Right to Independent Counsel?

by James W. Bryan

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Does an insurance company's reservation of rights to contest coverage create a conflict of interest which gives the policyholder an automatic right to retain its own independent counsel to defend a liability claim at the insurer's expense? This question has spawned a multitude of lawsuits over the years. The result has not been uniform. Much depends on the jurisdiction you find yourself in and the state's law that governs the dispute. But the stakes are high for insurer and insured, and if you are counsel for either side, you have a tough nut to crack.[1]

The factual setting is a common one. Policyholder gets sued and tenders the defense to its liability insurance carrier. Insurer investigates and determines there is a good possibility that some of the claims asserted against its insured are not covered by the liability insurance policy. But because other claims may be covered thereby triggering the duty to defend, the insurer provides a defense under a reservation of rights and engages defense counsel to defend the insured. The policyholder objects, claiming a conflict of interest exists for defense counsel because such counsel cannot ethically answer to two masters. Policyholder asserts the right to select independent counsel to be paid by the insurer, but the carrier disagrees. Policyholder hires its own personal counsel for the defense and a dispute ensues over who controls the defense and who pays the bills of the policyholder's personal counsel.

A federal district court in Indiana captured the essence of the issue:

> The problem here is one that arises often when a liability insurer cannot be confident at the outset of litigation whether the insured's actions are covered by the liability insurance policy.... In cases where the handling of the underlying litigation may affect whether the claim is covered or not covered, the conflict of interests may be sufficiently clear and immediate that one attorney cannot represent the interests of both the insurer and the insured.... At the same time, not every reservation of rights poses a conflict for defense counsel. If the coverage dispute turns on issues that are independent of the issues in the underlying lawsuit, one lawyer selected by the insurer can handle the underlying litigation, and the insured and insurer can resolve the coverage dispute separately.[2]

Independent counsel is counsel "chosen by the insured or with the approval of the insured, but whose fees are paid by the insurer."[3] "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."[4] 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."[5]

The issue surrounding the right to independent counsel is a by-product of the unique tripartite relationship between insurer, insured and insurance defense counsel. "In no other area of the law are parties routinely represented by counsel selected and paid for by a third party whose interests may differ from those of the individual or entity the attorney was hired to defend."[6] The potential for conflict is inherent in the tripartite relationship.[7]

Per Se Disqualification Rule

A body of case law has developed where the insurer's simple act of a reservation of rights letter due to the existence of covered and noncovered claims becomes the justification for the disqualification of insurance defense counsel and the insured's entitlement to independent counsel at the insurer's expense. "When the insurer defends under a reservation of rights, a potential conflict between insured and insurer may arise.... Even if no actual conflict ever materializes, the threat of conflict is so great that a reservation of rights defense is often treated as an actual conflict."[8] An insurer's obligation to provide independent counsel is not necessarily based on

insurance law; rather, it often is based on a lawyer's duty of loyalty which prohibits him or her from representing conflicting interests.[9]

The decision in *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*[10] articulates the perceived concerns about conflicts of interest. There, the Alaska Supreme Court listed three possible sources of a conflict of interest between an insurer and insured in cases where an insurer asserts either policy or coverage defenses and defends its insured under a reservation of rights. One, the insurer may offer a less than vigorous defense if the insurer knows that it can later assert non-coverage, or if it thinks that the loss it is defending will not be covered under the policy. Two, the insurer may steer the defense so as to make the likelihood of a plaintiff's verdict greater under an uninsured theory. Three, the insurer might gain access to confidential or privileged information, which it might later use to its advantage in litigation concerning coverage.[11]

The seminal case from California that adopted the *per se* disqualification rule, and which is responsible for independent counsel sometimes being referred to as *Cumis* counsel, is *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y.*[12] The underlying action included claims for tortious wrongful discharge and intentional infliction of emotional distress. The insurer provided its own counsel to defend the insured, but reserved its rights to deny coverage for willful misconduct and disclaimed coverage for punitive damages. It was uncontested that the insurer's defense counsel was aware of the insurer's investigation into the claim and client communications that could provide information directly related to the coverage issue. In finding a conflict of interest existed, the *Cumis* court held that:

