

No. 1-07-3208

MOTA CONSTRUCTION COMPANY,	)	
INC., and COUNTRY MUTUAL	)	
INSURANCE COMPANY,	)	
	)	Appeal from the
Plaintiffs-Appellants,	)	Circuit Court of
	)	Cook County, Illinois,
v.	)	Law Division.
	)	
WESTFIELD INSURANCE COMPANY,	)	No. 07 CH 5060
	)	
Defendant-Appellee	)	
	)	Honorable
(Fernando Berrera,	)	James Epstein,
	)	Judge Presiding.
Defendant).	)	

JUSTICE JOSEPH GORDON delivered the opinion of the court:

This case concerns the scope of an insurer's duty to defend a general contractor that is an additional insured on a subcontractor's liability insurance policy. In the underlying action, construction worker Fernando Berrera, an employee of subcontractor Pinto Construction (Pinto), was allegedly injured on the job. Berrera brought suit against another subcontractor, GM Sloan Mosaic Tile Company (Sloan), as well as the general contractor, Mota Construction Company (Mota). Sloan was insured under a policy issued by defendant Westfield Insurance Company (Westfield), on which Mota was named as an additional insured. Mota tendered its defense to Westfield. However, Westfield refused to defend Mota, contending that additional insureds were only covered for liability imputed to them as a result of the named insured's actions, not direct liability, which Westfield said was alleged against Mota in the worker's complaint.

Mota was also carried as an insured under Pinto's policy with Country Mutual Insurance

No. 07-3208

Company (Country Mutual), which furnished Mota with a defense (apparently after its defense was rejected by Westfield). Mota and Country Mutual (collectively plaintiffs) then brought the instant action, seeking declaratory judgment that Westfield had a duty to defend. Westfield counterclaimed for declaratory judgment that it did not have to defend. The trial court granted summary judgment for Westfield, from which plaintiffs now appeal. For the reasons that follow, we reverse and remand.

## I. BACKGROUND

On February 23, 2007, Mota and Country Mutual filed their complaint for declaratory judgment against Westfield and Berrera<sup>1</sup>, in which they alleged the following. Westfield issued an insurance policy to Sloan, and Mota was added to the policy as an additional insured in connection with a construction project at the New Mexican Council Building in Chicago.

Berrera, a worker at the construction project, brought suit against Sloan and Mota for injuries he allegedly sustained while on the job. A copy of Berrera's second amended complaint is attached to Mota's complaint. In it, Berrera stated that he was employed by Pinto Construction as a drywall tapper and painter. On May 23, 2003, while working at the New Mexican Council Building, Berrera allegedly tripped over construction debris in the bathroom and was severely injured. His complaint contained two counts of negligence against Mota and one count of negligence against Sloan. In count I, Berrera contended that as the general contractor, Mota controlled, managed, and supervised construction at the construction project, and it had a duty to

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<sup>1</sup> The exact spelling of Berrera's name is unclear from the record, but we choose to follow the spelling used in the case caption of the instant lawsuit.

No. 07-3208

maintain a safe work site. Notwithstanding this duty, Berrera alleged that Mota “carelessly, negligently, and unlawfully performed one of the following acts and/or omissions”: failing to reasonably inspect the construction site, failing to supervise its employees and subcontractors, failing to clean debris and provide proper lighting, and permitting dangerous conditions to exist.

In count II, Berrera contended that Mota

“retained control over work and safety of the project as well as actual control over the entire project, and through the manner in which it scheduled and coordinated the work, controlled the means and manner of work of the subcontractors during the construction process.”

As a result, Berrera said, Mota was under a duty to exercise reasonable care to avoid injury to those working on its premises under section 414 of the Restatement (Second) of Torts (Restatement (Second) of Torts §414 (1965)), which provides for liability for parties who entrust work to an independent contractor yet retain control over part of the work. Berrera then alleged that Mota instructed the flooring and tiling contractor to work in the bathroom where he was injured before the drywalling work was complete, contrary to standard practice, and instructed him to perform his drywall taping duties there despite his knowledge that other contractors were still working in the area.

In count III, Berrera contended that Sloan was employed as the tile contractor on the project and was laying tile in the bathroom on the date that Berrera was injured and that Sloan had a duty to maintain a safe work site. Berrera then claimed that Sloan committed the same negligent failures alleged of Mota in count I (failure to inspect, supervise, clean, and provide

No. 07-3208

proper lighting, as well as permitting dangerous conditions to exist).

