FOURTH DIVISION
February 27, 2014

No. 1-13-0756

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FOUNDERS INSURANCE COMPANY, Plaintiff-Appellee, v. PALDO SIGN and DISPLAY COMPANY, Defendant-Appellant, and NITE & DAY ENTERTAINMENT, INC., Defendant.	))))))))))))))	Appeal from the Circuit Court of Cook County. No. 11 CH 19523 Honorable Rita M. Novak, Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment granting summary judgment in favor of plaintiff and

denying defendant's cross-motion for summary judgment is affirmed. Defendant's fourth-amended complaint against plaintiff's insured did not state any claims based on defendant's receipt of "junk faxes" related to the insured's business that would trigger a duty on plaintiff to defend the complaint under the terms of the insurance policy. Therefore, the trial court properly granted summary judgment on plaintiff's complaint for a declaratory judgment that plaintiff did not have a duty to defend.

¶ 2 Plaintiff, Founders Insurance Company (Founders), filed a complaint for declaratory judgment against defendant, Paldo Sign and Display Company (Paldo) and Nite & Day Entertainment, Inc. (hereinafter Nite & Day or the insured) seeking a declaration that Founders did not have a duty to defend Nite & Day against Paldo's complaint. Nite & Day is Founders' insured. Paldo's complaint against Nite & Day is based on Paldo's receipt of unsolicited advertisements for Nite & Day's business through Paldo's facsimile machine (junk faxes). Founders moved for summary judgment, and Paldo filed a cross-motion for summary judgment on the basis that Founders did owe a duty to defend Nite & Day, Founders refused to do so until resolution of the case through settlement was imminent, and, therefore, Founders is estopped from raising policy defenses to indemnity coverage of any judgment entered in the underlying case. The trial court granted summary judgment in favor of Founders. Accordingly, the court denied Paldo's cross-motion for summary judgment. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In December 2010, Paldo filed a fourth amended complaint alleging claims for violations of the Telephone Consumer Protection Act (Protection Act) (47 U.S.C. § 227 (2006)), common law conversion, and violations of the Illinois Consumer Fraud and Deceptive Practices Act (Deceptive Practices Act) (815 ILCS 505/1 *et seq*. (West 2006)). The complaint sought

certification of a class of defendants who received junk faxes from Nite & Day. The complaint alleged Nite & Day sent advertisements to the class members' facsimile machines when it knew or should have known that it did not have the recipients' permission or invitation to send the advertisements. Previously, Founders had informed the insured's attorney of Founders' position that the second amended complaint in this matter did not state a claim with a potential for coverage. Later, Founders wrote to the insured that Founders was denying coverage for Paldo's second amended complaint. Then, Paldo filed a third amended complaint and later, the fourth amended complaint at issue.

¶ 5 By letter dated March 24, 2011, Founders informed Nite & Day's attorney that Founders would undertake Nite & Day's defense subject to a reservation of rights. On March 23, 2011, the insured had signed a settlement agreement with Paldo, which Paldo signed on March 28, 2011. By letter dated April 1, 2011, Nite & Day's attorney informed Founders it and Paldo executed a settlement agreement on March 28, 2011. Founders subsequently filed a complaint against Paldo and Nite & Day for a declaratory judgment seeking a declaration that it does not owe a duty to defend or indemnify its insured, Nite & Day, against underlying "junk fax" litigation filed by Paldo. Founders filed a second amended complaint for declaratory judgment alleging the underlying complaint "does not allege an occurrence on the insured premises resulting in property damage," "does not allege an occurrence resulting in property damage included within the completed operations hazard" and "does not allege an occurrence resulting in property damage included within the products hazard." On January 28, 2013, the trial court entered an order granting Founders' motion for summary judgment and denying Paldo's cross-motion for

summary judgment on Founders' complaint for declaratory judgment.

¶ 6 This appeal followed.