> the Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent to continued representation, counsel must cease to represent both. Moreover, in the absence of such consent, where there are divergent interests of the insured and the insurer brought about by the insurer's reservation of rights based on possible non-coverage under the insurance policy, the insurer must pay the reasonable costs for hiring independent counsel by the insured.... Disregarding the common interests of both insured and insurer in finding total nonliability in the third party action, the remaining interest of the two diverge to such an extent as to create an actual, ethical conflict of interest, warranting payment for the insured's independent counsel.[13]

Similar reported decisions hold that an insurer's reservation of rights triggers a conflict of interest which authorizes independent counsel for the insured at the insurer's expense. In other words, the insurer should pay for counsel selected by the insured in circumstances where the underlying lawsuit against the insured alleges both covered and non-covered conduct. For example, in *Nandorf, Inc. v. CNA Ins. Co.*,[14] the Illinois court noted that in determining whether a conflict exists, Illinois courts have considered whether the interest of the insurer would be furthered by providing a less than vigorous defense to the allegations of the injured party's complaint. "An insurer's interest in negating policy coverage does not, in and of itself, create sufficient conflict of interest to preclude the insurer from assuming the defense of its insured."[15] "However, conflict of interest has been found where the underlying action asserts claims that are covered by the insurance policy and other causes which the insurer is required to defend but asserts are not covered by the policy.[16] The court found that a conflict of interest would arise where the insurer lacks incentive to defend its insured on a portion of the claims that appear not to be covered by the policy and has "an interest in providing a less than vigorous defense."[17] In *Northland Ins. Co. v. Heck's Service Co., Inc.*,[18] the insured was sued under a bailment theory and a negligence theory, and it would be to the insurer's benefit to defend the case on the bailment theory and to the insured's benefit to defend the case on the negligence theory. The federal district court found a conflict of interest existed and the insured must be allowed to select its own legal counsel for defense of the underlying suit.[19]

Case by Case Analysis

But a sizable number of jurisdictions take a different view and are not so quick to apply a *per se* disqualification rule of automatically allowing the insured to select counsel and requiring the insurer to pay for counsel's fees in a reservation of rights situation. As stated by a federal district court in Michigan,

> An insurer complies with its duty to defend when, after it has reserved its rights to contest its obligation to indemnify, it fully informs the insured of the nature of the conflict and selects independent counsel to represent the insured in the underlying action. 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.[20]

"This rule is not universally followed, and there are divergent views on this issue which appear to be 'jurisdiction specific.' ... It has, however, been applied in well-reasoned opinions by other courts."[21] The court held that under Michigan law the insurer discharged its duty to defend by assigning an attorney to defend insured and was not required to honor insured's selection of defense counsel at insurer's expense.[22]

In *The Driggs Corp. v. Pennsylvania Manufacturers' Association Ins. Co.*, the federal district court concluded that the high court of Maryland would rule in favor of the insurer, stating that the insurer had no duty to furnish separate counsel to the insured, that an actual conflict of interest between insurer and insured did not exist, and that the insurer had not breached any duty to the insured by refusing to pay $2.8 million in legal fees incurred by separate counsel.[23] The Fourth Circuit Court of Appeals affirmed the district court. The Fourth Circuit stated that Maryland has rejected a *per se* rule whereby the insurer is required to pay for the insured's independent counsel any time that the insured's objectives might differ from the objectives of the insurer.[24] The Fourth Circuit sided with the insurer because, among other things, insurance defense counsel gave no coverage advice to the insurer and defended only the interests of the insured, not the insurer, in the underlying case.[25] With no actual conflict of interest found, summary judgment was properly granted for the insurer.[26]

> ***[A]n insurer "does not automatically breach its duty to defend merely because it reserves the right to deny coverage under the policy."***

The Fifth Circuit Court of Appeals stated in *National Union Fire Ins. Co. v. Circle, Inc.*, that an insurer "does not automatically breach its duty to defend merely because it reserves the right to deny coverage under the policy."[27] The court ruled such an insurer "may nevertheless discharge its contractual obligation to defend its insured by engaging separate counsel to represent the insured."[28] If the insured can prove that the defense counsel provided by the insurer was "objectively inadequate," the insured would have a claim for breach of the duty to defend by the insurer.[29] But the court found no evidence to suggest that defense counsel fell short of the duty and held that the insurer was not liable for reimbursing insured for its own counsel's attorney's fees.[30]

