
Edited and Updated as of January 10, 2014 by:
Neil B. Posner
Much Shelist, P.C.
Chicago, Illinois

Additional editing and analysis provided by:
Theodore A. Howard
Wiley Rein LLP
Washington DC

Original Authors:
David B. Applefeld
Adelberg, Rudow, Dorf & Hendler, LLC
Baltimore, Maryland

Susan J. Field
Musick, Peeler & Garrett LLP
Los Angeles, California

J. James Cooper
Gardere Wynne Sewell LLP
Houston, Texas

Rodrigo “Diego” Garcia, Jr.
Thompson Coe Cousins & Irons, LLP
Houston, Texas

This survey reflects the views of the authors only as of the date of its preparation, and does not necessarily reflect the views of their law firms or their clients. The original authors gratefully acknowledge the assistance of Amy Baghramian, Jordan Isom, and Steve Poston in the preparation of this paper. Mr. Posner gratefully acknowledges the assistance of Kendalle Jacobson in the preparation of the update to this paper.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>State</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALABAMA</td>
<td>1</td>
</tr>
<tr>
<td>ALASKA</td>
<td>1</td>
</tr>
<tr>
<td>ARIZONA</td>
<td>3</td>
</tr>
<tr>
<td>ARKANSAS</td>
<td>4</td>
</tr>
<tr>
<td>CALIFORNIA</td>
<td>5</td>
</tr>
<tr>
<td>COLORADO</td>
<td>7</td>
</tr>
<tr>
<td>CONNECTICUT</td>
<td>7</td>
</tr>
<tr>
<td>DELAWARE</td>
<td>8</td>
</tr>
<tr>
<td>DISTRICT OF COLUMBIA</td>
<td>8</td>
</tr>
<tr>
<td>FLORIDA</td>
<td>8</td>
</tr>
<tr>
<td>GEORGIA</td>
<td>9</td>
</tr>
<tr>
<td>HAWAII</td>
<td>10</td>
</tr>
<tr>
<td>IDAHO</td>
<td>11</td>
</tr>
<tr>
<td>ILLINOIS</td>
<td>11</td>
</tr>
<tr>
<td>INDIANA</td>
<td>12</td>
</tr>
<tr>
<td>IOWA</td>
<td>13</td>
</tr>
<tr>
<td>KANSAS</td>
<td>13</td>
</tr>
<tr>
<td>KENTUCKY</td>
<td>13</td>
</tr>
<tr>
<td>LOUISIANA</td>
<td>14</td>
</tr>
<tr>
<td>MAINE</td>
<td>14</td>
</tr>
<tr>
<td>MARYLAND</td>
<td>15</td>
</tr>
<tr>
<td>MASSACHUSETTS</td>
<td>16</td>
</tr>
<tr>
<td>MICHIGAN</td>
<td>17</td>
</tr>
<tr>
<td>MINNESOTA</td>
<td>18</td>
</tr>
<tr>
<td>MISSISSIPPI</td>
<td>18</td>
</tr>
</tbody>
</table>
Statutes: Alaska, California & Florida

Authors’ and Editors’ Note: See also, Duty of insurer to pay for independent counsel when conflict of interest exists between insured and insurer, 50 A.L.R.4TH 932 (2013).
ALABAMA

In Alabama, the mere fact that an insurer is defending under a reservation of rights does not entitle a policyholder to independent counsel, nor is the insurer obligated to pay for policyholder’s independent counsel. *L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1303 (Ala. 1987).

A policyholder is entitled to control the litigation through his or her own counsel with the insurer paying reasonable attorney’s fees only if the insurer breaches certain specific conditions set out by the court. *Strength v. Alabama Dept. of Finance, Div. of Risk Management*, 622 So. 2d 1283, 1291 (Ala. 1993). The Alabama Supreme Court describes these conditions as an “enhanced obligation” and also mentions “other specific criteria” to be met by the defense counsel in a reservation-of-rights case. *L & S Roofing Supply Co., Inc.*, 521 So. 2d at 1303.

The “enhanced obligation” includes thoroughly investigating the cause of the insured’s accident and the plaintiff’s injuries, retaining competent defense counsel for the insured, making sure both counsel and the insured know that the insured is the client, fully informing the insured with respect to all coverage issues, disclosing all settlement offers made by the company, and refraining from engaging in any action that would demonstrate a greater concern for the insurer’s monetary interest than for the insured’s financial risk. *Id.*

Even though the insured is not entitled to independent counsel, the insured may pay for his or her own defense, and the insurance company must reimburse for defense costs if an adverse final judgment establishes the company’s liability. See, e.g., *L&S Roofing Supply Co., Inc.*, 521 So. 2d at 1304, citing to *Waite v. Aetna Cas. & Sur. Co.*, 77 Wash. 2d 850, 467 P.2d 847 (1970). However, if the insured chooses to hire its own counsel and does not allow the carrier’s counsel to participate, the insured risks losing the insurer’s “enhanced obligation of good faith.” *Aetna Cas. & Sur. Co. v. Mitchell Bros., Inc.*, 814 So. 2d 191, 197 (Ala. 2001).

The case law concerning independent counsel and “enhanced obligation of good faith” was most recently affirmed in 2009 by a federal district court applying Alabama law. *State Farm and Cas. Co. v. Myrick*, 611 F. Supp. 2d 1287, 1299 (M.D. Ala. 2009). In this case, the court found that the mere refusal to settle for the insured was precisely what a reservation of rights permits and not a breach of its enhanced obligation of good faith.

*But see MetLife Auto & Home Ins. Co. v. Reid*, Civil Action No. CV-09-S-01762-NE, 2013 WL 6844109 (N.D. Ala. Dec. 23, 2013), which followed the holding of *L & S Roofing*, but nevertheless found that the insurer was not obligated to provide a defense in the first instance.

For one commentator’s analysis, see William E. Shreve, Jr., *Determining An Insurer’s Duty to Defend*, 74 ALA. LAW. 238 (July 2013).

ALASKA

A. Parameters of Insured’s Right to Independent Counsel

When and under what circumstances, however, an insurer must provide independent counsel to its insured is now governed by statute in Alaska (see AS § 21.96.100(1)). This statute came into effect on July 1, 1995, and provides:

(a) If an insurer has a duty to defend an insured under a policy of insurance and a conflict of interest arises that imposes a duty on the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to the insured unless the insured in writing waives the right to independent counsel.

The statute then specifies the parameters of this obligation. In particular, it explains that claims for punitive damages; claims for damages in excess of the policy limits; and claims or facts in a civil action for which the insurer denies coverage, do not constitute a conflict of interest. (Id. subsection (b)). If, however, an insurer reserves rights on an issue for which coverage is denied, then the insurer must provide independent counsel to the insured.

Whether the statute in any way limits the right to independent counsel established in the prior case law has not yet been tested in the courts, but it appears that the statute was essentially enacted to codify the existing case law. See Great Divide Ins. Co. v. Carpenter ex rel. Reed, 79 P.3d 599, 604 (Alaska 2003). Although the statute has been in existence for nearly a decade and a half, there has been very little interpretation in published case law. However, there are cases which further illuminate the right to independent counsel.

For example, a case that postdates the statute, but does not directly address it, further explains the duties of an insurer in this context. The court in Lloyd’s & Institute of London Underwriting Co. v. Fulton, 2 P.3d 1199 (Alaska 2000), explained that an insurer has a duty to advise its insured that a potential conflict exists as soon as its investigation reveals that grounds to dispute coverage exist, not on “the insurer’s final decision on coverage.” Moreover, the insured need not continue to provide information to the insurer once the insurer has a reason to believe that there are coverage issues: “to allow the insurer to attempt to obtain information from the insured in order to bolster an undisclosed policy defense would, in effect, allow the company to take advantage of its fiduciary relationship with the insured in order to strengthen its position against the insured.” Id. at 1205.

As noted, although the insured has an automatic right to independent counsel under the circumstances specified, the insured may waive its right to independent counsel by signing a statement which describes this intention (an exemplar of such a statement exists in the statute at subsection (f)).

B. Additional Requirements and Duties Under Statute

In addition to explaining when an insured has a right to independent counsel, AS § 21.96.100(3) sets forth other requirements to which the insured and insurer must both adhere. In particular, subsection (d) discusses the minimum qualifications of the independent counsel, and the rates that an insurer may be obligated to pay when such counsel is retained.

The statute also explains the obligations the insured and insurer have vis-à-vis one another if independent counsel is retained: “the independent counsel and the insured shall consult with the insurer on all matters

---

1 Formerly AS § 21.89.100.
2 See Appendix.
3 Formerly AS § 21.89.100.
relating to the civil action and shall disclose to the insurer in a timely manner all information relevant to the civil action, except information that is privileged and relevant to disputed coverage.” The statute also explains that it does not eliminate the insured’s duty to cooperate as required by the terms of an insurance policy. (Id. subsection (g)).

Finally, the statute provides that when an insured is represented by independent counsel, the insurer may settle directly with the plaintiff if the settlement includes all claims based upon the allegations for which the insurer previously reserved its position as to coverage or accepted coverage, regardless of whether the settlement extinguishes all claims against the insured. (Id. subsection (h)).

Interestingly, this statute is almost identical to California Civil Code § 2860. Case law interpreting and applying the California statute may serve as possible guidance for questions not answered by or yet decided under the Alaska statute. (Indeed the CHI court cited heavily to California cases that predated the California statute).

**ARIZONA**

Whether an insured has a right to independent counsel is determined by reference to case law in Arizona. Although the first case addressing this issue was in 1976, there has been little significant development on the principals governing the question in the years since, and the specific requirements and process that must be followed remain unresolved.

A. **Parameters of Insured’s Right to Independent Counsel**

Arizona appears to have first addressed whether an insured has a right to independent counsel in *Joseph v. Markovitz*, 551 P.2d 571 (Ariz. App. 1976), in which the Arizona Court of Appeal explained that when a conflict of interest exists between an insurer and its insured, “public policy” demands that the insured be able to “choose his own attorney without relieving [the insurer] of its contractual obligation under the policy to pay for the defense.” Id. at 577. However, the *Markovitz* court did not elaborate on this obligation beyond this general statement. In a case decided that same year, *Fulton v. Woodford*, 545 P.2d 979 (Ariz. App. 1976), an Arizona Court of Appeal explained that an insurer’s reservation of rights to seek reimbursement of payments created a conflict of interest.

Three decades later, however, the Arizona courts provided additional guidance. In *Pueblo Santa Fe Townhomes Owners’ Ass’n v. Transcontinental Ins. Co.*, 178 P.3d 485 (Ariz. App. 2008), the Court of Appeal explained that a conflict of interest is created when an insurer “reserves rights to contest indemnification liability.” When this happens, the court explained, “[a]n insured … is on notice of the conflict of interest and is free, upon proper notice to the insurer, to act to protect its rights in the litigation with the claimant.” Id. at 491. The court further warned that, if an insurer fails to advise the insured that it is reserving rights to contest coverage, an insurer may be estopped from asserting its coverage defenses.

*But see Nucor Corp. v. Employers Ins. Co. of Wausau*, No. CV-12-678-PHX-SMM, __ F. Supp. 2d __, 2013 WL 5428751 at *7 (D. Ariz. Sept. 27, 2013), holding that “there is no support in Arizona case [law] for the blanket proposition that an insurer defending under a reservation of rights loses its right to appoint defense counsel for its insured. Although the courts in *Morris* and *Pueblo Santa Fe* indicated that an insurer defending under a reservation of rights loses some of its contractual rights to control the defense of an insured, neither of those opinions, nor any other Arizona case that the Court has found, addressed the specific issue of whether an insurer loses its right to appoint defense counsel.” Thus, in the absence of any authority in support of Nucor’s claim that it has a right to appoint its own defense counsel, the Court finds that Wausau has a contractual right under the insurance policies to appoint defense counsel in the underlying RID action.”
B. Additional Requirements and Duties?

Thus, it appears the basic principle in Arizona is that an insured is entitled to seek independent counsel when a conflict of interest exists with the insurer, and that a conflict exists whenever an insurer reserves rights to contest coverage. Beyond this, there is no Arizona authority defining what happens when independent counsel is selected.4

It is important to note, however, that the issue of right to independent counsel may be subsumed by Morris (United Services Automobile Ass’n v. Morris, 154 Ariz. 113, 741 P.2d 246 (1987)), and Damron (Damron v. Sledge, 105 Ariz. 151, 460 P.2d 997 (1969)) in which the Supreme Court held that where there is a reservation of rights, “an insured may protect itself … by assigning the claimant the insured’s coverage rights under the policy.” Pueblo Santa Fe, 178 P.2d at 491. Such protection can include a stipulated judgment and covenant not to execute.

ARKANSAS

No Arkansas state court has directly addressed the issue of whether a policyholder has a right to choose its own counsel under circumstances in which its insurer has reserved its rights. However, numerous federal courts applying Arkansas law have recognized the right of a policyholder to choose its own counsel and be reimbursed reasonable fees when the insurer has accepted the defense under a reservation of rights. Northland Ins. Co. v. Heck’s Service Co., Inc., 620 F. Supp. 107 (E.D. Ark. 1985), Union Ins. Co. v. Knife Co., Inc., 902 F. Supp. 877, 879 (W.D. Ark. 1995) (includes a lengthy discussion on “relevant data” and the majority rule among the states on this issue).

A United States District Court applying Arkansas law also held that the insurer must either provide an independent attorney to represent the insured or pay the costs incurred by the insured in hiring counsel of its own choice, not both. Bituminous Cas. Corp. v. Zadeck Energy Group, Inc., 416 F. Supp. 2d 654, 660-61 (W.D. Ark. 2005).

But the Eighth Circuit appears to have limited that holding to situations where the appointed lawyer’s conflict of interest is more apparent.

PNC argues Hortica assigned Cross Gunter to represent PNC, despite PNC’s “absolute right” to choose its own counsel. Appellant/Cross-Appellee’s Br. 35. Hortica counters it had no prior relationship with Cross Gunter and the firm was well qualified to represent PNC. Arkansas law does not directly address this question, but two federal courts have held the insured has a right to select its own counsel in cases where an insurer-appointed counsel would face a conflict of interest. Union Ins. Co. v. The Knife Co., 902 F. Supp. 877, 881 (W.D. Ark. 1995); Northland Ins. Co. v. Heck’s Serv. Co., 620 F. Supp. 107, 108 (E.D. Ark. 1985). But even assuming Arkansas law provides PNC the right to choose its own counsel, PNC presents no evidence Hortica chose Cross Gunter out of malice or dishonesty. Nor does PNC explain how its inability to choose proximately caused its harm. We are not anxious to infer bad faith or negligence in such

---

4 There is Arizona case law explaining that when a liability insurer assigns an attorney to represent an insured, the lawyer owes a duty to the insurer arising from the understanding that the lawyer’s services are intended to benefit both insurer and insured when their interests coincide, even if the insurer is a nonclient. See Paradigm Ins. Co. v. Langerman Law Offices P.A., 24 P.3d 593 (Ariz. 2001). Because the ruling rests on the premise that the parties’ “interests coincide,” it does not speak to the situation of when independent counsel is retained for an insured because its interests diverge from the insurer’s.
speculative circumstances. See Wheeler v. Bennett, 312 Ark. 411, 849 S.W.2d 952, 958 (1993) (declining to award recovery where cause of damages was conjectural).