¶ 7 ANALYSIS

¶ 8 The first issue in this case is whether Founders had a duty to defend its insured against Paldo's complaint. Two conditions must be met before an insurer's duty to defend arises: (1) the action must be brought against an insured, and (2) the allegations of the complaint must disclose potential coverage under the policy. *Employers Mutual Companies/Illinois Emcasco Insurance Co. v. Country Companies*, 211 Ill. App. 3d 586, 591 (1991). If the allegations of the complaint reveal that the action was not brought against an insured or that there was no potential for coverage under the policy, there is no duty to defend the underlying action, and the insurer can justifiably refuse to defend. *Id*. The second issue, whether Founders is estopped from asserting any defense to liability based on the policy, depends on how the first issue is resolved.

¶ 9 1. Standard of Review

¶ 10 The trial court resolved this matter on summary judgment.

> "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court [to decide and] are appropriate subjects for disposition by way of summary judgment. [Citation.] We review cases involving summary judgment *de novo*. [Citation.] Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when

> viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. [Citation.]" (Internal quotation marks omitted.) *Illinois Emcasco Insurance Co. v. Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735, ¶ 11.

¶ 11 Where, as here, the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law." *Id*.

¶ 12 2. Legal Principles

¶ 13 Paldo argues the issue of whether Founders has a duty to defend its insured against Paldo's suit should be resolved in its favor because the underlying complaint alleges facts within the policy's definition of "property damage" and within the coverage provided under two separate provisions of the policy. Paldo argues that the policy's (1) "Commercial Products Liability Coverage" and (2) "Commercial Owners, Landlords & Tenants Liability Coverage" apply to the alleged property damage caused by Founders' insured.

> "To determine whether an insurer has a duty to defend an action against an insured, generally, we compare the allegations of the underlying complaint to the relevant portions of the insurance policy. [Citation.] If the complaint alleges facts that fall within or potentially within the coverage of the policy, the insurer is obligated to defend its insured even if the allegations are groundless, false, or fraudulent. [Citations.]" (Internal quotation

marks omitted.) *Pekin Insurance Co. v. Equilon Enterprises LLC*, 2013 IL App (1st) 120735, ¶ 14.

¶ 14 Paldo's fourth amended complaint alleges Founders' insured's actions caused damages to Paldo and other members of the purported class by causing them to lose paper, toner, ink, and employee time consumed in the printing and receiving of the junk faxes. Founders does not dispute that the receipt of fax advertisements damaged property under the policy. See *Insurance Corp. of Hanover v. Shelborne Associates*, 389 Ill. App. 3d 795, 800 (2009).

¶ 15 The insurance policy at issue was effective between December 15, 2006 and December 15, 2007. The policy provides Commercial Products Liability Coverage, Commercial Liquor Liability Coverage, and Commercial Owners, Landlords, & Tenants Liability Coverage. "In construing an insurance policy, the primary function of the court is to ascertain and enforce the intentions of the parties as expressed in the agreement. [Citations.] To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the type of insurance for which the parties have contracted, the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract." *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). "[T]erms utilized in the policy are accorded their plain and ordinary meaning [citation] unless specifically defined in the policy, in which case they will be given the meaning as defined in the policy." *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 343 Ill. App. 3d 93, 103 (2003). "[I]t is the alleged conduct, and not the labeling of the claim in the complaint, which determines whether there is a duty to

defend. [Citation.] Both the underlying complaint and the insurance policy should be liberally construed in favor of the insured. [Citation.]" *Menard, Inc. v. Country Preferred Insurance Co.*, 2013 IL App (3d) 120340, ¶ 25.

¶ 16 In this case, the fourth amended complaint alleges that the insured "transmitted by telephone facsimile machine an unsolicited facsimile." The complaint alleges the insured violated the Protection Act "by sending advertising faxes *** without first obtaining *** prior express invitation or permission," converted the plaintiffs' property by sending unsolicited faxes, and violated the Deceptive Practices Act by engaging in "an unfair practice of sending unsolicited and unauthorized faxes."

¶ 17 3. Commercial Products Liability Coverage

¶ 18 The "Completed Operations and Products Liability Coverage Part" of the policy states:

> "[Founders] will pay on behalf of the insured all sums
> which the insured shall become legally obligated to pay as damages
> because of [property damage] to which this insurance applies,
> caused by an occurrence, if the *** property damage is included
> within the completed operations hazard or the products hazard."