The Court of Appeals of Washington in *Johnson v. Continental Cas. Co.*, similarly stated that "an insurer, defending under a reservation of rights, has an 'enhanced obligation of fairness towards its insured.' ... [N]o actual conflict of interest necessarily exists in a reservation of rights defense."[31] To fulfill the enhanced obligation of fairness, the insurer must (1) thoroughly investigate the claim, (2) retain competent defense counsel for the insured and both insurer and insured must understand that only the insured is the counsel's client, (3) inform the insured of the reservation of rights defense and all developments relevant to policy coverage and progress of the lawsuit, and (4) refrain from any activity that would show a greater concern for its monetary interest than for insured's financial risk.[32] Defense counsel must understand that he or she represents the insured, not the insurer, and owes a duty to the insured to disclose conflicts of interest, all information relevant to the insured's defense and all offers of settlement as they are presented.[33] The *Johnson* court found that insurer and insurance defense counsel met the above criteria and settled the underlying case and that no conflict of interest existed. The insurer was not liable for the fees.[34]

Conflict of Interest Ethics Rule

The problem is governed at its core by the Rules of Professional Conduct that address conflicts of interest where an attorney has multiple clients or where a third party is paying the attorney to represent a client (such as the insured). For example, in Indiana, the governing Rule of Professional Conduct is Rule 1.7(a). As amended effective January 1, 2005, the rule provided that unless the client gives informed consent, a lawyer shall not represent a client if the representation involves a "concurrent conflict of interest."[35] A concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[36] The question under Rule 1.7(a)(2) is whether there is a "significant risk" that an attorney selected by the insurer and subject to its direction would be "materially limited" in representing the policyholder by a relationship with the insurer under these circumstances.[37] As the Indiana court noted in *Armstrong Cleaners, Inc. Inc. v. Erie Ins. Exchange*, the ethics rule 1.7(a)(2) does not impose a *per se* rule; it instead requires a close look at the nature of the conflicting interests, the issues in the underlying litigation, and the risk that the attorney's relationship with the insurer will materially limit his representation of the insured.[38] But the fact-intensive and case-specific nature of the inquiry does not establish a *per se* rule.[39]

Instructive is the Eighth Circuit's statement in *U.S. Fidelity & Guaranty Co. v. Louis A. Roser Co., Inc.*,[40] where the court found that an actual conflict required the insurer to pay for independent counsel for the insured. The insurer had selected counsel to defend its insured in a case with three theories of liability, two that were covered and one that was not. The court acknowledged that an attorney retained by an insurance company is required and expected to act conscientiously and to render effective service.[41] But the court continued:

> However, we cannot escape the conclusion that it is impossible for one attorney to adequately and fairly represent two parties in litigation in the face of the real conflict of interest which existed here. Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client-the one who is paying his fee and from whom he hopes to receive future business-the insurance company.[42]

South Carolina dealt with the issue in *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Company of South Carolina, LP.*[43] At the time, a pertinent provision of the South Carolina Rules of Professional Conduct governed a lawyer's ethical obligation when paid by an insurance company to represent an insured: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[44] The federal district court declined to apply a *per se* disqualification rule requiring the immediate disqualification of counsel selected by an insurance carrier any time the carrier purports to defend a civil action under a reservation of rights. As noted by the court, "a lawyer hired by an insurer to represent an insured owes an unqualified duty of loyalty to the insured and must act at all times to protect the insured's interest."[45]

The *Twin City Fire* court found the cases rejecting the *per se* rule to be better reasoned, more in line with South Carolina jurisprudence, and in accordance with traditionally accepted practices in South Carolina.[46] The court cited to cases from Alabama, California, Hawaii, Illinois, Michigan, Maryland, and Ohio as rejecting the *per se* rule.[47]

The Supreme Court of Hawaii recognized the salutary effect of existing ethical requirements in this area:

> There is no consensus on [the *per se* disqualification rule] issue nationwide.... Upon balancing the respective pros and cons of suggested solutions to the issue, we are convinced that the best result is to refrain from interfering with the insurer's contractual right to select counsel and leave the resolution of the conflict to the integrity of retained defense counsel. Adequate safeguards are in place already to protect the insured in the case of misconduct. If the retained attorney scrupulously follows the mandates of the Hawaii Rules of Professional Conduct (HRPC), the interests of the insured will be protected. In the event that the attorney violates the HRPC, the insured has recourse to remedies against both the attorney and the insurer.[48]

