

WORKERS' COMPENSATION PUBLICATION TEAM

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A WORD FROM THE PRACTICE CHAIR

If you enjoy cold weather, then January 2022 has been right up your alley. For the rest of us, grab another blanket or sweatshirt, turn up your thermostat, and dream about spring. Under the "count your blessings" subject matter, I am pleased that my job is one where I work indoors on days like today. My sincere thanks to those who brave the cold and work outside during these winter months.

A quick COVID update regarding the Illinois Workers' Compensation Commission: Docket calls and pre-trial hearings are still virtual (via Webex), and that will continue into the foreseeable future. Our workers' compensation trials, or arbitration hearings, are still taking place in-person. Most motion hearings are occurring

virtually, but there are some motion hearings that require an in-person appearance. But generally speaking, the Commission in Illinois is keeping as much as practical virtual, except trials and certain motion hearings.

With enthusiasm, I want to share the news of the return of Heyl Royster's Workers' Compensation Practice Group's Fall Claims Handling Seminar in 2022. Dates and times are under consideration, but we will continue with a virtual format. I can report our Team is eager to be back in action providing you and your Team with cutting-edge updates and content to help you with your everyday claims handling needs. For those clients interested in an in-person visit, we can accommodate that as well. Contact me and we can work on setting that up. More details will follow regarding the Fall Claims Handling Seminar as the planning unfolds.

In this month's article my partner, [Amber Cameron](#), outlines for us what happened in a case where a workers' compensation carrier asserted its insured failed to cooperate in investigation, thus nullifying the carrier's duty to defend or indemnify the employer in the pending workers' compensation matter. In the

case of *Country Mutual Insurance Co. v. Under Construction and Remodeling, Inc.*, the Appellate Court grappled with what obligations are owed by each party in an insurance contract before a determination could be made regarding whether a breach of the cooperation clause had occurred to nullify the insurer's duty to defend or indemnify the employer in the workers' compensation claim. Amber talks about the "take-aways" or lessons our clients can appreciate and learn from this fact pattern which does come up now and again. It is always best to know the rules the Courts want us to play by when figuring out who is upholding their end of the contract.



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FEATURE ARTICLE

Country Mutual vs. Under Construction: Insurer and Employer Contractual Duties

By Amber Cameron

There are basic duties that apply to relationships between insureds and insurers. The insurance policy between the insurer and the insured is a contract and the language of that contract spells out the duties of each party. In general, most policies state that if a suit or claim is filed, the insured has a duty to the insurer to give notice of the filing, a duty to cooperate with defense of the claim, and a duty of good faith and fair dealing. The insurer has a duty to defend and indemnify the insured in the claim.

The Facts

In *Country Mutual Insurance Co. v. Under Construction and Remodeling, Inc.*, the Appellate Court of Illinois, First District, overturned a grant of summary judgment to the insurance carrier of an Illinois workers' compensation policy. 2021 IL App (1st) 210600. Petitioner Kazimierz Szymanski ("Szymanski") alleged an injury to his left shoulder on July 2,

2019 while working for his employer, Under Construction and Remodeling, Inc. ("Under Construction") and filed a timely Application for Adjustment of Claim with the Illinois Workers' Compensation Commission. Under Construction had a workers' compensation insurance policy at the time with Country Mutual Insurance Company ("Country Mutual"). Country Mutual began efforts to investigate Szymanski's injury claim and as part of that investigation, contacted Under Construction for more information. Country Mutual claimed to have attempted to contact Under Construction nine times within a four-month period, but the employer failed to respond.



Country Mutual filed a complaint against Under Construction (and Szymanski as a necessary part to the suit) for a declaratory judgment in Cook County, claiming it had no duty to defend or indemnify the employer, Under Construction, in Szymanski's workers' compensation claim because the insured had breached the cooperation clause

in the insurance policy. Country Mutual claimed Szymanski was not an employee of Under Construction based on an audit that did not list Szymanski as an employee, therefore the workers' compensation policy did not apply. Further, Under Construction had failed to cooperate with Country Mutual's investigation of the claim by not responding to its correspondence and therefore, the insurer had no obligation to defend or indemnify the employer in the workers' compensation claim filed by Szymanski.