CALIFORNIA

A. Parameters of Insured’s Right to Independent Counsel

In Executive Aviation, Inc. v. National Insurance Underwriters, 16 Cal. App. 3d 799, 810 (1971), the court held that in a conflict-of-interest situation, “[t]he insurer’s desire to exclusively control the defense must yield to its obligation to defend its policyholder,” allowing the insured to control the defense. Subsequently, San Diego Federal Credit Union v. Cumis Ins. Soc’y, Inc., 162 Cal. App. 3d 358 (1984), confirmed that when an insurer reserves rights on issues critical to the defense of the case, a conflict of interest arises for the attorney appointed by the insurer to defend and gives rise to the right of an insured to hire independent counsel at the insurer’s expense. The right to independent counsel set forth in Cumis was codified in 1987 by California Civil Code § 2860, which now sets forth the basic ground rules for rights and obligations with respect to independent counsel. And, although the statute sets forth those basic ground rules, there also is case law that guides the parties’ conduct.

To summarize, Civil Code § 2860 provides:

(a) If a conflict of interest arises which creates a duty on the part of the insurer to provide the independent counsel, the insurer shall provide independent counsel to represent the insured unless the insured is informed and expressly waives in writing its rights to independent counsel or the insurance contract itself provides a different method of selecting counsel consistent with § 2860.

(b) A conflict of interest does not arise under all circumstances; it arises when the outcome of a coverage issue upon which a reservation of rights is based can be controlled by the defending counsel. No conflict of interest exists by reason of claims for punitive damages or the potential for a judgment in excess of policy limits.

(c) The insurer has the right to require certain “minimum qualifications” of the independent counsel. The insurer’s obligation to pay fees for the independent counsel is limited “to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim is being defended.” Again, the policy can provide other methods for setting fees. Any dispute concerning attorneys' fees is to be resolved by “final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.”

(d) When independent counsel has been selected by the insured, that counsel and the insured must disclose “all information concerning the action except privileged materials relevant to coverage disputes” to the insurer and keep the insurer informed and “consult” in a timely manner on “all matters relating to the action.” Privilege claims are subject to an in camera review and information disclosed by the insured or independent counsel to the carrier does not create a waiver of any privilege.

5 See Appendix.
Originally Presented at the ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, March 4-6, 2010: Independent Defense Counsel: When can the Policyholder Select its Own Defense Lawyer and How Much Does the Insurer Have to Pay? A 50-State Survey
Re-presented at the Seminar on March 1, 2013 and on March 6, 2014

(e) The insured may waive its rights to independent counsel by a signed writing in conformance with the Code.

(f) If independent counsel is selected, the insurer may also provide counsel and such counsel “shall be allowed to participate in all aspects of the litigation.”

B. Additional Requirements and Duties

Not every conflict of interest requires independent counsel. According to case law, the conflict must be “significant, not merely theoretical, actual, not merely potential.” Dynamic Concepts, Inc. v. Truck Insurance Exchange, 61 Cal. App. 4th 999 (1998). A reservation of rights itself is not the trigger of independent counsel. The outcome of the coverage issue upon which the reservation is based must be such as can be controlled by counsel first retained by the insurer. Thus, where the reservation of rights is based on coverage disputes that have nothing to do with the issues being litigated in the underlying case, there is no right to independent counsel. See, e.g., McGee v. Superior Court, 176 Cal. App. 3d 221 (1985) (reservation of rights regarding resident relative exclusion does not give rise to rights to independent counsel); James 3 Corp. v. Truck Ins. Exchange, 91 Cal. App. 4th 1093 (2001) (insurer’s refusal to fund prosecution of affirmative claims does not give rise to right to independent counsel); Blanchard v. State Farm Fire & Casualty Co., 2 Cal. App. 4th 345, 347 (1991) (reservation of rights that certain types of construction-related damages were not covered by the insurance policy does not give rise to right to independent counsel). Accord with Dynamic Concepts and Blanchard, Fed. Ins. Co. v. MBL, Inc., 219 Cal. App. 4th 29, 42, 160 Cal. Rptr. 3d 910, 920 (6th Dist. 2013). Accord with James 3 Corp., Park Townsend, LLC v. Clarendon Am. Ins. Co., 916 F. Supp. 2d 1045 (N.D. Cal. 2013).


See also Behnke v. State Farm Gen’l Ins. Co., 196 Cal. App. 4th 1443 (4th Dist. 2011) (where insurer was not a party to a fee agreement between the insured and independent counsel, insurer was not contractually obligated to pay the full amount of independent counsel’s fees billed under that agreement).

The insurer’s obligation to pay the independent counsel rates is limited to the rate the insurer pays counsel it retains (i.e., panel counsel) to defend similar cases in the relevant community. Importantly, the rate is not a rate to be paid for each individual insurer which may be defending. California courts have held that when multiple insurers are obligated to provide Cumis counsel, the statute limits the attorney to a single
fee based on billing rates paid by one of the insurers (who must thereafter share such costs). Also Civil Code § 2860 applies to policies issued before its enactment. See, San Gabriel Valley Water Co. v. Hartford Accident & Indemnity Co., 82 Cal. App. 4th 1230 (2000).

Although Civil Code § 2860 references a conflict of interest created for counsel “first retained by the insurer,” in Long v. Century Indem. Co., 163 Cal. App. 4th 1460 (2008), the court made clear that the duty arises “when the potential conflict arises, whether or not the insurer has—or will—retain its own counsel.”

COLORADO

No Colorado state court has yet addressed this issue.


CONNECTICUT

There is no Connecticut statute or reported opinion addressing the insured’s right to select independent counsel. However, in Aetna Life & Casualty v. Gentile, 15 Conn. L. Rptr. 451, 1995 WL 779102 (Conn. Super. 1995), an unpublished opinion addressing a declaratory judgment action filed by the insurer seeking a declaration that it had no duty to defend or indemnify its insured, the Court noted:

Where an insurer perceives a conflict of interest between itself and its insured prior to or during the course of trial, it is customary, legally appropriate, and often legally necessary for the insurer to provide independent counsel to the insured, so as to not jeopardize the insured’s rights under the terms of the contract.

Id. In Gentile, the Court found in favor of the insured and ordered the insurer to defend. In addition the Court ordered that the insurer reimburse the insured for the reasonable costs and fees it had inured to date in defending the action, but did not elaborate on any standard for determining such reasonable costs and fees.

Gentile was abrogated by ACMAT Corp. v. Greater N.Y. Mut. Ins., 282 Conn. 576 (2007), holding that the insured was not entitled to attorney fees as the prevailing party in an action against its liability insurer for declaratory judgment regarding the existence of a policy issued in the 1960s; no finding of bad faith conduct by the insurer was made, and no statutory or contractual provision authorized such an award.

Similarly, in Hartford Fire Ins. Co. v. Rivers, 19 Conn. L. Rptr. 183, 1997 WL 162750 (Conn. Super. 1997), a case involving a declaratory judgment action initiated by the underlying plaintiff (as opposed to either the insurer or insured), the Court, noted, inter alia, that the insurer had provided the insured with independent counsel and, in doing so, had satisfied its contractual obligations to the insured.


Finally, in King v. Guiliani, 9 Conn. L. Rptr. 527, 1993 WL 284462 (Conn. Super. 1993), the Superior Court was called upon to consider the propriety of an insurance company’s practice of engaging a “captive” law firm to defend its insureds. The case arose from a dispute involving a former insurance company staff counsel who sought to continue to represent his insured clients after his employment was
terminated by the insurer. In considering the issue, the Court concluded that, absent a conflict, such a practice was appropriate. However, the Court pointed out:

I can only observe that anyone who believes that in conflict of interest situations, a salaried employee of [the insurer] would not place the welfare of the corporation above that of the policyholder, who theoretically he represents, probably also believes in the tooth fairy and the Easter bunny.

Id. (citations omitted).

Although it appears that Connecticut would conclude that an insured is entitled to separate counsel when a conflict of interest exists, there is no reported opinion on this issue and the few unreported opinion that touch on this issue do not elaborate upon an insurer’s obligations under these circumstances.

**DELAWARE**

The Delaware courts have not addressed the issue of an insured’s right to select independent counsel. However, in *Baio v. Comm’l Union Ins. Co.*, 410 A.2d 502 (Del. 1979), the Supreme Court recognized that an insurance company had a duty to act “equitably” towards its insured. There, an insurer sought to recover for its subrogated interest against a third party for funds it had paid out on a worker’s compensation claim. The insurer subsequently discovered that it also insured the defendant tortfeasor, whom the insurer was obligated to defend. The Court suggested that the insurer’s equitable conduct might include maintenance of separate files or “the employment of separate counsel . . . and so on,” but did not address the issue any further. *Id.* at 508 n.6. Likewise, in *Corrado Bros., Inc. v. Twin City Fire Ins. Co.*, 562 A.2d 1188 (Del. 1989), the court commented that an insured might need independent counsel when a claim exceeds policy limits.

**DISTRICT OF COLUMBIA**


**FLORIDA**

By statute,6 Florida law requires that the insurer retain “independent counsel which is mutually agreeable to the parties.” FLA. STAT. § 627.426. To be mutually agreeable, the insured must actually approve the selected counsel. *See Cont’l Ins. Co. v. City of Miami Beach*, 521 So. 2d 232, 233 (Fla. App. 3d Dist. 1988); *Am. Empire Surplus Lines Ins. Co. v. Gold Coast Elevator, Inc.*, 701 So. 2d 904, 906 (Fla. App. 4th Dist. 1997).

When an insurer defends under a reservation of rights, the insured may reject the carrier’s defense and retain its own attorneys without jeopardizing its right to seek indemnification from the insurer for liability. *See Travelers Indem. Co. of Ill. v. Royal Oak Enterprises, Inc.*, 344 F. Supp. 2d 1358, 1370 (M.D. Fla. 2004). Under Florida law, however, the policyholder is required to take several steps before he or she can actually retain his or her own attorney. First, the insured must actually reject the defense that the carrier offers before the insured is allowed to select his or her own counsel. *See Aguero v. First American Ins. Co.*, 927 So. 2d 894, 898 (Fla. App. 3d Dist. 2005). An unreported federal court decision

---

6 See Appendix.
indicates that, to reject the insurer’s counsel, the policyholder may have to show “harm or prejudice” as to why counsel provided by the insurer is not “mutually agreeable.” See Prime Ins. Syndicate, Inc. v. Soil Tech Distributors, Inc., 2006 WL 1823562, *6 (M.D. Fla. 2006) (rebutting arguments that counsel was not “mutually agreeable” on an estoppel theory with the argument that counsel did not harm or prejudice the insured).

See also:

Mid-Continent Cas. Co. v. Am. Pride Building Co., 601 F.3d 1143 (11th Cir. 2010) (while an insurer must defend its insured, and may tender its defense subject to a reservation of rights, Florida law does not require an insured to accept such a defense; when an insurer agrees to defend under a reservation of rights or refuses to defend, the insurer transfers to the insured the power to conduct its own defense and, under Florida law, if the insurer offers to defend under a reservation of rights, the insured has the right to reject the defense and hire its own attorneys and control the defense).

U.S. Specialty Ins. Co. v. Burd, 833 F. Supp. 2d 1348 (M.D. Fla. 2011) (under Florida law, an economic conflict occurs, precluding an attorney from representing both the insurer and the insured, when the financial interests of the insurer and insured diverge; this typically happens when the insured, facing an excess claim, wants the policy limits offered in order to head off an excess judgment, but the insurer is reluctant to do so in the belief that the claim is not worth the policy limit; and when the insurer that has hired an attorney to represent its insured raises coverage defenses to the insured’s claim, the interests of the insured and the insurer are in conflict, and the insurer normally issues a reservation of rights letter informing the insured that he might want to obtain independent counsel).

U. of Miami v. Great Am. Assur. Co., 112 So. 3d 504 (Fla. Dist. Ct. App. 2013) (conflict in legal defenses raised by university and operator of summer swim camp held on university campus required insurer to appoint separate independent counsel for university in a third-party negligence action falling under camp operator’s general liability policy, which covered university as an additional insured; complaint alleged that each of the co-defendants was directly liable, camp operator alleged that plaintiff’s injury was caused by the fault of university for which it was entitled to indemnification and contribution, university alleged that plaintiff’s injury was caused by the fault of camp operator, and single defense counsel was put in the position of arguing that each of its clients was not at fault, and the other was).

GEORGIA

In reservation-of-rights cases, the insurance company seeking to defend must obtain the consent of the insured. Richmond v. Georgia Farm Bureau Mut. Ins. Co., 140 Ga. App. 215, 219, 231 S.E.2d 245, 248 (Ga. App. 1976). “Where the insured refuses to consent to a defense offered subject to a reservation of rights, the insurer must thereupon (a) give the insured proper unilateral notice of its reservation of rights, (b) take necessary steps to prevent the main case from going into default or to prevent the insured from being otherwise prejudiced, and (c) seek immediate declaratory relief including a stay of the main case pending final resolution of the declaratory judgment action.” Id. Consent can be express or implied. Jacore Systems, Inc. v. Central Mut. Ins. Co., 194 Ga. App. 512, 390 S.E.2d 876 (1990).

Although Georgia law does not directly address the hiring of entirely independent counsel nor the payment thereof, it does discuss joint counsel. An Eleventh Circuit case applying Georgia law states the following:

Where an insured hires co-counsel instead of rejecting the defense offered by the insurance company after an insurance company denies coverage but offers to provide a defense, it does not seem to us misplaced to put the burden on the insurance company to
choose between denying a defense and providing a defense in cooperation with co-counsel retained by the insured.


**HAWAII**

A. **Insured’s Right to Independent Counsel?**

The Hawaii Supreme Court directly addressed the question of whether an insured is entitled to the appointment of independent counsel in *Finley v. Home Ins. Co.*, 975 P.2d 1145 (Haw. 1998). There, the court rejected the requirement that the insurer must fund a separate “independent” counsel of an insured’s choice when an insurer reserves rights. The court specifically explained:

[W]e are convinced that the best result is to refrain from interfering with the insurer’s contractual right to select counsel and leave the resolution of the conflict to the integrity of retained defense counsel. Adequate safeguards are in place already to protect the insured in the case of misconduct. If the retained attorney scrupulously follows the mandates of the Hawaii Rules of Professional Conduct (HRPC), the interests of the insured will be protected.

*Id.* at 1152. The *Finley* court explained that if the insured is concerned about the situation, it is free to reject the appointed counsel. However, if it does so, it waives the right to defense fees:

If the insured chooses to conduct its own defense, the insured is responsible for all attorneys’ fees related thereto. The insurer is still potentially liable for indemnification for a judgment within the scope of insurance coverage. However, having refused the contractual terms of the policy, the insured foregoes its right to compensation for defense fees.

The Supreme Court reaffirmed this approach in the case of *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159 (Haw. 1999), elaborating that the insured may refuse the counsel offered but is responsible for the attorney’s fees incurred if it does so.

