2019 IL App (1st) 182468-U

No. 1-18-2468

Order filed on September 17, 2019.

Second Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ALLIED WORLD SPECIALTY INSURANCE COMPANY, f/k/a DARWIN NATIONAL ASSURANCE COMPANY, Plaintiff and Counterdefendant-Appellant, v. JOHN SEXTON SAND & GRAVEL CORPORATION; SMD ASSOCIATES, INC.; and SEXTON RESOURCES MANAGEMENT, LLC; Defendants and Counterplaintiffs-Appellees, TODD SEXTON DANIELS; ARTHUR A. DANIELS; CAROLE S. MALINSKI; and ANDREW DANIELS, Defendants and Counterplaintiffs, SEXTON PROPERTIES, R.P., LLC; SEHC, LLC; SFM, LLC; A&L DANIELS GST TRUST; CAROL S. MALINSKI TRUST; KATHLEEN S. DANIELS TRUST; EILEEN G. SEXTON TRUST; HEIDI ANETSBERGER-DANIELS TRUST; and ALLIED WASTE TRANSPORTATION, INC., Defendants.	)	Appeal from the Circuit Court of Cook County. No. 2016 CH 09452 The Honorable Diane J. Larsen, Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Coghlan concurred in the judgment.

ORDER

¶1 *Held*: Where the insurer breached its duty to defend, it was estopped from denying coverage and was liable for defense costs and prejudgment interest.

¶2 Allied Waste Transportation, Inc., (AWT) and John Sexton Sand & Gravel Corporation (Sexton) were partners in the Congress Development Company (CDC), which operated a landfill at 4100 West Frontage Road in the Village of Hillside (the Congress Site). In 2015, AWT filed a state lawsuit against Sexton and other related entities, including SMD Associates, Inc. (SMD). According to AWT, Sexton essentially transferred assets to SMD and others to avoid Sexton's share of financial responsibility to the CDC and the Congress Site.

¶3 Subsequently, Sexton and SMD's insurer, Allied World Specialty Insurance Company, f/k/a Darwin National Assurance Company (Allied), denied coverage. Allied also sought a declaration that it had no duty to defend or indemnify the insureds. The circuit court found, however, that Allied had a duty to defend and breached that duty. Consequently, Allied was estopped from denying coverage. On appeal, Allied challenges the court's aforementioned determinations as well as the amount of damages awarded. For the following reasons, we affirm the circuit court's judgment.

¶ 4 I. Background

¶ 5 A. The Landfill

¶ 6 In 1980, Sexton formed a partnership with AWT's predecessor to operate the Congress Site. As of February 2007, AWT and Sexton were equal partners, and the Congress Site had

received 27 years' worth of municipal solid waste. That waste contained hazardous substances, which were alleged to have been detected in leachate and groundwater at the Congress Site.[1]

¶ 7 In 2006, the Village of Hillside (the Village) filed a lawsuit against the CDC, alleging it had violated the Village's odor ordinance and created a public nuisance. Pursuant to an agreed order entered in March 2007, the Congress Site would stop accepting solid waste as of 2008 and move toward closing. The agreed order also required the CDC to reimburse the Village for reasonable costs and expenses incurred with respect to the site.

¶ 8 The Congress Site accepted its final solid waste delivery in June 2008 and subsequently closed. According to AWT, it performed closure, post-closure and remediation activities on the CDC's behalf. In addition, AWT and Sexton executed an amended partnership agreement in September 2010, which altered the partners' interests in the CDC but essentially left each partner responsible for one-half of all capital and expenses. According to AWT, however, Sexton, to eliminate its ability to satisfy its obligations to the CDC, had already begun transferring assets to related corporations and insiders, such as SMD.

¶ 9 B. AWT Seeks Legal Recourse

¶ 10 i. Federal Lawsuit

¶ 11 In 2013, AWT filed a federal lawsuit against Sexton and others not party to this appeal. AWT alleged breach of contract and sought the recovery of costs incurred with respect to the Congress Site. According to AWT, Sexton was liable under the Comprehensive Environmental

[1]We note that Allied's fact section contains impermissible argument, omits pertinent facts and misrepresents the record. See Ill. S. Ct. R. 341(h) (6) (eff. May 25, 2018) (requiring that facts be "stated accurately and fairly without argument or comment"). We also note that Allied's argument section contains an erroneous, misleading quote. See Ill. S. Ct. R. 341(h) (7) (eff. May 25, 2018). We urge Allied's counsel to take greater care in the future.

Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9607) and the Illinois Joint Tortfeasor Contribution Act (740 ILCS 100/0.01 *et seq.* (West 2012)).

¶ 12 AWT alleged that not only had the CDC paid the Village over $1 million, but the CDC had also entered into a $1.2 million settlement with Illinois for various violations. Additionally, AWT had entered into a settlement with a hotel adjacent to the Congress Site. Moreover, a neighboring freight terminal contributed contamination to the Congress Site, resulting in further costs. Between February 2007 and July 2012, the CDC incurred $125 million in expenses, including operating, investigation and remediation expenses, and sustained $110 million in total losses. Yet, Sexton had not contributed toward the CDC's expenses since at least February 2007.

¶ 13 Sexton did not ask Allied to defend the federal action and the parties agree that no coverage was available.

¶ 14 ii. Underlying Lawsuit

¶ 15 On October 28, 2015, AWT filed a complaint against Sexton, SMD and others in state court, alleging that Sexton and SMD transferred assets to affiliates with the intent to hinder, delay or defraud a creditor, namely, AWT.[2] Relying on documents produced in the federal action, AWT alleged violations of the Illinois Fraudulent Transfer Act for Avoidance of Intentionally Fraudulent Conveyances (740 ILCS 750/5(a)(1) (West 2014) (count 1) and unjust enrichment (count 2).

