

# SHRINKING THE TARGET

## New Developments in “Targeted Tender”

By Richard J. VanSwol

One of the most distinctive and controversial features of Illinois insurance law is the doctrine of “targeted tender” or “selective tender,” which lets an insured covered by multiple policies choose which insurer will defend and indemnify it against a specific claim.<sup>1</sup> Although courts have characterized targeted tender as a “paramount” right of the insured, the doctrine’s critics have opined that Illinois has no reason to take pride in being the first state to recognize that right.<sup>2</sup>

While targeted tender remains the law of Illinois, recent decisions suggest that courts are increasingly seeking ways to limit or avoid its application. This article will summarize how targeted tender developed and how courts have restricted its scope.

### Before targeted tender: other insurance clauses

Because a single suit can trigger more than one liability insurer’s duties to defend and indemnify an insured, and because allowing multiple recoveries for the same liability could lead to carelessness or fraud, insurance policies generally contain “other insurance” clauses to establish the order in which available policies will defend and indemnify the insured.<sup>3</sup> These clauses take three basic forms: (1) a “pro rata clause,” stating that the insurer will pay the same proportion of the loss as the ratio between its policy limits and the limits of all available insurance; (2) an “excess clause,” stating that the insurer’s duties arise only after other coverage has been exhausted; or (3) an “escape clause,” stating that the insurer is not liable if other insurance is available.<sup>4</sup>

Without a valid targeted tender, Illinois courts will still seek to give effect to the parties’ intentions by enforcing “other insurance” clauses if possible. However, it is sometimes impossible to enforce “other insurance” clauses – for instance, when each of two policies asserts that it applies in excess of the other – which may lead a court to disregard the provisions as mutually exclusive and to prorate coverage between the policies.<sup>5</sup> With minor variations, and with the possible exceptions of Montana

and Washington,<sup>6</sup> this approach remains standard in most states.<sup>7</sup>

### Early targeted-tender decisions

Courts recognize a 1992 appellate decision, *Institute of London Underwriters v. Hartford Fire Insurance Co.*,<sup>8</sup> as the origin of targeted tender. The Great Lakes Towing Company held a Hartford policy and contracted for Thatcher Engineering Corporation to perform repairs, requiring Thatcher to add Great Lakes as an additional insured on Thatcher’s Institute policy.

When sued for a Thatcher employee’s death, Great Lakes advised that it

1. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 107 (2007).

2. *North River Insurance Co. v. Grimmell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 574-75 (1st Dist. 2006).

3. *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 76 (1970).

4. *Id.*  
5. *Ohio Casualty Insurance Co. v. Oak Builders, Inc.*, 373 Ill. App. 3d 997, 1002-03 (1st Dist. 2007).

6. See *Illinois School District Agency v. St. Charles Community Unit School District 303*, 2012 IL App (1st) 100088, ¶ 37.

7. See, e.g., *McMurray v. Nationwide Mutual Insurance Co.*, 878 N.E.2d 488, 491-92 (Ind. App. 2007); *Farm Bureau Town & Country Insurance Co. of Missouri v. American Alternative Insurance Corp.*, 347 S.W.3d 525, 532 (Mo. App. 2011); *Oelhafen v. Tower Insurance Co.*, 492 N.W.2d 321, 323 (Wis. App. 1992).

8. *Institute of London Underwriters v. Hartford Fire Insurance Co.*, 234 Ill. App. 3d 70 (1st Dist. 1992).

“Targeted tender” allows an insured with multiple insurance policies covering the same risk to choose the order in which the insurers on those policies must defend and indemnify it. Recent decisions, however, have limited the scope of the doctrine. This article tracks the development of targeted tender and courts’ subsequent efforts to refine it.

wanted the Institute to defend and indemnify it exclusively and did not want Hartford to respond. Because Great Lakes had not tendered the suit to Hartford, the court concluded that Hartford’s policy was not triggered and that the issue of Hartford’s pro rata “other insurance” clause did not arise.<sup>9</sup>

The court also said Great Lakes should have the right not to seek Hartford’s participation because Great Lakes contracted for Thatcher to provide coverage, because Great Lakes concluded it was not responsible for the alleged accident, and because it might have feared that Hartford would raise its premiums or cancel its policy.<sup>10</sup> The Institute therefore could not obtain contribution from Hartford.