B. **Additional Requirements or Duties**

Although independent counsel need not be provided merely because a potential conflict exists, as subsequent cases have explained, the *Finley* case nonetheless adopted an “enhanced” standard of good faith when an insurer defends subject to a reservation of rights.

[T]he potential conflicts of interest between insurer and insured inherent in this type of defense mandate an even higher standard: an insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith.... This enhanced obligation is fulfilled by meeting specific criteria. First, the company must thoroughly investigate the cause of the insured’s accident and the nature and severity of the plaintiff’s injuries. Second, it must retain competent defense counsel for the insured [subject to rejection by the insured].... Third, the company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, but of all developments relevant to his policy coverage and the progress of his lawsuit.... Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer’s monetary interest than for the insured’s financial risk.
Although under Hawaii law, an insurer need not provide separate counsel if a potential conflict exists with the insured, such as if the insurer has reserved rights, and the insurer is subject to an enhanced standard of good faith under this circumstance to ensure that its ethical obligations are met, case law does not address the question of what obligations an insurer has if an actual conflict develops.

IDAHO

A. Parameters of Insured’s Right to Independent Counsel

Although the Idaho courts have not directly considered the question of whether an insured is entitled to independent counsel when a conflict of interest exists, in 1941 the Supreme Court indirectly considered this question in the case of Boise Motor Car Co. v. St Paul Mercury Indem. Co., 112 P.2d 1011 (Idaho 1941). There, the court briefly discussed the consequences that flow from an insurer reserving rights in connection with a matter, explaining that if the insured did not consent to the reservation, and the insurer nevertheless continued to assert a right to withdraw, the insurer was in breach of the insurance contract such that it was appropriate for the insured to protect itself by employing its own counsel. The court concluded that under this circumstance, “[a] fee paid the attorneys is … properly chargeable against respondent.” In other words, if an insurer reserves right, the insured may retain separate counsel funded by the defense.

B. Additional Requirements and Duties?

It appears that the Boise case is still relied on today for the general notion that an insurer must pay for separate counsel for its insured when it reserves rights. Since that time, however, there has been no elaboration on this requirement, such as the rate that must be provided or if there are any limitations on this requirement.

ILLINOIS

If there is an actual conflict of interest between the insurer and insured, the Illinois Supreme Court has held that the insured has the right to obtain independent counsel at the insurer’s expense. Murphy v. Urso, 430 N.E.2d 1079, 1084 (Ill. 1981) (holding that insurer could not appoint counsel to defend insureds with diametrically opposed interests); Thornton v. Paul, 384 N.E.2d 335, 343 (Ill. 1978), overruled on other grounds, Am. Family Mut. Ins. Co. v. Savickas, 739 N.E.2d 445 (Ill. 2000); Maryland Cas. Co. v. Peppers, 355 N.E.2d 24, 31 (Ill. 1976) (holding that conflict existed between insurer and insured where insured in underlying lawsuit could be held liable on either negligent or intentional act claims and only negligence claim was covered under policy). In order to determine whether an actual conflict exists, the court must determine whether the resolution of the factual issues in the underlying lawsuit would allow insurer-retained counsel to lay the groundwork for a later denial of coverage. Am. Family Mut. Ins. Co. v. W.H. McNaughton Builders, Inc., 843 N.E.2d 492, 498 (Ill. Ct. App. 2006) (holding that an actual conflict existed between the insurer and insured because the date on which the property damage began in the underlying construction defect lawsuit was disputed and would affect coverage); but see National Cas. Co. v. Forge Indus. Staffing, Inc., 567 F.3d 871 (7th Cir. 2009) (applying Illinois law) (holding that an actual conflict did not exist merely because of the hypothetical possibility that the plaintiffs could amend their complaint to add uncovered punitive damages claims). “The insurer must underwrite the reasonable

7 By right to withdraw, the court here means the insurer maintains the position that it does not have duty to defend, but nevertheless continues to defend under a reservation of rights.

See also:

*Santa’s Best Craft, LLC v. Zurich Am. Ins. Co.*, 941 N.E.2d 291 (Ill. App. Ct. 1st Dist. 2010) (when a conflict of interest exists between insured and insurer that prevents insurer from defending insured in an underlying suit, the insurer must permit the insured to be represented by counsel of its own choosing, and must reimburse the insured for the reasonable cost of defending the action).

*Am. Fam. Mut. Ins. Co. v. Westfield Ins. Co.*, 962 N.E.2d 993 (Ill. App. Ct. 4th Dist. 2011) (same; and, additionally, a reservation of rights must adequately inform the insured of the rights the insurer intends to reserve, because it is only when the insured is adequately informed of the potential policy defense that the insured can intelligently determine whether to retain his or her own counsel or accept the tender of defense counsel from the insurer).

*Econ. Premier Assur. Co. v. Faith in Action of McHenry County*, Nos. 1-11-2329, 1-11-2457, 2013 IL App (1st) 112329-U, 2013 WL 1227118 (1st Dist. Mar. 26, 2013) (trial court did not err in granting insured’s motion on the issue of the appointment of counsel; appellate court agreed that the conflict outlined by the insured at the beginning of the case, and repeated by appointed counsel during the case, is akin to *Peppers*, supra, because it created an unresolved conflict between the interests of the insured and the insurer as it would be in the insurer’s interest to keep the insured in the case).


For one commentator’s views, see Scott O. Reed, *Conflicts and the Use of Independent Counsel*, 25 DCBA BRIEF 26 (July 2013).

**INDIANA**

Generally, under Indiana law, where there is a coverage dispute, the insurer must either hire independent counsel for the insured and defend under a reservation of rights or file a declaratory judgment action. *Nat’l Union Fire Ins. Co. v. Standard Fusee Corp.*, 917 N.E.2d 170, 187 (Ind. Ct. App. 2009), vacated on other grounds, 940 N.E.2d 810 (Ind. 2010). Where a conflict of interest arises, an insurer “must” either retain independent counsel or choose to reimburse the insured for its choice of independent counsel. *All-Star Ins. Corp. v. Steel Bar, Inc.*, 324 F. Supp. 160, 165 (N.D. Ind. 1971) (holding that conflict existed necessitating retention of independent counsel where liability for underlying case and coverage dispute turned on whether injury was the result of an accident or insured’s intentional conduct). While this rule of law seems to imply an insured may select counsel only if the insurer does not retain counsel itself, subsequent cases provide otherwise. In *Snodgrass v. Baize*, 405 N.E.2d 48, 51 (Ind. Ct. App. 1980), the court stated that in instances where a conflict of interest arises, “the insurer should not defend, but, rather, [they] should reimburse the insured’s personal counsel.” In *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 F. Supp. 2d 797, 808 (S.D. Ind. 2005), a federal district court similarly stated that “the conflict may be
sufficient to require the insurer to pay for counsel of the insured’s choice.” A conflict of interest exists where there is a “significant risk that an attorney selected by and under the control [of the insurer] would be materially limited in the representation” as a result of the relationship with the insurer and the reservation of rights. Id. at 817 (emphasis added). In Armstrong Cleaners, an environmental pollution coverage matter, the district court denied the insurer’s motion for summary judgment and granted a cross motion in favor of the insureds, holding that the insureds had the right to select defense counsel where the insurer’s reservation of rights included coverage defenses concerning whether the pollution was the result of an “occurrence” or whether the insureds expected or intended to cause the alleged property damage. Id. at 815–16.

See also:

Am. Fam. Mut. Ins. Co. v. C.M.A. Mortgage, Inc., 682 F. Supp. 2d 879 (S.D. Ind. 2010) (under Indiana law, where insurer, in response to insured’s tender of defense, reserves it rights to deny coverage based on a policy exclusion, thus creating a conflict of interest, the insurer is required to reimburse the insured’s independent counsel as part of its duty to defend).

Auto-Owners Ins. Co. v. Lake Erie Land Co., Cause No. 2:12-CV-184 JD, 2013 WL 4401834 at *7 (N.D. Ind. Aug. 13, 2013) (citing Armstrong extensively, court stated: “Indiana has intentionally adopted the wider ‘significant risk’ approach reflected in [Indiana] Rule of Professional Conduct 1.7(a)(2), see Armstrong Cleaners, 364 F. Supp. 2d at 808), but even under the narrower standard advocated by the Plaintiff Insurers, [Lake Erie Land] would carry the day. The simple fact is that, by deciding the claims raised in the Hite Lawsuit, a jury must also necessarily decide the question of intent. The question of intent, in turn, goes a long way towards deciding the question of coverage. That clearly satisfies the National [Cas. Co. v. Forge Indus. Staffing, Inc., 567 F.3d 871 (7th Cir. 2009)] test, and that creates a conflict of interest.”).

IOWA

This state has not yet addressed this issue.

KANSAS

The Kansas Supreme Court stated that when a conflict of interest arises between an insured and insurer, the insurer must hire independent counsel to defend the insured in the action and notify the insured of the reservation of rights. Patrons Mut. Ins. Ass’n v. Harmon, 732 P.2d 741, 745 (Kan. 1987). No case law has addressed whether an insured has a right to select its own counsel absent a designation by the insurer. See also, Hackman v. W. Agric. Ins. Co., 275 P.3d 73 (Ct. App. Kans. 2012).

KENTUCKY

Kentucky case law states that “an insured is not required to accept a defense offered by the insurer under a reservation of rights.” Med. Protective Co. of Fort Wayne, Ind. v. Davis, 581 S.W.2d 25, 26 (Ky. App. 1979); see Cincinnati Ins. Co. v. Vance, 730 S.W.2d 521, 524 (Ky. 1987). Kentucky courts, however, have not addressed whether the insured may hire its own defense counsel or whether an insurer would be obligated to pay for such expense.

See also Lee v. Med. Protective Co., 858 F. Supp. 2d 803 (E.D. Ky. 2012) (if a conflict of interest arises for the attorney retained by the insurer to defend the insured against an underlying claim, the insured typically retains her own attorney due to the conflict, such as receipt of an offer to settle within the policy limits in a case where an excess verdict is possible; the attorney must advise the insured of the conflict
and advise her further about the possibility of an excess verdict and of her right to retain her own attorney).

LOUISIANA

A 1936 Louisiana appellate case was the first case in the state to recognize a policyholder’s right to independent counsel and award payment to such counsel of reasonable attorney fees. *Shehee-Ford Wagon & Harness Co. v. Cont’l Cas. Co.*, 170 So. 249 (La. App. 2d Cir. 1936). The court did state that it would generally not order payment of insured’s attorney fees but for the fact that the counsel provided by the insurer so “directly opposed” the policy. *Id* at 252 (insurer’s counsel denied the validity of the policy as part of the “defense” of the insured)

See also, *Emery v. Progressive Cas. Ins. Co.*, 49 So. 3d 17 (Ct. App. La. 1st Cir. 2010) (if insurer chooses to defend the insured but deny coverage, it must employ separate counsel).

Since the 1936 case, a state appellate court has held that “if the insurer chooses to represent the insured but deny coverage it must employ separate counsel. If it fails to do so, the insurer is liable for the attorney fees and costs the insured may incur for defending the suit.” *Dugas Pest Control of Baton Rouge, Inc. v. Mut. Fire, Marine and Inland Ins. Co.*, 504 So. 2d 1051, 1054 (La. App. 1st Cir. 1987); but cf. *Trinity Universal Ins. Co. v. Stevens Forestry Service, Inc.*, 335 F.3d 353, 356 (5th Cir 2003) (Louisiana law) (not requiring reimbursement for the insured’s additional counsel as long as insurer provided competent defense counsel).


MAINE

In *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220 (Me. 1980), the Supreme Judicial Court of Maine recognized in *dicta* the insurer’s obligation to provide independent counsel when a conflict arises between insurer and insured:

> Of course, the insurers’ obligation to defend can lead to a serious dilemma for the insurer. In some cases, the parties may agree that the insurer hire independent counsel for the insured. . . . The difficulties which these cases may pose will have to be addressed as they arise. For the case at bar, it is sufficient for us to hold that the complaint here does generate a duty to defend, because it discloses a potential for liability within the coverage and contains no allegation of facts which would necessarily exclude coverage.


The Supreme Judicial Court next addressed the issue in *Patrons Oxford Ins. Co. v. Harris*, 905 A.2d 819 (Me. 2006). There, in the context of reviewing a settlement entered by appointed counsel on behalf of an insured which was being defended under a reservation of rights, the Court commented that when an insurer defends subject to a reservation of rights—irrespective of the basis for the reservation and whether it creates an actual conflict of interest—it gives up its right to control the defense. *Id.* at 826.

---

8 Of interest, in the *Magoun* case cited by the *Dingwell* Court, the Massachusetts Court concluded that absent a separate agreement on the issue, when an insurer issues a reservation of rights and thereafter “acquiesces” in the insured’s selection of counsel, the insurer must pay the “reasonable charges” of that counsel.
MARYLAND

The Maryland state courts have concluded that, in the case of an actual conflict of interest, the insured is entitled to retain independent counsel to defend the claim and that the insurer is required to pay the reasonable cost of that defense. See Brohawn v. Transamerica Ins. Co., 276 Md. 396, 414-15, 347 A.2d 842 (1975); So. Md. Agric. Assoc., Inc. v. Bituminous Cas. Corp., 539 F. Supp. 1295 (D. Md. 1982); Allstate Ins. Co. v. Campbell, 334 Md. 381, 392, 639 A.2d 652, 657 (Md. App. 1994) (“We have recognized an obligation by the insurer to assume the reasonable costs of the defense provided by an independent attorney where independent counsel is necessary because there exists a conflict of interest between the insurer and the insured.”).

In Brohawn, an insurer brought a declaratory judgment action against its insured, seeking a declaration that it had no obligation to defend or indemnify its insured in an action brought by third parties based on alternative allegations of negligence and assault. The policy expressly excluded from coverage liabilities arising from any intentional acts committed by the insured, and the insured had pleaded guilty to assault in a criminal action arising out of the same incident. The Court concluded that the insurer's obligation to defend is determined by the allegations in the complaint and if the complaint alleges a claim potentially covered by the policy, the insurer has a duty to defend. Id. at 407, 347 A.2d 842. In order to fulfill this duty, the Brohawn Court concluded that the insurer must permit the insured to select independent counsel to defend the entire case and pay that independent counsel a reasonable fee:

We hold that an insured is not deprived of his contractual right to have a defense provided by the insurer when a conflict of interest between the two arises under circumstances like those in this case. When such a conflict of interest arises, the insured must be informed of the nature of the conflict and given the right either to accept an independent attorney selected by the insurer or to select an attorney himself to conduct his defense. If the insured elects to choose his own attorney, the insurer must assume the reasonable costs of the defense provided.

Id. at 414-15, 347 A.2d at 854.

