INSURED-SELECTED INDEPENDENT COUNSEL

STATE-BY-STATE* QUICK REFERENCE GUIDE

*(Including the District of Columbia, Puerto Rico and the Virgin Islands)

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USING THIS QUICK REFERENCE GUIDE

A word of caution . . . this Quick Reference Guide is intended to assist the user in evaluating situations and circumstances in which issues of independent counsel arise. This Guide, and the information reported herein, are not intended to replace focused, legal research and analysis into specific factual situations.

Care must be taken when relying upon the conclusions and findings reported in this Guide. In each instance, the specific question posed is: "***Does the state recognize a conflict of interest giving rise to the right to defense counsel unilaterally selected by the insured to be paid concurrently by the carrier when the carrier issues a reservation of rights letter after the tender of a claim?***" The answers of: "yes," "no," "sometimes" and "undecided" are based upon this particular wording. Change the wording of the question, and the answer may also change.

Additionally, caution must be exercised in extrapolating the findings from state-to-state. The rationale for recognizing, or declining to recognize, the insured's right to unilaterally selected counsel may not carry over from one state (jurisdiction) to another. This is because the manner in which a jurisdiction deals with the issue of the selection of defense counsel is inextricably interwoven with, and interdependent upon, its prior decisions regarding a carrier's right and duty to defend and the contractual obligations a carrier owes its insured. Historically, early decisions on the issue of independent counsel, or the appointment of personal counsel, were driven by insureds seeking to enforce their rights to a defense under their contracts of insurance, and the carriers seeking to avoid performance by claiming that their denial of coverage in its entirety, of certain claims, or of certain parties, created a conflict which "frustrated" the carriers' duty to defend and/or made that duty "impossible" to perform such that the carriers' performance was legally "excused." Certain jurisdictions, like California, Illinois and New York, responded to these arguments by refusing to excuse the carriers' performance and, as a result, found that a carrier, which had issued a reservation of rights acknowledging a duty to defend some portion of an action against the insured, must defend the action in its entirety, but must also cede to the insured the right to control the litigation and to select its own counsel. By contrast, New Jersey has held that a conflict of interest will in fact excuse the carrier from its duty to defend and converts that duty into a duty to reimburse the insured (after the fact) for counsel of its choice.

Yet another nuance to which the user of this Guide should be alert is the interplay of the ethical issues involving defense counsel's duties regarding joint representation and the carrier's contractual right to control the litigation. These issues have a profound impact upon the decision as to when, or under what circumstances, a jurisdiction will recognize a conflict between the parties in the first instance that may alter the parties' contractual rights and obligations. Interestingly, those jurisdictions that ***reject*** the "two client" rule (recognizing a tripartite relationship between the carrier, counsel and the insured) in favor of a "one client" rule (recognizing the insured as the sole client of defense counsel) are the least likely to presume there is any conflict of interest that cannot be adequately safeguarded by the ethical and disciplinary rules and civil remedies already in place. In this regard, we note that even among the tripartite or "two client" states, the majority of cases require that an actual, identifiable conflict of interest -- and not the mere potential for a conflict of interest -- be present before the

insured will be allowed the right to select counsel.[1]

Finally, we caution the user to pay attention to the particular facts and procedural aspects of the cases reported. Certain cases that appear in other treatises or works may have been excluded from this Guide for this reason. In particular, we have excluded any reliance upon cases where the only alleged conflict relates to the fact that the carrier has a duty to defend two antagonistic insureds, *e.g.*, an insured and an additional named insured, or two insureds under separate policies. Also excluded are cases where it is clear that the carrier breached the insurance contract by refusing to defend the case entirely, leaving the insured no choice but to obtain its own counsel or default in the underlying litigation. In those cases, the carrier will avoid liability for the insured's counsel only if its coverage denial was correct. Additionally, we did not include those cases involving uninsured motorists coverage where the carrier seeks to intervene directly in the litigation between the insured and the uninsured motorist in order to represent the interests of the uninsured motorist against its insured. Those cases are clearly distinguishable based on the directly adverse interests of the parties in the litigation.

The presence of a  symbol above a jurisdiction is intended to indicate a situation where the reported cases or conclusions for that jurisdiction may be questionable either because, *inter alia*: the cases are older (often preceding the enactment of the specific state's Rules of Professional Responsibility or Rules of Professional Conduct); there is no specific state court decision, or there are conflicting appellate decisions without any supreme court resolution.

[1] Anyone who has devoted significant time to researching and analyzing the carrier's duty to defend and its obligations to the insured will quickly realize that the use of the term "independent counsel" is somewhat of a misnomer and often can be misleading when attempting to decipher the rationale or holding of any particular case. This is because virtually all jurisdictions have enacted some form of disciplinary rules or ethical rules governing the conduct of lawyers that requires them to exercise "independent professional judgment" on behalf of their clients regardless of who pays the bill. In those situations where a lawyer cannot exercise such independent professional judgment, he or she is required to decline the representation. More often than not, the lack of "independence" referred to in the case law refers to an issue of implied control or untoward loyalty in favor of the carrier because counsel is either panel, captive or house counsel for a carrier and derives a substantial percentage, if not all, of its income from the carrier. Thus, as referred to in the cases "independent counsel," is frequently short-hand for personal counsel of the insured or insured-selected counsel.

CHOICE-OF-LAW CONSIDERATIONS

Modern day insurance transactions frequently involve multiple parties, who or which reside and/or are located in different jurisdictions. This potentially calls into play the consideration as to which jurisdiction's law controls the right to selection of counsel. This Quick Reference Guide does not attempt to address these choice-of-law issues and the user is urged to seek the advice of legal counsel if there is any question as to the applicable law.

TRENDS

The cases in this **Quick Reference Guide** generally fall into three categories:

(1) those states that always recognize the insured's unilateral right to select counsel whenever the carrier issues a reservation of rights;

(2) those states that never recognize the insured's unilateral right to select counsel when the carrier issues a reservation of rights or require a showing that the carrier cannot meet its enhanced obligation of good faith to the insured; and

(3) those states that recognize the insured's right to unilaterally select counsel only in certain circumstances, *i.e.*, where the reservation of rights create an actual, identifiable conflict of interest and not a mere theoretical or potential conflict of interest.

A few states have not yet decided the issue directly, and a few states, while recognizing a conflict of interest between the carrier and the insured, allow the carrier to select counsel (but not to control the litigation).

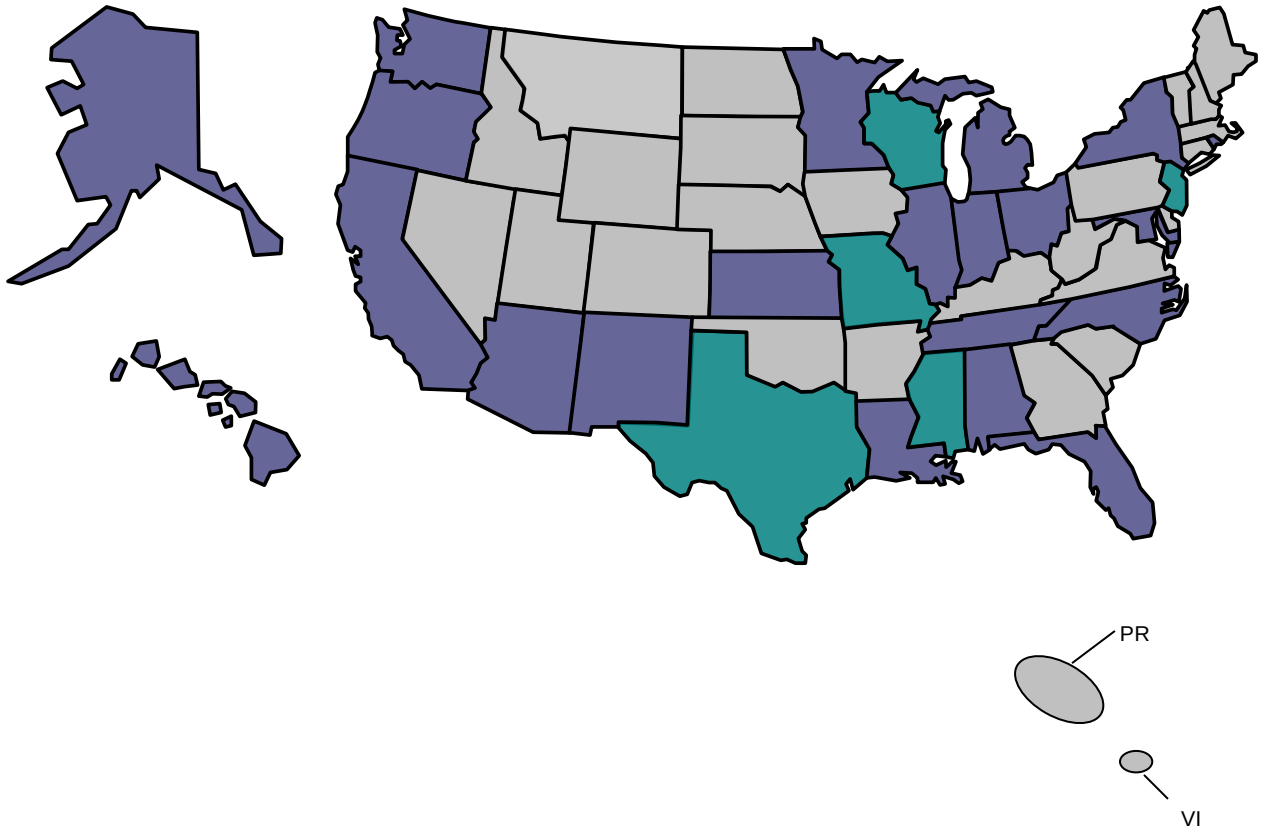
Of the cases expressly deciding the issue of unilateral insured-selected counsel, a few trends have emerged. As to recognizing conflicts that may trigger an insured's right to unilaterally select counsel, the clear majority of these cases (at least within the last decade) find that only an actual, identifiable conflict of interest will entitle an insured to select its own counsel to be paid for by the carrier. Perhaps the best expression of the modern rule or trend is set forth in the case of *Dynamic Concepts, Inc. v. Truck Insurance Exchange*, 71 Cal. Rptr. 2d 882, 887 (Cal. Ct. App. 1998) :

> An insurer's reservation of rights may create a disqualifying conflict of interest requiring the insurer to pay the cost of *Cumis* counsel to represent the insured in the underlying action. (Civil Code Section 2860(b)). But not every reservation of rights entitles an insured to select *Cumis* counsel. There is no entitlement, for example, where the coverage issue is independent of, or extrinsic to, the issues in the underlying action or where the damages are only partially covered by the policy.
>
> A mere possibility of an unspecified conflict does not require independent counsel. The conflict must be significant, not merely theoretical; actual, not merely potential…
>
> * * *
>
> …The potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled (such as by a defense based on total non-liability) or whether an actual conflict of interest precludes carrier-appointed defense counsel from presenting a qualified defense for the insured.

Similarly, it would appear that even in those cases that recognize that certain carrier-insured conflicts may call for the appointment of independent counsel to defend the insured, the carrier may still retain the right to select counsel as long as the counsel selected recognizes that its only duty is to the insured. While several cases would require the carrier to cede control of the defense to the insured after selecting independent counsel, a growing number of cases have held that a carrier may still retain control of the defense, but under an enhanced obligation of good faith.

In short, the absolutists' view that every reservation of rights creates a conflict of interest demanding insured-selected counsel (and resulting in a loss of carrier control), has virtually gone by the wayside. When the modern trend cases which restrict the circumstances under which a conflict of interest is recognized in the first instance are considered in context with those cases that reject the proposition of insured-selected counsel altogether, the clear weight of authority tips in favor of the carrier being able to issue a reservation of rights while simultaneously selecting counsel and/or retaining control of the case in all but a few jurisdictions or under a few circumstances.

AT A GLANCE: THE INSURED'S RIGHT TO UNILATERALLY SELECTED INDEPENDENT COUNSEL



Legend:

- Jurisdictions adopting Modern-Trend or Rejecting Insured-Selected Counsel
- Jurisdictions Requiring Insured-Selected Counsel Whenever an ROR is Issued
- Undecided

ALABAMA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No; only where carrier cannot meet its enhanced obligation of good faith; in absence of any breach of the enhanced obligation, the carrier must select competent counsel to represent insured, with insured as sole client, and otherwise act in accordance with enhanced obligation (*see* comments).	*L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1303-1304 (Ala. 1987).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What types of reservations create a conflict of interest triggering the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier ?	None; however, the enhanced obligation of good faith is triggered any time an insurer controls the defense under a reservation of rights.	*L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1303-1304 (Ala. 1987); *Twin City Fire Ins. Co. v. Colonial Life & Accident Ins. Co.*, No. 1001831, 2002 WL 1353355 (Ala. June 21, 2002) ("whenever an insurer defends the insured under a reservation of rights, the enhanced duty of good faith is read into that reservation of rights.").

COMMENTS:

The Alabama Supreme Court has concluded that the "[m]ere fact that the carrier 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 carrier." *L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1304 (Ala. 1987). However, the carrier is placed under an enhanced obligation of good faith and its failure to meet that enhanced obligation of good faith entitles the insured "[t]o retain

defense counsel of its choice at the expense of the carrier." *Id.* at 1304. In order to meet its enhanced obligation of good faith, the carrier must meet the following criteria:

1. The carrier must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries.

2. The carrier must retain competent defense counsel for the insured. Both retained counsel and carrier must understand that only the insured is the client.