¶ 19 Paldo argues that the underlying claims fall within the policy's definition of "completed operation hazard" as well as the definition of "product hazard." The policy defines "completed operation hazard" as follows:

> " '[C]ompleted operation hazard' includes *** property
> damage *arising out of operations* or reliance upon a representation

> or warranty ***. 'Operations' [include] materials, parts or equipment furnished in connection therewith." (Emphasis added.)

¶ 20 The policy defines "product hazard" as:

> "property damage arising out of (a) the named insured's products or (b) reliance upon a representation or warranty made with respect thereto; but only ifn the *** property damage occurs after physical possession of such products has been relinquished to others."

¶ 21 a. Completed Operations Hazard

¶ 22 Under the plain language of the policy, to be included within the completed operations hazard, the property damage at issue must arise from the insured's operations. Paldo argues that the property damage arose out of Nite & Day's "operations" because the junk faxes were materials distributed by Nite & Day as part of Nite & Day's advertising operation, which was completed once it hired the fax broadcaster. Founders argues that forming the contract with the fax distributor was not a completed operation as the policy defines that term: an operation is complete when the operation to be performed under the contract is complete, not when the contract is formed.[1] Therefore, Founders argues, the completed operations coverage does not apply. Although we agree that under the defined terms of the policy, hiring the fax broadcaster alone would not constitute a "completed operation," we again note that it is the factual

[1] "Operations shall be deemed competed ***: when all operations to be performed *** under the contract have been completed. When all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or when the portion of the work out of which the injury or damage arises had been put to its intended use ***."

allegations of the complaint which determines whether there is a duty to defend. "The allegations of the complaint must be construed liberally, and any doubts must be resolved in favor of the insured." *Pekin Insurance Co.*, 355 Ill. App. 3d at 520.

¶ 23 The complaint alleges that the fax was "part of [Nite & Day's] work or operations to market [its] goods or services." The fourth amended complaint also expressly alleged the insured sent unsolicited *advertisements*. Thus the alleged "operation" from which the property damage arose is advertising the insured's business. The advertising would have been completed when the fax was received. The policy does not explicitly include advertising in operations. In fact, the policy does not define "operations." Rather, the policy only defines what "operations" includes when certain items are "furnished in connection" *with* "operations." The question we must answer is whether advertising is included within the insured's operations as that term is used in the policy. "In assessing the scope of coverage afforded by a policy of insurance, our initial consideration is the type of policy for which the parties have contracted. [Citation.]" (Internal quotation marks omitted.) *Continental Casualty Co. v. Law Offices of Melvin James Kaplan*, 345 Ill. App. 3d 34, 38 (2003). To ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must construe the policy as a whole, taking into account the risks undertaken and purchased, the subject matter that is insured and the purposes of the entire contract. *Crum and Forster Managers Corp.*, 156 Ill. 2d at 391. With those principles in mind, we find that advertising is not an operation of Nite & Day as that term is used in the policy.

¶ 24 Founders filed a motion to cite as additional authority this court's recent decision in

Windmill Nursing Pavilion, Ltd. v. Cincinnati Insurance Co., 2013 IL App (1st) 122431. We granted Founders motion to cite *Windmill* as authority in this case. *Windmill* is instructive on the question of whether Nite & Day's advertising was part of its "operations" as that term is used in the policy. The policy provision at issue in *Windmill* is similar to the "completed operations hazard" provision at issue in this case. The insured in *Windmill* sold an iron-on label system. *Id*., ¶ 3. The policy at issue provided coverage for property damage "arising out of 'your work' except *** [w]ork that has not yet been completed or abandoned." *Id*., ¶ 40. The policy in *Windmill* defined "your work" as " '(1) [w]ork or operations performed by you or on your behalf; and (2) [m]aterials, parts or equipment furnished in connection with such work or operations.' " *Id*., ¶ 42.