At least one Maryland federal court, however, appears to differ. In Cardin v. Pac. Employers Ins. Co., 745 F. Supp. 330 (D. Md 1990), the Court concluded the insured was not entitled to select independent counsel of his own choosing when the counsel retained by the carrier is instructed to defend all claims. In Cardin, the insurer hired a private attorney from a noncaptive law firm to represent its insured subject to a reservation of rights in which the insurer asserted that it would not pay any judgment against the insured based on any “non-covered or excluded grounds.” The insured asserted that he was entitled to select his own counsel at the insurer’s expense because there was a conflict between his interests and that of the insurer in light of the fact that claims were made for both negligent and intentional acts and because there were claims for punitive damages. The District Court held that because appointed counsel: (1) was instructed by the insurer to represent only the interests of the insured; (2) was at no time also representing the insurer in the case; and (3) had an ethical responsibility to work only on behalf of the insured, his client, that no actual conflict of interest was created. The Court held, therefore, that the insurer had no duty to pay for independent counsel selected by the insured.

[The insured] asserts that he was entitled to independent counsel in the defense of the [claim] due to the conflict of interest that arose from [the insurer’s] reservation of rights.
based on the presence of covered and uncovered claims in the underlying suits. In addition, [the insured] alleges that unusual circumstances in this case, including the claim for compensatory damages far in excess of policy limits (with a provision for allocation of counsel fees if there were a recovery in excess of coverage), the claim for punitive damages and the related criminal investigation and prosecution, justified [his] right to select his own counsel and have that counsel paid by the insurer. Finally, Cardin argues that because [the law firm selected by the insurance company] receives referrals frequently from [the insurer], the lawyer might appear to have an incentive to steer his defense of [the insured] in a direction favorable to [the insurer].

* * *

[T]he potential existence of such different objectives cannot, per se, warrant requiring the insurer to pay the fees of the insured’s criminal defense counsel even if there could be an allocation of fees between the civil and criminal defense functions.

Id. at 335-36.

MASSACHUSETTS

In Magoun v. Liberty Mutual Insurance Co., 346 Mass 677, 195 N.E.2d 514 (1964), the Massachusetts Supreme Judicial Court was called upon to discuss the “dilemma confronting an insurance company, when it discovers in the course of defence [sic] of an action that it has a probable basis for disclaiming liability.” In Magoun, the insurer issued a reservation of rights to the insured, who rejected the insurer’s offer and selected its own counsel to defend the litigation. The insurer did not insist that it maintain control of the defense and merely cooperated with its insured’s chosen counsel. Ultimately, the insured prevailed in its defense of the underlying claim and thereafter filed suit against the insurer to recover the fees and expenses incurred in defending the litigation. The Court ruled that under such circumstances the insurer was required to pay the “reasonable charges” of the insured’s counsel, but did not elaborate.

More recently, in N. Sec. Ins. Co. v. Sandpiper Village Condominium Trust, 24 Mass. L. Rptr. 500, 2008 WL 4514515 (2008), the Superior Court was called upon to address the insurer’s obligation to reimburse its insureds for costs and fees paid by the insured to independent counsel who successfully defended the insured after the carrier issued a reservation of rights. In Sandpiper, the insurer argued that it should not be required to pay more than $150.00 per hour for counsel since this was the rate it paid counsel it typically retained. The insured’s selected counsel, however, billed at a higher hourly rate and the insured argued that it was entitled to be reimbursed for the full amount it had incurred. Although the Court concluded that the insured was entitled to be reimbursed for “reasonable fees” and outlined the parameters for making this determination, the Court declined to decide the issue in the context of the summary judgment motion before it because the Court concluded that the determination was a factual issue:

Next, the Court considers the defendants’ argument on summary judgment that the Court should require Northern Security to pay the $15,563.00 in attorney’s fees incurred by Marcus Errico Emmer & Brooks in the underlying case. The question of reasonable attorneys fees is a question left up to the sound discretion of the judge... In making that determination the Court considers, “the nature of the case and issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.”... The
defendants point to Marcus Errico Emmer & Brooks’ experience representing condominium associations and note that they successfully obtained a rare motion for reconsideration in the underlying case. In the instant case, however, the issue of “reasonableness,” is a genuine issue of material fact inappropriate on summary judgment.

Id.9

While the Sandpiper Court did not elaborate on which party bore the burden of establishing the reasonableness of counsel fees, this issue was addressed by the United States Court of Appeals in Liberty Mut. Ins. Co. v Cont’l Cas. Co., 771 F.2d 579 (1st Cir. 1985), which held that the insured, as the party claiming attorney’s fees, has the burden of proving that the fees are reasonable. Id. at 582.

See also:


MICHIGAN

The Michigan Supreme Court has not specifically addressed the issue of whether an insured, upon receipt of a reservation-of-rights letter, may insist upon independent counsel at the insurer’s expense. The federal district courts in Michigan, however, repeatedly have addressed that question. Those courts have held that where a conflict of interest between the insured and insurer arises—i.e. when the insurer “reserves its rights”—the insurer’s duty to defend is discharged when it selects independent counsel to represent the insured, as long as the insurer exercises good faith in its selection and the attorney selected is truly independent. Central Mich. Bd. of Trustees v. Employers Reinsur. Corp., 117 F. Supp. 2d 627, 633-35 (E.D. Mich. 2000) (insured could not recover costs of retaining counsel it selected in the absence of evidence that counsel selected by insurer could not be independent); Aetna Cas. & Sur. Co. v. Dow Chem. Co., 44 F. Supp. 2d 847, 860-61 (E.D. Mich. 1997) (insured has the right to select counsel where there is a conflict of interest between the insurer and the insured, but denying insured’s motion for partial summary judgment on recovery of pretender defense costs because there was a genuine issue of material fact as to whether a conflict-of-interest situation existed); Fed. Ins. Co. v. X-Rite, Inc., 748 F. Supp. 1223, 1226 (W.D. Mich. 1990) (policyholder was not entitled to recovery of defense costs incurred by law firm it selected in the absence of evidence that the law firm selected by the insurer could not act

---

9 The Court added the following footnote to its discussion:

The Court declines to reach the argument regarding whether the Court should only consider the usual price charged for similar services by other attorneys in the same area in place of the usual price paid by insurance companies to other attorneys for similar services in the same area.

Id. at n.6.
independently). Should the insurer fail to provide independent counsel, the insured is at liberty to hire its own defense counsel, and the insurer is then liable for all reasonable attorney fees. See Fireman’s Fund Ins. Cos. v. Ex-Cell-O Corp., 790 F. Supp. 1339, 1346 (E.D. Mich. 1992). “Reasonable” is measured by what a typical defense lawyer would have done under same or similar circumstances. Id.

But see, Lapham v. Jacobs Technology, Inc., Nos. 295482, 295489, 2011 WL 2848802 (Ct. App. Mich. July 19, 2011) (in case where issue was whether counsel selected by insurer on account of a conflict of interest necessitating the need for independent counsel truly was “independent,” court held that “communications between the [law] firm and [the insurer] is not enough to show that the [law] firm acted against [the insured’s] interests.”).

MINNESOTA

See also:
Cont’I Cas. Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 940 F. Supp. 2d 898, 928 (D. Minn. Mar. 29, 2013, as amended and op. denying reconsideration, Aug. 9, 2013) (“Generally, in the absence of an actual conflict of interest between the insured and the insurer, the insured has no right to choose independent defense counsel to provide the insured with a defense. Mut. Serv. Cas. Ins. Co. v. Luetmer, 474 N.W.2d 365, 368 (Minn. Ct. App. 1991). When a conflict of interest exists—such as when an insurer accepts the tender of defense but also disputes coverage—the insurer’s duty to defend is transformed into a ‘duty to reimburse [the insured] for reasonable attorneys’ fees.’ Prahm v. Rupp Constr. Co., 277 N.W.2d 389, 391 (Minn. 1979).”).

MISSISSIPPI
Where only a part of the claim against the insured, or only one (or less than all) of the underlying plaintiff’s multiple theories of recovery from the insured, is subject to potential coverage, the insurer is obligated only to provide a defense with respect to the potentially-covered claim and the insured must retain its own counsel, at its own expense, to defend the remaining noncovered claims. If, however, the insurer, at its election, agrees to provide a defense as to the entire action, encompassing both covered and noncovered claims, subject to a reservation of rights, the resulting potential conflict of interest entitles the insured to retain additional counsel with respect to the noncovered claims at the insurer’s expense. Moeller v. Am. Guar. & Liab. Ins. Co., 707 So. 2d 1062, 1070-71 (Miss. 1996); see also Twin City Fire Ins. Co. v. City of Madison, Miss., 309 F.3d 901 (5th Cir. 2002); Scottsdale Ins. Co. v. Bungee Racers, Inc., 2006 WL 2375367 (N.D. Miss. Aug. 14, 2006); Hartford Acc. & Indem. Co. v. Foster 528 So. 2d 255 (Miss., 1988) (discussing in detail the ethical dilemmas of an attorney selected by the insurer and noting that coverage, not policy limits, creates a conflict).

See also PIC Group, Inc. v. LandCoast Insul., Inc., 795 F. Supp. 2d 459 (S.D. Miss. 2011) (under Mississippi law, attorney fees incurred by the insured in retaining its own counsel to defend it against claims falling outside coverage of policy, after insurer chose to defend insured under a reservation of rights, were reasonable and, thus, were encompassed within the indemnity provision of a subcontractor’s agreement requiring the subcontractor to indemnify the insured for any “costs” or “expenses” in any
matter “arising out of, resulting from, caused by or in connection with” the agreement. Further, under Mississippi law, when an insurer undertakes the defense of its insured while reserving its right to deny coverage, the insurer must permit the insured to select its own counsel for those claims outside the coverage of the policy, and is responsible for the reasonable legal expenses incurred in defense of such claims. Compare with U.S. Liab. Ins. Co. v. Goldin Metals, Inc., 2012 WL 130254 (S.D. Miss. 2012), holding that the insurer is not entitled to depose insured’s counsel on issue of reasonableness of fees.

MISSOURI

The Missouri Supreme Court recently explained that where an insurer offers its insured a defense subject to a reservation of rights, the insured, in turn, may elect to allow the insurer to defend or refuse the insurer’s offer. If the insured rejects the defense offered the insurer subject to reservation, the insurer has one of three options: (1) represent the insured without reservation; (2) withdraw from representing the insured altogether; or (3) file a declaratory judgment action to determine the insurer’s obligations under the policy. Kinnaman-Carson v. Westport Ins. Corp., 283 S.W.3d 761, 765 (Mo. 2009) (citing Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 88 (Mo. Ct. App. 2005)). If the insurer selects the first option, it may maintain control of the defense; if, however, it selects the second or third options, it necessarily relinquishes control of the defense to the insured. Federal courts applying Missouri law have further held that where a conflict of interest arises, the carrier must provide independent counsel or pay the costs incurred by the insured in securing counsel of its choosing. Howard v. Russell Stover Candies, Inc., 649 F.2d 620, 625 (8th Cir. 1981) (applying Missouri law) (quoting U.S. Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 939 n.6 (8th Cir. 1978)).

See also Heubel Materials Handling Co., Inc. v. Universal Underwriters Ins. Co., 704 F.3d 558 (8th Cir. 2013) (“Under Missouri law, a ‘reservation of rights’ refers to an insurer’s offer ‘to defend its insured but reserve the right to later disclaim coverage.’ “) citing Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 88 (Mo. Ct. App. 2005) (per curiam). The insured may reject an insurer’s offer to defend with a reservation of rights, and if the insurer refuses to withdraw the reservation of rights, the insured is then free to hire independent counsel to defend the underlying suit and obtain compensation from the insurer if the underlying suit later is held to be covered by the policy. Id.

MONTANA

A. Parameters of Insured’s Right to Independent Counsel

Montana has not directly addressed the question of whether an insured is entitled to independent counsel if a reservation of rights is asserted and/or when a conflict of interest exists. Montana appears to have concluded indirectly, however, that an insurer is obligated to pay for separate counsel for its insured when an actual conflict has developed. See St. Paul Fire & Marine Ins. Co. v. Thompson, 433 P.2d 795 (Mont. 1967). In Thompson, an employee of a company was in an auto accident during the course and within the scope of his employment, but while driving his own vehicle. After resolution of the underlying action, the employer’s insurer, St. Paul, sued the employee as a subrogee because the company’s liability was based on respondeat superior. The employee’s own insurer, State Farm, defended the first action, however it refused to defend the indemnity action by St. Paul (it initially accepted, but then withdrew). In analyzing whether State Farm had a duty to defend this second action, the Court stated:

State Farm argues that it should be allowed to defend rather than paying counsel to defend the action. There can be no question of the good faith and sincere defense by counsel for State Farm in the Welsh suit nor here. However, the inconsistent and yes,
antagonistic positions that have developed make it clear that Thompson was required to hire his own counsel.

Id. at 799. In other words, the insured was entitled to retain separate counsel, apparently of his own choosing, because a conflict existed, and the insurer was obligated to fund it.

It should also be noted that in In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806 (Mont. 2000)—a declaratory relief action challenging insurer-imposed billing guidelines—the Supreme Court ruled that an insured is the sole client of defense counsel appointed by the insurer, and thus, the insurer is not a co-client of defense counsel. Nevertheless, the court explained that a potential conflict of interest may exist where an insurer provides a defense under a reservation of rights. Given the Thompson case, it appears an insured may retain separate counsel whenever an insurer reserves rights under Montana law, although, as indicated, no Montana court has directly considered this issue.

B. Additional Requirements and Duties?

It appears that no case since Thompson has addressed this issue, and thus there has been no elaboration on the scope of this requirement or accompanying duties.

NEBRASKA

The Nebraska Supreme Court explained in Hawkeye Cas. Co. v. Stoker, 48 N.W.2d 623 (Neb. 1951) that while an insurer may defend its insured under a reservation of rights with its insured’s consent, the insurer may not continue to defend the insured if it initiates a declaratory judgment action or other denies coverage under the policy. The existence of a conflict of interest between the insurer and the insured is not a basis upon which the insurer can refuse to defend the insured. Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 537-38 (8th Cir. 1970) (applying Nebraska law).

NEVADA

A. Right to Independent Counsel?

The state courts of Nevada have not yet considered the issue of whether an insured is entitled to independent counsel when a conflict of interest arises between the insurer and insured. A federal district court in Nevada has touched upon this issue, but did not reach a determination on the subject. In particular, in the case of Crystal Bay Gen’l Improvement Dist. v. Aetna Cas. & Sur. Co., 713 F. Supp. 1371 (D. Nev. 1989), an insurer reserved rights on a claim tendered by its insured because of the possible application of the sudden and accidental pollution exclusion. The insurer, acknowledging the presence of a conflict, suggested the insured retain independent counsel, at its own expense. The court analyzed this conduct in the context of bad faith and in particular, in terms of the whether the insurer had given consideration to its insured’s interests equivalent to its own. The court explained:

The result is that … the insurer must conduct itself with that degree of care which would be used by an ordinarily prudent person in the management of his own business, with no policy limits applicable to the claim.

Id. at 1379. The court stated that some courts have found this standard to require the insurer to provide its insured with independent counsel, but expressly declined to address this issue since it had not been briefed.
In a more recent Federal district court case, however, the Court held that “Nevada law requires that independent Cumis counsel must be appointed when a conflict of interest arises between the insured and insurer.” Hansen v. State Farm Mut. Auto. Ins. Co., No. 2:10-cv-01434-MMD-RJJ, 2012 WL 6205722 at *7 (D. Nev. Dec. 12, 2012).

