FIRST DIVISION
Date Filed: March 15, 2010

No. 1-07-2732

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

EMPLOYERS REINSURANCE CORPORATION, Plaintiff v. STEPHEN R. HASTINGS, MARK HORNUNG, F. DAVID RADLER, DAILY SOUTHTOWN, HOLLINGER, INC., HOLLINGER INTERNATIONAL, INC., MIDWEST SUBURBAN PUBLISHING, INC., STAR NEWSPAPERS, THE CHICAGO SUN-TIMES, INC., DOES 1-20 and Other Necessary Parties, Defendants (Sun-Times Media Group, Inc., Chicago Sun-Times, LLC, and Midwest Suburban Publishing, Inc., Defendants and Third-Party Plaintiffs-Appellants, and Hartford Fire Insurance Company, Safeco Surplus Lines Insurance Company, General Insurance Company of America, ACE American Insurance Company and Executive Risk Indemnity, Inc., Third-Party Defendants-Appellees.)	Appeal from the Circuit Court of Cook County. 05 CH 10429 Honorable James F. Henry, Judge Presiding.

O R D E R

Employers Reinsurance Company (Employers Re) filed a complaint for declaratory judgment against the Sun-Times Media Group, Inc., Chicago Sun-Times, LLC, Midwest Suburban Publishing,

Inc. (collectively the insureds), and other named defendants seeking a declaration that it had no duty to defend or indemnify the insureds in connection with a class action lawsuit brought against the insured by advertisers in their publications. The insureds filed a third-party complaint for declaratory judgment against Hartford Fire Insurance Company (Hartford), Safeco Surplus Lines Insurance Company (Safeco), General Insurance Company of America,[1] American Insurance Company (ACE) and Executive Risk Indemnity Company (ERII) (or collectively the insurers) seeking an adjudication of the rights and liabilities of the parties under various insurance policies issued by the insurers to the insureds. The circuit court granted ACE's motion to dismiss the third-party complaint, granted Hartford's motion for judgment on the pleadings and granted summary judgment to the remaining insurers.

The insureds appeal raising the following issues: (1) whether the insurance polices issued by ACE, Safeco and Hartford required those insurers to defend the insureds in connection with the advertisers' suit; and (2) whether circuit court erred in determining that ERII's agreement to provide a defense was voluntary. We affirm the orders of the circuit court.

Between the years 1999 and 2004, the insurers provided the insureds with media coverage insurance. In 2004, various

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[1] The Safeco policy was renewed by General Insurance Company. "Safeco" will refer to both companies.

advertisers in the insureds' publications filed lawsuits against the insureds seeking damages for the overstatement of the circulation figures of those publications.[2] The cases were joined in a consolidated class action (the circulation lawsuit). The second amended consolidated complaint alleged the following pertinent facts.

The advertisers paid for advertizing based on the insureds' representation as to the number of persons who received the Sun-Times newspaper. The insureds provided circulation figures to the advertisers to induce them to advertize in the Sun-Times newspaper. The circulation figures are audited by the Audit Bureau of Circulations (ABC). ABC issued standardized statements of circulation data reported by the member (in this case, the plaintiffs) based on its verification of the figures and disseminates the data for the benefit of advertisers.

On June 15, 2004, the insureds issued a press release announcing that an internal review was being conducted "into practices that resulted in the overstatement of circulation figures for The Chicago Sun-Times over the past several years. *** The Sun-Times has discontinued the practices believed to have led to the overstated circulation reporting." On October 5, 2004, Hollinger International issued a press release announcing

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[2]Federal law required the Sun-Times to publish circulation figures in the newspaper once a year. See 39 U.S.C. §3685 (____).

the findings of the internal review. The audit revealed that beginning in 1998, the circulation figures for the daily and Sunday editions of The Chicago Sun-Times were improperly overstated. The inflated figures were reported to ABC, which then reported the figures in its semi-annual audit reports issued with respect to the Sun-Times. The audit committee determined that the inflation practices were instigated by the newspaper's former management and that the officers responsible for the inflated figures were no longer employed by the company. In addition, disciplinary action had been taken against other employees, and procedures had been implemented to prevent circulation overstatements in the future.

