

BLOGS

Choice of Counsel; Policyholder

When Can You Insist on Your Choice of Defense Counsel Despite the Insurer Paying the Bills?

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When facing a lawsuit, most policyholders would understandably rather use familiar, trusted defense counsel instead of attorneys chosen by their insurer. If you tender that lawsuit to your insurance company and it agrees to defend you without reserving its rights to later deny coverage, insurers generally have the right to control the defense and appoint defense counsel for you. But, what happens when an insurer agrees to defend, while also reserving any rights it may have under the policy to deny coverage later? Or, what if the potential damages exceed the policy limits? These and other situations may give rise to a policyholder's right to select independent defense counsel, to be paid by the insurer. Since the law is constantly changing on this issue, and the outcome varies depending on the jurisdiction, always check with coverage counsel, but below are some of the most common situations and reasons why a policyholder could have the right to independent counsel.

Generally speaking, an insurer cannot control the defense of a case when a conflict of interest exists between itself and its insured. In some jurisdictions, a conflict of interest arises when any doubt exists about the attorney appointed by the insurer being able to fully represent the insured's interests at all times. In other jurisdictions, there must be a significant risk that the insured's representation by the appointed counsel will be adversely affected because of the lawyer's "countervailing interests or duties."

In many states, a "reservation of rights," i.e., a statement that the insurer will agree to defend, but it reserves the right to later disclaim coverage, creates an inherent conflict of interest between an insurer and its insured. Once such a conflict exists, the insurer's right to control the defense instead converts into an obligation to fund it. In that case, the insured gets to choose who defends it at the insurer's expense. The main limitation on this right to independent counsel is that the defense costs must be reasonable in light of the complexity of the matter and the geographic location or market.

Even if the relevant jurisdiction does not automatically deem a reservation of rights a conflict, there are several other circumstances that may still give rise to a conflict and thus the policyholder's right to choose counsel, including:

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- the outcome of any coverage issues being potentially controlled or steered by choices made in the defense of the underlying lawsuit, such that the insurer's hired defense counsel could impact whether coverage ultimately exists,
- insufficient policy limits to fully protect the insured's rights
- punitive damages being alleged, but not covered as a matter of law
- when counsel's duty to the insured requires defeating all grounds of liability, while the duty to the insurer requires only that covered grounds of liability be defeated, and
- appointed, i.e., "panel" counsel having a blatant conflict of interest, or not having adequate expertise or skills to effectively handle the defense.

Even if a legal conflict of interest does not currently exist, policyholders may be able to present practical, business reasons why the insurer should agree to their choice of counsel. These include counsel's knowledge of the underlying facts of the case, familiarity with the insured's business or personal activities, the status of the case and the amount of work already performed by defense counsel when the insurer agrees to defend, and the attorney's expertise implicated by the underlying suit. All of these factors favor keeping the insured's choice of counsel rather than switching to panel counsel.