requirements of reasonable care in the context of known or imputed dangers applies only to “direct liability” inasmuch as vicarious liability makes the employer responsible for the acts and omissions of the contractor without regard to its own neglect.

The author submits that *Cochran* and its progeny have misinterpreted Section 414, thereby opening the door for incremental misperceptions which are capable of significant mischief. A fair reading of Section 414 and its accompanying comments leaves no room for the thought that the drafters intended to articulate a vicarious liability standard. In fact, the language of *comment a* compels the opposite conclusion. As stated succinctly in *Aguirre v. Turner Constr. Co.*, 401 F.3d 825 (7th Cir. 2007):

The “retained control” theory of negligence liability described in Section 414 was adopted by the Illinois Supreme Court in *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 211 N.E.2d 247 (1965). However, some confusion has arisen recently among Illinois intermediate appellate courts regarding whether Section 414 states a theory of vicarious liability or direct liability. See, e.g., *Cochran v. George Sollitt Const. Co.*, 358 Ill. App. 3d 865, 295 Ill.Dec. 204, 832 N.E.2d 355, 361 (2005). Although the Illinois Supreme Court has yet to lend its guidance on this issue, we are confident it would interpret Section 414 in accordance with its plain language and accompanying commentary, which clearly state a theory of direct liability for a general contractor’s own negligence, not a basis for imposing vicarious liability on a general contractor for the negligence of a subcontractor.

Aguirre v. Turner Constr. Co., 501 F.3d at 828.

As *Aguirre* found, the first sentence in *comment a* refers to the principles of vicarious liability which can be found in the Restatement of Agency, Sections 2.04, 7.07, as opposed to describing the circumstances which give rise to a duty in tort law. The purpose of Section 414 is to carve out a “duty” in instances where the control is retained short of that which is required for vicarious liability. Thus, the drafters separated tort law considerations from those which apply to the master and servant relationship. That demarcation is clear in *comment b* which indicates that “[t]he rule stated in this Section” in the context of a duty to exercise “reasonable care.” The term “Section” is singular and refers to the language of Section 414 in its entirety. Thus, considering *comment b* in conjunction with *comment a* precludes vicarious liability considerations, inasmuch as exposure under *respondeat superior* principles is wholly derivative and exists without regard to the exercise of reasonable care.

Vicarious liability renders a principal liable for the conduct of his agent and a master responsible for the acts and omissions of his servant. Section 414 deals with parties who hire independent contractors, and creates a duty with attendant direct liability where the control retained is less than that which exists in either of those derivative exposure relationships. If the controlled party is either an agent or a servant, then agency principles apply. This distinction probably explains why there are no construction negligence cases which hold a general contractor liable under *respondeat superior* rules for the conduct of a subcontractor.

The language of *comments a, b and c* to Section 414 *all* describe the type of control which is required to impose a duty of reasonable care upon a general contractor to protect third parties against hazards on a construction site of which the general contractor knows or has reason to know. As enunciated consistently in the majority of cases which construe the Restatement, that control must be over the “methods of work” or “its operative detail” in order for a duty to arise. Only in that respect will the retention of the right of supervision

be such “that the contractor is not entirely free to do the work in his own way.” (*comment c*). The misconception articulated by the court in *Cochran v. Sollitt* and adopted by a number of the cases that follow, that Section 414 sets the standards for both vicarious and direct liability has profound consequences in a number of respects. First, it creates a distinct basis for derivative exposure where none exists. Second, it lessens the type of supervision required for the creation of a duty to exercise ordinary care. Third, it has implications for the expansion of additional insured liability coverages of the type which are discussed in the following Section of this article.