See also:


B. Further Requirements and Duties?

As the above discussion notes, the insurer must give the same degree of consideration to the interests of the insured as it does to its own, and this may include provision of independent counsel to defend the insured if a conflict develops. Except for the federal court’s decision in the Hansen case, however, there has been no further elaboration on this principle in connection with whether an insured has a right to independent counsel if a conflict of interest exists under Nevada law.

NEW HAMPSHIRE

In White Mountain Cable Constr. Co., Inc. v. Transamerica Ins. Co., 137 N.H. 478, 631 A.2d 907 (1993), the New Hampshire Supreme Court held that where there is a conflict between the insurer and the insured, the insurer is not relieved of its duty to defend and, although the insurer must defend, it is precluded from controlling the defense. The Court appears to hold that independent counsel must be provided:

Having a duty to defend, and faced with a conflict of interest, the [insurer] could have hired independent counsel to defend the [insured] while intervening on its own behalf. In the alternative, the [insurer] could have provided the defense but reserved its right to later deny coverage.

Id. at 913.

NEW JERSEY

Under New Jersey law, if an actual conflict exists between the insured and the insurer as a result of the issuance of a reservation of rights with respect to mutually exclusive covered and noncovered claims, the insured is permitted to select independent counsel at the expense of the insurer. Under such circumstances, the insurer is required to pay independent counsel for the reasonable costs incurred in defending the entire action.

Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 267 A.2d 7 (1970), is the earliest reported New Jersey case addressing this issue. In Burd, the Court recognized that in circumstances where there is a conflict of interest between the carrier and the insured over coverage and where “the case may be so defended by a
carrier as to prejudice the insured thereafter upon the issue of coverage,” the carrier is not permitted to control the defense.

The issue was next addressed in Yeoman’s v. Allstate Ins. Co., 130 N. J. Super. 48, 324 A.2d 906 (1974). In Yeoman’s the carrier insured two codefendants who had antagonistic defenses, and selected separate counsel to defend each insured. In holding that the carrier had fulfilled its duty to both insureds by retaining separate counsel for each, the Court distinguished this situation, (i.e. a conflict between two insureds), from that presented in Burd, supra, where an actual conflict existed between insurer and insured. The Court pointed out that only in the later situation is the insured entitled to select independent counsel to defend the action.

We must, however, disassociate ourselves from that portion of the trial court’s opinion holding that under the circumstances [the insurer] should not have selected defense counsel, but should have permitted the [insured] to do so, subject to [the insurer’s] approval and at its expense. Two of the cases cited in support of this theory ... are not pertinent. They involved the issue of the company’s right to control the defense of pending tort litigation where the company disputed its obligation to pay any adverse judgment that might be rendered.

Id. at 53-54.

The issue of what billing rate an insurer is required to pay independent counsel retained to defend an insured when an actual conflict exists was addressed in Aquino v. State Farm Ins. Co., 349 N.J. Super. 402, 793 A.2d 824 (2002). There, the Court concluded that independent counsel was not able to dictate the rate the carrier was required to pay, and concluded that the insurer was only required to pay a “reasonable fee” for work performed after counsel entered his appearance in the case. While the Court declined to decide what a “reasonable fee” would be, the Court did outline factors which should be considered in making this determination.

It does not follow, however, that [independent counsel] is entitled to be compensated by the carriers for that defense work on the same basis that he is entitled to be compensated for work performed in connection with the declaratory judgment action. While Aquino may have been entitled to an attorney of his selection to handle the claim of intentional conduct, he does not have the right to dictate to the insurers the hourly rate they must pay. The trial court here should have determined a reasonable hourly rate for defense work of this nature and set a fee accordingly. Published material indicates, for example, that lawyers who perform insurance defense work may bill at a significantly lower hourly rate than do lawyers rendering other legal services. [Citation omitted.]

Nor does it follow that counsel is entitled to an award of fees for all the work he has performed. We have conducted our own cursory review of the affidavit of service in Faison v. Aquino. It commences with his initial meeting with Aquino in December 1997 and his background investigation. He did not formally enter the case until he was granted that limited relief in March 1999. Clearly, much of the earlier work was entirely unrelated to the conflict of interest confronting Travelers and we are unable to perceive any basis why the carriers should be required to assume responsibility for those fees.

Moreover, it has not escaped our notice that [the insured’s independent] counsel was unhappy with the nature of the defense efforts put forth by the firm selected by [the insurer], and spent at least a portion of his time monitoring that work. Again, we see no
basis to charge such work to the carriers at all, at least to the extent it was not specifically designed to protect [the insured] against the conflict of interest.

** * **

We are satisfied that with the limitations we have set forth, the result which we have reached is fair and appropriate in the context of this case. [The insurer], in essence, undertook, according to its letter of December 17, 1997, to defend [its insured] against allegations of intentional conduct, as well as negligence, and assured him his “rights and interests [would be] protected.” Having undertaken that responsibility, we cannot consider it unfair to charge it with the reasonable cost of defending against allegations of intentional conduct when the attorneys it selected had an inherent conflict of interest which precluded them from handling both aspects of the defense. It will, in substance and effect, be responsible for that which it originally agreed to provide, no more and no less.

*Id. at 349 N.J. Super. at 415-16; 793 A.2d at 832-33.*

In a more recent unpublished opinion, *Township of Readington v Gen'l Star Ins. Co.*, 2006 WL 551404 (N.J. Super. March 3, 2006), the Superior Court held that in a matter involving nonmutually exclusive claims against an insured, an insurer was permitted to defend the entire action under a reservation of rights and to select and retain counsel. The Court further held that under such circumstances, if the insured rejects the proffered defense and retains its own counsel, it is precluded from recovering the fees it incurs.

Most recently, a federal district court summarized the current state of New Jersey law as follows:


**NEW MEXICO**

The New Mexico Supreme Court has held that when an insurer perceives a conflict of interest, it may demand that the policyholder obtain independent counsel, or the insurer may satisfy its duty to defend by employing two sets of attorneys, one to represent the insured and one to represent the insurer. *Am. Employers Ins. Co. v. Crawford*, 533 P.2d 1203, 1209 (N.M. 1975) (citing *Employers’ Fire Ins. Co. v. Beals*, 240 A.2d 397 (R.I. 1968), abrogated on other grounds by *Peerless Ins. Co. v. Viegas*, 667 A.2d 785 (R.I. 1995)).
NEW YORK

While there is no New York statute pertaining to an insured’s right to select independent counsel, under New York case law, an insured is permitted to select independent counsel when there is an actual conflict of interest between the interests of the insured and the insurer concerning the defense of a liability claim. Under such circumstances, the insurer is required to pay independent counsel a “reasonable fee”.


The *Prashker* case involved a claim brought by the personal representative of a deceased passenger who was killed in a private airplane crash against the estate of the pilot. It was alleged that the pilot operated the aircraft in violation of his license, which allegation could serve as a basis for the pilot’s insurer to deny coverage. The Court held that the insurer had a duty to defend the claim and, when it was presented with the suggestion that counsel appointed by the carrier to defend might have divided loyalties, responded as follows:

The objection taken by the insurance company is without substance that it would subject to divided loyalty any attorneys who might defend the action, in that their duty to the assureds would be to endeavor to defeat recovery on any ground, whereas their duty to the insurance company would be to defeat recovery only upon such grounds as might render the insurance company liable. If any such conflict of interest arises, as it probably will, the selection of the attorneys to represent the assureds should be made by them rather than by the insurance company, which should remain liable for the payment of the reasonable value of the services of whatever attorneys the assureds select.

In *Goldfarb*, supra, New York’s highest court addressed the conflict situation and the right to select independent counsel in the context of a case where the plaintiff asserted mutually exclusive alternative claims for negligence and intentional tort in a case alleging that a dentist had sexually abused a patient during the course of treatment. Relying on the *Prashker* decision, the Court concluded that because “the insurer’s interest in defending the lawsuit is in conflict with the defendant’s interest—the insurer being liable only upon some of the grounds for recovery asserted and not upon others—[the defendant] is entitled to defense by an attorney of his own choosing, whose reasonable fee is to be paid by the insurer.” 53 N.Y.2d at 427, 425 N.E.2d 815. The Court clarified, however, that not every conflict requires the appointment of independent counsel:

That is not to say that a conflict of interest requiring retention of separate counsel will arise in every case where multiple claims are made. Independent counsel is only necessary in cases where the defense attorney’s duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds which would render the insurer liable. When such a conflict is apparent, the insured must be free to choose his own counsel whose reasonable fee is to be paid by the insurer. On the other hand, where multiple claims present no conflict—for example, where the insurance contract provides liability coverage only for personal injuries and the claim against the insured seeks recovery for property damage as well as for personal injuries—no threat of divided loyalty is present and there is no need for the retention of separate counsel. This is so because in such a situation the question of insurance coverage is not intertwined with the question of the insured’s liability.
Originally Presented at the ABA Section of Litigation Insurance Coverage Litigation Committee CLE Seminar, March 4-6, 2010: Independent Defense Counsel: When can the Policyholder Select its Own Defense Lawyer and How Much Does the Insurer Have to Pay? A 50-State Survey
Re-presented at the Seminar on March 1, 2013 and on March 6, 2014


NORTH CAROLINA

In a case where the insurance company as reserved its rights, a North Carolina appellate court has held that a policyholder may refuse the insurance company’s defense, select its own counsel, and seek indemnification of its legal expenses. Nat’l Mortg. Corp. v. Am. Title Ins. Co. 41 N.C. App. 613, 622-23, 255 S.E.2d 622, 629 (1979) reversed on other grounds, 299 N.C. 369, 261 S.E.2d 844 (1980). The Supreme Court reversed this case on other grounds, stating that the policy did not cover the insured. The Court, however, made no mention of independent-counsel or attorney’s-fees issues.

NORTH DAKOTA

A trial court may require an insurer, in instances where a conflict of interest is present, to “furnish independent counsel to represent the insured on the insurer’s claims and defenses, or by requiring reimbursement of the insured’s reasonable attorney fees for those services.” Fetch v. Quam, 530 N.W.2d 337, 341 (N.D. 1995).

OHIO

The Ohio Supreme Court has stated that an insurer’s issuance of a reservation of rights letter, by itself, does not automatically obligate the insurer to pay for an insured’s independent counsel. Socony-Vacuum Oil Co. v. Cont’l Cas. Co., 59 N.E.2d 199 (Ohio 1945). Only when the interests of the insurer and insured are “mutually exclusive” does an obligation on the part of the insurer to pay the cost of the insured’s private counsel arise. Id. Therefore, the test in determining whether an insured can secure its own counsel at the expense of the insurer “is whether the insurer’s reservation of rights renders it impossible for the company to defend both its own interests and those of its insured.” In Socony-Vacuum, the Supreme Court held that interests of the insurer and the insured were mutually exclusive, as both the liability in the underlying case and the coverage questions turned on whether the alleged tortfeasor was a Socony-Vacuum employee acting within the course and scope of his employment at the time of the incident. Intermediate appellate courts, however, have held that conflicts of interest of lesser magnitude do not require the insurer to pay for the insured’s independent or private counsel. See, e.g., Lusk v. Imperial Cas. & Indem., 603 N.E.2d 420, 423 (Ohio Ct. App. 1992) (holding that insured was not entitled to reimbursement for private counsel where two insurers had offered to defend insured under reservations of rights and the insurers’ reservations concerned only which insurer’s policy had a duty to indemnify the insured in event of adverse judgment); see also Red Head Brass, Inc. v. Buckeye Union Ins. Co., 735 N.E.2d 48, 55 (Ohio Ct. App. 1999) (holding that the insured was not entitled to reimbursement for cost of private counsel hired to prosecute compulsory counterclaims or for defense costs incurred after covered claims had been dismissed by court on summary judgment). Where the insurer’s interest and the insured’s interest are mutually exclusive, an insurer that offers the insured the option to hire private counsel must bear the expense for reasonable attorney fees. Socony-Vacuum, 59 N.E.2d at 205.

OKLAHOMA

The only Oklahoma case that has addressed this issue stated the following:

From our review of these decisions and others, we discern a common theme: not every perceived or potential conflict of interest automatically gives rise to a duty on the part of the insurer to pay for the insured’s choice of independent counsel. Independent counsel is
only necessary in cases where the defense attorney’s duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds that would render the insurer liable. Conversely, absent a threat of divided loyalty between the insured and insurer, no need for retention of independent counsel arises because the issue of coverage is then separate from the issue of liability. However, an insurer may demand their insured obtain independent counsel when the insurer perceives a conflict of interest.


OREGON

A. Parameters of Insured’s Right to Independent Counsel

Oregon law does not require the insurer to provide the insured with separate counsel, even when a clear conflict of interest arises. The Oregon courts first considered this issue in the case of Ferguson v. Birmingham Fire Ins. Co., 460 P.2d 342 (Or. 1969), in which an insurer reserved rights after its insured tendered a complaint alleging willful trespass. The insured refused the defense offered by the insurer under reservation, and retained separate counsel. In analyzing whether the insurer had acted inappropriately, the Ferguson court concluded that the danger that an insurer would not provide the insured with an adequate defense because it could later assert a defense of noncoverage was minimal. In particular, the court explained that “[t]he insurer knows that when it is the defendant in a lawsuit brought by one of its policy holders the jury’s sympathy for the insured frequently produces a plaintiff verdict even when the insurer’s case is strong. Knowing this, the insurer is not likely to relax its efforts in defending the action against the insured. If the insurer feels certain that it can successfully defend an action brought against it by the insured, it is not likely to accept the insured’s tender of the defense in the first place.” This analysis was reiterated in the subsequent case of Home Indem. Co. v. Stimson Lumber Co., 229 F. Supp. 2d 1075 (D. Or. 2001).

The Ferguson court did find that if the insured prevailed in the coverage dispute on remand, the insurer would have to pay for the defense costs incurred in the underlying lawsuit. Thus, in effect, an insurer risks having to pay for separate counsel if it concludes no defense is owed and its coverage evaluation is incorrect. Ferguson, supra, 460 P.2d at 349-50.

B. Additional Requirements and Duties?

It does not appear that any Oregon statute or case law has established any additional requirements on insurers or insureds in connection with this issue.

PENNSYLVANIA

Before 2013, no state appellate court had addressed the issue of an insured’s right to select independent counsel, although at least one trial court has concluded that the issuance of a reservation of rights letter does not automatically create a conflict and the insurer’s appointed counsel has only one client: the insured. Bedwell Co. v. D. Allen Bros., 2006 WL 3692592 at *2 (Pa. Com. Pl. Dec. 6, 2006).

10 It should be noted that despite the case law cited herein, certain treatises and authorities have concluded that Oregon does not have case law directly considering this question.
On July 10, 2013, the Superior Court affirmed a lower-court decision, holding that, as a matter of first impression, when an insurer tenders a defense subject to a reservation of rights to contest coverage, the insured may choose to accept the defense or decline the insurer’s tender of a qualified defense and furnish its own defense. Babcock & Wilcox Co. v. Am. Nuclear Insurers, 76 A.3d 1, 2013 PA Super 174 (Pa. Super. Ct. 2013).