3. The carrier 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 the lawsuit. This includes disclosure of all settlement offers made by the carrier.

Id. at 1303. The counsel retained by the carrier must also meet distinct criteria as well:

1. Counsel owes a duty of loyalty to their clients and cannot allow carrier to influence his or her professional judgment. "in a reservation-of-rights defense RPC 5.4(c) demand that counsel understand that he or she represents only the insured, not the company."

2. Counsel owes a duty of full and ongoing disclosure to the insured.

    a. Potential conflict of interest between carrier and insured must be fully disclosed and resolved in favor of the insured.

    b. All information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, must be communicated to the insured.

    c. All offers of settlement must be disclosed to the insured as those offers are presented.

Id. at 1303. The criteria set forth in *L&S Roofing* "[n]ecessarily assume that the insurer is controlling the investigation, the defense of the lawsuit, and settlement negotiations"; however, in the instance where the insured does not relinquish control of the lawsuit, the carrier does not have an enhanced obligation of good faith. *Aetna Cas. & Surety Co. v. Mitchell Bros.*, 814 So. 2d 191, 195-196 (Ala. 2001).

Significantly, the Alabama Supreme Court recently held that a breach of a carrier's enhanced duty of good faith sounds in contract (with contract damages), and not in tort. *Twin City Fire Ins. Co. v. Colonial Life & Accident Ins. Co.*, No. 1001831; 2002 WL 1353355., at *3 (Ala. June 21, 2001) (not yet released for publication).

ALASKA		
Does the jurisdiction recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Yes, subject to an implied covenant of good faith; but statutes provide the carrier may select if the policy gives carrier the right; carrier may also select counsel if insured waives right to select.	*Alaska Stat §21.89.100; CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993); *Cont'l Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281 (Alaska 1980).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Cases where policy defense is asserted -- such as breach of the policy's cooperation clause. Cases where coverage defense is asserted -- such as carrier's reservation of right to disclaim coverage for intentional misconduct. It should be noted that by statute, Alaska has determined that the following do *not* constitute a conflict of interest: 1) a claim for punitive damages; 2) a claim of damages in excess of the policy limits; 3) claims or facts in a civil action for which the carrier denies coverage, unless the carrier reserves its right on the issue for which coverage is denied.	*Cont'l Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281 (Alaska 1980). *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993). Alaska Stat. §21.89.100(b) and (c)

COMMENTS:

Carrier only has to pay rates it pays in ordinary course of business and does not have to pay for the allocable defense of properly denied claims.

In *CHI of Alaska, Inc.*, 844 P.2d 1113, 1116 (Alaska 1993) (citing *Continental Insurance Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281 (Alaska 1980), the Alaska Supreme Court held that when a carrier asserts *either policy or coverage defenses*, and defends the insured under a reservation of rights, there are various conflicts-of-interest between the carrier and the insured:

1. The carrier knows that it can later assert non-coverage, or if it thinks that the loss which it is defending will not be covered under the policy, it may only go through the motions defending or only offer a token defense;

2. If there are several theories of recover, at least one of which is not covered under the policy, the carrier might conduct the defense in such a manner as to make the likelihood of plaintiff's verdict greater under the uninsured theory.

3. The carrier might gain access to confidential or privileged information in the process of the defense which it might later use to its advantage in litigation concerning coverage.

CHI of Alaska, 844 P.2d at 1117. The Alaska Supreme Court held that the presence of these conflicts mandated that carriers retain independent counsel anytime the carrier asserted policy defenses or coverage defenses, and defended under a reservation of rights. *Cont'l Ins. Co. v. Bayless and Roberts, Inc.*, 608 P.2d 281, 289 (Alaska 1980); *CHI of Alaska*, 844 P.2d at 1118-1119. Further, the *CHI of Alaska* court determined that a carrier did not satisfy the insured's right to independent counsel by employing a two-counsel scheme -- one counsel, selected by the insured, to defend uncovered claims, while counsel selected by carrier defended covered claims -- as the conflict of interest would still be present as long as carrier selected counsel participated in or directed the defense. *CHI of Alaska*, 844 P.2d at 1120.

Two years after the *CHI of Alaska* decision, Alaska enacted a statute which specifically deals with the appointment of independent counsel, conflict of interest issues and settlement of cases where independent counsel is involved. Alaska Stat. §21.89.100. This statute places some restrictions on the insured's right to independent counsel. The statute provides as follows:

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

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

(1) a claim of punitive damages;

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

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

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

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

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

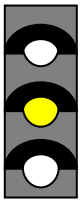
(f) An insured may waive the right to select independent counsel by signing a statement that reads substantially as follows:

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

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

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

Alaska Stat. §21.89.100. Please note that there have been no decisions interpreting this statute.



ARIZONA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No.	*Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593 (Ariz. 2001) (counsel retained by carrier has ethical duty to represent interests of insured, and carrier cannot interfere with counsel's conduct of litigation).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

Generally speaking, Arizona courts have ruled that counsel retained by a carrier has an independent ethical obligation towards the insured, who is the primary client. *See Farmer's Ins. Co. v. Vagnozzi*, 675 P.2d 703 (Ariz. 1983). This suggests that it is generally not necessary to retain independent counsel, as counsel is always to advance the best interests of the insured. Specifically, the *Vagnozzi* court held as follows:

> If the insurer defends the insured pursuant to a contractual duty to defend, the insurer must do so under a properly communicated reservation of rights to later litigate coverage. We emphasize that the attorney who represents the insured owes him an undeviating allegiance whether compensated by the insurer or the insured and cannot act as an agent of the insurance company by supplying information detrimental to the insured.

Vagnozzi, 675 P.2d at 708 (citing to *Parsons v. Contintental Nat'l Am. Group*, 550 P.2d 94 (Ariz. 1976)). In *Parsons*, the Arizona Supreme Court held that the attorney retained by an insurer to defend the interests of the insured owed "undivided fidelity" to the insured, as the insured is the client. *Parsons v. Cont'l Nat'l Am. Group*, 550 P.2d 94, 97 (Ariz. 1976). While the attorney may represent the interests of the insurer as well, an attorney must cease any representation of the insurer's interest when a conflict of interest develops between insurer and insured. *Id.* at 98.

Recently, the Arizona Supreme Court discussed the duties of counsel retained by the carrier for the insured, and the part the carrier plays in the relationship between counsel and insured. *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593 (Ariz. 2001). Specifically, the *Paradigm* court stated as follows:

> There can be no doubt that actual conflicts between insured and insurer are quite common and that the potential for conflict is present in every case. Conflicts may arise over the existence of coverage, the manner in which the case is to be defended, the information to be shared, the desirability of settling at a particular figure or the need to settle at all, and an array of other factors applicable to the circumstances of a particular case. This is especially true in cases involving medical malpractice claims. We have recognized such tensions, holding in both *Barmat* and *Parsons* that when a conflict actually arises, and not simply when it potentially exists, the lawyer's duty is exclusively owed to the insured and not the insurer. Because a lawyer is expressly assigned to represent the insured, the lawyer's primary obligation is to the insured, and the lawyer must exercise independent professional judgment on behalf of the insured. Thus, a lawyer cannot allow an insurer to interfere with the lawyer's independent professional judgment, even though, in general, the lawyer's representation of the insured is directed by the insurer.

Id. at 597.

While a carrier generally retains the right to appoint counsel and control the defense, Arizona courts have recognized that where a carrier defends under a reservation of rights, the insured controls the right to settlement. *United Servs. Auto. Ass'n v. Morris*, 741 P.2d 246, 252 (Ariz. 1987) ("An insurer that performs the duty to defend but reserves the right to deny the duty to pay should not be allowed to control the conditions of payment.") Where an insured elects to settle a case, the settlement must be fair, with notice to the insurer, and without fraud or collusion. *Id.* at 252.

We also note that the *United Servs. Auto. Ass'n v. Morris* decision suggests that the carrier loses control of the litigation, and not just the settlement decision, anytime a reservation of rights is issued. *See Id.* at 252 ("The insurer's reservation of the privilege to deny the duty to pay relinquishes to the insured control of the litigation, almost as if the insured had objected to being defended under a reservation.") However, the *Morris* court does not further indicate that a carrier defending under a reservation of rights must provide insured-selected counsel. In light of the Arizona Supreme Court's other rulings, discussed above, we believe that insured-selected

counsel is required only under extraordinary circumstances. *See, e.g., Joseph v. Markovitz*, 551 P.2d 571, 576 (Ariz. Ct. App. 1976) (where one insured (with insurer supplied counsel) brought a third party action against another insured, insurer was required to provide separate counsel for the insured who was a third-party defendant, as insurer could not be allowed to control both sides of the third-party action).

ARKANSAS		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided; federal authority only.	*But see, Northland Ins. Co. v. Heck's Serv. Co.*, 620 F. Supp. 107 (E.D. Ark. 1985).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		*Northland Ins. Co. v. Heck's Serv. Co.*, 620 F. Supp. 107 (E.D. Ark. 1985) (Coverage for certain property damage may be excluded under policy terms and determination of whether those damages are at issue is dependent on outcome of underlying litigation).

COMMENTS:

There is no state authority on this issue. Further, the federal authority listed above does not rely upon Arkansas statutory or case law. However, Federal District courts sitting in Arkansas have held that the insured does have a right to select independent counsel. *See, e.g., Union Ins. Co. v. Knife Co.*, 902 F. Supp. 877, 880, 881 (W.D. Ark. 1995) ("Due to this conflict of interest, which exists in this case, the carrier must give up control of the litigation and retain independent counsel for the insured…" and "[t]he conflict situation cannot be eliminated as long as the insurance company selects the counsel."); and *Northland Ins. Co. v. Heck's Serv. Co.*, 620 F. Supp. 107, 108 (E.D. Ark. 1985) (given conflict of interest between insured and carrier who is defending under reservation of rights, insured must be allowed to select own counsel).

CALIFORNIA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Sometimes. If insured selects, insured is subject to duty of good faith fair dealing; carrier may select if the policy gives the carrier the right.	Cal. Civ. Code § 2860(a); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 208 Cal. Rptr. 494 (Cal. Ct. App. 1984); *Dynamic Concepts, Inc. v. Truck Ins. Exchange*, 71 Cal. Rptr. 2d 882 (Cal. Ct. App. 1998).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Careful analysis of the parties' respective interests to determine whether they can be reconciled (such as by a defense based on total non-liability) or whether an actual conflict of interest precludes carrier-appointed defense counsel from presenting a qualified defense for the insured; it is not enough to trigger independent counsel that carrier defends both covered and uncovered claims and reserves the right to deny indemnity as to some.	*Bank of Oakland v. Zurich-America Ins. Group*, No. 92-15094, 1993 WL 159902, at *2 (9th Cir. 1993) (applying California law).
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Not every reservation of rights creates a conflict. Conflict exists where coverage turns on <u>facts</u> or issues to be determined in the underlying action. <u>No</u> conflict created where punitive damages or damages in excess of policy limits are claimed.	*Blanchard v. State Farm Fire & Cas. Co.*, 2 Cal. Rptr. 2d 884, 887 (Cal. Ct. App. 1991). *Scottsdale v. Housing Group*, No. C 94-3864 TEH, 1995 U.S. Dist. LEXIS 8791, at *22-23 (N.D. Cal. 1995). Cal. Civ. Code §2860(b).

COMMENTS:

California has enacted legislation specifically designed to deal with conflicts-of interests between carriers and their insureds and the duty to provide independent counsel. Cal. Civ. Code §2860. The text of the statute is as follows:

> §2860. Conflict of interest: duty to provide independent counsel; waiver; qualifications of independent counsel: fees: disclosure of information
>
> (a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.
>
> (b) For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.
>
> (c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.
>
> (d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. Any claim of privilege asserted is subject to in camera review in the

appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

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

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

Note: In *Dynamic Concepts*, the court noted that Cal. Civ. Code § 2860 did not adopt the absolutist view that every reservation of rights creates a conflict of interest requiring the retention of independent counsel, as suggested in *dicta* in *Cumis*.

See, Gafcon v. Ponser & Associates, et al., 98 Cal. App. 4th 1388, 120 Cal. Rptr. 2d 392 (Cal. App. Dist. 4 2002) (carrier has burden of proof on independent counsel issues).

COLORADO		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

***COMMENTS*:**

In *Hartford Insurance Group v. District Court*, 625 P.2d 1013 (Colo. 1981) the Colorado Supreme Court specifically declined to address whether a conflict of interest between carrier and insured, caused by the carrier's defending the insured under a reservation of rights, required the carrier to furnish independent counsel.

> The petitioners-carriers do not assert that they are unable to provide a proper defense for Hailey and Johnson because of a conflict of interest. The personal injury defendants Red Ball, Hailey, and Johnson have a common interest in establishing that Johnson was not negligent and to this extent their interests will be similarly aligned at trial. However, Red Ball has a separate interest in showing that Johnson was not acting as its agent or employee at the time of the accident and that Red Ball should not be vicariously liable to Cheney, the personal injury plaintiff. Whether the carriers under these circumstances are obligated under their liability policy to furnish separate counsel to Hailey and/or Johnson, or to pay the fees of counsel chosen by them, are issues not before us. *See* J. Appleman, 7C Insurance Law and Practice, s 4685.01 at 139-41 (rev. ed. W. Berdal 1970).

