The Unique Nature of Coverage Litigation: Why Policyholders Need Not Prove Their Own Liability in Coverage Actions, and Should Not be Bound by Positions Taken in Underlying Litigation

by Marc E. Rosenthal and Kelly DeAngelis

Marc Rosenthal is a partner in the Chicago office of Proskauer Rose LLP specializing in a wide variety of insurance and reinsurance matters, including litigation, arbitration, counseling, corporate, captives, and regulatory compliance relating to property and casualty, life, D&O, financial guaranty and professional liability coverages. Mr. Rosenthal can be reached at mrosenthal@proskauer.com. Kelly DeAngelis is a law clerk in the Litigation and Dispute Resolution Department and is resident in Proskauer's New York office. Ms. DeAngelis can be reached at kdeangelis@proskauer.com. The opinions expressed in this opinion are not necessarily those of Proskauer Rose LLP, its attorneys or its clients.

I. Introduction

In the context of insurance litigation, there are two distinct types of actions in which the insured is involved, the underlying action and the coverage action. Each of these types of actions serves a very different and separate purpose. The purpose of the underlying action is to determine whether the insured is liable to the underlying plaintiffs for their injuries. The purpose of the coverage action is to determine whether the insured's liability in the underlying action, often in the form of a settlement, is covered by its insurance policies.

Because of this dichotomy, the policyholder can find itself in the curious position of denying its liability in the underlying action and then needing to argue a seemingly contrary position in order to obtain insurance coverage. Recognizing this catch-22, several courts have correctly found that the policyholder need not prove its liability to the underlying plaintiff in order to obtain coverage, but rather need only show that a settlement was paid in reasonable anticipation of liability. Such a rule of law fosters the goal of settlement and recognizes the realities of the underlying litigation in which all the facts necessary to prove coverage are often not at issue or fully developed before settlement. This situation can arise, for example, in the context of product identification in toxic tort actions, proof that the insured's building products were actually used in a particular building, or that underlying plaintiffs were actually injured by a particular product.

If a court were to apply the principle of judicial estoppel in such a situation, and therefore limit the insured's argument in the coverage litigation to that made in the underlying actions, the insured would be placed in an unenviable, and largely unworkable, position of having to mold its defense of the underlying liability actions around a potential subsequent coverage action.

Recognition of the differing purposes of liability and coverage actions has also led at least one court to further hold that positions taken in the underlying action should not form the basis for judicial estoppel in a subsequent coverage action. Accordingly, it is entirely appropriate for an insured defending itself against a series of underlying asbestos claims to take one position regarding the trigger of coverage in the underlying action in order to refute its liability, but a different position in the subsequent coverage action. If a court were to apply the principle of judicial estoppel in such a situation, and therefore limit the insured's argument in the coverage litigation to that made in the underlying actions, the insured

would be placed in an unenviable, and largely unworkable, position of having to mold its defense of the underlying liability actions around a potential subsequent coverage action. Such a ruling would force the policyholder to make a choice between protecting itself in the underlying actions or asserting its rights in the coverage action. A better approach is to recognize the distinct natures of the underlying and coverage actions and to permit the insured to make seemingly inconsistent arguments, thus protecting the insured from having to prove its own liability.

Finally, it is also reasonable and appropriate for courts to prohibit inconsistent litigation positions when taken by the insurer, rather than by the policyholder. Unlike the differing purposes of liability and coverage litigation faced by the insured, the insurer is faced only with the decision to accept or deny coverage. Once the insurer has taken a position in coverage litigation as to why coverage should be denied, the insurer should not be allowed to "mend the hold" and take an inconsistent position.

