The Right to Choose: When Can the Policyholder Pick Its Own Lawyer And How Much Does the Insurer Have to Pay?

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[1] This is an academic discussion. The views and opinions expressed in this article do not necessarily reflect the opinions of all of its authors on everything expressed herein, nor of their firms or clients.

Most U.S. jurisdictions recognize that, in certain situations, the insured has or may have the right to select its own independent counsel to defend it in an underlying action. How much the insurer may have to pay independent counsel can be a thorny issue, with most states providing little to no guidance, let alone limitations, to address the tension between the defendant/insured's need for a zealous defense and the insurer's need to have defense counsel work efficiently. This article surveys the law on the defendant's right to independent counsel and the extent of the insurer's right to control the costs of that defense, and provides practical tips on this issue. Notably, it is not just insurers who are interested in keeping costs at a reasonable level, but insureds who may have to pay the difference between reasonable rates and independent counsel's actual rates.

I. STATES' VIEWS ON WHETHER AN INSURED MAY HAVE A RIGHT TO INDEPENDENT COUNSEL

A. States That Have Recognized a Right to Independent Counsel

The following jurisdictions have recognized a right to independent counsel in one or more situations.

- Alabama: "The mere fact that the insurer chooses to defend its insured under a reservation of rights does not *ipso facto* constitute such a conflict of interest that the insured is entitled at the outset to engage defense counsel of its choice at the expense of the insurer. We hold that, if the insurer and the defense counsel retained by the insurer *to represent its insured* meet the specific criteria hereinabove adopted, the insurer has met its enhanced obligation of good faith, and the defense provided by the insurer may proceed under a reservation of rights. It is only when those criteria have not been met in whole or in part that the insured is entitled to retain defense counsel of its choice at the expense of the insurer." *L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co*., 521 So. 2d 1298, 1304 (Ala. 1987) (emphasis in original).

- Alaska: An insured has a right to independent counsel where there is a conflict of interest created by an insurer's reservation of right for policy and coverage defenses. *CHI of Alaska, Inc. v. Employers Reins. Corp*., 844 P.2d 1113, 1117-19 (Alaska 1993). Alaska also has an independent counsel statute, which provides for independent counsel where the insurer and insured have a conflict. Alaska Stat. § 21.96.100(a). A conflict does not exist where there is a claim for punitive damages, a claim in excess of limits, or "claims or facts in a civil action for which the insurer denies coverage." Alaska Stat. § 21.96.100(b). Notwithstanding subsection (b), "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 …" Alaska Stat. § 21.96.100(c). The independent counsel statute has been held to be preempted by federal law governing risk retention groups. *Attorneys Liab. Prot. Soc'y, Inc. v. Ingaldson Fitzgerald, P.C.*, 838 F.3d 976 (9th Cir. 2016).

- Arizona: Some Arizona courts have recognized that an insured is "able to choose his own attorney without relieving [the insurer] of its contractual obligation under the policy to pay for the defense." *Joseph v. Markovitz*, 27 Ariz. App. 122, 128, 551 P.2d 571 (1976); *see Lennar Corp. v. TransAmerica Ins. Co*., No. 1 CA-CV 10-0686, 2011 WL 5374434, at *3 (Ariz. Ct. App. Nov. 8, 2011) (noting that in *Markovitz*, "the conflict demanded that the insured be allowed to refuse the insurer's demanded counsel and choose his own attorney to be paid by the insurer."). However, "there is no support in Arizona case for the blanket proposition that an insurer defending under a reservation of rights loses its right to appoint defense counsel for its insured." *Nucor Corp. v. Employers Ins. Co. of Wausau*, 975 F. Supp. 2d 1048, 1055 (D. Ariz. 2013).

- Arkansas: Federal courts in Arkansas have recognized an insured's right to independent counsel where the insurer asserted coverage defenses. *E.g*., *Union Ins. Co. v. Knife Co*., 902 F. Supp. 877 (W.D. Ark. 1995) (right to independent counsel held to exist where insurer reserved right on intentional conduct); *Northland Ins. Co. v. Heck's Service Co., Inc*., 620 F. Supp. 107, 108 (E.D. Ark. 1985).

- California: California has a statute governing independent counsel issues, which provides that a conflict may exist "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." Cal. Civil Code § 2860(b). The statute codifies, and partially overrules, the landmark *Cumis* case, *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc*., 162 Cal. App. 3d 358 (1984). *Cumis* had held that a reservation of rights to disclaim coverage for punitive damages entitled the insured to independent counsel, and cited to an earlier case that held that a likely excess verdict entitled the insured to independent counsel. However, Section 2860(b) provides, "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."

- District of Columbia: A federal court held that the insured was entitled to separate counsel where the professional liability policy was ambiguous as to who could "designate" the separate counsel. *O'Connell v. Home Ins. Co*., No. CIV. A. 88-3523, 1990 WL 137386, at *4 (D.D.C. Sept. 10, 1990). A New York federal court, applying D.C. law, relied on this case to hold that an insurer's "reservation of right" was "sufficient" to require it to pay for the insured's chosen counsel. *Wallace v. National R.R. Passenger Corp*., 5 F. Supp. 3d 452, 487-88 (S.D.N.Y. 2014) (involving CGL and railroad protective liability policies).

- Florida: Florida statute provides that an insurer is not permitted to deny coverage based on a particular coverage defense unless it gives a written notice of its reservation of rights and, among other things, "[r]etains independent counsel which is mutually agreeable to the parties." Fla. Stat. § 627.426(2). The insured may reject the insurer's defense and may recover the costs of the independent counsel in a separate action

against the insurer, but only if the defense provided by the insurer was "inadequate," requiring the insured "to engage the services of its own attorneys." *Travelers Indem. Co. of Illinois v. Royal Oak Enterprises, Inc*., 344 F. Supp. 2d 1358, 1369 (M.D. Fla. 2004), *aff'd*, 171 F. App'x 831 (11th Cir. 2006).

- Georgia: Where there is an actual conflict of interest, such as where an insurer denies coverage, an insured may "retain independent counsel at the expense of the insurer." *Utility Service Co., Inc. v. St. Paul Travelers Ins. Co*., No. 5:06-CV-207 (CAR), 2007 WL 188237, at *4 (M.D. Ga., Jan. 22, 2007) (relying on *American Family Life Assur. Co. of Columbus, Ga. v. U.S. Fire Co*., 885 F.2d 826 (11th Cir. 1989), and rejecting insurer's motion to dismiss where insurer did not provide "any authority that a reservation of rights letter does not, and cannot, create a conflict of interest"). However, there is no *per se* rule that a reservation of rights creates a conflict of interest sufficient to allow an insured to retain independent counsel at the insurer's expense. *Sigman & Sigman Gutters, Inc. v. Auto-Owners Ins. Co*., No. 1:07-CV-1400-ODE, 2008 WL 11336745, at *7 (N.D. Ga. Aug. 26, 2008). While Georgia state courts have not directly addressed the hiring of entirely independent counsel or the payment of their fees, they discuss the hiring of joint counsel with the consent of the insured. *Richmond v. Georgia Farm Bureau Mut. Ins. Co*., 140 Ga. App. 215, 219, 231 S.E.2d 245 (1976).

- Guam: Guam has an independent counsel statute, which provides that a conflict may exist "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." 22 Guam Code § 12111(b). "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." *Id*.

- Idaho: Idaho courts have recognized an insured's right to independent counsel. *Boise Motor Car Co. v. St. Paul Mercury Indem. Co*., 62 Idaho 438, 112 P.2d 1011, 1016 (1941) (insurer issued a full reservation of rights, and third-party claimant sued for amount in excess of policy limits; insured held "justified in employing attorneys" and "fee paid the attorneys" was "properly chargeable against" insurer).

