

**THE EVOLVING
“TARGETED” OR “SELECTIVE”
TENDER DOCTRINE IN ILLINOIS**

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**William G. Stone, Esq.
Christian D. Ambler, Esq.
STONE & MOORE, CHTD
150 North Michigan, #2600
Chicago, Illinois 60601
Phone: (312) 332-5656
Fax: (312) 332-5858
wstone@stonemoore.com
cambler@stonemoore.com**

**DEVELOPMENT OF TARGETED TENDER OF DEFENSE
AND INDEMNIFICATION IN ILLINOIS**

A. What is a “targeted” or “selective” tender of defense or indemnification?

In certain circumstances an insured will have potential primary and excess coverage under two or more policies or programs of insurance. This occurs most often when the insured has its own general liability policy or program and is also named as an additional insured under another’s policy or program of insurance. Although it most frequently arises from construction related claims it can also arise in automobile claims and other claims where multiple insurers cover the same risk.

In Illinois and presently only in Illinois, if more than one insurer is potentially obligated to defend or indemnify a claim, the insured may “target” or “select” one insurer and forgo or reserve coverage from any other non-selected insurer. This selected tender right was first announced by the Appellate Court in Institute of London Underwriters v. Hartford Fire Insurance Co., 234 Ill.App.3d 70 (1992). In Institute, the court, in establishing the right, found that:

“ ... the insured ought to have the right to seek or not to seek an insurer’s participation in a claim as the insured chooses when more than one carrier’s policy covers the loss.” Id. at 78-79.

Although the target tender rule was not at issue in the case, the Illinois Supreme Court in Cincinnati Cos. v. West American Insurance Co., 183 Ill.2d 317 (1998), cited the targeted tender rule announced in London Underwriters with approval. In Cincinnati Cos., the Supreme Court held that an insurer was relieved of its obligation to its insured where the insured instructed the insurer not to involve itself in the litigation. The court upheld as paramount the right of the insured to elect which of its insurers would defend a particular claim, even against another insurer's claim for equitable contribution:

*“Where the insured makes such a designation, the duty to defend falls solely on the selected insurer. That insurer may not in turn seek equitable contribution from the other insurers who were not designated by the insured. * * * This rule is intended to protect the insured's right to knowingly forgo an insurer's involvement.”* Id. at 324.

Subsequently, however in John Burns Const. Company v. Indiana Insurance Co., 189 Ill.2d 570 (2000), the Illinois Supreme Court directly

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adopted the targeted tender rule based upon the recognition that the insured has the “*paramount right*” to choose or knowingly forego an insurer’s participation in a claim for a variety of reasons. Under the rule if the insured selectively tenders the defense to one insurer, that insurer may not seek equitable contribution under its “other insurance” clause from any other non-selected insurer. In these cases the court has rationalized the non-selected insurer’s coverage is not available since the insured elected to forgo coverage under the non-selected policy.

Significantly, the targeted tender rule was most recently addressed by the Illinois Supreme Court in Kajima Construction Services, Inc. v. St. Paul Fire and Marine Insurance Company, 227 ILL. 2d 102, 879 N.E.2d 305 (2007). It is significant since the court in Kajima, the addressed an issue of first impression regarding the affect of the targeted tender rule on excess policies in the context of whether vertical or horizontal exhaustion should apply. Kajima argued its right to target St. Paul’s policy included the right to forego coverage from its own primary carrier’s policy, Tokio Marine, and selectively target *both* St. Paul’s primary and excess policies to pay a \$3 million settlement. Tokio argued for what is known as vertical exhaustion since the primary and excess policies are vertically aligned in the coverage chart with the excess policy above the underlying primary generally covering the same loss. St. Paul, on the other hand argued for horizontal exhaustion. Horizontal exhaustion unlike vertical exhaustion (recognizing the substantial difference between the premiums paid for primary versus excess coverage) requires all available primary coverage to be exhausted before triggering excess coverage. In addressing the arguments the court framed the issue to be whether the targeted tender rule supersedes horizontal exhaustion and allows a targeting insured to vertically spike up the layer of targeted insurance. In answering the question, the court held that:

“the target tender rule does not preempt horizontal exhaustion. Consequently, to the extent that defense and indemnity costs exceed the primary limits of a targeted insurer, the deselected insurer or insurers’ primary policy must answer for the loss before an insured can invoke coverage under an excess policy”. Id. at 316.