¶ 16 According to AWT, Sexton transferred assets worth more than $11 million to SMD in December 2006, but received no consideration in return. Those assets included Spencer Farms. In December 2012, SMD sold a portion of Spencer Farms for $10.3 million. Between 2012 and 2015, SMD used the proceeds from that sale to benefit Sexton's insiders and affiliates.

[2]*Allied Waste Transportation, Inc. v. John Sexton Sand & Gravel Corp., et al.*, 2015 L 010948.

¶ 17 AWT further alleged that from at least October 2005 through December 2009, Sexton received more than $5.6 million in cash dividends from its interest in Nortech Waste, LLC (Nortech). Yet, Sexton subsequently transferred its interest in Nortech to Sexton Resources Management, LLC (SRM) in exchange for a $4.8 million note receivable.[3] Between December 2009 and June 2015, SRM received $9.4 million in Nortech cash dividends and transferred more than $5.5 million to other Sexton affiliates.

¶ 18 Unlike the federal action, Sexton and SMD tendered the defense of the underlying state action to Allied.

¶ 19 C. The Insurance Policies

¶ 20 Allied issued Sexton a management liability policy for the period of June 1, 2013, through June 1, 2014. Relevant to this dispute, liability was generally capped at $1 million, and both SMD and SRM were named as additional insureds. While the policy covered "loss," including "damages, settlements or judgments," the definition of "loss" excluded "amounts deemed uninsurable under applicable law." In addition, the policy contained an "Absolute Pollution Exclusion" as well as a "Specific Litigation or Event Exclusion." The latter exclusion identified "Hillside Landfill/Congress Development Company" as "the event."

¶ 21 Allied also issued a management liability policy to SMD for the period of June 1, 2015 to June 1, 2016. The policy limited coverage to $1 million and defined "loss" in the same manner as the Sexton policy. Furthermore, the SMD policy contained a pollution exclusion as well as a prior acts exclusion.

¶ 22 D. The Present Declaratory Action

[3]While SRM has joined in Sexton and SMD's brief, the arguments on appeal pertain largely to Sexton and SMD.

¶ 23 In late October 2015, Sexton and SMD tendered the defense of the underlying lawsuit to Allied. In early December, Allied notified both insureds that the policy provided no coverage and, consequently, Allied would neither defend nor indemnify them. Sexton, SMD and AWT subsequently entered into a settlement agreement as to both the underlying lawsuit and the federal lawsuit on July 8, 2016. Pursuant to the agreement, Sexton would pay Allied $7.125 million and SMD would pay Allied $1 million, for a total settlement payment of $8.125 million.

¶ 24 On July 19, 2016, 11 days after the settlement was reached, Allied filed the present action against Sexton, SMD and others, seeking a declaration that their insurance policies did not require Allied to defend or indemnify them with respect to the underlying lawsuit. The underlying lawsuit was dismissed 10 days later, however, due to the settlement.[4] Sexton and SMD then filed a counterclaim in Allied's declaratory judgment action, asserting that Allied breached its duty to defend and, as a result, Allied was estopped from denying coverage.

¶ 25 Allied moved for judgment on the pleadings in the declaratory judgment action. The court denied that motion, however, and subsequently granted the insureds' motion for judgment on the pleadings.[5] The court found that Allied breached its duty to defend and was required to indemnify its insureds.

¶ 26 When Sexton and SMD sought more than $2 million in damages, Allied argued, among other things, that the insureds had failed to allocate the total settlement amount between the underlying lawsuit and the federal lawsuit. Allied added that the insureds were not entitled to

[4]A court is generally permitted to take judicial notice of matters of record from another case in that court. *All Purpose Nursing Service v. Illinois Human Rights Comm'n*, 205 Ill. App. 3d 816, 823 (1990).

[5]While the record contains the transcript from the hearing at which the circuit court granted the insureds' motion for judgment on the pleadings, Allied has failed to provide a transcript reflecting the court's denial of Allied's own motion.

defense costs or prejudgment interest. The circuit court subsequently awarded the insureds $2 million as well as attorney fees and prejudgment interest, for a total of $2,353,982.48.

¶ 27 II. Analysis

¶ 28 A. Duty to Defend

¶ 29 On appeal, Allied first asserts that the circuit court erred in entering judgment in favor of the insureds on the pleadings because Allied had no duty to defend. Specifically, Allied contends that coverage was barred by (1) the prior acts exclusion in the SMD policy; (2) the specific litigation or event exclusion in the Sexton policy; and (3) the pollution exclusions found in both polices. Allied also argues that the relief sought in the underlying lawsuit did not constitute a covered "loss" under the policies and Illinois law. We review a judgment on the pleadings *de novo*. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010).

¶ 30 Judgment on the pleadings is appropriate where the pleadings disclose no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. *Id*. Courts may consider facts appearing on the face of the pleadings as well as matters subject to judicial notice and any judicial admissions. *Hooker v. Illinois State Board of Elections*, 2016 IL 121077, ¶ 21. All well-pleaded facts, and reasonable inferences drawn therefrom, are taken as true. *Id*.

