

Lessons Learned From Celebrity Trials

American College of Coverage Counsel 2022 Law Symposium

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Topics

- Choice of Law
- Duty to Defend
- Right to Independent Counsel
- Reasonable Hourly Rates
- Reimbursement of Defense Costs



Choice of Law

First, is there a real conflict? If so, which test will apply:

- *Lex loci contractus* (Place of Contract)
- Restatement Section 193, or Most Significant Relationships
- Governmental Interest
- Statutory Test
- Leflar's Five Choice-Influencing Factors
- Choice of Law Provision in the Insurance Policy

Choice of Law: Which Test Will Be Applied?

Lex loci contractus (Place of Contract)	Restatement (Second) Conflict of Laws; Most Significant Contacts	Governmental Interest	Statutory Provisions	Leflar's Five Choice- Influencing Factors
Alabama; Florida; Georgia; Maryland; New Mexico; Rhode Island (but Restatement could be applied); Tennessee	Alaska; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Idaho; Indiana; Iowa; Kentucky; Maine; Massachusetts; Michigan; Mississippi; Missouri; Nebraska; Nevada; New Hampshire; New Jersey; New York; North Dakota (combined with other factors); Ohio; Oregon; Pennsylvania (combined with government interest); Texas; Utah; Vermont; Washington; West Virginia	California; District of Columbia;	Louisiana Civil Code articles 3515, 3537, 3540; Montana Code Ann. section 28-3-103; North Carolina Gen. Statutes section 58-3-1; 15 Oklahoma Statutes section 162; South Carolina Code section 53-104; Virginia Code Ann. Section 38.2-313	Minnesota; Wisconsin (along with Restatement)

Choice of Law: Bill Cosby



Choice of Law: Bill Cosby

- A number of women accused Bill Cosby of sexual assault. In 2014 and 2015, nine women filed three separate lawsuits claiming that Cosby defamed them by publicly denying their allegations.
- Cosby held two insurance policies issued by AIG: a homeowners policy and a personal “umbrella policy”). Under each, AIG had a duty to “pay damages [Cosby] is legally obligated to pay [due to] personal injury ... caused by an occurrence covered[] by this policy anywhere in the world...” Both policies defined “personal injury” to include “defamation,” and obliged AIG to pay the cost of defending against suits seeking covered damages.

ALG Property Casualty Co. v. Cosby (C.D. Cal. 2015) 2015 W.L. 90700994

The California District Court found no conflict between California law and Massachusetts law, so it applied the law of its forum (California).

Applying California law, the federal district court held that the sexual assault exclusion was ambiguous and that the insurer had a duty to defend.

ALG Property Casualty Co. v. Cosby (1st Cir. 2018) 892 F.3d 25

The District Court found no conflict between Massachusetts law and California law, so it applied the law of its forum (Massachusetts).

Applying Massachusetts law, the First Circuit held that a sexual assault exclusion was ambiguous under the facts of the case and held the insurer had a duty to defend.

Choice of Law: Resources

- ALFA International 2021 Insurance Law Compendia

<https://www.alfainternational.com/insurance-law-compendia>

- Tressler LLP Choice of Law Standards re: Insurance Coverage (2016)

https://www.tresslerllp.com/docs/default-source/Publication-Documents/50_state_choice_of_law_standards_re_insurance_coverage.pdf?sfvrsn=0

Duty to Defend

- Claim That Alleges Facts That Are Even Potentially Covered
- 8-Corners Rule or Extrinsic Evidence
- Extends to a Counterclaim, Cross-Claim, or Third-Party Claim



Duty to Defend

Extrinsic Evidence Allowed to Establish But Not Negate Coverage	Extrinsic Evidence May Be Allowed to Both Establish or Negate Coverage	Extrinsic Evidence Is Not Allowed to Establish The Duty To Defend or Can Only Be Used By An Insurer To Negate Coverage
Alabama, Alaska, Connecticut, District of Columbia, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New York, Oklahoma, Vermont, Washington	Arizona, California, Colorado, Georgia, Illinois, Iowa, Kentucky, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, West Virginia, Wisconsin	Arkansas, Delaware, Florida, Idaho, Louisiana, Maine, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Texas, Virginia, Wyoming



Duty to Defend: Kim Kardashian



Duty to Defend: Kim Kardashian

Tria Beauty, Inc. v. National Union Fire Ins. Co., 2013 W.L. 2818649 (N. D. Cal. 2013)

Tria sued competitor Radiancy for false advertising, unfair competition, and trademark infringement. Radiancy counterclaimed against Tria and its celebrity spokesperson, Kim Kardashian, alleging Tria made false and misleading statements about its own products which damaged Radiancy. Tria and Kardashian claimed:

- The Tria Hair product is the “first” and “only” at-home laser hair removal device cleared by the FDA
- The Tria Skin product is “faster,” “superior,” “more powerful,” and more “advanced” than other acne treatment products on the market
- The Tria Skin product is the “first and only” blue light acne treatment equivalent to blue light therapy available from dermatologists.



