

# Cray • Huber

## **Illinois Coverage Basics**

### *Potential Exceptions to Limit the Applicability of Illinois' Targeted Tender Rule*

In the year 2000, the Illinois Supreme Court forever changed the landscape of Illinois coverage law by adopting the “targeted tender rule” (also known as the “selected tender rule”). *See John Burns Construction Company v. Indiana Insurance Company*, 189 Ill.2d 570, 574 (2000). The Illinois targeted tender rule gives an insured who is covered by multiple concurrent liability policies the right to choose which insurer will defend and indemnify with respect to a particular claim. Further, when an insured directs a targeted tender to an insurer, the targeted insurer loses its rights to seek contribution from other potentially applicable policies.

The Illinois Supreme Court’s broad rationale for the targeted tender rule was “to protect the insured’s right to knowingly forgo an insurer’s involvement.” In essence, the Court determined as a matter of public policy that an insured’s right to manage its insurance assets is of greater importance than insurers’ rights to expect faithful enforcement of the “other insurance” provisions in their respective policies. On its face, the John Burns rationale for the targeted tender doctrine did not seem to allow for any exceptions. Nonetheless, exceptions to targeted tender rule have begun to emerge in the case law.

#### **Targeted Tenders to Excess Insurers**

One of the first limitations engrafted on the targeted tender rule affected the right of an insured to make a targeted tender to an excess insurer before all available primary insurance has been exhausted. In Kajima Construction Services, Inc. v. St. Paul Fire and Marine Insurance Company, 227 Ill.2d 102 (2007), the Illinois Supreme Court addressed this issue and determined that Illinois’ horizontal exhaustion rule trumps the targeted tender rule under such circumstances. The Court held that an insured may not make a targeted tender to an excess insurer unless and until all available primary insurance has been exhausted.

#### **Targeted Tenders to Excuse Performance of Statutorily Mandated Insurance**

Subsequent rulings have also determined that the right to make a targeted tender cannot be used to excuse an insurer providing a statutorily required form of liability insurance. In Pekin Insurance Company v. Fidelity & Guaranty Insurance Company, 357 Ill.App.3d 891 (4th Dist. 2005), the Appellate Court found that a tow truck driver who was covered by both a personal auto liability policy and a statutorily mandated auto liability policy (i.e., insurance specifically required for tow truck operators) could not employ a targeted tender to the personal auto policy to excuse performance of the statutorily mandated tow truck policy. The rationale of the

Appellate Court in Pekin was that the legislative mandate to require liability insurance for tow truck operators should not be superseded by the court-created targeted tender rule.

More recently, the Federal District Court for the Southern District of Illinois undertook a similar analysis with respect to an auto dealer's garage and auto liability policy. In Shelter General Insurance Company v. Zurich Direct, 2008 WL 4449873 (S.D. Ill. 2008), the District Court found that an auto dealer's employee who was covered by both a personal auto liability policy and the auto dealership's statutorily mandated liability policy (i.e., insurance specifically required for new automobile dealers) could not make a targeted tender to the personal auto policy in order to excuse performance of the auto dealer's statutorily mandated policy.

### **Targeted Tenders Made by Additional Insureds**

A more far-reaching limitation of the targeted tender rule was recently recognized by the Appellate Court in State Auto Property & Casualty Insurance Company v. Springfield Fire & Casualty Company (No. 4-08-0977, filed September 30, 2009). In State Auto, the insured was a construction company that had purchased a commercial general liability policy and a special project liability policy that both applied to an accidental death claim. Faced with two applicable primary policies to provide a defense, the insured decided to make a targeted tender to the commercial general liability policy and "deselect" the special project policy. The general liability insurer challenged the validity of the insured's targeted tender on several grounds.

The Appellate Court's analysis of the general liability carrier's position contained a summary of the targeted tender rule and its applications. In the course of that summary, the Appellate Court made a startling declaration: the targeted tender rule applies only to named insureds. The State Auto opinion explained that the right to make targeted tenders is limited to named insureds, because only a named insured pays the premium on a policy and negotiates to be named on the policy as a named insured. Under the Appellate Court's rationale in State Auto, an insured does not have a right to make a targeted tender to a policy under which it is an additional insured; it can target a tender only to a policy under which it is a named insured and paid a premium.

The Appellate Court's analysis of the targeted tender rule is surprising for several reasons. First, in the years following the John Burns decision, targeted tenders have been made without distinction as to whether the tendering party was a named insured or an additional insured. Second, there is nothing in the John Burns opinion that even remotely foreshadowed the exclusion of additional insureds under the targeted tender rule. Third, the Appellate Court's rationale for the limitation does not seem to have any obvious connection with the policy underlying the targeted tender rule. Finally, such disparate treatment of named insureds and additional insureds seems inconsistent with the provision in most policies that states the rights of all insureds are deemed to be separate and equal.

As of the date of this newsletter, the Appellate Court's State Auto opinion is still subject to possible rehearing by the Appellate Court and review by the Illinois Supreme Court.

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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](mailto:jkh@crayhuber.com).