Plaintiffs' complaint asserted that Mota tendered its defense of the Barrera lawsuit to Westfield, but Westfield denied the tender in a letter dated January 26, 2006, a copy of which is attached to the complaint. As explanation for the denial, Westfield cited the following language from the endorsement that added Mota as an additional insured:

“This endorsement provides no coverage to the additional insured for liability arising out of the claimed negligence of the additional insured, other than that which may be imputed to the additional insured by virtue of the conduct of the named insured.”

Westfield contended that under this provision, Mota was not entitled to coverage, since Berrera's lawsuit did not allege imputed liability to Mota as a result of Sloan's activities. Westfield also asserted in the letter that Mota had selected the coverage of Country Mutual, which it identified as the insurer for Berrera's employer, Pinto Construction, and that Country Mutual was defending Mota in the Berrera lawsuit.

Plaintiffs contended that, notwithstanding the language of the cited endorsement, Westfield had a duty to defend Mota against Berrera's lawsuit. Plaintiffs further contended that Mota had incurred legal fees in its defense of the lawsuit through Country Mutual. (The complaint contains no direct allegations about the relationship between Mota and Country Mutual.) Accordingly, plaintiffs requested that the court find that Westfield wrongfully failed to defend Mota in the Berrera lawsuit and require Westfield to reimburse Mota and Country Mutual for all legal fees expended in the defense of that lawsuit.

Westfield filed an answer and counterclaim for declaratory judgment on May 14, 2007, in

No. 07-3208

which it contended that the Barrera lawsuit did not seek to impute liability to Mota by virtue of Sloan's conduct, but rather alleged only direct negligence on the part of Mota as a basis for imposing liability. It requested that the court find that Westfield did not have a duty to defend or indemnify Mota in the Barrera lawsuit or compensate plaintiffs for any legal fees they had occurred in the defense of that lawsuit.

Westfield attached a copy of the insurance policy at issue to its counterclaim. The policy contains the following provision:

“b. Excess Insurance

This insurance is excess over:

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(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.' ”

Westfield additionally alleged in its counterclaim that the Barrera lawsuit remained pending and was set for trial on September 10, 2007. Plaintiffs admitted this assertion in their answer to Westfield's counterclaim. They also admitted that Country Mutual furnished a defense to Mota in the Berrera lawsuit, which, they alleged, was a result of Westfield's refusal to defend.

The parties filed cross-motions for summary judgment. Plaintiffs contended that Westfield

No. 07-3208

had a duty to defend, since Berrera's complaint contained allegations that might fall within the scope of coverage, and since Westfield was estopped from denying coverage due to its delay in filing for declaratory judgment. In support of the former contention, it attached a third-party complaint that Mota had filed against Sloan in connection with the underlying Berrera lawsuit. In the third-party complaint, Mota alleged that the blame for Berrera's injuries rested more heavily with Sloan than with Mota, because of various acts of negligence that Sloan had committed. Mota therefore contended that if Berrera won a judgment against Mota, then Mota would be entitled to contribution from Sloan based upon their relative degrees of culpability.

Meanwhile, in its summary judgment motion, Westfield took the position that Berrera's complaint alleged no facts that could give rise to a duty to defend. It also argued that no estoppel had occurred, since Westfield had sought declaratory judgment before the underlying case had gone to trial, and in any case the doctrine of estoppel only applied to bar coverage defenses where an insurer wrongfully refused to defend.

The trial court granted Westfield's summary judgment motion, finding that Westfield need not defend or indemnify Mota in connection with the Berrera lawsuit. It reasoned that Berrera's complaint did not allege that any negligence by Sloan might be imputed to Mota, but rather it alleged that Sloan and Mota committed independent acts of negligence. It also agreed with Westfield that the doctrine of estoppel did not apply. Plaintiffs now appeal.

## II. ANALYSIS

Westfield argues that the trial court's grant of summary judgment should be affirmed for two reasons: first, that the complaint in the underlying action presents no allegations that could

No. 07-3208

give rise to a duty to defend on the part of Westfield; and second, that the coverage provided by Westfield is excess to that provided by Country Mutual. Plaintiffs dispute both of these points and further argue that Westfield is estopped from denying coverage because it failed to seek a declaratory judgment within a reasonable amount of time after being notified of Mota's claim.

We note at the outset that summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284, 769 N.E.2d 18, 20 (2002), citing 735 ILCS 5/2-1005(c) (West 2006). The motion should be granted only if the movant's right to judgment is clear and free from doubt (*Reed v. Bascon*, 124 Ill. 2d 386, 393, 530 N.E.2d 417, 420 (1988)), and where fair-minded persons could draw different inferences from the facts, summary judgment should not be granted (*In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1013, 679 N.E.2d 393, 401 (1997)). We review the trial court's entry of summary judgment *de novo*. *General Casualty Insurance*, 199 Ill. 2d at 284, 769 N.E.2d at 20.

