Insurance Law Update

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Additional Limits to the Targeted Tender Doctrine: *AMCO Insurance Co. v. Cincinnati Insurance Co.*

The targeted (or "selective") tender doctrine is a somewhat unique feature of Illinois insurance law that seems to constantly create confusion and questions. What is the doctrine? When does it apply or not apply? What are its limits? This column briefly provides some illumination about the doctrine, the manner in which Illinois courts have applied it, and the growing limitations placed upon it, as most recently exemplified by the appellate court's opinion in *AMCO Insurance Co. v. Cincinnati Insurance Co.*, 2014 IL App (1st) 122856.

A Background of the Targeted Tender Doctrine

The targeted tender doctrine is seldom found outside of Illinois. Indeed, as the appellate court recently noted, Illinois is "one of a very small minority of states that employ the targeted tender doctrine," finding that only Montana and Washington have also recognized it. *See Illinois School Dist. Agency v. St. Charles Cmty. Unit School Dist. 303*, 2012 IL App (1st) 100088, ¶ 37. In a nutshell, "[t]he targeted tender doctrine allows an insured who is covered by multiple and concurrent insurance policies to select, or 'target,' which insurer he wants to defend and indemnify him regarding a specific claim." *River Vill. I, LLC v. Central Ins. Cos.*, 396 Ill. App. 3d 480, 486 (1st Dist. 2009). Where an insured has properly targeted a particular insurer to the exclusion of other insurers, the targeted insurer has the sole responsibility for providing a defense and may not seek equitable contribution from undesignated insurers. *See*, *e.g.*, *Cincinnati Cos. v. W. Am. Ins. Co.*, 183 Ill. 2d 317, 326 (1998). The doctrine is "intended to protect the insured's right to knowingly forgo an insurer's involvement." *Cincinnati Cos.*, 183 Ill. 2d at 324. And, it "allows an insured who has paid for multiple coverage to protect his interests, namely, keeping future premiums low, optimizing loss history and preventing policy cancellation among the insurers he chooses." *River Village I*, 396 Ill. App. 3d at 486.

Since its inception, Illinois courts have grappled with the scope and practical application of the doctrine. For instance, by itself, the mere presence of an "other insurance" clause seeking to spread an insurer's obligation to provide coverage among other available insurance does not thwart the doctrine. *See*, *e.g.*, *John Burns Constr. Co. v. Indiana Ins. Co.*, 189 Ill. 2d 570, 577 (2000). The appellate court has explained, "an 'other insurance' clause in a policy will not automatically reach into coverages provided under other policies merely because such other policies are in existence." *Alcan United, Inc. v. West Bend Mut. Ins. Co.*, 303 Ill. App. 3d 72, 81 (1st Dist. 1999). Instead, the "insured still must be given the right to determine whether it wishes to invoke its rights to such other coverages before those coverages become accessible under the 'other insurance' provision of a triggered policy." *Alcan United*, 303 Ill. App. 3d at 81. Similarly, in the appropriate circumstances, the targeted tender doctrine allows an insured to deactivate "coverage with a carrier previously selected for purposes of invoking exclusive coverage with another carrier." *Id*. at 83.

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However, Illinois courts have also limited the doctrine in other important ways. The doctrine does not permit an insured to target an excess insurer over a primary insurer. *See Kajima Constr. Servs. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102 (2007). As the Illinois Supreme Court has stated, "[e]xtending the targeted tender rule to require an excess policy to pay before a primary policy would eviscerate the distinction between primary and excess insurance." *Kajima*, 227 Ill. 2d at 116; *see also River Village I*, 396 Ill. App. 3d 480 (extending the *Kajima* rule to a scenario where an insurer was excess by operation of an "other insurance" clause, rather than due to the provision of a pure excess policy).

Likewise, Illinois courts have held that the targeted tender doctrine is limited to situations where multiple *concurrent* primary insurers exist. They have been reluctant to extend the targeted tender doctrine to situations involving multiple *consecutive* primary insurers. *See Ill. School Dist. Agency*, 2012 IL App (1st) 100088, ¶ 45. Finally, as discussed below, in *AMCO Insurance Co. v. Cincinnati Insurance Co.*, the appellate court most recently held that the doctrine does not allow an insurer to deselect itself as the targeted insurer—even if it has taken an assignment of rights from the insured as part of a settlement agreement. 2014 IL App (1st) 122856, ¶ 24-25.

