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# *Illinois Appellate Court Rejects "Non-Trivial Probability of Excess Judgment" Test for Conflict of Interest*

In 2011 the U.S. Court of Appeals for the Seventh Circuit found a conflict of interest was present which required the insurer to reimburse its insured for independent counsel whenever there was a "non-trivial probability" of a judgment in excess of the policy limit. *Wegman Const. Co. v. Admiral Ins. Co*., 629 F. 3d 724, 730 (applying Illinois law). Judge Posner, writing for the court, did not elaborate on this standard. At least one federal district court interpreted *Wegman* to mean that a claim for damages exceeding the policy limit, without more, gives rise to a conflict that requires independent counsel. *Perma-Pipe, Inc. v. Liberty Surplus Lines Ins. Co.,* 38 F. Supp. 3d 890, 896 (N.D. Ill. 2014).

Many insurers expressed concern in the wake of *Wegman* that its rule could, in theory, apply to virtually any substantial claim, and that Illinois courts might follow it. However, in a case of first impression, the Illinois appellate court has now declined to follow *Wegman*. In *Ryerson & Son, Inc. v. Travelers Indemnity Co.,* No. 18-2491, 2020 IL App (1st) 182491 (April 7, 2020) the court disagreed with *Wegman* and held no conflict of interest was created merely by the nontrivial probability of an excess judgment in the underlying suit. The *Ryerson* court observed that the point of *Wegman* appeared to be "informing the insured of the possibility of an excess judgment" after the insurer clearly knew of that possibility. This was done in *Ryerson*. It was not done in *Wegman*.

The court distinguished *Wegman* on this basis, finding that unlike *Wegman*, it was undisputed that the insured was aware prior to the excess verdict of the potential for the verdict to exceed the policy limit. *Ryerson,* at ¶60. This fact led the court to conclude: "This is not a situation in which Travelers was 'gambling' on reducing Ryerson's damages at trial or appeal to an amount within the primary policy limits without informing Ryerson [the insured] about the possibility that the verdict amount could exceed those limits and that Ryerson could be responsible for paying the amount in excess of those limits." *Id*. Therefore, there was no conflict of interest that entitled Ryerson to independent counsel at the insurer's expense.

*Ryerson* is good news for insurers handling Illinois claims. It should lay to rest the question left open by *Wegman* -- that a claim of, or demand for, damages exceeding the policy limit does not, in and of itself, create a conflict of interest which allows the insured to select its own counsel at the insurer's expense. *Ryerson* also underscores the importance of the practice of issuing an "excess letter" – simply advising the insured of the possibility of a judgment in excess of the policy limit, and that the insured has the right to retain counsel at its own expense to protect itself against such a judgment.