Accordingly, although many questions remain to be answered, the targeted tender rule at least for the time being remains the law in Illinois. The rule however has been limited by the Kajima decision and now only protects non-selected primary carriers to the extent the loss is fully

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covered by the selected primary carrier. This obviously means insureds employing the rule must be careful not to “forgo” coverage from any non-selected primary or excess carriers when selectively tendering to a primary carrier. The court, however has not addressed whether primary coverage that has been forgone can later be unforgone.

The court also has not addressed the affect of the targeted tender rule in the context of a wrap-up insurance program which often takes the form of a Contractor’s Controlled Insurance Program, (“CCIP”) or an Owners Controlled Insurance Program (“OCIP”). In general such wrap-up programs are written to cover multiple contractors working at a single project under a single primary and excess policy. Presumably, and contrary to the holding in *Kajima*, if the court is faced with this situation it will not require the exhaustion of all of the participating contractors’ other primary coverage when the claim is tendered by participants to the exhausted primary wrap-up policy. Nevertheless, this and countless other issues will need to be resolved as the law of targeted tender continues to evolve in Illinois.

As the doctrine has evolved it allows an insured that has *initially* targeted tendered one insurer to deselect that insurer and target a new insurer. This selection and deselection process was found permissible in a case where the insured was unaware of the coverage afforded by the second insurer at the time it made its first selection. Alcan United, Inc. v. West Bend Mut. Ins. Co., 303 Ill.App.3d 72, 83, 707 N.E.2d 687, 694 (1st Dist. 1999).

Recently, the selective tender rule has been extended to the excess level. Accordingly, in cases where all of the primary selected and non-selected coverage has been exhausted, the insured now has the right to select which one of several potential excess carriers must next respond. See, North River Ins. Co v. Grinnell Mutual Reinsurance Co., 369 ILL. App. 3d 563, 860 N.E. 2d 460 (2006). Although it is an appellate decision, it was decided by the same appellate court issuing the *Kajima* opinion affirmed by the Illinois Supreme Court.

Finally, in *RICHARD MARKER ASSOCIATES v. PEKIN INSURANCE COMPANY*, Ill.App. 2 Dist.,2001.

The insured's right to choose not only encompasses the right to deactivate coverage with an insurer previously selected for purposes of invoking exclusive coverage with another insurer but also the right to do so after a case settled.

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This paper will generally examine the use of the “targeted tender” rule which while constantly evolving remains unique to Illinois. Accordingly one must be careful to determine whether Illinois law will govern the insurance policies at issue before targeting a carrier and forgoing coverage from another carrier. One must also be very careful when selecting one carrier and forgoing coverage from another carrier since the non-selected carrier may need to be triggered if the selected carrier’s primary limits are exhausted. The bottom line is to proceed cautiously.

B. Why use a “targeted” or “selective” tender of defense?

1. Protect the insured’s limits and loss experience.

An insured generally does not want to deplete its own aggregate coverage or satisfy its own self insured retentions or deductibles especially when it can select another’s insurer defend and indemnify a claim. By using a targeted tender, the insured selects which carrier will defend the claim. If the insured selects another insurer and requests no defense or indemnification from its own insurer, the selected insurer is then precluded from seeking reimbursement or contribution from the insured’s non-selected insurer. The insured will therefore not be responsible for any the payment of any deductibles or self insured retentions that may have been due under the non-selected policy. Also, its policy premiums may not increase, its policy may not be subject to cancellation and unless the policy limits on the selected policy are insufficient to cover the loss the insured’s carrier will not be involved in paying any losses or defense costs.

2. Prevent equitable contribution from the selected insurer.

In most states, **except Illinois**, one of several primary carriers defending a claim can seek equitable contribution from any other carriers covering the same claim under the terms of the respective carrier’s “other insurance clauses”. That is because generally when two policies apply to the same loss, the insured can tender its defense to one of the insurers, and the selected insurer is not precluded from seeking contribution from other insurer(s). In such cases the insurers respective “*other insurance*” clauses will be

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applied and if repugnant, the carriers will generally be responsible for the loss on either an equal or on a pro-rata basis taking into account their respective policy limits.