Additional Insured Coverage Considerations

Coverage Analysis

Commencing with *Institute of London Underwriters v. Hartford Fire Ins. Co.*, 234 Ill. App. 3d 70, 599 N.E.2d 1311 (1st Dist. 1992), the courts have consistently recognized the right of an insured to select one insurer to provide the defense to the exclusion of others. These “targeted tenders” are frequently made in construction cases where the daisy chain of contracts from the owner through the sub-subcontractor on the bottom rung require lower level contractors to provide additional insured coverage endorsements to their CGL policies. The threshold issue in making or evaluating a targeted tender is whether there is a duty to defend under the policy, as it is well recognized that the duty to defend is broader than the duty to indemnify. *Sims v. Illinois National Cas. Co. of Springfield*, 43 Ill. App. 2d 184, 193 N.E.2d 123 (3rd Dist. 1963).

Traditionally, the standard for determining whether or not the duty to defend is triggered under a liability policy is that which the Illinois Supreme Court articulated in *Northbrook Property and Casualty Co. v. Transportation Joint Agreement*, 194 Ill. 2d 96, 98, 741 N.E.2d 253 (2000). There the court stated:

To determine an insurer’s duty to defend its insured, a court must look to the allegations of the underlying complaints. If the underlying complaints allege facts within or potentially within policy coverage, the insurer is obliged to defend its insured even if the allegations are groundless, false, or fraudulent. * * * An insurer may not justifiably refuse to defend an action against its insured unless it is clear from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy’s coverage.

Northbrook Property and Casualty Co. v. Transportation Joint Agreement, 194 Ill. 2d at 96.

Under *Northbrook* there is no duty to defend when it is clear from the face of the underlying complaint that the allegations fail to state facts which bring the case within, or potentially within the policy’s coverage.

Recently, the limited scope of *Northbrook* in comparing the language of the policy to the underlying complaint has been called into question. In *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 930 N.E.2d 1011 (2010), the court looked beyond the complaint in determining whether there was a potential for coverage in an assault and battery case under a comprehensive general liability policy which contained an intentional act exclusion with the following exception, “[t]his exclusion does not apply to ‘bodily injury’ resulting from the use of reasonable force to protect persons or property.” As a part of his answer in the underlying case, the Pekin insured filed a counterclaim alleging that the plaintiff was the aggressor and that the insured was “defending himself.”

Pekin filed a declaratory judgment action in which it asserted the exclusion for intentional acts. Pekin then filed a motion for judgment on the pleadings asserting that a comparison of the complaint to the policy precluded coverage based upon the exclusion. The trial court agreed and declared that Pekin had no duty to defend the underlying case because its policy did not cover the claims which were asserted in the complaint. The appellate court reversed holding that, “[i]n addition to relying upon the allegations of Johnson’s complaint in the underlying lawsuit to ascertain Pekin’s duty to defend, the court could consider whether the allegations which Wilson raised in his counterclaim against Johnson triggered the self-defense exception in the policy.”

The Illinois Supreme Court agreed. In doing so it recognized that under certain circumstances a circuit court may look beyond the underlying complaint in order to determine an insurer's duty to defend. For support, the court cited and relied upon *American Economy Ins. Co. v. Holabird and Root*, 382 Ill. App. 3d 1017, 886 N.E.2d 1166 (2008) and *Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301, 461 N.E.2d 471 (1983). In *Holabird and Root*, the appellate court considered the allegations of a third party complaint in finding there was a duty to defend stating:

The trial court should be able to consider all the relevant facts contained in the pleadings, including a third-party complaint, to determine whether there is a duty to defend. After all, the trial court "need not wear judicial blinders" and may look beyond the complaint at other evidence appropriate to a motion for summary judgment.

Holabird and Root, 382 Ill. App. 3d at 1024.

In *Fidelity & Casualty Co. of New York v. Envirodyne Engineers*, the court held that extraneous evidence could be considered in a declaratory judgment action except "when it tends to determine an issue crucial to the determination of the underlying lawsuit." *Envirodyne Engineers, Inc.*, 122 Ill. App. 3d at 304-05.