A.

Westfield first contends that it has no duty to defend Mota because Berrera's complaint does not allege any liability on the part of Mota that is imputed as a result of Sloan's actions, but, rather, that it charges Mota with only direct liability, which is beyond the scope of Mota's coverage with Westfield. We disagree. Berrera's complaint alleges that Mota maintained control over the manner and means of the work of its subcontractors, including Sloan, and in combination with its allegations of negligence by Sloan, this is sufficient to present the possibility of Sloan's liability being imputed to Mota under the complaint.

The extent of an insurer's duty to defend is determined by comparing the terms of the insurance policy with the allegations in the underlying complaint. *United States Fire Insurance Co. v. Aetna Life & Casualty*, 291 Ill. App. 3d 991, 997, 684 N.E.2d 956, 960 (1997). The duty extends to any claim under the pleadings that might *potentially* fall within the scope of the policy's coverage; thus, it is broader than the duty to indemnify. *American Country Insurance Co. v. Cline*, 309 Ill. App. 3d 501, 512, 722 N.E.2d 755, 764 (1999); *United States Fire Insurance*, 291 Ill. App. 3d at 997, 684 N.E.2d at 960-61; see *International Insurance Co. v. Rollprint Packaging Products, Inc.*, 312 Ill. App. 3d 998, 1007, 728 N.E.2d 680, 688 (2000) (stating that "[t]he duty to defend does not depend on the probability of recovery").

Furthermore, "if the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy." *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73, 578 N.E.2d 926, 930 (1991); see *National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Glenview Park District*, 158 Ill. 2d 116, 124-25, 632 N.E.2d 1039, 1043 (1994) (finding that, since insurer had duty to defend insured against Structural Work Act claim, it also had a duty to defend insured against the remaining claims alleged by plaintiff in the underlying action).

The duty to defend " 'does not require that the complaint allege or use language affirmatively bringing the claims within the scope of the policy.' " *Illinois Emcasco Insurance Co. v. Northwestern National Casualty Co.*, 337 Ill. App. 3d 356, 361, 785 N.E.2d 905, 909 (2003), quoting *Rollprint Packaging*, 312 Ill. App. 3d at 1007, 72 N.E.2d at 688. This is because "[t]he question of coverage should not hinge on the draftsmanship skills or whims of the plaintiff

No. 07-3208

in the underlying action.’ ” *Emcasco*, 337 Ill. App. 3d at 361, 785 N.E.2d at 909, quoting *Rollprint Packaging*, 312 Ill. App. 3d at 1007, 728 N.E.2d at 688. Rather, the duty is triggered “unless the allegations of the underlying complaint demonstrate that the plaintiff in the underlying suit will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts that show the loss falls outside the coverage of the insurance policy.” *Emcasco*, 337 Ill. App. 3d at 361, 785 N.E.2d at 909. In applying this standard, courts construe both the allegations of the underlying complaint and any policy limitations on coverage liberally in favor of the insured. *Glenview Park District*, 158 Ill. 2d at 122, 632 N.E.2d at 1042; *American Country Insurance Co. v. James McHugh Construction Co.*, 344 Ill. App. 3d 960, 970, 801 N.E.2d 1031, 1039 (2003).

The endorsement under which Mota seeks coverage in this case explicitly limits liability to that “which may be imputed to the additional insured by virtue of the conduct of the named insured.” Imputed liability is liability that is vicariously attributed to a party, rather than liability incurred directly by the party’s own actions. *Cline*, 309 Ill. App. 3d at 510 n.1, 722 N.E.2d at 763 n.1. The distinction between direct and vicarious liability as alternate bases for recovery is as follows: By retaining control over the “operative details” or “manner and means” of a subcontractor’s work, a general contractor may be held vicariously liable for harm to third parties caused by the subcontractor’s negligence. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 874, 832 N.E.2d 355, 361 (2005) (explaining that “the general contractor, by retaining control over the operative details of its subcontractor’s work, may become vicariously liable for the subcontractor’s negligence”); Restatement (Third) of Agency §7.07(3)(a) at 198