Hartford Ins. Group, 625 P.2d at 1018 n.5. (Note, however, that the citation to Appleman's Insurance Law and Practice is to a section addressing the retention of independent counsel when carriers defend under a reservation of rights).

We note that while the Colorado Supreme Court has mentioned situations where a carrier retained independent counsel to provide a defense for its insured under a reservation of rights (*see, e.g., Troelstrup v. District Court*, 712 P.2d 1010, 1011 (Colo. 1986) ("Allstate accepted defense of the suit under a reservation of rights and retained the services of independent counsel to defend the petitioner.")), no Colorado court has addressed whether a carrier must retain independent counsel where the carrier puts itself into conflict with its insured by issuing a reservation of rights. S*ee, e.g. Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1098 n.7 (Colo. 1991) (dissenting opinion) ("The issue of whether the insurers would be involved in a conflict of interest requiring them to provide independent counsel, possibly of Hecla's choosing, or to obtain Hecla's consent to allow the carriers to conduct the defense is not before us.").

CONNECTICUT		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided, *dicta* only.	*See, Metropolitan Life Ins. Co. v. Aetna Cas. & Surety Co.*, 730 A.2d 51, 65 (Conn. 1995) (When an insurer retains an attorney to defend an insured, the attorney's only allegiance is to the insured.)
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

***COMMENTS*:**

We note that the Connecticut Supreme Court has not ruled on whether a carrier providing an insured a defense under a reservation of rights must retain independent counsel for its insured when there is a conflict of interest between the carrier and the insured. Indeed, despite the *dicta* found in *Aetna Life & Casualty Co. v. Gentile*, No. 0122259, 1995 WL 779102 (Conn. Super. Ct. Dec. 12, 1995) it is arguable that Connecticut does not recognize a right to independent counsel, as "even when an attorney is compensated or expects to be compensated by a liability insurer, his or her duty of loyalty and representation nonetheless remains exclusively with the insured." *Higgins v. Karp*, 837 A.2d 539, 543 (Conn. 1997). The ruling in *Higgins* suggests that the Connecticut Supreme Court considers the selection of independent counsel unnecessary, as counsel, whether selected by the carrier or the insured, is to consider only the interests of the insured, such that any conflicts between the carrier and the insured do not impact the decisions of counsel. *See also, Metropolitan Life Ins. Co. v. Aetna Cas. & Surety Co.*, 730 A.2d 51, 65 (Conn. 1995) ("we have long held that even when an insurer retains an attorney in order to defend a suit against an insured, the attorney's only allegiance is to the client, the insured"); and *King v. Guiliani*, No. CV920290370 S, 1993 WL 284462 (Conn. Super. Ct. July 27, 1993) (counsel from "captive firms" represent the interests of insureds, and not carrier, despite having salaries and expenses paid by carrier).

DELAWARE		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided, *dicta* only.	*See Shepard v. Reinoehl*, No. C.A. 99C-06-030-JTV, 2000 WL 973079 (Del. Super. Ct. March 29, 2000).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

Although the issue of the recognition of the right to independent counsel has not be specifically addressed by Delaware courts, the court's unpublished decision in *Shephard v. Reinoehl*, No. C.A. 99C-06-030-JTV, 2000 WL 973079 (Del. Super. March 29, 2000), offers some indication that the courts would recognize the right to independent counsel selected by the insured. In *Shephard*, the insured was the driver of a vehicle involved in an automobile collision. Although not named as a defendant in the wrongful death action brought by the parents of a passenger in her vehicle, the insured was named as a third-party defendant in an action by the driver of the other vehicle. The carrier appointed counsel to represent the insured in the defense of the third-party action, but the insured also retained her own counsel to represent her with respect to a claim for her own damages. The insured brought a motion seeking to have the attorney appointed by the carrier removed so that she could be represented on all claims by the attorney she selected. The court denied the motion finding that the insurance policy expressly permitted the carrier to designate an attorney to represent the insured's interest in the third-party action and that there did not appear to be any conflict of interest relating to that representation. However, in dicta, the court stated: "Counsel should be on notice that if conflicts do develop between [the carrier and the insured], the [carrier] runs the risk that it may lose its right to designate counsel and control the defense of the third party claim." *Shephard*, 2000 WL 9773079, at *2. (citing *Maryland Cas. Co. v. Peppers*, 355 N.E.2d 24 (Ill. 1976), and *Roussos v. Allstate Ins. Co.*, 655 A.2d 40 (Md. Ct. Spec. App. 1995).

DISTRICT OF COLUMBIA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Sometimes.	*O'Connell v. Home Ins. Co.*, Civ. A. No. 8803523, 1990 WL 137386, at *4 (D.D.C. Sept. 10, 1990) (policy should make clear who has right to select independent counsel and where policy is ambiguous it should be construed in favor of insured).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Undecided, but case law suggests not every reservation of rights will entitle the insured to independent counsel.	*O'Connell v. Home Ins. Co.*, Civ. A. No. 8803523, 1990 WL 137386, at *4 (D.D.C. Sept. 10, 1990).
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

While the *O'Connell* court recognized that a reservation of rights does not automatically create a conflict of interest, the court suggests that "separate counsel" must be retained whenever a carrier defends under reservation of rights. *O'Connell v. Home Ins. Co.*, Civ. A. No. 8803523, 1990 WL 137386, at *4 (D.D.C. Sept. 10, 1990).

FLORIDA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No, must be mutually agreeable.	Fla. Stat. §627.426(2)(b)(3); *Am. Empire Surplus Lines Ins. Co. v. Gold Coast Elevator, Inc.*, 701 So. 2d 904, 906 (Fla. Dist. Ct. App. 1997)(unilateral retention of counsel after carrier advised its insured that it was defending under a reservation of rights violated statutory duty to select mutually agreeable counsel).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Policy defense of late notice.	*Am. Empire Surplus Lines Ins. Co. v. Gold Coast Elevator, Inc.*, 701 So. 2d 904, 906 (Fla. Dist. Ct. App. 1997)(unilateral retention of counsel after carrier advised its insured that it was defending under a reservation of rights that late notice was provided violated statutory duty to select mutually agreeable counsel).

COMMENTS:

The Florida legislature has specifically recognized the right to independent counsel, but requires that it be mutually agreeable. Fla. Stat. § 627.426(2) provides:

> (2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:
>
> (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand delivery; and

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

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

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

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

GEORGIA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	*See comments.*
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

***COMMENTS*:**

The authority from Georgia concerning an insured's right to independent counsel is mixed, with opinions from Georgia appellate courts providing conflicting indications, and an opinion from the United States Court of Appeals for the 11th Circuit providing an opinion purportedly based on Georgia law, but not citing to any Georgia authority for issues concerning the right to independent counsel.

Specifically, the opinion of the Georgia appellate court in *Mead Corp. v. Liberty Mut. Ins. Co.*, 129 S.E.2d 162 (Ga. Ct. App. 1962) *rev'd on other grounds*, 131 S.E.2d 534 (1963), suggests that it is not necessary to retain independent counsel for an insured, as counsel retained by the insurer must always look after the best interests of the insured. Specifically, the *Mead Corp.* court stated:

> To contend that it would not be to the best interests of the insured to leave his defense to the insurance company and counsel chosen by it after the company had ceased to have a pecuniary interest in the indemnity aspects of the case, and that such a defense might in that event be carelessly or frivolously handled, would be a reflection on the insurance industry and the counsel who represent them. Attorneys, whether or not paid by insurance companies, owe their primary obligation to the insured they are employed to

> defend, and the insurance company likewise owes to its insured the duty to provide competent investigative and legal representation.

Id. at 165.

In a separate holding, the Georgia Appellate Court has ruled that, in a situation where an indemnity contract specified that the indemnitor had the "exclusive (sole) right … to defend, decide tactics, compromise or settle any claim," the indemnitee did not have the option of choosing its own counsel and assuming control of the defense. *Tuzman v. Leventhal*, 329 S.E.2d 610, 614 (Ga. Ct. App. 1985). (We note most states will also allow the carrier to select counsel where the policy actually gives the carrier the express right to do so.)

In contrast to these cases, which suggest that an insured does not have a right to independent counsel, there is the decision in *Richmond v. Georgia Farm Bureau Mut. Ins. Co.*, 231 S.E.2d 245 (Ga. Ct. App. 1976), which suggests that an insured may, in certain circumstances, have a right to independent counsel.

> An insurer may not give an insured a unilateral notice of reservation of rights and thereupon proceed with a complete defense of the main claim absent insured's express or implied consent. This course of action may well result in prejudice to an insured. Upon learning of facts reasonably putting it on notice that there may be grounds for noncoverage and where the insured refuses to consent to a defense under a reservation of rights, the insurer must thereupon (a) give the insured proper unilateral notice of its reservation of rights, (b) take necessary steps to prevent the main case from going into default or to prevent the insured from being otherwise prejudiced, and (c) seek immediate declaratory relief including a stay of the main case pending final resolution of the declaratory judgment action.

Id. at 248. While the *Richmond* court found it acceptable for an insurer to issue a unilateral reservation of rights, to have insurer-retained counsel file "defensive pleadings" for the insured, and "immediately thereafter file a petition for declaratory judgment, the court did not indicate what actions should be taken were it not possible to stay the underlying liability action. The *Richmond* court's holding that an insurer may not proceed with a defense of the liability action under a reservation of rights, absent the consent of the insured, suggests that the insurer would have to retain independent counsel for the insured. However, no Georgia courts have specifically addressed the issue of whether an insured has a right to independent counsel, at the insurer's expense, when there are conflicts of interest between the insurer and the insured.

In addition to these cases stands the ruling of the United States Court of Appeals for the Eleventh Circuit, in *American Family Life Assurance Co. v. United States Fire Co.*, 885 F.2d 826 (11th Cir. 1989). The *American Family* case addresses a situation where an insurer "denied coverage of liability but agreed to defend" the insured. *Id.* at 829. (The opinion does not refer to any reservation of rights, but repeatedly refers to the insurer's denial of coverage.) In this situation, the court held that there is a conflict of interest between the insurer and the insured, such that the insured is entitled to refuse the defense proffered by the insurer, and retain its own

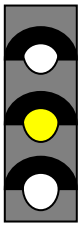
counsel at the insurer's expense. *Id.* at 831 (citing to *Cay Divers, Inc. v. Raven*, 812 F.2d 866 (3d. Cir 1987), which suggests that an insurer must retain independent counsel for the insured where there is a conflict of interest between the insurer and the insured.)[2] Interestingly, however, the insured did not reject the insurer's defense, but instead hired independent counsel to monitor the insurer's defense. The *American Family* court held that

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

Id. at 831-832. Accordingly, the insurer was required to reimburse the insured for the costs of the insured's co-counsel, despite having already paid for the insured's defense.

Given the conflicting and factually specific nature of these holdings, Georgia's position on the issue of independent counsel for an insured is best described as "undecided."

[2] *American Family* also cites to a Georgia Court of Appeals decision, *Hughes v. State Farm Mut. Auto. Ins. Co.*, 114 S.E.2d 61 (1960), which holds that an insurer is liable for the legal fees incurred by an insured in a breach of contract action, where the insurer wrongly refused to defend its insured.



HAWAII		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No.	*Finley v. Home Ins. Co.*, 975 P.2d 1145 (Haw. 1998) (rejects *Cumis* doctrine in Hawaii and holds that carrier must meet enhanced standard of good faith when defending insured subject to reservation of rights); *Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159 (Haw. 1999).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

In *Finley v. Home Ins. Co.*, 975 P.2d 1145 (Haw. 1998), the Hawaii Supreme Court held that the insured does not have the right to select counsel to represent its interests solely due to a carrier's reservation of rights. *Finley*, 975 P.2d at 1151. The *Finley* court held that the best result is to "[r]efrain from interfering with the insurer's contractual right to select counsel [footnote omitted] and leave the resolution of the conflict to the integrity of retained defense counsel." *Id.* at 1151-1152. Insured may reject tender of defense and pursue own defense. However, if the insured pursues its own defense, ***it is at the insured's own cost***. *Id.* at 1155. The *Finley* court cited to the Washington Supreme Court decision in *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986) finding that a carrier which provides a defense subject to reservation of rights to deny coverage must act under an enhanced obligation of good faith and, in order to do so, must meet the following criteria:

1. The carrier must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries.

2. The carrier must retain competent defense counsel for the insured. The carrier and defense counsel must understand that the insured is the only client.

3. The carrier has responsibility for fully informing the insured not only of the reservation-of-rights defense, but of all developments relevant to insured's policy coverage and the progress of the lawsuit. Information regarding the progress of the lawsuit includes disclosure of all settlement offers made by the carrier.

4. The carrier must refrain from engaging in any action which would demonstrate a greater concern for the carrier's monetary interest than for the insured's financial risk.

Finley, 975 P.2d at 1156-1157; *see also, Delmonte v. State Farm Fire & Cas. Co.*, 975 P.2d 1159, 1175 (Haw. 1999).