*Institute of London Underwriters* received little attention until the Illinois Supreme Court incidentally cited it in *Cincinnati Cos. v. West American Insurance Co.* for the rule that an insured could choose to forgo an insurer’s assistance, while disagreeing with *Institute* on other grounds.<sup>11</sup> The Illinois Appellate Court then held in both *Bituminous Casualty Corp. v. Royal Insurance Co. of America*<sup>12</sup> and *Alcan United, Inc. v. West Bend Mutual Insurance Co.*<sup>13</sup> that an additional insured on a subcontractor’s policy had validly targeted a suit brought by the subcontractor’s employee. The *Alcan* court recognized that Alcan could “deactivate” or withdraw its tender to its own insurer when it learned of coverage on another policy, obligating Alcan’s insurer only to provide “standby” coverage if the other carrier refused its tender.<sup>14</sup>

The Illinois Supreme Court formally adopted targeted tender in

*John Burns Construction Co. v. Indiana Insurance Co.*<sup>15</sup> In a subcontract to pave a rail station’s parking lot, Burns required Sal Barba Asphalt Paving to procure coverage for Burns as an additional insured. A person using the rail station sued Burns, and Burns made a targeted tender to Barba’s insurer, Indiana.

Indiana claimed that its “other insurance” clause required Burns’s own insurer to share in the defense and indemnity, but the court disagreed, holding that the purpose of the clause was not to trigger coverage but to provide a method of apportioning otherwise-triggered coverage.<sup>16</sup> The court said that when an insured instructs an insurer not to defend it, that policy is not “available” for purposes of the targeted policy’s “other insurance” clause.<sup>17</sup>

The Illinois Appellate Court extended *Burns* in cases like *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange* (“CHRPP”), which held that targeted tender applied between a physician’s professional liability policy and a hospital’s self-insured risk-pooling trust to which the physician tendered a malpractice suit,<sup>18</sup> and *Legion Insurance Co. v. Empire Fire & Marine Insur-*

9. *Id.* at 75-77.

10. *Id.* at 78-79.

11. *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 323-26 (1998).

12. *Bituminous Casualty Corp. v. Royal Insurance Co. of America*, 301 Ill. App. 3d 720 (3d Dist. 1998).

13. *Alcan United, Inc. v. West Bend Mutual Insurance Co.*, 303 Ill. App. 3d 72 (1st Dist. 1999).