In the press release, John Cruickshank, publisher of The Chicago Sun-Times, acknowledged: "The unacceptable practices we uncovered and discontinued betrayed the trust placed in us by advertisers." The Chicago Sun-Times "intends to make restitution to all its advertisers for losses associated with the overstatements in the ABC circulation figures."

The second amended consolidated class action complaint alleged causes of action for violation of the Illinois Consumer Fraud Act (815 ILCS 505/2 (West 2004)), the Illinois Uniform Deceptive Trade Practices Act (815 ILCS 510/2 (West 2004)) and for unjust enrichment, breach of contract and civil conspiracy. The second amended complaint sought compensatory and punitive damages.

The insureds tendered the defense of the circulation law suits to the insurers. With the exception of ERII, the insurers denied coverage. ERII agreed to defend the insureds under a reservation of rights. On June 21, 2005, Employers Re filed its complaint for declaratory judgment against the insureds. Employers Re sought a declaration that it owed no duty to defend or indemnify the Sun-Times with regard to the circulation lawsuits.

In September 2005, a stipulation of settlement was filed in connection with the circulation lawsuit. Under the terms of the settlement agreement, the insureds agreed to pay $7.6 million to the class members, $5.575 million to the attorneys for the class members, $145,000 in incentive payments to the named plaintiffs in the class action and $50,000 in cy pres payments. The insureds made no admission of liability in connection with the settlement. On January 20, 2006, a final judgment on the settlement was entered, and the class action was dismissed. As of March 6, 2006, the insureds had incurred legal fees and related expenses in the amount of $2,827,123.86, of which they had paid $2,789,344.93.

On November 2, 2005, the insureds filed their third-party complaint against the insurers in Employers Re's declaratory judgment suit. The third-party suit sought damages for breach of contract by the insurers and sought a declaration that the insurers had a duty to indemnify insureds and to pay their

defense costs. The third-party complaint also alleged that ERII was estopped from challenging its obligation to pay defense costs.

ACE filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2004) (the Code)); Hartford filed a motion for judgment on the pleadings. Both ACE and Hartford alleged that the circulation lawsuits alleged claims which did not fall within the coverage of the media liability policies it issued to the plaintiffs and that coverage was barred by policy exclusions. In addition, ACE alleged that New York law applied and that New York law does not recognize the estoppel doctrine. ERII, Safeco and the plaintiffs filed cross-motions for summary judgment.

On July 21, 2006, the circuit court issued its memorandum opinion and order, inter alia, disposing of the motions filed by ACE and Hartford. The court's findings are summarized below.

As to ACE's motion to dismiss, the circuit court noted that the parties agreed that there were no significant differences between New York and Illinois law regarding the coverage issues raised but determined that New York law applied. The court found that no coverage existed under either the "assumed under contract" or under any of the enumerated "occurrences." The court further found that coverage was precluded under both the false advertising exclusion and the intentional acts exclusions in the policy. The court determined that the same analysis

applied to Hartford's motion for judgment on the pleadings and found no coverage under the Hartford policy for the causes of action alleged in the circulation lawsuits.

On August 16, 2007, the circuit court issued its memorandum opinion and order with respect to the cross-motions for summary judgment filed by the insureds, Safeco and ERII. The court found that the Safeco policy did not afford coverage to the Sun-Times based on its analysis in connection with the ACE and Hartford policies. The court further found that, while the Safeco policies did not contain an intentional exclusion provision, its prior finding that the intentional acts exclusion provision precluded coverage under the ACE policy, ultimately meant that the loss was not fortuitous. Therefore, Safeco was entitled to rely on the common law fortuity doctrine, which also precluded coverage.

The court agreed with ERII that the false advertizing provision of its policy barred coverage and that the common law doctrine of fortuity precluded coverage, given the non-fortuitous nature of the loss. Finding that ERII's agreement to pay an allocated amount of defense expenses was voluntary, the court concluded it would not be fair or logical to bind ERII to that agreement.

The circuit court granted summary judgment to Safeco and ERII and denied summary judgment to the insureds. On August 31, 2007, the court entered an order voluntarily dismissing Employers

Re's complaint for declaratory judgment and dismissed the insureds' remaining motion for summary judgment against ACE.

The insureds filed a timely notice of appeal.