We note that other states, such as Alabama and Washington, have enacted similar rules by case law. However, there is some recognition that if the carrier cannot meet its "enhanced obligation of good faith" that the insured may select its own counsel. Whether the failure to allow an insured to select its own counsel in such a situation would constitute a breach of contract or something else, remains to be seen. Nonetheless, there may be an argument that Hawaii will recognize an insured's right to independent counsel where the carrier cannot meet its enhanced obligation of good faith.

One case in point is *CIM Ins. Corp. v. Masamitsu*, 74 F. Supp. 2d 975 (D. Haw. 1999). In this case, the United States District Court for the District of Hawaii recognized that Hawaii does not require a carrier defending under a reservation of rights to provide separate defense counsel of the insured's choosing because of the enhanced duty of good faith. However, while the *Masamitsu* court, in line with the decisions of *Finley* and *Delmonte*, noted that an insured's choice to reject defense under a reservation of rights would result in the insured bearing the cost of its defense, it also noted that the "enhanced obligation of good faith" meant that the carrier's handling of the claim, including its appointment and direction of counsel, would require increased scrutiny in the face of allegations of bad faith. *Masamitsu*, 74 F. Supp. 2d at 992. Thus, where a carrier's decision to proffer a defense under a reservation of rights was made late in the proceedings, the court questioned whether the carrier's insistence on appointing counsel of its choosing, rather than allowing the insured's counsel to assume the defense, met the carrier's enhance obligation of good faith, given that the insured's counsel had been involved in the litigation from the beginning and substituting counsel at such a late stage may have been unreasonable. *Id.* at 992-993.

IDAHO		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

We have found no Idaho statutory or case law on whether a carrier defending its insured under a reservation of rights must retain independent counsel for its insured. However, as with most states, the Idaho Supreme Court has held that where a carrier breaches the insurance contract by failing to defend a suit against its insured, attorney fees incurred by the insured are an element of damages in the breach of contract action. *Boise Motor Car Co. v. St. Paul Idem. Co.*, 112 P.2d 1011, 1016 (Idaho 1941); *Abbie Uriguen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.*, 511 P.2d 783, 791 (Idaho 1973).

ILLINOIS		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Sometimes.	*Maryland Cas. Co., v. Peppers*, 355 N.E.2d 24, 31 (Ill. 1976); *Nandorf, Inc. v. CNA Ins. Co.*, 479 N.E.2d 988, 992 (Ill. App. Ct. 1985); *Mobil Oil Corp. v. Maryland Cas. Co.*, 681 N.E.2d 552, 561-562 (Ill. App. Ct. 1997); *but see Sears, Roebuck & Co. v. Emerson Elec. Co.*, No. 99 C 5280, 2001 WL 1155273 (N.D. Ill. Sept. 28, 2001) (No right to independent counsel where vigorous defense benefits both parties).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Insured can appoint defense counsel of its choice where the carrier's interests in defending the case and defeating coverage are such that it would provide a less than vigorous defense; however, carrier's interest in negating policy coverage does not, in and of itself, create a sufficient conflict of interest to preclude the carrier from assuming control of the defense.	*Nandorf, Inc. v. CNA Insurance Cos.*, 134 Ill.App.3d 134, 479 N.E.2d 988, 88 Ill.Dec. 968 (1st Dist. 1985) (attorney paid by insurer may have different interests than those of insured; insurer could potentially benefit in certain instances by having less than vigorous defense); *See also Pekin Ins. Co. v. Home Ins. Co.*, 134 Ill. App. 3d 31, 479 N.E.2d 1078 (1st Dist. 1985) (situations wherein a conflict of interest gives rise to the requirement to retain outside counsel include those circumstances where proof of certain facts would move liability from the carrier to the insured.)

What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Conflict created by knowledge based reservations, or where proof certain facts would move liability from carrier to insured.	*Maryland Cas. Co. v. Peppers, 355 N.E.2d 24 (IL.1976);Pekin Ins. Co. v. Home Ins. Co.,* 134 Ill. App. 3d 31, 479 N.E.2d 1078 (1st Dist. 1985).
	Complaint had allegations which were both within and out of policy coverage. (continued below)	*Maryland Cas. Co., v. Peppers*, 355 N.E.2d 24, 31 (Ill. 1976) (Carrier had obligation to defend since some allegations were within and some outside of policy coverage; insured could either accept defense counsel engaged by carrier after full disclosure of conflict, carrier could waive noncoverage defense and defend without reservation of rights or, absent one of the preceding, insured had right to select an attorney whose reasonable fees were to be paid for by carrier); *Am. Family Mut. Co. Ins. v. Blackburn*, 566 N.E.2d 889 (Ill. App. Ct. 1991).
	Conflict created where defense under reservation of rights was asserted because suit had potential award of punitive damages far in excess of compensatory damages.	*Nandorf, Inc. v. CNA Ins. Co.*, 479 N.E.2d 988, 992 (Ill. App. Ct. 1985); *Illinois Municipal League Risk Management Ass'n v. Siebert,* 585 N.E.2 1130 (Ill. Ct. App. 1992).
	Conflict created where entry of a default judgment was entered against the insured.	*Mitchell v. Tatum*, 104 Ill. App. 3d 986, 433 N.E.2d 978, 60 Ill. Dec. 740 (1st Dist. 1982).
	Conflict created where the complaint contains allegations of damage arising out of liability of insured or independent contractor's negligence.	*Burlington Northern R.R. v. Illinois Emcasco Insurance Co.*, 158 Ill. App. 3d 783, 511 N.E.2d 776, 110 Ill. Dec. 599 (1st Dist. 1987).

	Conflict created where coverage may be afforded under CGL policy versus professional liability policy. Conflict created where loss arguably arises outside policy terms.	*Royal Insurance Co. v. Process Design Associates, Inc.*, 221 Ill. App. 3d 966, 582 N.E.2d 1234, 164 Ill.Dec. 290 (1st Dist. 1991). *Doe v. Illinois State Medical Inter-Insurance Exchange*, 234 Ill. App. 3d 129, 599 N.E.2d 983, 174 Ill. Dec. 899 (1st Dist. 1992).

COMMENTS:

The term "reimbursement" of defense costs as used by the Illinois courts means contemporaneous reimbursement, as the fees and expenses of counsel are incurred. *See Ins. Co. of Pennsylvania v. Protective Ins. Co.*, 227 Ill. App. 3d 360, 592 N.E.2d 117 (1st Dist. 1992); *Gibraltar Cas. Co. v. Sargent Lundy and Wabash Valley Power Assn.*, 214 Ill. App. 3d 768, 574 N.E.2d 664 (1st Dist. 1991).

INDIANA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No. Carrier has the option of providing defense counsel or reimbursing insured for costs incurred by insured's chosen counsel.	*Snodgrass v. Baize*, 405 N.E.2d 48, 51 (Ind. Ct. App. 1980) (carrier should not defend, but, rather should reimburse the insured's personal counsel); *accord, State Farm Mut. Auto. Ins. Co. v. Glascow*, 478 N.E.2d 918 (Ind. Ct. App. 1985); *Gallant v. Wilkerson*, 720 N.E.2d 1223, 1227 (Ind. Ct. App. 1999) ("When an insurer questions whether the insured party's claim falls within the scope of the policy coverage or raises a defense that its insured has breached a policy condition the carrier essentially has two options: (1) file a declaratory judgment for a declaration of its obligations under the policy; or (2) hire independent counsel and defend its insured under a reservation of rights."); *All Star Ins. Corp. v. Steel Bar, Inc.*, 324 F. Supp. 160 ,165 (N.D. Ind. 1971).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

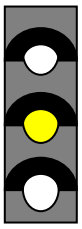
COMMENTS:

In *Cincinnati Insurance Co. v. Wills*, 717 N.E.2d 151 (Ind. 1999), the Indiana Supreme Court decided a related issue involving the use of in-house counsel, employed by an insurance company, to defend insureds against third-party claims. While resolving the multi-issue case primarily in favor of the insurer, the Indiana Supreme Court also found that the use of in-house counsel to represent insureds did not create an "inherent conflict in violation of the Rules of Professional Conduct." *Id.* at 162. Specifically, the *Wills* court held that:

> most of the problems identified by the [insured] exist whether house counsel or outside counsel are used. If there is any difference between house and outside lawyers in this respect it is quantitative and not qualitative and varies from situation to situation. Employee-attorneys may be subject to pressures from their employer. But it is also unrealistic to suggest that an outside lawyer is immune from the blandishments of a client, particularly a high volume client that may be the source of a significant portion of the firm's revenues. For a decade the legal press has been full of stories of various cost containment programs implemented by insurers and others to reduce their outside legal expenses. Ultimately all attorneys are bound by their professional obligations to place the interests of their policyholder-client ahead of their own if pressure from an employer or a co-client insurer conflicts with those of the policyholder. We will not assume that an attorney employed by an insurance corporation is in violation of any of the Rules based solely on that employment relationship. The full range of disciplinary sanctions and civil remedies are available to deal with hopefully isolated instances of trouble. This is true whether the attorney is an employee of an insurance company, a partner in a firm significantly dependent on the insurer's business or a lawyer relatively free of direct economic pressure.

Id. at 163.

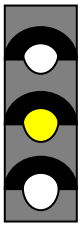
While the *Wills* court did not directly address the selection of counsel in reservation of rights situations, the opinion lends support to the argument that as long as the attorney understands that the interests of the insured are paramount, it is unimportant who chooses or pays the attorney.



IOWA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	*See Comments.*
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

In *First Newton National Bank v. General Casualty Co.*, 426 N.W.2d 618, 630 (Iowa 1988) the Iowa Supreme Court addressed the issue of whether a carrier had a duty to defend its insured where the third-party action contained both covered and uncovered claims. In declaring that the carrier did have a duty to defend in these situations, the Court addressed the argument that the carrier only owed the insured a partial defense -- a defense of the covered claims only. The Iowa Supreme Court rejected this argument, relying upon *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620 (8th Cir. 1981) for the proposition that not only must the carrier provide a complete defense, but that the carrier, if it believes there is an "inherent conflict of interest" between it and the insured, could allow the insured to select counsel and then reimburse the insured for the cost of the entire defense. *First Newton Nat'l Bank*, 426 N.W.2d at 630. We note, however, that the court in *Howard* also allowed that any such conflict could be avoided by the carrier retaining independent counsel. *Howard*, 649 F.2d at 625.



KANSAS		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No.	*Bell v. Tilton*, 674 P.2d 468 (Kan. 1983); *Patrons Mut. Ins. Ass'n v. Harmon*, 732 P.2d 741, 745 (Kan. 1987) (proper way for carrier to protect both its insured's and its own interest in cases of conflict is to hire independent counsel for the insured and reserve all of its own rights under the policy); *State Farm Fire & Cas. Co. v. Finney*, 770 P.2d 460, 464 (Kan. 1989) (carrier acted correctly by providing counsel for insured and reserving right to decline coverage)
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

The United States District Court for Kansas, applying Kansas law, has also held that where a defendant's counsel in a criminal proceeding was also serving as defense counsel in medical malpractice actions brought against the defendant, the fact that defendant's malpractice insurer was paying for counsel's fees did not create a conflict of interest invoking the presumption against a criminal defendant being represented by a lawyer hired and paid for by a third party. *United States v. Daniels*, 163 F. Supp. 2d 1288, 1290 (D. Kan. 2001).

KENTUCKY		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	*O'Bannon v. Aetna Cas. & Surety Co.*, 678 S.W.2d 390, 392-393 (Ky. 1984) (where carrier refused to defend insured, court could not require carrier to defend and insured to accept defense); *Medical Protective Co. v. Davis*, 581 S.W.2d 25 (Ky. Ct. App. 1979) (insured is not required to accept a defense offered by the carrier under a reservation of rights and may conduct its own defense).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

LOUISIANA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Sometimes.	*Smith v. Reliance Ins. Co.*, 807 So. 2d 1010, 1022 (La. Ct. App. 2002); *Belanger v. Gabriel Chems., Inc.*, 787 So. 2d 559, 566 (La. Ct. App. 2001).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	The significant question in determining if a conflict of interest is created is whether, in comparing the allegations of the complaint to the terms of the policy, the interests of insurance company or codefendant would be furthered by providing a less than vigorous defense to those allegations.	*Belanger v. Gabriel Chems., Inc.*, 787 So. 2d 559, 566 (La. Ct. App. 2001).
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Claim of coverage exclusions, such as pollution exclusion, created conflict of interest. Coverage defenses such as total pollution and intentional acts exclusion created conflict. Claim for exemplary damages not covered by policy.	*Smith v. Reliance Ins. Co.*, 807 So. 2d 1010, 1022 (La. Ct. App. 2002) (carrier's claim that exclusions apply entitles insured to independent counsel). *Belanger v. Gabriel Chems., Inc.*, 787 So. 2d 559, 566 (La. Ct. App. 2001). *Scottsdale Ins. Co. v. Gulf Sea Temps.*, Civ. A. 98-1364, 1999 WL 599313 (E.D. La. Aug. 5, 1999).

COMMENTS:

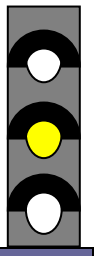
We note that in *Belanger v. Gabriel Chemicals., Inc.*, 787 So. 2d 559 (La. Ct. App. 2001), the Louisiana Appellate Court, while holding that the insured under the facts of that case was entitled to independent counsel, also held that the carrier could enforce the *Cumis*-style endorsement. *Id.* at 566. This endorsement allowed the carrier to limit its payment to such independent counsel to the rates that the carrier actually pays to counsel typically retained by the carrier, and that the insurer could require any independent counsel selected by the insured to have certain minimum qualifications (such as experience in defending similar claims).