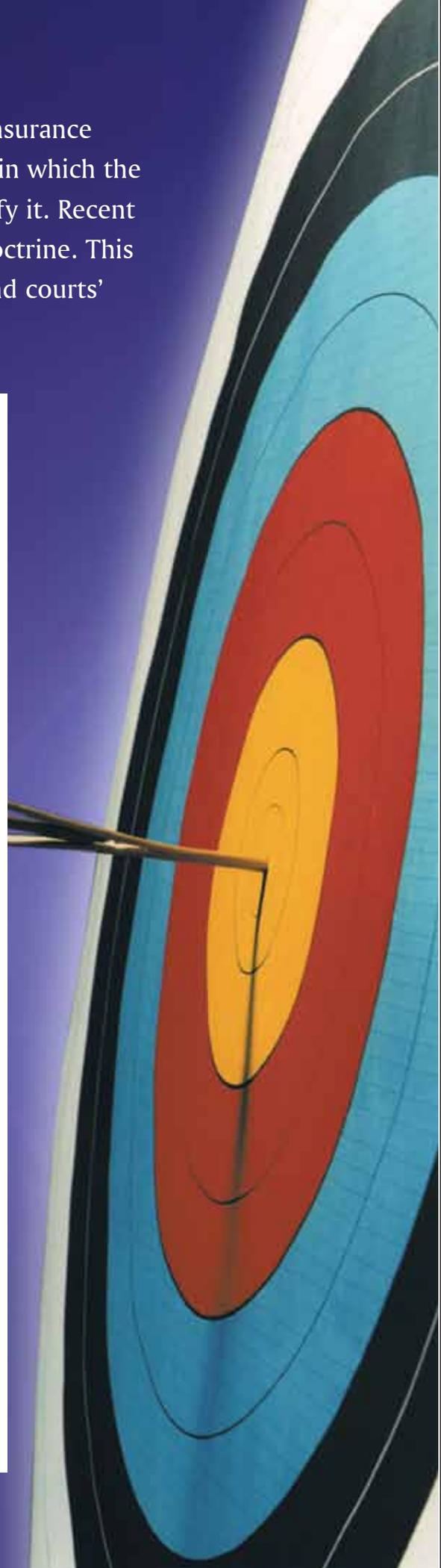
14. *Id.* at 82-83.

15. *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570 (2000).

16. *Id.* at 576.

17. *Id.* at 578.

18. *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 325 Ill. App. 3d 970, 977-80 (1st Dist. 2001).



ance Co., which allowed a subcontractor to target its employer's liability policy and to deselect its general liability policy with respect to contribution claims in a leased employee's injury suit.<sup>19</sup>

### Limitations on targeted tender

Almost as soon as the *Burns* court adopted targeted tender, some judges urged against reading the doctrine expansively. Concurring in *CHRPP*<sup>20</sup> and in *American National Fire Insurance*

was an additional insured, but that the general contractor's own primary carrier had to indemnify its insured before the subcontractor's excess policy applied.<sup>24</sup> The Illinois Appellate Court similarly held in *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.* that after a general contractor had exhausted all available primary insurance, it could repeat the targeting process among the available excess policies.<sup>25</sup>

More recent appellate decisions have applied *Kajima* in ways that seem not merely to limit the targeted-tender doctrine but to undermine it entirely. This line of cases began with *River Village I, LLC v. Central Insurance Cos.*<sup>26</sup>

In most respects, *River Village* presented typical facts for a targeted-tender case: general contractor River Village tendered its defense to subcontractor First Choice Drywall's insurer, whose policy covered it as an additional insured.

However, where prior targeted-tender cases had held that targeted tender trumped the policies' "other insurance" clauses, the *River Village* court held that the excess "other insurance" clause in First Choice's policy rendered it an excess policy and first required exhaustion of River Village's policy, which was not before the trial court when it ruled on cross-motions for summary judgment.<sup>27</sup>

The *River Village* court misstated the history of targeted tender in asserting that insurers had developed "other insurance" clauses "[i]n an effort to override" targeted tender.<sup>28</sup> Moreover, while the court claimed to be applying *Kajima*'s decision on horizontal exhaustion, the court actually blurred the lines between primary and excess insurance: it held that an "other insurance" clause could turn First Choice's general liability policy into an excess policy providing coverage at a different level from River Village's own general liability policy.<sup>29</sup>

While "other insurance" clauses can render policies excess "by coincidence" to other policies at the same level,<sup>30</sup> they do not transform policies into "true" excess or umbrella policies like those in *Kajima* and *North River*. Such policies are specifically written to apply in excess of other policies, with lower premiums to reflect that they apply only after the un-

derlying policies have been exhausted.<sup>31</sup> Although *River Village* appeared to be an aberration in these respects, it has gained traction since it was decided.<sup>32</sup>

**Targeted tender as exclusive right of insured.** As noted above, cases like *Alcan* have recognized targeted tender as a "paramount right" of the insured.<sup>33</sup> In *AMCO Insurance Co. v. Cincinnati Insurance Co.*,<sup>34</sup> the court emphasized that this right is exclusive to the insured.

