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A "Selective" Club – The Targeted Tender Doctrine Keeps Illinois in the Minority

For more than 25 years, Illinois has recognized the targeted/selective tender doctrine, which allows insureds confronted with a claim that implicates two or more insurance policies to choose which insurer should respond to the claim. Once a selection is made, this judicial doctrine applies to restrict the rights of the targeted/selected insurer, preventing claims for contribution by otherwise co-liable (non-selected) insurers. No statute or regulation controls, nor do the terms of the insurance policies themselves. Rather, targeted tender is a judicial solution to a purported problem that Illinois courts decided could not be otherwise resolved.

The Illinois Supreme Court has repeatedly addressed the doctrine and determined it to be sound. The quandary, however, is that after 25 years, Illinois is the only state to apply the targeted/selective tender doctrine with regularity, and based on reported decisions, it appears that only two other states, Washington and Montana, have applied the doctrine to resolve insurance coverage disputes. The lack of adherents to the Illinois approach calls into question whether the doctrine should continue in Illinois, or whether it should be discarded in favor of approaches used in other jurisdictions.

Why Are There Two Policies?

The concept of targeted tender presumes that an insured person or entity is insured by two insurance policies. As might be expected, it is highly unusual for an insured to purchase multiple redundant insurance policies for a particular policy period. Although companies certainly maintain "towers" of excess coverage and may purchase "umbrella" policies to insure gaps in coverage, it would be atypical to pay for two substantially identical primary insurance policies from different insurance companies.

Targeted tender is not directed at an outlier situation involving an insured that bought redundant coverage, however. Rather, it is most often directed at a commonplace factual scenario. Commercial contracts of all kinds, such as for construction or repairs, the sale of goods, or the manufacture of a product, frequently require the good or service provider to have insurance, and to name the contract counterparty (the person paying for the goods/services) as an additional insured on the provider's insurance policy. Being named as an additional insured does not cost the party being added anything, and it is an attractive benefit because if a claim has to be tendered under that insurance, the claim will not be held against the additional insured for purposes of its own loss history. This means it will not face increased insurance premiums as a result of the contractual counterparty's insurer paying the claim. Accordingly, the ability to "target" a policy that the insured did not have to pay premiums for carries a potentially significant advantage.

Key Cases

The targeted/selective tender doctrine was first articulated by the Illinois Appellate Court First District in *Inst. of London Underwriters v. Hartford Fire Ins. Co.*, 234 Ill. App. 3d 70, 73 (1st Dist. 1992). At issue was an accident settlement which implicated insurance policies issued by both the Institute of London Underwriters and Hartford Fire Insurance Company. *Inst. of London Underwriters*, 234 Ill. App. 3d. at 71. Underwriters sought contribution from Hartford, and Hartford resisted on the grounds that the insured had instructed Hartford not to respond to the loss. *Id.* at 74. Without an actual tender of the claim (a request for the insurer to respond), Hartford had no responsibility to indemnify the insured for any portion of the settlement, and therefore Hartford similarly had no obligation to reimburse or otherwise contribute with respect to amounts that Underwriters paid in settlement. *Id.* at 76. Arguments that the "other insurance" provisions of the respective policies—contractual provisions that expressly contemplated the existence of other applicable insurance policies and purported to provide how the policies responded—were rejected. *Id.* at 77. Specifically, the appellate court held:

> The Institute's argument that the 'other insurance' clause of Hartford's policy requires Hartford to contribute to the settlement suffers from the same infirmity as its argument for application of the equitable contribution doctrine, in that any liabilities arising under this clause are not triggered until the insurer becomes obligated to pay or defend.

Id. Without a tender by the insured, the court found that Hartford could have no obligations—either contractual or contributory. *Id.* at 80. It specifically reasoned that:

> Contribution is a creature of equity. . . . Under the circumstances of this case, it would be inequitable to require an insurer to reimburse another carrier for a claim it has no obligation to pay to its insured and in circumvention of the insured's wishes with whom it has the contract.

Id. The Illinois Supreme Court subsequently cited *London Underwriters* with approval in a decision discussing Illinois law on what constitutes tender of a claim and the implications for the trigger of insurance coverage. *Cincinnati Companies v. W. Am. Ins. Co.*, 183 Ill. 2d 317, 326 (1998). There, the court recognized the principle that an insured could knowingly choose to forego an insurer's assistance on a particular claim as an accurate statement of Illinois law. *Cincinnati Companies*, 183 Ill. 2d at 326. ("It is true that an insured may choose to forgo an insurer's assistance for various reasons, such as the insured's fear that premiums would be increased, or the policy cancelled, in the future.").