- Illinois: Where an actual conflict of interest exists, the insured has "the right to be" represented "by an attorney of his own choice who shall have the right to control the conduct of the case." *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 198-99, 355 N.E.2d 24 (1976).

- Indiana: Federal courts have held where there is a conflict of interest, the "insurer must either provide an independent attorney to represent the insured, or pay for the cost of defense incurred by the insured hiring an attorney of his choice." *All-Star Ins. Corp. v. Steel Bar, Inc*., 324 F. Supp. 160, 165 (N.D. Ind. 1971). However, a "blanket reservation" of rights did not create "a conflict of interest that would entitle the' insured "to select

their own counsel." *Armstrong Cleaners, Inc. v. Erie Ins. Exch*., 364 F. Supp. 2d 797, 809 (S.D. Ind. 2005).

- Kansas: Where there is a conflict between an insurer and an insured, the insurer must hire independent counsel to defend the insured. *Patrons Mut. Ins. Ass'n v. Harmon*, 240 Kan. 707, 712 (1987). However, Kansas law does not require an insurer to pay for the insured's counsel of choice if the insurer has provided independent counsel. *Eye Style Optics, LLC v. State Farm Fire & Cas. Co*., No. 14-2118-RDR) 2014 WL 2472096, at *4 (D. Kan., June 3, 2014).

- Louisiana: Where there is a conflict of interest, Louisiana requires an insurer to appoint independent counsel or pay for counsel hired by the insured. *Emery v. Progressive Cas. Ins. Co*., 2010-0327 (La. App. 1 Cir. 9/10/10), 49 So. 3d 17, 21 ("if the insurer chooses to represent the insured but deny coverage, it must employ separate counsel."); *Smith v. Reliance Ins. Co. of Illinois*, 807 So. 2d 1010, 1022 (La. Ct. App. 2002).

- Maine: An insured has a right to independent counsel, and a right to control the defense, when there is a conflict of interest. *Patrons Oxford Ins. Co. v. Harris*, 2006 ME 72, 905 A.2d 819.

- Maryland: Where there is a conflict of interest, the insured has the right to either "accept an independent attorney selected by the insurer or to select an attorney himself to conduct his defense" and if he chooses the later, the "insurer must assume the reasonable costs of the defense provided." *Brohawn v. Transamerica Ins. Co*., 276 Md. 396, 414-15, 347 A.2d 842 (1975).

- Massachusetts: An insured has a right to independent counsel, and the insurer must pay the "reasonable charges" of insured's counsel. *Magoun v. Liberty Mut. Ins. Co*., 346 Mass. 677, 684-85, 195 N.E.2d 514 (1964). A recent case held that an insured was not entitled to separate counsel to prosecute a counterclaim at the insurer's expense. *Mount Vernon Fire Ins. Co. v. VisionAid, Inc*., 875 F.3d 716 (1st Cir. 2017) (Massachusetts law; conforming certified questions answered at 76 N.E.3d 204).

- Michigan: Michigan recognizes an insured's right to independent counsel, but notes the insured does not have an absolute right to choose the defending attorney if the insurer exercises good faith in selecting the attorney. *Central Michigan Bd. of Trustees v. Employers Reins. Corp*., 117 F. Supp. 2d 627, 635 (E.D. Mich. 2000).

- Minnesota: Minnesota recognizes an insured's right to independent counsel of the insured's choice, but only when there is an actual conflict of interest. The fact that the insurer has reserved rights is not sufficient to create a right to independent counsel. *Mut. Serv. Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368 (Minn. Ct. App. 1991); *see Select Comfort Corp. v. Arrowood Indem. Co*., No. CIV. 13-2975 JNE/FLN, 2014 WL

4232334, at *5-6 (D. Minn., Aug. 26, 2014) (noting while "not every reservation of rights will create a conflict of interest," in some cases, reservation of rights may create "a qualifying conflict of interest").

- Mississippi: Where the insurer has chosen to defend all claims under reservation of rights, the insured is allowed to select its own counsel for noncovered claims at the insurer's expense. *Moeller v. Am. Guar. & Liab. Ins. Co*., 707 So. 2d 1062 (Miss. 1996), as corrected (Sept. 19, 1996).

- Missouri: Where there is a conflict of interest, the insurer must provide independent counsel or allow insured to hire her own counsel at the insurer's expense. *Howard v. Russell Stover Candies, Inc*., 649 F.2d 620, 625 (8th Cir. 1981) (Missouri law).

- Montana: Where there is an actual conflict of interest, the insured may "hire his own counsel" at the insurer's expense. *St. Paul Fire & Marine Ins. Co. v. Thompson*, 150 Mont. 182, 188-89, 433 P.2d 795 (1967); *see Mid-Century Ins. Co. v. Windfall, Inc*., No. CV 15-146-M-DLC, 2016 WL 2992114, at *7 (D. Mont., May 23, 2016).

- Nebraska: Where there is a reservation of rights, the insurer cannot insist on retaining control of the insured's defense. *Hawkeye Cas. Co. v. Stoker*, 154 Neb. 466, 479, 48 N.W.2d 623 (1951).

- Nevada: Where an actual conflict of interest exists from an insurer defending its insured under a reservation of rights, the insurer is required to satisfy its contractual duty to provide representation by permitting the insured to select independent counsel, and by paying the reasonable costs of such counsel. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. 743, 748, 357 P.3d 338 (2015).

- New Hampshire: An insured has a right to independent counsel, but appears not to have the right to choose her own counsel. *White Mountain Cable Const. Co. v. Transamerica Ins. Co*., 137 N.H. 478, 487, 631 A.2d 907 (1993).

- New Jersey: Where there is a conflict of interest, the insured is allowed to select her own counsel at the insurer's expense, but only for "reasonable" fees. *Szelc v. Stanger*, No. CIV. 08-4782, 2010 WL 2925847, at *2 (D.N.J. July 21, 2010).

- New Mexico: Where there is a conflict of interest, New Mexico requires the "insured hire independent counsel" or the insurer "hire two sets of attorneys, one to represent the insured and the other the [insurer]." Am. Emp. Ins. Co. v. Crawford, 1975-NMSC-020, 87 N.M. 375, 381, 533 P.2d 1203.

- New York: An insured is permitted to select independent counsel when there is an actual conflict of interest between the insured and the insurer, but the insurer is only

required to pay the attorney's "reasonable" fees. *Prashker v. U.S. Guar. Co*., 1 N.Y.2d 584, 593, 136 N.E.2d 871 (1956); *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 401, 425 N.E.2d 810 (1981).

- North Carolina: An intermediate court of appeals held a reservation of rights "entitled" the insured to defend the case and seek indemnity for the costs of defending that action. *Nat'l Mortg. Corp. v. Am. Title Ins. Co*., 41 N.C. App. 613, 255 S.E.2d 622 (1979), *rev'd on ground that underlying action was not covered*, 299 N.C. 369, 261 S.E.2d 844 (1980).

- North Dakota: Where there is a conflict of interest, the insurer must "furnish independent counsel to [the insured] or to reimburse [the insured]'s reasonable attorney fees." *Fetch v. Quam*, 530 N.W.2d 337, 341 (N.D. 1995).

- Ohio: Where an insurer has placed itself in a position in which it cannot fully and completely perform its contractual obligations to defend, the insured is entitled to retain independent counsel and recover reasonable fees. *Socony-Vacuum Oil Co. v. Cont'l Cas. Co*., 144 Ohio St. 382, 397, 59 N.E.2d 199 (1945).

