

# Cray • Huber

## **Illinois Coverage Basics**

### *Rulings Suggest Possible Exceptions and Limitations to Illinois' Targeted Tender Rule*

Under Illinois' targeted tender rule (sometimes also called the "selective tender" rule), an insured covered by multiple concurrent policies has the right to choose which of those policies must provide defense and indemnification. In other words, the insured may selectively tender its defense to one insurer while relieving all other insurers from any primary defense obligation. Once an insured has made a targeted tender to a particular insurer, that insurer is then prohibited from seeking equitable contribution from the insurers that were not selected by the insured. *See John Burns Construction Company v. Indiana Insurance Company*, 189 Ill.2d 570 (2000).

The rationale for the targeted tender rule is to protect the insured's right to knowingly forgo an insurer's involvement. 189 Ill.2d at 575. The Illinois Supreme Court has recognized that the ability to target tenders is a right possessed by insureds that supersedes the effect and operation of any "other insurance" clause contained in an insurance policy. 189 Ill.2d at 577-578. An insured could choose to forgo an insurer's assistance in order to avoid the risks that its policy premiums might be increased or its policy might be cancelled as the result of a tendered claim. *See Cincinnati Companies v. West American Insurance Co.*, 183 Ill.2d 317, 326 (1998).

#### **Rulings May Erode Targeted Tender Rule**

Although the Illinois Supreme Court's opinion in *John Burns* recognized no exceptions to the right of insureds to make targeted tenders, some rulings of the lower courts have suggested that an insured's right to make a targeted tender may not be absolute. The Illinois Appellate Court and the federal District Court have refused to give effect to insureds' targeted tenders under particular circumstances. In *Pekin Insurance Company v. Fidelity & Guaranty Insurance Company*, 357 Ill.App.3d 891 (4th Dist. 2005) and *Shelter General Insurance Company v. Zurich Direct*, 2008 WL 4449873 (S.D. Ill. 2008) those courts found that the *John Burns* targeted tender rule is limited in scope and subject to limitations.

In *Pekin Insurance*, *supra*, a towing company was sued after a van that it was towing broke loose and collided with an oncoming vehicle. The Appellate Court found that the towing company was potentially covered both by the towing company's own liability insurance and also by the liability policy maintained on the towed van. The towing company formally targeted the tender of its defense to the policy maintained on the towed van, and it "deselected" its own liability insurance for purposes of defending the claim.

Nonetheless, the Appellate Court in *Pekin Insurance* declined to give effect to the towing company's targeted tender. Noting that a state statute required tow truck operators to maintain

liability insurance, the Appellate Court held that “to allow the owner of a policy mandated by this statute to deselect that coverage in favor of the coverage of the vehicle it tows would render the statute and its purpose virtually meaningless.” 357 Ill.App.3d at 902.

The Appellate Court in Pekin Insurance also distinguished the John Burns opinion. First, it found that John Burns should be limited to situations in which the tendering party is actually named on both policies. Second, it suggested that John Burns should be limited to situations in which the tendering party’s inclusion on the other policy was a negotiated requirement of an underlying business contract. Third, it found that “the ‘targeted tender’ doctrine has thus far been limited primarily to the context of construction contracts.” 357 Ill.App.3d at 902-903.

In Shelter General, supra, an auto dealer was sued after one of its employees was involved in an accident while driving a car owned by a customer. The District Court found that the auto dealer was potentially covered both by its own liability insurance and by the customer’s liability policy. The auto dealer targeted the tender of its defense to the customer’s policy and “deselected” its own liability insurance. However, following the rationale of Pekin Insurance, the District Court in Shelter General declined to enforce the auto dealer’s targeted tender.

The rationale of the District Court in Shelter General was similar to that of the Appellate Court in Pekin Insurance. Because an Illinois statute required auto dealers to maintain liability insurance, the Appellate Court found that it would violate public policy to allow an auto dealer to selectively tender to a customer’s insurer. 2008 WL 4449873 at \*8. It also distinguished John Burns on the basis that John Burns arose from a construction context and that no prior contract required the auto dealership to be added as an insured on the customer’s policy. Id.

### **Significance of Pekin Insurance and Shelter General Rulings Going Forward**

Arguably, Pekin Insurance and Shelter General mean that targeted tenders are contrary to public policy and unenforceable in any situation where public liability insurance is required by law. On the other hand, the analysis adopted by these courts is subject to challenge. It might be argued that, contrary to the conclusions of the courts in Pekin Insurance and Shelter General, the enforcement of targeted tenders does not frustrate the public policy underlying mandatory insurance, because targeted tenders never reduce the amount of available insurance; targeted tenders merely determine the order in which available insurance policies perform. It might also be contended that John Burns cannot properly be limited to construction cases because the legal basis for the ruling in John Burns had nothing to do with the particular factual background of the case. In fact, courts of review have applied the targeted tender rule outside the context of construction cases. Nor is there anything in the John Burns analysis that limits the targeted tender right to insureds that are specifically named in a policy or to situations in which another contract requires an additional insured be named in a policy. The Illinois Supreme Court has not yet addressed the exceptions and limitations created in Pekin Insurance and Shelter General.

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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.