¶ 25 The insured in this case is in the business of operating a nightclub and selling alcoholic beverages on its premises. Although "operations" is not defined in Founders' policy, the dictionary defines "operation" as "performance of a practical *work*." (Emphasis added.) http://www.merriam-webster.com/dictionary/operation (visited January 16, 2014). "An undefined term in an insurance policy is given its plain and ordinary meaning, which can be obtained from a dictionary." *Alberto-Culver Co. v. Aon Corp.*, 351 Ill. App. 3d 123, 135 (2004). Moreover, Founders' policy includes within the definition of "operations," "material, parts, or equipment furnished in connection" with operations; much like the policy in *Windmill* included those items in its definition of "your work." Also like the policy in *Windmill*, Founders' policy excludes coverage for operations that have not been "completed or abandoned."

¶ 26 The *Windmill* court reasoned that the faxes "did not constitute [the insured's] work or

operations, and they were not materials, parts, or equipment furnished in connection with its operations. *** [T]he faxes were advertisements meant to solicit orders for [its] products." *Windmill*, 2013 IL App (1st) 122431, ¶ 43. The *Windmill* court agreed with the trial court that "the faxed advertisements did not constitute [the insured's] *** work under the policy. *Windmill*, 2013 IL App (1st) 122431, ¶ 43. We find the *Windmill* court's reasoning applicable to the policy at issue in this case. Hiring a fax broadcaster or actually sending a fax does not constitute Nite & Day's work to operate a nightclub. The faxes were not materials furnished in connection with operating a nightclub. Rather, the faxes were meant to solicit customers for Nite & Day's nightclub. Advertising was not part of Nite & Day's "operations" for purposes of coverage under the insurance policy in this case. See also *Westport Insurance Corp. v. Jackson National Life Insurance Co.*, 387 Ill. App. 3d 408, 413-14 (2008) (professional liability insurance contract provided coverage for liability for invasion of privacy arising out of the conduct of the business of the insured, but unsolicited faxes were not covered because sending them was not a professional service within the contemplation of the policy). Compare with *Landmark American Insurance Co. v. NIP Group, Inc.*, 2011 IL App (1st) 101155, ¶ 42 (distinguishing *Westport Insurance Corp.* on the grounds the policy in *Landmark* specifically provided coverage for "Advertising Liability"). Accordingly, the property damage did not arise out of Nite & Day's operations. Therefore, the property damage at issue is not included in the completed operations hazard and there is no potential for coverage under the completed operations coverage part of the policy.

¶ 27 b. Product Hazard

¶ 28 Under the policy in this case, to be included in the product hazard, the property damage must arise out of the named insured's products or from reliance upon a representation or warranty made with respect to the named insured's products. Paldo argues that the faxes were the insured's "product" because the complaint alleges they were Nite & Day's product, the policy does not narrow the scope of what constitutes the insured's products under the policy, and the faxes satisfy the dictionary definition of "product" because they were "produced by labor." Founders argues that the junk faxes were not the insured's good or products, such that the product hazard coverage does not apply.

¶ 29 We find that the faxes were not Nite & Day's product. Again, *Windmill* is instructive. The court in that case held that "the fax advertisements were not 'products' resulting in coverage under the products-completed operations hazard provisions." *Id*., ¶ 46. The policy in *Windmill* defined "your product" as " '[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by *** [y]ou.' " *Id*., ¶ 42. The policy in this case similarly defines "named insured products" as "good or products manufactured, sold, handled or distributed by named insured *** but 'named insured's product' shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold." The *Windmill* court held that the "faxes were not [the insured's] goods or products ***." *Windmill*, 2013 IL App (1st) 122431, ¶ 43. The *Windmill* court reasoned that "[i]t is undisputed that [the insured] was not in the business of selling the advertisements themselves. Rather, the faxes were advertisements meant to solicit orders for [its] products ***." *Windmill*, 2013 IL App (1st) 122431, ¶ 43.