An Insurer Cannot Deselect Itself After Settlement—Even With an Assignment of Rights

Like many targeted tender doctrine cases, *AMCO Insurance* arose out of a personal injury at a construction site. Hartz Construction Company (Hartz), Van Der Laan Brothers, Inc. (Van Der Laan), and Cimarron Construction Company (Cimarron) were contractors working at Manchester Cove Subdivision. *AMCO Ins. Co.*, 2014 IL App (1st) 122856, ¶ 3. Hartz was the general contractor, and Cimarron and Van Der Laan were subcontractors. *Id*. Cincinnati Insurance Company (Cincinnati) had issued a CGL policy to Hartz; AMCO had issued a CGL policy to Cimarron; and Erie Insurance (Erie) had issued a CGL policy to Van Der Laan. *Id*. ¶ 4. Hartz was also named as an additional insured under both the AMCO and Erie CGL policies. *Id*. ¶ ¶ 4, 5.

In March 2007, Kevin Smith sued Hartz, Cimarron, and Van Der Laan for personal injuries that he allegedly suffered as a result of his employment at the Manchester Cove Subdivision. *Id*. ¶ 3. After suit was filed, Hartz made targeted tenders to both Erie and AMCO and sought insurance coverage solely from the Erie and AMCO policies, without recourse to its own policy with Cincinnati "except as standby coverage." *Id*. ¶¶ 4, 5. AMCO accepted the defense of Hartz under a reservation of rights. *Id*. ¶ 5.

In 2011, Smith, Hartz, Cimarron, and AMCO executed a settlement agreement that assigned "any and all rights, claims and causes of action Hartz and/or Cimarron have to recover any sums from [Cincinnati] . . . in connection with the claims of [the Smith lawsuit] . . . to AMCO." *Id*. ¶ 7. After entering into the settlement agreement, AMCO sued Cincinnati for equitable contribution. *Id*. ¶ 8. In its action, AMCO argued that the assignment of rights conferred the power to change the previous targeted tenders and seek coverage under the Cincinnati policy. *Id*. ¶ 16. The trial court disagreed and dismissed the action against Cincinnati. *Id.* ¶ 9.

Despite the various arguments of the parties, the appellate court found the case rested on a single issue: "whether the targeted tender doctrine allows insurers to deselect themselves as targeted insurers following the settlement of the insured's underlying lawsuit." *Id*. ¶ 24. It held that the doctrine cannot be interpreted in such a manner. *Id.*

First, it reasoned that "Illinois courts have made it clear that the targeted tender doctrine should be narrowly applied to the types of factual situations for which it was originally intended." *Id.* The court could find no precedent for AMCO's proposed application of the doctrine—which weighed against the adoption of AMCO's proposed interpretation. *Id*.

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Furthermore, the court explained that AMCO's suggested application of the doctrine would nullify the doctrine itself, finding:

> The point of the doctrine is to allow the insured to select which insurer it wants to target for defense of an underlying lawsuit. Under AMCO's interpretation, a targeted insurer could simply settle the underlying lawsuit contingent on the assignment of the insured's rights, and then seek contribution from every other insurer that was not originally targeted. The entire purpose of the targeted tender doctrine would be eviscerated.

Id. ¶ 25. Finally, the court concluded that the assignment of rights against Cincinnati was essentially meaningless because Hartz had no claim to recover money from Cincinnati after AMCO paid the full amount of the settlement. *Id*.

Conclusion

At very least, Illinois courts have expressed little desire to expand the targeted tender doctrine. Some courts have even expressed skepticism about the soundness of the doctrine itself. *See Illinois School Dist. Agency v. St. Charles Cmty. Unit School Dist. 303*, 2012 IL App (1st) 100088, ¶ 37. Accordingly, while the facts and holding of *AMCO Insurance* are interesting, the case can be included in a broader trend of opinions keeping the targeted tender doctrine within its traditional scope. As future cases appear before the Illinois courts, an unwillingness to expand the scope of the doctrine will likely remain, and one should expect the courts to closely scrutinize suggestions taking the doctrine outside of its historical boundaries.

About the Author

Patrick D. Cloud is an attorney in *Heyl Royster's* Edwardsville office. Patrick concentrates his practice on insurance coverage litigation, toxic tort matters, complex civil litigation, and products liability defense. As part of his practice, Patrick takes a lead role in significant pretrial discovery, motions and briefs, such as those involving federal preemption, *forum non conveniens,* the Illinois *Frye* doctrine, consumer fraud, and insurance coverage litigation pending throughout the Midwest, including Illinois and Missouri.

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