The *Wilson* court appears to meld the decisions in *Holabird and Root* and *Envirodyne Engineers* in considering all of the pleadings. That consideration included Wilson's counterclaim in the underlying lawsuit which alleged self-defense. Those allegations, together with various facts raised in the insured's memorandum in response to the plaintiff's motion for judgment on the pleadings permitted the inference that "Johnson's injury could have resulted from Wilson's act of self-defense," thereby triggering the duty to defend. Interestingly, the court seems to limit the breadth of its decision by finding that there were "unusual or compelling circumstances" which required the trial court to go beyond the sole allegations of the underlying complaint in order to determine the insured's duty to defend. Specifically, the self-defense exception to the intentional exclusion is something which would be unlikely to appear in the complaint in the underlying case, leading the court to conclude:

There is no possible reason for Johnson, suing in tort for the intentional conduct of Wilson, to allege that Wilson's actions were excused by, as the policy states: "Bodily injury" resulting from the use of reasonable force to protect persons or property." Thus, unless Wilson, as the defendant-insured in the underlying lawsuit, is allowed to plead facts alleging that the plaintiff's injury occurred through Wilson's reasonable use of self-defense, there is no way for the self-defense exclusion to be triggered, and the coverage is illusory.

Pekin Ins. Co. v. Wilson, 237 Ill. 2d at 465-66.

Thus, the court's recognition of the unusual circumstances which were posed by the exception to the exclusion may limit the application of *Pekin Ins. Co. v. Wilson* to its facts or to similar circumstances. Nonetheless, it is likely that the courts in declaratory judgment actions involving liability policies will look beyond the complaint in the underlying case to other pleadings in that litigation, particularly to third party complaints in the setting of additional insured coverage in construction cases. *American Economy Ins. Co. v. Holabird and Root*, 382 Ill. App. 3d 1017, 886 N.E.2d 1166 (1st Dist. 2008).

Additional Insured Endorsements

The extent of coverage afforded under an "additional insured" endorsement is the frequent subject of debate. Often the endorsement is tied to claims that are caused by the subcontractor's conduct or arise out of its work. *J.A. Jones Constr. Co. v. Hartford Fire Ins. Co.*, 269 Ill. App. 3d 148, 150. 645 N.E.2d 980 (1st Dist. 1995), and *U.S. Fire Insurance Co. v. Aetna Life & Casualty Co.*, 291 Ill. App. 3d 991, 994-98, 684 N.E.2d

956 (1st Dist. 1997). In those instances the courts generally reject the contention that liability on the part of the subcontractor is required to trigger coverage.

On the other hand, a number of endorsements are written to: (1) limit the scope of coverage which is afforded the additional insured to liability for the imputed negligence of its subcontractor, or (2) preclude coverage for the additional insured's own negligence. The former is typified by the following language:

'Who is an Insured' is amended to include as an Insured the person or organization shown in the schedule as an Additional Insured. The coverage afforded to the Additional Insured is solely limited to liability specifically resulting from the conduct of the Named Insured which may be imputed to the Additional Insured.

* * *

This endorsement provides no coverage to the Additional Insured for liability arising out of the claimed negligence of the Additional Insured, other than which may be imputed to the Additional Insured by virtue of the conduct of the Named Insured.

American Country Ins. Co. v. Kraemer Bros., 298 Ill. App. 3d 805, 808, 699 N.E.2d 1056 (1998).

The latter customarily states:

'Who Is An Insured' (Section II) is amended to include as an insured the person or organization shown in the schedule. Such person or organization is an additional insured 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.

Pekin Ins. Co. v. Beu, 376 Ill. App. 3d at 294, 876 N.E.2d 167 (2007).

The purpose of both endorsements is to limit the insurer's exposure to the vicarious liability of the additional insured for the acts or omissions of the named insured. For the purposes of considering the implications of *respondeat superior* exposure under Section 414 they will be treated alike under the descriptive: "[i]mputed liability/sole negligence endorsements."