No. 07-3208

(2006) (stating that a principal is subject to vicarious liability for the acts of its employee, defined as “an agent whose principal controls or has the right to control the manner and means of the agent’s performance of work”). Alternately, as discussed in Restatement (Second) of Torts section 414, a general contractor may be held directly liable for harm caused by its own failure to exercise its supervisory control with reasonable care, even where it does not retain a sufficient degree of control over the subcontractor to subject it to vicarious liability. Restatement (Second) of Torts §414, Comment *a*, at 387 (1965) (contrasting the degree of control necessary for vicarious liability with the lesser degree necessary for direct liability); see Restatement (Third) of Agency §7.03(1)(b) at 151 (2006) (“A principal is subject to direct liability to a third party harmed by an agent’s conduct when \*\*\* the principle is negligent in selecting, supervising, or otherwise controlling the agent”). Thus, for instance, allegations that a general contractor failed to properly inspect, manage, and supervise a jobsite are allegations of direct liability, not of imputed liability. See *James McHugh*, 344 Ill. App. 3d at 971-72, 977, 801 N.E.2d at 1041, 1044-45.

Westfield argues that Berrera’s complaint does not advance vicarious liability as a theory, but merely asserts the direct liability of Mota in counts I and II and, independently, the direct liability of Sloan in count III. However, Berrera’s complaint does allege facts which, if true, could potentially be sufficient to support a finding of vicarious liability. Specifically, it alleges that Mota “controlled the means and manner of work of the subcontractors during the construction process.” This contention, when added to the contention that its subcontractor Sloan was negligent in the performance of that work, leaves open the possibility that liability might be

No. 07-3208

imputed to Mota for Sloan's negligence under the allegations of the complaint, even though the complaint does not explicitly seek recovery under a theory of vicarious liability. See *Emcasco*, 337 Ill. App. 3d at 361, 785 N.E.2d at 909 (duty to defend " 'should not hinge on the draftsmanship skills or whims of the plaintiff in the underlying action' "), quoting *Rollprint Packaging*, 312 Ill. App. 3d at 1007, 728 N.E.2d at 688; *Winklevoss Consultants, Inc. v. Federal Insurance Co.*, 991 F. Supp. 1024, 1030 (N.D. Ill. 1998) (under Illinois law, key to determining duty to defend " 'is not the legal label that the [underlying] plaintiff attaches to the [insured's] conduct, but whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers' "), quoting *Curtis-Universal, Inc. v. Sheboygan Emergency Medical Services, Inc.*, 43 F.3d 1119, 1122 (7th Cir. 1994). At the very least, we cannot say that such a possibility is foreclosed by the complaint when it is read liberally in favor of coverage (see *Glenview Park District*, 158 Ill. 2d at 122, 632 N.E.2d at 1042), so Westfield's duty to defend is triggered. See *Emcasco*, 337 Ill. App. 3d at 361, 785 N.E.2d at 909; *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73, 578 N.E.2d 926, 930 (1991) ("An insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage").

In this regard, the case at hand is analogous to *Emcasco*, 337 Ill. App. 3d 356, 785 N.E.2d 905. In *Emcasco*, an injured worker sued both a subcontractor and a general contractor for committing negligence " 'through [their] duly authorized agents,' " although his complaint did not specifically allege that the subcontractor was an agent of the general contractor. *Emcasco*,

No. 07-3208

337 Ill. App. 3d at 358, 785 N.E.2d at 907. Under such facts, the court found that it was possible that the subcontractor's negligence might be imputed to the general contractor.

*Emcasco*, 337 Ill. App 3d at 362, 785 N.E.2d at 910. Accordingly, it found that the subcontractor's insurer had a duty to defend the general contractor, although the terms of coverage only included liability that might be imputed to the general contractor by virtue of the subcontractor's actions. *Emcasco*, 337 Ill. App 3d at 362, 785 N.E.2d at 910.

Westfield claims that *Emcasco* is distinguishable because Barrera's complaint does not allege that Sloan was acting as Mota's agent, nor does it allege facts from which such an inference could reasonably be drawn. This contention is incorrect; as discussed earlier, Barrera's complaint alleges on its face that Mota retained control over the means and manner of the work of its subcontractors, which would by implication include Sloan, and which has the potential to support an allegation of an agency relationship between them. Restatement (Third) of Agency §§7.03(2)(a), 7.07(3)(a) (2006); see *Cochran*, 358 Ill. App. 3d at 874, 832 N.E.2d at 361.