However, as with many states, Louisiana courts have held that "[w]hen an insurer, with knowledge of facts indicating noncoverage under the insurance policy, assumes or continues insured's defense without obtaining a nonwaiver agreement to reserve its coverage defense, carrier waives such policy defense." *Steptore v. Masco Constr. Co.*, 643 So. 2d 1213, 1216 (La. 1994)

MAINE		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided; federal authority only.	*But see, Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 639 (1st Cir. 1989).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

Although the issue of the insured's right to select defense counsel has not been addressed by Maine courts, in *Travelers Indemnity Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989), the United States Court of Appeals for the 1st Circuit, applying Maine law, recognized that it is "[w]ell-established policy that an insurer who reserves the right to deny coverage cannot control the defense of a lawsuit brought against its insured by an injured party." *Id.* at 639.



MARYLAND		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No; certain conflicts require carrier to offer insured choice of defense by independent counsel selected by carrier or defense by counsel of insured's choosing.	*Brohawn v. Transamerica Ins. Co.*, 347 A.2d 842, 854 (Md. 1975) (carrier's choice under a reservation of rights situation is to appoint independent counsel or to allow the insured to select counsel of its choice).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Independent counsel must be appointed in case of actual conflict between insured and carrier.	
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Reservation of rights letter does not automatically create a conflict. Conflict where claims both within and outside of coverage (intentional assault) were asserted. Independent counsel must be appointed in case of actual conflict between insured and carrier, but carrier's rejection of offer to settle within policy limits does not automatically create conflict. Claim for amount in excess of policy limits does <u>not</u> automatically create conflict.	*Cardin v. Pacific Employers Ins. Co.*, 745 F. Supp. 330, 336 (D. Md. 1990); *Driggs Corp. v. Pennsylvania Mfrs' Ass'n Ins. Co.*, 3 F. Supp. 2d 657 (D. Md. 1998). *Brohawn v. Transamerica Ins. Co.*, 347 A.2d 842 (Md. 1975). *Allstate Ins. Co. v. Campbell* 639 A.2d 652, 659 (Md. 1994). *Roussos v. Allstate Ins. Co.*, 655 A.2d 40, 44 (Md. Ct. Spec. App. 1995).

COMMENTS:

In *Cardin v. Pacific Employers Insurance Co.*, 745 F. Supp. 330 (D. Md. 1990), the United States District Court for the District of Maryland took an exhaustive look at Maryland law and the law of other jurisdictions in an attempt to clarify the holding of the Court of Appeals of Maryland in *Brohawn v. Transamerica Insurance Co.*, 347 A.2d 842 (Md. 1975). The *Cardin* court held that when a carrier, which retained counsel for the insured after issuing a reservation of rights, instructed that counsel devote itself exclusively to the representation of the insured, the carrier had satisfied its duty to defend. As a result, the carrier was not required to pay for the fees of the separate counsel selected by the insured. *Cardin*, 745 F. Supp. at 337-338.

Subsequently, in the case of *Allstate Insurance Co. v. Campbell*, 639 A.2d 652 (Md. 1994), the Court of Appeals of Maryland, holding that "the existence of a potential conflict does not require the insurer to pay for independent counsel," cited the *Cardin* decision with approval and implicitly accepted the *Cardin* court's interpretation of Maryland law. *Allstate Ins. Co. v. Campbell*, 639 A.2d at 659.

MASSACHUSETTS		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Yes.	*Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 788 N.E.2d 522 (Mass. 2003) (Carrier cannot reserve its rights to disclaim liability while at the same time insisting on retaining control of the insured's defense.)
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Insured has right to select independent counsel whenever carrier reserves its right to disclaim liability.	*Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 406, 788 N.E.2d 522, 539 (Mass. 2003); *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 276-277, 357 N.E.2d 774, 777 (Mass. 1970); *Salonen v. Paanenen*, 320 Mass. 568, 575, 712 N.E.2d 227, 232 (Mass. 1947).
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Anytime carrier reserves right to disclaim liability, insured has right to select independent counsel .	*Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 406, 788 N.E.2d 522, 539 (Mass. 2003); *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 276-277, 357 N.E.2d 774, 777 (Mass. 1970); *Salonen v. Paanenen*, 320 Mass. 568, 575, 712 N.E.2d 227, 232 (Mass. 1947).

COMMENTS:

Massachusetts courts have repeatedly held that a carrier cannot "reserve its rights to disclaim liability while also insisting on retaining control of the insured's defense." *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 406, 788 N.E.2d 522, 539 (Mass. 2003); *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 276-277, 357 N.E.2d 774, 777 (Mass. 1970); *Salonen v. Paanenen*, 320 Mass. 568, 575, 712 N.E.2d 227, 232 (Mass. 1947).

> When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require

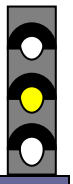
> the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs.

Herbert A. Sullivan, Inc., 439 Mass. At 406-407, 788 N.E.2d at 539.

However, where the insured allows the carrier to appoint counsel and does not insist upon utilizing counsel of its own choosing, the insured will be held to have acquiesced in letting the carrier control the defense. *Id.*

As to what constitutes independent counsel, the United States District Court for the District of Rhode Island, applying Massachusetts law, provided the following guidance:

> "Independent counsel must be one who operates independently of the insurer—the litigation cannot be controlled by the insurer. Independent counsel also cannot become involved in coverage disputes. Independent Counsel cannot be an in-house counsel of the insurance company or in a 'captive' law firm, i.e., one that primarily relies on the insurance company for its income. Independent counsel, although paid by the insurer, must be loyal only to the insured, owing the insured 'the full measure of the fiduciary duties of loyalty and independent judgment.'" *Id.* at 90 (citing throughout to *Magoun v. Liberty Mut. Ins. Co.*, 195 N.E.2d 514 (Mass. 1964) and to *Palermo v. Fireman's Fund Ins. Co.*, 676 N.E.2d 1158 (Mass. App. Ct. 1997)).



MICHIGAN		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No. Carrier may offer independent counsel of its own selection in the first instance and insured may have to show counsel was aligned with carrier to be entitled to select its own counsel.	*Allstate v. Freeman*, 443 N.W.2d 734, 756 n.3 (Mich. 1989) (concurring opinion).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	*See Comments below.*	
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	*See Comments below.*	

COMMENTS:

In a concurring opinion in *Allstate Insurance Co. v. Freeman*, Justice Boyle of the Michigan Supreme Court indicates that where a conflict of interest develops between the carrier and the insured, the "insured must be informed of the nature of the conflict and given the right either to accept an independent attorney selected by the carrier or to select an attorney himself to conduct his defense; if the insured elects to choose his own attorney, the carrier must assume the reasonable costs of the defense provided." *Allstate Ins. Co. v. Freeman*, 443 N.W.2d 734, 756 n.3 (Mich. 1989) (concurring opinion). While there have been no further rulings on this issue in the Michigan state courts, Justice Boyle's footnote has received significant attention in several United States District Courts sitting in Michigan.

Thus, in *Federal Insurance Co. v. X-Rite, Inc.*¸748 F. Supp. 1223 (W.D. Mich. 1990), the district court attempted to determine what rights an insured had when being offered a defense under a reservation of rights. The *X-Rite* court discussed the *dicta* from *Freeman* and, after analyzing the positions of other jurisdictions and various Michigan opinions concerning the duty of insurer retained counsel to represent solely the interests of the insured, determined that the Michigan Supreme Court would not grant the insured the right to select counsel of its choosing

whenever an insurer offered a defense under a reservation of rights. *X-Rite*, 748 F. Supp. at 1229-1230. Rather, the carrier was entitled to a presumption that the counsel it selected was independent. *Id.*

Subsequent decisions by the United States District Court have followed the lead of *X-Rite*. *See, e.g., Aetna Cas. & Surety Co. v. Dow Chem Co.*, 44 F. Supp. 2d 847, 861 (E.D. Mich. 1997) (insured not entitled to select counsel absent specific factual showing of conflict); *Central Mich. Bd. of Trustees v. Employers Reinsurance Corp.*, 117 F. Supp. 2d 627, 635 (E.D. Mich. 2000) ("The insured has no absolute right to select the attorney himself, as long as the insurer exercises good faith in its selection and the attorney selected is truly independent.").

MINNESOTA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Sometimes.	*Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389 (Minn. 1979) (conflict of interest between carrier and insured transforms duty to defend into duty to reimburse insured for fees incurred in defending suit, citing to *Maryland Cas. Co. v. Peppers*, 355 N.E.2d 24 (Ill. 1976)); *United States Fid. & Guar. Co. v. Lois A. Roser Co.*, 585 F.2d 932 (8th Cir. 1978) (interpreting *dicta* from Minnesota decisions predating *Prahm*, *supra*).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Actions demonstrating greater concern for carrier's interest than insured's was required to support finding of conflict. Actual conflict versus appearance of conflict required to trigger right to independent counsel.	*Mutual Serv. Cas. Ins. Co. v. Leutmer*, 474 N.W.2d 365 (Minn. Ct. App. 1991). *Mutual Serv. Cas. Ins. Co. v. Leutmer*, 474 N.W.2d 365 (Minn. Ct. App. 1991).
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

While recognizing that certain conflicts would entitle an insured to independent counsel, the Minnesota Supreme Court also indicated that a carrier could avoid these conflicts by bringing a declaratory judgment action against the insured. *Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 391 n.2 (Minn. 1979). This view was confirmed by the Minnesota Court of Appeals, in *Mutual Service Casualty Insurance Co. v. Leutmer*, 474 N.W.2d 365, 368-369 (Minn. Ct. App. 1991), which held that an insured must demonstrate an *actual* conflict before an insured is entitled to counsel of its own choosing. *See also, Miller v. Shugart*, 316 N.W.2d 729, 733 n.4 (Minn. 1982) (counsel retained by carrier to defend insured appropriately represented best interests of insureds).

MISSISSIPPI		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Yes, but only for those portions of the case for which coverage has been reserved; if the carrier elects it may defend the covered actions.	*Moeller v. Am. Guarantee & Liab. Ins. Co.*, 707 So. 2d 1062, 1071 (Miss. 1996) (where carrier offered defense under reservation of rights, "not only must the insured be given the opportunity to select his own counsel to defend the claim, the carrier must also pay the legal fees reasonably incurred in the defense."); s*ee also, Am. Guarantee & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 621 (5th Cir. 2001) (where insureds were being defended under reservation of rights and were potentially exposed to liability in excess of policy limits, carrier was obligated to let them select their own attorney at carrier's cost).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Any reservation of rights concerning coverage or defense to coverage creates a conflict such that insured can choose counsel.	
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Carrier denied coverage for certain claims against insured. Conflict created where carrier is defending under reservation of rights and insureds are potentially exposed to liability in excess of policy limits.	*Moeller v. Am. Guarantee & Liab. Ins. Co.*, 707 So. 2d 1062, 1072 (Miss. 1996). *Am. Guarantee & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605, 621 (5th Cir. 2001).

COMMENTS:

The Mississippi Supreme Court's decision in *Moeller* to handle the conflict of interest situation by allowing the insured to select counsel for only those claims as to which coverage reserved is difficult to implement in practice and has been criticized. In most instances, the carrier may want to consider the economics of independent defense counsel for the entire suit with its own counsel monitoring, directing and controlling the defense of the covered claims.

See also, Twin City Fire Ins. Co. v. City of Madison, Mississippi, 309 F.3d 901 (2002) (referring at p. 907 to the requirement that the carrier give the insured a *Moeller* notice).

MISSOURI		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Yes.	*State ex rel. Mid-Century Ins. Co. v. McKelvey*, 666 S.W.2d 457 (Mo. Ct. App. 1984) (Insured not required to accept defense under reservation of right to deny policy coverage as insurance company may not provide zealous defense.) *See also, State ex re. Rimco, Inc. v. Dowd*, 858 S.W.2d 307, 309 (Mo. Ct. App. 1993) ("The insurer has the opportunity to control the litigation by accepting the defense without reservation. ***If it elects some other course it forfeits its right to participate in the litigation and to control the lawsuit.***")
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

MONTANA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

Other secondary sources often cite to the case of *St. Paul Fire & Marine Insurance Co. v. Thompson*, 433 P.2d 795, 798 (Mont. 1967), decided by the Montana Supreme Court. This case appears to indicate that an insured has the right to select counsel of its choosing whenever a carrier takes a position potentially adverse to an insured, such as issuing a reservation of rights. However, we note that *Thompson* involved a situation where the carrier completely denied its duty to defend, rather than an offer to defend under a reservation of rights. Given the carrier's failure to defend, the insured would have no choice but to retain counsel of its choosing.

We also note a recent decision in a related matter raises doubt about interpretations of *St. Paul* as requiring insured-selected counsel. Specifically, in the matter *In re Rules of Professional Conduct and Insurer Imposes Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000), the Montana Supreme Court addressed the role of counsel selected by carriers to represent insureds. The court, which held that "the insured is the sole client of defense counsel," made it very clear that any guideline or rule imposed by an insurer which would restrict, or even appear to restrict, counsel's independent judgment as to how the defense should proceed, was in violation of the Rules of Professional Responsibility. *Id.* at 815. Indeed, the Montana Supreme Court indicated

that once counsel is retained to defend an insured, the carrier loses its right to control the litigation. *Id.* at 813-815.