The court premised its holding on the view that it is implicit in the Hawaii Rules of Professional Conduct that "retained counsel *solely* represents the insured when a conflict arises between the interests of the insurer and the insured."[49]

Quite often, there is real value to having insurance defense counsel defend the civil action under the control of the insurance company without a dispute over independent counsel bubbling to the surface. But other factors may tip the scale in favor of pressing the issue upfront.

Practice Tips

From the standpoint of the policyholder, the pros and cons of asserting a right to independent counsel will need to be weighed. Quite often, there is real value to having insurance defense counsel defend the civil action under the control of the insurance company without a dispute over independent counsel bubbling to the surface. But other factors may tip the scale in favor of pressing the issue upfront. The business relationship with the insurer may not be strong. Many other similar lawsuits may be anticipated with the same independent counsel issue coming into play. The insured may not think the insurance defense counsel has enough expertise to handle the matter and may want to select an independent counsel who is known to have the expertise in defending such liability claims. Once the decision is made to press the issue, the policyholder should send a written demand for independent counsel to the insurer and try to open up dialogue with the insurer on the issue. If the insurer declines the insured's demand for independent counsel, the options for the insured would appear to be the following: have its personal counsel monitor the defense provided by insurance defense counsel; have personal counsel take over the defense to the exclusion of the insurance defense counsel; do

nothing and take a wait-and-see approach; or file suit against the insurer. Each option has its own risks and benefits. But if the insurer agrees to meet you halfway and pay for independent counsel at the same rates as it pays insurance defense counsel, but independent counsel charges higher rates, this may be the best you could do under the circumstances at the time.

From the standpoint of the insurer, before sending the reservation of rights letter, the insurer should develop a good understanding of the case law that may govern the issue of whether the insured has a right to independent counsel. The insurer may choose not to reserve its right to contest coverage under a specific policy provision in order to avoid a conflict of interest situation, in which case the insurer may be able to blunt the insured's efforts to claim a right to independent counsel. If the reservation-of-rights letter draws an objection and demand for independent counsel by the insured, the insurer's response may depend on the extent of the business relationship with the insured, how the insurer has handled the demand in similar cases with other insureds, the concerns about making unfavorable law in a jurisdiction, or the desire to obtain a court ruling and reported decision which might bring more certainty for the insurer in handling this and future claims. If the decision is to hold the line and insist on insurance defense counsel defending the liability claim, a written response to the insured would be in order. Retaining coverage counsel for advice may provide an outside perspective that helps the insurer understand the options. Filing a declaratory judgment action may be appropriate or it may not be appropriate. If the policyholder permits insurance defense counsel to proceed with the defense despite the objection, the liability claim may end up with a defense verdict, or a settlement with the insurer paying the lion's share of the settlement, and thus filing a declaratory judgment action may not have been a good choice. Or filing suit right away may be necessary if the insured fired insurance defense counsel and brought in its own personal counsel to defend and the insurer has potentially significant exposure in the liability claim or may have future similar claims with the insured that warrant a judicial determination on the subject now. Short of filing suit, look for creative solutions with the insured that keep insured and insurer on the same side and unified in the defense against the plaintiff.

If the insured wants to talk coverage, tell the insured to talk directly to the insurer instead and let the insured know that you are trying to abide by your ethical obligations to the insured. The insurer may also need an occasional reminder to keep you out of the loop on issues of coverage.