¶ 31 An insurer's duty to defend its insured is broader than its duty to indemnify. *Illinois Municipal League Risk Management Ass'n v. City of Genoa*, 2016 IL App (4th) 150550, ¶ 12. In a declaratory judgment action to determine whether an insurer has a duty to defend, courts ordinarily compare the underlying complaint's allegations with the insurance policy's provisions. *Wilson*, 237 Ill. 2d at 455. "If the facts alleged in the underlying complaint fall within, *or potentially within*, the policy's coverage, the insurer's duty to defend arises." (Emphasis added.) *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). This is true

even if only one of several theories in the underlying complaint falls within the policy's potential coverage. *U.S. Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991).

¶ 32 The threshold for an underlying complaint to fall within coverage is low (*Illinois Municipal League Risk Management Ass'n*, 2016 IL App (4th) 150550, ¶ 13) and courts must liberally construe the facts alleged in favor of the insured (*Valley Forge Insurance Co. v. Swiderski Electronics, Inc*., 223 Ill. 2d 352, 363 (2006)). While the insured has the burden of proving that its claim falls within coverage (*Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009)), the insurer has the burden of proving that an exclusion applies (*Skolnik v. Allied Property & Casualty Insurance Co.*, 2015 IL App (1st) 142438, ¶ 26). Moreover, courts liberally construe policy limitations in favor of the insured. *Empire Indemnity Insurance Co. v. Chicago Province of the Society of Jesus*, 2013 IL App (1st) 112346, ¶ 39.

¶ 33 I. Prior Acts Exclusion

¶ 34 Allied contends that the Prior Acts Exclusion in SMD's policy precluded coverage in the underlying action:

> "No coverage will be available for Loss from any Claim based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any Wrongful Act actually or allegedly committed prior to June 1, 2014."

According to Allied, the policy unambiguously excludes coverage for anything even related to wrongful acts alleged to have been committed before June 1, 2014. See *General Insurance Company of America v. Robert B. McManus, Inc.*, 272 Ill. App. 3d 510, 512, 515-16 (2006) (finding an exclusion to be unambiguous where it stated "that coverage shall not apply to claims or suits arising as a result of acts, errors, or omissions which occurred prior to April 4, 1990").

¶ 35 We note that the language "arising out of" may be interpreted differently in coverage provisions and exclusions. See *United Services Auto Ass'n v. Dare*, 357 Ill. App. 3d 955, 969-70 (2005). The cases presented by the parties suggest, however, that whether the inclusion of "arising out of" renders a provision ambiguous depends largely on overall context. See *e.g. Oakley Transportation, Inc. v. Zurich Insurance Co.*, 271 Ill. App. 3d 716, 718, 722, 726-27 (1995) (finding a provision excluding damages "arising out of *** entrustment to others of any *** 'auto' *** owned or operated by or rented or loaned to any insured" unambiguously excluded claims for negligent entrustment and negligent supervision); *United Services Auto Ass'n*, 357 Ill. App. 3d at 959, 968-971 (finding that policy excluding injury or damage "arising out of *** ownership" of motor vehicles was ambiguous).

¶ 36 We will assume for purposes of this appeal that the provision at issue is facially unambiguous and broad. That being said, the record does not support Allied's contention that *all* prior acts at issue in the underlying action were alleged to have occurred before June 2014.

¶ 37 AWT alleged in the underlying action that it was relying on Sexton's general ledgers from January 2006 to March 2014. Yet, the underlying complaint did not allege that *all* of the fraudulent conveyances occurred before June 2014. Additionally, the underlying complaint alleged that "as recently as August 24, 2015, Sexton produced other documents establishing Sexton's transfer of assets to affiliates and insiders." Furthermore, the underlying complaint challenged transfers that SMD itself made "as of June 2015." Thus, the record shows that the underlying complaint was at least potentially based on acts occurring after June 1, 2014, which would not be barred by the exclusion.

¶ 38 Allied argues that even if some of the fraudulent transfers took place after June 1, 2014, the transfers were alleged to have been part of the same scheme to hide assets. It follows, argues

Allied, that the prior acts exclusion would still be a complete bar to coverage. *Cf. Bainbridge Management, LP v. Travelers Casualty & Surety Company of America*, No. 2:03-cv-459 JM, 2006 W.L. 978880, at *3-4 (N.D. Ind. Apr. 10, 2006) (unpublished decision) (finding in the context of the duty to indemnify that an exclusion of any claim "arising out of or in any way related to any Wrongful Act committed or alleged to have been committed, in whole or in part, prior to October 6, 1998" unambiguously precluded coverage for a scheme alleged to commence before October 1998). [6] Yet, Allied ignores the possibility that the underlying transactions were not all improper or all part of the same scheme. See Ill. S. Ct. R. 341(h) (7) (eff. May 25, 2018) (providing that points not argued are forfeited); *Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 12 (reiterating that courts are entitled to clearly defined issues supported by cohesive arguments and pertinent authority). Liberally construing the facts alleged in favor of the insured, potential coverage exists.

¶ 39 ii. The Specific Litigation or Event Exclusion

¶ 40 Next, Allied asserts that the "Specific Litigation or Event Exclusion" in the Sexton policy precludes coverage. Sexton argues, however, that the exclusion is facially ambiguous and does not warrant the broad reading that Allied suggests.

¶ 41 The exclusion, which defines "Event" to solely include the "Hillside Landfill/Congress Development Company," states as follows:

> "This Coverage Section shall not cover any Loss in connection with any Claim alleging, arising out of, based upon or attributable to:
>
> (1) the Event**;**

[6]We limit our discussion of the numerous, nonbinding decisions relied on by the parties on appeal. *Nicholson v. Shapiro & Associates, LLC*, 2017 IL App (1st) 162551, ¶ 11 (stating that cases from other jurisdictions are not binding but may be persuasive).