- Oklahoma: Only where there is an actual conflict of interest does an insurer have a duty to pay for insured's choice of counsel. *Nisson v. Am. Home Assur. Co*., 1996 OK CIV APP 40, 917 P.2d 488, 490.

- Oregon: Oregon has a statute that provides for independent counsel in the context of environmental claims. "If the provisions of a general liability insurance policy impose a duty to defend upon an insurer, and the insurer has undertaken the defense of an environmental claim on behalf of an insured under a reservation of rights, or if the insured has potential liability for the environmental claim in excess of the limits of the general liability insurance policy …" Or. Rev. Stat. Ann. § 465.483(1). In other contexts, however, an insurer is not required to provide independent counsel. *Ferguson v. Birmingham Fire Ins. Co.*, 254 Or. 496, 460 P.2d 342 (Or. 1969); *Home Indem. Co. v. Stimson Lumber Co*., 229 F. Supp. 2d 1075 (D. Or. 2001); Or. State Bar, Formal Op. 2005-166 (2005) (retained attorney must consider insured as "primary client" and attorney's "dominant concern").

- Pennsylvania: An insured has a right to independent counsel "when an insurer tenders a defense subject to a reservation, the insured either accepts the defense or the insured may decline the insurer's tender of a qualified defense and proceed *pro se* or retain independent counsel at the insured's expense." *Divito v. First Am. Title Ins. Co.*, No. 1317 WDA 2012, 2013 WL 11254608, at *6 n.6 (Pa. Super. Ct. Sept. 23, 2013). Federal courts have also found a right to independent counsel. *Rector, Wardens & Vestryman of St. Peter's Church in City of Philadelphia v. Am. Nat'l Fire Ins. Co*., No. CIV.A. 00-2806, 2002 WL 59333, at *9 (E.D. Pa. Jan. 14, 2002) (where there is conflict of interest, "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.'") (citation omitted), *aff'd sub nom. Rector, Wardens & Vestrymen of St. Peter's Church in City of Philadelphia v. Am. Nat. Fire Ins. Co*., 97 F. App'x 374 (3d Cir. 2004); *Krueger Assocs., Inc. v. ADT Sec. Systems*, No. CIV.A. 93-1040, 1994 WL 709380, at *5 (E.D. Pa., Dec. 20, 1994 ("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.").

- Rhode Island: Where an insurer disputes coverage and the insured has been sued, the insurer is obligated to provide an independent attorney. *Quality Concrete Corp. v. Travelers Prop. Cas. Co. of Am*., 43 A.3d 16, 21 (R.I. 2012); *see Labonte v. Nat'l Grange Mut. Ins. Co*., 810 A.2d 250, 254 (R.I. 2002); *Employers' Fire Ins. Co. v. Beals*, 103 R.I. 623, 634, 240 A.2d 397 (1968) (in conflict situation, insured "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."), *abrogated on other grounds by Peerless Ins. Co. v. Viegas*, 667 A.2d 785 (R.I. 1995).

- South Carolina: Under a federal case, an insured has a right to independent counsel where there is an actual conflict of interest, and not merely a reservation of rights. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C*., 433 F.3d 365, 372 (4th Cir. 2005) ("we agree with the district court and reject the notion that the reservation of rights letter issued in this case creates a per se conflict that must be remedied through the insured selecting counsel and having the insurance companies pay the legal fees" and "we agree with the district court's conclusion that the Supreme Court of South Carolina would so hold."). In a decision requiring an insurer to reimburse the insured for defense costs it had denied, a South Carolina intermediate court of appeals approvingly cited a federal decision for the proposition that "reimbursement for insured's choice of counsel and expenses ordinarily would fulfill insurer's duty to defend, and is particularly appropriate where there is a conflict of interest between the insurer and insured." *BP Oil Co. v. Federated Mut. Ins. Co*., 329 S.C. 631, 641, 496 S.E.2d 35 (Ct. App. 1998) (citing *Cay Divers, Inc. v. Raven*, 812 F.2d 866, 870 n.3 (3d Cir. 1987) (affirming lower court decision that apparently applied Virgin Islands law).

- South Dakota: Where there is a reservation of rights, the insurer may, with the consent of the insured, retain control of the defense. *Connolly v. Standard Cas. Co*., 76 S.D. 95, 101, 73 N.W.2d 119 (1955). *Connolly* suggests that, in the absence of such consent, an insured can "take over defense of the action." *Id*.; *see State Farm Mut. Auto. Ins. Co. v. Armstrong Extinguisher Service, Inc*., 791 F. Supp. 799, 801 (D.S.D. 1992) (citing *Connolly* for proposition that "insurer [does] not have the right, without the consent of the insured, to retain control of the defense and at the same time reserve right to disclaim liability.").

- Tennessee: An insurer "possesses no right to control the methods or means chosen by an attorney to defend the insured." *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 394 (Tenn. 2002), *superseded by statute on other grounds as stated in Willeford v. Klepper*, 597 S.W.3d 454, 467 (Tenn. 2020). The basis for this per se rule is the existence of a "potential for conflicts of interest," such as "situations where a defense is afforded under a reservation of rights, where there is a defense of alternative claims, one with coverage and the other with no coverage, where there is a defense of claims for damages in excess of the policy limits, and where the defense involves multiple insureds." *Petition of Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995).

- Texas: Among other grounds, Texas recognizes an insured's right to independent counsel where an insurer provides a defense under a reservation of rights and "the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends." *N. Cty. Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004).

- Utah: In the context of conflict between insured and insurer, Utah recognizes that "an insured should be allowed to choose his own independent counsel who must then be compensated by the insurer." *Lima v. Chambers*, 657 P.2d 279, 285 (Utah 1982), *superseded on other grounds by statute on intervention, as stated in Supernova Media, Inc. v. Pia Anderson Dorius Reynard & Moss, LLC*, 2013 UT 7, 297 P.3d 599; *see U.S. Fid. & Guar. Co. v. Louis A. Roser Co., Inc*., 585 F.2d 932, 939 (8th Cir. 1978) (under Utah law, where insurer and insured have conflict, insurer must provide independent counsel to its insured). Utah has held that, where the insurer contended that the policy was invalid and that it owed no duty to defend, the court could "appoint counsel for the insured and to order that the insurer pay attorney fees for appointed counsel, if and when the insured prevails in the action." *Doctors' Co. v. Drezga*, 2009 UT 60, 218 P.3d 598, 609.

- Vermont: "[U]nder Vermont law, the lack of an insured's assent to a reservation of rights alone appears to be sufficient to require the insurer to relinquish control over the defense and *appoint* independent counsel." *Northern Sec. Ins. Co. v. Pratt*, No. 838-11-10 WNCV, 2011 WL 8472930 (Vt. Super. Ct. May 19, 2011) (emphasis added). The insurer can appoint independent counsel if it releases control over the defense, and "appoints a truly independent counsel." *Id*. In *Pharmacists Mut. Ins. Co. v. Myer*, 2010 VT 10, ¶ 5, 187 Vt. 323, 327, 993 A.2d 413, 416 (2010), the court noted that the insurer agreed to defend the insured under a reservation of rights, filed a declaratory relief action against the insured, and advised the insured to select his own counsel to defend him, given the conflict between the insurer and insured. The court ruled that the insurer had an obligation to reimburse the insured for independent counsel's fees through the appeal of the underlying action.