Illinois, on the other hand, takes a much different approach. Equitable contribution is not allowed between insurers when an insured makes a valid targeted tender to another's carrier. The selected carrier in Illinois will be responsible to pay the entire claim up to its policy limits, and cannot seek equitable contribution from any other non-selected insurance carrier. In a very real sense the "other insurance" provision in the selected policy has been made void since in such case it is rationalized that no other available coverage exists. Of course if two or more insurers are selected and others are not the selected carriers can seek equitable contribution from each other since other available coverage exists. Thus, a targeted tender to a carrier *with sufficient limits to cover the loss* is an absolute risk transfer of the defense and indemnification obligations of the insured.

3. Bolster the indemnification agreement.

As noted above, it is therefore in a company's best interest in Illinois to be named as an additional insured under another's policy. Obtaining this additional insured status and then targeting the other's insurer with a claim, essentially results in having an indemnification agreement without relying on the validity of the indemnification clause in the contract.

Contractual indemnification provisions, whereby one party promises to pay another party for certain types of loss, are very common in business. Such provisions are designed to place the risk of loss upon the party best able to manage the risk and bear the loss. However, a right of indemnification is only as good as the indemnitor's ability to pay, and as will be discussed below, indemnification agreements are strictly construed and often void as against public policy.

An indemnification agreement is a form of private insurance that transfers risk from one party to another. Because the right of indemnification is limited, as a practical matter, by the indemnitor's assets, the insurance industry offers insurance that covers the Named Insured's indemnification obligations. This

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insurance is called Contractual Liability coverage and insures against the obligations assumed by the Named Insured in an indemnification agreement.

Contractual Liability coverage, however has many limitations. The coverage applies only if the indemnification agreement qualifies as an “insured contract” (as defined in the policy) and is executed prior to the loss. Assuming the coverage applies, the indemnitee may be forced to conduct its own defense and await reimbursement of defense costs and the amount of the settlement or judgment from the insurer. Also, the indemnitee, who is not an insured under the policy, has no recourse against the insurer for misconduct.

On the other hand, obtaining “*additional insured*” status allows the additional insured to look to the indemnitee’s insurance company for payment of its defense costs and indemnification obligations from the time of tender. More importantly, the additional Insured, who is actually made a party to the insurance policy, is in privity and can sue the insurer for any misconduct. All of these factors establish it is better to be an additional insured than a mere indemnitee.

4. Circumvent indemnification agreements that are void as against public policy.

Additional Insured status is a method used by contracting parties to circumvent some state’s prohibitions against broad form indemnification agreements. This situation arises frequently when the agreement is a broad form indemnification agreement (i.e. agreeing to indemnify the indemnitee for his or her sole negligence) because most states have passed laws invalidating such agreements as against public policy. Even though most courts will not allow an indemnitor to indemnify the indemnitee for his or her own negligence, courts allow the indemnitee to provide both defense and indemnification for the indemnitee’s own negligence if there is an additional insured endorsement in place. Illinois courts have held that providing another party with insurance coverage is not the same as indemnifying that party; therefore, indemnitees can be covered for their sole negligence in a “targeted tender” situation. See, Jokich v. Union Oil Company of California, 214 Ill.App.3d 906, 858, Ill. Dec.420 (1990).

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In construction contracts, in Illinois it is against public policy for a party to provide indemnification for the other party's negligence. See The Construction Contract Indemnification for Negligence Act, 740 ILCS 35/1. It is also against public policy in Illinois for a tenant to provide indemnification to a landlord for a landlord's own negligence. See The Landlord and Tenant Act, 765 ILCS 705/1. Thus, in each of these situations the public policy can be *presently* be circumvented if the contractor or the landlord is made an additional insured on the other's policy of insurance. A bill, however was introduced in Illinois last year seeking to amend the anti Indemnification statute to prohibit one from purchasing insurance for another. Although the bill was not passed one should keep an eye on this evolving matter. The sponsor of the bill believes one who is negligent should pay for their negligence by experiencing higher insurance rates and losses. It is believed that unless the negligent party bares the loss there will be no deterrent to act safely.