Westfield further argues that this case is controlled by *Cline*, 309 Ill. App. 3d 501, 722 N.E.2d 755, and *American Country Insurance Co. v. Kraemer Brothers, Inc.*, 298 Ill. App. 3d 805, 699 N.E.2d 1056 (1998), in which no duty to defend was found. However, these cases are readily distinguishable. In *Cline* and *Kraemer*, as in the case at hand, a general contractor was added as an additional insured to a subcontractor's insurance policy under an endorsement that limited coverage to vicarious liability arising out of the subcontractor's actions. An injured worker sued the general contractor, and the issue was whether the subcontractor's insurer had a duty to defend. Yet a critical distinction exists in *Cline* and *Kraemer*: in both cases, the

No. 07-3208

subcontractor was not a defendant in the underlying lawsuit. *Cline*, 309 Ill. App. 3d at 504-05, 722 N.E.2d at 758-59; *Kraemer*, 298 Ill. App. 3d at 808, 699 N.E.2d at 1058.

Thus, the *Cline* court premised its holding on the fact that the underlying complaint raised no allegation of negligence against the subcontractor, stating, “The allegations in [the worker’s] complaint do not raise the possibility that [the subcontractor] was in charge of work or that its conduct caused the underlying injury.” *Cline*, 309 Ill. App. 3d at 515, 722 N.E.2d at 766. Since no subcontractor negligence was alleged, reasoned the court, there was no possibility under the complaint that such negligence might be imputed to the general contractor. *Cline*, 309 Ill. App. 3d at 513, 722 N.E.2d at 765. The *Kraemer* court followed the same line of argument. *Kraemer*, 298 Ill. App. 3d at 813-14, 699 N.E.2d at 1062. This stands in stark contrast to the present case, in which not only did the complaint allege negligence on the part of the subcontractor, but it also alleged that the general contractor exercised control over the means and manner of that subcontractor’s work. Thus, this case is more readily governed by *Emcasco* rather than *Cline* and *Kraemer*. See *James McHugh*, 344 Ill. App. 3d at 975, 801 N.E.2d at 1043-44 (noting that the crucial distinction between *Cline*, in which there was no duty to defend, and *Emcasco*, in which there was a duty to defend, was that the underlying complaint in *Emcasco* named the subcontractor as well as the general contractor as a defendant).

Westfield also argues that under *Village of Hoffman Estates v. Cincinnati Insurance Co.*, 283 Ill. App. 3d 1011, 670 N.E.2d 874 (1996), no duty to defend can arise where the complaint alleges any direct liability against Mota, even if vicarious liability may also be alleged, because in such a case direct liability would not be the sole theory of recovery against Mota. Yet *Hoffman*

No. 07-3208

*Estates* is distinguishable because the scope of coverage in that case was significantly less than the scope of coverage that Westfield's policy grants to Mota. In *Hoffman Estates*, a village entered into a construction contract with a general contractor and was added as an additional insured on the general contractor's policy under a clause stating that it would be covered only for "liability incurred *solely as a result of some act or omission*" of the general contractor (emphasis in original). *Hoffman Estates*, 283 Ill. App. 3d at 1013, 670 N.E.2d at 875. Based upon the use of the word "solely," the court found that the insurer had no duty to defend the village when an injured construction worker brought suit against both the general contractor and the village. *Hoffman Estates*, 283 Ill. App. 3d at 1013-14, 670 N.E.2d at 876. The court reasoned that the word "solely" meant that the village would not be covered unless the general contractor's acts or omissions were the sole ground for alleging liability against the village. *Hoffman Estates*, 283 Ill. App. 3d at 1014, 670 N.E.2d at 876.

By contrast, the Westfield policy contains no such limiting language. It contains an exclusion for that portion of the liability "other than that which may be imputed to the additional insured by virtue of the conduct of the named insured," but there is no suggestion in the text of the endorsement that the presence of direct liability as an alternate theory of recovery would remove coverage for any imputed liability. Accordingly, under the language of the Westfield policy, the fact that Mota may potentially be found liable under both a vicarious liability theory and a direct liability theory pursuant to Restatement (Second) of Torts section 414 would not necessarily preclude Westfield from having to pay that portion of liability that stemmed from Mota's vicarious liability. See *Wilkin Insulation*, 144 Ill. 2d at 73, 578 N.E.2d at 930 (stating the

No. 07-3208

general rule that “if the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is within the potential coverage of the policy”); *Glenview Park District*, 158 Ill. 2d at 124-25, 632 N.E.2d at 1042.