From the standpoint of insurance defense counsel, counsel should focus exclusively on the defense of the liability claim and not get involved in coverage issues. Understanding the ethics rules on conflicts of interest in insurer-insured situations is of paramount importance. If the insured wants to talk coverage, tell the insured to talk directly to the insurer instead and let the insured know that you are trying to abide by your ethical obligations to the insured. The insurer may also need an occasional reminder to keep you out of the loop on issues of coverage. But if there is no way to avoid conflicts, you may have to withdraw from the case. As aptly put by the North Carolina State Bar in its guidance to counsel, "[t]he attorney should also keep the insured informed of his or her evaluation of the case as well as the assessment of the insurance company, with appropriate advice to the insured with regard to the employment of independent counsel whenever the attorney cannot fully represent his or her interest."[50]

Conclusion

Whether you are the insured or insurer in the battle over the right to independent counsel, reasonable minds can and do differ on the best resolution of the conflict inherent in the tripartite relationship among the insurer, insured and insurance defense counsel. If you are in a jurisdiction with no precedent on the issue, the ground is fertile for both sides to utilize case law from other jurisdictions to make their respective case. If your jurisdiction has already spoken in favor of the *per se* disqualification rule, the parties will have more certainty in how to address the insured's demand for independent counsel. However, many jurisdictions understand that not every reservation of rights by an insurer poses a conflict for defense counsel. The fact-intensive and case-specific nature of the inquiry is what drives the battle over whether an insurance company's reservation of rights to contest coverage creates the kind of conflict of interest which gives the policyholder the right to independent counsel at the insurer's expense.

[1] In recent issues of *Coverage*, the subject of independent counsel has been addressed in two articles. *See* Dale Hausman, *Uncertainty as to Extra-Contractual Liability for an Insurer's Failure to Advise the Policyholder of Conflict of Interest and Option to Retain Independent Counsel for Defense under Reservation of Rights*, Vol. 19, No. 1, Jan./Feb. 2009; John S. Vishneski, Noel C. Paul, Jessica E. Brown, *With Reservations: Why Conflicts of Interest Arise When Insurers Reserve Their Rights, and What Insurers Must Do in Response*, Coverage, Vol. 19, No. 2, March/April (2009). The instant article looks at yet another angle of the independent counsel issue—does the insurer's reservation of rights automatically give rise to the insured's right to independent counsel.

[2] Armstrong Cleaners, Inc. v. Erie Ins. Exchange, 364 F. Supp. 2d 797, 805–07 (S.D. Ind. 2005).

[3] Hartford Cas. Ins. Co. v. A & M Associates, Ltd., 200 F. Supp. 2d 84, 90 (D.R.I. 2002).

[4] *Hartford Cas. Ins. Co.*, 200 F. Supp. 2d at 90.

[5] *Hartford Cas. Ins. Co.*, 200 F. Supp. 2d at 90.

[6] Finley v. Home Ins. Co., 90 Haw. 25, 975 P.2d 1145, 1149 (1998) (*quoting* Douglas Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured and Insurance Defense Counsel*, 73 Neb. L. Rev. 265, 270 (1994)).

[7] *Finley*, 975 P.2d at 1149.

[8] *Hartford Cas. Ins. Co.*, 200 F. Supp. 2d at 89; *see also* Nowacki v. Federated Realty Group, 36 F. Supp. 2d 1099, 1107–08 (E.D.Wis. 1999) (once insurer tenders defense under reservation of rights, a conflict of interest is created, at which time the insured is free to control its defense and select its own counsel at the insurer's expense); American Family Life Assur. Co. v. United States Fire Co., 885 F.2d 826, 831–32 (11th Cir. 1989).

[9] *See* James 3 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th 1093, 111 Cal. Rptr. 2d 181, 186 (2001).

[10] CHI of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1113, 1116–19, 1121 (Alaska 1993).

[11] *CHI of Alaska, Inc.*, 844 P.2d at 1116; *see also* N. County Mut. Ins. Co. v. Davalos, 47 Tex. 786, 140 S.W.3d 685 (2004) (*citing* 1 Allan D. Windt, *Insurance Claims & Disputes* § 4:25 at 393 (4th ed. 2001).

[12] San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (4th Dist.1984).

[13] *Cumis Ins. Soc'y*, 208 Cal. Rptr. at 506 (the ruling of *Cumis* has been superseded in California by statute, Cal. Civil Code § 2860, which sets forth more specific standards).

[14] Nandorf, Inc. v. CNA Ins. Co., 134 Ill. App. 3d 134, 88 Ill. Dec. 968, 479 N.E.2d 988 (1985).

[15] *Nandorf, Inc.*, 479 N.E.2d at 992.

[16] *Nandorf, Inc.*, 479 N.E.2d at 992.

