

MEMORANDUM

To: Coverage Clients
From: Gregory G. Vacala
Date: February 24, 2010
Re: **TARGETED TENDERS: GENERAL CONTRACTOR COULD DESIGNATE ONE SUBCONTRACTORS INSURER WITH SOLE LIABILITY UP TO THE POLICY LIMITS**
Statewide Ins. Co. and Westfield Ins. Co. v. Houston General Ins. Co.,
2009 Ill.App. LEXIS 1231 (published 01/29/10)

In September 2001, general contractor, JCC, tendered its defense of the *McCartin* lawsuit to its subcontractor's insurers, Westfield and Houston General. JCC was named as an additional insured on the Westfield and Houston General policies. In its tender, JCC advised both Westfield and Houston General that although JCC's insurer, Statewide, was given notice of the claim, JCC did not seek indemnification from Statewide at that time.

On March 25, 2003, JCC sent Houston General a letter stating that it had detendered its defense for Statewide and looked to Houston General to defend and indemnify it "exclusively." The letter made no mention of Westfield. On March 27, 2003, JCC sent Houston General another letter stating that it had detendered its defense for Statewide and looked to Houston General to defend and indemnify it "exclusively." Westfield again was not mentioned.

In October, 2003, JCC, Statewide and Westfield reached a settlement agreement that resolved Westfield's declaratory judgment action. The settlement agreement specifically provided as follows:

"2. Houston General, the insurer of Dryden Contractors, has refused to participate in settlement. Therefore, Westfield, Statewide and JCC shall pursue a suit to recover any settlement payments made . . .

7. For the purposes of the *McCartin* suit, it is the express desire of JCC that the entire cost of any settlement be borne by Houston General. Any payments made by Westfield and Statewide, as set forth herein, will be made only because Houston General has breached its obligations to JCC under its policies of insurance. . ."

The Court held initially held that since JCC did not clearly state that it had tendered to Houston General to the exclusion of both Statewide and Westfield, the March, 2003 letters did not deactivate its previous tender to Westfield.

The court then held that the October 2003 settlement funding agreement's unequivocal language notified Westfield that JCC was deactivating its tender to Westfield and exclusively targeting Houston General as JCC's sole insurer. The court noted that the settlement funding agreement left no doubt of JCC's decision to knowingly forego Westfield's triggered coverage. The court found that the settlement agreement deactivated the tender to JCC.

The court remanded the matter to the trial court and found that due to the deactivated tender of Westfield, Houston General could not seek equitable allocation of coverage from Westfield or contribution based on an "other insurance" policy provision.

The decision has affirmed many basic tenets of targeted tender law, as follows:

1. That the insured has the paramount right to choose or knowingly forego an insurer's participation in a claim. John Burns Construction v. Indiana Insurance, 189 Ill.2d 570 (2000).
2. The insured's right to choose encompasses the right to deactivate coverage with an insurer previously selected for purposes of invoking exclusive coverage with another insurer. Alcan United, Inc. v. West Bend Mutual Ins. Co., 303 Ill.App.3d 72 (2001).
3. The insured's right to choose has some limits.
 - a. If defense and indemnity requests exceed the primary limits of selected insurer's policy, then the primary policy of the deselected insurer or insurers must answer for the loss before the insured can seek coverage under an excess policy. Kajima Construction v. St. Paul, 227 Ill.2d 102 (2007).
 - b. It doesn't apply to auto policies. Pekin v. Fidelity, 357 Ill App 3d 281 (2005).
4. When an insured tenders its defense to multiple insurers who provide concurrent coverage, the insurers may seek equitable contribution from each other. (Alcan United, Inc., 303 Ill.App.3d at 81).
5. If the insured selectively tenders a claim to one insurer alone, the duty to defend and indemnify remains on the targeted insurer and the insurer is precluded from seeking equitable contribution. John Burns, 189 Ill.2d at 578.
6. The insured may detender his defense and forego coverage even after settlement of the underlying dispute. Richard Marker Associates v. Pekin Ins., 318 Ill.App.3d 1137 at 1143-44 (2001).

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