5. Prevent subrogation actions by the selected party and/or the selected insurer.

Additional insured status precludes the selected insurer from suing the tendering party directly if the tendering party caused the loss. Normally, insurers have the right of subrogation, which is the legal right to pursue recovery from third parties who are legally to blame for the loss. However, an insurer has no right of subrogation against its own insured, which includes an entity that holds the status of an additional insured. It is well settled that an additional insured is immune from subrogation so long as the money paid out was within the defined scope of the additional insured coverage. See, Chubb Insurance Co. v. DeChambre, 349 Ill.App.3d 56, 808 N.E.2d 37 (2004).

6. Get what the insured paid for when it signed the contract.

Risk transfer techniques are becoming common place in many types of contracts, leases, and service agreements. Typically, the cost of providing the additional insured coverage is incorporated into the terms of the contract. In order to take advantage of potential additional insured coverages, it is up to the insured and/or the insured's carrier to perfect a targeted tender of defense

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and get the insured exactly what they bargained for when they entered into the contract.

7. Simplify the litigation and allow one insurer to control the defense and indemnification provisions for both parties.

One of the most problematic issues involved in settling an underlying case with two or more defendants insured by different policies is determining each parties relative degree of fault so their carrier can satisfy that part of he settlement. Because a targeted tender completely shifts the risk of defense and indemnification to the selected carrier that carrier will pay the entire settlement or judgment. This risk transfer technique also simplifies the litigation since the defendants generally do not sue each other for contribution, unless other excess coverage is implicated and the defendants can likewise generally be defended by a single law firm minimizing the defense and indemnification costs.

C. When is the Blanket “Additional Insured” coverage triggered under another carrier’s policy?

To trigger a duty to provide additional insured coverage, the contract or agreement must specifically obligate the named insured to provide insurance to the additional insured.

A typical Blanket Additional Insured Endorsement is created by modifying coverage form CG2010 (Ed. 11/85) with the following language:

Name of Person or Organization:

Any person or organization that the insured has agreed and/or is required by written contract to name as an additional insured.

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.

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This endorsement provides coverage for the additional insured's liability "arising out of" the named insured's work and/or operations. Thus, the key question when determining if a party qualifies as an additional insured under this endorsement is the meaning of the phrase "arising out of your work."

The majority of courts, including Illinois considering the "arising out of" language have construed it broadly, equating the phrase "arising out of" to "causally connected with." Thus, most courts have held that "arising out of" refers even to the additional insured's own negligence if it relates at all to the named insured's work. National Union Fire Ins. Co. of Pittsburgh, PA v. Glenview Park Dist., 158 Ill. 2d 116, 632 N.E.2d 1039 (1994) ("arising out of" covers an additional insured's sole negligence though an endorsement containing a special limiting provision might lead to a different result); Burlington Northern R. Co. v. Illinois Emcasco Ins. Co., 158 Ill. App. 3d 783, 511 N.E.2d 776 (1st Dist. 1987) (holding that the phrase "arising out of," for purposes of a liability policy providing coverage for injuries "arising out of" the named insured's business, is both broad and vague, and should be liberally construed in favor of the insured); Casualty Ins. Co. v. Northbrook Prop. & Cas. Co., 150 Ill.App.3d 472, 501 N.E.2d 812 (1st Dist. 1986) (holding that the phrase "arising out of the operations", performed by the additional insured for the named insured, extended coverage to the additional insured for its own negligence).

D. The "Targeted Tender" Rule can be overcome by a contractual duty to tender.

The only limitation to a "targeted tender" recognized to date is contained in the case of American Country Ins. Co. v. Kraemer Brothers, Inc., 298 Ill.App.3d 805, 699 N.E.2d 1056 (1st Dist. 1998). In that case, the "targeted" insurer's policy contained a cooperation clause that required any named insured or additional insured to tender the defense of a claim to "any other insurer, which also has available insurance." Kraemer Brothers, 699 N.E.2d at 1060. When the additional insured failed to tender the defense of the claim to its own carrier, American Country denied the "targeted tender" on the ground the additional insured breached the cooperation clause. The additional insured argued such a requirement was against the public policy because it limited its right under Illinois law to select the insurer it wanted to respond to the claim. The Illinois Appellate Court sided with the insurance company and held that such a requirement in a cooperation clause was enforceable and was

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not against the public policy of Illinois. Id., 699 N.E.2d at 1061. Especially helpful to the court's decision was the fact this particular policy language was included in endorsement forms that had been accepted by the Illinois Department of Insurance. The Kraemer decision was decided before the Illinois Supreme Court issued its John Burns decision, which was strongly in favor of the "targeted" tender rule. The Illinois Supreme Court did not address the issue in its recent Kajima decision when it surveyed the law of targeted tenders. Accordingly we must wait whether the "anti-target" cooperation clause contained in the Kraemer decision is eventually accepted by the Supreme court remains to be determined.