Plaintiffs further argue that a duty to defend arises from Mota’s third-party complaint against Sloan, which they contend raises the possibility that Mota might be found vicariously liable for Sloan’s conduct. We note that there is a split in authority in Illinois as to whether consideration of the allegations in a third-party complaint may be considered in determining the duty to defend. See, e.g., *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 1031-32, 886 N.E.2d 1166, 1179 (2008) (finding that a third-party complaint could be considered in determining the duty to defend); *West Bend Mutual Insurance Co. v. Sundance Homes, Inc.*, 238 Ill. App. 3d 335, 337, 606 N.E.2d 326, 327 (1992) (same); *National Union Fire Insurance Co. v. R. Olson Construction Contractors, Inc.*, 329 Ill. App. 3d 228, 235, 769 N.E.2d 977, 982 (2002) (declining to consider allegations of third-party complaint). This issue is currently pending before the Illinois Supreme Court. *American Economy Insurance Co. v. Holabird & Root*, 229 Ill. 2d 617, 897 N.E.2d 249 (2008). Although this court has taken the position favoring consideration of third-party complaints, our decision need not rest upon determination of this issue. A strong argument could be made that the third-party complaint in this case does no more than the primary complaint does to establish potential coverage. Indeed, the implications of potential coverage may be greater in the primary complaint, as the third-party complaint does not contain any allegations about the nature of the relationship between Mota and Sloan, but merely speaks of their relative degree of culpability. In any event, we need not rely on

No. 07-3208

Mota's third-party complaint as a basis for invoking the duty to defend, since such duty is already invoked by the primary complaint, for the reasons discussed above.

B.

Westfield next contends that, in any event, it had no duty to defend Mota against Berrera's suit because its coverage was excess to the coverage provided by Country Mutual. Plaintiffs contend that Westfield has waived this point by failing to raise it below, and in any event, that Mota had the right to elect which insurer to seek coverage from. We find that waiver applies, as the record lacks sufficient evidence for us to properly consider Westfield's contention.

An appellant may not raise an issue for the first time on appeal. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536, 662 N.E.2d 1248, 1253 (1996). By contrast, an appellee may raise any point in support of the judgment, as long as the factual basis for the defense was before the trial court. *Beahringer v. Page*, 204 Ill. 2d 363, 370, 789 N.E.2d 1216, 1222 (2003) (undertaking substantive review of issues raised by appellees that had not been presented to the trial court), citing *Shaw v. Lorenz*, 42 Ill. 2d 246, 248, 246 N.E.2d 285, 287 (1969); see *Coleman v. Hinsdale Emergency Medical Corp.*, 108 Ill. App. 3d 525, 527, 439 N.E.2d 20, 22 (1982) (contrasting waiver rules with respect to appellants and appellees). However, where the necessary factual basis is not contained in the record, even an appellee is subject to waiver for points not raised below, since we cannot consider facts that are not in the record. *Sanni, Inc. v. Fiocchi*, 111 Ill. App. 3d 234, 236, 443 N.E.2d 1108, 1111-12 (1982) (finding that appellee had waived argument that she had not brought before the trial court, since the record was insufficient to assess her argument); *Talbert & Mallon, P.C. v. Stokes Towing Co.*, 213 Ill. App. 3d 992, 996, 572 N.E.2d

No. 07-3208

1214, 1216-17 (1991) (same).

In this case, Westfield contends that under the terms of the policy, since Mota was added as an additional insured onto Pinto Construction's policy with Country Mutual, the coverage provided by Westfield is excess to that provided by Country Mutual.

However, the record before us does not provide us with enough information to properly assess this contention, nor indeed to determine the exact nature of the relationship between Mota and Country Mutual. It is undisputed that Country Mutual provided a defense to Mota in the Berrera lawsuit. However, the record does not establish that Country Mutual was a primary insurer of Mota. Nor do we know whether the Country Mutual policy contained any provisions regarding other insurance that might on their face conflict with the quoted language in the Westfield policy. Without more information about the Country Mutual policy, we are unable to determine whether the coverage provided by Westfield is excess to that provided by Country Mutual, and thus this point is waived. See *Sanni*, 111 Ill. App. 3d at 236, 443 N.E.2d at 1111-12; *Talbert & Mallon*, 213 Ill. App. 3d at 996, 572 N.E.2d at 1216-17.

C.

Finally, plaintiffs allege that, as it has been established that Westfield had a duty to defend, that duty was breached by Westfield's failure to either defend the Barrera suit under a reservation of rights or bring a declaratory judgment action within a reasonable amount of time after being notified of the suit. As a result, plaintiffs claim that Westfield is estopped from asserting any coverage defenses with respect to its duty to indemnify.