The Illinois Supreme Court then fully adopted the *London Underwriters* framework in the case *John Burns Const. Co. v. Indiana Ins. Co.*, 189 Ill. 2d 570, 578 (2000). In *John Burns*, the supreme court expressly found that an "other insurance" provision does not overcome the right of an insured to tender defense of an action to one insurer alone. *John Burns Const. Co.*, 189 Ill. 2d at 578. The insured (John Burns) had a right to coverage under two insurance policies – one it paid the premiums for, and one paid for by John Burns' subcontractor (as is customary, the subcontractor had to provide this insurance as a condition of working on the applicable construction project). *Id.* at 571. The court found that John Burns' decision to target the policy procured by the subcontractor was controlling with respect to the rights of the two insurers. *Id.* at 578. The insurance that John Burns purchased directly was found to be "unavailable" as the result of John Burns' decision not to tender to that insurer, and therefore the "other insurance" provisions of the insurance policies could not be invoked. *Id.* ("The insurance provided to Burns by Royal was not 'available,' in the language of the other insurance provision, for Burns had expressly declined to invoke that coverage."). This meant that Indiana Insurance (the insurer providing coverage paid for by the subcontractor) had to bear the full loss, notwithstanding the fact that John Burns had other insurance that it had the ability to access, and which would have covered John Burns' liability but for the decision to forego that insurer's participation. *Id.* ("Indiana was foreclosed from seeking equitable contribution from [Burns' insurer].").

In 2007, several years after *John Burns*, the Illinois Supreme Court finally labeled and formalized the targeted/selective tender doctrine that had first been applied in *London Underwriters*. Specifically, in *Kajima Const. Servs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102, 107 (2007), the supreme court expressly stated that "[T]he 'targeted' or 'selective' tender doctrine allows an insured covered by multiple insurance policies to select or target which insurer will defend and indemnify it with regard to a specific claim." *Kajima Const. Servs., Inc.*, 227 Ill. 2d at 107. The facts presented by *Kajima* forced the supreme court to address a consequence of allowing insureds to manipulate the sources of insurance available to them; namely, that at some point the manipulation becomes so prejudicial to the insurers that it would be inequitable to permit. *See, Id.* At issue in *Kajima* was whether the non-selected primary insurance had to be exhausted prior to the obligations of an excess insurer being triggered. *Id.* at 112-113. The court recognized that the targeted tender doctrine had to have limits, lest it eviscerate the distinction between primary and excess insurance – it hypothesized that, after all, if you can pick any insurer to target, why not pick the excess policy which likely has greater limits and was purchased for a lower premium? *Id.* at 116-117. The court declined to go this far and expressly held that:

> Given the clear distinctions between primary and excess insurance coverage, we decline to extend the targeted tender doctrine to require one insurer to vertically exhaust its primary and excess coverage limits before all primary insurance available to the insured has been exhausted.

Id. Thus, while the targeted tender doctrine was reaffirmed, the supreme court recognized its utility was subject to certain limits.

Trending Away from Targeted Tender

In the decade since the *Kajima* decision, the Illinois Supreme Court has not revisited the targeted doctrine. The Illinois Appellate Court First District and several federal courts have had occasion to address it, however, and those cases demonstrate a trend away from applying selective tender. *See, Illinois Emcasco Ins. Co. v. Nationwide Mut. Ins. Co.*, 2015 IL App (1st) 140928-U, ¶ 79, as modified (Nov. 9, 2015) ("Illinois precedent disfavors expanding the targeted tender doctrine beyond its originally intended scope.").