E. Steps an insured should follow to take advantage of a "targeted" or "selective" tender of defense.

1. Obtain all certificates of insurance, contracts, and work orders to determine if additional insured coverage was required by the contracts and/or is otherwise available.

Illinois courts have discussed the enforceability of an "oral" promise to provide additional insured coverage. Targeted tenders of defense have traditionally only been enforced if they are in writing and part of a negotiated contract. Pekin Insurance Company v. Fidelity and Guaranty Insurance Company, 2005 WL 1475542 (Ill.App. 2005).

In United States Fire Inc. Co. v. Hartford Ins. Co., 312 Ill.App.3d 153, 726 N.E.2d 126 (2000), a contractor and its insurer filed a declaratory judgment action against a subcontractor's insurer, claiming it had a duty to defend the contractor in an underlying negligence action brought by an injured worker of the subcontractor. The contractor claimed the subcontractor *orally* agreed to name it as an additional insured under its policy and to provide the contractor with a certificate of insurance. The subcontractor failed to provide a certificate of insurance before the accident, but did so after the accident when the contractor requested the certificate. The court upheld summary judgment in favor of the subcontractor's carrier, finding that for the contractor to be an "additional insured" under the policy, there had to be a written contract or agreement by the subcontractor to provide insurance coverage.

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The court also referred to a provision of the policy that stated that the endorsement did not apply unless the “written contract or agreement” has been “executed” prior to the bodily injury.

However, in West American Ins Co. v. J.R. Construction Co., 333 Ill. App.3d 871, 776 N.E.2d 588 (2002), the Illinois Appellate Court reached a different result and found a duty to defend was established where the additional insured relied on an oral agreement rather than a certificate of insurance issued after the injury. In this case, a general contractor hired a steel subcontractor to supply and install steel for a construction project. The steel subcontractor orally agreed to add the general contractor as an additional insured on its general liability policy and an agent of the subcontractor issued a certificate of insurance listing the general contractor as an additional insured.

The Appellate Court affirmed entry of summary judgment in the general contractor’s favor. According to the court, the general contractor’s status as an insured did not arise out of the terms of the blanket additional insured endorsement. The endorsement and its limitations, therefore, did not apply. Instead, the general contractor was an additional insured under the policy based on the certificate of insurance identifying the general contractor as an additional insured, the undisputed testimony that the subcontractor orally agreed to add the general contractor as an additional insured, the general contractor’s reliance on the certificate of insurance, and the insurer’s initial acknowledgment that the general contractor was an additional insured.

2. Send a letter to your own liability carrier deactivating coverage and to the selected carrier activating coverage pursuant to the targeted tender rules.

When a new claim is brought to the attention of an insured, the insured typically tenders the defense of the claim to its own liability carrier which conducts its initial investigation. As part of that investigation, it may become apparent the insured is entitled to additional insured coverage under another carrier’s policy. In Illinois, an insured has a paramount right to choose or not choose an insurer’s participation in a claim. See, Cincinnati Companies v. West American Insurance Co., 183 Ill.2d 317, 233 Ill.Dec. 649, 701 N.E.2d 499 (1998) and Institute of London Underwriters v.

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Hartford Fire Insurance Co., 234 Ill.App.3d 70, 175 Ill.Dec. 297, 599 N.E.2d 1311 (1992). Accordingly, under certain circumstances the insured can deactivate coverage with the insurer first selected and select a second carrier. Thus, if the insured deactivates coverage with its own carrier and selects coverage with a second selected carrier, there is no “other insurance” for the selected carrier to seek contribution. See, Alcan United Ins. v. West Bend Mutual Insurance Company, 303 Ill.App.3d 72, 707 N.E.2d 687, 236, Ill.Dec. 560 (1999). However in light of the Illinois Supreme court’s decision in Kajima, Id., an insured deselecting coverage should reserve the right to reselect if the selected carrier’s insurance limits may be insufficient to satisfy the claim.

