Independent Counsel

Walk-In or Reservations Required?

By Maria Quintero and Rachel Ehrlich

While most insurers, claims professionals and counsel try to avoid positions that will cause a conflict of interest with an insured, sometimes conflict is unavoidable. This is especially true in the context of an insurer's defense of an insured under reservation of rights. Conflicts can also arise where the interests of the insurer and the insured are materially different.

The concept of independent counsel — which, like Shakespeare's rose, is known by many different names such as *"Cumis"* counsel or "conflict" counsel — is rooted in conflict, though not every type of conflict requires that the insurer provide independent counsel.

Whether and under what circumstances an insured has the right to independent counsel is jurisdiction-specific. Some states govern the right pursuant to statute. The rationale in the jurisdictions that require independent counsel is to afford the insured a defense that is free from the insurer's possible influence and the insurer's right to exclusively control the defense must make way for the insurer's obligation to defend its insured.

Potential Conflicts

The types of conflicts that give rise to a duty to provide independent counsel can vary from jurisdiction to jurisdiction. The easiest conflicts to recognize are those that affect the tripartite relationship, such as situations where the insurer employs a single defense counsel to represent several insureds whose interests begin to differ during litigation, or commences litigation against the insured, or appoints the same attorney employed to defend the insured to represent the insurer in an accompanying declaratory judgment action. These types of conflict are the obvious ones. Less obvious conflicts can arise when the insurer defends the insured under reservation of rights.

In some jurisdictions, the mere issuance of a reservation of rights letter triggers the right to independent counsel. Although this bright line rule offers consistency, it ignores those situations where defense counsel would have no actual conflict of interest in defending the insured while the insurer controls the defense. Recognizing this possibility, some jurisdictions instead take a case-by-case approach that looks at whether, through the appointed defense counsel, the insurer can steer the defense towards its own coverage interests. Under this approach, there is no need for independent counsel when the coverage dispute is extrinsic to the issues in the third party action. An example of this is a dispute about who is an insured. There is likely no conflict between the insurer and the insured in that situation because the insurer and insured are aligned in defeating the claim of liability — something that has nothing to do with whether the defendant is an "insured" under the policy.

What happens, however, where the defense is being offered in a "mixed action" — where both covered and uncovered claims are alleged? In these types of situations, looks can be deceiving. Some courts have found that independent counsel is not automatically required despite an apparent conflict. These courts instead focus on who can control the outcome of that coverage dispute. If the insurer through appointed defense counsel can control the outcome of any later coverage determination by the way in which in the liability action is defended, then there may be a conflict triggering the right to independent counsel.

An easy example of this type of conflict is where the basis of an insured's liability in the underlying litigation rests on conduct excluded by the terms of the policy. For instance, the insured's allegedly wrongful conduct could be found to be intentional, with coverage depending on the characterization of the insured's actions. Defense counsel in such a situation could defend the action so that the insured's actions are ruled intentional and thus not covered under the policy. According to a number of courts, this is a clear conflict requiring the appointment of independent counsel.

There are other types of coverage situations where the insurer and the insured's interests may conflict. Examples include allegations of punitive damages or where the damages sought are in excess of policy limits. In some jurisdictions, such as California, these conflicts do not automatically require the appointment of independent counsel, but in other jurisdictions, these conflicts are sufficient to trigger the right to independent counsel. There is a similar disagreement among jurisdictions in answering the question of whether independent counsel is required when an insurer reserves its right to deny coverage for certain types of damages.

Selecting Independent Counsel

There are varying views as to who selects independent counsel. Most states agree that the insured has the right to make that selection, but the language of the insurance policy may give the insurer the right to consent to the independent counsel selected by the insured. No matter what the jurisdiction, if a conflict requires the appointment of independent counsel, the insured is entitled to control the defense of the case and the insurer will have to pick up the tab, subject to any applicable fee caps. In some cases, this could make for a very expensive meal.

Sometimes the conflict between the insurer and the insured is irreconcilable and the appointment of independent counsel may not only be required, but desired. In other cases, however, it is possible that a conflict can be avoided by the careful consideration of coverage defenses or by reconciling the interests of the insured and the insurer as to the bases for the insured's liability. Resolving the conflict that may otherwise give rise to the appointment of independent counsel helps an insurer keep exclusive control of the defense. LM

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