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Two recent Illinois decisions could greatly affect your decision making pertaining to the acceptance of tenders of defense from additional insureds arising out of construction incidents. The Illinois appellate courts have recently ruled that equitable contribution may be unavailable among co-additional insurance providers and that equitable contribution is not available against a general liability carrier, even when a Kotecki waiver exists.

In Legion, the First District Appellate Court ruled that when coverage with the named insured's primary insurance carrier has been deactivated, equitable contribution cannot be sought by an additional insurance provider, despite a waiver of the named insured's Kotecki protections.

Legion Ins. Co. v. Empire Fire and Marine Ins. Co., 2004 WL 2998536 (Ill. App. 1 Dist. 2004). In Legion, both Legion and Empire provided insurance to Barrco. Legion was the insured's worker's compensation/employer's liability carrier and Empire was the general liability carrier. Barrco employed the plaintiff, Ronald Stone.

As a subcontractor, Stone was injured on a construction site. Joseph J. Duffy Co. was the general contractor. Ozark Steel Fabricators, contracted with Barrco. In the Barrco/Ozark subcontract, Barrco waived its Kotecki protections for any injuries for which Barrco was responsible. After Stone sued Duffy and Ozark, Duffy and Ozark filed third party claims for contribution against Barrco. Barrco initially tendered its defense to Empire and Empire initially assumed the defense of Barrco. Barrco subsequently deactivated its coverage with Empire and sought an exclusive defense from Legion. As Barrco had waived any Kotecki protections, its liability was not limited to the amount of the worker's compensation payments already made to Stone.

Based on the deactivation of the tender, Empire refused to defend or indemnify Barrco. Legion eventually waived its lien and paid an additional \$640,000 to settle the Stone suit. Legion then sought equitable contribution from Empire. The court held that the deactivation of the tender to Empire acted as a bar to any equitable contribution claim. The court stated that "[o]nce Barrco targeted Legion to exclusively defend it in the contribution suits, Legion had the sole responsibility to defend and indemnify Barrco with respect to those claims and Empire was relieved of its obligation to defend and indemnify." Id.

Illinois case law has held that the excess exposure over and above the worker's compensation exposure is payable by a general liability policy. However, the Legion case allows for an insured to specifically deactivate this general liability coverage and place the full burden for defense and indemnity on the employer's liability carrier. The question remains open whether, under this set of facts, the employer's liability carrier would be obligated to indemnify for any amounts over and above the worker's compensation payments already made. For this reason, a deactivation of the general liability carrier would seem to be a bad decision for an insured that has waived its Kotecki protections.

In Home, the Illinois Supreme Court recently ruled that equitable contribution was not available by one subcontractor's carrier against another subcontractor's carrier for the liability of the general contractor as each insured different risks. Home Ins. Co. v. Cincinnati Ins. Co., 2004 WL 2749854 (Ill. 2004).

In Home, Allied was the general contractor on a construction project. Allied subcontracted with Aldridge Electric Co. and Western Industries. Matthew Fisher was employed by Aldridge. Mr. Fisher was injured at the site and sued, inter alia, Allied. Allied was named as an additional insured on the

policies issued to Western (by Cincinnati) and to Aldridge (by Home). **Id.**

Allied tendered its defense to both Cincinnati and Home. Both accepted the tender under differing terms. The Fisher suit was settled against Allied with Home paying \$500,000 and Cincinnati paying \$100,000. Home subsequently filed a two count declaratory judgment action against Cincinnati seeking both equitable contribution and equitable subrogation. The Supreme Court found that the equitable contribution claim could not stand but the equitable subrogation count was valid. **Id.**

The court held that in order for an equitable contribution count to stand, both insurers must have provided coverage for the same risk. The additional insured endorsements for each carrier stated that the coverage was provided “only with respect to liability arising out of ‘your work’ for that insured by or for you.” **Id.** The court held that this language explicitly supplied coverage for different risks, as they applied to Allied. Allied was insured under each policy but only to the extent that the injury was caused by the work of the named insured subcontractor. As Home could not be liable for any injury caused by Western and Cincinnati could not be liable for any injury caused by Aldridge, the coverage afforded Allied by each policy inherently involved a separate risk. **Id.**

The court then addressed the equitable subrogation claim and overruled the existing case law in Illinois. Contrary to equitable contribution’s requirement of insuring the “same risk,” equitable subrogation requires insuring against the “same loss.” The court held that these two requirements are different as a matter of law. Insuring the same risk looks directly at the risk covered whereas insuring for the same loss requires looking at the loss that was incurred. As the loss in this case was the loss of Allied in paying a claim to Fisher, equitable subrogation was allowed. **Id.**

These two cases have clarified the law in Illinois while leaving important questions unanswered. For anyone who has had to decide whether or not to accept a tender of defense from a general contractor, these cases must be completely understood as the ramifications could lead to significantly overpaying a claim.

Very truly yours,

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