- Virgin Islands: A federal court of appeals stated: "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. [Citations.] 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." *Cay Divers, Inc. v. Raven*, 812 F.2d 866, 870 n.3 (3d Cir. 1987). The court of appeals did not state which jurisdiction's law applied. The case was appealed from the District of Virgin Islands, and the district court appears to have applied Virgin Islands law. *Cay Divers, Inc. v. Raven*, 627 F. Supp. 453, 22 V.I. 158 (D.V.I. 1986).

- Wisconsin: "When an insurer reserves rights the insured has the right to control the defense." *Lakeside Foods, Inc. v. Liberty Mut. Fire Ins. Co*., 2010 WI App 120, ¶ 31, 329 Wis. 2d 270, 789 N.W.2d 754 (unpublished). However, state courts have not settled whether this right includes "a right to select counsel under Wisconsin law." *Id*. at ¶ 47 n.11. A federal court has ruled that "[w]here there is a conflict, the insurer 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), *aff'd*, 718 F.2d 842 (7th Cir. 1983).

- Wyoming: Wyoming courts have yet to decide whether and when an insured has a right to independent counsel. However, one federal court stated, "were it faced with this question, the Wyoming Supreme Court would adopt the rationale of those cases holding that an insurer who reserves the right to deny coverage loses the right to control the litigation." *Ins. Co. of N. Am. v. Spangler*, 881 F. Supp. 539, 544 (D. Wyo. 1995).

B. States That Have Not Recognized a Right to Independent Counsel

A handful of jurisdictions have determined that an insured does not have a right to independent counsel. These jurisdictions typically reason that defense counsel is bound by ethical obligations to the insured, who is defense counsel's primary or only client, and/or that the insurer has an enhanced obligation to the insured in this situation. *E.g*., *Tank v. State Farm Fire & Cas. Co*., 105 Wash. 2d 381, 715 P.2d 1133 (1986).

II. SCOPE OF THE RIGHT TO INDEPENDENT COUNSEL IN SELECTED STATES

Of the jurisdictions that recognize a right to independent counsel, there is considerable difference in the scope of that right. A few jurisdictions hold that any reservation of the right to disclaim coverage creates a conflict that entitles the insured to independent counsel. Most jurisdictions have placed some limitations on the scope of an insured's right to independent counsel, for example, by holding that an actual conflict of interest must exist, or by holding that a reservation of the right not to indemnify for any award of punitive damages does not entitle the insured to independent counsel. Courts often consider the issue of whether an actual conflict exists from the perspective of defense counsel's ethical obligation to his or her client.

A. California

Although the *Cumis* case did not originate the concept the independent counsel, and even though the case has been superseded by statute, independent counsel is frequently nicknamed "*Cumis* counsel." Insurers and insureds alike should keep in mind that California Civil Code Section 2860 supersedes *Cumis*. *Dynamic Concepts, Inc. v. Truck Ins. Exch*., 61 Cal. App. 4th 999, 1001 n.1 (1998). A large number of cases have further interpreted when an insured is, and is not, entitled to independent counsel in specific situations. It is a fact-based analysis. *Centex Homes v. St. Paul Fire & Marine Ins. Co*., 19 Cal. App. 5th 789, 798 (2018).

Courts have held that an insured is or may be entitled to independent counsel in the following situations:

- "[W]here the insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by the insurer's retained counsel." *James 3 Corp. v. Truck Ins. Exch*., 91 Cal. App. 4th 1093, 1101-02 (2001) (citing Cal. Civ. Code § 2860(b)). The classic example is when the insurer reserves rights on intentional conduct (which is typically not covered for indemnity) versus negligent conduct (which may be covered for indemnity). *San Diego Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358, 364-365, 375 (1984); *see Blanchard v. State Farm Fire & Cas. Co*., 2 Cal. App. 4th 345, 349 (1991). Whether the insured is entitled to independent counsel depends on the insurer's reservation of rights, not what the underlying action alleges. Cal. Civ. Code § 2860(b). If the insurer wishes to control the defense, and thus chooses not to reserve the right to disclaim coverage for intentional conduct, it cannot disclaim indemnity coverage for intentional conduct. *Foremost Ins. Co. v. Wilks*, 206 Cal. App. 3d 251, 258 (1988).

- "[W]here the insurer insures both the plaintiff and the defendant …" *James 3 Corp. v. Truck Ins. Exch*., 91 Cal. App. 4th 1093, 1101-02 (2001) (citing *O'Morrow v. Borad*, 27 Cal. 2d 794 (1946)). However, it may also be possible for the insurer to appoint panel counsel in this situation. If a counterclaim is filed, the insurer may be able to appoint panel counsel for both parties, but the insurer should usually segregate the files. *Federal Ins. Co. v. MBL, Inc*., 219 Cal. App. 4th 29, 46-47 (2013) (distinguishing *O'Morrow* on basis that at time it was decided, contributory negligence was complete bar to recovery, whereas comparative negligence is current law).

- "[W]here the insurer pursues settlement in excess of policy limits without the insured's consent and leaving the insured exposed to claims by third parties." *James 3 Corp. v. Truck Ins. Exch*., 91 Cal. App. 4th 1093, 1101-02 (2001).

- "[A]ny other situation where an attorney who represents the interests of both the insurer and the insured finds that his or her "representation of the one is rendered less effective by reason of his [or her] representation of the other." *James 3 Corp. v. Truck Ins. Exch*., 91 Cal. App. 4th 1093, 1101-02 (2001).

Courts have held that an insured is not entitled to independent counsel in the following situations:

- "A mere possibility of an unspecified conflict does not require independent counsel. The conflict must be significant, not merely theoretical, actual, not merely potential." *Dynamic Concepts, Inc. v. Truck Ins. Exch*., 61 Cal. App. 4th 999, 1007 (1998); *Centex Homes v. St. Paul Fire & Marine Ins. Co*., 19 Cal. App. 5th 789, 798 (2018).

- "But not every reservation of rights entitles an insured to select *Cumis* counsel. There is no such entitlement, for example, where the coverage issue is independent of, or extrinsic to, the issues in the underlying action … " *Dynamic Concepts, Inc. v. Truck Ins. Exch*., 61 Cal. App. 4th 999, 1006 (1998). The reason is that panel counsel cannot control the outcome of such issues. Cal. Civ. Code § 2860(b).

- Reserving the right to disclaim coverage for punitive damages. Cal. Civ. Code § 2860(b); *Nede Mgmt., Inc. v. Aspen Am. Ins. Co*., 68 Cal. App. 5th 1121 (2021). California public policy prohibits indemnity coverage for punitive damages. Cal. Ins. Code § 533.

- Reserving the right to withdraw from the defense. *See St. Paul Mercury Ins. Co. v. McMillin Homes Constr., Inc*., No. 15CV1548 JM(BLM), 2016 WL 5464553, at *5 (S.D. Cal. Sept. 29, 2016).

- Reserving the right to seek *Buss* reimbursement. *James 3 Corp. v. Truck Ins. Exch*., 91 Cal. App. 4th 1093, 1106-1109 (2001).

- Reserving the right not to pay any judgment in excess of policy limits. *Nede Mgmt., Inc. v. Aspen American Ins. Co*., 68 Cal. App. 5th 1121 (2021).

- Insurer declining to pursue certain affirmative defenses on behalf of insured. *James 3 Corp. v. Truck Ins. Exch*., 91 Cal. App. 4th 1093, 1106-1109 (2001).

- Insurer's declining to cover remedies for equitable relief (specifically restitution and disgorgement of wrongfully obtained profits). *See James 3 Corp. v. Truck Ins. Exch*., 91 Cal. App. 4th 1093 (2001). Such remedies are not covered under general liability policies. *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266-1267 (1992).

- Reserving the right to contend that the policy period requirement is not satisfied. *Federal Ins. Co. v. MBL, Inc*., 219 Cal. App. 4th 29, 47 (2013).

