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Re-Tender of Lawsuit After Withdrawal Permissible Under Illinois "Target Tender" Doctrine

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Other than Montana and Washington, Illinois is the only state which has specifically adopted what is known as the "target tender doctrine." The doctrine provides that when multiple insurance companies have a duty to defend an insured in a single action, the insured can select, or "target," which insurer or insurers must provide the defense (or indemnity). While Illinois courts have grappled with various issues surrounding the scope and breadth of the "target tender" doctrine, the Central District of Illinois recently held that an insured that has relieved an insurer of the obligation to defend a lawsuit under the doctrine can later re-tender the lawsuit to the insurer and require the insurer to defend, so long as the re-tender is made within a reasonable amount of time.

In *Westfield Ins. Co. v. Indem. Ins. Co. of N. Am.*, 2019 WL 5558234 (C.D. Ill. Oct. 28, 2019), reconsideration denied, 2020 WL 223609 (C.D. Ill. Jan. 15, 2020), the insureds, Sandstone North, LLC, and Sandstone South, LLC (collectively "Sandstone") owned and operated confined area feeding operations, called "Hog Facilities." In 2010, a neighbor brought a nuisance suit against the insureds in Illinois state court, alleging various injuries resulting from the insureds' operation of the Hog Facilities. At various times relevant to the lawsuit, Sandstone was insured by insurance policies issued by Indemnity Insurance Company of North America ("Indemnity"), Westfield Insurance Company ("Westfield"), and was also named as an additional insured under a policy issued by Star Insurance ("Star").

Sandstone initially tendered the defense of the underlying action to all three insurers. While all three insurers accepted Sandstone's tender under a reservation of rights, Indemnity filed a declaratory action seeking a determination that it owed no coverage for the underlying suit, arguing that the pollution exclusion in its policy barred coverage. Indemnity then offered to dismiss the declaratory action if Sandstone withdrew its tender, which Sandstone agreed to do. Nearly three years later, Sandstone re-tendered the underlying lawsuit to Indemnity, based on the Fourth District Appellate Court's decision in *Country Mutual Insurance Company v. Hilltop View, LLC, et al.*, No. 4-13-0124, which rejected Indemnity's prior argument that odor claims involving a hog production facility constituted "traditional environmental pollution" excluded by an absolute pollution exclusion in an insurance policy. Indemnity rejected the re-tender and re-filed its declaratory action, arguing that the decision did not establish coverage and that the re-tender violated the notice provision of the policy.

The underlying lawsuit proceeded to a jury trial, with the jury finding in favor of Sandstone. Westfield subsequently filed a declaratory action against Indemnity seeking a declaration that Indemnity had a duty to defend the underlying action and was required to reimburse Westfield all of the defense costs it paid, or at least a pro rata share of defense costs.

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On cross-motions for summary judgment, the District Court denied Indemnity's motion and granted Westfield's motion in part. The District Court noted that Illinois courts have not addressed whether an insured may re-tender a defense to an insurer after initially withdrawing the tender, nor could the District Court locate any case addressing the issue in Washington or Montana, the only other states which have specifically adopted a similar doctrine. The District Court noted that in *Burns Const. Co. v. Indiana Ins. Co.,* 189 Ill. 2d 570 (2000), the insured was covered under policies issued by Indiana Insurance Company ("Indiana") and Royal Insurance Company ("Royal"). The insured made a targeted tender to Indiana, who subsequently denied coverage. The insured thereafter re-tendered the suit to Royal, which accepted the tender. While the Burns Court did not address the issue of whether the re-tender was permissible, the District Court reasoned that if it accepted Indemnity's position, the insured in *Burns* would have been left without a defense, since it would have been unable to re-tender the lawsuit to Royal. The District Court was convinced that the Illinois Supreme Court would have rejected such an outcome, and thus held that the Sandstone was entitled to re-tender the lawsuit to Indemnity, so long as the re-tender occurred within a "reasonable time."

In addressing what constitutes a "reasonable time" to re-tender the suit to the insurer, the District Court likened the concept to the original notice of suit to the carrier. The District Court cited several factors approved by the Illinois Supreme Court in *West American Ins. Co. v. Yorkville Nat. Bank*, 238 Ill.2d 177 (Ill. 2010), in determining whether notice to an insurer has been given within a reasonable time. Those factors included: (1) the specific language of the policy's notice provision; (2) the insured's sophistication in commerce and insurance matters; (3) the insured's awareness of an event that may trigger insurance coverage; (4) the insured's diligence in ascertaining whether policy coverage is available; and (5) prejudice to the insurer.

In balancing these factors, the District Court found that Sandstone's re-tender was reasonable under the circumstances. The District Court noted that Sandstone promptly re-tendered the defense to Indemnity after the *Hilltop* decision clearly established that the pollution exclusion did not relieve Indemnity of its defense obligation. The District Court also held that the three year delay did not prejudice Indemnity because Sandston ultimately prevailed at trial and Indemnity could not have secured a better result.

Ultimately, the District Court held that Indemnity was required to pay a pro rata share of the defense costs for the underlying action. Curiously, this included defense costs for the period of time between Sandstone's withdrawal of tender and re-tender years later. The District Court rejected Star and Westfield's argument that Indemnity had waived all coverage defenses and was thus liable to pay all of the defense costs, reasoning that Indemnity promptly filed a declaratory action both times the underlying lawsuit was tendered to Indemnity. The District Court also held that Westfield and Star were entitled to pre-judgment interest from the date of the re-tender, as that was the date that the carriers' claim for defense costs became liquidated and ascertainable.

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