II. An Insured Need Not Prove Its Own Liability in Order to Obtain Coverage

Courts in various jurisdictions have recognized the dilemma a policyholder can face in denying liability in an underlying case and subsequently seeking insurance coverage for settlement of such claims.[1]

A line of cases applying New York law provides a particularly apt illustration of the widely accepted principle refusing to force an insured to prove its own liability. Generally speaking, under New York law, for an insured to recover for an amount paid in settlement of a claim, two requirements must be met. First, under *Servidone Construction Corp. v. Security Ins. Co. of Hartford,*[2] the claim must be covered by the policy.[3]

Second, under *Luria Bros. & Co., Inc. v. Alliance Assurance Co., Ltd.,*[4] the insured must show that it settled the claim in "reasonable anticipation of liability."[5] In *Luria*, the United States Court of Appeals for the Second Circuit addressed the question of whether an insured, a time charter on a cargo ship, was entitled to coverage for settlements it entered into with the shipowner after the ship sank.[6] In applying the standard it had announced, the Second Circuit evaluated the facts known to the insured at the time of the settlement, and affirmed the district court's determination that the possibility of liability existed.[7] Specifically, the court noted that even though the law did not generally hold time charters liable for defects in vessels, based on the fact that the insured had "actively participated in exposing third parties" to dangerous situations, a jury "might well have found" the insured liable.[8]

The relationship between these two requirements is illustrated in *Uniroyal, Inc. v. Home Ins. Co.*[9] In *Uniroyal*, the United States District Court for the Eastern District of New York determined that the insured was entitled to coverage for settlements executed with claimants who allegedly suffered injury due to exposure to Agent Orange. In making its coverage determination, the district court relied on a separate opinion by the Second Circuit, which evaluated the settlement pursuant to federal class action rules. In that opinion, the Second Circuit identified important weaknesses in the plaintiffs' case against the insured. First, the appeals court noted that the plaintiffs lacked evidence as to the severity of the claims.[10] Second, the court was "unimpressed" by the ability of the plaintiffs to prove that their injuries were actually caused by Agent Orange. Specifically, the court noted that some of the plaintiffs' ailments were "so common that causation by Agent Orange simply cannot be proved."[11] Despite these weaknesses, the court concluded that the litigation created "dangerous exposure" for the defendant companies, and that if the plaintiffs tried the case successfully, the potential verdict was substantial.[12]

The Uniroyal court found the distinction between the nature of the underlying actions and the subsequent action key to its refusal to allow the circumstances of the underlying action to affect the subsequent coverage determination. Such a policy offers necessary protection to policyholders who must be able to defend themselves in the underlying actions without worry that their defense will later prevent them from obtaining coverage in disputes with their carriers.

Applying the balancing test articulated in *Luria*, the district court in the coverage action determined that even though the Second Circuit had found the settlement to be of nuisance value, a "settlement is reasonable when it reflects both the probability of loss and the probable size of that loss, as Uniroyal's settlement certainly did."[13] Specifically, the *Uniroyal* court stated:

> [The insurers' approach] would place settling defendants in the hopelessly untenable position of having to refute liability in the underlying action until the moment of settlement, and then of turning about face to prove liability in the insurance action. Often the evidence needed to prove actual injury—such as the tort plaintiffs' medical histories—would be unavailable to the insured. Such a regime would markedly reduce the advantages to the insured of settling:

> faced with the choice of defending the tort action vigorously or settling it without hope of insurance reimbursement, insureds would tend to choose the former ... These developments would conflict with the policy, which pervades all areas of law, of encouraging settlements wherever it is possible.[14]

The *Uniroyal* court found the distinction between the nature of the underlying actions and the subsequent coverage action key to its refusal to allow the circumstances of the underlying action to affect the subsequent coverage determination. Such a policy offers necessary protection to policyholders who must be able to defend themselves in the underlying actions without worry that their defense will later prevent them from obtaining coverage in disputes with their carriers.