- The insured is unhappy with panel counsel's defense, or panel counsel is "unremittingly hostile" to the insured and does not believe the insured will make a credible witness. *Nede Mgmt., Inc. v. Aspen American Ins. Co*., 68 Cal. App. 5th 1121 (2021).

- Rejection of a policy limits demand at the start of the underlying action without consulting the insured, where the demand was clearly premature, and panel counsel was acting to defend both the insurer and the insured. *Nede Mgmt., Inc. v. Aspen American Ins. Co*., 68 Cal. App. 5th 1121 (2021).

B. Florida

Florida law requires that the *insurer* retain "independent counsel which is mutually agreeable to the parties." Fla. Stat. § 627.426.[2] 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).

[2] Section 627.426 provides:

> **(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 United States postal proof of mailing, registered or certified mail, or other mailing using the Intelligent Mail barcode or other similar tracking method used or approved by the United States Postal Service 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 United States postal proof of mailing, registered or certified mail, or other mailing using the Intelligent Mail barcode or other similar tracking method used or approved by the United States Postal Service 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.

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 Am. Ins. Co*., 927 So. 2d 894, 898 (Fla. App. 3d Dist. 2005). An unreported federal court decision 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*., No. 8:05-CV-280-T-30, 2006 WL 1823562, *6 (M.D. Fla. June 30, 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., LLC, 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).

Maronda Homes, Inc. of Fla. v. Progressive Express Ins. Co., 118 F. Supp. 3d 1332 (M.D. Fla. 2015) (although Florida law requires an insurer to provide an adequate defense of a claim against its insured that is covered by a policy and that if such defense is not adequate and it is reasonable for an insured to retain its own counsel, then an insured may recoup attorney fees from the insurer because it has, in effect, forced the insured to retain its own counsel, and although under Florida law the right to manage claims and defenses by an insurer can be overridden only when the insurer's interest interferes with the independent representation by counsel provided by the insurer, insured was not entitled to recoup because insured precluded insurer's efforts to provide a defense from the start of the underlying lawsuit by rejecting first

defense counsel due to alleged conflict of interest and second defense counsel because insured disagreed with his litigation strategy; there was no showing that any aspect of insurer's defense was inadequate).

C. 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*, 88 Ill. 2d 444, 430 N.E.2d 1079, 1084 (1981) (holding that insurer could not appoint counsel to defend insureds with diametrically opposed interests); *Thornton v. Paul*, 74 Ill. 2d 132, 384 N.E.2d 335, 343 (1978), *overruled on other grounds*, *Am. Family Mut. Ins. Co. v. Savickas*, 193 Ill. 2d 378, 739 N.E.2d 445 (2000); *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24, 31 (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). The landmark *Peppers* case has given rise to the term "*Peppers* conflict."

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*., 363 Ill. App. 3d 505, 843 N.E.2d 492, 498 (2d Dist. 2006) (holding that an actual conflict existed between the insurer and the 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 costs incurred by the insured in defending the action with counsel of his own choosing." *Ill. Masonic Medical Center v. Turegum Ins. Co*., 168 Ill. App. 3d 158, 522 N.E.2d 611, 613 (1st Dist. 1988).

See also:

Santa's Best Craft, LLC v. Zurich Am. Ins. Co., 408 Ill. App. 3d 173, 941 N.E.2d 291 (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).

First Mercury Ins. Co. v. Nationwide Security Services, Inc., 2016 IL App (1st) 143924, 54 N.E.3d 323 (where liability insurer surrenders defense to independent legal counsel because of a conflict of interest, it thereby relinquishes control over the litigation, and a reasonable settlement by the insured should not prevent an action for or in opposition to indemnification).

Rainey v. Indiana Ins. Co., 2016 IL App (1st) 150862-U (May 11, 2016) (unpublished) (absent a conflict of interest in the underlying litigation, insurer was not obligated to pay for independent counsel and did not breach its duty to defend by failing to do so; because insured cannot show that insurer breached its duty, insured cannot satisfy his contention that insurer was estopped from denying its obligation to provide independent counsel).

Builders Concrete Servs., LLC v. Westfield Nat'l Ins. Co., 486 F. Supp. 3d 1225, 1230 (N.D. Ill. 2020) (holding that under the *Forge Industrial Staffing* standard the policyholder was not entitled to independent counsel because "[u]nless the insurer, through its chosen counsel, can manipulate or otherwise affect the course of the underlying suit in a way that would 'completely and irreparably' eliminate coverage for a judgment, the insured is not entitled to independent counsel") (citing *Nat'l Cas. Co. v. Forge Indus. Staffing, Inc*., 567 F.3d 871, 879 (7th Cir. 2009)). *Builders Concrete* and *Forge Industrial Staffing* employed the "mutually exclusive theories" standard, which provides that "an 'actual conflict' exists only when the underlying complaint contains *two mutually exclusive theories* of liability, one which the policy covers and one which the policy excludes.'" *Builders Concrete*, 486 F. Supp. 3d at 1229 (citation omitted; emphasis by *Builders Concrete* court). This standard "is a demanding standard, requiring the insured to show how the insurer, by making strategic choices in conducting the defense, could avoid *any* responsibility to pay the underlying judgment by shifting all losses to uncovered categories. An insured failing to meet that standard is not entitled to independent counsel." *Id*. at 1230 (emphasis in original).

D. Nevada

Nevada is the most recent state to adopt a rule entitling the insured to independent counsel in certain situations. *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. 743, 748, 357 P.3d 338 (2015). In Hansen, the Nevada Supreme Court ruled that "[w]hen a conflict of interest exists between an insurer and its insured, Nevada law requires the insurer to satisfy its contractual duty to provide representation by permitting the insured to select independent counsel and by paying the reasonable costs of such counsel." *Id*. at 749. "[A] reservation of rights does not create a per se conflict." *Id*. at 750. Instead, under Nevada law, "[c]ourts must inquire, on a case-by-case basis, whether there is an actual conflict of interest." *Id*. Where an actual conflict exists, the insured may choose independent counsel. *Id*. at 751.

So far, there are no published Nevada state cases that have further interpreted the parameters of *Hansen*. A few federal decisions provide additional guidance.

In *Andrew v. Century Surety Co*., 134 F. Supp. 3d 1249, 1265 (D. Nev. 2015), the court held that there was "no conflict of interest" where the insurer disclaimed coverage, because "the very reason" the insurer disclaimed coverage was that an employee "was not working in the course and scope of employment," which "would have entitled" insured "to a judgment in [the insured]'s favor."

In *Starr Indemnity & Liability Co. v. Young*, 379 F. Supp. 3d 1103, 1108 (D. Nev. 2019), the court held that "for an insurer to demonstrate that it has fulfilled its contractual duty to defend in a case where there is continued dual representation after the emergence of an actual conflict, the insurer must demonstrate that the insured waived their right to independent counsel." The waiver must be "explicit . . . as opposed to simply notice." *Id*.

As new issues arise in Nevada, it is likely that courts will look to California law for guidance. *Great Am. Ins. Co. of New York v. N. Am. Specialty Ins. Co.*, 542 F. Supp. 2d 1203, 1211-12 (D. Nev. 2008) ("The Nevada Supreme Court has often turned to California decisions when faced with issues of first impression.").