(2) the prosecution, adjudication, settlement, disposition, resolution or defense of either the Event or any claims arising from or based upon an Event; or

(3) any Wrongful Act**,** underlying facts, circumstances, acts or omissions in any way relating to the Event**."**

¶ 42 We first note the difficulty of defining "Event" to include only the CDC or the Congress Site itself. Neither constitutes an "event" within the ordinary meaning of the word. In addition, substituting "Event" with the CDC or Congress Site produces an awkward syntax. For example, the exclusion of coverage for "any Claim alleging *** the [CDC]" is an incomplete proposition. Thus, the exclusion is troubling from the outset. See *Elson v. State Farm Fire & Casualty Co.*, 295 Ill. App. 3d 1, 7 (1998) (stating that "exclusions from the general coverage provided by an insurance policy must be stated in such clear, definite and explicit language as to warrant the conclusion that the insured understood and accepted them").

¶ 43 Allied observes that when the policy was issued, the Congress Site was subject to significant environmental litigation. Allied suggests that this was the impetus for the exclusion. If so, it is reasonable to conclude that the exclusion was intended to preclude coverage for loss based on litigation and damages for which the CDC itself was in some way responsible.

¶ 44 With that in mind, and considering the exclusion's language, a reasonable person could find that AWT's claims against the insureds arose out of, were based on and were attributable to wrongful acts and underlying facts related to the insureds' conveyances, not conduct of the CDC or the Congress Site themselves. See 740 ILCS 160/5(a) (1) (West 2014). As Allied states in its opening brief, the underlying lawsuit stemmed from the "alleged fraudulent transfer of assets." Stated differently, the facts underlying AWT's lawsuit as a creditor differ from the facts that led AWT to become a creditor in the first instance, notwithstanding that the underlying complaint

referred to the CDC partnership as the basis for making AWT a creditor and for giving Sexton a motive to transfer assets. The success of AWT's action did not rise or fall based on the conduct of the CDC or the Congress Site. Rather, the underlying action was based on the insureds' conduct.

¶ 45 To be sure, one could also reasonably read language such as "in any way related" to encompass any number of degrees of separation from the actual claims at hand. Yet, we must construe this exclusion narrowly and resolve this ambiguity in favor of Sexton and SMD. The specific litigation or event exclusion did not preclude coverage.

¶ 46 iii. The Pollution Exclusions

¶ 47 Allied also asserts that the policies' pollution exclusions precluded coverage. The exclusion in the Sexton policy states as follows:

> "This Policy shall not cover any Loss in connection with any Claim alleging, arising out of, based upon or attributable to any injury, matter, damage, liability, obligation or risk due to, arising from or related to any Pollutant. This Exclusion shall apply whether such injury, matter, damage, liability, obligation or risk may arise from any federal, state, provincial, municipal or other local laws, statutes, ordinances, rules, *** and all amendments thereto, including without limitation any state voluntary cleanup or risk-based corrective action guidance, or any voluntary or contractual undertaking of any legal responsibility or obligation, or any other basis."[7]

Additionally, the SMD exclusion provides:

> "No coverage will be available for Loss from any Claim alleging, arising out of, based upon, attributable to, directly or indirectly resulting from, or in consequence of, or

[7]The Sexton policy defined "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including without limitation smoke, vapors, soot, fumes and acids[.]" The SMD policy contained a different but similarly broad definition of "pollutant."

in any way involving, actual, alleged or threatened discharge, dispersal, release, escape, seepage, transportation, emission, treatment, removal or disposal of Pollutants into or on real or personal property, water or the atmosphere; or seeking any Cleanup Costs."

The SMD exclusion also specified that "Cleanup Costs" included "expenses (including but not limited to legal and professional fees) incurred in testing for, monitoring, cleaning up, removing, containing, treating, neutralizing, detoxifying or assessing the effects of Pollutants**."**

¶ 48 According to Allied, these exclusions precluded coverage "because *all* of the [underlying] allegations flow from Sexton's obligation to pay for pollution or cleanup costs." (Emphasis added.) We disagree.

¶ 49 AWT alleged in the underlying complaint that it had covered all of the CDC's operating expenses, other expenses and losses since February 2007. In addition, AWT alleged that it continued to provide capital to maintain and operate the Congress Site in accordance with industry standards. Such broad allegations would encompass expenses not related to pollution or cleanup. Accordingly, the pollution exclusions did not entirely bar coverage. See also *Sealed Air Corp. v. Royal Indemnity Co.*, 404 N.J. Super. 363, 366, 373-74, 376-79 (2008) (finding that where the underlying litigation arose from the insured's alleged misrepresentations as to whether it properly evaluated contingent liabilities from potential pollution liability, the underlying case was grounded in securities fraud and misrepresentation, not pollution, rendering the insurance policy's pollution exclusion inapplicable); *Lansing Board of Water & Light v. Deerfield Insurance Co.*, 183 F. Supp. 2d 979, 985, 988 (2002) (finding that where the underlying injury allegedly resulted from the failure to disclose information, rather than pollution itself, the pollution exclusion did not apply).

