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Illinois Coverage Basics

How the Targeted Tender Rule Works With Excess and Umbrella Policies

Under Illinois' targeted tender rule, an insured covered by multiple concurrent policies has the right to choose which of those policies will defend and indemnify. The Illinois Supreme Court first adopted the targeted tender rule (sometimes also called the "selective tender" rule) in a case concerning concurrent primary policies. John Burns Construction Company v. Indiana Insurance Company, 189 Ill.2d 570, 727 N.E.2d 211 (2000). Ever since, insurers have wondered how the targeted tender rule applies, if at all, to excess and umbrella policies. The answer still is not completely clear.

Application of the Targeted Tender Rule Among Primary Policies

The John Burns case involved a general contractor who was covered by two concurrent primary policies that applied to the claim of an injured worker. The general contractor had its own general liability policy, and it was also an additional insured on a subcontractor's general liability policy. The general contractor directed its own insurer not to respond to the claim and demanded that the subcontractor's insurer provide full defense and indemnity. On appeal, the Illinois Supreme Court supported the general contractor, ruling that the general contractor had an absolute right to select which of the two concurrent primary liability policies should perform.

When an insurer is de-selected by a selected tender made to another insurer, the de-selected insurer is relieved of any further obligation to the insured and to other insurers as well. The Court in John Burns contended that this application of the selective tender rule does not violate the "other insurance" clause of the targeted policy, because there is no "other insurance" when only one policy has been triggered by a targeted tender. Thus, once an insured has made a targeted tender, the insurer selected to perform is prohibited from seeking any contribution from other potentially applicable concurrent policies.

John Burns dealt solely with concurrent primary policies, and to this day the most common use of the target tender rule is to selectively tender the defense of claims. However, John Burns did not address tenders of indemnity to excess or umbrella insurance.

Targeted Tenders Involving Primary and Excess/Umbrella Policies

Applying the targeted tender rule to excess and umbrella insurance raises a potential conflict with Illinois' rule of horizontal exhaustion. Under the rule of horizontal exhaustion, all applicable primary policies must exhaust before any excess or umbrella policy can be called upon to respond. However, if an insured has an unrestricted right to selectively tender to both primary policies and to excess/umbrella policies, an insured could theoretically de-select an available primary policy in favor of a targeted tender to another primary policy and the excess/umbrella insurance above it. One or the other of these rules would have to yield; otherwise the targeted tender rule might be used to require excess/umbrella policies to respond before all available primary insurance has been exhausted.

This potential collision of Illinois insurance rules was addressed in Kajima Construction Services v. St. Paul Fire & Marine Insurance Company, 368 Ill.App.3d 665, 856 N.E.2d 452 (1st Dist. 2006). In Kajima, a general contractor was covered by its own primary and excess insurance and also by primary and excess insurance maintained by a subcontractor. The settlement of an injury claim required payment of the full limits of the subcontractor's primary insurance and also some of its excess insurance. However, the general contractor took the position that its own insurance should not contribute to the settlement and de-selected its own insurance when it targeted its tender to the subcontractor's primary and excess insurance.

The Appellate Court in Kajima held that an insured cannot circumvent the horizontal exhaustion rule by de-selecting its own primary insurance while targeting a tender to an excess policy. The Court reasoned that to allow such use of the targeted tender rule would ignore the fundamental differences between primary and excess insurance. The Kajima Court held emphatically that the selective tender rule does not trump the horizontal exhaustion rule. However, the ruling of the Appellate Court in Kajima is now on appeal to the Illinois Supreme Court.

Targeted Tenders Among Excess/Umbrella Policies

The ruling in Kajima left uncertainty regarding whether the targeted tender rule has any application to excess and umbrella insurance. In North River Insurance Company v. Grinnell Mutual Reinsurance Company, 369 Ill.App.3d 563, 860 N.E.2d 460 (1st Dist. 2006), the Appellate Court put those doubts to rest. The Appellate Court in North River held that once an insured has exhausted all of its concurrent primary insurance, it may selectively tender indemnity among excess insurers. In the same way that an insured is entitled to select one primary insurer and de-select all other primary insurers, an insured has the right to select one excess insurer and de-select all other excess insurers. North River also held that for purposes of the targeted tender rule, umbrella policies are treated as pure excess insurance. This ruling is not yet final, because a motion for rehearing remains pending in the Appellate Court.

While both Kajima and North River currently remain subject to further revision on appeal, they provide guidance for application of the targeted tender rule. First, an insured has the right to selectively tender to one primary insurer and de-select all other primary insurers. Second, an insured may not use the targeted tender rule to force an excess or umbrella insurer to respond before all available primary insurance has been exhausted. Finally, an insured has the right to selectively tender to one excess insurer and de-select all other excess insurers.

As of yet, there are no rulings prescribing how targeted tenders should be handled among multiple layers of excess insurance or in those situations where an umbrella policy performs as primary insurance rather than excess insurance.

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If you have questions or would like to discuss the implications of this report further, please feel free to contact James K. Horstman at Cray Huber Horstman Heil & VanAusdal LLC, 303 West Madison, Suite 2200, Chicago IL 60606; 312-332-8494; jkh@crayhuber.com.