General contractor Hartz targeted its subcontractor's carrier AMCO, which settled the underlying suit while taking an assignment of Hartz's rights against other carriers. AMCO then sought to recover a portion of its settlement payment from those carriers, claiming that Hartz's assignment of rights allowed AMCO to deactivate Hartz's targeted tender.<sup>35</sup> The court disagreed, saying that AMCO's argument would not only violate the guideline that targeted tender be applied narrowly, but even nullify targeted tender because it would defeat the insured's purpose in seeking to shift the loss to a particular carrier.<sup>36</sup>

The AMCO court made a point of distinguishing *Richard Marker Associates v. Pekin Insurance Co.*, which had allowed an insured architect – as opposed to its carrier – to withdraw a tender to one professional liability insurer after the insured

19. *Legion Insurance Co. v. Empire Fire & Marine Insurance Co.*, 354 Ill. App. 3d 699, 704-05 (1st Dist. 2004).

20. *Chicago Hospital Risk-Pooling Program*, 325 Ill. App. 3d at 983-87.

21. *American National Fire Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 343 Ill. App. 3d 93, 106-09 (1st Dist. 2003).

22. *Id.* at 109.

23. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102 (2007).

24. *Id.* at 116-17.

25. *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 575 (1st Dist. 2006).

26. *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480 (1st Dist. 2009).

27. *Id.* at 485, 490.

28. *Id.* at 487.

29. *Id.* at 482, 491.

30. See *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 115 (2007).

31. See *id.* at 115-16; *North River Insurance Co. v. Grinnell Mutual Reinsurance Co.*, 369 Ill. App. 3d 563, 566 (1st Dist. 2006).

32. See, e.g., *Certain Underwriters at Lloyd's, London v. Central Mutual Insurance Co.*, 2014 IL App (1st) 133145, ¶¶ 9, 13-18; *Illinois School District Agency v. St. Charles Community Unit School District 303*, 2012 IL App (1st) 100088, ¶¶ 38, 40.

33. *Alcan United, Inc. v. West Bend Mutual Insurance Co.*, 303 Ill. App. 3d 72, 83 (1st Dist. 1999).

34. *AMCO Insurance Co. v. Cincinnati Insurance Co.*, 2014 IL App (1st) 122856.

35. *Id.* ¶ 16.

36. *Id.* ¶¶ 24-25.

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**A distinctive feature of Illinois insurance law is the "targeted tender" doctrine, which lets an insured covered by multiple policies choose which insurer will defend it against a specific claim.**

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*Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*,<sup>21</sup> Justice Quinn expressed concern that targeted tender made it harder for insurers to determine the extent of their insured risks, blurred the distinction between primary and excess coverage, and possibly even violated the state constitution by interfering with freedom of contract.

He recommended limiting the targeted-tender rule, at most, to cases where parties were additional insureds under concurrent primary policies, as commonly seen in construction cases. He explained that subcontractors' insurers could increase premiums for the risk of the additional insured's liability, so a targeted tender would not "blindsided" the insurer.<sup>22</sup> Subsequent decisions have repeatedly looked back to these opinions in limiting targeted tender.

**Horizontal exhaustion trumps targeted tender.** In *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*,<sup>23</sup> the Illinois Supreme Court reconciled targeted tender with the doctrine of horizontal exhaustion, which requires an insured to exhaust all available primary insurance before seeking coverage under excess or umbrella policies. The *Kajima* Court held that a general contractor could target a subcontractor's primary policy on which it

paid a settlement and to target another exclusively.<sup>37</sup>

Despite some factual similarities, AMCO is also distinguishable from another case that the court did not dis-