¶ 50 iv. Loss-Disgorgement

¶ 51 Allied further asserts that coverage was not triggered because the insureds did not sustain "loss" under the policies. Specifically, both policies defined "loss" to include "damages, settlements or judgments" but exclude "amounts deemed uninsurable under applicable law." According to Allied, the underlying complaint sought disgorgement, which is uninsurable under Illinois law and, thus, outside the policies' definitions of "loss." See *Level 3 Communications, Inc. v. Communications, Inc. v. Federal Insurance Co.*, 272 F.3d 908, 910-11 (7th Cir. Ill. 2001) (observing that where the remedy for the insured obtaining stock through false pretenses would be to deprive it of the benefit of its deception, the "insured incurs no loss within the meaning of the insurance contract by being compelled to return property that it had stolen"); *Local 705 v. Five Star Managers, LLC,* 316 Ill. App. 3d 391, 395 (2000) (finding that "loss" as used in the policy did not include returning money that the insured had no right to possess in the first instance); see also *Cohen v. Lovitt & Touche,* 233 Ariz. 45, 48 ¶ 10 (App. 2013) (stating that *Level 3 Communications, Inc.*, was anchored in the policy's language, not public policy).

¶ 52 Here, the underlying complaint did not only seek the return of property or money but also sought damages for the value of the property at the time of the transfers. Compare *Rosalind Franklin University of Medicine & Science v. Lexington Insurance Co.*, 2014 IL App (1st) 113755, ¶¶ 69-77 (finding that damages for breach of duty, fraud and misrepresentation, as opposed to turnover, did not constitute disgorgement), and *Schlueter v. Latek,* 683 F.3d 350, 353 (7th Cir. 2010) (recognizing that "[d]amages are measured by the plaintiff's loss, restitution by the defendant's gain"), with *Freeland v. Enodis Corp*, 540 F. 3d 721, 740 (7th Cir. 2008) (stating outside of the insurance context that fraudulent transfer recovery is a form of disgorgement). Thus, AWT did not merely seek disgorgement.

¶ 53 Even assuming that (1) the underlying complaint sought only disgorgement; (2) the insureds' payments to AWT constituted disgorgement rather than a settlement payment; and (3) Illinois law and the insurance policies prevent recovery of disgorged sums, we would nonetheless find the underlying complaint triggered Allied's duty to defend.

¶ 54 Both polices stated, "this Coverage Section shall provide coverage for Defense Costs incurred in a Claim seeking amounts specified in [exclusions from the definition of loss], subject to all other terms, conditions and exclusions of this Policy." Thus, Allied's duty to defend would not be negated by the insureds' attempt to recover sums that did not qualify as "loss." Even if Allied was excused from indemnifying Sexton and SMD for an uninsurable amount, Allied was nonetheless required to provide them with a defense.[8] Allied has not shown that the circuit court erred by finding it had a duty to defend Sexton and SMD.

¶ 55 B. Estoppel

¶ 56 Alternatively, Allied asserts that the circuit court improperly found it breached its duty to defend and, thus, was estopped from asserting coverage defenses.

¶ 57 When an insurer believes that a claim is not covered under a policy, it must either (1) defend the lawsuit under a reservation of rights, or (2) seek a judgment declaring that no coverage exists. *State Auto Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill. App. 3d 946, 959 (2006). If the insurer takes neither action, and is later determined to have wrongfully denied defense coverage, the insurer will be estopped from raising any policy defenses. *Id.* The estoppel doctrine prevents the insurer from raising even those policy defenses that may have

[8]The policies contained a separate exclusion for loss attributable to ill-gotten gains "if a *final judgment or adjudication* establishes that such Insured was not legally entitled to such profit or advantage." (Emphasis added.) Allied has not developed a cohesive argument addressing whether excluding coverage for settlements based on unlitigated, disputed, disgorgement claims would negate the ill-gotten gains exclusion.

been successful had the duty to defend not been breached. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151-52 (1999).

¶ 58 Here, Allied filed a declaratory judgment action after denying coverage. To prevent estoppel, however, an insurer's declaratory action must be timely filed. *Aetna Casualty & Surety Co. v. O'Rourke Bros., Inc*., 333 Ill. App. 3d 871, 880 (2002). An insurer cannot seek a declaratory judgment at its leisure and avoid estoppel. *Westchester Fire Insurance Co. v. G. Heileman Brewing Company, Inc*., 321 Ill. App. 3d 622, 633 (2001). "Where an insurer waits to bring its declaratory judgment action until after the underlying action has been resolved by a judgment or a settlement, the insurer's declaratory judgment action is untimely as a matter of law." *Employers Insurance of Wausau*, 186 Ill. 2d at 157.

¶ 59 Allied filed its declaratory judgment complaint on July 19, 2016, after AWT and the insureds reached a settlement agreement. Yet, Allied contends it acted in a timely fashion by filing a notice of motion for leave to file this action under seal on May 27, 2016, before the underlying case was settled. Allied has not directed this court to the page of the record on which this pleading can be found. Ill. S. Ct. R. 341(h) (7) (eff. May 25, 2018) (requiring argument to contain citation to "the pages of the record relied on"); *Prairie Rivers Network v. Illinois Pollution Control Board*, 335 Ill. App. 3d 391, 408-09 (2002) (finding that the failure to cite relevant pages of the record results in forfeiture); see also *Romito v. City of Chicago*, 2019 IL App (1st) 181152, ¶ 23 (reiterating that an appellant has the burden of providing a record sufficient to support its claims and, in the absence of a sufficient record, we resolve all resulting doubts against the appellant). Accordingly, we cannot take Allied's representation as true.