ANALYSIS

I. Mootness

Initially, Hartford contends that this appeal is moot under the principles of res judicata and collateral estoppel because the plaintiffs failed to appeal from the grant of summary judgment to Employers Re. The circuit court granted summary judgment to Employers on the basis that the false advertizing provision of the Employers Re' policy excluded coverage for the plaintiffs.

"The doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction acts as an absolute bar to a subsequent action between the same parties or their privies involving the same claim, demand or cause of action." Arvia v. Madigan, 209 Ill. 2d 520, 533, 809 N.E.2d 88 (2004). Res judicata does not apply in the present case because the claim litigated was between the plaintiffs and Employer's and there is no privity between Hartford and either of those parties.

Hartford acknowledges that the issue is more appropriately characterized as direct estoppel, but further acknowledges that the same rules apply to both. See People v. Daniels, 187 Ill. 2d 301, 320 n.3, 718 N.E.2d 149 (1999). "Collateral estoppel" is an

equitable doctrine and is evoked to prevent the relitigation of issues previously decided. Garley v. Columbia LaGrange Hospital, 377 Ill. App. 3d 678, 682, 881 N.E.2d 370 (2007). Collateral estoppel applies where "(1) the issue decided in the prior adjudication is identical to the one presented in the suit in question; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication." Garley, 377 Ill. App. 3d at 682-83.

Hartford's direct/collateral estoppel argument fails because estoppel would apply in "any future lawsuit" not in an appeal of the present one. See Daniels, 187 Ill. 2d at 320-21 (that issue cannot again be litigated between the same parties in any future lawsuit).

We conclude that neither the doctrine of res judicata nor direct/collateral estoppel applies to moot the plaintiffs' appeal as to Hartford.

II. Duty to Defend - ACE, Safeco, Hartford Policies

A. Standard of Review

The de novo standard applies to this court's review of the circuit court's rulings in this case. See Gillen v. State Farm Mutual Automobile Insurance Co., 215 Ill. 2d 381, 393, 830 N.E.2d 575 (2005) (grant of judgment on the pleadings); Luise, Inc. v. Village of Skokie, 335 Ill. App. 3d 672, 678, 781 N.E.2d 353 (2002) (grant of summary judgment); Westmeyer v. Flynn, 382

Ill. App. 3d 952, 954-55, 889 N.E.2d 671 (2008) (dismissal pursuant to section 2-619). As the construction of an insurance policy's provisions presents a question of law, we apply the de novo standard of review. See Hobbs v. Hartford Insurance Co. of the Midwest, 214 Ill. 2d 11, 17, 823 N.E.2d 561 (2005).

B. Applicable Legal Principles

The principles applicable to the review of the grant of summary judgment are well settled. "Summary judgment is proper if, and only if, the pleadings, depositions, admissions, affidavits and other relevant matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Illinois Farmers Insurance Co. v. Hall, 363 Ill. App. 3d 989, 993, 844 N.E.2d 973 (2006). Where as in this case, the parties have filed cross-motions for summary judgment, they invite the court to determine the issues as a matter of law and enter judgment in favor of one of the parties. Hall, 363 Ill. App. 3d at 993. We will uphold the grant of summary judgment only when the right of the moving party is free from doubt. Hall, 363 Ill. App. 3d at 993.

Similar to summary judgment, judgment on the pleadings should only be granted where there is no genuine issue of material fact. Gillen, 215 Ill. 2d at 385. "In ruling on a motion for judgment on the pleadings, the court will consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the

record." Gillen, 215 Ill. 2d at 385. We will accept as true all well-pleaded facts and all reasonable inferences that can be drawn from those well-pleaded facts. Gillen, 215 Ill. 2d at 385

The principles applicable to the review of dismissal of a complaint pursuant to section 2-619 of the Code are also well-settled. All well-pleaded allegations are taken as true and all reasonable inferences are drawn in the plaintiff's favor. Westmeyer, 382 Ill. App. 3d at 955. A section 2-619 motion to dismiss should be granted if, after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the circuit court finds that no set of facts can be proved upon which relief could be granted. Westmeyer, 382 Ill. App. 3d at 955.

