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Illinois Coverage Basics

Illinois Appellate Court Creates a New Exception to the Targeted Tender Rule

Under Illinois law, if an insured is covered by more than one primary liability policy for a given loss, the insured has the right to select which of those policies must provide defense and indemnification, and it can excuse the performance of all other policies. This is known as Illinois' "targeted tender" rule (also known as the "selective tender" rule). Once an insured has made a targeted tender to a particular insurer, that insurer is prohibited from seeking equitable contribution from insurers that were not targeted by the insured. *See* John Burns Construction Company v. Indiana Insurance Company, 189 Ill.2d 570 (2000).

The rationale for the targeted tender rule is that an insured should have the right to knowingly forgo an insurer's involvement. The Illinois Supreme Court has recognized, for example, that an insured may wish to forgo an insurer's assistance in order to avoid the risk that its policy premiums will be increased, or that its policy might be cancelled as the result of a tendered claim. *See* Cincinnati Companies v. West American Insurance Co., 183 Ill.2d 317, 326 (1998).

From its inception, the targeted tender rule has been unpopular among the courts. At present, Illinois is one of only three states that recognize the targeted tender rule. In Illinois, the targeted tender rule has been widely criticized, and several exceptions to the targeted tender rule have been created by Illinois' intermediate Appellate Court. The Illinois Supreme Court has declined to either approve or disapprove those exceptions. As the list of Appellate Court exceptions grows, and the Illinois Supreme Court remains silent on those exceptions, the applicability of the targeted tender rule has become more and more uncertain in Illinois.

A New Exception from the Illinois First District Appellate Court

A recent opinion of the Illinois First District Appellate Court has established an important exception to the targeted tender rule. In Illinois School District Agency v. St. Charles Community Unit School District 303, 2012 IL App (1st) 100088 (filed on March 30, 2012), the Appellate Court analyzed the targeted tender rule in the context of long-tail mold-related bodily injury claims. Three former students sued the insured school district in the St. Charles case for alleged mold-related bodily injuries. The school district had general liability insurance in place for 30 years before the mold claims were made, and it tendered the defense of the claims to each of those insurers. In response, each of those insurers reserved its rights.

Subsequently, each of the insurers on the risk during the first 15 years of the exposure period settled with the school district and obtained releases regarding the three mold-related bodily injury claims. General Casualty (policies in effect from 1971 through 1974), Employers Fire

(policies in effect from 1974 through 1977), Hartford Accident (policies in effect from 1977 through 1985) and Indiana Insurance (policies in effect from 1985 through 1995) each settled with the school district for amounts far less than their respective policy limits. The school district then "de-activated" its tenders to those insurers, and targeted its tender to the only remaining insurer that had not settled with the school district: the Illinois School District Agency ("ISDA"), which insured the school district during the last 15 years of the exposure period.

ISDA was understandably unhappy with the disproportionate allocation of the liability for the mold claims. By settling with all the other insurers for relatively modest amounts of money, and targeting a tender solely against ISDA, the school district precluded ISDA from sharing the burden with the other insurers through contribution. So, ISDA sued the school district seeking to invalidate the target tender.

To rule in ISDA's favor on this issue, the Appellate Court needed to create a new exception to the targeted tender rule, because the school district had otherwise made an ordinary and proper targeted tender to ISDA. The Appellate Court held, for the first time ever, that a valid targeted tender can be made only among "concurrent" policies, by which it meant policies covering the same period of time. It also ruled that a targeted tender could not be properly made among policies covering chronologically "consecutive" periods.

In support of its ruling, the Appellate Court found that almost all of the prior Illinois targeted tender cases had involved chronologically concurrent policies, rather than policies covering consecutive periods. However, none of those cases had ever before suggested that the targeted tender rule should be applied to concurrent policies but not consecutive policies. The Appellate Court explained that concurrent policies and consecutive policies must be treated differently due to the public policy underlying the targeted tender rule. In the Court's view, the justification for the targeted tender rule is that it gives an insured the right to selectively tender claims in order to avoid the risk of increased premiums or possible cancellation that may result if a claim is made under a particular policy. However, the Appellate Court found that this justification does not apply when a tender is targeted to an insurer that is currently on the risk and insurers with earlier policies are excused. Rather, "[t]he District's tender to the ISDA made future premium increases or cancellation of its policy more likely, rather than less."

It seems clear that the holding in the St. Charles case should be limited to the factual setting of the case. Some targeted tenders among chronologically consecutive policies clearly will advance the public policy underlying the targeted tender rule. For example, a targeted tender to an earlier policy which excuses the current policy from performing would undoubtedly make future premium increases or cancellation less likely, rather than more likely. Although the St. Charles opinion broadly states that targeted tenders cannot properly be made among chronologically consecutive policies, a more accurate reading would be that a targeted tender cannot be made to a current liability insurer to excuse the performance of earlier policies. Undoubtedly, this analytical disconnect in the St. Charles opinion will be a source of much litigation in the future.

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This newsletter provides information on recent legal developments. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. If you have questions, please feel free to contact Jim Horstman (312.332.8494; jkh@crayhuber.com).