¶ 60 Allied also contends that further delay in filing its complaint occurred when the circuit court found Allied (1) failed to notify all the defendants in the underlying action of Allied's

prospective declaratory judgment action, and (2) failed to file an unredacted version of the declaratory judgment complaint under seal. Once again, however, Allied has failed to identify where supporting documentation can be found. Moreover, Allied's representation suggests that it could have avoided at least some of the delay. Accordingly, we consider Allied as having first acted in this matter when it filed its complaint on July 19, 2016.

¶ 61 Allied further argues that in assessing timeliness, courts must consider the date on which the circuit court disposed of the underlying action pursuant to a settlement agreement, rather than the date on which the parties reached the agreement, relying on *Employers Insurance of Wausau*, 186 Ill. 2d at 157. There, our supreme court noted that the declaratory judgment action was filed almost four months after the underlying suit was dismissed. *Id*. The court did not, however, find that the date on which the underlying parties reached an agreement was irrelevant. *Id*. Moreover, the court stated that a declaratory action is untimely when "the underlying action has been resolved by a judgment *or* a settlement." *Id*. This indicates that a settlement need not be memorialized in a judgment for purposes of assessing timeliness. Thus, we find the underlying settlement occurred on July 8, 2016, the day on which the insureds and AWT reached an agreement.

¶ 62 Having established certain time parameters, we review the relevant sequence of events. In October 2015, Sexton and SMD tendered the defense of the underlying action to Allied. In early December, Allied unequivocally declined to defend the insureds, leaving them to fend for themselves. Seven months later, on July 8, 2016, the insureds entered into a settlement agreement with AWT as to both the underlying state action and the federal action. The insureds did not act with undue haste in settling; rather, Allied had plenty of time in which to file a declaratory judgment action. Instead, Allied filed the present action on July 19, 2016, 11 days

after the insureds had reached a settlement. Because Allied did not file its declaratory action until after the insureds settled, that action was untimely as a matter of law.

¶ 63 Even assuming our inquiry is controlled by the date on which a settled lawsuit is dismissed, and that Allied filed the declaratory action before that date, we would nonetheless find Allied's action was untimely.

¶ 64 Allied correctly states that in *Farmers Automobile Insurance Ass'n v. Country Mutual Insurance Co.*, 309 Ill. App. 3d 694, 700-01 (4th Dist. 2000), the reviewing court stated that an insurer that files a declaratory judgment action prior to judgment in the underlying action is not estopped from asserting policy defenses to coverage. In making that statement, the reviewing court cited our supreme court's decision in *State Farm Fire & Casualty Co. v. Martin*, 186 Ill. 2d 367, 374 (1999). *Farmers Automobile Insurance Ass'n*, 309 Ill. App. 3d at 700-01. Another reviewing court similarly cited *Martin* for that principle. *Pekin Insurance Co. v. Allstate Insurance Co.*, 329 Ill. App. 3d 46, 50 (1st Dist. 2002) (citing *Martin*, 186 Ill. 2d at 374). Yet, those appellate court decisions expanded *Martin's* holding. See *Employers Reinsurance Corp. v. E. Miller Insurance Agency, Inc.*, 332 Ill. App. 3d 326, 342 (2002).

¶ 65 In *Martin*, the supreme court rejected the suggestion that an insurer needed to *secure* a declaratory judgment to avoid estoppel. *Martin*, 186 Ill. 2d at 371-74. Instead, the court found an insurer need only *seek* a declaratory judgment. *Id*. Thus, estoppel does not apply merely because the underlying case was resolved before the declaratory judgment action reached its conclusion. *Id*. at 374. The supreme court did not hold, however, that insurers may file declaratory judgment actions at any time before the underlying litigation is resolved in order to avoid estoppel. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 342.

¶ 66 Appellate court decisions have used two other approaches to timeliness. One approach requires courts to consider whether trial or settlement of the underlying case was imminent when the insurer sought declaratory relief, while the other approach requires courts to focus on whether the insurer filed the declaratory action within a reasonable amount of time after receiving notification of the underlying action. *State Auto Mutual Insurance Co.*, 364 Ill. App. 3d at 959-60 (cases complied therein). We agree with those cases adopting the latter approach. See *Id*. at 960; *L.A. Connection v. Penn-America Insurance Co.*, 363 Ill. App. 3d 259, 265-66 (3d Dist. 2006). Requiring insurers to act within a reasonable time encourages insurers to take prompt action and furthers the enforcement of the duty to defend. *L.A. Connection*, 363 Ill. App. 3d at 265-66.

¶ 67 Here, the record supports the determination that Allied did not act within a reasonable time. Allied filed its declaratory judgment complaint approximately 8 months after the insureds tendered their defense, 7 months after Allied declined to defend them, 11 days after the underlying parties came to an agreement and only 10 days before the underlying case was dismissed. *Cf. Kingsport Development, LLC,* 364 Ill. App. 3d at 960-61 (finding a seven-month delay was reasonable where the underlying litigation remained unresolved at the time of the declaratory action appeal before the reviewing court); *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 340-41 (finding estoppel did not apply where the insurer filed a declaratory judgment action almost 15 months after receiving notice of the complaint but the underlying litigation remained pending at the time of the appeal before the reviewing court). The underlying matter was substantially resolved by the time Allied chose to get involved. In addition, the record is silent as to why Allied did not file its declaratory judgment action sooner. *Cf. Sears, Roebuck & Co. v. Seneca Insurance Co.*, 254 Ill. App. 3d 686, 693-94 (1993) (declining to apply estoppel

where the insured itself had filed a declaratory action). Furthermore, the insureds were not required to notify Allied that settlement was imminent and we do not fault them for diligently resolving the underlying action. See *e.g.*, *Davis v. United Fire & Casualty Co.*, 81 Ill. App. 3d 220, 224-5 (1980) (finding the insured was justified in concluding that further communication with its insurer was useless after the insurer denied coverage for the accident); see also *Custer v. Cerro Flow Products, Inc*., 2018 IL App (5th) 160161, ¶ 62 (recognizing that public policy favors settlement). Consequently, Allied is estopped from asserting coverage defenses to its duty to indemnify Sexton and SMD.