C. Discussion

The plaintiffs contend that policies issued to it by ACE, Safeco and Hartford required them to provide a defense to the plaintiffs because the circulation lawsuit alleged claims potentially covered by the policies. It is undisputed that ACE, Safeco and Hartford declined to provide the plaintiffs with a defense to the claims in the circulation lawsuit. As a result, the plaintiffs assert that those insurers are estopped from raising any policy defenses and must indemnify and pay the defense costs incurred by the plaintiffs.

An insurer who takes the position that a complaint potentially alleging coverage is not covered under a policy that

includes a duty to defend has two options: (1) defend the suit under a reservation of rights or (2) seek a determination of no coverage in a declaratory judgment suit. Employers Insurance of Wausau v. Ehlco Liquidating Trust, 186 Ill. 2d 127, 150, 708 N.E.2d 1122 (1999). Where the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage. Employers Insurance of Wausau, 186 Ill. 2d at 150-51. The estoppel doctrine does not apply if the insurer has no duty to defend or the insurer's duty to defend was not properly triggered. Employers Insurance of Wausau, 186 Ill. 2d at 151. If a comparison of the policy and the complaint reveal that there was clearly no coverage or potential for coverage, the estoppel doctrine does not apply. Employers Insurance of Wausau, 186 Ill. 2d at 151.

1. Estoppel

a. ACE

ACE correctly notes that New York law does not recognize the estoppel rule. See Household International, Inc. v. Liberty Mutual Insurance Co., 321 Ill. App. 3d 859, 869, 749 N.E.2d 1 (2001) (under New York law, an insurer does not forfeit policy defenses to coverage for improperly failing to defend its insured). The plaintiffs maintain the circuit court erred in determining that New York law applied to ACE/s policy.

Our supreme court has held that where the insurance policy

is silent as to the choice of law, the policy generally will be governed by the subject matter location, where the contract was delivered, the insured's or the insurer's domicile, where the last act to give rise to a valid contract occurred, where the contract was to be performed, or a place bearing a rational relationship to the general contract. Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co., 166 Ill. 2d 520, 526-27, 655 N.E.2d 842 (1995). The insureds maintain that Illinois law applies because two of them are located in Illinois, and the subject matter of the contract was in Illinois.

The circuit court determined that New York law applied because the policy was issued and delivered in New York. In Lapham-Hickey Steel Corp., the supreme court cited with approval appellate case law specifically holding that "an insurance policy is governed by the law of the State where the policy was issued or delivered or by the law of the place of the last act to give rise to a valid contract." Lapham-Hickey Steel Corp., 166 Ill. 2d at 527, citing United States Fire Insurance Co. v. CNA Insurance Cos., 213 Ill. App. 3d 568, 575, 572 N.E.2d 1124 (1991); Jadczak v. Modern Service Insurance Co., 151 Ill. App. 3d 589, 593, 503 N.E.2d 794 (1987).

The insureds concede that New York could be considered the domicile of one of the parties and was the place where the contract was delivered. Therefore, the circuit court correctly determined that New York law applied in this case, and the

estoppel does not bar ACE from raising policy defenses in this case.

b. Safeco and Hartford

Safeco and Hartford maintain that estoppel does not apply because their respective polices are not defense policies. The Safeco and Hartford policies provide that the "insured shall retain counsel approved by the Company" (emphasis omitted) and sets forth the various duties of the insured in conducting the defense. The insured is also permitted to settle the suit without the insurer's permission provided it is within remaining retention amount. Safeco and Hartford argue that as their polices only require them to pay the costs of the defense, they do not have the duty to defend. See University of Illinois v. Continental Casualty Co., 234 Ill. App. 3d 340, 599 N.E.2d 1338 (1992) (the fact that the insurer could chose to advance defense costs and fees did not create a duty to defend).

Both Safeco and Hartford rely on Goodheart-Willcox Co. v. First National Insurance Co. of America, Inc., No. 00 C 0411 (N.D. Ill. 2001). Citing Illinois case law, the district court observed that the "standard duty to defend policy is one in which the insurer selects counsel and assumes control of the defense, paying all costs and fees directly." Goodheart-Willcoz Co., at ___, citing In Re Liquidation of Pine Top Insurance Co., 266 Ill. App. 3d 99, 103, 639 N.E.2d 168 (1994). The district court found that the plain language of the policies at issue in that case

imposed a duty to indemnify for defense costs rather than a duty to defend. The policy provided that the insured was to employ counsel, file proper pleadings, and if the case went to trial, the insured was to conduct the defense. Goodheart-Willcoz Co., at ___.