Alternatively, Pennsylvania’s federal courts have held that if there is an actual conflict of interest between the insurer and the insured, that the insured is permitted to select counsel of its choosing whose reasonable fee is to be paid by the insurer.

In Krueger Assoc., Inc., v. ADT Sec. Systems, 1994 WL 709380 (E.D. Pa. Dec. 20, 1994), the Court concluded that “[i]t is settled law that ‘where conflicts of interest between an insurer and its insured arise, such that a question as to the loyalty of the insurer’s counsel to that insured is raised, the insured is entitled to select its counsel, whose reasonable fee is to be paid by the insurer.’” Id., at *5 (quoting Emons Industries, Inc. v. Liberty Mut. Ins. Co., 749 F. Supp. 1289, 1297 (S.D.N.Y. 1990)). The Krueger Court did not elaborate on what a reasonable fee is or the factors which should be considered in making this determination.


“It is clear that in Pennsylvania, as in most other jurisdictions, if an insurance company breaches its duty to defend, it is liable to reimburse the [insured] the costs the latter incurred in conducting its own defense.” St. Paul Fire & Marine Ins. Co. v. Roach Bros. Co., 639 F. Supp. 134, 138-39 (E.D. Pa. 1986). An insurance company breaches its duty to defend when a conflict of interest arises between the insurer and its insured “such that the company’s pursuit of its own best interests in the litigation is incompatible with the best interests of the [insured].” Id. at 139. A conflict of interest between an insurer and its insured will not relieve insurer of its duty to provide a defense. See Consolidated Rail Corp. v. Hartford Acc. & Indem. Co., 676 F. Supp. 82, 86 (E.D. Pa. 1987). Rather, courts have concluded that one appropriate resolution in this circumstance “is for the insurer to obtain separate, independent counsel for each of its insureds, or to pay the costs incurred by an insured in hiring counsel.” Id.

In support of its contention that it is entitled to remuneration for the procurement of conflict-free counsel, [insured] cites to Cay Divers, Inc. v. Raven, 812 F.2d 866 (3d Cir. 1987) (applying law of the Virgin Islands). In Raven, the Third Circuit found that the

 Provision of independent counsel or reimbursement for the insured’s choice of counsel and expenses ordinarily fulfills the duty to defend, and is particularly appropriate where, as here, there is a conflict of interest between the insurer and the insured.... Indeed, where there is a conflict of interest, ethical considerations may even require that the insurer provide independent counsel rather than participate in the defense.

Id. at 870 n.3.


The insured’s right to select independent counsel at the expense of the insurer only applies, however, if there is an actual conflict, and at least one Pennsylvania federal court has concluded that the fact that an

In the present case, there were at least two potential sources of conflict between [insurer] and its insureds, the defendants: [insurer’s] policy did not cover intentional acts of wrongdoing or claims for punitive damages, and the [plaintiffs’] claims greatly exceeded the policy limits. But, since the [plaintiffs] would be entitled to prevail even if they did not prove intentional wrongdoing on the part of the defendants, but merely negligence (for example, a genuine but erroneous belief that the [plaintiffs] had abandoned the project, or a genuine but unfounded belief that the [plaintiffs] had consented to defendant’s activities, or lack of communication within defendant’s organization concerning their representation of the [plaintiffs], it was the obligation of the [insurer] to provide a defense. Moreover, that obligation extended to *all* claims asserted by the [plaintiffs], regardless of the limited nature of [insurer’s] obligation to indemnify. *Gedeon v. State Farm Mut. Auto. Ins. Co.*, 410 Pa. 55, 188 A.2d 320 (1963); *Wilson v. Md. Cas. Co.*, 377 Pa. 588, 105 A.2d 304 (1954); *Cadwallader v. New Amsterdam Cas. Co.*, 396 Pa. 582, 152 A.2d 484 (1959).

With respect to the policy limits, no actual conflict of interest arises except in connection with possible settlement negotiations (for example, an opportunity to settle within the policy limits, favored by the insured but not by the company); although a very great disparity between exposure and policy limits may suggest that the uninsured portion of the claim is what is really at stake in the litigation. But where a claim is settled for the full policy limits, with the consent of the insured, there is obviously neither conflict nor the potential for conflict.

With respect to the existence of both covered and uncovered claims or theories of liability, the potential for conflict is much greater, but actual conflict is not inevitable. In some circumstances, the company might be tempted to save money by urging that the insured was guilty of intentional wrongdoing or wanton recklessness, rather than mere negligence. At the least hint of such a development, an obligation to provide independent counsel would be triggered, and the company’s unwillingness to protect the full interests of its assured would probably also trigger a reimbursement obligation.

But I am aware of no case, from any jurisdiction, which has held that the mere theoretical possibility of such a conflict requires the company to pay for the assured’s separate representation. The [insureds] place principal reliance upon the California case of *San Diego Navy Fed. Credit Union v. Cumis Ins. Co.*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984). That case, however, held merely that where punitive damages (not covered) and compensatory damages (covered) are sought against the assured, and the exposure is in excess of the policy limits, and there is an opportunity to settle the entire case within the policy limits, the company is obligated either to settle within the policy limits, or to pay the reasonable expenses of independent counsel to represent the interests of the assured. It is unnecessary for me to essay a prediction as to whether the Pennsylvania Supreme Court would agree with the *Cumis* decision; for even under the holding of that case, [insureds] would not prevail here.
See also:

Eckman v. Erie Ins. Exch., 2011 PA Super 87, 21 A.3d 1203, 1208-09 (2011) (fact that any attorney appointed by insurer to represent insureds in underlying defamation action would be compensated by insurer did not require per se disqualification of the attorney on the grounds of conflict of interest, relying on Pa. R. Prof. Cond. 1.7(a)(2)).

Am. & Foreign Ins. Co. v. Jerry’s Sport Center, Inc., 606 Pa. 584, 616, 2 A.3d 526, 545 (2010) (an insurer faced with uncertainty about its duty to indemnify offers a defense under a reservation of rights to avoid the risks to which it might be exposed if an inept or lackadaisical defense of the underlying action results in the imposition of liability for which it ultimately turns out there was a duty to indemnify).

Yaron v. Darwin Nat’l Ins. Co., No. 502, 2011 WL 3027835 (Pa. Com. Pl. July 5, 2011) (Trial order) (liability insurer’s issuance of a reservation of rights letter, warning insureds that the claims asserted against them could trigger an exclusion of coverage, did not automatically create a conflict of interest between insurer and insureds, so as to entitle insureds to select their own defense counsel to be paid for by insurer subject to its reservation of rights; reservation of rights presented only the possibility of a conflict, and some evidence of an actual conflict would be required before requiring insurer to pay for insured’s chosen counsel).

RHODE ISLAND

The Rhode Island courts have concluded that in the case of a conflict of interest between insurer and insured, the insured is permitted to reject the insurer’s selected counsel and retain independent counsel of its own choosing at the reasonable expense of the insurer. But Rhode Island’s court have yet to provide guidance as to how this “reasonable fee” is to be determined.


If, however, an insured, after having been apprised of the conflicting interests existing between him and his insurer, declines to be represented by the insurer’s attorney, we have a different situation. Concerned as we are that the public’s trust in the judicial processes be maintained, this court cannot stand idly by in such circumstances. We are as conscious of an insurer’s concern that it control the defense of any action brought against one of its insureds as we are of an insured’s expectations that his rights will be properly protected. In our opinion, however, an insured, when faced with the quandary posited by the facts of the instant case, has a legitimate right to refuse to accept the offer of a defense counsel appointed by the insurance company; and when an insured elects to exercise this prerogative, the insurer’s desire to control the defense must yield to its obligation to defend its policyholder.

There is, therefore, a discernible need to discover a solution to this dilemma which will, at the same time, be mutually protective and satisfactory to the parties.

Beals, 103 R.I. 633-34; 240 A.2d at 403.

More recently, the Supreme Court, in Labonte v. National Grange Mut. Ins. Co., 810 A.2d 250 (R.I. 2002) re-affirmed the Beals holding, but declined to extend the insurer’s obligation to provide independent counsel to a presuit coverage investigation:
In *Beals*, the insurer found itself in a situation in which it was simultaneously suing the insured in a declaratory judgment action and defending the insured in a tort suit. In the declaratory judgment action, the insurer attempted to demonstrate that the insured’s actions were intentional, a position it certainly did not want to advance in the tort action. In face of the clear conflict, this Court required the insurer to provide the insured with an independent attorney in the tort action and held that “the insurer’s desire to control the defense must yield to its obligation to defend its policyholder.” . . . Here, in contrast, plaintiff had not yet been sued when he requested independent counsel. Moreover, defendant had not yet brought a declaratory action against plaintiff at the time it sought to examine him.

Therefore, on the basis of the facts of this case, we decline to extend *Beals* to require an insurer to provide independent counsel to an insured on each occasion that the insurer initiates a coverage investigation.

*Labonte*, 810 A.2d at 254-55.

See also *Quality Concrete Corp. v. Travelers Prop. Cas. Co. of Am.*, 43 A.3d 16, 20-22 (R.I. 2012) (insured not entitled to have insurer—which issued CGL policy—subsidize engagement of independent counsel to represent insured in addition to law firm that insurer had hired to represent insured in connection with death of trespasser, even though insurer reserved right to deny coverage for punitive damages; there was no actual conflict between prime interests of insurer and those of insured given that no complaint was ever filed by trespasser’s estate and, as a general rule, the engagement of an independent counsel to represent the insured due to a conflict of interest between the insured and the liability insurer should be approved by the insurer).

**SOUTH CAROLINA**

In South Carolina, a case defended under a reservation of rights only gives rise to a “potential,” not actual, conflict of interest. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP*, 336 F. Supp. 2d 610, 621 (D.S.C., 2004). Thus, an insured does not have an automatic right to select and retain his or her own counsel. *Id.*

*Ben Arnold* was affirmed at 433 F.3d 365 (4th Cir. 2005) (under S.C. law as predicted by federal court, CGL insurer’s reservation of rights letter disclaiming coverage as to some claims asserted against insured, but not as to others, did not create per se conflict of interest; thus, insurer was not required to cover legal fees of counsel that insured appointed to replace insurer’s chosen counsel, after insured had rejected insurer’s counsel on conflict grounds and excluded insurer from litigation. Further, under S.C. law, no actual conflict of interest arose when CGL insurer sent reservation of rights letter disclaiming coverage as to some sexual harassment claims asserted against insured, but not as to others, and thus insured was not entitled to reimbursement from insurer of legal fees and costs of settling cases using insured’s own counsel; there was no inherent conflict since claims turned largely on credibility determination and thus fact that only some claims were covered would not divide insurer and insured, and further more insured ousted insurer from defense before any hypothetical conflict could materialize).

See also:

2012). Similarly, in *Twin City Fire Ins. Co. v. Bear Arnold-Surebelt Beverages*, 433 F.3d 365, 366 (4th Cir. 2010), the Court held that when a policyholder notifies its insurer of a potentially covered suit, the ‘insurance company, in turn, typically chooses, retains, and pays private counsel to represent the insured as to all claims in that suit.’ *Id.* at 366.” [emphasis added by Crossmann court]).

**SOUTH DAKOTA**

A. **Parameters of Insured’s Right to Independent Counsel**

South Dakota considered the issue of what duties an insurer has when a conflict of interest arises between itself and its insured in the case of *Connolly v. Standard Cas. Co.*, 73 N.W.2d 119 (S.D. 1955). The insurer defended under a reservation of rights.

The insured argued that, by assuming defense of the underlying case, the insurer was estopped from denying liability. However, the court explained that it was a well-settled rule that an insurer is not so estopped as long as timely notice is given to the insured that it has not waived the benefit of its coverage defenses under the policy, i.e., reserved rights. The court found the insured here had impliedly consented to defense under these circumstances. If it had not, however, the court suggested that the insurer could not retain control of the defense and at the same time reserve the right to disclaim liability. Thus, while the court does not explicitly set forth a requirement, it suggests that under these circumstances, separate counsel for the insured is warranted. *Id.* at 122. The Supreme Court reaffirmed this approach in *St. Paul Fire and Marine Ins. Co. v. Engelmann*, 639 N.W.2d 192, 201 (S.D. 2002).

The South Dakota federal district court and the Eight Circuit have reached the same conclusion, specifically finding that a reservation of rights can create a conflict of interest. See *State Farm Mut. Auto. Ins. Co. v. Armstrong Extinguisher Service, Inc.*, 791 F. Supp. 799 (D.S.D. 1992); *Kansas Bankers Sur. Co. v. Lynass*, 920 F.2d 546 (8th Cir. 1990). The *Lynass* Court explained: “It is clear how a conflict of interest can develop in a situation like this. Kansas Bankers could conceivably offer only a token defense if it knows that it can later assert non-coverage. If an insurer does not think that the loss on which it is defending will be covered under the policy, the insurer may not be motivated to achieve the best possible settlement or result.” *Id.* at 549.

B. **Additional Requirements and Duties?**

Although South Dakota appears to have concluded that an insured may retain separate counsel when a conflict of interest exists, and that a reservation of rights alone can create a conflict, South Dakota has not elaborated upon an insurer’s obligations under these circumstances.

**TENNESSEE**

The Tennessee Supreme Court has recognized the existence of a conflict of interest in an insurer’s provision of a defense under a reservation of rights. *Petition of Youngblood*, 895 S.W.2d 322, 328 (Tenn., 1995). Courts in Tennessee have also held that “an insurer in Tennessee clearly possesses no right to control the methods or means chosen by an attorney to defend the insured.” *Givens v. Mullikin ex rel. Estate of McElvaney*, 75 S.W.3d 383, 394 (Tenn. 2002) (emphasis added). However, the courts have not yet addressed the right to independent counsel.
TEXAS

A. When The Right Arises


The Texas Supreme Court refined this rule in *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004). This case arose from a car accident in Dallas County. Davalos, the insured, was injured in the accident and sued the driver of the other car in Matagorda County. *Id.* at 687. The other driver then sued Davalos in Dallas County, which suit Davalos tendered to his insurer for a defense. Before insurer-appointed counsel appeared in the case, Davalos, through his Matagorda County counsel, moved to transfer venue of the Dallas case to Matagorda County. *Id.* The insurer informed Davalos that it opposed the transfer of venue. Davalos advised the insurer that its opposition to the transfer of venue created a conflict, which Davalos believed gave him the right to choose his own independent counsel. *Id.* Davalos refused to accept the insurer-appointed defense counsel and demanded that the insurer pay for his independently retained lawyer. The case centered around whether the insurer’s disagreement with Davalos, its insured, over the proper venue of the case created the type of conflict that triggered the insured’s right to independent counsel (and the insurer’s obligation to pay that lawyer’s fees).

The Texas Supreme Court initially accepted the proposition that the carrier may be precluded from insisting on its contractual right to control the defense where there is a “conflict of interest” between the carrier and the insured. The most common situation giving rise to such a conflict, the Court acknowledged, is where there is a dispute between the carrier and the insured as to the existence or scope of coverage. “When the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense.” *Id.* at 689. Under those circumstances, the insured has the right to select defense counsel and send the bill to its carrier.