¶ 30 Similarly, in this case, Nite & Day is not in the business of selling advertisements. The fourth amended complaint admits that the faxes were intended to "*market* [Nite & Day's] goods or services." (Emphasis added.) In its reply brief, Paldo asserts "the faxes promoted an event at Nite & Day's night club. It [the event], and the martinis advertised in the ad for the martini tasting event [citation] *are* Nite & Day's products." (Emphasis in original.) The faxes were not Nite & Day's product, and the fourth amended complaint does not allege that the property damage arose from a reliance upon a representation or warranty made with respect to any of Nite & Day's actual products. Therefore, the property damage is not included within the products hazard and there is no potential for coverage under the products liability coverage part.

¶ 31 The provision in the policy for completed operations and products liability states that the insurer will pay all sums which the insured shall become legally obligated to pay as damages because of property damage to which the insurance applies. The insurance does not apply to the property damage for which Paldo asks the insurer to pay. There is no possibility for coverage under the "Completed Operations and Products Liability Insurance Coverage Part" of the policy; therefore, Founders did not have a duty to defend Paldo's suit.

¶ 32 4. Owners', Landlords', and Tenants' Coverage

¶ 33 Next, we address whether Founders had a duty to defend its insured because the facts alleged in the underlying complaint potentially fall within the coverage provided by the "Owners' Landlords' and Tenants' Liability Insurance Coverage Part" of the policy. The relevant portion of the policy states that:

"[Founders] will pay on behalf of the insured all sums

> which the insured shall become legally obligated to pay as damages because of [property damage] to which this insurance applies *caused by an occurrence on the insured premises* and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto ***." (Emphasis added.)

¶ 34 Paldo argues that its and the other class members' property damage was caused by an occurrence on the insured premises and arising out of the ownership, maintenance, or use of the insured premises and operations necessary or incidental thereto. Specifically, Paldo argues that the "occurrence" on the insured premises was the "depression of the 'send' button on its fax machine in hiring the fax broadcaster" to send the junk faxes. Paldo argues that the activity at issue here was not an "accident" and arises out of the use of the insured premises. Paldo argues that this court has interpreted "arising out of the use" language broadly and has found coverage for injuries that occur offsite "if they arose out of the use of the designated premises."

¶ 35 Paldo cites *Indiana Insurance Co. v. Royce Realty and Management, Inc.*, 2013 IL App (2d) 121184, as "the most recent pronouncement" of the proposition that where a premises limitation is ambiguous it must be construed to encompass accidents that arose out of the insured's use of the premises despite the fact the damage occurred away from the premises. In *Royce*, the court held that, reading the policy at issue in that case, "a reasonable person would likely understand the terms 'use' and 'operations incidental to the premises' to encompass business operations conducted from the designated premises, even where those operations involve off-premises activities." *Royce*, 2013 IL App (2d) 121184, ¶ 29. Thus, the court held

that the policy encompassed accidents arising out of the insured's use of the premises to conduct its business, despite the fact that the accident at issue occurred away from those premises. *Id*.

¶ 36 We find *Royce* distinguishable. We again note that to ascertain the intent of the parties and the meaning of the words used in the insurance policy, the court must take into account the type of insurance for which the parties have contracted. *Crum and Forster Managers Corp.*, 156 Ill. 2d at 391. The *Royce* court relied on the fact that the policy at issue in *Royce* was a commercial general liability policy which "contained several provisions suggesting that off-premises accidents would be covered." *Royce*, 2013 IL App (2d) 121184, ¶ 32. It also noted that the insurer knew the nature of the insured's business would involve substantial off-premises risks but attempted to rely on an ambiguous endorsement that would have left such risks without coverage. *Id*., ¶ 33. Under those circumstances, the *Royce* court held that the trial court "correctly resolved the ambiguity in favor of coverage." *Id*. Paldo also cites *Insurance Corp. of Shelborne Assoc.*, 389 Ill. App. 3d at 795, and *Pekin Insurance Co. v. XData Solutions, Inc.*, 2011 IL App (1st) 102769, in support of its position that the policy provides coverage. In *Shelborne Assoc.*, an insurer sought a declaratory judgment that it did not have a duty to defend its insured against a complaint based on the receipt of an unsolicited fax advertisement. *Shelborne Assoc.*, 389 Ill. App. 3d at 795. The *Shelborne Assoc.* court held that the allegations in the complaint set forth sufficient facts to bring the underlying lawsuit potentially within the coverage of the policy's property damage provision. *Id*. at 803. In *XData*, an insurer argued that it had no duty to defend a lawsuit based on unsolicited faxes because the property damage and occurrence provisions did not apply to intentional acts. *Xdata*, 2011 IL App (1st) 102769, ¶ 1.