Applying the expansive rule in *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 930 N.E.2d 1011 (2010), which permits the trial court in a declaratory judgment action to consider all of the pleadings in the underlying case, it can be said that there is no duty to defend when it is clear from the face of the pleadings in the underlying case that the allegations in those pleadings fail to state facts which bring the case within, or potentially within the policy's coverage. Before *Pekin Ins. Co. v. Wilson*, that standard was consistently applied in the limited context of "complaints" and is logically extended to the broader focus upon all pleadings. Thus, coverage has consistently been denied to additional insureds under imputed liability and sole negligence endorsements where the pleadings neither: (1) allege facts giving rise to liability on the part of the named insured or (2) provide a basis for the imputation of that liability to the additional insured. *Pekin Ins. Co. v. United Parcel Service*, 381 Ill. App. 3d 98, 104, 876 N.E.2d 167 (1st Dist. 2008), *American Country Ins. Co. v. McHugh*, 344 Ill. App. 3d 960, 975-976, 801 N.E.2d 1031 (1st Dist. 2003) and *National Union Fire Ins. Co. of Pittsburg v. R. Olson Constr. Contractors, Inc.*, 329 Ill. App. 3d 228, 234-235, 769 N.E.2d. 977 (2d Dist. 2002). In making the analysis it is significant to note that for the named insured to be potentially liable in the underlying case the pleadings must contain facts which permit the inference of fault on the part of the named insured *as well as* facts which show that the named insured's misconduct "proximately caused or contributed to cause [the plaintiff's] injury." *National Fire Ins. of Hartford v. Walsh Constr. Co.*, 392 Ill. App. 3d 312, 318-20, 909 N.E.2d 285 (1st Dist. 2009).

Commencing with *Village of Hoffman Estates v. Cincinnati Ins. Co.*, 283 Ill. App. 3d 1011, 670 N.E.2d 874 (1st Dist. 1996), the following endorsements have been given that effect: (1) those which limit coverage to

liability which is imputed from the named insured or (2) limit coverage to liability incurred solely as a result of the negligence of the named insured and/or (3) those which exclude coverage for the additional insured's own negligence. In *Village of Hoffman Estates v. Cincinnati Ins. Co.*, *supra*, the court found that the complaint was not based solely on the acts of the named insured, but rather alleged liability directly against the additional insured. Consequently, "the explicit terms of the endorsement are not met, and plaintiff is not covered under [the named insured's] insurance policy." The same result was reached shortly thereafter in *American Country Ins. Co. v. Kraemer Bros., Inc.*, 298 Ill. App. 3d 805, 699 N.E.2d 1056 (1st Dist. 1998), where coverage was "solely limited to liability specifically resulting from the conduct of the Named Insured which may be imputed to the Additional Insured." Again, the underlying complaint neither alleged predicate liability on the part of the named insured, nor any basis for its imputation to the additional insured which was directly exposed for its own misconduct. The court in *American Country Ins. Co. v. Cline*, 309 Ill. App. 3d 501, 722 N.E.2d 755 (1st Dist. 1999), reached the same result as the court in *Kraemer* based upon a like endorsement.

The policy in *National Fire Ins. Co. of Pittsburgh v. R. Olson Constr. Contractors*, 329 Ill. App. 3d 228, 769 N.E.2d 977 (2d Dist. 2002), specifically excluded coverage for the additional insured's "own negligence or the negligence of its servants, agents or employees." That exclusion precluded a duty to defend against a complaint which alleged a right to recover for the additional insured's own misconduct. As is generally the rule, the *Olson* court held that the additional insured had failed to sustain its burden of showing that its exposure under the complaint was for the fault of the named insured. Thus, the opinion stated:

The complaint does not allege that Olson [the additional insured] was somehow strictly liable or vicariously liable for Meyer's [the named insured's] conduct. There is no indication that Meyer was anything but an independent contractor, so Olson cannot be vicariously liable for the negligent acts of Meyer resulting in harm to Meyer's employee. There are no allegations in the underlying complaint that Olson was vicariously liable because it retained control over the operative details of Meyer's work.