Other courts have taken an approach consistent with that taken by the *Uniroyal* court. These courts do not require the insured to prove that the underlying claimant's injury was caused by the insured's own product.[15] In fact, these courts specifically reject the requirement that the insured prove that the underlying claimant's injury was caused by the insured's own product. For example, in *Maryland Cas. Co. v. W.R. Grace & Co.,*[16] an action involving insurance coverage for property damage caused by the insured's product, the United States District Court for the Southern District of New York rejected the insurers' argument that the insured had the burden of proving that its asbestos-containing product was actually installed in the buildings at issue in particular years in order to allocate the claims.[17] According to the court, *Luria* did not require the insured to establish actual liability so long as it could show potential liability on the facts known to the insured.[18] The *Luria* rule was found consistent with *Servidone*, and the *Servidone* decision made it clear that a plenary trial on coverage is not always necessary.[19]

Similarly, in *Dow Corning Corp. v. Continental Cas. Co., Inc.,*[20] the issue was the appropriate trigger of coverage in connection with settlements entered into with claimants alleging injury from breast implants. In the coverage action, the insurers attempted to argue that the timing of the claimants' injuries was not established and, without this determination, it was improper for the court to apply a continuous trigger of coverage.[21] The Michigan Court of Appeals rejected this argument holding that the policies did not grant the insurers a right to litigate the facts in the underlying action.[22]

In *United States Gypsum Co. v. Admiral Ins. Co.,*[23] the insured sought a declaration that its primary and excess insurers were obligated to defend and indemnify it in over 200 property damage claims relating to Gypsum's manufacture of asbestos-containing building materials.[24] On appeal, the insurers argued that the trial court erred in finding a duty to indemnify because it failed to require Gypsum to prove through "actual facts" that there was "property damage" within the meaning of the polices in each of the underlying cases.[25] In rejecting the insurers' argument, the court noted that the insured in a coverage action does not have to prove its own liability:

> The challenge by the insurers in a coverage action may ... not address the issue as to whether the underlying plaintiffs sustained damage for which the insured is liable. That was the subject of the underlying action. The coverage action may only address whether the damage in question falls within the coverage provisions of the policies.[26]

Finally, in *Vitkus v. Beatrice Co.,*[27] the United States Court of Appeals for the Tenth Circuit turned to the policy discussions in the *Luria*, *Uniroyal* and *Gypsum* opinions in determining that "[i]n order to recover the amount of the settlement from the insurer, an insured need not establish actual liability to the party with whom it has settled ..."[28] Similarly, in *American States Ins. Co. v. Synod of the Russian Orthodox Church Outside of Russia,*[29] the United States Court of Appeals for the Fifth Circuit relied on both *Servidone* and *Luria* in rejecting the insurer's argument that it owed the insured no liability because the insured failed to prove that it faced actual liability in the settled action.

The principle that a policyholder need not prove its liability in order to obtain coverage protects the insured from the Morton's fork of having to admit liability in order to obtain coverage or contesting liability and losing coverage.

Each of these decisions underscores the difference between the purposes of the underlying litigation and the coverage litigation. The principle that a policyholder need not prove its liability in order to obtain coverage protects the insured from the Morton's fork of having to admit liability in order to obtain coverage or contesting liability and losing coverage. Such a rule of law also promotes settlement, as well as the financial interests of the policyholder and, ultimately, its insurers.[30]

III. The Next Step: Judicial Estoppel Should Not Apply to the Policyholder's Differing Positions Taken in the Underlying and Coverage Actions

On December 20, 2007, the Illinois Circuit Court issued a decision taking an appropriate next step in

building off of the policy that protects policyholders from having to prove their own liability in order to receive coverage for settlements, and extending this policy into the arena of coverage actions themselves. In *John Crane, Inc. v. Admiral Ins. Co.*[31] ("*John Crane*"), the Illinois Circuit Court held that as a result of the unique interplay between an underlying action and the subsequent insurance coverage action, the doctrine of collateral estoppel does not bar a policyholder from advocating one position in the underlying liability case and an opposite position in the subsequent insurance coverage action.[32] This decision, which was rooted in the court's recognition of the separate purposes of the underlying liability action and the subsequent coverage action, appropriately protects policyholders in insurance coverage actions from becoming trapped by the arguments they make in the underlying liability actions.

John Crane was a coverage action involving the responsibilities of umbrella and excess carriers for asbestos related claims.[33] Beginning in 1979, John Crane, Inc. ("Crane"), a manufacturer and distributor of sealing devices and the plaintiff in the coverage action, was named as a defendant in over 250,000 claims alleging asbestos related injuries.[34] In May, 2004, Crane brought a coverage action, *John Crane*, to determine its Insurers' duties under the relevant policies.