The trial court in *XData* had relied on *Shelbourne* and held that the insurer owed a duty to defend the insured pursuant to the policy's property damage provision. *Id*., ¶ 25. On appeal, the insurer "acknowledge[d] that the circuit court's order *** was accurate in its account of Illinois law on this issue" and instead argued that the court erred in refusing to apply Indiana law, which would result in a finding in the insurer's favor. *Id*. The *XData* court found that there was no Indiana law interpreting claims based on the Protection Act, therefore there was no conflict with Illinois law, and, accordingly, it would follow Illinois law. The *XData* court did not engage in any further analysis and held that the insurer had a duty to defend the insured pursuant to the property damage and occurrence provisions in the policy. *Id*., ¶ 26.

¶ 37 Both *Shelborne Assoc.* and *XData* are distinguishable on the same grounds *Royce* is distinguishable: neither case involved owners, landlords, and tenants insurance. *Shelborne Assoc.*, 389 Ill. App. 3d at 796; *XData*, 2011 IL App (1st) 102769, ¶ 25. In this case, Paldo is not seeking coverage under a commercial general liability policy. Nor is Nite & Day's business the type that would involve substantial off-premises risks. Rather, Paldo is seeking coverage under an owners, landlords, and tenants liability policy. There is no ambiguity in the policy, therefore we may apply its terms as written rather than strain for a construction which would cover off-premises injuries under the owners, landlords, and tenants coverage part.

¶ 38 Owners, landlords, and tenants policies "are designed to protect against claims for accidents occurring on the covered premises." *Royce Realty and Management, Inc.*, 2013 IL App (2d) 121184, ¶ 26. Although Paldo cited *Royce* in support of its argument that where a premises limitation is ambiguous it must be construed to encompass accidents that arose out of the

insured's use of the premises despite the fact the damage came about away from the premises, the *Royce* court found coverage in that case because the policy at issue was *not* an owners, landlords, and tenants policy. *Id*., ¶¶ 28, 29. Our supreme court has construed owners, landlords, and tenants' policies and answered the question of whether such policies cover damages that occur away from the insured premises. In *Cobbins v. General Accident Fire & Life Assurance Corp.*, 53 Ill. 2d 285 (1972), our supreme court held that an owners, landlords, and tenants liability insurer was not required to defend or pay any judgment against its insured based on a claim for damages caused by a product sold on the insured premises but where the injury occurred away from the insured premises. *Cobbins*, 53 Ill. 2d at 294. The language of the policy the supreme court construed in *Cobbins* is almost identical to the policy language at issue in this case. In *Cobbins*, the policy provided coverage for "all sums which the insured shall become legally obligated to pay as damages *** caused by accident and arising out of *** [t]he ownership, maintenance or use of the premises, and all operations necessary or incidental thereto." *Cobbins*, 53 Ill. 2d at 288. The court adopted the view that coverage like that at issue in this case "applies only to those situations wherein the injury occurs on the premises." *Id*., at 289. Under this view, "[t]he determining factor for the coverage *** is not the negligent cause, but the occurrence of the accident itself." *Id*., at 289. That is, if the property damage happens off premises, the policy will not provide coverage notwithstanding the fact that the occurrence may arise out of the ownership, maintenance, or use of the premises. See *Id*., at 289-90.