Szymanski was personally served with the civil complaint and entered an appearance, but Under Construction was only served through leaving the complaint with a registered agent on file with the Illinois Secretary of State. Under Construction failed to enter an appearance or answer in the civil claim and the Court granted Country Mutual's Motion for Default Judgment against Under Construction. Country Mutual later filed a Motion for Summary Judgment with the sole argument that Country Mutual had exercised a reasonable degree of diligence in seeking Under Construction's cooperation in defense of the underlying workers' compensation claim without success and Under Construction had breached the cooperation clause of the insurance policy. In support, Country Mutual

stated that it made phone calls to Under Construction but was unable to leave messages, sent letters by US mail, and sent emails without a response. Additionally, Country Mutual had sent a special investigator to the registered agent's address. The evidence submitted to the Court however did not include the phone numbers, physical addresses, email addresses or the time of day contact was attempted. Further, the letters were not certified (but for the reservation of rights letter), and the record did not include whether any of the letters were returned undelivered or if anyone had signed for the one certified letter. The insurer claimed the silence by Under Construction was "willful refusal to cooperate" and this refusal "greatly prejudiced" Country Mutual's ability to obtain facts necessary to defend the workers' compensation claim.

A default judgment was entered by the Cook County Circuit Court against the employer, Under Construction, after which the insurer moved for summary judgment. In response to the Motion for Summary Judgment, injured employee Szymanski claimed Country Mutual had failed to establish how it was prejudiced by Under Construction's alleged failure to cooperate, argued that the insurer had not displayed a reasonable degree of due diligence in seeking the employer's cooperation, and

further that the employer's failure to respond to letters and calls as alleged did not mean it was willfully noncooperative with the workers' compensation claim. Summary judgment was granted on the basis of the employer's breach of contract under the cooperation clause of the insurance policy.

After summary judgment was entered in Country Mutual's favor, Szymanski filed an appeal as a defendant in Country Mutual's declaratory judgment complaint. The Appellate Court reversed the summary judgment and remanded the case back to the Circuit Court. The basis for summary judgment was the employer's breach of the insurance policy's cooperation clause with respect to the insurer's investigation of Szymanski's workers' compensation claim. However, the burden of establishing breach of contract rests on the insurer; in order for the insurer to make a *prima facie* case of failure to cooperate, it must prove both a breach of the cooperation clause in the contract and resulting substantial prejudice to the insurer.

The Appellate Court ruled that the record did not establish that the insurer engaged in "reasonable diligence" in attempting to secure the employer's cooperation in the workers' compensation investigation and defense.

The Appellate Court noted the insurer had attempted to reach the policyholder employer by phone, mail, email and through personal service but the evidence didn't indicate any communications reached the employer or if they did, did not make clear to Under Construction that it was required to respond and participate in the investigation. The insurer did not hire a special investigator until after the civil complaint was filed, and the investigator's efforts did not prove any contact was reached with the insured. While Under Construction had recently renewed its policy with the same insurance broker, Country Mutual did not attempt contact through the broker or the address for Under Construction listed on the new policy. The Court opined that the insurer did try to reach the insured but did not show reasonable diligence in its effort and the lack of response by the insured in this case was not enough to demonstrate a willful refusal to cooperate in the investigation of the workers' compensation claim. In short, the insurer did not do enough to be relieved of its duty to defend and indemnify the employer. The summary judgment was reversed and the claim was remanded.

Conclusion

The holding in Country Mutual makes clear that in order for an insurer to be relieved of its

duty to defend and indemnify an insured for breach of the cooperation clause of an insurance policy, there must be convincing evidence that the insurer made a diligent effort to solicit the insured's cooperation in the defense of the claim in addition to persuasive evidence that the insured willfully refused to cooperate in the investigation. What actions could the insurer have taken after its initial efforts to contact the insured failed to elicit a response? It would likely have gone a long way with the court if the insurer had confirmed the insurer's good addresses and phone numbers for its correspondence through a skip trace service, Szymanski himself, or policy broker. The correspondence should have also directly outlined the action that the insured needed to take to assist in the defense of the claim and the consequences of inaction. Further, if the insurer provided evidence of receipt by the insured of certified mail sent, used a special investigator to attempt service before filing the declaratory judgment, or used other sources that were likely to disclose and reach the insured and then pursued the leads that were generated, the Court would have likely found that the insured breached the cooperation clause of the policy if they failed to respond and relieved the insurer of its duty to defend and indemnify the insured in the workers' compensation claim.