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cuss, *Statewide Insurance Co. v. Houston General Insurance Co.*, which allowed a previously targeted carrier to proceed against another carrier after participating in the underlying settlement.<sup>38</sup> As part of that settlement, the insured itself expressly said that it wished the non-paying carrier, Houston General, to bear the entire cost of the settlement, and that the paying carriers paid only because of Houston General's breach of its duties.<sup>39</sup>

This distinction brings *Statewide* into line with cases such as *Alcan* and *Legion*, where the paying carriers provided only "standby" coverage, and where their suits to recover indemnity from non-paying insurers simply implemented the stated intentions of their insureds.<sup>40</sup>

**Targeted tender inapplicable to auto policies.** Several courts have declined to extend the targeted-tender rule to auto liability coverage. In *Pekin Insurance Co. v. Fidelity & Guaranty Insurance Co.*, a towing business tried to target the policy of the vehicle it was towing, but the court held that doing so would violate the public policy reflected in the statute mandating liability insurance for tow trucks.<sup>41</sup>

In *Coca-Cola Enterprises, Inc. v. ATS Enterprises, Inc.*,<sup>42</sup> the owner of a tractor-trailer sought to deactivate its own policy and to target the policy of a repair service. However, the seventh circuit applied the general Illinois rule that an owner's policy is primary to an operator's policy, noting that the Illinois Vehicle Code required the owner to carry a minimum level of coverage that also covered the vehicle's permissive users.<sup>43</sup>

In *Vedder v. Continental Western In-*

*urance Co.*,<sup>44</sup> Vedder got into an accident while driving her personal vehicle as an ambulance service's volunteer, and she tried to target the ambulance service's carrier. As in *Coca-Cola*, the court rejected her targeted tender based in part on the rule that holds an owner's policy primary to other insurance.<sup>45</sup> While that rule was a sufficient basis for the court's decision, the court then also went on to accept the questionable argument, based on *River Village*, that Vedder could not target a policy with an excess "other insurance" clause.<sup>46</sup>

### Bargaining for insured status on targeted policy.

The courts in *Vedder* and *Pekin v. Fidelity & Guaranty* also balked at the idea of allowing a targeted tender against a policy that covered the insured simply because of the circumstances of an accident, and not because the insured had bargained for insured status on the targeted policy.<sup>47</sup> Classic targeted tender cases involve a construction contract that obligates one party to procure insurance for another.<sup>48</sup> Cases like *Marker* show that courts have also allowed targeted tenders where a single insured procured and paid for both the targeted policy and the deselected one.<sup>49</sup> For instance, in *State Auto Property & Casualty Insurance Co. v. Springfield Fire & Casualty Co.*, a contractor could deselect its project-specific policy and target its general liability policy.<sup>50</sup>

These cases can reasonably be read to distinguish between insureds who have bargained for coverage in one way or another and those who have not. However, confusion can arise from the imprecise use of the term "named insured," which ordinarily means the insured that procured the policy and has distinct rights and obligations.<sup>51</sup>

Contracting to be "named as an additional insured" does not make a party a "named insured" within this meaning. It does not even necessarily mean that a party will appear by name in the policy, as a blanket endorsement could provide coverage to all additional insureds as required by contract. Those additional insureds have still bargained for coverage, and courts have upheld targeted tenders by additional insureds on policies with such blanket endorsements.<sup>52</sup>

### Limitations for consecutive policies.

Most targeted-tender cases involve concurrent policies, and the doctrine has limited application, if any, to consecutive policies. *Marker* allowed an insured to target the earlier of two professional liability policies and to deselect the later policy.<sup>53</sup>

However, *Illinois School District Agency v. St. Charles Community Unit School District 303* more recently rejected the district's deselection of its prior carriers and targeting of its current carrier, holding targeted tender's rationale did not apply because this tender *increased* the risk of raised premiums or policy cancellation.<sup>54</sup> Another reason to limit targeted tender to concurrent policies is that consecutive policies arguably do not "cover the same risk."<sup>55</sup>

**Attempts to contract around targeted tender.** Besides the limits that courts have imposed on targeted tender, insurers have sometimes tried to contract around the doctrine in their policy terms. In *American Country Insurance Co. v. Kraemer Brothers, Inc.*, the court upheld

37. *Id.* ¶ 24 (citing *Richard Marker Associates v. Pekin Insurance Co.*, 318 Ill. App. 3d 1137, 1143-44 (2d Dist. 2001)).