The *Davalos* Court listed other types of conflicts that may justify an insured’s refusal of a defense offered by the carrier:

- When the defense tendered “is not a complete defense under circumstances in which it should have been.”
- When “the attorney hired by the carrier acts unethically and, at the insurer’s direction, advances the insurer’s interest at the expense of the insured’s.”
- When “the defense would not, under the governing law, satisfy the insurer’s duty to defend.”
- When, although the defense is otherwise proper, “the insurer attempts to obtain some type of concession from the insured before it will defend.”

The conflict alleged by Davalos, however, concerned a disagreement over the appropriate venue for the defense of a third-party claim, not Davalos’s independent right to pursue his own remedy. According to the Court, the insurer’s actions did not actually deprive Davalos of the defense attorney’s independent counsel on any issue and, thus, did not amount to a disqualifying conflict of interest. Because Davalos
rejected the insurer’s defense in the absence of a qualifying conflict, he lost his right to recover the costs of that defense.

B. When A Reservation Of Rights Might Not Be Sufficient To Create A Conflict

Texas case law provides very few examples of reservation-of-rights letters that are insufficient to create an independent-counsel-triggering conflict of interest. Clearly, a disagreement over the venue of the lawsuit will not create such a conflict. See Davalos, supra. If in doubt about whether an insurer’s reservation of rights is of such nature as to create a conflict of interest, one might look to the general rule provided by United States District Judge Lee Rosenthal in Rx.com, Inc. v. Hartford Fire Ins. Co., 426 F. Supp. 2d 546, 559 (S.D. Tex. 2006): “[a] conflict of interest does not arise unless the outcome of the coverage issue can be controlled by counsel retained by the insurer for the defense of the underlying claim.”

C. How Much Does The Insurer Have To Pay The Independent Counsel?

It is not unusual for an insurance carrier to concede the insured’s right to select its own counsel, but then refuse to pay the insured’s selected lawyer a rate higher than those charged by the carrier’s local “panel counsel.” These “panel counsel” rates are typically the lowest rate that an insurer can contractually impose on particular firms in particular regions. Most of the “panel counsel” firms are willing to charge lower rates because of the high volume of business provided by the insurer. According to one insurance commentator, defense attorneys who serve as “panel counsel” or “captive counsel” are paid 15% to 50% less per hour than the hourly rate of outside counsel selected by the insured. See Charles Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 TEX. L. REV. 1583, 1597-98 n.72 (1994).

Absent an express provision in the insurance policy, an insurer does not have the right under Texas law to impose its “panel counsel” rates on its insured and the insured’s independent counsel. Once the insured exercises its right to select its own defense counsel to defend the claim, the insurer must then pay the legal fees reasonably incurred in the defense. See, e.g., “Chapter V Insurance Defense,” 50 BAYLOR L. REV. 671, 679 (1998) (“The insurer has to pay only the reasonable expenses of independent counsel”). A determination of the reasonableness of attorneys’ fees should be guided by the following factors (not the insurer’s “panel counsel rates”):

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the relevant locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or by the circumstances;
6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the service; and
8. Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.
See, TEX. DISCIPLINARY R. PROF. CONDUCT 1.04(b). See also Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997).\(^{11}\)

There are no Texas statutes addressing this issue (unlike the Cumis statute in California), but two Texas courts—both federal courts in the Northern District of Texas—have rejected an insurer’s attempt to limit fees to panel counsel rates. In *Housing Auth. of the City of Dallas, Texas v. Northland Ins. Co.*, 333 F. Supp. 2d 595 (N.D. Tex. 2004) (Lindsay, J.), the insured retained its own counsel to defend against a lawsuit involving covered claims because the insured was dissatisfied with the insurer-appointed defense counsel. The insurer disagreed that there was an independent-counsel-triggering conflict, and also argued that it should only have to pay the insured’s defense counsel the same rates that it paid its panel counsel. At the most senior lawyer level, the panel counsel rates were less than half of the rates charged by the insured’s chosen counsel. Finding that the insurer created a conflict that allowed the insured to choose its own defense counsel, Judge Lindsay ordered that the insurer pay the “reasonable attorney’s fees” incurred by the insured in the defense of the lawsuit.

Shortly thereafter, the parties submitted the attorney’s fees issue to Judge Lindsay by way of written submissions. The Judge made his determination in an eleven-page order issued on January 27, 2005, *Housing Auth. of the City of Dallas, Texas v. Northland Ins. Co.*, Case No. 3:03-cv-00385 (N.D. Tex. January 27, 2005) (unpublished). In his ruling, Judge Lindsay applied the two-step process for determining a reasonable fee award in the Fifth Circuit (“lodestar” plus the *Johnson* factors) and found that the rates charged by the insured’s counsel were reasonable. In one instance the court noted that the insured’s lawyer’s rate “is on the low end of reasonableness for an attorney of [the lawyer’s] experience.” Significantly, the court expressly rejected the insurer’s proffer of its panel counsel’s rates as any evidence of reasonableness of the hourly rates charged by the insured’s counsel.

Additionally, in *Kirby v. Hartford Cas. Ins. Co.*, 2003 WL 23676809, at *2 (N.D. Tex. June 9, 2003) (Stickney, M.J.), the court stated as follows:

In addition to its failure to offer any evidence to support its assertion that $135.00 per hour represents the only “reasonable and customary” rate for defense counsel in a matter like the Underlying Lawsuit (MPSJ ¶ 9), Hartford cites no authority for its conclusion that Kirby is obligated to accept defense counsel “appointed” by Hartford or be limited to any rate the insurer is able to negotiate with such counsel. Hartford cites one case confirming that the insurer is obligated to pay “reasonable and necessary” defense costs. (MPSJ ¶ 19, citing *Travelers Ins. Co. v. Chicago Bridge & Iron Co.*, 442 S.W.2d 888, 900 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref’d n.r.e.). Neither that case nor any other authority establishes, as Hartford contends, that “any rate above [$135 per hour] simply cannot be deemed as necessary.” *See Ripepi v. Am. Ins. Cos.*, 234 F. Supp. 156, 158 (W.D. Pa. 1964) (insured “was not required to employ the cheapest lawyer he could get, or solicit competitive bids” after insurer failed to defend), aff’d, 349 F.2d 300 (3rd Cir. 1965).

\(^{11}\) These factors are closely associated with the federal appellate decision in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and have come to be referred to as “the *Johnson* factors.” They are commonly considered in the resolution of disputes regarding attorneys’ fee awards arising in federal court actions decided under fee-shifting statutes.
D. Recent Cases


- Insurer’s right of control, pursuant to its defense of the insured under a liability policy, generally includes the authority to make defense decisions as if it were the client.

- Insurer’s right to appoint counsel to defend insured in an underlying suit gives way when a disqualifying conflict of interest exists; in such a situation, the insured may select its own, independent counsel, thus protecting the insured from an insurer-hired attorney who may be tempted to develop facts or legal strategy that could ultimately support the insurer’s position that the underlying lawsuit fits within a policy exclusion.

- Reservation of rights letters do not necessarily create a conflict between the insured and the liability insurer; rather, a reservation of rights letter only recognizes the possibility that such a conflict may arise in the future.

- Disqualifying conflict of interest exists under Texas law, such that a liability insurer’s right to appoint counsel to defend insured in an underlying suit gives way to the insured’s selection of its own, independent counsel, where the facts to be adjudicated in the underlying suit are the same facts upon which coverage depends.

Partain v. Mid-Continent Specialty Ins. Services, Inc., Civil Action No. H-10-2580, 2012 WL 524130 (S.D. Tex. Feb. 15, 2012) (insurer’s remaining argument—that insureds are no longer entitled to defense and indemnity on grounds that: (i) by refusing to accept insurer’s counsel and allowing insured’s counsel to assume the defense, insured’s repudiated the insurance contract and prevented insurer from performing under it; (ii) by failing to cooperate with insurer, insureds breached a condition precedent to coverage; and (iii) because insurer was prejudiced by insured’s acts, insureds have forfeited their rights under the insurance policies—are rejected and remaining portion of insurer’s Motion for Summary Judgment is denied).

Downhole Navigator, LLC v. Nautilus Ins. Co., 686 F.3d 325, 328-31 (5th Cir. 2012) (under Texas law, potential conflict of interest created by insurer’s reservation of rights letter did not disqualify counsel offered by insurer to represent insured or entitle insured to reimbursement for cost of hiring independent counsel absent any demonstrated overlap between the facts implicated in the underlying negligence action and the facts determinative of the coverage defenses upon which the insurer’s reservations were based).

Coats, Rose, Yale, Ryman & Lee, P.C., v. Navigators Specialty Ins. Co., 830 F. Supp. 2d 216, 219 (N.D. Tex. 2011) (under Texas law, if attorney appointed by insurance company would have incentive to act for insurance company’s interest rather than insured’s interest and, therefore, deprive insured of its right to independent counsel, conflict of interest exists triggering insured’s right to select counsel; but only actual conflict of interest will trigger insured’s right to select independent counsel).

UTAH

A. Parameters of Insured’s Right to Independent Counsel

Although Utah has not directly addressed the question of whether an insurer must provide independent counsel to its insured when a conflict of interest exists, the courts have commented on this issue in dicta. In particular, in two cases, the Supreme Court indicated that an insured should be allowed to choose independent counsel to be funded by the insurer when there is a conflict. Lima v. Chambers, 657 P.2d
279, 285 (Utah 1982), superseded by rule on other grounds by State v. Bosh, 266 P.3d 788 (Utah 2011); and Foster v. Salt Lake County, 712 P.2d 224, 228 (Utah 1985).

Although it is not binding, the Eighth Circuit evaluated this issue at length under Utah law. See U.S. Fid. & Guar. Co. v Louis A. Roser Co., 585 F.2d 932 (8th Cir. 1978). Because, as indicated, no Utah court had directly considered this question, the Eighth Circuit predicted how Utah would rule based on its law on conflict of interest more generally and concluded that when a conflict of interest between insurer and insured exists, an insurer must provide independent counsel to its insured. Because the Utah cases cited above echo this conclusion, it is reasonable to conclude that, in Utah, an insured is entitled to independent counsel, funded by its insurer, when a conflict of interest exists.

B. Additional Requirements and Duties?

Although Utah appears to have concluded that an insured is entitled to separate counsel when a conflict of interest exist, Utah has not elaborated upon an insurer’s obligations under these circumstances.

VERMONT

The Vermont courts have not directly addressed the issue of an insured’s right to independent counsel. In Am. Fid. Co. v. Kerr, 138 Vt. 359, 416 A.2d 163 (1980), the court noted generally that an insurer needs consent from the insured in order to control the defense when a reservation of rights is issued. While one could conceivably argue that implicitly, in the absence of such consent an insurer must cede control by hiring independent counsel, this issue was not addressed. Additionally, in a concurring opinion filed in the case of Orleans Village v. Union Mut. Fire Ins. Co., 133 Vt. 217, 335 A.2d 315 (1975), it was noted that notwithstanding the existence of a conflict of interest triggering the right of the insured to select its own defense counsel, there may be a duty for the company to reimburse an insured’s legal costs.

More recently, the Supreme Court held that a homeowner’s liability insurer had a duty to pay attorney fees and costs incurred in an appeal from a judgment in an underlying defamation lawsuit against its insured, where the underlying judgment exposed the insured to both covered and uncovered damages such that a reversal would have served the insured’s interests, and the appeal raised at least reasonable, if ultimately unsuccessful, grounds for challenging the judgment. Pharmacists Mut. Ins. Co. v. Myer, 187 Vt. 323, 2010 VT 10, 993 A.2d 413 (2010).

VIRGINIA

In Virginia, the insurer has the right to select counsel to defend its insured. In reaching this conclusion, the Supreme Court, in Norman v. Ins. Co. of N. Am., 218 Va. 718, 239 S.E.2d 902 (1978), reasoned that the ethical obligations of an attorney to act in the interest of his or her client were sufficient to protect the insured:

No one questions the fact that the standards of the legal profession require undeviating fidelity of a lawyer to his client, and no exceptions can be tolerated. A client may presume that his attorney has no interest which will interfere with his devotion to the cause confided in him. And an insurer’s attorney, employed to represent an insured, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.

There is no allegation by Norman, and no intimation in the record, that in defending Norman in the [subject] case, his attorneys safeguarded the interest of INA and neglected that of Norman. This is not an action by Norman against his attorneys and INA for
negligent representation, or one against INA for negligent employment of incompetent attorneys.

Id. at 727-28, 239 S.E.2d at 907. See also State Farm Fire & Cas. Co. v. Mabry, 255 Va. 286, 497 S.E.2d 844 (1998).

WASHINGTON

A. Right to Independent Counsel

Under Washington law, the insurer may retain the right to select defense counsel even where it reserves rights. However, Washington law essentially strips control of the defense from the insurer and places other heightened obligations on the insurer when it reserves rights.

The seminal case is Tank v. State Farm Fire & Cas. Co., 105 Wash. 2d 381, 715 P.2d 1133 (Wash. 1986), in which the Supreme Court declared that an insurer has an “enhanced obligation” to its insured when defending under a reservation of rights. The insurer can fulfill its enhanced obligation by meeting four criteria: (1) the company must thoroughly investigate the claim; (2) it must retain competent defense counsel for the insured, and both retained defense counsel and the insurer must understand that only the insured is the client; (3) the company must inform the insured of the reservation of rights defense and all developments relevant to policy coverage and progress of the lawsuit; and (4) the company must refrain from any activity that would show a greater concern for its monetary interest than for insured’s financial risk. Tank, 105 Wash. 2d at 388. But see, Phila. Indem. Ins. Co. v. Olympia Early Learning Center, No. C12-5759 RLB, 2013 WL 6174480 (W.D. Wash. Nov. 21, 2013) (following Tank but nevertheless finding that insured did not establish that, as a matter of law, the insurer’s assertion of its policy limits or its defense of the underlying claims amounted to bad faith or unclean hands).

Additionally, defense counsel retained by insurers to defend an insured under a reservation of rights must also recognize that his or her ethical duties of loyalty and disclosure run solely to the insured. This means that counsel must understand that she or he represents the insured, not the insurer, and must not allow the fact that she or he is being paid by the insurer to influence her or his professional judgment. It also means that potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured; that all information relevant to the insured’s defense must be communicated to the insured; and that the insured, not the insurer, has the ultimate choice regarding settlement. Id. In other words, the insured is the client, so counsel’s obligations run to the insured and the insured can control the defense.

In Johnson v. Cont’l Cas. Co., 57 Wash. App. 359, 788 P.2d 598 (1990), the Court of Appeals rejected an insured’s contention that a conflict of interest automatically arises requiring that the insurer pay for independent counsel chosen by the insured anytime an insurer defends under a reservation of rights; the Court noted, however, that an insurer, defending under a reservation of rights, has an “enhanced obligation of fairness towards its insured. . . .” The obligation comes about because of “[p]otential conflicts between the interests of insurer and insured, inherent in a reservation of rights defense. . . .”