During the coverage action, Crane presented evidence to support the application of a continuous trigger theory "whereby all policies in effect from the first inhalation [of asbestos] through the diagnosis or death are triggered."[35] This position, however, was contrary to the position that Crane took in the underlying tort actions against it.[36] In the underlying actions, Crane asserted that injury did not occur from mere exposure to asbestos.[37] Instead, Crane asserted "that injury does not occur with the first inhalation of asbestos fibers. Rather, injury occurs after a certain amount of fibers is inhaled and the body's defense mechanism can no longer fend off the fibers."[38] This position, which Crane had successfully advocated and therefore was able to avoid liability in numerous underlying actions, became the position that some of the insurers advocated in the coverage action and that Crane contended was inaccurate.[39] The insurer defendants moved to strike the trial testimony of Crane's expert witnesses supporting Crane's position on the trigger of coverage issue.[40]

One of the grounds upon which the insurers based their motion to strike was the doctrine of judicial estoppel.[41] Judicial estoppel provides that "a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding, *Bidani v. Lewis*.[42] Under Illinois law, there are generally five elements necessary to successfully assert the doctrine of judicial estoppel: (1) the two positions must be taken by the same party; (2) the position must be taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position, and received some benefit thereby; and (5) the two positions must be "totally inconsistent."[43]

In *John Crane*, the insurers asserted that Crane "should be judicially estopped from submitting expert testimony and arguing a position which is contrary to Crane's expert testimony and arguments put forth in the underlying action."[44] The court denied the insurers' motion to strike Crane's witnesses' testimony based upon the doctrine of judicial estoppel.[45]

In discussing its reasons for rejecting the insurers' motion seeking to bar Crane from advocating one position in the underlying liability cases and an opposite position in the subsequent insurance coverage action, the court examined the unique nature of insurance coverage actions as well as the policy considerations underlying such actions. The court found it "improper" for the insurers to attempt to avoid coverage by "emphasizing defenses that Crane made in the underlying cases."[46] The court acknowledged that "at first blush" it appears as though Crane should be judicially estopped from asserting inconsistent positions in the underlying actions and the subsequent coverage action.[47] However, the court quickly removed Crane's inconsistent positions from the grasps of the doctrine of judicial estoppel:

> [D]ue to the nature and interplay of an underlying liability action and the subsequent insurance coverage action, a unique situation may arise where it appears that the insured is taking two different positions and the insured is not judicially estopped from doing so.[48]

The holding in John Crane operates as a logical and necessary extension of the holdings by courts in various jurisdictions that an insured who settles should not be forced to establish its own liability in order to receive insurance coverage for its settlement costs.

In rejecting the application of judicial estoppel to the positions taken by Crane, the court relied on the distinction between the underlying actions and the subsequent coverage action, stressing that "[t]hey are two different types of actions with two different questions of law to be answered."[49] Most notably,

the purpose in the coverage action is not to determine Crane's liability.[50] While the purpose in the underlying actions is to determine Crane's ultimate liability to the underlying plaintiffs for their injuries, the issue in the coverage action is "whether the findings of liability in the underlying action are covered by the insurers' policies."[51] In identifying the separate legal issues in the underlying cases and the coverage action, the court noted that Crane was not required to establish its underlying liability in the underlying cases nor was it required to present expert testimony in the underlying cases to support its subsequent coverage action.[52] Accordingly, the court refused to apply judicial estoppel and thus prevent Crane from presenting expert testimony in which it advocates a different trigger than it did in the underlying claims against it.[53]

The holding in *John Crane* operates as a logical and necessary extension of the holdings by courts in various jurisdictions that an insured who settles should not be forced to establish its own liability in order to receive insurance coverage for its settlement costs. Like the decisions discussed in Section II above, *John Crane* recognized the unique nature of coverage litigation and the differing purposes of underlying liability and coverage litigation. Thus, the *John Crane* court's holding was correct as it appropriately aligns itself with and furthered the policy refusing to force an insured to prove its own liability in order to obtain coverage.