As a rule, contracts should be construed as a whole. Hall, 363 Ill. App. 3d at 996. Ambiguities arising when several portions of an insurance policy are read together, will be construed in favor of the insured. Bedoya v. Illinois Founders Insurance Co., 293 Ill. App. 3d 668, 676, 688 N.E.2d 757 (1997).

The exclusions section in both the Safeco and the Hartford policies provide that the insurer "shall not be obligated to defend or to pay loss or defense costs arising from claims: ***." The reference to the obligation "to defend" in the exclusions provision conflicts with the requirement that the insured conduct its own defense, resulting in an ambiguity which must be construed in favor of the plaintiffs. See Bedoya, 293 Ill. App. 3d at 676 (where the policy terms could be read to provide only a duty to indemnify or both a duty to indemnify and defend, the ambiguity must be resolved in favor of the insured). Therefore, we find that the Safeco and Hartford polices are not indemnity only policies, and the estoppel rule applies if they have breached their duty to defend.

2. Coverage

When construing an insurance policy, our primary objective

is to ascertain and give effect to the intention of the parties, as expressed in the policy language. Gillen, 215 Ill. 2d at 393. "If the policy language is unambiguous, the policy will be applied as written, unless it contravenes public policy." Hobbs, 214 Ill. 2d at 17. "If the words used in the policy, given their plain and ordinary meaning, are unambiguous, they must be applied as written." Valley Forge Insurance Co. v. Swiderski Electronics, Inc., 223 Ill. 2d 352, 363, 860 N.E.2d 307 (2006)

The plaintiffs contend that the breach of contract claims in the circulation lawsuit are covered claims pursuant to the Coverage Agreement A of the ACE, Safeco and Hartford insurance polices.[3] Coverage Agreement A of the ACE policy provided in pertinent part as follows:

> The Company shall pay on behalf of the insured all loss *** which the insured is validly required to pay to compensate third parties because of liability imposed by law or assumed under contract as the result of claims arising from an occurrence committed by the insured during the policy term in or for scheduled publications arising from but not limited to:
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> 1. defamation ***;

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[3]The plaintiffs acknowledge that the ACE, Safeco and Hartford policies contain substantially identical coverage provisions. Unless otherwise indicated, quoted portions will be taken from the ACE policy.

2. invasion of or interference with the right of privacy or publicity ***;

3. negligent or intentional infliction of emotional distress, outrage or outrageous conduct;

4. trespass or wrongful entry or eviction;

5. false arrest or imprisonment, abuse of process detention or malicious prosecution;

6. harassing or stalking;

7. violations of the Fourth Amendment to the U.S. Constitution or other equivalent state statute preventing unreasonable searches and seizures relating to newsgathering;

8. breach of confidentiality or any oral, written or implied agreement, however styled in a claim, arising from the failure to maintain the confidentiality of a source or the materials furnished by a source, or from the failure to portray a source or subject in a certain manner or light;

9. infringement of copyright, plagiarism, piracy and misappropriation of ideas or information under implied contract or other misappropriation of ideas or information;

10. infringement or dilution of trademark, title, slogan, trade name, trade dress, service mark or service name;" (Emphasis omitted.)

Coverage Agreement A also provided coverage for unfair competition, deceptive trade practices or fraud, conspiracy,

negligent supervision of an employee, but only if they were alleged in claims covered under the first 10 clauses.

In determining whether there is a duty to defend on the part of the insurer, the court compares the facts alleged in the underlying complaint to the relevant portions of the insurance policy. Valley Forge Insurance Co., 223 Ill. 2d at 363. The insurer is obligated to defend the insured if the complaint alleges facts within or potentially within the policy's coverage. Valley Forge Insurance Co., 223 Ill. 2d at 363. The insurer must defend the insured even if the allegations are false or groundless and even if only one theory of recovery is covered under the policy. Valley Forge Insurance Co., 223 Ill. 2d at 363. The court must construe the allegations liberally in favor of the insured. Valley Forge Insurance Co., 223 Ill. 2d at 363.