While the court did not explicitly address the issue of whether an insured who is offered a defense under a reservation of rights would have the right to unilaterally select defense counsel, the decision in *In re Rules of Professional Conduct* suggests that the question would be answered in the negative. Given that the Montana Supreme Court has held that a carrier is not permitted to exert any influence over the decisions and tactics of counsel in matters where the insurer has accepted a defense without reservation, and that the insured is the sole client of the insured, it would be difficult for an insured to argue that the counsel selected by carrier will face a conflict of interest.

NEBRASKA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

***COMMENTS*:**

There is no authority concerning the right to independent counsel in Nebraska. While several articles have referred to decisions from Nebraska courts, these decisions do not deal with the issue of independent counsel, but whether an insured must accept a defense under a reservation of rights. *See, e.g., Hawkeye Cas. Co. v. Stoker*, 48 N.W.2d 623 (Neb. 1951) ("An insured does not have the right without consent of the insured to retain control of the defense of an action indemnifiable under the apparent terms of an insurance policy and at the same time reserve the right to disclaim liability on the policy"); *Iowa Mut. Ins. Co. v. Meckna*, 144 N.W.2d 73 (Neb. 1966); *First United Bank v. First Am. Title Ins. Co.*, 496 N.W.2d 474 (Neb. 1993) (insured may, after receiving a reservation of rights from its carrier, assume control of its defense) *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 537-38 (8th Cir. 1970) (Nebraska law) (insured does not have to allow the carrier to conduct the defense under a reservation of rights).

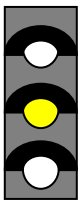
While these cases recognize the conflicts-of-interest that can develop when counsel retained by the carrier is defending an insured under a reservation of rights, and recognize that an insured may seek reimbursement for defense expenditures if it is determined that the insured's claim was covered, the cases do not address whether the carrier, if defending under a reservation of rights, must allow the insured to select counsel of its choice, at the carrier's expense.

NEVADA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided; federal *dicta* only.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

In *Crystal Bay General Improvement District v. Aetna Casualty & Surety Co.*, 713 F. Supp. 1371, 1379 (D. Nev. 1989), the court noted in *dicta* that:

> There is also respectable authority for the proposition that, in a conflict of interest situation, the right of the carrier to control the defense, investigation and settlement of the action includes the obligation to pay the reasonable value of the legal services and costs incurred for independent counsel for the insured. (citations omitted) The foregoing observations concerning applicable legal principles are not stated as final determinations inasmuch as neither party in the extensive briefs saw fit to discuss these areas of jurisprudence.



NEW HAMPSHIRE		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

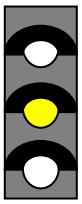
COMMENTS:

Courts in New Hampshire have yet to determine whether a carrier must pay for counsel of the insured's choosing when defending under a reservation of rights. In *White Mountain Construction Co. v. Transamerica Insurance Co.*, 631 A.2d 907 (N.H. 1993), a case where the insurer declined to provide any defense to the insured, the Supreme Court stated as follows:

> The defendant is correct to the extent that if there was a conflict of interest, it could not control the plaintiff's defense. Controlling the defense, however, is not synonymous with providing a defense. Having a duty to defend, and faced with a conflict of interest, the defendant could have hired independent counsel to defend the plaintiff while intervening on its own behalf. In the alternative, the defendant could have provided the defense but reserved its right to later deny coverage.

White Mountain Constr., 631 A.2d at 912-913. However, the Court has yet to address the issue of whether a carrier must allow the insured to choose counsel when defending under a reservation of rights.

A decision from the United States District Court for the District of New Hampshire, in *Gibbs v. Lapies*, 828 F. Supp. 6 (D. N.H. 1993), implicitly suggested that a carrier would be able to select counsel when defending under a reservation of rights, when it determined that "[w]hen an attorney is retained by an insurance company to provide a defense under a liability policy, the attorney's client is the insured not the insurer." *Id.* at 7. While the district court purported to be applying New Hampshire law, it cited a federal case interpreting the rules of professional conduct for Mississippi. Thus, the courts of New Hampshire have yet to address these issues.



NEW JERSEY		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No. Carrier cannot assume control of case absent specific agreement by the insured to the reservation after being informed specifically of the conflict. A conflict of interest converts the carrier's duty to defend to a duty of reimbursement and thus the carrier has no obligation to defend or pay counsel contemporaneously. If the carrier desires to defend under a reservation of rights, carrier cannot assume control of the defense absent the specific agreement by the insured to the reservation of rights after being informed of the conflict.	*Burd v. Sussex Mut. Ins. Co.*, 267 A.2d 7, 10-13 (N.J. 1970); *Hartford Accident & Indemnity Co. v. Aetna Life & Casualty Insurance Co.*, 483 A.2d 402 (N.J. 1984).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

In *Burd v. Sussex Mutual Insurance Co.*, 267 A.2d 7 (N.J. 1970), the New Jersey Supreme Court confronted a situation where a carrier was being asked to defend an insured against a complaint containing allegations of both intentional and negligent conduct. *Id.* at 9. When asked to determine the carrier's duty to defend in this situation, the court declared:

> There may be cases in which the interests of the carrier and the insured coincide so that the carrier can defend such an action with complete devotion to the insured's interest. But if the trial will leave the question of coverage unresolved so that the insured may later be called upon to pay, or if the case may be so defended by a carrier as to prejudice the insured thereafter upon the issue of coverage, the carrier should not be permitted to control the defense. …
>
> In such circumstances the carrier should not be estopped from disputing coverage because it refused to defend. On the contrary the carrier should not be permitted to assume the defense if it intends to dispute its obligation to pay a plaintiff's judgment, unless of course the insured expressly agrees to that reservation. *This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay.*

Burd, 267 A.2d at 10.

Subsequent opinions from New Jersey courts have confirmed this position: where the carrier reserves its rights as to coverage, the carrier's duty to defend is "excused" and transformed into a duty to reimburse the insured for reasonable defense costs, once it has been determined that the carrier did have a duty to indemnify. *See, e.g., Trustees of Princeton Univ. v. Aetna Cas. & Surety Co*, 680 A.2d 783, 786 (N.J. Super. Ct. App. Div. 1996) ("*Burd* has been generally understood as giving insurance companies a right to refuse to defend insureds in certain circumstances." Indeed, the New Jersey Supreme court, in *Hartford Accident & Indemnity Co. v. Aetna Life & Casualty Insurance Co.*, 483 A.2d 402 (N.J. 1984) noted that the "practical effect of *Burd* is that an insured must initially assume the costs of defense itself, subject to reimbursement by the insurer if it prevails on the coverage question." *Id.* at 407 n.3.

Six years after *Burd*, but eight years before the *Hartford v. Aetna*, the New Jersey Supreme Court rendered the decision *Dunne v. Fireman's Fund American Insurance Co.*, 353 A.2d 508 (N.J. 1976) which contains the following *dicta*:

> We envision possible conflicts in this defense because coverage may not exist if liability is fixed on some other predicate, such as violation of right of privacy. Therefore, in the first instance the insured should select their own counsel, subject to the carrier's approval. In the event such approval is not forthcoming the selection should be made by the assignment judge. Reasonable counsel fees and costs of defenses are to be paid by Fireman's Fund.

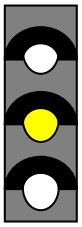
Dunne, 353 A.2d at 513. While several New Jersey cases have attempted to interpret this *dicta*, none has held that a carrier defending under a reservation of rights has duty to

contemporaneously fund the insured's choice of counsel. Significantly, the New Jersey Supreme Court has itself distinguished the decision in *Dunne* from the general rule espoused in *Burd*:

> In short, *Dunne* was concerned with the mechanics of implementing a previously acknowledged duty of an insurer to provide a defense. It did not involve the interpretation of a 'duty to defend' clause of a policy nor did it silently overrule the holdings of *Burd* concerning the duties of an insurer where the duty to defend turns on the existence of coverage and coverage is in dispute.

Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co., 483 A.2d at 408. Thus, when a carrier issues a reservation of rights regarding coverage, not only can the insured not demand that the carrier contemporaneously pay for counsel of the insured's choosing, the insured cannot even demand that the carrier assume defense of the matter under a non-waiver agreement. *See, Trustees of Princeton Univ. v. Aetna Cas. & Surety Co.*, 680 A.2d at 784, 789.

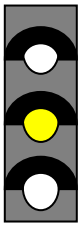
In *Acquino v. State Farm Ins. Co.*, 793 A.2d 824 (N.J. Super. Ct. App. Div. 2002), the court held that where a carrier unilaterally undertook the defense of covered claims and offered the insured the right to have its own counsel defend the uncovered claims, the carrier would be responsible for the fees of the insured's counsel for the time period the uncovered claims were a viable part of the action. The decision seems premised on two particular facts: (a) the fact that the carrier did not specifically advise the insured of the conflict of interest; and (b) the carrier's unilateral decision to undertake the defense of the covered claims. In the absence of the insured's explicit agreement to the carrier's reservation of rights, New Jersey courts would appear to find that the voluntary undertaking of the defense of any part of the claim subjects the carrier to a duty to defend entirely. The better practice then appears that, in absence of an express agreement to the insured's reservation of rights, the carrier should undertake no defense whatsoever. Given that its duty to defend is "excused" by the conflict under *Burd*, this best protects the carrier's interest if the defense or indemnity of the uncovered claims or parties is the driving force behind the litigation and the carrier's reservation.



NEW MEXICO		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No; carrier may select counsel in first instance. However, the New Mexico Supreme Court left open the question as to whether the insured could object to the carrier's selection, suggesting that if the insured objected the carrier would have to allow the insured to select counsel, or at least select counsel agreeable to the insured.	*Am. Employers' Ins. Co. v. Crawford*, 533 P.2d 1203, 1208-1209 (N.M 1975) (Carrier's selection of qualified counsel to represent interests of insured satisfied carriers duty to defend, as counsel did not represent carrier's interests); *Am. Employers' Ins. Co. v. Cont'l Cas. Co.*, 512 P.2d 674 (N.M. 1973) (existence of a conflict does not excuse duty to defend).[3]
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Factual issue that was relevant to both coverage and underlying claim.	*Am. Employers' Insurance Co. v. Crawford*, 533 P.2d 1203, 1205 (N.M 1975).

[3] Older cases. The *Crawford* case comes up in the context of an appeal from a verdict finding the insurance company liable for bad faith. One of the issues was whether the company, which retained qualified counsel for the insured (separate from their coverage counsel), breached its duties to the insured. The New Mexico Supreme Court held it did not, reversing the appellate court. One of the factual predicates, however, was that the insured did not object to counsel and indeed was advised by the counsel selected by the company that he had a "perfect right to secure other counsel." *Am. Employers' Ins. Co. v. Crawford*, 533 P.2d 1203, 1208 (N.M. 1975). Nonetheless, the New Mexico Supreme Court, relying upon *Employers' Fire Ins. Co. v. Beals*, 240 A.2d 397 (R.I. 1968), *overruled in part on other grounds by Peerless Ins. Co v. Viegas*, 667 A.2d 785 (R.I. 1995) for the proposition that in a conflict of interest situation, the carrier can insist the insured retain independent counsel *or* hire two sets of attorneys, one to represent the insured and the other to represent the insurance company.

NEW YORK		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Sometimes; however, contract provisions allowing carrier to select "independent counsel" or providing that carrier must agree to insured's choice of counsel are permissible and enforceable.	*Public Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810 (N.Y. 1981) (When a conflict arises, the insured must be allowed to select independent counsel "whose reasonable fee is to be paid by the carrier"); *Prashker v. United States Guarantee Co.*, 136 N.E.2d 871, 875 (N.Y. 1956). *Cf., New York State Urban Dev. Corp. v. VSL Corp.*, 738 F.2d 61, 66 (2nd Cir. 1984) (applying New York law) (insured's right to counsel is a contractual right; contract in this case provided that carrier not obligated to pay for counsel unless carrier consented to insured's choice); *cf. Cunniff v. Westfield, Inc.*, 829 F. Supp. 55, 58 (E.D.N.Y. 1993) (carrier not allowed to participate in selection of independent counsel absent contractual right).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	As general rule, independent counsel is only necessary in cases where 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 carrier liable.	*Public Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 815 fn. (N.Y. 1981); *Steinman v. Silbowitz*, 714 N.Y.S.2d 209 (N.Y. App. Div. 2000).
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Conflict exists where some claims are within and others are outside policy coverage. Conflict exists where carrier claimed that insured's conduct was intentional and therefore outside policy coverage.	*Prashker v. U.S. Guarantee Co.*, 136 N.E.2d 871 ((N.Y. 1956). *225 E. 57th Street Owners, Inc. v Greater New York Mut. Ins. Co.*, 589 N.Y.S.2d 481 (N.Y. App. Div. 1992).



