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(E)stop, Hey, What's That Sound? Insurers Get What's Going Down

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For what it's worth, a fight between insurance companies can sound like music to a policyholder lawyer's ears. It's really fun to hum along when a major insurer tries to use a classic policyholder tactic against another insurer. Two recent disputes between insurers involved the Illinois estoppel rule, which generally bars an insurer from contesting its duty to indemnify after it has breached its duty to defend. The insurance companies most definitely were not singing in harmony. What can policyholders learn from these insurance company vs. insurance company internecine disputes? In both cases, insurance companies actually said that it is correct to estop an insurance company from raising coverage defenses. Keep that thought in your back pocket the next time an insurance company refuses to defend or do the right thing by its insureds. **Battle Lines Being Drawn** In *Certain Underwriters at Lloyd's v. Central Mut. Ins. Co.,* 2014 IL App (1st) 133145, a general contractor (General) was the named insured on a Lloyd's general liability policy and, in compliance with a construction contract, an additional insured on its subcontractor's (Sub's) Central Mutual policy. An employee of another subcontractor sued General and Sub for a workplace injury. General tendered its defense to its own carrier, Lloyd's, which defended under a reservation of rights. The Lloyd's-appointed defense counsel tendered to Central Mutual, which responded with multiple letters asking why General would be covered as an additional insured. Months passed before Lloyd's itself purported to re-tender General's defense to Central Mutual, which declined. In Lloyd's declaratory judgment action against Central Mutual, the court held that General was indeed an additional insured under the Central Mutual policy but only in excess of Lloyd's primary coverage. The court began its analysis by looking at the "other insurance" provisions of the respective policies. The Lloyd's policy said it was excess over any other primary insurance for which General was added as an additional insured. The Central Mutual policy said the additional insured coverage was excess unless a contract specifically required the additional insured coverage to be primary. So then the court reviewed the construction contract and saw that it was silent on whether the additional insured coverage was to be primary. The court concluded that silence left the Central Mutual additional insured coverage as excess and Lloyd's as primary. Ho hum, primary vs. excess solved, nothing to see here. But wait! Illinois law has long held that an insurer with a duty to defend may not simply refuse to defend. *Employers Ins. of Wausau v. Ehlco Liquidating Trust,* 708 N.E.2d 1122 (Ill. 1999). To contest its duty, the insurer must either defend under a reservation of rights or file a declaratory judgment action to determine its obligations. *Id.* ***If the insurer sits on the sidelines and does nothing, it breaches its duty to***

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defend and is estopped from raising policy defenses to its duty to indemnify the insured in the event of a judgment or settlement. *Id.* Because Central Mutual neither defended General under a reservation of rights nor filed a declaratory judgment action, Lloyd's contended that Central Mutual should be estopped from asserting its defenses. The court said no. Because Central Mutual's coverage was excess and not primary, it had no duty to defend, could not be in breach of that duty, and therefore was not subject to estoppel. Plus, Central Mutual didn't just sit around ignoring the case against General. Central Mutual sent at least three letters trying to investigate the claim and received no meaningful response until Lloyd's filed its declaratory judgment action. And Central Mutual promptly responded to Lloyd's complaint and filed affirmative defenses seeking its own declaratory judgment. So Central Mutual's additional insured coverage of General remained merely excess to the primary Lloyd's policy issued to General, and Central Mutual was not estopped from relying on its excess status. **Paranoia Strikes Deep** *Mt. Hawley Ins. Co. v. Certain Underwriters at Lloyd's,* 2014 IL App (1st) 133931, also arose out of a construction accident and the additional insured coverage for a general contractor (General). This time, Mt. Hawley was General's carrier, and the Lloyd's policy issued to a subcontractor (Sub) included an endorsement providing additional insured coverage for liability caused, in whole or in part, by acts or omissions of Sub or others acting on Sub's behalf. Plaintiff sued General, Sub and others, and General tendered its defense to Lloyd's. Citing the absence of any allegation that General was vicariously liable for Sub's acts or omissions, Lloyd's refused to defend or indemnify. Sub got out of the injury case on summary judgment, at which point Lloyd's may have said "hooray for our side." Not so fast. Mt. Hawley settled on behalf of General and then sued Lloyd's. Eventually Lloyd's admitted it should have defended General, and it agreed to pay General's defense costs. As for the settlement that Mt. Hawley paid for General, Lloyd's pointed to the summary judgment for Sub. No liability for Sub means no vicarious liability for General, and that means no duty to indemnify General as an additional insured. That's what Lloyd's said. But the court held that Lloyd's stepped out of line. The fact that its insured, Sub, wasn't liable to the plaintiff did not eliminate Lloyd's duty to defend General as an additional insured. Because it failed to defend General, Lloyd's was estopped from contesting its duty to indemnify. Lloyd's may or may not be paranoid, but it didn't really lose on each side of the estoppel rule because Lloyd's isn't really a single company. It's more like an exchange where various investors accept portions of risks and the associated premiums. So the Certain Underwriters who couldn't get Central Mutual estopped probably were not the same Certain Underwriters who were estopped by Mt. Hawley. But it's still interesting to hear insurers sing different tunes on estoppel. They're getting so much resistance from behind their own industry.