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Illinois Coverage Basics

Illinois Courts Create a New Defense to Targeted Tenders Based on “Other Insurance” Policy Language

Illinois’ targeted tender rule has been a lightning rod for controversy and challenge since its inception. In the year 2000, the Illinois Supreme Court first announced the rule that an Illinois insured covered by multiple concurrent primary liability policies has the right to selectively tender defense and indemnity to one of those insurers while excusing performance by all other insurers. John Burns Construction Company v. Indiana Insurance Company, 189 Ill.2d 570. Under the John Burns “targeted tender” rule, a selective tender to an insurer requires the insurer to provide full defense and indemnity up to the limits of its policy, without contribution from other concurrent primary liability policies.

The targeted tender rule has been widely criticized for several reasons. First, the rule has no basis in policy language or insurance law; it was simply an initiative of the Illinois Supreme Court based upon a questionable public policy analysis. Second, application of the targeted tender rule often overrides the express language and underwriting intent of liability policies. Third, the rule is a legal anomaly unique to the State of Illinois. Fourth, the rule provides an insured with unprecedented power to manipulate coverage to the detriment of the insurer’s need to manage and limit the underwritten risks. Finally, the targeted tender rule promotes gamesmanship in an arena unsuited to the whims and uncertainty of gamesmanship.

A New Weapon against Targeted Tenders: The River Village Rule

The unpopularity of the targeted tender rule has challenged Illinois courts to find exceptions to the rule. *See, e.g., “Potential Exceptions to Limit the Applicability of Illinois’ Targeted Tender Rule,” Illinois Coverage Basics, October 2009.* On November 20, 2009, the First District Appellate Court recognized a new exception to the targeted tender rule that may defeat targeted tenders in many cases. *See River Village I, LLC v. Central Insurance Companies, 2009 WL 4041944.* This new rule will make it possible for insurers in some cases to resist target tenders by asserting “excess” language contained in their policy’s “other insurance” clauses.

In the River Village case, River Village was the general contractor and retained First Choice as a subcontractor to perform drywall work on a construction project. The River Village-First Choice contract required First Choice to name River Village as an additional insured on its insurance policy (issued by Central Insurance Company), but the contract did not expressly address whether that insurance must be primary or excess. During the course of the construction work a First Choice employee was injured on the work site and he subsequently sued River Village. River Village then made a targeted tender to First Choice’s insurer, Central Insurance Company, and instructed its own insurer not to respond to the claim.

However, Central Insurance Company denied River Village's targeted tender based on the "other insurance" provision contained in its policy. The "other insurance" provision in Central Insurance Company policy stated that the policy would perform only as excess insurance over all other insurance available to a named insured, unless a contract specifically required that the policy operate as primary insurance. Central Insurance Company argued that it was required to provide only excess insurance to River Village, because the River Village-First Choice contract was silent as to whether the Central Insurance Company policy must perform on a primary or excess basis. In opposition, River Village argued that the Central Insurance Company policy must provide it with primary insurance, because River Village's targeted tender superseded the "other insurance" language of the policy.

The trial court in River Village ruled that Central Insurance Company was not required to respond to the targeted tender and River Village appealed. On appeal, the First District Appellate Court emphasized that the John Burns targeted tender rule applies only in situations where multiple concurrent primary liability policies are available to an insured. The Appellate Court cited the Illinois Supreme Court's opinion in Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co., 227 Ill.2d 102 (2007) as authority for the broad proposition that a targeted tender cannot be made to an "excess insurer" until all primary insurance has been exhausted. The Appellate Court's opinion recognized that Kajima involved a true excess umbrella policy and acknowledged that the Central Insurance Company policy was a primary policy with an "other insurance" clause requiring it to apply on an excess basis under certain circumstances. Nevertheless, it extended the Illinois Supreme Court's holding in Kajima beyond true excess policies to any primary policy that would to perform as excess insurance by operation of its "other insurance" provision. Hence, the Appellate Court held that River Village could not make a targeted tender to Central Insurance Company because the "other insurance" clause of the Central Insurance Company policy provided that the policy would perform only as excess insurance under the facts of the case.

Because River Village's own policy was not before the court in River Village, the Appellate Court remanded the case to examine the "other insurance" clause of River Village's own policy to determine whether the Central Insurance Company policy should respond as primary or excess insurance. Under Illinois law, when an "other insurance" clause in a policy contains "excess" language that conflicts with the "excess" language of another policy, those "excess" clauses are held to be in conflict, mutually repugnant and unenforceable. The River Village ruling would provide no defense to a targeted tender in a case involving mutually repugnant "excess" provisions, because in that event neither policy would qualify as "excess" insurance within the meaning of Kajima and River Village.

Nevertheless, River Village provides a potential defense to targeted tenders for any insurer that has an "excess" provision in its "other insurance" clause. Whether an insurer has a viable defense to a targeted tender based on its "other insurance" clause depends upon whether the insurer's "excess" provision will be enforced under Illinois law.

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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.