Under the general rule of estoppel, an insurer that is presented with a defense claim may

No. 07-3208

not simply refuse to defend the insured; rather, it must either (1) defend the suit under a reservation of rights or (2) seek declaratory judgment that no coverage exists. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151, 708 N.E.2d 1122, 1135 (1999); *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, PA.*, 343 Ill. App. 3d 93, 101, 796 N.E.2d 1133, 1140 (2003). If the insurer fails to take either of these measures in a timely fashion, and if it is later ruled that the insurer's refusal to defend was wrongful, then the insurer is estopped from later raising policy defenses to coverage, "even those defenses that may have been successful had the insurer not breached its duty to defend." *Ehlco*, 186 Ill. 2d at 151-52, 708 N.E.2d at 1135; see C. Drechsler, Annot., *Consequences of Liability Insurer's Refusal to Assume Defense of Action Against Insured Upon Ground That Claim Upon Which Action is Based is Not Within Coverage of Policy*, 49 A.L.R.2d 694, at 717 (1956) ("The first and most obvious of the positive obligations created by an insurer's unjustified refusal to defend is its obligation to pay the amount of the judgment rendered against the insured or of any settlement made by the insured of the action brought against him by the injured party"). This is a significant penalty because, as discussed earlier, the duty to defend is normally broader than the duty to indemnify. *Cline*, 309 Ill. App. 3d at 512, 722 N.E.2d at 764. The reasoning behind this rule of estoppel is that "the insurer has no right to insist that the insured be bound by the provisions of the insurance contract inuring to its benefit, i.e., the 'Exclusions' provisions, when it has already breached the contract by violating the provisions inuring to the benefit of the insured, i.e., the defense provisions." *Sims v. Illinois National Casualty Co.*, 43 Ill. App. 2d 184, 197, 193 N.E.2d 123, 129 (1963).

No. 07-3208

Plaintiffs contend that Westfield's delay in filing a claim for declaratory judgment was so unreasonable as to constitute estoppel. Westfield, on the other hand, contends that no estoppel can exist where its claim for declaratory judgment was filed before trial in the underlying action.

The appellate courts have taken three main approaches in determining whether an insurer's declaratory judgment action was timely filed, so as to avoid a finding of estoppel.

“One group of cases has required only that the declaratory judgment action be filed before the underlying lawsuit is resolved. [Citations.] A second group of cases has looked to whether a trial or settlement was imminent at the time the insurer sought declaratory relief. [Citations.] Finally, a third group of cases has focused on whether the insurer filed its action within a reasonable time of being notified of the underlying suit.” *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill. App. 3d 946, 960, 846 N.E.2d 974, 987-88 (2006).

See also *L.A. Connection v. Penn-America Insurance Co.*, 363 Ill. App. 3d 259, 265, 843 N.E.2d 427, 432-33 (2006) (discussing these three standards for determining whether estoppel has occurred).

We agree with the *Kingsport* and *L.A. Connection* courts that the “reasonable time” test is the best approach in determining whether an insurer's declaratory judgment action was timely. *Kingsport*, 364 Ill. App. 3d at 960, 846 N.E.2d at 988; *L.A. Connection*, 363 Ill. App. 3d at 265-66, 843 N.E.2d at 33. As the *Kingsport* court explained:

“The estoppel doctrine is meant to enforce the duty to defend. [Citation.] Tests that require only that an insurer file a declaratory judgment action before the underlying suit is

No. 07-3208

resolved or a trial or settlement is imminent contravene this goal, as they potentially give an insurer free license to abandon its insured until the underlying case is almost complete or well underway. In other words, such approaches offer no incentive to the insurer to resolve coverage issues as soon as possible. In contrast, the ‘reasonable time’ test is a more flexible approach that allows the court to decide each case according to its own facts and circumstances [citation] and encourages the prompt filing of declaratory judgment actions.” (Emphasis omitted.) *Kingsport*, 364 Ill. App. 3d at 960, 846 N.E.2d at 988.

See S. Nardoni & J. Vishneski, *The Illinois Estoppel Doctrine Revisited: How Promptly Must an Insurer Act?*, 24 N. Ill. U.L. Rev. 211, 224-30 (2004) (arguing in favor of the “reasonable time” test). This is a flexible approach dependent on the facts and circumstances of each individual case, and while the status of the underlying suit is still a factor in determining the timeliness of an insurer’s declaratory judgment action, it is not necessarily dispositive. *Kingsport*, 364 Ill. App. 3d at 960, 846 N.E.2d at 988. We therefore reject Westfield’s contention that it is automatically free from estoppel by virtue of the fact that its declaratory judgment claim came before Berrera’s lawsuit went to trial.