E. New York

In New York, where there is a conflict between the insurer and the policyholder, the insurer must allow the policyholder to select its own counsel, for which the insurer will pay. While there is no statute pertaining to an insured's right to independent counsel, case law has held that "the insured's right to independent counsel is only triggered when the reservation of rights creates a potential conflict of interest for the counsel provided by the insurer, and in particular, where the defense attorney's duty to the insured would be to defeat liability on any ground but his duty to the insurer would be to defeat liability on only those grounds for which the insurer might be liable." *Exec. Risk Indem. Inc. v. Icon Title Agency, LLC*, 739 F. Supp. 2d 446, 450 (S.D.N.Y. 2010). However, "'[w]hen 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.'" *Great Am. Ins. Co. v. Houlihan Lawrence, Inc*., 449 F. Supp. 3d 354, 373 (S.D.N.Y. 2020) (quoting *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422, 425 N.E.2d 810, 815 n.* (1981)).

New York's seminal case on the subject is *Prashker v. U.S. Guarantee Co*., 1 N.Y.2d 584, 136 N.E.2d 871 (1956), where the Court of Appeals required the insurer "immediately to pay or provide for the defense." *Id*. at 591. The court based its ruling on the fundamental premise that defense counsel cannot be asked to represent conflicting interests, which would subject them to divided loyalties:

> 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.

Id., 1 N.Y.2d at 593.

Twenty-five years later, the Court of Appeals revisited the issue in *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 401, 442 N.Y.S.2d 422, 425 N.E.2d 810 (N.Y. 1981), and held that the insured, a dentist accused of sexual abuse, was entitled to a defense "because a claim within the stated coverage has been made," even though the underlying complaint also included allegations of intentional harm, which the policy excluded. *Id*. As the New York Court of Appeals held:

> [I]nasmuch as 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—***defendant Goldfarb is entitled to defense by an attorney of his own choosing, whose reasonable fee is to be paid by the insurer***.

Id. (emphasis added). In a footnote, the Court added that its rule may not apply in every case:

> 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.

Id., 53 N.Y.2d at 401, 425 N.E.2d at 815 n.* (emphasis added). Thus, the "*Goldfarb* rule" also is rooted in concerns about "divided loyalty" on the part of defense counsel, where, for example, the policy would provide coverage if the insured did not intend to cause injury, but not if the injury was intended.

See also:

In *Great Am. Ins. Co. v. Houlihan Lawrence, Inc*., 449 F. Supp. 3d 354, 373 (S.D.N.Y. 2020), Houlihan Lawrence, Inc. ("Houlihan") brought a claim seeking a declaratory judgment that it was permitted to be represented by independent counsel of its choosing. *Id*. at 357-58. Houlihan argued that "it is entitled to independent counsel of its choosing because Plaintiff's reservation of right to deny coverage based on Exclusion A 'is the classic conflict of interest that gives [Defendant] the right to choose its own independent counsel.'" *Id*. at 373. The insurer argued that there was no conflict and that if there was, the rates charged by the independent counsel must be reasonable. *Id*. The court reasoned that the claims against the insured were for breach of fiduciary duty and violation of N.Y. Gen. Bus. Law § 349, entitled "Deceptive acts and

practices unlawful," and both allegations claimed that insured acted intentionally. *Id*. Therefore, the court held that "[b]ecause the Policy excludes coverage for any claim based on or arising out of intentional acts by an insured, and the Underlying Action 'may result in a finding that [Defendant] acted fraudulently, [Defendant] has alleged a potential conflict of interest sufficient to trigger a right to independent counsel.'" *Id*. (quoting *Exec. Risk Indem. Inc. v. Icon Title Agency, LLC*., 739 F. Supp. 2d 446, 450 (S.D.N.Y. 2010) (footnote omitted in original)). The court concluded that "Defendant is entitled to independent counsel, with reasonable costs to be paid by Plaintiff." *Id*. at 374.

In *Sordoni Constr. Co. v. Chartis Ins. Co. of Can*., 2021 N.Y. Slip Op. 32322(U), at *3 (Sup. Ct. Nov. 15, 2021), the coverage dispute focused on an underlying action brought after an accident of a construction worker at a project site. Plaintiff was sued in its capacity as the contractor. *Id*. Plaintiff was an additional insured under the policy, and the insurer attempted to appoint counsel to defend the additional insured in the underlying action. *Id*., at *10. The court held that "there is the potential for a conflict of interest in light of the pending claims for summary judgment between Sordoni and Chartis's insured, Canatal, in the Cross Action and Chartis's claims for summary judgment against Sordoni in the instant action." *Id*. The court held that "'[i]ndeed, the law is clear that where a conflict of interest is probable, selection of attorneys to represent the insured should be made by the insured rather than by the insurance company, which should remain liable for reasonable fees...'" *Id*. (citation omitted).

F. Texas

Prior to guidance from the Texas Supreme Court, Texas courts routinely allowed the insured to choose independent counsel—at the insurer's expense—when an insurer offered a defense under a reservation of rights. *See Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 (5th Cir. 1983) (applying Texas law); *Britt v. Cambridge Mut. Fire Ins. Co*., 717 S.W.2d 476, 481 (Tex. App.—San Antonio 1986, writ ref'd n.r.e. May 6, 1987); *Steel Erection Co. v. Travelers Indem. Co*., 392 S.W.2d 713, 716 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

Then, in *Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004), the Texas Supreme Court addressed this issue where the insured, Davalos, was injured in a car accident in Dallas County and sued the driver of the other car in Matagorda County. When the other driver sued Davalos in Dallas County, Davalos notified his insurer and requested a defense. However, before insurer-appointed counsel appeared in the case, Davalos' Matagorda counsel moved to transfer venue of the Dallas case to Matagorda County. The insurer informed Davalos that it opposed the transfer of venue. Davalos refused to accept the insurer-appointed defense counsel, taking the position that the insurer's opposition to transfer created a conflict that Davalos believed gave him the right to independent counsel.

The coverage dispute thus centered around whether the insurer's disagreement with 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 accepted the proposition that the insurer may be precluded from

insisting on its contractual right to control the defense where there is a "conflict of interest" between the insurer and its insured. The Court acknowledged that the most common situation giving rise to such a conflict occurs when an insurer issues a reservation of rights letter that questions the existence or scope of coverage. However, the Texas Supreme Court was careful to make clear that "[e]very disagreement about how the defense should be conducted cannot amount" to a disqualifying conflict of interest. *Id*. at 689.

The conflict alleged by Davalos concerned a disagreement over the appropriate venue for the defense of a third-party claim, not Davalos' 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 without a sufficient conflict, he lost his right to recover the costs of that defense.

Importantly, the Court provided guidance with respect to those conflicts of interest that may justify an insured's refusal of a defense offered by its insurer:

1. When the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends.

2. When the defense tendered is not a complete defense under circumstances when it should have been.

3. When the attorney hired by the carriers acts unethically and, at the insurer's direction, advances the insurer's interest at the expense of the insured's.

4. When the defense would not, under the governing law, satisfy the insurer's duty to defend.

5. When, although the defense is otherwise proper, the insurer attempts to obtain some type of concession from the insured before it will defend.

1. <u>When a Reservation of Rights Might Not Be Sufficient to Create a Conflict</u>

Texas case law provides very few examples of reservation-of-rights letters that are either sufficient or insufficient, as a matter of law, to create an independent-counsel-triggering conflict of interest. We know from *Davalos*, *supra*, that simply issuing a reservation of rights will not create a conflict of interest allowing an insured to select independent counsel. Nor will a disagreement over the venue of the lawsuit. On the other hand, an insurer's reservation of right to deny coverage based upon a breach of contract exclusion, where the underlying litigation raises a claim for breach of contract, will likely create an independent-counsel-triggering conflict of interest. *See Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 686 F.3d 325, 330-31 (5th Cir. 2012). So will an insurer's reservation of right to deny coverage for damages taking

place outside the contract period if the underlying action involves the issue of when damages took place. *Id.* The Texas Supreme Court has also cautioned insurers against using staff attorneys or captive counsel to defend their insureds when a reservation of rights letter has been issued. *See Unauthorized Practice of Law Comm. v. Am. Home Assur. Co.*, 261 S.W.3d 24, 40 (Tex. 2008) ("Declining representation is the safer course to avoid conflicts that destroy the congruence of interest between the insurer and the insured that allows for the use of staff attorneys.").