National Fire Ins. Co. of Pittsburgh, 339 Ill. App. 3d at 235.

In *American Country Ins. Co. v. McHugh Constr. Co.*, 344 Ill. App. 3d 960, 801 N.E.2d 1031 (2003) the underlying complaint did not trigger a duty to defend under an endorsement which limited coverage to the named insured's acts or omissions, and correspondingly excluded coverage for "bodily injury arising out of any act or omission of the additional insured" There, as in the preceding authorities, a pleading which alleged negligence on the part of the additional insured did not permit the inference that it was otherwise liable for any misconduct by the named insured. In *Liberty Mutual Fire Ins. Co. v. Statewide Ins. Co.*, 352 F.3d 1098 (7th Cir., 2003) the court cited with approval several cases which stand for the proposition that an imputed liability endorsement is not triggered by a complaint which alleges the direct liability of the additional insured. See *American Country Ins. Co. v. Kraemer Bros., Inc.*, 298 Ill. App. 3d 805, 699 N.E.2d 1056 (1st Dist. 1998); *American Country Ins. Co. v. Cline*, 309 Ill. App. 3d 501, 722 N.E.2d 755 (2d Dist. 1999).

Dodd v. Federated Mutual Ins. Co., 365 Ill. App. 3d 260, 848 N.E.2d 656 (2d Dist. 2006), involved an endorsement which excluded liability for the additional insured's "sole negligence." Coverage under the policy was not triggered where the complaint alleged only negligence on the part of the additional insured. Similarly, in *Pekin Ins. Co. v. Beu*, 376 Ill. App. 3d 294, 876 N.E.2d 167 (1st Dist. 2007) the court held that where additional insured coverage was limited to "liability incurred solely as a result of some act or omission of the named insured and not for [the additional insured's] own independent negligence or statutory violation" the insurer had no duty to defend against allegations which were limited to the additional insured's "own negligence." The identical endorsement was thereafter given the identical interpretation, with the identical result by the First District in *Pekin Ins. Co. v. United Parcel Service, Inc.*, 381 Ill. App. 3d 98, 885 N.E.2d 386 (1st Dist. 2008).

Subsequently, the court in *National Fire Ins. of Hartford v. Walsh Constr. Co.*, 392 Ill. App. 3d 312, 318-20, 909 N.E.2d 285 (1st Dist. 2009), held that a policy which restricted additional insured coverage to liability

which was solely due to the named insured's negligence was not triggered by a complaint which alleged direct negligence against the named insured. As was the case in *Pekin Ins. Co. v. United Parcel Service*, allegations of "retained control" and "exercised control" were not sufficient to support the inference that the general contractor was vicariously liable for the acts and omissions of its subcontractors.

Contrary to the preceding authorities, the Appellate Court, First District, in *Illinois Emcasco Ins. Co. v. Northwestern National Cas. Co.*, 337 Ill. App. 3d 356, 785 N.E.2d 905 (1st Dist. 2003), construed a complaint which joined both the named insured and the additional insured as sufficiently broad to trigger coverage under an endorsement which limited liability of the latter to that which was imputed from the former. In reaching that result the court pushed the analysis envelope to its furthest boundaries stating:

Thus, if the insurance covers the liability on any set of facts consistent with the allegations needed to support recovery on any theory raised in the complaint, the insurance company cannot simply refuse to defend, without suing for a judgment declaring that it has no duty to defend.

Illinois Emcasco Ins. Co. v. Northwestern National Cas. Co., 337 Ill. App. 3d at 360.

