

# Cray • Huber

## **Illinois Coverage Basics**

### *Illinois' Targeted Tender Rule is Far from Absolute: Important Exceptions That Insurers Should Know*

Under Illinois' targeted tender rule (also known as the "selective tender" rule), an insured that is insured by multiple concurrent policies has the right to choose which of those policies must provide defense and indemnification. In other words, the insured may selectively tender its defense to one insurer while relieving all other insurers from any defense obligation. Once an insured has made a targeted tender to a particular insurer, that insurer is prohibited from seeking equitable contribution from the insurers that were not selected by the insured. *See John Burns Construction Company v. Indiana Insurance Company*, 189 Ill.2d 570, 727 N.E.2d 211 (2000).

The rationale for the targeted tender rule is to protect the insured's right to knowingly forgo an insurer's involvement. The Illinois Supreme Court has recognized that an insured may choose to forgo an insurer's assistance in order to avoid the risks that its policy premiums will be increased or 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).

However, several exceptions to the targeted tender rule have arisen in recent years. Significantly, most of those exceptions have been created by the Illinois Appellate Court, and the Illinois Supreme Court has so far declined to either approve or disapprove those exceptions. As a result, Illinois' targeted tender rule remains somewhat unsettled and uncertain.

#### **An Insured Cannot Target a Tender Away from Mandatory Insurance**

Courts have held that when a statute requires an insured to maintain liability insurance, the insured cannot use the targeted tender rule to excuse performance of the policy that is mandated by the statute. *See Pekin Insurance Company v. Fidelity & Guaranty Insurance Company*, 357 Ill.App.3d 891, 830 N.E.2d 10 (4th Dist. 2005) (involving mandatory tow truck liability insurance) and *Shelter General Insurance Company v. Zurich Direct*, 2008 WL 4449873 (S.D. Ill. 2008) (involving mandatory auto dealer liability insurance). The rationale of the courts is that it would be against public policy to allow an insured to deselect an insurance policy that the Legislature has required to be maintained. The exception to the targeted tender recognized by the courts in *Pekin Insurance* and *Shelter General* has not yet been adopted by the Illinois Supreme Court or addressed by other courts of review in Illinois.

#### **An Insured Cannot Target a Tender Away from a Primary Policy to an Excess Policy**

Courts have also held that Illinois' "horizontal exhaustion" rule imposes a limitation on an insured's right to make targeted tenders. Thus, an insured is not allowed to use the targeted

tender rule to excuse the performance of a primary policy and require an excess policy to drop down to perform in the place of the primary policy. Kajima Construction Services v. St. Paul Fire & Marine Insurance Company, 227 Ill.2d 102, 879 N.E.2d 305 (2007). However, once an insured has exhausted all of its concurrent primary insurance, it may selectively tender among excess insurers. In the same way that an insured is entitled to select one primary insurer and de-select all other primary insurers, an insured has the right to select one excess insurer and de-select all other excess insurers. North River Insurance Company v. Grinnell Mutual Reinsurance Company, 369 Ill.App.3d 563, 860 N.E.2d 460 (1st Dist. 2006). (North River also held that for purposes of the targeted tender rule, umbrella policies are to be treated as pure excess insurance.)

### **Only a Named Insured Can Target a Tender**

The rule in at least one of the Illinois intermediate appellate districts is that only a named insured has the power to make a targeted tender. State Auto Property & Casualty Insurance Company v. Springfield Fire & Casualty Company, 394 Ill.App.3d 414, 916 N.E.2d 157 (4th Dist. 2009); *see* Pekin Insurance, *supra*, 357 Ill.App.3d at 902-903. The rationale of the Fourth District Appellate Court on this issue is that the right to make targeted tenders should be limited to named insureds, because only a named insured pays the premium on a policy and negotiates to be named on the policy as a named insured. Under the Fourth District's rationale, a party does not have a right to make a targeted tender to a policy under which it is merely an additional insured; it can target a tender only to a policy under which it is a named insured and has paid a premium. The Illinois Supreme Court declined to grant review of the Fourth District's State Auto ruling.

### **A Policy's "Other Insurance" Provision May Defeat a Targeted Tender**

Although earlier decisions indicated that the targeted tender rule effectively eliminated the "other insurance" provisions from liability policies, the First District Appellate Court has concluded that in some circumstances an "other insurance" provision can be used by an insurer to defeat a targeted tender. In River Village I, LLC v. Central Insurance Companies, 396 Ill.App.3d 480, 919 N.E.2d 426 (1st Dist. 2009), the Appellate Court emphasized that the targeted tender rule applies only in situations where multiple concurrent primary liability policies are available to an insured. The River Village Court observed that at least two types of policies may qualify as excess insurance for purposes of the targeted tender rule: (a) a policy may be written and sold as excess insurance, or (b) a policy may be written and sold as primary policy but may contain an "other insurance" provision that allows the policy to operate as excess insurance if primary insurance is otherwise available. River Village held that an insured can never excuse the performance of an applicable primary policy and target a tender to an excess insurer, regardless of whether the targeted policy was issued as an excess policy or it is a primary policy that operates as excess insurance pursuant to an "other insurance" provision. The Illinois Supreme Court declined to grant review of the First District's River Village ruling.

\* \* \*

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