3. Send the initial “targeted tender” of defense letter, certified mail, return receipt requested, to the selected carrier.

In Illinois, an insured may only recoup defense costs incurred subsequent to giving an insurer notice of the action. Typically, there is a voluntary payment clause contained in the policy, which provides that an insurer will not be held liable for expenses voluntarily incurred by an insured before tendering defense of a suit to the insurer. See, Faust v. The Travelers, 55 F.3d 471 (9th Cir. 1995). Pittway Corp. v. American Motorist Insurance Co., 56 Ill.App.3d 338, 370 N.E.2d 1271 (1977). Westchester Fire Insurance Co. v. G. Heileman Brewing Company, Inc., 321 Ill.App. 622, 747 N.E.2d 955 (2001).

Thus, in order to have tangible proof that the tender of defense was made to the selected insurer on a given date, the best approach is to send the targeted tender certified mail, return receipt requested, or some other method where a proof of delivery is provided by the delivery service. At the same time, the insured should notify its primary and excess carriers that notwithstanding its selection of another carrier it reserves the right to trigger coverage under their policies in the event the primary limits of the selected carrier are exhausted.

4. Cooperate with the selected carrier like your own carrier if the tender of defense is accepted.

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Once the tender of defense is accepted, the additional insured gains insured status on the selected carrier's policy and is subject to all the rights and responsibilities of a named insured under that policy including cooperating with the selected carrier during the litigation process.

5. File a breach of contract action against the party or parties who failed to purchase the required additional insurance coverage and/or file a declaratory judgment action against the selected carrier for its failure to accept the targeted tender of defense.

If a targeted tender of defense is denied, an additional insured has two separate causes of action to preserve its rights under the selected carrier's policy. First, if the contract requires the purchase of additional insurance for your client and the contractor failed to procure the required insurance, the contractor is subject to a breach of contract action for failing to procure the insurance required by the contract. Thus, if the selected carrier denies coverage to the additional insured pursuant to a targeted tender of defense, the insured who failed to purchase the proper insurance can be named as a defendant in a breach of contract to procure insurance action. In addition, the additional insured can pursue a declaratory judgment action against the selected carrier directly if it believes it is entitled to additional insured status under the selected carrier's insured contract provision and the selected carrier has wrongfully denied coverage.

F. Steps a "selected insurer" should follow when responding to a "targeted" or "selective" tender of defense.

1. Which state's law governs the interpretation of the contract or agreement?

The contract will frequently include specific language setting forth which state's law will govern the interpretation of the contract. Illinois allows the contracting parties to choose the applicable law for their contract. See, Int'l Surplus Lines Inc. Co. v. Pioneer Life Ins. Co. of Ill., 209 Ill.App.3d 144, 568 N.E.2d 9, 14 (1990) (indicating that Illinois follows the Restatement (Second) of Conflicts § 187 (1971) regarding the freedom of parties to choose applicable law).

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If Illinois law applies, it will drastically effect how the insurer responds to the tender of defense. As previously discussed, a “targeted” tender completely shifts the responsibility to pay defense and indemnification costs to the selected insurer. No equitable contribution applies between insurers when a “targeted tender” is accomplished under Illinois law. Most states, however besides Illinois, allow equitable contribution between insurers and do not recognize a targeted tender. Accordingly, attempt to apply the law of another jurisdiction to defeat the targeted tender. Thus, if Illinois law does not apply, the selected insurer when faced with a targeted tender may still be able to seek equitable contribution from the additional insured’s own liability carrier, depending on the language in the policies.

2. **If the contract is silent as to choice of law, look to the choice of law provision in the state where the action is pending to determine how the governing law will be decided by the court construing the agreement.**

Illinois has adopted the “most significant contacts test” which is set forth in section 188 of the Restatement (Second) of Conflict of Laws (1971) entitled “Law Governing in Absence of Effective Choice by the Parties”. The factors to be considered in determining the applicable law under Section 188 include the place(s) of negotiation, execution and performance of the contract, the location of the subject matter and the domiciles or places where the parties are incorporated or do business. Nelson v. Hix, 122 Ill.2d 343, 522 N.E.2d 1214 (1988); Wartell v. Formusa, 34 Ill.2d 57, 213 N.E.2d 544 (1966); Donaldson v. Flour Engineers, Inc., 169 Ill.App.3d 759, 523 N.E.2d 1113 (1988).