Whereas the insured is faced with the differing purposes of coverage and underlying litigation, the insurer is not placed in a similarly "untenable position," but rather need only determine whether coverage exists and, if not, why not.

IV. The Same Rule Should Not Apply to an Insurer's Attempt to Change Its Litigation Position

The holding of *John Crane* is not inconsistent with cases which bar an insurer from changing its litigation position as to denial of an insured's claim. Each is rooted in recognition of the difference between coverage litigation and underlying liability actions. Whereas the insured is faced with the differing purposes of coverage and underlying litigation, the insurer is not placed in a similarly "untenable position," but rather need only determine whether coverage exists and, if not, why not.

An example of circumstances in which the insurer may not change its position is illustrated in *Harbor Ins. Co. v. Continental Bank Corp.*[54] There, the United States Court of Appeals for the Seventh Circuit, citing the "mend the hold" doctrine, refused to allow Continental Bank's D&O insurer to change its litigation position."[55] *Harbor* identifies the phrase "mend the hold" as a nineteenth-century wrestling term, meaning to get a better grip or "hold" on one's opponent. The first case to use the term and spell out the doctrine was *Railway Co. v. McCarthy*.[56] In *McCarthy*, a contract dispute, the defendant railroad attempted to show that it was unable to make the necessary shipment under the contract due to its lack of railway cars.[57] After the close of evidence, the railroad suggested for the first time that it could not make the shipment because to do so would have violated the state's Sunday-closing law.[58] The court refused to consider this "afterthought," stating that "where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted to mend his hold."[59]

This prohibition has been applied to an insurer's litigation position. In the *Harbor* case, the bank sought coverage from its D&O insurer for various securities fraud actions against it and its board of directors.[60] In response, the insurer sued, seeking a declaration that the directors committed such egregious acts that no coverage was available.[61] After the bank settled the underlying claims, it filed a counterclaim for coverage.[62] In a complete about-face, Harbor claimed that no coverage for the settlement was available because the directors were not shown to have committed any wrongdoing.[63] The Seventh Circuit properly prohibited the insurer from changing its litigation position in such a manner.[64] While the court's ruling was based in large part on the doctrine of good faith, which the insurer clearly breached,[65] such a ruling is equally supportable in terms of the principles discussed above which refrain from applying judicial estoppel due to the unique nature and interplay of the underlying and coverage litigations. The insurer, however, is not in such a position and should not benefit from the exception applicable to policyholders.

V. Conclusion

The principles advanced by the courts that prevent an insured from having to prove its own liability, as well as by the courts that refuse to apply judicial estoppel to different positions taken by the insured in the underlying and coverage actions, work to protect policyholders from becoming victims of the unique circumstances involved in insurance coverage litigation. More specifically, the courts advocating such a

policy provide the policyholder with the necessary ability to both adequately defend itself in the underlying actions while allowing the policyholder to insist upon coverage from its insurers.

[1] *See, e.g.*, Vitkus v. Beatrice Co., 127 F.3d 936, 945 (10th Cir. 1997) (a court in a coverage litigation would "look askance" at an insured if it "definitively claimed actual responsibility" after vigorously refuting it in the underlying actions); Uniroyal, Inc. v. Home Ins. Co., 707 F. Supp 1368 (E.D.N.Y. 1988) (refusing to put the insured in the "hopelessly untenable" position of proving its actual liability in the underlying actions in order to obtain coverage for its settlement); IBJ Whitehall Bank & Trust Co. v. Cory & Assocs., Inc., 2001 U.S. Dist. LEXIS 7732, at *7 (N.D.Ill. June 7, 2001) (finding it "wholly impracticable" to consider the insured's actual liability when considering the reasonableness of a settlement); Diamond Shamrock Chemicals Co. v. Aetna Cas. & Sur. Co., 258 N.J. Super 167, 244–45 (N.J. Super. Ct. App. Div. 1992) (refusing to force the insured to prove that plaintiffs suffered bodily injury to recover for its liability under Agent Orange settlements because to do so would "markedly diminish the advantages of settling"); United States Gypsum Co. v. Admiral Ins. Co., 268 Ill.App.3d 598 (1st Dist. 1994) (insurers may not challenge whether underlying plaintiffs sustained injury).