Emcasco was distinguished and limited to its facts by subsequent Appellate Court, First District, decisions in *American Country Ins. Co. v. James McHugh Ins. Co.*, *supra*, and *Pekin Ins. Co. v. Roszak/ADC, LLC*, 402 Ill. App. 3d 1055, 931 N.E.2d 799 (1st Dist. 2010). However, the misapprehension that Section 414 of the Restatement recognizes vicarious liability in construction negligence cases has given it new life.

The confluence of vicarious liability exposure under Section 414 of the Restatement, as posited by *Cochran v. Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 874, 832 N.E.2d 355 (1st Dist. 2005) and the supreme court decision in *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 930 N.E.2d 1011 (2010), which expands the coverage analysis to pleadings and matters beyond the complaint creates a fertile field in which to find a potential for coverage. That potential is particularly fecund in jurisdictions and forums which follow the "possibility of coverage" rule espoused by the court in *Illinois Emcasco Ins. Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 785 N.E.2d 905 (1st Dist. 2003).

In *Pekin Ins. Co. v. Hallmark Homes, L.L.C.*, 392 Ill. App. 3d 589, 912 N.E.2d 250 (2d Dist. 2009), the court considered the following additional insured endorsement in the context of a claim for bodily injuries incurred by the employee of a subcontractor on a construction project:

Who is An Additional Insured (Section II) is amended to include as an insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured 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.

Pekin Ins. Co. v. Hallmark Homes, L.L.C., 392 Ill. App. 3d at 591.

The complaint in the underlying case was brought against Hallmark as the general contractor and one of its subcontractors, MC Builders, which was the named insured under the Pekin policy. Consistent with the favorable construction of the identical endorsement which it had received from the Appellate Court, First District, in *Pekin Ins. Co. v. Beu*, 376 Ill. App. 3d 294, 876 N.E.2d 167 (1st Dist. 2007), and *Pekin Ins. Co. v. United Parcel Service*, 381 Ill. App. 3d 98, 885 N.E.2d 386 (1st Dist. 2008), Pekin sought a declaration that it had no duty to defend the general contractor under the policy which it had issued to MC Builders. The court disagreed. Applying the vicarious liability rationale which was suggested in *Cochran v. Sollitt Constr. Co.* the court found that allegations that the general contractor "participated in coordinating the work being done and designated various work methods, maintained and checked work progress and participated in [the] scheduling of the work and inspection of the work" were sufficient to suggest that" Hallmark Homes retained control over many of the operative details of its agents' and subcontractors' work, which could subject Hallmark Homes to

vicarious liability.” *Pekin Ins.*, 392 Ill. App. 3d, at 594. Based upon that interpretation the court further reasoned that if Hallmark Homes were vicariously liable for the acts and omissions of its subcontractors then it could be potentially liable “solely as a result of MC Builders’ acts or omissions.” From that the court concluded:

Pekin argues that it need not defend Hallmark Homes unless the allegations of the underlying complaint specifically identify a scenario in which Hallmark Homes’ liability rests solely on MC Builders’ negligence. Pekin points out that the complaint: alleges that Hallmark Homes was itself negligent; does not identify MC Builders as a subcontractor; and does not specifically assert that Hallmark Homes’ liability rests on the negligence of MC Builders. However, the test is not whether the complaint directly alleges facts that show that the claim is within the coverage provided by the policy. Rather, the insurer owes a duty to defend unless “the insurance cannot possibly cover the liability arising from the facts alleged” and the terms of the policy clearly preclude coverage under all of the facts consistent with the allegations. **** As we have discussed, a fair reading of the complaint shows that Bremer has alleged a vicarious liability theory against Hallmark Homes and that MC Builders’ own negligence caused his injury. We must construe the complaint liberally in determining whether its allegations “allege facts within or *potentially* within policy coverage.” *** Because the allegations of the complaint, construed liberally, comprise at least one claim that is within the terms of Pekin’s policy coverage for additional insureds, liability under that complaint is “potentially within” the policy and Pekin has a duty to defend Hallmark Homes.

