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Illinois Coverage Basics

What Liability Insurers Need to Know about Excess Exposure Claims Following the R.G. Wegman Decision

Last month's *Illinois Coverage Basics* reported the Seventh Circuit Court of Appeals' landmark opinion in R.G. Wegman Construction Company v. Admiral Insurance Company. In R.G. Wegman, the Court of Appeals ruled that a conflict of interest is created in any case when a liability insurer learns that "a nontrivial probability" of an excess verdict exists. R.G. Wegman also held that when such a conflict arises, the insurer is required to offer the insured the right to select independent defense counsel at the insurer's expense. We now address some of the practical implications and realities of the Seventh Circuit's R.G. Wegman opinion.

The first thing to know about R.G. Wegman is that it is an irreversibly final ruling. The only higher court in the federal court system is the United States Supreme Court, and there is no basis for invoking the jurisdiction of the Supreme Court, because this ruling concerns a question of state insurance law. Also, the time for seeking *en banc* rehearing by the Seventh Circuit Court of Appeals has now expired. Further, because the opinion was joined by two of the Court's intellectual heavyweights, Judges Richard Posner and Frank Easterbrook, it is unlikely that any subsequent decision of the Seventh Circuit will change the substance of R.G. Wegman.

However, a contrary ruling on the same issue by the Illinois Supreme Court could supercede the federal ruling. R.C. Wegman was a diversity jurisdiction case and as such the Seventh Circuit's task was to apply the rule that it believed the Illinois Supreme Court would follow. If the Illinois Supreme Court subsequently looks at the same issue and concludes that the Seventh Circuit guessed wrong about the applicable rule of Illinois law in R.C. Wegman, the ruling of the Illinois Supreme Court would trump the Seventh Circuit's opinion in R.C. Wegman.

Second, while R.C. Wegman is a binding rule of decision for federal courts, it is not binding on any Illinois state court. If a state court disagrees with R.C. Wegman, it can choose not to follow the ruling. However, as a practical matter this does not provide a safe harbor for most insurers. Federal diversity jurisdiction can be obtained over any out-of-state insurer. Consequently, parties seeking to implement R.C. Wegman against most insurers can file their actions in federal court or invoke federal removal jurisdiction to relocate cases initially filed in state court. Ultimately, the applicability of R.C. Wegman depends not on where the underlying malpractice claim has been filed (state court versus federal court), but on where an action against the insurer could be prosecuted. Except for insurers that are citizens of Illinois, those actions can be maintained in federal court, where R.C. Wegman will control.

Third, if an insurer acknowledges a potential excess verdict exposure with respect to a claim, that acknowledgment creates a conflict of interest under R.C. Wegman, which will require the insurer