The claims against the insureds in the circulation lawsuit are not based on any of the actions set forth in the first 10 actions set forth under Coverage Agreement A. While there were claims made for violations of the Consumer Fraud Act and the Unfair and Deceptive Trade Practices Act, they were not alleged in claims covered under the first 10 clauses of the Coverage Agreement A.

The plaintiffs maintain that because the circulation complaint contained breach of contract claims, there is coverage under the language of the policy providing coverage for all losses from liability "assumed under contract." The policies

similarly define "assumed under contract" as follows:

> "1. liability legally assumed by an insured in any written, oral or implied hold harmless or indemnity agreement relating to matter furnished or provided by the insured and for the types of occurrences covered by this policy;
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> 2. liability imposed pursuant to a claim for breach of contract, promissory estoppel or misrepresentation, but only if such claim:
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> a. arises out of an actual or allegedly broken promise to maintain the anonymity of a confidential source;
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> b. is brought by a source providing matter or is the subject of matter intended to be uttered or disseminated in matter to this policy, but this shall not include claims arising out of a promise by an insured that a monetary payment would be made to any source who has provided matter intended to be uttered or disseminated; or
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> c. arises out of an agreement by an insured to utter or disseminate or refrain from uttering or disseminating matter within a certain time period." (Emphasis omitted.)

Relying on subsection (c) of the "assumed under contract" definition, the insureds argue that breach of contract claims

made against them in the circulation lawsuit are covered under the policy. The insureds point out that the circulation lawsuit alleged that the contract between the insureds and ABC incorporated ABC's bylaws under which the insureds agreed to disseminate data for the benefit of the advertisers. The insureds also argue that several of the individual advertisers alleged breach of contract claims which were covered because "advertizing" was included in the definition of "matter."

"[T]he general rules which favor the insured must yield to the paramount rule of reasonable construction which guides all contract interpretations." Travelers Insurance Co. v. P.C. Quote, Inc., 211 Ill. App. 3d 719, 570 N.E.2d 614 (1991). Where possible, "every provision and word in a contract must be given meaning and effect because it is assumed that everything in a contract is inserted deliberately and for a purpose." Industrial Commodity Corporation v. E.J. Brach & Sons, 92 Ill. App. 2d 163, 167, 235 N.E.2d 857 (1968). In order for this court to find that "assumed under contract" applied to the breach of contract claims in the circulation lawsuit, we would have to treat as surplusage that part of the definition that required a time frame as part of the agreement to disseminate or not disseminate the material.

Moreover, in giving effect to the parties' intent as expressed in this definition, that intent "should not be gathered from any clause or provision standing by itself, but each provision should be viewed in light of the others." Carrico v.

Delp, 141 Ill. App. 3d 684, 689-90, 490 N.E.2d 972 (1986). Read as a whole, the "assumed under contract" definition contemplates hold harmless or indemnification agreements or agreements for the treatment of information provided by a source. Neither of these situations are presented by the breach of contract claims alleged in the circulation lawsuit.

We conclude that the plaintiffs have failed to establish that there was coverage or the potential for coverage under the insurance polices issued to them by ACE, Safeco or Hartford.

3. False Advertising Exclusion

Even if we were to determine that the potential for coverage existed, the false advertising exclusion contained in the ACE, Hartford and Safeco policies barred coverage. The exclusion provided as follows:

> "The Company shall not be obligated to defend, to pay loss or defense costs arising from claims:
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> * * *
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> for or arising out of actual or alleged false, fraudulent, deceptive, or misleading advertising or for unfair competition arising therefrom, but only in regard to intentionally fraudulent, deceptive or misleading advertising with respect to the insured's own products or services;" (Emphasis omitted.)

"Advertising" meant "advertising, publicity, press releases or promotional materials or public appearances on behalf of the

insured or for others, but this definition does not include one-on-one written or oral communications, or the redemption of lotteries, sweepstakes, coupons, contests or games of chance, including the over or under redemption of any of the above." (Emphasis omitted.)

The insureds contend that the circuit court erred when it determined that the false advertising exclusion barred coverage in this case. The insureds' argument on this point is confined to one conclusory sentence, stating that "the term 'advertising' cannot reasonably be read to include circulation numbers submitted to an auditing body such as ABC or communications between Sun-Times sales reps and its advertisers. The insureds cite two cases but fail to explain how they support their position.