3. **Does the language of the contract and/or agreement actually require the selected insurer to provide additional insured coverage?**

As previously discussed, the typical Blanket Additional Insured Endorsement only requires additional insured coverage for “any person or organization that the insured has agreed and/or is required by written contract to name as an additional insured.” Thus, unless the insured has agreed, or there is a written contract

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requiring additional insured coverage, the selected carrier may not have a duty to provide additional insured coverage.

4. Does the additional insured endorsement in the selected insurance carrier's policy provide additional insured coverage?

As previously discussed, the additional insured endorsement should be closely examined to determine if there is limiting language set forth in the endorsement as to how and when the additional insured is entitled to additional insured status under the policy.

5. Assuming Illinois law applies, the contract requires the selected insurer to provide additional insured coverage if there is potentially coverage for the additional insured under the selected carrier's policy and a proper tender of defense was made to the selected insurer. The selected insurer should either (a) defend the additional insured without a reservation of rights, (b) defend the additional insured with a reservation of rights, (c) file a declaratory judgment action to determine the additional insured's rights under the policy or (d) disclaim coverage to the additional insured at its peril.

Under Illinois law, the standard that the complaint must satisfy to trigger a duty to defend is very minimal. All doubt as to coverage is to be resolved in favor of the insured. American Country Ins. Co. v. James McHugh Const. Co., 344 Ill.App.3d 960, 801 N.E.2d 1031, 1038 (1st Dist. 2003). Therefore, when faced with a tender of defense, a liability insurer in doubt over whether it has a duty to defend must either defend under a reservation of rights or immediately secure a declaratory judgment as to its rights and obligations. Employers Ins. of Wausau v. Ehlco Liquidating Trust, 186 Ill.2d 127, 150, 708 N.E.2d 1122 (Ill. 1999).

The general rule of estoppel provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured. Employers Ins. of Wausau v. Ehlco Liquidating Trust, 186 Ill.2d 127, 708 N.E.2d 1122, 1135 (Ill.1999). The insurer's options are to: (1) defend under a reservation of rights or (2) timely seek a declaratory judgment that there is no coverage. Id. at 1134-35. If the insurer fails to take

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either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising a policy defense to coverage. *Id.* at 1135; see also, Waste Management, Inc. v. International Surplus Lines Inc. Co., 144 Ill.2d 178, 579 N.E.2d 332 (Ill. 1991). Once the insurer breaches its duty to defend, however, the estoppel doctrine has broad application and operates to bar the insurer from raising policy defenses to coverage, even those defenses that may have been successful had the insurer not breached its duty to defend. Ehlco, 579 N.E.2d at 1135. Indeed, the estoppel doctrine is paramount in Illinois law; it arises out of the recognition that an insurer's duty to defend under a liability contract is so fundamental an obligation that a breach of duty constitutes rescission of the contract. *Id.* Once the insurer breaches its duty to defend, this doctrine has far reaching application and bars an insurer from raising policy defenses to coverage, even if those defenses may have been successful but for the breach. *Id.*

G. Conclusion

As previously discussed, Illinois courts take a unique approach to the handling of tenders of defense and indemnification. In Illinois, a targeted tender of defense and indemnification can, when properly handled, result in a complete shift of the responsibility to pay defense and indemnity costs to the selected carrier. Individuals handling targeted tenders of defense in Illinois should be aware of the requirements and pitfalls unique to the handling of such claims to properly represent their clients and insureds. The rules are changing. Presently, an insurer can require its insured to tender to all other carriers and defeat the targeted tender. Furthermore, all available insurance must be exhausted before excess coverage can be triggered, even if a targeted tender has been made. Accordingly an insured must not forgo coverage but reserve the right to request coverage when selecting another carrier in the event the other carrier's limits are insufficient. Finally, the right to select coverage also exists at the excess level and accordingly should be properly reserved and noticed in cases with large verdict exposure.

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TABLE OF CASES

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