

# Cray • Huber

## Illinois Coverage Basics

### Tender Of Defense Is Not Required To Trigger An Insurer's Duty To Defend.

In 1998, the Illinois Supreme Court decided that an insured is not required to request a defense to invoke an insurer's duty to defend. Previously, the prevailing rule had been that an insurer would have no duty to defend unless and until the insured tendered its defense to the insurer. However, the rule today in Illinois is that an insurer's duty to defend is triggered when it has "actual notice" of a suit against its insured, regardless of whether the insured has asked to be defended.

The decision that changed Illinois law on this point is Cincinnati Companies v. West American Insurance Company (1998), 183 Ill.2d 317, 701 N.E.2d 499. Cincinnati Companies arose from a construction site accident resulting in a suit against several subcontractors for bodily injuries. A subcontractor, Baird, was defended under a policy issued by Cincinnati Companies. A second subcontractor, B&D, was defended by West American. Until the eve of trial, Baird was unaware that it was an additional insured under B&D's West American policy, consequently it did not tender its defense to West American. Shortly before trial, B&D disclosed Baird as an additional insured on the West American policy, but West American denied Baird's tender.

Rejecting prior law established by the Illinois Appellate Court, the Illinois Supreme Court in Cincinnati Companies held that a tender by Baird was not necessary to invoke West American's duty to defend. The Illinois Supreme Court ruled that an insurer's duty to defend a suit will be triggered by the insurer's "actual notice" of a suit against its insured. In Cincinnati Companies, West American's duty to defend Baird was triggered because it had obtained actual notice of the suit against Baird during the course of its defense of its own insured, B&D.

In opposition to this analysis, West American argued that a tender should not be implied as a matter of law, because an insured should be able to choose which insurer it wants to provide a defense when more than one primary policy is available. The Illinois Supreme Court agreed that an insured should be able to forgo the involvement of an insurer in its defense, but suggested that this is best done by the insured expressly instructing the insurer not to involve itself in the litigation. Recognizing that an insurer is not required to defend every suit against its insured of which it has notice, the Illinois Supreme Court directed that "The duty to defend may be discharged simply by contacting the insured to ascertain whether the insurer's assistance is desired." If the insured indicates that it does not want the insurer's assistance, or is unresponsive or uncooperative, the insurer is relieved of its duty to defend. Unless the insurer asks the insured the question, it must assume that the insured desires the insurer to provide a defense.

The practical consequences of the Cincinnati Companies ruling are significant. Prior to this ruling, insurers in Illinois who knew of a suit against an insured could safely wait to take any action on the file until it received a tender of defense from its insured. The “actual notice” rule encourages gamesmanship by insureds to “set up” insurers by providing notice of suits in indirect and subtle ways. “Actual notice” could be provided to an insurer by a newspaper article or by a letter from a plaintiff’s attorney. More commonly, an insurer handling the defense of a suit against one insured may learn of a suit against an additional insured. Insurers handling claims in Illinois must be more vigilant than in the past about evaluating circumstances in which knowledge of a suit against an insured may have been received. The great unfairness of the rule is that it creates situations in which an insurer may be charged with breaching its duty to defend its insured when it honestly does not know that it is supposed to be defending.

When an insurer has actual notice of a lawsuit against an insured, it may not safely sit back and wait to see if the insured will request a defense. The penalties for failure to defend are severe in Illinois (those penalties will be described in a future issue of Illinois Coverage Basics). Cincinnati Companies requires the insurer to take the affirmative step of asking the insured if it wants the insurer to provide a defense. To insurers familiar with the pre-Cincinnati Companies Illinois rule, asking the insured if it wants the insurer to become involved will seem like asking for trouble. There is no safe way around asking the question, but *how* it is asked is not addressed by the Cincinnati Companies opinion.

When actual notice of a suit against a named insured is received, and it appears that other primary coverage may be available, the advantages of tendering to the other carrier can be discussed with the insured. In discussing the defense issue, the insurer may frankly admit that tendering to the other carrier will benefit both the named insured and the insurer, by placing the cost of defense and the loss on the other policy. When notice of a suit is received concerning an additional insured, other reasons might be suggested for tendering to the additional insured’s own policy, such as enhancing its business relationship with the named insured and the logic of obtaining a defense from the insurer that has received premiums for the specific purpose of providing a defense under such circumstances.

The recommended approach in every case in which an insurer believes that it is not the appropriate insurer to provide the defense is to *confirm* that the insured is not looking for a defense, after explaining the reasons supporting that view. This should always be memorialized in writing, to prevent later misunderstandings. As uncomfortable as this process may be for insurers, the penalties for failing to do so are much worse, including estoppel and possible monetary penalties.

The Cincinnati Companies “implied tender” rule is the foundation for the most important Illinois coverage rules and strategies today. As such, a clear understanding of the Cincinnati Companies rule will go a long way toward keeping insurers away from dangerous coverage traps in Illinois.

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