¶ 68 C. The Judgment Amount

¶ 69 i. Allocating Damages

¶ 70 Next, Allied argues that Sexton and SMD failed to allocate damages between the federal action and the underlying action, both of which were part of the settlement. Sexton and SMD agree that the federal action was not covered by the policies, but argue that the settlement agreement did not need to allocate damages between the two lawsuits.

¶ 71 Where an insured enters into a settlement agreement disposing of both covered and non-covered claims, the insurer is required to indemnify the insured for the entire settlement if the covered claims were a primary focus of the underlying litigation. *Rosalind Franklin University of Medicine & Science*, 2014 IL App (1st) 113755, ¶ 81. Additionally, it may be impossible to determine the amount of settlement attributable to covered claims and the amount of settlement attributable to uncovered claims. *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277, 289 (2009). Requiring an actual allocation between claims would have a chilling effect on settling the underlying case.[9] *Id*. at 288-89. Specifically, an insured forced to choose between

[9]We note that Allied has failed to develop a cohesive argument explaining why settlements involving both covered and noncovered lawsuits meaningfully differ from settlements involving both

defending a lawsuit or settling a claim without hope of receiving insurance reimbursement would choose to defend the lawsuit. *Commonwealth Edison Co. v. National Union Fire Insurance Company of Pittsburgh*, 323 Ill. App. 3d 970, 983 (2001). Furthermore, the insured, having attempted to refute liability in the underlying action, would be required to prove its own liability to prevail in a subsequent action to procure insurance coverage. *Federal Insurance Co.*, 393 Ill. App. 3d at 289.

¶ 72 Here, the underlying action was a primary focus of the settlement. See *Commonwealth Edison Co.*, 323 Ill. App. 3d at 982-83 (finding that a covered loss under the policy "was *a* primary focus of the litigation" (emphasis added)). As Allied states, "the settlement amount attributable to the [underlying action] was undeterminable." Thus, Sexton and SMD were not required to allocate the settlement amount between the underlying action and the federal action.

¶ 73 Allied nonetheless maintains that Sexton and SMD were required to allocate damages because a settlement cannot convert uncovered claims into covered ones, relying primarily on *First Mercury Insurance Co. v. Nationwide Security Services*, 2016 IL App (1st) 143924. There, unlike the present case, the reviewing court found the insurer did not breach its duty to defend and then turned to the insurer's duty to indemnify. *Id*. ¶¶ 13, 19, 30. The court stated, "the settlement cannot convert an uncovered claim into an otherwise covered one." *Id*. ¶¶ 30. The decision in *First Mercury Insurance Co.* did not, however, address whether an insurer that has breached its duty to defend an underlying action and is subject to estoppel can require its insured to allocate settlement amounts. See also *Rosalind Franklin University of Medicine & Science*, 2014 IL App (1st) 113755, ¶ 98 (stating that absent a breach of the duty to defend, an insured

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covered and noncovered claims. See *Marzouki*, 2014 IL App (1st) 132841, ¶ 12. Moreover, Allied itself relies on case law addressing covered and noncovered claims.

must obtain the insurer's consent before settling the underlying claim). Allied's reliance on *First Mercury Insurance Co.* is misplaced.

¶ 74 Moreover, we are not persuaded by Allied's reliance on *Vita Food Products, Inc. v. Navigators Insurance Co.*, No. 16 C 08210, 2017 WL 2404981 at * 8 (N.D. Ill. June 2, 2017), which did not involve a settlement. There, the policy at issue contained an allocation clause stating that if "a Claim made against any Insured includes both covered and uncovered matters, or is made against any Insured and others, the Insured and the Insurer recognize that there must be an allocation between insured and uninsured Loss." (Internal quotation marks omitted.) *Id.* Allied has not directed our attention to the presence of an allocation clause in either of the policies before us. We find no error.

¶ 75 ii. Reasonable Settlement

¶ 76 Allied further asserts that Sexton and SMD failed to demonstrate that the settlement was reasonable. The insured has the burden of demonstrating that a settlement was reasonable. *Universal Underwriters Insurance Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶ 57. Additionally, we review the reasonableness of a settlement under the manifest weight of the evidence standard. *U.S. Gypsum Co. v. Admiral Insurance Co*., 268 Ill. App. 3d 598, 638-39 (1994).[10]

¶ 77 Here, Arthur Daniels, the president of both Sexton and SMD, filed an affidavit stating that those entities "entered into the Settlement Agreement because of a good-faith apprehension

[10]Having already determined that the insureds were not required to allocate damages within the settlement, we reject Allied's suggestion that this argument concerns the legal question of whether the trial court applied the correct measure of damages. See *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 252 (2006) (stating that while the amount of damages is factual determination for the trier of fact, the measure of damages constitutes a question of law). To the extent Allied argues for the first time in its reply brief that Daniels' affidavit fails to satisfy Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2014), that argument is forfeited. See Ill. S. Ct. R. 341(h) (7) (eff. May 25, 2018).