ABOUT THE AUTHOR

Amber Cameron

Heyl Royster Partner Amber Cameron concentrates her practice in workers' compensation and toxic tort litigation. Her previous experience as a staff attorney for the Illinois Workers' Compensation Commission provides her unique expertise when representing employers of all sizes at dockets in Missouri and southern Illinois—having drafted hundreds of opinions on review and on remand, gaining advanced knowledge in workers' compensation law. Additionally, she devotes a portion of her practice to the defense of asbestos personal injury suits, representing the firm's clients at depositions, hearings, and procedural matters.



Amber earned her law degree and a certificate in dispute resolution from the University of Missouri-Columbia School of Law. As a law student, she served as Vice-Justice of the Lawson Chapter of Phi Alpha Delta Law Fraternity and excelled in legal writing, winning Best Brief in the Board of Advocates Moot Court Competition.



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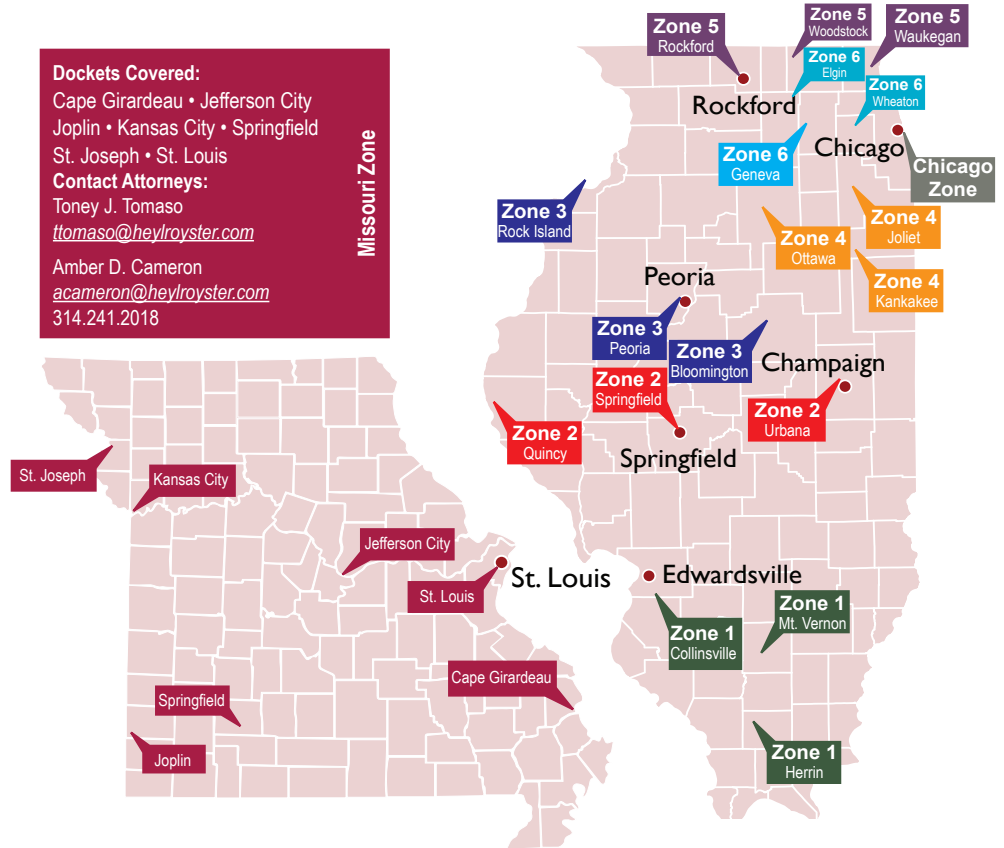
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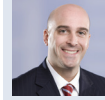
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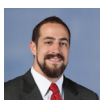
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