Rather, an insured is allowed to select its own counsel, at the insurer's expense, where "the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends." *Davalos*, 140 S.W.3d at 680; *Partain v. Mid-Continent Specialty Ins. Servs., Inc.*, 838 F. Supp. 2d 547, 567 (S.D. Tex. 2012) (stating that a true conflict of interest exists when it is apparent that the facts on which coverage depends will be ruled on judicially in the underlying lawsuit); *Mid-Continent Cas. Co. v. Petroleum Solutions, Inc.*, No. 4:09-0422, 2016 WL 5539895 (S.D. Tex. Sept. 29, 2016) ("an insured is entitled to independent counsel at the insurer's expense if a conflict of interest precludes the insurer from controlling the insured's defense"), *aff'd in part and rev'd in part*, 917 F.3d 352 (5th Cir. 2019); *Allstate Cnty. Mut. Ins. Co. v. Wootton*, 494 S.W.3d 825, 837 (Tex. App.--Houston [14th Dist.] 2016, pet. denied) (same).

See also:

Yowell v. Seneca Specialty Ins. Co., 117 F. Supp. 3d 904, 908-09 (E.D. Tex. 2015) (holding that "once an insurer has breached its duty to defend, the insured is free to proceed as he sees fit; he may engage his own counsel and either settle or litigate, at his option" and that because "[the insurer] breached its duty to defend, [the insurer] waived its right to control the defense, and [the policyholder] is free to utilize the attorney of its choice in the defense of the [underlying] lawsuit.").

G. Washington State

Under Washington State law, a conflict between the insurer and insured does not entitle the insured to independent counsel. Instead, the insured is entitled to an "enhanced obligation" from the insurer as part of the duty of good faith. *Tank v. State Farm Fire & Cas. Co*., 105 Wash. 2d 381, 387-88, 715 P.2d 1133, 1137 (1986).

> 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. Both retained defense counsel and the insurer must understand that only the *insured* is the client. 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. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company. 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.

Id., 105 Wash. 2d at 388 (emphasis in original).

Both the insurer and defense counsel are to comply with the "enhanced obligation." An insurer's reservation of rights does not create an automatic conflict of interest, and where the insurer and selected defense counsel comply with the "enhanced obligation," the insured is not entitled to select its own independent counsel. *Johnson v. Cont'l Cas. Co*., 57 Wash. App. 359, 788 P.2d 598 (1990).

The "enhanced obligation" does not apply where the insurer has not reserved its rights. *Philadelphia Indem. Ins. Co. v. Olympia Early Learning Center*, No. C12-5759 RBL, 2013 WL 6174480, at *2 (W.D. Wash., Nov. 21, 2013). The court stated that the insurer was not required to reserve rights on its policy limits, and the issue of policy limits did not create a conflict. *Id*., at *3.

In 2017, the Washington Supreme Court applied *Tank* to a case where the insureds claimed an attorney "fail[ed] to disclose a potential conflict based on a long-standing relationship the law firm had with the insurance company in not only accepting cases representing insureds in civil cases, but also at some time representing the insurance company in coverage disputes." *Arden v. Forsberg & Umlauf, P.S*., 189 Wash. 2d 315, 319, 402 P.3d 245 (2017). There, the insurer did not issue a reservation of rights letter "at the outset of the case," but instead did so "later during the representation." *Id*., 189 Wash. 2d at 324. The court noted that while "reserving its right to contest coverage," the insurer "actively participated in settlement negotiations and advanced settlement offers intended to prevent judgment against the" insureds. *Id*., 189 Wash. 2d at 3235. The insurer "authorized settlement offers and evidently agreed to the settlement theory." *Id*. Accordingly, the Washington Supreme Court concluded the "'inherent' conflict of interest concern in *Tank* did not fully materialize." *Id*. (noting insureds "cite no case supporting a heightened standard or identify how any alleged conflict negatively impacted their interests.").

III. INDEPENDENT COUNSEL RATE ISSUES

A. Jurisdictions with General Independent Counsel Statutes

General independent counsel statutes provide some limitations on the rates that insurers are required to pay independent counsel. California's and Guam's statutes regarding independent counsel rates provide:

> 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.

Cal. Civ. Code § 2860(c); 22 Guam Code § 12111. Insurers typically pay their outside panel counsel lower rates than the rates non-panel firms charge. The statutes provide strong support for the insurer's ability to cap rates. In response, insurers and independent counsel sometimes assert that the type of action is different than the insurer's characterization of the action. For example, an insured might argue that a nuisance dispute between neighbors actually involves sophisticated privacy issues that warrant a higher hourly rate. Sometimes insurers and insureds negotiate these issues. Even so, the insured may have to pay the difference between independent counsel's actual rates and the insurer's independent counsel rates.

Independent counsel may not have the same incentive to work efficiently as panel counsel does. Case law differs on the extent to which an insurer's billing guidelines may apply. Compare *Dynamic Concepts, Inc. v. Truck Ins. Exch*., 61 Cal. App. 4th 999, 1009 n.9 (1998) ("we question the wisdom and propriety of so-called 'outside counsel guidelines' by which insurers seek to limit or restrict certain types of discovery, legal research, or computerized legal research by outside attorneys they retain to represent their insureds. Some guidelines go so far as to call for the use of paralegals, rather than attorneys, to respond to 'routine' discovery requests or prohibit the retention of experts or the filing of certain pretrial motions until shortly before trial. Under no circumstances can such guidelines be permitted to impede the attorney's own professional judgment about how best to competently represent the insureds. If the attorney's representation is to be limited in any way that unreasonably interferes with the defense, it is the *insured*, not the insurer, who should make that decision.") (emphasis in original) *with Pepsi-Cola Metro. Bottling Co. v. Ins. Co. of N. Am*., No. CV 10-2696 SVW MANX, 2010 WL 10875087, at *9 (C.D. Cal. Dec. 28, 2010) ("the evidence does not show that the 'billing guidelines' were applied in a manner that influenced [independent counsel's] substantive strategy decisions, but instead, it appears that the purpose and result of the guidelines is to reduce overall fees based on objective standards relating to billing practices. Much like reducing the overall hourly billing rates under § 2860 to conform with those ordinarily charged in the community, the application of the guidelines in this case appears to turn on reducing costs that the insurer finds needless or unexplained, under strategy-neutral criteria. … A finding that insurers must pay even unreasonable and unnecessary defense costs would fly in the face of California law.").

Independent counsel may be unfamiliar with an insurer's requirements for billing descriptions. Typical requirements are that billing descriptions not be vague, that descriptions state the cause of action to which the task relates and the work product to be generated, and block-billing is prohibited. Insurers may need to request further specificity, in order to determine whether the tasks relate to the defense to the defense of the insured and are reasonable. *Center Foundation v. Chicago Ins. Co*., 227 Cal. App. 3d 547, 560 (1991) (independent counsel must be "willing to engage in ethical billing practices susceptible to review at a standard stricter than that of the marketplace.").

Alaska's independent counsel statute is much more specific than California's, and requires independent counsel to allocate fees and costs between covered and non-covered claims, because the insurer can allocate between covered and non-covered fees and costs up front.