38. *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 428-31 (1st Dist. 2009).

39. *Id.* at 416.

40. *Legion Insurance Co. v. Empire Fire & Marine Insurance Co.*, 354 Ill. App. 3d 699, 706 (1st Dist. 2004); *Alcan United, Inc. v. West Bend Mutual Insurance Co.*, 303 Ill. App. 3d 72, 82 (1st Dist. 1999).

41. *Pekin Insurance Co. v. Fidelity & Guaranty Insurance Co.*, 357 Ill. App. 3d 891, 901-02 (4th Dist. 2005) (citing 625 ILCS 5/12-606(d)).

42. *Coca-Cola Enterprises, Inc. v. ATS Enterprises, Inc.*, 670 F.3d 771 (7th Cir. 2012).

43. *Id.* at 774-76 (citing 625 ILCS 5/7-317(b)(2), 7601(a)).

44. *Vedder v. Continental Western Insurance Co.*, 2012 IL App (5th) 110583.

45. *Id.* ¶ 19.

46. *Id.* ¶ 21 (citing *River Village I, LLC v. Central Insurance Cos.*, 396 Ill. App. 3d 480, 492 (1st Dist. 2009)).

47. *Vedder*, 2012 IL App (5th) 110583, ¶ 22; *Pekin Insurance Co. v. Fidelity & Guaranty Insurance Co.*, 357 Ill. App. 3d 891, 902 (4th Dist. 2005).

48. See, e.g., *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570, 571 (2000).

49. *Richard Marker Associates v. Pekin Insurance Co.*, 318 Ill. App. 3d 1137, 1139 (2d Dist. 2001).

50. *State Auto Property & Casualty Insurance Co. v. Springfield Fire & Casualty Co.*, 394 Ill. App. 3d 414, 419-20 (4th Dist. 2009).

51. See *Bruder v. Country Mutual Insurance Co.*, 156 Ill. 2d 179, 199 (1993) (Harrison, J., concurring in part and dissenting in part).

52. See, e.g., *United National Insurance Co. v. 200 North Dearborn Partnership*, 2012 IL App (1st) 100569, ¶ 7.

53. *Richard Marker Associates v. Pekin Insurance Co.*, 318 Ill. App. 3d 1137, 1139, 1143-44 (2d Dist. 2001).

54. *Illinois School District Agency v. St. Charles Community Unit School District 303*, 2012 IL App (1st) 100088, ¶¶ 42-43.

55. See *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 105 (2007).

American Country's requirement that the insured promptly tender the defense of any claim or suit to any other insurer which has available insurance.<sup>56</sup> However, as Justice Quinn noted when concurring in *CHRPP*, *Kraemer's* continued viability is in doubt because it predates *Burns*, and courts might no longer consider a deselected policy "available."<sup>57</sup>

No published cases since *Burns* have interpreted similar provisions.

### **Conclusion**

Although the doctrine of targeted tender has been expanded from *Institute of London Underwriters*, courts have started defining narrower parameters for its application. Nonetheless, it remains

the law of Illinois, and attorneys for insurers and insureds alike should be familiar with the doctrine and its limitations. ■

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<sup>56</sup> *American Country Insurance Co. v. Kraemer Brothers, Inc.*, 298 Ill. App. 3d 805, 812 (1st Dist. 1998).

<sup>57</sup> *Chicago Hospital Risk Pooling Program v. Illinois State Medical Inter-Insurance Exchange*, 325 Ill. App. 3d 970, 987 (1st Dist. 2001).

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