that they risked exposure to substantial judgments against them if the Underlying Lawsuit had proceeded to trial." Daniels noted that just one of the transfers challenged in the underlying case was for $11 million and Allied had substantial evidence to support its case, notwithstanding that Sexton and SMD denied improper motives or liability. Additionally, Sexton and SMD had greater exposure than the other defendants because Sexton was the initial transferor of all assets and SMD received the greatest amount of assets. Additionally, it was likely that a jury would find for AWT due to the timing of when liabilities arose and transfers occurred. The insureds were also likely to incur significant legal expenses in defending themselves. Furthermore, Sexton and SMD were not passive participants in the underlying action; rather, they asked the court to dismiss that action, albeit unsuccessfully. Finally, the insureds themselves paid $8.125 million to settle this matter, despite knowing that each policy limited damages to $1 million. See *Taco Bell Corp. v. Continental Casualty Co.*, 388 F.3d 1069, 1075-76 (7th Cir. 2004) (stating that there was "no occasion for a painstaking judicial review" of legal expenses because the uncertainty of reimbursement gave the insured incentive to minimize legal expenses and there were market incentives to economize). Based on the foregoing, the circuit court's determination that the settlement was reasonable was not against the manifest weight of the evidence.

¶ 78 iii. Defense Costs

¶ 79 Next, Allied asserts that the policies did not permit the court to award defense costs in addition to the policy limits because both policies stated, "Defense Costs are part of, and not in addition to, the Limits of Liability *** and payment by the Insurer of Defense Costs shall reduce and may exhaust such Limits of Liability." [11]

[11]Allied's opening brief solely argued that the award of defense costs contravened the policies' terms. Consequently, Allied has forfeited its contention, raised for the first time in its reply brief, that the insureds failed to demonstrate that the amount of defense costs was reasonable. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 80 When an insurer has breached its duty to defend, the insured may recover an amount exceeding policy limits if (1) the insurer acted in bad faith; or (2) the insurer's breach of duty proximately caused the insured's damages. *Delatorre v. Safeway Insurance Co.*, 2013 IL App (1st) 120852, ¶ 33; see also *Conway v. Country Casualty Insurance Co.*, 92 Ill. 2d 388, 397-8 (1982) (stating that "damages for breach of the duty to defend are not inexorably imprisoned within the policy limits, but are measured by the consequences proximately caused by the breach"). The insurer's failure to defend exposes the insurer to additional liability for the insured's costs, expenses and attorney fees incurred due to the insurer's breach of contract. *Conway*, 92 Ill. 2d at 397; see also *A. Kush & Associates, Ltd. v. American States Insurance Co.*, 927 F.2d 929, 934 (7th Cir. 1991) (stating that an insurer with the duty to defend an underlying action must reimburse its insured for reasonable fees and costs incurred in that action).

¶ 81 Here, Allied's breach of duty foreseeably led Sexton and SMD to incur defense costs they would not have otherwise incurred. Consequently, the circuit court properly awarded defense costs in addition to the policies' limits.

¶ 82 iv. Prejudgment Interest

¶ 83 Finally, Allied argues that the circuit court improperly awarded prejudgment interest. Section 2 of the Interest Act provides 5% interest to creditors for "all moneys after they become due on any *** or other instrument of writing." 815 ILCS 205/2 (West 2016). Additionally, insurance policies constitute instruments of writing covered by this statute. *Lyon Metal Products, LLC, v. Protection Mutual Insurance Co.*, 321 Ill. App. 3d 330, 348 (2001). In order for prejudgment interest to be awarded, however, the amount due must be liquidated or easy to determine. *Santa's Best Craft, LLC, v. Zurich American Insurance Co.*, 408 Ill. App. 3d 173, 191 (2010). A court may award prejudgment interest from the time money became due under the

policy. *Couch v. State Farm Insurance Co*., 279 Ill. App. 3d 1050, 1054 (1996). Furthermore, an award of prejudgment interest involves questions of fact, which will not be altered unless contrary to the manifest weight of the evidence. *Id*. at 1055.

¶ 84 Here, Sexton and SMD entered into a settlement agreement with AWT on July 8, 2016, for a sum that was subject to exact calculation. See *Illinois Tool Works, Inc. v. Home Indemnity Co.*, 24 F. Supp. 2d 851, 858 (N.D. Ill. 1998) (finding that the sum due was subject to exact calculation when the underlying settlement agreement was executed). At a minimum, the sum due could be calculated when the underlying case was dismissed on July 29, 2016. The amount due was rendered no less certain by the omission of any allocation between the underlying suit and the federal suit. Even assuming Allied had a good faith defense, this did not preclude an award of prejudgment interest. Compare *Knoll Pharmaceutical Co. v. Automobile Insurance Co. of Hartford*, 210 F. Supp. 2d 1017, 1026 (2002) (stating that "the existence of a good faith defense does not preclude recovery of interest" and that disallowing prejudgment interest would permit the insurers to improperly benefit from breaching their duty to defend), with *Federal Insurance Co.*, 393 Ill. App. 3d at 297 (affirming the circuit court's decision not to award interest where the insurer initiated a declaratory judgment action due to a genuine dispute).

¶ 85 III. Conclusion

¶ 86 Allied had a duty to defend Sexton and SMD because facts in AWT's underlying complaint potentially fell within coverage. Additionally, Allied breached its duty to defend by failing to timely file its complaint for a declaratory judgment. Allied was consequently estopped from denying coverage. Furthermore, the record does not show the circuit court erred in calculating the amount of damages.

¶ 87 For the foregoing reasons, we affirm the trial court's judgment.

¶ 88 Affirmed.