> 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.

Alaska Stat. § 21.96.100(d). Such an approach would not be permissible in California, because an insurer is required to defend the entire action if even one claim is potentially covered. *E.g*., *Buss v. Superior Court*, 16 Cal. 4th 35 (1997).

Fee disputes that are not resolved by the statutes, the policy, or otherwise, are subject to fee arbitration. Alaska Stat. § 21.96.100(d); Cal. Civ. Code § 2860(c); Guam Code § 12111.

B. Interpretations of "Reasonable" Rates

As indicated in Section I of this article, a handful of courts have stated that independent counsel's fees should be "reasonable." *Ill. Masonic Medical Center v. Turegum Ins. Co*., 168 Ill. App. 3d 158, 522 N.E.2d 611, 613 (1st Dist. 1988); *Brohawn v. Transamerica Ins. Co*., 276 Md. 396, 414-15, 347 A.2d 842 (1975); *Magoun v. Liberty Mut. Ins. Co*., 346 Mass. 677, 684-85, 195 N.E.2d 514 (1964); *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. 743, 748, 357 P.3d 338 (2015); *Szelc v. Stanger*, No. CIV. 08-4782, 2010 WL 2925847, at *2 (D.N.J. July 21, 2010); *Pub. Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422, 425 N.E.2d 810, 815 n.* (1981); *Fetch v. Quam*, 530 N.W.2d 337, 341 (N.D. 1995); *Socony-Vacuum Oil Co. v. Cont'l Cas. Co*., 144 Ohio St. 382, 397, 59 N.E.2d 199 (1945); *Krueger Assocs., Inc. v. ADT Sec. Systems*, No. CIV.A. 93-1040, 1994 WL 709380, at *5 (E.D. Pa., Dec. 20, 1994).

However, the insurer and the insured and his or her independent counsel may disagree on what constitutes a reasonable rate. Insurers typically pay outside panel defense counsel at a lower rate than the rates charged by non-panel firms. As a practical matter, courts may simply determine that the market rate, meaning whatever the client/insured would be willing to pay, constitutes a reasonable rate. Such an approach is exemplified in *Housing Auth. of the City of Dallas, Texas v. Northland Ins. Co.,* Case No. 3:03-cv-00385 (N.D. Tex. Jan. 27, 2005) (unpublished), discussed in Section III.C of this article. The Second Circuit applies this approach, with the limitation of "'what a reasonable, paying client would be willing to pay, given that such a party wishes to spend the minimum necessary to litigate the case effectively.'" *Bergerson v.*

N.Y. State Off. of Mental Health, 652 F.3d 277, 289 (2d Cir. 2011), *quoted and cleaned up in Charles v. Seinfeld*, No. 18-CV-1196 (AJN), 2022 WL 889162, at *3 (S.D.N.Y. Mar. 25, 2022).[3]

Following Nevada's recent adoption of an independent counsel requirement, *State Farm Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. 743, 748, 357 P.3d 338 (2015), insureds and insurers have disputed what the reasonable cost of independent counsel is. In *Wood v. Nautilus Ins. Co*., No. 217CV02393MMDDJA, 2022 WL 845758 (D. Nev. Mar. 22, 2022), the court first ruled that Nevada law, not California law, governed independent counsel rates, even though the underlying action was filed in California, because Nevada law applied to the policy. *Id*., at *14. The court then reasoned:

> The Nevada rule articulated in *Hansen*—that the insurer is required to pay "reasonable" fees for independent counsel—is expressly derived from California's *Cumis* rule. *See Hansen*, 357 P.3d at 341. Plaintiffs [the insureds] have not explained or established that the *Cumis* rules' successor, Section 2860, necessarily results in lower or more restrictive fees for independent counsel than Nevada's rule.
>
> The evidence Plaintiffs provide, though probative, is not conclusive. Plaintiffs established that Defendant's [the insurer's] counsel charges substantially more than its stated panel rate, including associate billing at $255/hour and partner billing at $285/hour at some point in this case (ECF No. 281-5 at 3), and between $325/hour and $365/hour during the [underlying] *Switzer* Action (ECF No. 281-4 at 4). But Plaintiffs do not provide the hourly rate of their independent counsel, nor do they explain that the fees Defendant paid to its coverage counsel in the Switzer Action or its defense counsel in the Coverage Action are similar in kind to what Defendant would pay to defend its insureds in the Switzer Action. The Court finds that, based on the evidence before it, Plaintiffs have failed to meet their burden of establishing Defendant's rate for independent counsel was not "reasonable."

Id., at *14-15.

C. Texas

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 "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

[3] The authors acknowledge Dan D. Kohane of Hurwitz & Fine, P.C. for bringing *Charles v. Seinfeld* to their attention.

rate of outside counsel selected by the insured. *See* Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 Tes. 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).[4]

There are no Texas statutes addressing this issue (unlike the general independent counsel statutes in Alaska, California, and Guam), 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

[4] These factors are analogous to those identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and have come to be referred to as "the *Johnson* factors." They are commonly applied by the courts in the Fifth Circuit to attorney's fees awards under federal fee-shifting statutes.

(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. Jan. 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.

IV. CONCLUSIONS AND PRACTICAL IMPLICATIONS

The rules governing the defense obligations of insurers are both animated by and complementary to the rules that govern the ethical obligations of defense counsel. While those rules are specific to the jurisdictions in which defense counsel are rendering services, in all U.S. jurisdictions they generally prohibit the representation of conflicting interests in the same matter. *See, e.g*., ABA Model Rule of Professional Conduct 1.7(a)(2) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client"). Thus, in addition to the insurer's obligation to provide a defense by independent counsel where a conflict exists, the attorney retained by the insurer also remains bound by the rules of professional conduct in his or her jurisdiction.

Insureds may wish to consider the following:

- Negotiate independent counsel's rates in advance.

- Include a Choice-of-Counsel endorsement in the policy that provides the insured with the right to choose its own defense lawyer (or even name a particular lawyer or firm in the endorsement).

- Negotiate rates, particularly for high stakes, complex litigation. This point may be especially persuasive to insurers where the indemnity exposure is large, and a loss may not only harm the defendant, but may affect the indemnifying insurer's bottom line.

- If the insurer has appointed defense counsel, ask defense counsel whether he or she believes a conflict exists based on the insurer's reservation of rights that would prevent defense counsel from representing the insured, based on the state's rules of professional conduct. If defense counsel does not believe there is such a conflict, ask defense counsel to provide his or her reasoning.

Insurers may wish to consider the following:

- If the insurer agrees to a Choice-of-Counsel endorsement, consider including terms that may offset the risk of overinflated independent counsel invoices, such as a high self-insured retention or deductible, and/or agreed hourly rates.

- Advise the insured of what the reasonable rates are for the jurisdiction and the type of litigation, in the reservation of rights letter if possible. If the insured wishes to be defended by independent counsel with higher rates, the insured can pay the difference between reasonable rates and the independent counsel's actual rates.

- Provide the insured and independent counsel with the billing guidelines, and request compliance with them.

- Review defense invoices promptly, and request clarification from the insured and independent counsel of vague billing descriptions. Follow up on time entries that do not comply with the billing guidelines, and request additional detail. Request copies of work product to evaluate whether tasks were reasonable and necessary to the defense.

- Advise the insured and independent counsel that unreasonable charges will not be paid. For example, if the insured has retained a high-caliber law firm, lengthy memos on basic issues of law and procedure should not be necessary; the firm should be familiar with the applicable rules.

- Request defense reports from independent counsel, to determine whether the work being done is reasonable and necessary to the defense.