NORTH CAROLINA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No; it would appear that the insured cannot both accept the defense under a reservation of rights and still select counsel. Where insured rejects defense under reservation of rights, it may select, but its remedy is to seek indemnity or reimbursement after the fact.	*Nat'l Mortgage Corp. v. Am. Title Ins. Co.*, 255 S.E.2d 622, 629-630 (N.C. Ct. App. 1979), *rev'd on other grounds*, 261 S.E.2d 844 (N.C. 1980)(insured is entitled to reject carrier's offer of defense under reservation of rights and may seek indemnity for costs of defending action from carrier).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

We note that the authority cited above, *National Mortgage Corp. v. American Title Insurance Co.*, 255 S.E.2d 622 (N.C. Ct. App. 1979) may be questionable authority, both because the case is dated and because the issued has not been addressed by the North Carolina Supreme Court.

NORTH DAKOTA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

The North Dakota Supreme Court has recognized that there are options for a carrier that wants to control the litigation against its insured, but is disputing the coverage the insured may have. *D.E.M. and D.J.M. v. Allickson*, 555 N.W.2d 596 (N.D. 1996). Specifically, **"**the appropriate response to a coverage dispute was to continue to defend [the insured] and to bring a declaratory judgment action to determine coverage.**"** *Id.* at 602. However, no North Dakota court has elaborated on what **"**controlling the litigation**"** in this situation entails, or whether an insured would be entitled to counsel of its choosing in situations where the carrier is defending under a reservation of rights.

OHIO		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Sometimes.	*Socony-Vacuum Oil Co. v. Cont'l Cas. Co.*, 59 N.E.2d 199, 205 (Ohio 1945) (insurance company's denial of the duty to indemnify certain claims justified insured's retaining separate counsel to protect its interests, and requiring carrier to pay counsel's fees); *Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 735 N.E.2d 48, 55 (Ohio App. Ct. 1999) (carrier must pay for insured's chosen counsel only where carrier's interests are "mutually exclusive" to interests of insured); *Lusk v. Imperial Cas. & Indem. Co.*, 603 N.E.2d 420, 423 (Ohio App. Ct. 1992) (carrier must pay for insured's chosen counsel where reservation of rights renders it impossible for carrier to defend both its interests and interests of insured).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Insured's and carrier's interests must be "mutually exclusive" such that carrier is unable to provide a defense on all claims. "Therefore, the test is whether the insurer's reservation of rights renders it impossible for the company to defend both its own interests and those of its insured."	*Red Head Brass, Inc. v. Buckeye Union Ins. Co.*, 735 N.E.2d 48, 55 (Ohio App. Ct. 1999). *Lusk v. Imperial Cas. & Indemnity Co.*, 605 N.E.2d 420, 423 (Ohio Ct. App. 1992).

What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Mere fact that defense was subject to reservation of rights and that certain claims fell outside of policy coverage did not automatically entitle insured to choose counsel at expense of carrier; Conflict was <u>not</u> created where dispute was not about whether employee was covered under policies but rather which policy provided coverage. Continued representation by attorney retained by insured, prior to carrier retaining counsel, necessary to protect interest of insured since insured and carrier have differing interests. Two independent attorneys working together for common interests but separately for separate interests is appropriate.)	*Lusk v. Imperial Cas. & Indem. Co.*, 603 N.E.2d 420 (Ohio Ct. App. 1992). *Sturt v. Grange Mut. Cas. Co.*, 761 N.E.2d 1108 (Ohio Ct. App. 2001)

COMMENTS:

The Ohio Supreme Court's decision in *Socony -Vacuum Oil Co. v. Continental Casualty Co.*, 59 N.E.2d 199 (Ohio 1945), briefly discussed above, has been clarified multiple times by the Ohio intermediary courts. One of the most important clarifications was in *Lusk v. Imperial Casualty & Indemnity Co.*, 603 N.E.2d 420 (Ohio Ct. App. 1992), where the Ohio Court of Appeals held that an insured is entitled to counsel of its choosing only in those situations where it is impossible for the carrier to represent the insured's interests. *Lusk*, 603 N.E.2d at 423.

Subsequent decisions from the Ohio Court of Appeals have discussed when these situations occur. *See, e.g., Toth v. Gluck*, Nos. 94 C.A. 85, 94, C.A. 101, 1995 WL 562274 (Ohio Ct. App. Sept. 22, 1995) (no conflict between carrier and insured where primary carrier's coverage defenses did not prevent carrier selected counsel from providing competent defense); *Pasco v. State Auto. Mut. Ins. Co.*, No. 99Ap-430, 1999 WL 1221633 (Ohio Ct. App. Dec 21, 1999), *appeal denied*, 727 N.E.2d 135 (Ohio 2000) (no conflict of interest between carrier and insurer where carrier's defense of negligence actions could not increase insured's liability under certain Consumer Sales Practices Act regulations); *and Int'l EDPM Rubber Roofing Sys., Inc. v. Midwestern Indemnity Co.*, No. L-92-406, 1993 WL 452084 (Ohio Ct. App. Nov. 5, 1993), *appeal denied*, 647 N.E.2d 1389 (Ohio 1995) (no conflict between carrier and insured, even though settlement obtained by carrier appointed counsel was not covered, when settlement

strategy was also recommended by insured's private counsel).[4] The fact that the Ohio Supreme Court has refused to hear appeals in the above-listed cases implicitly indicates that these cases do not conflict with its ruling in *Socony-Vacuum Oil Co.*

The decision in *Pasco v.* is interesting in that it involved claims under the Ohio CSPA, and the court found that the facts necessary to prove the CSPA claim were different from the negligence claims therefore carrier's defense of the negligence claims and the CSPA did not increase defendant's liability under the Act. *Pasco*, 1999 WL 1221633 at *8.

The above cases stand in contrast to the decision of the Ohio Court of Appeals in *Dietz-Britton v. Symthe, Cramer Co.*, 743 N.E.2d 960 (Ohio Ct. App. 2000). In *Dietz-Britton*, a matter involving a fraud claim in a real estate transaction, the court found that where the "insurer"[5] issued a reservation of rights three months before trial, after having controlled the defense of the insured up to that point, the carrier had prejudiced the insured's right to select independent counsel and to settle the case. As a result, the carrier's reservation was struck. This case appears to be more of an estoppel or waiver case and less of an independent counsel case. This is because where a carrier issues a reservation of rights, the insured always has the option to reject the defense under the reservation, hire its own counsel and seek reimbursement after the fact. That does not necessarily mean that in the absence of an actual conflict, the insured can impose liability on the carrier to pay those fees. The focus in *Dietz* was really one of prejudice to the insured in multiple ways; the right to select counsel was just one.

[4] Please consult the Ohio Supreme Court Rules on the use and reliance upon unpublished cases.

[5] The defendant in this action was a real estate company that provided a "legal defense program." For purposes of its decision, the Ohio Court of Appeals treated the real estate company as if it were an insurer.

OKLAHOMA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided, as to who selects.	*Nisson v. Am. Home Assurance Co.*, 917 P.2d 488 (Okla. Ct. App.1996).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	Whether the carrier and insured have differing interests in defeating liability.	
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Multiple insureds with conflicting defense strategies.	*Nisson v. Am. Home Assurance Co.*, 917 P.2d 488 (Okla. Ct. App.1996).

COMMENTS:

Nisson recognizes that, under certain circumstances, a carrier might have to afford the insured the right to its own counsel, but does not address who can select. In *Nisson*, the specific facts involved the insured's selection after the carrier did not select separate counsel.

OREGON		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No.	*Ferguson v. Birmingham Fire Ins. Co.*, 460 P.2d 342 (Or. 1969); *Two Bears Co. v. Am. State Ins. Co.*, No. 98-35407, 1999 WL 390922 (9th Cir. May 24, 1999).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

***COMMENTS*:**

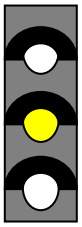
The Oregon Supreme Court in the case of *Farris v. USFG*, 273 Or. 628, 637, 542 P.2d 1031, 1035 (1975) explains that originally the rule in Oregon was that a conflict of interest between a carrier and an insured relieved the carrier of its duty to defend, but that the *Ferguson* case overruled that rule. Under *Ferguson*, the carrier is not relieved of its duty to defend if it issues a reservation of right; but may still retain control of the defense.

PENNSYLVANIA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided, federal authority only.	*The Rector, Wardens and Vestryman of St. Peter's Church v. Am. Nat'l Fire Ins. Co.*, Civ. A.00-2806, 2002 WL 59333 at 9 (E.D. Pa. Jan. 14, 2002).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		*The Rector, Wardens and Vestryman of St. Peter's Church v. Am. Nat'l Fire Ins. Co.*, Civ. A.00-2806, 2002 WL 59333 at 9 (E.D. Pa. Jan. 14, 2002) (Actual conflict exists where liability can rest on either of two causes of action, one which is covered (breach of fiduciary duty) and one which is not (racial discrimination)). *But see, Pennbank v. St. Paul Fire & Marine Ins. Co.*, 669 F. Supp. 122, 126-127 (W.D. Pa. 1987) (claim for punitive damages does not create conflict which triggers right to independent counsel). *St. Paul Fire & Marine Ins. Co. v. Roach Bros.*, 639 F. Supp 134, 139 (E.D. Pa. 1986) (claim for damages in excess of policy limits does not create actual conflict except in connection with possible settlement negotiations (*e.g.* opportunity to settle within policy limits)).

***COMMENTS*:**

Pennsylvania courts have not specifically addressed whether a carrier must provide independent counsel when providing a defense under a reservation of rights. However, the Pennsylvania Supreme Court has held that where the carrier is either reserving its right to deny the insured's claim, or has obtained a non-waiver agreement from the insured, it is prudent for the carrier to advise the insured to "secure competent counsel of its choice." *Nichols v. Am. Cas. Co.*, 225 A.2d 80, 82 (Pa. 1966). However, Pennsylvania courts have yet to address whether a carrier should secure independent counsel for an insured.

In the case of *Krueger Associates, Inc. v. ADT Security Systems*, No. CIV.A. 93-1040, 1994 WL 709380, at * 5 (E.D. Pa. Dec. 20, 1994) (where conflict of interest existed between party indemnifying other party, indemnified party, rather than indemnifying party, had right to control defense, analogizing to third party liability situations where "[i]t is settled law that 'where conflicts of interest between an insurer and its insured arise, such that a question as to the loyalty of the carrier's counsel to that insured is raised, the insured is entitled to select its counsel, whose reasonable fee is to be paid by the carrier.'") (citing to Federal District court opinions in New York and Pennsylvania, and to Appleman's Insurance Law and Practice).



RHODE ISLAND		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No; with Carrier's approval.	*Employers' Fire Insurance Company v. Beals*, 240 A.2d 397 (R.I. 1968); *Aetna Casualty & Surety Company v. Kelly*, 889 F. Supp. 535, 542 (D. Rhode Island 1995).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

See, Labonte v. National Grage Mutual Ins. Co., 810 A.2d 250 (R.I. 2002) (cooperation efforts in carrier's pre-suit investigation does not entitle insured to independent counsel).

SOUTH CAROLINA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

SOUTH DAKOTA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

St. Paul Fire & Marine Ins. Co. v. Engelmann, 639 N.W.2d 192 (S.D. 2002), while not directly addressing the independent counsel issue, strongly suggests that an insured does not have a right to independent counsel. While the *Engelmann* court recognized that conflicts of interest may develop between an insured and an insurer who is providing a defense under a reservation of rights, this conflict should not impact the defense provided by the insurer. As the court stated:

> Because attorneys representing insureds on behalf of carriers owe an undeviating fealty to the insured, attorneys act unethically if they attempt to preserve the insurer's noncoverage claim while purporting to represent the best interests of the insured.

Engelmann, 639 N.W.2d at 200, n.7. According to the *Englemann* court, the proper course for an insurer with coverage reservations is to assume defense of the insured under a reservation of rights and then file a declaratory judgment action. Coverage questions will be decided in the declaratory action, and counsel retained by the insurer to defend the insured will work solely to defend the insured. Indeed, the *Engelmann* court suggests that it would be improper for counsel, where the allegations against the insured include allegations of both negligent and intentional conduct, to submit special interrogatories to determine whether any liability determined by the finder of fact was based upon the negligent or intentional conduct of the insured. *Id*. at 201, n.9.

Rather, these issues should be resolved in the declaratory action, such that independent counsel for the insured is unnecessary.

The *Englemann* court cites approvingly to a decision from the United States District Court for the District of South Dakota, *State Farm Mut. Auto. Ins. Co. v. Armstrong Extinguisher Serv.*, 791 F. Supp. 799 (D.S.D. 1992). In *Armstrong*, State Farm was defending its insured under a reservation of rights. Counsel selected by State Farm to defend the insured, however, was the same counsel being used to prosecute a declaratory judgment action seeking a finding of non-coverage for the insured. The district, when addressing a motion to State Farm's counsel in the declaratory judgment action, recognized that there was a conflict of interest between the insurer and the insured because of the reservation of rights and the declaratory judgment action. While the district court considered several opinions discussing the necessity to retain independent counsel for the insured in the underlying liability action, the court chose instead to remove counsel from the declaratory judgment action, so that counsel could exercise "independent professional judgment" on behalf of the insured in the underlying case. *Armstrong*, 791 F. Supp. at 802.

We also note, however, that the South Dakota Supreme Court had previously indicated that once an insurer issued a reservation of rights, it lost the right to control the litigation, unless the insured consented (either directly or implicitly) to the insurer assuming control. *Connolly v. Standard Casualty Co.*, 73 N.W.2d 119, 122 (S.D. 1955). The *Engelmann* court does not discuss the *Connolly* decision, except to cite to *Connolly* for the proposition that an insurer can preserve its defenses by issuing a reservation of rights. While the *Connolly* decision is dated, it has not been overruled. Given this apparent conflict, it appears that the law of South Dakota is continuing to evolve.