The insurer’s duty to defend is triggered by its actual notice of a claim. *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 328, 701 N.E.2d 499, 504 (1998). In the case at hand, the exact date that Westfield had actual notice of the claim against Mota is unclear. However, it is undisputed that Westfield notified Mota of its refusal to defend on January 26, 2006, and yet it did not file its counterclaim for declaratory judgment until May 14, 2007. We find this delay of nearly 16 months to be unreasonable. There is a scarcity of case law defining

No. 07-3208

what precisely constitutes a reasonable time; however, we find the case of *Central Mutual Insurance Co. v. Kammerling*, 212 Ill. App. 3d 744, 571 N.E.2d 806 (1991), to be instructive. In *Kammerling*, the insurer had notice of the claim at issue for 10 months before it filed for a declaratory judgment. *Kammerling*, 212 Ill. App. 3d at 746-47, 571 N.E.2d at 808-09. The declaratory action was filed before the underlying lawsuit was resolved. Nevertheless, the court found the 10-month delay to be unreasonable, stating, “No reasons equitable or otherwise suggest itself in the record as to why [the insurer] delayed its legal obligation to file a declaratory action during this period.” *Kammerling*, 212 Ill. App. 3d at 750, 571 N.E.2d at 810. Likewise, no reasons appear in the record for Westfield’s delay, which is significantly longer than the delay that the *Kammerling* court found to be unreasonable. See also *Ehlco*, 186 Ill. 2d at 155, 708 N.E.2d at 1137 (estoppel where insurer did not seek declaratory judgment until nearly 12 months after receiving notice of the underlying claim); *Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 451, 750 N.E.2d 764 (2001) (estoppel where insurer did not seek declaratory judgment until 18 months after suit was filed in the underlying action). Moreover, the *Kammerling* court did not find it significant that the insured had obtained coverage from another carrier, citing the rule that “ ‘[t]he contract becomes no less breached because of the fortuitous existence of another insurer who is willing to meet its own obligations.’ ” *Kammerling*, 212 Ill. App. 3d at 749, 571 N.E.2d at 810, quoting *Aetna Casualty & Surety Co. v. Coronet Insurance Co.*, 44 Ill. App. 3d 744, 749, 358 N.E.2d 914, 917 (1991). Similarly, the fact that Mota obtained a defense from Country Mutual does not excuse Westfield’s tardiness in filing a declaratory judgment action. As a result, we find that Westfield is estopped from asserting

No. 07-3208

coverage defenses due to its failure to seek timely adjudication of its rights with regard to the Berrera lawsuit. See *Ehlco*, 186 Ill. 2d at 151, 708 N.E.2d at 1135.

Accordingly, for the foregoing reasons, we reverse the trial court's grant of summary judgment in favor of Westfield, as Westfield had a duty to defend Mota in the Berrera lawsuit.

We remand for the trial court to adjudicate the appropriate relief for Westfield's failure to defend Mota.

Reversed and remanded for proceedings not inconsistent with this opinion.

O'MALLEY, P.J., and McBRIDE, J., concur.

<b>REPORTER OF DECISIONS - ILLINOIS APPELLATE COURT</b> <b>(Front Sheet to be Attached to Each Case)</b>	
Please use the following form	<p>Mota Construction Co., Inc., and Country Mutual Insurance Co.,</p> <p style="text-align: center;">Plaintiffs-Appellants,</p> <p style="text-align: center;">v.</p> <p>Westfield Insurance Co.,</p> <p style="text-align: center;">Defendant-Appellee</p> <p>(Fernando Berrera,</p> <p style="text-align: center;">Defendant).</p>
Docket No.	No. <u>1-07-3208</u>
COURT	Appellate Court of Illinois First District, <u>SIXTH</u> Division
Opinion Filed	<u>June 5, 2009</u> (Give month, day and year)
JUSTICES	<b>JUSTICE JOSEPH GORDON DELIVERED THE OPINION OF THE COURT:</b>  <u>O'Malley, P.J., and McBride, J.</u> , concur.
APPEAL from the Circuit Court of Cook County; the Hon ___ Judge Presiding.	Lower Court and Trial Judge(s) in form indicated in margin:  Appeal from the Circuit Court of Cook County.  The Hon. <u>James Epstein</u> Judge Presiding.
APPELLANTS: John Doe, of Chicago	Indicate if attorney represents APPELLANTS or APPELLEES and include attorneys of counsel. Indicate the word NONE if not represented.  <u>APPELLANTS: Keith G. Carlson, Carlson Law Offices, 6 W. Hubbard Street, 8th Floor, Chicago, IL 60654</u>
For APPELLEES, Smith and Smith of Chicago	<u>APPELLEE: Stephen A. Kolodziej and Scott R. Britton, Brenner, Ford &amp; Monroe, Ltd., 33 North Dearborn St., Suite 300, Chicago, IL 60602</u>
Add attorneys for 3rd party appellants and/or appellees.	