[2] 477 N.E.2d 441 (N.Y. 1985).

[3] In *Servidone*, the insurer had breached a contractual duty to defend. 477 N.E.2d at 442. The insured then settled the claim and sought indemnity from the insurer. In the subsequent coverage litigation, the trial court held that the insurer had breached its contractual obligation to provide an unqualified defense, and granted the insured's motion for summary judgment to recover both the defense costs and the settlement amount. The insurer then appealed. The New York Court of Appeals reversed the order awarding the insured the settlement amount. According to the court, the duty to indemnify is determined by the "actual basis for the insured's liability to a third person." Applying this standard, the appeals court in *Servidone* reversed the trial court's decision that the insurer had a duty to indemnify because the trial court had never made any determination that the claim was covered. Reasoning that "further proceedings" were necessary to determine the basis for the insured's liability, the New York Court of Appeals remanded the case to the lower court for the factual determination. *Servidone*, 477 N.E.2d at 443–45.

[4] 780 F.2d 1082 (2d Cir. 1986).

[5] *Luria*, 780 F.2d at 1091.

[6] *Luria*, 780 F. 2d at 1084.

[7] *Luria*, 780 F.2d at 1091–92.

[8] *Luria*, 780 F.2d at 1091.

[9] 707 F. Supp 1368 (E.D.N.Y. 1988).

[10] *In re* Agent Orange Product Liability Litigation, 818 F.2d 145, 171 (2d Cir. 1987).

[11] *In re Agent Orange Product Liability Litigation*, 818 F.2d at 171.

[12] *In re Agent Orange Product Liability Litigation*, 818 F.2d at 171.

[13] *Uniroyal*, 707 F. Supp. at 1379.

[14] *Uniroyal*, 707 F. Supp. at 1379 (internal citations omitted).

[15] *See, e.g., Vitkus*, 127 F.3d 936, 945 (10th Cir. 1997); *Diamond Shamrock*, 258 N.J. Super 167, 244–45 (N.J. Super. Ct. App. Div. 1992); Dow Corning Corp. v. Continental Cas. Co., Inc., 1999 Mich. App. LEXIS 2920 (Mich. App. Oct. 12, 1999); *Gypsum*, 268 Ill.App.3d 598 (1st Dist. 1994).

[16] No. 8 Civ. 2613, slip op. (S.D.N.Y. March 12, 1996).

[17] *W.R. Grace*, No. 8 Civ. 2613, slip op. at 7. The court noted that the insurers apparently conceded that the policyholder need not prove that its products were installed in the buildings at issue, but nonetheless argued that Grace was required to prove installation in a particular year. The court disagreed. *W.R. Grace*, No. 8 Civ. 2613, slip op. at 7.

[18] *W.R. Grace*, No. 8 Civ. 2613, slip op. at 7.

[19] *W.R. Grace*, No. 8 Civ. 2613, slip op. at 7.

[20] 1999 Mich. App. LEXIS 2920 (Mich. App. Oct. 12, 1999).

[21] *Dow Corning Corp.*, 1999 Mich. App. LEXIS 2920, at * 14.

[22] *Dow Corning Corp.*, 1999 Mich. App. LEXIS 2920, at * 18.

[23] 268 Ill. App. 3d 598 (1st Dist. 1994).

[24] *Gypsum*, 268 Ill. App. 3d at 602–4.

[25] *Gypsum*, 268 Ill.App.3d at 603.

[26] *Gypsum*, 268 Ill.App.3d at 623.

[27] 127 F.3d 936 (10th Cir. 1997).

[28] *Vitkus*, 127 F.3d at 944–45.

[29] 2006 U.S. App. LEXIS 5346 (5th Cir. March 12, 2006).

[30] Indeed, the insurer should encourage the policyholder to contest liability vigorously, as a defense verdict or reduced settlement in the underlying action most often benefits the financial interests of both insurer and insured.