TENNESSEE		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

No right to unilaterally select independent counsel.

The Tennessee Supreme Court strongly suggested that an insured does not have a right to independent counsel by holding that counsel retained by an insurer to defend its insured, whether that counsel is in-house counsel or outside counsel, must "exercise professional judgment and devote complete loyalty to the insured regardless of the circumstances." *In re: Petition of Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995). The *Youngblood* Court's opinion, while not directly addressing the issue of independent counsel, was issued in response to an ethics opinion issued by Tennessee's Board of Professional Responsibility, which said that it was unethical for insurers to retain in-house attorneys to represent insureds, because of the types of conflicts that many jurisdictions have held justify the retention of independent counsel.

In vacating the section of the ethics opinion dealing with these issues, the Tennessee Supreme Court stated as follows:

> The employment of an attorney by an insurer to represent the insured does not create the relationship of attorney-client between the insurer and the attorney, nor does that employment necessarily impose upon the attorney any duty or loyalty to the insurer which impairs the attorney-client relationship between the attorney and

the insured or impedes the performance of legal services for the insured by the attorney. Where the employer is not also a client, a conflict will not occur unless the attorney is obligated by the terms or circumstances of employment to protect the interest of the employer even to the detriment of the insured.

The Code prohibits any relationship between the attorney and the insurer, or any other person or entity, which impairs the attorney's complete loyalty to the client with regard to the performance for the client of the agreed legal services or with regard to any matter touching the attorney-client relationship between the attorney and the insured. The terms of the agreement between the insurer and the attorney whereby the attorney agrees to undertake the representation of the insured must respect the attorney-client relationship between the attorney and the insured. The employer cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation. Any policy, arrangement or device which effectively limits, by design or operation, the attorney's professional judgment on behalf of or loyalty to the client is prohibited by the Code, and, undoubtedly, would not be consistent with public policy.

The Board designates several specific situations which may give rise to conflicts of interest and, therefore, require special care in providing for the insured's defense. They include 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.

The obligation to defend the insured under a contract of insurance obviously contemplates representation by counsel who can exercise professional judgment and devote complete loyalty to the insured regardless of the circumstances. The same loyalty is owed the client whether the attorney is employed and paid by the client, is a salaried employee of the insurer, or is an independent contractor engaged by the insurer. Compliance with the Code in all cases will be measured against the Code itself, rather than some variation of the "outside counsel" practice, which, depending upon the circumstances of the particular situation, may not conform to the requirements of the Code. Both the insurer and the attorney assigned implicitly represent to the insured in all situations that the representation provided comports with the requirements of the Code.

> …The loyalty and independent judgment required by the Code are absolute. They are essential to the integrity and accountability of the profession and the legal system.

In re: Petition of Youngblood, 895 S.W.2d at 328-329.

In a recent decision concerning the relationship of insurer, counsel and insured (but not directly addressing the issue of independent counsel), the Tennessee Supreme Court made the following statements concerning the role of counsel retained by insurers to defend insureds:

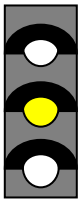
> Following our decision in *Youngblood*, no doubt can exist that the insured is the sole client of an attorney hired by an insurer pursuant to its contractual duty to defend, and in the typical attorney-client relationship, the client maintains a significant right to control the objectives of the representation. Indeed, Ethical Consideration 7-7 states that the client retains "exclusive authority" to direct all areas of the representation that affect the merits of the cause or substantially prejudice his or her rights.

Givens v. Mullikin, 75 S.W.3d 383, 396 (Tenn. 2002). Thus, while the Tennessee Supreme Court has not yet declared that there is no right to independent counsel, these pronouncements on the duty that counsel retained by an insurer has to an insured strongly suggest that the Tennessee Supreme Court would declare independent counsel unnecessary.

TEXAS		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Yes.	*See, Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Reservation of rights issued when suit alleged claims both within and outside of policy's coverage. Complaint alleges conduct, specifically sexual misconduct, which is not covered or excluded by policy. Where coverage will depend upon the finding of the trier of facts as to certain issues in main case.	*Am. Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169 (Tex. App. 1996). *Maayeh v. Trinity Lloyds Ins. Co.*, 850 S.W.2d 193,197 (Tex. App. 1992) (rights letter appropriate since carrier who becomes aware of possible conflict of interest has a duty to inform the insured immediately so that the insured may protect himself if necessary). *Rhodes v. Chicago Insurance Co.*, 719 F.2d 116, 118 (5th Cir. 1983). *Steel Erection Co. v. Travelers Indemnity Co.*, 392 S.W.2d 713, 716 (Tex. App. 1965).

COMMENTS:

The Texas Supreme Court, in *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973), held that "[w]here there is a question of coverage or other conflict of interest, the company and the attorney selected by the company to defend the claim or suit should not thereafter continue to defend the insured in the matter in question unless, after a full explanation of the coverage question, the insured acquiesces in the continuation of such defense…" *Tilley*, 496 S.W.2d at 559. Texas appellate courts, as well as federal courts, have construed *Tilley* to allow an insured to refuse the carrier's proffered defense and control its own defense anytime the carrier issues a reservation of rights. *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 (5th Cir. 1983); *Am. Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 174 (Tex. App. 1996). However, the rationale behind the *Tilley* decision arguably disappeared when Texas supplanted its Code of Professional Responsibility (upon which the *Tilley* court relied) with its current Disciplinary Rules of Professional Conduct. *See generally*, Robert B. Gilbreath, *Caught in a Crossfire Preventing and Handling Conflicts of Interest: Guidelines for Texas Insurance Defense Counsel*, 27 TEX. TECH L.R. 139 (1996).



UTAH		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided; federal authority only.	*See U.S. Fidelity & Guar. Co. v. Louis A. Roser Co., Inc.*, 585 F.2d 932 (8th Cir. 1978)(applying Minnesota and Utah law))(conflict created where claim asserted for design defect and policy exclusion precluded coverage for product design defect).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

U.S. Fidelity & Guar. Co. v. Louis Roser Co., Inc., is a unique case in that the issue of attorneys' fees for independent counsel were tried after the main case, and notwithstanding admissions made by the carriers' counsel at the trial level (where both independent counsel and insurance counsel defended the insured) that a conflict of interest did in fact exist. At the time *U.S. Fidelity* was decided, the court acknowledged no Utah law on point. Several of the states relied upon by the Fifth Circuit have subsequently moved toward the middle ground finding only actual conflict warranting independent counsel.

VERMONT		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

VIRGINIA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided; federal authority only	*See, Town Crier, Inc. v. Hume*, 721 F. Supp. 99, 102 (E.D. Vir. 1989).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

Although Virginia courts have not directly addressed the issue of the right to independent counsel, it appears that such a right would likely be recognized. In *Town Crier, Inc. v. Hume*, 721 F. Supp. 99, 102 (E.D. Vir. 1989), in a case discussing a carrier's duty to defend where claims have been asserted against the insured which potentially fall within coverage, the district court, applying Virginia law, noted in *dicta* the "[i]nsurer's duty to issue a reservation of rights notice with respect to any claims not covered. In those instances, insureds may retain personal counsel to represent their interests or to monitor the conduct of the defense by the carrier."

WASHINGTON		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	No; only where carrier cannot meet its enhanced obligation of good faith.	*Tank v. State Farm Fire & Casualty Co.*, 715 P.2d 1133 (Wash. 1986).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?	*See Comments*.	
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	*See Comments*.	

COMMENTS:

A defense under a reservation of rights does not automatically create a conflict of interest which requires that the carrier pay for independent counsel chosen by the insured. *Johnson v. Cont'l Cas. Co.*, 788 P.2d 598 (Wash. Ct. App. 1990). The duty of good faith of an insurance company defending under a reservation of rights includes an enhanced obligation of fairness towards its insured. *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1137 (Wash. 1986). In order to meet this enhanced obligation, the carrier must meet the following criteria:

1. The carrier must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries.

2. The carrier must retain competent defense counsel for the insured. Both retained defense counsel and the carrier must understand that only the insured is the client.

3. The carrier 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 the lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the carrier.

4. The carrier must refrain from engaging in any action which would demonstrate a greater concern for the carrier's monetary interest than for the insured's financial risk.

Tank, 715 P.2d at 1137. Counsel retained by the carrier to defend the insured must meet distinct criteria as well:

1. Counsel owes a duty of loyalty to the client. Rule of Professional conduct 5.4 (c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment. Counsel must understand that he represents only the insured, not the carrier.

2. Counsel owes a duty of full and ongoing disclosure to the insured.

    a. Potential conflict of interest between carrier and insured must be fully disclosed and resolved in favor of the insured.

    b. All information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, must be communicated to the insured.

    c. All offers of settlement must be disclosed to the insured as those offers are presented.

Tank, 715 P.2d at 1137-1138.

WEST VIRGINIA		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided.	
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

WISCONSIN		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Yes, although parties are free to mutually agree on counsel.	*Jacob v. West Bend Mut. Ins. Co.*, 553 N.W.2d 800 (Wis. Ct. App. 1996)(carrier may provide insured notice of intent to reserve its coverage rights which allows the insured the opportunity to a defense not subject to the control of the carrier although the carrier remains liable for the legal fees incurred); *Grube v. Daun*, 496 N.W.2d 106 (Wis. Ct. App. 1992).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?	Conflict created where claims asserted for intentional acts and multiple (punitive) damages which are excluded under policy.	*Nowacki v. Federated Realty Group, Inc.*, 36 F. Supp.3d 1099 (E.D. Wis. 1999).

WYOMING		
Does the State recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided; federal authority only.	*INA v. Spangler*, 881 F. Supp. 539 (D. Wyo. 1995).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		

COMMENTS:

The issue of the recognition of the right to independent counsel has not been addressed by Wyoming courts. However, in *Insurance Co. of North America v. Spangler*, 881 F. Supp. 539 (D. Wyo. 1995), the district court was faced with the issue of whether the insured's entry into a consent judgment for which the insured is not personally liable, without the carrier's consent, in a case being defending under a reservation of rights to deny coverage, would discharge the carrier's obligations under the policy. The district court held that the "[W]yoming 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.*, 881 F. Supp. at 544. Although the district court was not asked to address the issue of the insured's right to independent counsel, several of the cases cited to by the district court recognized the insured's right to independent counsel in a conflict situation. None were from Wyoming, however. *See e.g., United Servs. Auto. Ass'n v. Morris*, 741 P.2d 246 (Ariz. 1987) and *Cay Divers, Inc. v. Raven*, 812 F.2d 866 (3d Cir. 1987).

PUERTO RICO		
Does the Jurisdiction recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided; federal authority only.	*Metlife Capital Corp. v. Water Quality Ins. Syndicate*, 100 F. Supp. 90 (D. Puerto Rico 2000) (Recognize regret under Puerto Rico law).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		*Metlife Capital Corp. v. Water Quality Ins. Syndicate*, 100 F. Supp. 90 (D. Puerto Rico 2000).

COMMENTS:

In *Metlife Capital Corp.*, the federal district court found that a conflict of interest is created when a carrier insures multiple parties with adverse interests in the litigation and that the carrier must take steps to remedy the situation. *Id.* at 94-95. The court concluded that the carrier complied with this duty when it authorized its insured to appoint independent counsel. *Id.* at 95-96. The court also recognized that it is the general rule that the carrier cedes control of the defense of the litigation to the insured's independent counsel but is responsible for paying *reasonable fees* of the independent counsel. *Id.* at 96.

The court did not find that a conflict of interest was automatically created where a defense was provided under reservation of rights, the insured was potentially liable for an amount in excess of policy limits, or a direct action statute required the carrier to be a party to the litigation. *Id.* at 94. Carrier is only required to pay reasonable fees of independent counsel. *Id.* at 94.

VIRGIN ISLANDS		
Does the Jurisdiction recognize the insured's right to unilaterally select defense counsel to be paid concurrently by the carrier when a carrier issues a reservation of rights letter?	Undecided; federal authority only.	*Cay Divers, Inc. v. Raven*, 812 F.2d 866 (3d Cir. 1987).
What is the standard for determining when a carrier's reservation creates a conflict of interest allowing the insured the right to select defense counsel?		
What type of reservations create conflicts of interest triggering the insured's right to unilaterally selected defense counsel to be paid concurrently by the carrier?		*Cay Divers, Inc. v. Raven*, 812 F.2d 866 (3d Cir. 1987) (court found that claim for breach of contract to provide "an introductory scuba diving lesson and supervised open water dive" and tort claim alleging a breach of the affirmative duty "to properly instruct, diligently supervise and otherwise exercise reasonable care during the introductory scuba diving lesson and open water dive" were outside policy coverage but claim alleging negligence in failing to provide boarding assistance was potentially within coverage.)

COMMENTS:

Carrier who provides independent counsel or reimburses the insured for its choice of counsel and expenses fulfills its duty to defend in a conflict situation. *Cay Divers, Inc. v. Raven*, 812 F.2d 866 (3d Cir. 1987). at 870, Fnt. 3. By providing independent counsel to the insured while reserving its rights to deny coverage, the carrier renounces its control of the litigation to the insured and its counsel. *Id.* at 870.

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