THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
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Young Lawyers Report

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The Art of the Tender: Basics Every Young Defense Attorney Needs to Know

One of the most powerful tools in a defense counsel's repertoire is the tender letter. Tendering a defense involves assigning that client's defense, and the costs associated with that defense, to another party pursuant to a contract or other agreement. The tender letter is the formal mechanism by which that happens. Thus, one of the first things an associate should do when diving into a new claim file–before filing an answer, thinking about a dispositive motion, or even filing an appearance–is to check for opportunities to tender to another party. Read on to find out how.

What Types of Cases Typically Involve Tenders?

The most likely sources of tender provisions are written contracts. Thus, tenders are commonplace in construction litigation, which usually involves multiple contracts between multiple parties. However, tender provisions are not limited to agreements between contractors and sub-contractors. Indeed, they can be found in transportation agreements, sales agreements, and rental agreements. Purchase orders, receipts, and invoices may even contain tender provisions. Thus, when investigating a new claim or lawsuit, make sure to ask your client for any and all contractual documents up front.

What Do Tender Provisions Look Like?

Tender provisions are risk-shifting clauses. As the name suggests, they are used to shift responsibility for potential risks from one party to another. They usually appear under headings titled "Defense," "Indemnity," and "Warranty." Remember, though, that each of these terms has different meanings and legal effects. More importantly, they impose different obligations upon the parties to a contract (and, assuming the parties fulfill these obligations, upon their insurers). For example, the duty to defend is much broader than the duty to indemnify. Make sure you know the differences between different types of risk-shifting provisions so that you assert the correct basis in your tender letter.

When Should You Tender?

Like the old joke about voting in Chicago, tender early and often. Tendering a claim early can potentially save your client thousands of dollars in unwanted litigation expenses. Litigation costs and expenses incurred pre-tender generally cannot be recouped. If you are investigating a claim that is pre-suit, do not wait for a lawsuit to be filed to send a tender letter. There are practical considerations for this, as it may take time for the insurer to receive the tender letter, analyze the relevant documents, and decide whether to accept or deny your tender. Significant litigation costs may be accrued

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while the decision is pending. Also, check the contractual documents to make sure there are no time limitations on when a tender must be made.

To Whom Should You Tender?

Generally, an insurance carrier's duty to defend is not triggered until it receives notice of a tender. To avoid any disputes over when a tender was made and to whom, be safe and send separate tender letters addressed to: (1) the party with whom you contracted (generally, a co-defendant); (2) the party's insurance carrier; and (3) the party's insurance producer. This way, you can avoid having your tender denied because of improper notice.

Look to your client's certificates of insurance to find this information. If sending via mail, make sure to send via certified mail so that you have a mailing receipt as proof that your letter was delivered or that a delivery attempt was made.

Sometimes there are multiple parties and insurers to whom a tender letter should be sent. In the construction context, it is fairly common to have multiple tiers of insurance coverage available depending on who your client is and where it falls in the insurance contract hierarchy. Make sure to tender not only to parties with whom your client has a contract(s), but also to any other "downstream" parties or contractors that were required to name your client as an additional insured.

What Should You Include in the Letter?

The most important aspect of your tender letter is that it provides an insurer with sufficient notice of a new claim and its duty to defend and/or indemnify your client in connection with said claim. To that end, your tender letter should include the name of the party you represent, a brief recitation of the facts of the case, and the basis upon which you are seeking a tender. The language in the tender letter should be lifted directly from the relevant contractual provision for clarity and emphasis.

If you practice in Illinois, you should also indicate the specific insurance policy you are "targeting." Illinois is a "targeted tender" state. This means an insured covered by multiple insurance policies can select or target which insurer will defend and indemnify it with respect to a specific claim. *Kajima Const. Servs., Inc. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102, 107 (2007). Include the specific citation to the contractual provision upon which you are relying, and include a copy of the relevant contract; the lawsuit, if one has been filed; and any other insurance documents, including certificates of insurance and endorsement forms, that support your basis for the tender.

Putting It All Together

Tender letters are powerful, cost-saving litigation tools that can sometimes be overlooked. Young associates who practice civil defense should be aware of the opportunities to tender the defense of new claims through the use of effective, well-organized tender letters.

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Justyna M. Kruk represents individual and corporate insureds in a variety of matters, including wrongful death, product liability, premises liability and construction cases. Her practice also includes professional liability and property damage matters, as well as general tort defense. She has handled all aspects of the litigation process, including resolution through mediation and trial. Before joining *Tribler Orpett & Meyer, P.C.*, Ms. Kruk honed her advocacy skills while working in-house with a major insurance company. Ms. Kruk earned her J.D. in 2014 from The John Marshall Law School and her B.A. in 2011 from The University of Chicago.

About the IDC

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