¶ 39 Paldo's argument that the "arising out of" language in this provision of the policy opens coverage to injuries occurring away from the insured premises fails. Paldo argues that the

activity at issue here arises out of the use of the insured premises because the insured was "neither conducting business offsite nor advertising for goods [or] services available somewhere other than the designated premises," and that it was the sending of the fax potentially from the premises that resulted in property damage off premises. Our supreme court rejected the rationale that it is the cause of the injury that is determinative of coverage under a policy providing coverage for premises liability. *Cobbins*, 53 Ill. 2d at 290. In this case, the fourth amended complaint alleges that the property damage materialized when the faxes were received at the recipients' places of business. In *United States Fire Insurance Co. v. Schnackenberg*, 88 Ill. 2d 1 (1981), our supreme court reiterated its earlier holding in *Cobbins* which rejected "the argument that injuries occurring off the premises would be covered if those injuries resulted from negligence occurring on the insured premises." *Id*. at 9. Therefore, it is immaterial that the faxes were potentially sent from the insured premises.

¶ 40 In *Schnackenberg*, our supreme court again construed an owners, landlords and tenants policy that provided coverage for occurrences arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto. *Schnackenberg*, 88 Ill. 2d at 3-4. Similar to Paldo's argument that their property damage is covered because the junk fax arises out of the insured's use of the premises in this case, the defendants in *Schnackenberg*, a declaratory judgment action seeking a declaration that coverage did not exist under an owners, landlords, and tenants policy, argued that the activity (bicycle riding) that resulted in injuries away from the insured premises was " 'incidental to' the use of [the] premises" and, therefore, the policy provides coverage. *Id*. at 4. Our supreme court rejected that argument, finding that

"[i]f defendants' interpretation of the coverage clause were adopted, the 'insured premises' definition would be rendered meaningless for there would be no geographical limit to coverage and liability for conduct which originated on the premises and could be said to be incidental thereto." *Id*. at 8. In this case, the policy at issue also defines the insured premises, and that definition does not encompass the location of any fax machine that received a "junk fax." The allegations in the fourth amended complaint establish that the property damage occurred at the location of the recipients' fax machines.

¶ 41 In *Heritage Insurance Co. v. Bucaro*, 101 Ill. App. 3d 919 (1981), an insured claimed that his allegedly negligent conduct on the insured premises, resulting in injuries that occurred off premises, was covered under a policy that provided coverage for property damage "caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto." *Bucaro*, 101 Ill. App. 3d at 921-22. The *Bucaro* court found that the insured's conduct, "while causally related to the ensuing [injury] away from the premises, is not an occurrence covered by the policy." *Id*. at 923. The court construed the term "occurrence," as used in the policy to presume a mishap and an accompanying injury on the premises. *Id*.

¶ 42 Although the conduct resulting in the property damage may have originated on the insured premises, the policy at issue in this case does not cover damages that do not occur on the insured premises. *Schnackenberg*, 88 Ill. 2d at 8; *Bucaro*, 101 Ill. App. 3d at 923. As in *Schnackenberg*, "we should not impose such open-ended coverage when the geographic limits of the policy are clear." *Id*. We find there is no potential for coverage under the "Owners',

Landlords' and Tenants' Liability Insurance Coverage Part" of the policy.

¶ 43 5. Estoppel

¶ 44 Finally, Paldo argued that, assuming Founders breached its duty to defend its insured against Paldo's complaint, Founders should be estopped from asserting any policy defenses to coverage for its insured's claim. "It has long been established that the consequence of an insurer's breach of its duty to defend is that it is estopped from later raising any policy defenses based on noncoverage." *LaGrange Memorial Hospital v. St. Paul Insurance Co.*, 317 Ill. App. 3d 863, 870 (2000). Here, however, Founders had no duty to defend Paldo's suit, and "if the insurer had no duty to defend ***, estoppel cannot be applied against the insurer." *Pope v. Economy Fire & Casualty Co.*, 335 Ill. App. 3d 41, 51 (2002). The underlying complaint did not allege facts potentially within the coverage of Founders' policy. Founders did not have a duty to defend the underlying complaint. Therefore, estoppel does not apply.

¶ 45 CONCLUSION

¶ 46 For all of the foregoing reasons, the trial court's judgment is affirmed.

¶ 47 Affirmed.