The decisions are varied in their rationales, but the trend has clearly been to seize upon any distinguishing factors recognized by the Illinois Supreme Court (such as the primary/excess distinction addressed in *Kajima*), and move away from allowing targeted tender to control outcomes (instead seeking to reach a result that is both equitable and which gives force to the intentions of the parties, as expressed by the relevant insuring agreements). *See, e.g.*, *Greenwich Ins. Co. v. John Sexton Sand & Gravel Corp.*, 2016 IL App (1st) 151606-U, ¶ 54, *as modified on denial of reh'g* (July 22, 2016) (case involving two commercial liability policies and a pollution policy, all of which were alleged to apply on a primary basis; court found pollution policy was, in fact, an excess policy, and therefore targeted tender doctrine could not apply); *Netherlands Ins. Co. v. Knight*, No. 410CV04043, 2014 WL 3376873, at *2 (C.D. Ill. July 10, 2014) (targeted tenders found invalid); *Certain Underwriters at Lloyd's, London v. Cent. Mut. Ins. Co.*, 2014 IL App (1st) 133145, ¶ 9, 12 N.E.3d 762, 767 (suggesting, incorrectly, that "other insurance" clauses were created in response to the targeted tender doctrine, and therefore not applying the doctrine); *AMCO Ins. Co. v. Cincinnati Ins. Co.*, 2014 IL App (1st) 122856, ¶ 14, 10 N.E.3d 374, 378 (discussing that "the targeted tender doctrine has been criticized in recent years.").

Other States' Approaches

As noted, Montana and Washington have sparingly applied the targeted tender doctrine. *See, Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wash. 2d 411, 431, 191 P.3d 866, 878 (2008); *see also, Cas. Indem. Exch. Ins. Co. v. Liberty Nat. Fire Ins. Co.*, 902 F. Supp. 1235, 1239 (D. Mont. 1995). All other states have rejected it. *See*, *Am. States Ins. Co. v. Nat'l Fire Ins. Co. of Hartford*, 202 Cal. App. 4th 692, 706, 135 Cal. Rptr. 3d 177, 187 (2011) (citing 4 Bruner & O'connor, Construction Law (2011) § 11:59) ("The selective tender rule has had little traction outside of Illinois"); *Ins. Co. of Pennsylvania v. Great N. Ins. Co.*, 787 F.3d 632, 637 (1st Cir. 2015), *certified question answered sub nom. Ins. Co. of State v. Great N. Ins. Co.*, 473 Mass. 745, 45 N.E.3d 1283 (2016) ("This is not to say that selective tender makes obvious sense as a rule. . . . The parties point us to only a few jurisdictions that have expressly adopted the rule."); *see generally* 14 Couch on Ins. § 200:37 ("A minority of jurisdictions have adopted what is commonly referred to as the "selective tender" rule.").

Instead of allowing an insured to override the other insurance clauses in the insurance policies that apply, other states have taken the more traditional approach of attempting to give effect to the intentions of the parties, as expressed through the contractual language utilized. *See W. Bend Mut. Ins. Co. v. MacDougall Pierce Const., Inc.*, 11 N.E.3d 531, 546 (Ind. Ct. App. 2014) (resolving multiple insurer dispute by reference to underlying indemnity agreements); *see also Cont'l Cas. Co. v. N. Am. Capacity Ins. Co.*, 683 F.3d 79, 93 (5th Cir. 2012) (permitting subrogation by one insurer against three others, relying on policy language). These cases demonstrate that a judge-made doctrine is not essential to resolving disputes between or involving one insured and multiple insurers.

These courts would appear to seek to avoid the parade of horribles that have been asserted to accompany selective tender:

> [A]doption [of selective tender] would also be contrary to sound public policy because it would reward insurers that try to ignore their coverage obligations at the expense of those that conscientiously honor them. Under the selective tender exception, an insured that has two insurers of the same risk might choose to tender the claim to the insurance company that will promptly honor and pay the claim with minimum inconvenience and paperwork, and avoid tendering the claim to the insurance company that would delay payment of the claim and maximize the inconvenience and paperwork involved in obtaining payment. Selective tender would prevent the conscientious insurer from seeking equitable contribution from its less conscientious coinsurer. It would reward the "bad" insurer, who would be spared paying its fair share of the claim, and punish the "good" insurer, who would be required to pay the entirety of the claim alone.

Great Northern, 473 Mass. at 752.

Conclusion

After 25 years of experience with targeted tender, the case law in Illinois has failed to demonstrate that the targeted tender doctrine is a better way to resolve issues with multiple insurers than the alternatives utilized elsewhere. This is best illustrated by the failure of the doctrine to gain any adherents from other states, as well as by the several courts applying Illinois law that have shown a trend toward declining to apply the doctrine. Accordingly, whether the doctrine should continue to have vitality in Illinois is a significant question, as well as whether courts will continue to independently move away from finding that the doctrine governs particular situations.

About the Author

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