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Illinois Coverage Basics

Where Multiple Primary Liability Policies Could Apply To A Loss, The Insured Has the Exclusive Right to Choose Which Of Those Policies Will Defend And Indemnify.

Illinois' "selective tender" rule provides that when more than one primary liability policy potentially apply to an occurrence, the insured has an absolute right to choose which of those policies must defend and indemnify. And, once the insured has made such a "selective tender," the insurer that has been selected is prohibited from seeking contribution from any other potentially applicable primary policies.

The Illinois Supreme Court adopted the "selective tender" rule (sometimes also called the "targeted tender" rule) in John Burns Construction Company v. Indiana Insurance Company (2000), 189 Ill.2d 570, 727 N.E.2d 211. In that case, John Burns Construction Company ("John Burns") was a general contractor that hired Sal Barba Asphalt Paving, Inc. ("Barba") as a paving subcontractor for a commuter train station project. Pursuant to the terms of the subcontract, Barba arranged to have John Burns named as an additional insured on its Indiana Insurance Company liability policy. Following completion of the work, a person using the train station slipped and fell on the parking lot that Barba had paved. The injured person later sued John Burns and others for his injuries.

After being served, John Burns informed Barba of the lawsuit and requested coverage from Indiana Insurance. John Burns stated in a letter that it was looking solely to Indiana Insurance for defense and indemnity. It explained that it had put its own liability insurer, Royal Insurance Company, on notice of the suit, but it had instructed Royal Insurance that it did not want Royal Insurance to be involved in defending the suit.

Indiana Insurance initially refused to defend John Burns. In light of Indiana Insurance's declination, John Burns then asked Royal Insurance for a defense. John Burns and Royal Insurance subsequently brought a declaratory judgment action seeking a declaration that Indiana Insurance had a duty to defend and indemnify John Burns. In its responsive pleadings, Indiana Insurance admitted that it had a duty to defend and indemnify John Burns, but it argued that Royal Insurance was obligated to share the defense and indemnity duties pursuant to the "other insurance" clause in the Indiana Insurance policy.

The trial judge agreed with Indiana Insurance and held that the two insurers were required to contribute equally to John Burns' defense and indemnification. The Illinois Appellate Court

agreed and affirmed. But, on further review, the Illinois Supreme Court reversed the lower courts.

The Illinois Supreme Court held that John Burns possessed the right to choose which insurer would defend and indemnify it in the action for personal injuries. The Court explained that once an insured makes a designation as to which insurer it wishes to perform, the duty to defend must fall solely upon the selected insurer. Because the rule is intended to protect the insured's right to knowingly forgo an insurer's involvement, the selected insurer may not in turn seek equitable contribution from other insurers who have not been selected by the insured.

The Court found that nothing in the Indiana Insurance policy limited John Burns' right to select which insurer should perform. It reasoned that Indiana Insurance could not take advantage of the "other insurance" provision in its policy because John Burns' own insurance was not "available," to the extent that John Burns had expressly declined to invoke that coverage.

Some lawyers have argued that the John Burns holding is limited to coverage for construction-related insureds and losses, focusing on the particular factual background of the John Burns case. While no court of review has expressly considered that limitation, at least one Appellate Court opinion indicates that the John Burns analysis would be properly applied in a medical malpractice context. (See Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange, 758 N.E.2d 353 (1st Dist. 2001).)

Can an insured change its mind after making a selective tender? In Richard Marker Associates v. Pekin Insurance Company, 318 Ill.App.3d 1137, 743 N.E.2d 1078 (2nd Dist. 2001), the Appellate Court ruled that an insured has a right to withdraw a selective tender, even after the underlying case has been settled. In Marker, the insured first tendered to Pekin Insurance Company, and after Pekin Insurance declined, it tendered to Statewide Insurance Company, which also declined coverage. When the insured settled the claim with its own money, it withdrew its tender to Statewide Insurance and filed a declaratory judgment action Pekin Insurance. In turn, Pekin Insurance sought contribution from Statewide Insurance, arguing that the insured's attempt to withdraw its tender to Statewide Insurance was not proper. However, the Appellate Court flatly rejected Pekin Insurance's argument, holding that an insured has as much a right to "un-tender" a claim as it has to tender a claim in the first place.

The importance of the Illinois "selective tender" rule is that it effectively invalidates the "other insurance" provisions in primary policies by giving the insured the exclusive right to decide which primary insurer will defend and indemnify.

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If you have questions or would like to discuss the implications of John Burns 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.