Duty to Defend: Kim Kardashian

Tria Beauty, Inc. v. National Union Fire Ins. Co., 2013 W.L. 2818649 (N.D. Cal. 2013)

- Tria's insurance policy provided coverage for publication of material that disparages goods, products or services.
- The federal district court found that these alleged statements constituted "implied disparagement," because they implied that Radiancy's products were inferior, and thus fell within the insuring language. *Id.*, at *6.
- However, the court also found that no publications were made during the insurer's policy period, and that an intellectual property exclusion precluded coverage, and thus, the insurer had no duty to defend. *Id.*, at *8.



Duty to Defend: Resources

Big “I” Virtual University: Duty to Defend: What the Courts Say

<https://www.independentagent.com/vu/SiteAssets/Pages/checklist/checklist/Duty-to-Defend-State-List.pdf>

ALFA International, 2021 Insurance Law Compendia

<https://www.alfainternational.com/insurance-law-compendia>

Saxe, Doernberger & Vita, PC, Use of Extrinsic Evidence in Determining an Insurer’s Duty to Defend, October 2020

<https://www.sdvlaw.com/docs/news.21.pdf>



Right to Independent Counsel

A “tripartite relationship” is created when an insurance company retains counsel to defend the insured without reservation.

However, where an insurance company defends its insured through a reservation of its rights to later deny indemnity coverage, a potential for a conflict of interest may arise between the insured and the insurance company.

In this situation, the question arises as to whether the insured is entitled to be represented by independent counsel.



Right to Independent Counsel

25 States say a conflict of interest gives the insured the right to independent counsel. Six say no.

Of the 25, 11 say ANY reservation of rights triggers the insured's right to independent counsel. The other 14 say it depends on the nature of the reservation.



Right to Independent Counsel

Restatement of Law, Liability Insurance

§ 16 – The Obligation to Provide an Independent Defense

When an insurer with the duty to defend provides the insured notice of a ground for contesting coverage under § 15 [Reserving the Right to Contest Coverage] and there are facts at issue that are common to the legal action for which the defense is due and to the coverage dispute, **such that the action could be defended in a manner that would benefit the insurer at the expense of the insured**, the insurer must provide an independent defense of the action.

(Emphasis added.)



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Right to Independent Counsel: Depp v . Heard



Right to Independent Counsel: Depp v. Heard

Depp v. Heard, Circuit Court of Fairfax County, Virginia, Case No. CL-2019-0002911.

One insurer accepted Heard's defense subject to a reservation of rights and agreed to provide Heard with independent counsel.

A second insurer accepted Heard's defense subject to a reservation of rights, but declined to provide Heard with independent counsel.

The first insurer is currently suing the second insurer for reimbursement of fees and costs that it paid to Heard's independent counsel.

The second insurer is currently suing Heard for reimbursement of ALL defense fees and costs, because the jury verdict establishes that Heard acted willfully, and as such, California public policy and California Insurance Code Section 533 preclude coverage and any duty to defend.



Right to Independent Counsel: Resources

ALFA International, 2021 Insurance Law Compendia,
<https://www.alfainternational.com/insurance-law-compendia>

Tressler LLP, 50 State Survey, Right to Independent Counsel,
https://www.tresslerllp.com/docs/default-source/Publication-Documents/50-state-survey-right-to-independent-counsel_tressler-llp.pdf?sfvrsn=4



Reasonable Hourly Rates

Restatement of Law, Liability Insurance, § 17 – The Conduct of an Independent Defense

When an independent defense is required under § 16:

- 1) The insurer does not have the right to defend the legal action;
- 2) The insured may select defense counsel and related service providers;
- 3) The insurer is obligated to pay the **reasonable fees** of the defense counsel and related service providers on an ongoing basis in a timely manner;
- 4) The insurer has the right to associate in the defense of the legal action under the rules stated in § 23 [The Right To Associate In The Defense]; and
- 5) The rules stated in § 11 [Confidentiality] govern the insured's provision of information to the insurer.