B. Additional Matters

While insurers may agree to counsel selected by the insured, there are strong arguments that they are not required to pay such counsel more than they would pay counsel they selected. There is no case directly addressing this, but Griffin v. Allstate, 108 Wash. App. 133, 29 P.3d 777 (2001) supports the argument by implication.
C. Recent Cases

Weinstein & Riley, P.S. v. Westport Ins. Corp., No. C08-1694JLR, 2011 WL 887552 (W.D. Wash. Mar. 14, 2011). Insureds were not entitled to “independent counsel” under Washington law because they did not establish that insurer’s reservation of rights created an actual, rather than merely a potential, conflict of interest, with the result that the insurer retained the right to select defense counsel. Id. at *21. Elaborating, the court said:


Washington does not recognize an entitlement to “independent counsel” as it is understood under the Cumis model. In Washington, an insured is not entitled by law to choose independent counsel to represent it where there is a potential conflict with the insurer in a reservation of rights situation. Johnson v. Cont’l Cas. Co., 57 Wash. App. 359, 788 P.2d 598, 601 (Wash. Ct. App. 1990) (“In Washington, there is simply no presumption ... that a reservation of rights situation creates an automatic conflict of interest. Therefore, the insurer has no obligation before-the-fact to pay for its insured’s independently hired counsel.” (emphasis in original)). Instead, the insured is entitled to a defense provided by a lawyer selected by the insurer, and the appointed lawyer owes an enhanced obligation of fairness to the insured. Id. at 600; see Tank v. State Farm Fire & Cas. Co., 105 Wash. 2d 381, 715 P.2d 1133 (Wash. 1986). Thus, in contrast to Cumis, “any breach of the ‘enhanced obligation of fairness’ in a reservation of rights situation might lead to after-the-fact liability of the insurer, retained defense counsel, or both.” Johnson, 788 P.2d at 601 (italics added).


JACO Environmental, Inc. v. Am. Int’l Specialty Lines Ins. Co., No. C09-0145JLR, 2010 WL 415067 (W.D. Wash. Jan. 26, 2010) (“By contrast, under Washington law, ‘the insurer selects a lawyer for the insured who then has an obligation to represent only the insured.’ [San Diego Navy Fed. Credit Union v. Cumis Ins. Soc’y, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984) (citing Johnson v. Cont’l Cas. Co., 57 Wash. App. 359, 788 P.2d 598, 600 (Wash. Ct. App. 1990)).] Thus, ‘the prerequisite for the clause to apply, that “the insured is entitled by law to select independent counsel,” is absent here.’ (Id.) The court also noted that ‘the advent for JACO’s hiring of its own defense counsel was not the creation of a potential conflict created by AISLIC’s agreement to defend JACO under a reservation of rights, but rather AISLIC’s outright rejection of its duty to defend at the time it was initially notified of the suit by JACO.’”).

In a subsequent ruling in the same case, however, it was held that the insured was entitled to reimbursement for the costs of hiring independent counsel because the insurer refused to defend. JACO Environmental, Inc. v. Am. Int’l Specialty Lines Ins. Co., No. C09-0145JLR, 2010 WL 807441 (W.D. Wash. Mar. 9, 2010) (“In sum, because AISLIC breached its duty to defend as established in the insurance contract, JACO is entitled to recover the reasonable attorneys’ fees it incurred in defending
itself in the ARCA suit. Whether JACO was entitled to independent counsel under the Truck policy is not relevant to JACO’s rights under the AISLIC policy.”

Nat’l Surety Corp. v. Immunex Corp., 176 Wash. 2d 872, 297 P.3d 688 (Wash. 2013) (holding that: (1) an insurer may not seek to recoup defense costs incurred under a reservation of rights defense while the insurer’s duty to defend is uncertain; abrogating Holly Mountain Resources, Ltd. v. Westport Ins. Corp., 130 Wash. App. 635, 104 P.3d 725 (Wash. Ct. App. 2005); (2) for late notice of claim by insured to relieve insurer of duty to defend, insurer must show that the late notice actually and substantially prejudiced its interests; and (3) genuine issue of material fact as to whether insurer was prejudiced by insured’s late notice of claim, as could relieve insurer of duty to defend, precluded summary judgment).

West Virginia

The West Virginia courts have not addressed an insured’s right to independent counsel. However, at least two published opinions indicate that counsel hired by an insurer to defend the insured owes a duty of loyalty solely to the insured client. In Haba v. Big Arm Bar and Grill, Inc., 196 W. Va. 129, 468 S.E.2d 915 (1996), the Supreme Court of Appeals noted that:

We sanction the view that “an insurer's attorney, employed to represent an insured, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.” Norman v. Ins. Co. of N. Am., 218 Va. 718, 727, 239 S.E.2d 902, 907 (1978). In the absence of any claim to the contrary, it appears that the counsel employed by [the insurer] to represent [the insured] in the [underlying] action adequately discharged that duty.

196 W. Va. at 136, 468 S.E.2d at 922.

More recently, in Barefield v. DPIC Co.’s, Inc., 215 W.Va. 544, 600 S.E.2d 256 (2004), the Supreme Court of Appeals reiterated this position:

Arguably, the language of both Rules 1.7 and 1.8(f) might allow an attorney hired and paid by an insurance company to protect the insurance company's interests, and comply with the insurance company's directives and restrictions, in the representation of an insured if the insured “consents after consultation.” However, the Rules also require that there must also be “no interference with the lawyer's independence of professional judgment,” Rule 1.8(f)(2), and the attorney must reasonably believe that “the representation will not be adversely affected” by the joint representation. Rule 1.7(b)(1).

More specifically, Rule 5.4(c) prohibits a third-party who pays for an attorney's services from “direct[ing] or regulat[ing] the lawyer's professional judgment in rendering such legal services.”

In sum, our Rules of Professional Conduct compel us to the conclusion that when an insurance company hires a defense attorney to represent an insured in a liability matter, the attorney’s ethical obligations are owed to the insured and not to the insurance company that pays for the attorney's services. In accord, In re Rules of Professional

39
Because a defense attorney is ethically obligated to maintain an independence of professional judgment in the defense of a client/insured, an insurance company possesses no right to control the methods or means chosen by the attorney to defend the insured. As one court stated, an insurance company “cannot control the details of the attorney’s performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation [of the insured].” Petition of Youngblood, 895 S.W.2d at 328. Accordingly, “an attorney hired by an insurer to defend an insured must be considered, at least initially, to enjoy the status of an independent contractor.” Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 392 (Tenn. 2002).

WISCONSIN

The independent-counsel issue has not been addressed by the Wisconsin Supreme Court. There is a slight split of opinion between the federal district courts in Wisconsin that have addressed this issue. The U.S. District Court for the Eastern District of Wisconsin, citing various Wisconsin appellate court cases, has held that upon the insurer’s issuance of a reservation-of-rights letter, the insured is allowed to control its own defense. Nowacki v. Federated Realty Group, Inc., 36 F. Supp. 2d 1099, 1109 (E.D. Wis. 1999) (citing Jacob v. W. Bend Mut. Ins. Co., 553 N.W.2d 800 (Wis. Ct. App. 1996)); Grube v. Daun, 496 N.W.2d 106 (Wis. Ct. App. 1992)). The rule of law reached in Fireman's Fund Ins. Co. v. Waste Management, Inc., 777 F.2d 366 (7th Cir. 1985) (apparently applying Wisconsin law), which provides that an insurer is liable for the insured’s attorney fees only if a mutual agreement with defense counsel is reached between the parties, is not to be interpreted to add an additional requirement. Nowacki, 36 F. Supp. 2d at 1109.

A subsequent unpublished opinion, however, reasoned that the insurer may still be entitled to a role in the selection of defense counsel even if, because of a conflict of interest, it may not control the defense. HK Systems, Inc. v. Admiral Ins. Co., 2005 WL 1563340 (E.D. Wis. June 27, 2005). In that case, the district court stated (in dicta) that the insurer was still entitled to appoint defense counsel if the appointed counsel were truly independent of the insurer. HK Systems, 2005 WL 1563340, at *16. The district court also denied the insured’s motion for summary judgment that it was entitled to reimbursement for the expense of its much higher-priced law firm, holding that the insured was only entitled to reimbursement for reasonable defense costs and that fact questions existed as to whether the rates charged by its selected firm were reasonable. Id. at *18-19.

The U.S. District Court for the Western District of Wisconsin, citing an Eighth Circuit opinion, stated that the insurer, when confronted with a conflict of interest, must either provide an independent attorney to represent the insured or pay the costs incurred by the insured in hiring counsel of the insured’s own choice. Am. Motorists Ins. Co. v. Trane Co., 544 F. Supp. 669, 686 (W.D. Wis. 1982) (citing U.S. Fid. & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 939 (8th Cir. 1978)).

In a relatively recent state appellate decision, the court addressed the issue of an insurer’s obligation with respect to attorney’s fees:
Depending on the fact finder’s determination on remand, the issue of attorney fees may be resolved. However, if the fact finder determines that the rate schedule was only temporary, the court will have to determine Liberty’s obligation for attorney fees from the time of tender until the resolution of litigation. Whether the requested compensation for attorney fees is reasonable is a question of fact to be addressed by the trial court following consideration of the factors in SCR 20:1.5 (2010), which includes the fees customarily charged in the locality for similar service, SCR 20:1.5(a)(3). [Footnote omitted.] See Wright v. Mercy Hosp. of Janesville, Wis., Inc., 206 Wis. 2d 449, 470, 557 N.W.2d 846 (Ct. App. 1996); Fireman’s Fund Ins. Co. v. Bradley Corp., 261 Wis. 2d 4, ¶ 67, 660 N.W.2d 666; see also HK Sys., Inc. v. Admiral Ins. Co., 2005 WL 1563340 at *18, 19 (E.D. Wis. 2005) (applying Wisconsin law, holding that an insurer’s responsibility for defense costs extends only to a reasonable charge and the market standard for attorney rates for a particular type of litigation in a particular geographic area is a question of fact preventing the grant of summary judgment); see also 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INS. § 202:35, at 202-87 (3d ed. 1999) (“An insurer’s obligation to reimburse independent counsel is limited to reasonable attorney’s fees and disbursements.”).


WYOMING

Wyoming has not yet considered the issue of whether an insured is entitled to independent counsel if a conflict of interest develops between insurer and insured. Two Wyoming cases mention that an insurer provided independent counsel under such circumstances in their recitations of facts, but the courts did not comment on whether or not this was required. See Gainsco Ins. Co. v. Amoco Prod. Co., 53 P.3d 1051, 1059 (Wyo. 2002), and Crawford v. Infinity Ins. Co., 64 Fed. App’x 146 (10th Cir. 2003). Accordingly, it appears that whether an insurer must fund separate counsel in a conflict of interest situation remains an open question under Wyoming law. However, note that an insurer cannot defend under a reservation of rights and later seek reimbursement of defense costs in the event no coverage is owed. Rather, it must either deny the defense or seek declaratory judgment. See Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510 (Wyo. 2000).
Statutes: Alaska, California & Florida
ALASKA

§ 21.96.100. Appointment of independent counsel; conflicts of interest; settlement

(a) If an insurer has a duty to defend an insured under a policy of insurance and a conflict of interest arises that imposes a duty on the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to the insured unless the insured in writing waives the right to independent counsel. An insurance policy may contain a provision that provides a method of selecting independent counsel if the provision complies with this section.

(b) For purposes of this section, the following do not constitute a conflict of interest:

   (1) a claim of punitive damages;

   (2) a claim of damages in excess of the policy limits;

   (3) claims or facts in a civil action for which the insurer denies coverage.

(c) Notwithstanding (b) of this section, if the insurer reserves the insurer's rights on an issue for which coverage is denied, the insurer shall provide independent counsel to the insured as provided under (a) of this section.

(d) If the insured selects independent counsel at the insurer's expense, the insurer may require that the independent counsel have at least four years of experience in civil litigation, including defense experience in the general subject area at issue in the civil action, and malpractice insurance. Unless otherwise provided in the insurance policy, the obligation of the insurer to pay the fee charged by the independent counsel is limited to the rate that is actually paid by the insurer to an attorney in the ordinary course of business in the defense of a similar civil action in the community in which the claim arose or is being defended. In providing independent counsel, the insurer is not responsible for the fees and costs of defending an allegation for which coverage is properly denied and shall be responsible only for the fees and costs to defend those allegations for which the insurer either reserves its position as to coverage or accepts coverage. The independent counsel shall keep detailed records allocating fees and costs accordingly. A dispute between the insurer and insured regarding attorney fees that is not resolved by the insurance policy or this section shall be resolved by arbitration under AS 09.43.

(e) If the insured selects independent counsel at the insurer's expense, the independent counsel and the insured shall consult with the insurer on all matters relating to the civil action and shall disclose to the insurer all information relevant to the civil action, except information that is privileged and relevant to disputed coverage. A claim of privilege is subject to review in the appropriate court. Information disclosed by the independent counsel or the insured does not waive another party's right to assert privilege.

(f) An insured may waive the right to select independent counsel by signing a statement that reads substantially as follows:

12 Formerly AS § 21.89.100.
I have been advised of my right to select independent counsel to represent me in this lawsuit and of my right under state law to have all reasonable expenses of an independent counsel paid by my insurer. I have also been advised that the Alaska Supreme Court has ruled that when an insurer defends an insured under a reservation of rights provision in an insurance policy, there are various conflicts of interest that arise between an insurer and an insured. I have considered this matter fully and at this time I am waiving my right to select independent counsel. I have authorized my insurer to select a defense counsel to represent me in this lawsuit.

(g) If an insured selects independent counsel under this section, both the counsel representing the insurer and independent counsel representing the insured shall be allowed to participate in all aspects of the civil action. Counsel for the insurer and insured shall cooperate fully in exchanging information that is consistent with ethical and legal obligations to the insured. Nothing in this section relieves the insured of the duty to cooperate fully with the insurer as required by the terms of the insurance policy.

(h) When an insured is represented by independent counsel, the insurer may settle directly with the plaintiff if the settlement includes all claims based upon the allegations for which the insurer previously reserved its position as to coverage or accepted coverage, regardless of whether the settlement extinguishes all claims against the insured.
CALIFORNIA

§ 2860. Conflict of interest; duty to provide independent counsel; waiver; qualifications of independent counsel; fees; disclosure of information

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

(b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

(c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

(e) The insured may waive its right to select independent counsel by signing the following statement: “I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to
represent me in this lawsuit.”

(f) Where the insured selects independent counsel pursuant to the provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.
FLORIDA

627.426. Claims administration

(1) Without limitation of any right or defense of an insurer otherwise, none of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer thereunder:

(a) Acknowledgment of the receipt of notice of loss or claim under the policy.

(b) Furnishing forms for reporting a loss or claim, for giving information relative thereto, or for making proof of loss, or receiving or acknowledging receipt of any such forms or proofs completed or uncompleted.

(c) Investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim.

(2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:

(a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand delivery; and

(b) Within 60 days of compliance with paragraph (a) or receipt of a summons and complaint naming the insured as a defendant, whichever is later, but in no case later than 30 days before trial, the insurer:

1. Gives written notice to the named insured by registered or certified mail of its refusal to defend the insured;

2. Obtains from the insured a nonwaiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation; or

3. Retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, shall be set by the court.