[31] John Crane, Inc. v. Admiral Ins. Co., No. 04 CH 8266, slip op. (Ill. Cir. Ct. Dec. 20, 2007), 22–10 Mealey's Litig. Rep. Ins. 10 (2008). An appeal was taken to the First District Court of Appeals on July 9, 2008.

[32] *John Crane*, No. 04 CH 8266 at 26. *But see* McDonald's Corp. v. American Motorists Ins. Co., 321 Ill.App.3d 972, 987 (2d Dist. 2001) (applying judicial estoppel to policyholder which successfully obtained dismissal of unfair competition count in underlying

complaint, yet argued in coverage case that unfair competition survived dismissal to provide basis for coverage). In the subsequent coverage action, the *McDonald's* court did not discuss the differing natures of underlying and coverage litigation. Courts in other contexts have found judicial estoppel inappropriate in a coverage case. *See, e.g.*, Total Waste Mgmt. Corp. v. Commercial Union Ins. Co., 857 F. Supp. 140, 153 (D.N.H. 1994) (noting that seemingly contrary position was not taken against the same party and that position was argued in the alternative); Royal Ins. Co. of Am. v. The Boston Beer Co., Inc., 2007 U.S. Dist. LEXIS 25513, n.8 (N.D. Ohio 2007) (positions taken not clearly inconsistent).

[33] John Crane, Inc. v. Admiral Ins. Co., No. 04-CH-8266, slip op at 1 (Ill. Cir. April 12, 2006).

[34] Carvolo v. John Crane, Inc., 226 F.3d 46, 49 (2d Cir. 2000); *Admiral Ins. Co.*, No. 04-CH-8266, slip op at 1.

[35] *John Crane*, No. 04 CH 8266 at 8.

[36] *John Crane*, No. 04 CH 8266 at 23.

[37] *John Crane*, No. 04 CH 8266 at 23.

[38] *John Crane*, No. 04 CH 8266 at 23.

[39] *John Crane*, No. 04 CH 8266 at 23.

[40] *John Crane*, No. 04 CH 8266 at 21.

[41] *John Crane*, No. 04 CH 8266 at 22.

[42] 285 Ill.App.2d 545, 550 (1st Dist. 1996).

[43] Ceres Terminals v. Chicago City Bank & Trust Co., 259 Ill.App.3d 836, 850 (1st Dist. 1994).

[44] *John Crane*, No. 04 CH 8266 at 23.

[45] *John Crane*, No. 04 CH 8266 at 22.

[46] *John Crane*, No. 04 CH 8266 at 24.

[47] *John Crane*, No. 04 CH 8266 at 24.

[48] *John Crane*, No. 04 CH 8266 at 24.

[49] *John Crane*, No. 04 CH 8266 at 26.

[50] *John Crane*, No. 04 CH 8266 at 25.

[51] *John Crane*, No. 04 CH 8266 at 26.

[52] *John Crane*, No. 04 CH 8266 at 26.

[53] *John Crane*, No. 04 CH 8266 at 26.

[54] 922 F.2d 357 (7th Cir. 1990).

[55] *Harbor Ins. Co.*, 922 F.2d at 362. *See also*, Trossman v. Philipsborn, 373 Ill.App.3d 1020, 1042 (1st Dist. 2007); Liberty Mutual Ins. Co. v. Amer. Home Assurance Co., 368 Ill.App.3d 948, 958 (1st Dist. 2006).

[56] 96 U.S. 258 (1877).

[57] *McCarthy*, 96 U.S. at 258.

[58] *McCarthy*, 96 U.S. at 265–67.

[59] *McCarthy*, 96 U.S. at 365–67.

[60] *Harbor Ins. Co.*, 922 F.2d at 359–60.

[61] *Harbor Ins. Co.*, 922 F.2d at 359–60.

[62] *Harbor Ins. Co.*, 922 F.2d at 359–60.

[63] *Harbor Ins. Co.*, 922 F.2d at 360.

[64] *Harbor Ins. Co.*, 922 F.2d at 365.

[65] *See, Harbor Ins. Co.*, 922 F.2d at 362–65.