Reasonable Hourly Rates

Statutes:

California: Insurance Code Section 2860 - (rate actually paid by insurer);

Alaska: Stat. Section 21.90.100(d) - (rate actually paid by insurer);

Florida: Stat. Ann. Section 627.426(2)(b)(3) - (reasonable fees agreed on by parties or set by court)



Reasonable Hourly Rates

California: Insurance Code Section 2860:

The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees.

- Actually Paid by the Insurer
- Similar Actions
- Where the Claim Arose



Reasonable Hourly Rates: Depp v. Heard



Reasonable Hourly Rates: Depp v. Heard

- The insurers agreed to hire separate counsel to handle subpoenas, and other counsel to represent third party witnesses (most of whom were in California), both under separate capped fees.
- When the trial date was continued for a year, the cap for Heard's attorneys had been exhausted. The parties then negotiated agreed hourly rates for her counsel that are consistent with what the insurers pay in the ordinary course of business for similar types of cases.
- In closing argument, Heard's attorney stated that Heard had incurred \$7 million in attorney fees and costs.

Reasonable Hourly Rates: Depp v. Heard

- In Depp v. Heard, two insurers agreed to defend Amber Heard.
- The insurers initially set an hourly rate for partners, associates and paralegals, at amounts the insurer paid in the ordinary course of business.
- Heard's lawyers proposed a budget, and proposed SIGNIFICANTLY HIGHER hourly rates for specific attorneys, and for law clerks and paralegals. (*Their proposed rates for law clerks was higher than one of your panelist's hourly rate after 35 years of experience and who is a member of both ACCOC and ABOTA.*)
- Later, the insurers and Heard negotiated a cap of a set amount through post-trial motions, plus another cap of another set amount for an attorney to travel with Heard to the defamation trial of Depp v. Sun newspaper in the UK.

Reimbursement of Defense Fees and Costs



Buss v. Superior Court (Transamerica Ins. Co.) (1997) 16 Cal.4th 35

Dr. Jerry Buss owned the Lakers (basketball), Kings (hockey), Lakers (soccer), Great Western Forum (arena), Forum Entertainment Network, Box Seat, and Prime Ticket Network (cable networks). Buss contracted with H&H Sports for advertising.

H&H sued Buss for 27 causes of action, most dealing with breach of contract, but one cause of action for defamation.

Transamerica agreed to defend based on potential coverage for one cause of action, defamation. However, as required by California law, it provided a full defense, but reserved the right to seek reimbursement of defense fees and costs incurred to defend non-covered claims.

Buss settled with H & H for \$8.5 million. Transamerica refused to contribute to the settlement, but paid over \$1 million in defense fees and \$20,000 to \$55,000 for expert fees.

Buss sued Transamerica for breach of contract and bad faith, alleging Transamerica was obligated to pay the settlement. Transamerica cross-complained for recovery of its defense fees and costs, other than for the defamation cause of action.

Buss v. Superior Court (Transamerica Ins. Co.)
(1997) 16 Cal.4th 35, 40

The questions we shall address, and the answers we shall give, are these: First, may the insurer seek reimbursement from the insured for defense costs? Yes, as to claims that are not even potentially covered, but no, as to those that are. Second, for what specific costs may the insurer obtain reimbursement? Those that can be allocated solely to claims that are not even potentially covered. Third, when the insurer seeks reimbursement, which party must carry the burden of proof? The insurer. Fourth and final, what is the burden of proof? Proof by a preponderance of the evidence.

Reimbursement of Defense Costs

Allowed (States in bold allow reimbursement in “mixed” cases)	Not Allowed	Split or Undecided
Alabama, California , Colorado, Connecticut , Delaware, Florida , Georgia , Hawaii , Idaho, Illinois, Iowa, Kentucky, Mississippi, Montana , New Jersey, New Mexico, Ohio , Pennsylvania, Tennessee , Texas (if express policy provision), Utah, Virginia, Washington, Wyoming	Alaska, Arizona, Arkansas, Maryland, Missouri,	District of Columbia, Indiana, Kansas, Louisiana, Maine, Massachusetts, Nebraska, New York , North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Vermont, West Virginia, Wisconsin

Reimbursement of Defense Costs: Resources

Tressler, A 50 State Survey, Recoupment of Defense Costs, June 2016:

https://www.tresslerllp.com/docs/default-source/Publication-Documents/chicago1--666689-v2-50_state_survey_on_recoupment_of_defense_costs.pdf?sfvrsn=0

States May Require:

- Non-waiver Agreement or Bilateral Reservation of Rights
- Unilateral Reservation of Rights
- Express Policy Provision



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Conclusion

Thank you for your attention.

Questions?



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