Pekin Ins. Co., 392 Ill. App. 3d at 595.

Not surprisingly, the Illinois Appellate Court, First District, which had rejected coverage under the identical endorsement in *Pekin Ins. Co. v. Beu*, 376 Ill. App. 3d 294, 876 N.E.2d 167 (1st Dist. 2007) and *Pekin Ins. Co. v. United Parcel Service, Inc.*, 381 Ill. App. 3d 98, 885 N.E.2d 386 (1st Dist. 2008), took issue with the reasoning and outcome in *Pekin Ins. Co. v. Hallmark Homes, L.L.C.* Considering the same language as its predecessors in the context of a complaint against the general contractor and its structural steel fabrication subcontractor for injuries suffered by the latter’s steel erection sub-subcontractor, the court held that, even under a vicarious liability theory, the complaint demonstrated no potential for coverage. In reaching that result the First District affirmed its reasoning in *Pekin Ins. Co. v. Beu* and *Pekin Ins. Co. v. United Parcel Service* despite allegations that Roszak. “individually and through its agents, servants and employees” was negligent in a number of respects which caused the accident. Rejecting the reasoning in *Pekin Ins. Co. v. Hallmark Homes, L.L.C.*, *supra*, the Roszak court found: (1) the complaint on its face did not establish “that Rockford is one of Roszak’s ‘agents, servants and employees,’” and (2) no facts were alleged which would indicate that” Roszak retained sufficient control over the details of Rockford’s work so as to be vicariously liable for the acts or omissions of Rockford.” In the latter respect the opinion points out that allegations regarding participation in the work, coordination, inspection, scheduling and authority to stop the work do not show control over the operative details of the subcontractor’s work so as to trigger vicarious, as opposed to direct liability. In the latter respect the court’s reasoning is consistent with the holding in *National Fire Ins. of Hartford v. Walsh Constr. Co.*, 392 Ill. App. 3d 312, 319-20, 909 N.E.2d 285 (1st Dist. 2009), that a subcontractor’s breach of its general duty “to provide a safe work place to the injured worker” is not sufficient to trigger coverage under an imputed liability or sole negligence additional insured endorsement.

Following *Pekin Ins. Co. v. Roszak*, *supra*, another division of the First District reached the antipodal result in construing the same endorsement. In *Pekin Ins. Co. v. Pulte Home Corp.*, 404 Ill. App. 3d 336, 935 N.E.2d 1058 (1st Dist. 2010), the plaintiff, a Commonwealth Edison employee, fell into an unguarded sewer manhole while walking in the backyard of a home which was under construction. He sued Pulte, the developer, and Kunde Construction, Inc., the sewer and water subcontractor. In the underlying complaint the plaintiff alleged that the defendants “owned, controlled and/or were in charge of the erection, construction, repairs,

alteration, removal and/or painting' of the home and 'individually and through their agents, servants and employees ... were present ... and participated in coordinating the work being done and designated various work method, maintained and checked work progress and participated in the scheduling of the work and inspection of the work,' and 'had authority to stop the work, refuse the work and materials and order changes in the work'" The pleading further averred that the defendants "by and through their agents, servants and employees," were guilty of various negligent acts and omissions. Pulte also filed a counterclaim for contribution against Kunde. Additionally, in response to Pulte's request to admit the plaintiff's theories at trial included but were not limited to all theories of vicarious liability permitted under Section 414 of the Restatement (Second) of Torts."

