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Minn. Ruling Expands Insureds' Right To Independent Counsel

By **Bradley Prowant and Seth Row** (September 11, 2026, 1:52 PM EDT)

A recent decision by the Minnesota Court of Appeals — Fabyanske Westra Hart & Thomson PA v. Western National Mutual Insurance Co. — gives Minnesota policyholders a stronger basis to demand independent counsel when an insurer's reservation of rights establishes that coverage may turn on the same facts being litigated in the underlying case.

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On Aug. 26, the Minnesota Supreme Court granted a petition for further review of the Court of Appeals' decision.

When the Insurer Calls the Plays: Minnesota Expands the Right to Independent Counsel

Imagine a college football coach who is trying to win but is being told by the athletic director to coach in a way that is for the AD's benefit and aimed at getting a bigger budget next year. Even if the coach was doing the job well, one would worry that the game plan is serving someone else's interests.

A similar concern can arise when an insurer defends a lawsuit under a reservation of rights. In that situation, the insurer pays for the defense lawyer, but reserves the right to deny coverage later, depending on how the facts develop. That can put the insured in a difficult position: The lawyer controlling the defense may be shaping facts that determine not only whether the insured is liable, but also whether the insurer ultimately has to pay. But does that conflict mean that the insured is entitled to choose their own lawyer?

That is the problem the Minnesota Court of Appeals addressed on June 1 in Fabyanske v. Western National.[1] The court held that when the same facts being litigated in the underlying case also determine coverage, the insurer's reservation of rights can create an actual conflict requiring the insurer to fund independent counsel selected by the insured.

A Construction-Zone Accident and a Coverage Dispute

Fabyanske arose from a motorcycle crash in a Minnesota construction zone. The injured plaintiff sued both the general contractor and a subcontractor, alleging that both negligently maintained the road. Western National, the subcontractor's insurer, agreed to defend the general contractor as an additional insured, but did so under a reservation of rights.

That reservation of rights is where the conflict arose. Western National agreed to provide a defense but reserved the right to deny coverage if the general contractor was held liable based on its own negligence — as opposed to vicariously liable for the acts of the subcontractor.

The insurer took the position that the policy covered the general contractor only for liability caused "in whole or in part" by the subcontractor's acts or omissions. This language is very commonly found in additional-insured endorsements used in construction and other industries.

This produced a conflict because the underlying tort case would require fact development on the same question that mattered to coverage: Was the accident caused by the general contractor's own conduct, by the subcontractor's work or by some combination of both? In other words, the lawyer running the defensive plays could influence not only the outcome of the liability case, but also whether Western National ultimately had to pay for the verdict or settlement.

A defense strategy emphasizing the general contractor's own negligence could support Western National's coverage position. A strategy emphasizing the subcontractor's actions could better protect the general contractor's coverage position.

When Coverage Depends on the Defensive Game Plan

The Minnesota Court of Appeals held that an actual conflict exists when an insurer defends under a reservation of rights and the "facts to be determined in the underlying action are the same facts upon which coverage depends."[2] When that happens, the insurer's duty to defend transforms into a duty to reimburse the insured for reasonable fees incurred in hiring independent counsel.

Fabyanske does not result in every reservation of rights creating a right to independent counsel.

The key is whether the reserved coverage issue overlaps with facts that defense counsel can shape in the underlying case. Here, that issue was whether the general contractor's liability arose from its own negligence, which Western National said would result in no indemnity coverage, or from the subcontractor's acts or omissions, which could fall within the additional insured coverage.

That is why the "who is running the defense?" question mattered. Discovery, expert testimony, allocation arguments and settlement strategy all could affect how liability was characterized. The insured did not have to show that appointed counsel had already done anything wrong or that there was an ethical conflict. The conflict was actual because the structure of the case resulted in divided incentives.

Practical Takeaways for Policyholders

Fabyanske gives policyholders a useful checklist when an insurer agrees to defend under a reservation of rights.

1. Compare the reservation of rights with the issues being litigated in the underlying case.

2. Ask whether defense counsel's strategy could shape facts or findings that determine coverage, such as whether liability rests on covered or uncovered conduct.

3. If the answer to (2) is yes, the insured may have a strong argument for independent counsel. The insured should identify the overlap, explain the divided incentives, and demand either withdrawal of the reservation or reimbursement for independent counsel.

How Minnesota Compares to Other States

Fabyanske is best understood by comparing Minnesota's approach to how other states address the same problem.

California has a statutory independent counsel rule, referred to commonly as "Cumis counsel" for San Diego Navy Federal Credit Union v. Cumis Insurance Society Inc., the 1984 decision from the Court of Appeal of California, Fourth Appellate District, that spurred the adoption of the statute.[3]

Under California Civil Code Section 2860, a conflict may exist when the insurer reserves rights on an issue and the outcome of that issue can be controlled by defense counsel retained by the insurer. California also regulates counsel qualifications, fee rates, information-sharing and fee disputes.

Washington takes a different path. Under the Washington Supreme Court's 1986 decision in Tank v. State Farm Fire & Casualty Co., an insurer defending under a reservation of rights owes an enhanced obligation of fairness, including full disclosure, competent defense counsel, careful communication about settlement and coverage developments, and recognition that defense counsel's only client is the insured.[4]

Washington's rule is protective, but its doctrine focuses more on enhanced duties and good faith, along with ethical responsibilities of appointed counsel, than on a broad reimbursement rule for insured-selected counsel.

Unlike Fabyanske, Oregon has not adopted a broad common-law rule. Oregon's general tripartite counsel framework is driven largely by ethics guidance for insurance defense counsel, although Oregon has a specific independent counsel statute for environmental claims. Oregon Revised Statutes, Section 465.483, requires independent counsel when a general liability insurer defends an environmental claim under a reservation of rights or when the insured faces potential environmental liability above policy limits.

Conclusion

If the Minnesota Supreme Court affirms the Court of Appeals, then Fabyanske will give Minnesota policyholders a stronger basis to demand independent counsel when an insurer's reservation of rights establishes that coverage may turn on the same facts being litigated in the underlying case. That is especially important in construction and additional-insured disputes, where fault allocation can determine both liability and coverage.

The practical effect of Fabyanske may be that in all cases involving additional-insured endorsements with the "in whole or in part" language, the additional-insured will have the right to independent counsel.

When an insurer reserves rights, policyholders should ask who is running the defense and whether that lawyer's game plan could affect coverage. If insurer-appointed counsel controls the facts that will decide whether the insurer has to pay, Fabyanske may support a demand for a conflict-free independent defense funded by the insurer.

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[1] Fabyanske Westra Hart & Thomson PA v. Western National Mutual Insurance Co. , No. A25-1640, 2026 WL 1521270 (Minn. Ct. App. June 1, 2026).

[2] Fabyanske, 2026 WL 1521270, at *1.

[3] San Diego Navy Fed. Credit Union v. Cumis Insurance Society Inc. , 162 Cal.App.3d 358 (Cal. Ct. App. 1984).

[4] Tank v. State Farm Fire & Casualty Co. , 105 Wash. 2d 381 (1986).