Supreme Court Rule 341(h)(7) requires that the appellant's brief contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on. *** Points not argued are waived ***." 210 Ill. 2d R. 341(h)(7). This court has held a conclusory and underdeveloped argument does not meet the requirements of Rule 341(h)(7). Sobczak v. General Motors Corp., 373 Ill. App. 3d 910, 924, 871 N.E.2d 82 (2007). "[L]ack of development leads to waiver of the issue." Sobczak, 373 Ill. App. 3d at 924.

Nonetheless, the rule of waiver is not binding on this

court. Keefe-Shea Joint Venture v. City of Evanston, 332 Ill. App. 3d 163, 170, 773 N.E.2d 1155 (2002). Because this issue is easily disposed of, waiver notwithstanding, we chose to address the merits.

The evidence in the record established that the insureds provided false circulation figures to ABC to support their advertising charges. Providing such information and for such a purpose, clearly falls under "promotional materials" in the policy definition of "advertising." As the insureds were required to and did publish the circulation figures for their publications annually in The Sun-Times newspaper, the publication of the figures could be deemed "press releases," also included in the definition of advertising. Therefore, the circuit court correctly found that the false advertising exclusion applied to bar coverage.

II. ERII Policy

The insureds contend that ERII is estopped from denying it had an obligation to pay the insureds' defense expenses. Like other insurers in this case, the ERII policy contained a false advertizing exclusion. Where the insured has affirmatively demonstrated that the policy exclusions apply to bar coverage, there is no duty to defend or indemnify. See Allstate Insurance Co. v. Amato, 372 Ill. App. 3d 139, 146, 865 N.E.2d 516 (2007). Where there is no duty to defend, estoppel doctrine does not apply. Employers Insurance of Wausau, 189 Ill. 2d at 151.

In the absence of estoppel for violating the duty to defend, the insureds maintain that promissory estoppel applies in this case. Promissory estoppel requires an unambiguous promise by the defendant to the plaintiff, the plaintiff's reliance on that promise, that the reliance was expected and foreseeable by the defendant and the plaintiff must have relied on the promise to its detriment. Chatham Surgicore, Ltd. v. Health Care Service Corp., 356 Ill. App. 3d 795, 800, 826 N.E.2d 970 (2005).

The insureds point to ERII's agreement to pay their defense costs. They maintain that they relied on that agreement when they entered into the settlement of the circulation lawsuit. However, the following facts taken from the record do not support their argument for promissory estoppel.

On December 29, 2004, ERII's claims attorney advised the insurers that "ERII is prepared to indemnify the Insured for Covered Defense Expenses on an interim basis and subject to a proper allocation in light of the nature of the Insured's alleged wrongdoing, which appears to span several years outside the policy period ***." (Emphasis omitted.) Later, in the same letter, ERII "agreed to pay Defense Expenses on an interim basis subject to a reservation of rights as set forth herein." (Emphasis omitted.) Included in the reservation of rights was false advertizing exclusion and newsmedia activities taking place prior to the July 31, 2003, inception period of the ERII policy. On March 8, 2005, the insureds' attorneys sent bills representing

defense costs to ERII's claims attorney requesting payment pursuant to the December 29, 2004, letter and the requesting approval of counsel chosen by the insureds to represent them in the circulation lawsuit.

On April 25, 2005, the insureds' attorney advised ERII's claims attorney that a tentative settlement of the circulation lawsuit had been reached but was not yet finalized. On May 19, 2005, the insureds' attorneys forwarded more bills for defense expenses to ERII.

On June 17, 2005, ERII's claims attorney sent an e-mail to the insureds' attorneys stating, inter alia, as follows:

> "As previously stated in prior correspondence, ERII's obligations to contribute to Defense Expenses is conditioned upon a determination that the ERII policy is not excess of other applicable insurance. Furthermore, ERII is not responsible for assuming all Defense Expenses incurred in connection with the Claims. The misconduct which is the subject of the above actions is alleged to extend as far back as 1997."

After setting forth the policy provision providing that ERII was not responsible for any loss outside of its policy period and reiterating its right to disclaim coverage as set forth in its reservation of rights, the e-mail continued as follows:

> "In light of the other insurance and allocation issues, we need to discuss with you the defense obligations under