Pekin filed suit seeking a declaration that Pulte was not entitled to coverage because the additional insured endorsement did not insure Pulte against its own acts or omissions or those in which Pulte played a role. Both parties filed cross motions for summary judgment. The trial court denied Pekin's motion and granted Pulte's motion, finding that Pekin had a duty to defend Pulte in the underlying case. In affirming the court started with the liberal premise from *Illinois Emcasco Ins. Co. v. Northwestern National Casualty Co.*, *supra*, that an insurer is justified in declining to defend only when the terms of the policy "clearly preclude the possibility of coverage." The court then proceeded to apply the holding of the Illinois Supreme Court in *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 930 N.E.2d 1011 (2010), in considering matters *de hors* the underlying complaint, including Pulte's counterclaim, admissions by Kunde in its answer to that counterclaim, the plaintiff's response to Pulte's request for admissions regarding his intention to pursue vicarious or imputed liability, and the subcontract agreement between Pulte and Kunde. From these the court concluded:

Based on these admissions it is possible, perhaps even likely, that Kunde Construction will be found solely liable to Keyser in the underlying litigation, and that if Pulte is found to be vicariously liable, that liability will result solely from Kunde Construction's acts or omissions.

Pekin Ins. Co. v. Pulte Home Corp., 404 Ill. App. 3d at 342.

The *Pulte* court distinguishes its previous holdings in *Village of Hoffman Estates v. Cincinnati Ins. Co.*, 283 Ill. App. 3d 1011, 670 N.E.2d 874 (1st Dist. 1996), *Pekin Ins. Co. v. Beu*, 376 Ill. App. 3d 294, 876 N.E.2d 167 (1st Dist. 2007), and *Pekin Ins. Co. v. United Parcel Service*, 381 Ill. App. 3d 98, 104, 876 N.E.2d 167 (1st Dist. 2008) on the basis that the courts in those cases antedated *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 930 N.E.2d 1011 (2010) and did not look beyond the underlying complaint. The court also found it was significant that the named insured was also a defendant in the case, thereby permitting the trier of fact to determine that it was solely liable for the unguarded manhole thereby concluding that, "[a]s a result, any liability that Pulte may incur would be based solely on the acts or omissions of the named insured."

As the preceding discussion demonstrates, there is no clear consensus of opinion regarding an insurer's obligation to defend an additional insured under an "imputed liability" or "sole negligence" endorsement. Historically, the great majority of decisions have upheld the endorsements when the policy language is compared to a complaint which seeks damages from the additional insured based upon its own negligent acts and omissions. However, following *Cochran v. Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005), and its progeny some recent cases have construed those pleadings in the context of vicarious liability, thereby recognizing a "potential for" or "possibility of" imputed or derivative liability solely as a consequence of the named insured's conduct to the exclusion of the additional insured's negligence. It is significant to understand that even the latter and most liberal authorities address only the duty to defend. Unless and until judgment in the underlying case is actually entered against the additional insured on a *respondeat superior* or master-servant basis, there is no obligation to indemnify. The only exception would be in cases where the insurer declines to defend the additional insured, thereby estopping itself from asserting what would be otherwise prevailing policy defenses. *Illinois Emcasco Ins. Co. v. Northwestern National Cas. Co.*, 337 Ill. App. 3d 356, 362, 785 N.E.2d 905 (1st Dist. 2003).

Conclusion

Following *Cochran v. Sollitt Constr. Co.*, a number of appellate courts in construction negligence and related liability insurance cases have construed Section 414 of the Restatement (Second) of Torts as recognizing both vicarious and direct liability causes of action. Those authorities misperceive the rationale of Section 414, and in doing so misconstrue the clear language which relegates derivative liability exposures to instances which are covered by the Restatement of Agency. That misapprehension confuses the factors which are required for direct liability in construction negligence cases with those which the drafters of the Restatement discuss in negating what is required to create a duty on the part of the “employer” of an independent contractor. That confusion also has profound implications in additional insured coverage cases which involve the construction of “imputed liability” and “sole negligence” endorsements.

Thus far, there are no decisions in which an owner, general contractor or other contracting party has been found derivatively liable for the acts or omissions of a subcontractor. Nor should that vicarious exposure, which omits the defendant’s own actual or imputed knowledge of the hazard, be recognized, except in the extraordinary circumstances to which agency principles clearly apply.

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