[17] *Nandorf, Inc.*, 479 N.E.2d at 992; *see also* Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24, 31 (1976) ("Peppers has the right to be defended . . . by an attorney of his choice who shall have the right to control the conduct of the case. By reason of St. Paul's contractual obligation to furnish Peppers a defense it must reimburse him for the reasonable cost of defending the action.").

[18] Northland Ins. Co. v. Heck's Service Co., Inc., 620 F. Supp. 107 (E.D.Ark.1985).

[19] *Northland Ins. Co*, 620 F. Supp. at 108–09; *see also* Southern Maryland Agricultural Ass'n, Inc. v. Bituminous Cas. Corp., 539 F. Supp. 1295, 1304–05 (D. Md.1982) (finding conflict of interest where only one of three claims against insureds was even arguably within policy coverage; holding that insureds had right to choose their own attorney and insurer had to assume the reasonable costs of the defense provided); *CHI of Alaska*, 844 P.2d at 1116–19, 1121 (finding reservation of rights created conflict of interest where plaintiffs' complaint alleged negligent and intentional acts; insurer had to pay for counsel selected by insured, and insured had unilateral right to select counsel subject to implied covenant of good faith and fair dealing).

[20] Central Michigan Board of Trustees v. Employers Reinsurance Corp., 117 F. Supp. 2d 627, 634–35 (E.D. Mich. 2000).

[21] *Central Michigan Board of Trustees*, 117 F. Supp. 2d at 635.

[22] *Central Michigan Board of Trustees*, 117 F. Supp. 2d at 635; *see also* Bartels v. Romano, 407 A.2d 1248, 1251 (N.J. Super.A.D. 1979) ("the fact that the attorney is assigned by an insurance company does not alter the basic lawyer-client relationship, or the duty owed by lawyer to client"); The Driggs Corp. v. Pennsylvania Manufacturers' Association Ins. Co., 3 F. Supp. 2d 657, 659–60 (D.Md. 1998) ("a reservation of rights letter in this case did not amount to an actual conflict of interest, . . . the mere fact of 'dual' representation does not raise a conflict of interest" and "an insurer is free to select counsel of its choice to represent its insured"), *affirmed*, 181 F.3d 87, 1999 WL 305044 (4th Cir. 1999).

[23] *The Driggs Corp.*, 3 F. Supp. 2d at 660.

[24] *The Driggs Corp.*, 181 F.3d 87, 1999 WL 305044 at 6.

[25] *The Driggs Corp.*, 181 F.3d 87, 1999 WL 305044 at 6.

[26] *The Driggs Corp.*, 181 F.3d 87, 1999 WL 305044 at 6.

[27] National Union Fire Ins. Co. v. Circle, Inc., 915 F.2d 986, 991 (5th Cir. 1990).

[28] *National Union Fire Ins. Co.*, 915 F.2d at 991.

[29] *National Union Fire Ins. Co.*, 915 F.2d at 991.

[30] *National Union Fire Ins. Co.*, 915 F.2d at 991–92.

[31] Johnson v. Continental Cas. Co., 788 P.2d 598, 600 (Wash. App. 1990).

[32] *Johnson*, 788 P.2d at 600.

[33] *Johnson*, 788 P.2d at 600.

[34] *Johnson*, 788 P.2d at 600; *see also* Safeco Ins. Co. v. Butler, 823 P.2d 499, 503 (Wash. 1992) (same analysis by Supreme Court of Washington); L & S Roofing Supply Co. v. St. Paul Fire & Marine Insurance Co., 521 So. 2d 1298, 1304 (Ala.1988) (when an insurance company undertakes a defense pursuant to a reservation of rights, it does so under an "enhanced obligation of good faith" toward its insured in conducting such a defense); Roussos v. Allstate Ins. Co., 104 Md. App. 80, 655 A.2d 40 (1995) (insurer not liable for insured's counsel's fees, even though damages claimed were in excess of coverage, because insurer fully defended the insured).

[35] Ind. R. Prof. Cond. 1.7(a).

[36] Ind. R. Prof. Cond. 1.7(a)(2).

[37] Ind. R. Prof. Cond. 1.7(a)(2).

[38] *Armstrong Cleaners*, 364 F. Supp. 2d at 816–17.

[39] *Armstrong Cleaners*, 364 F. Supp. 2d at 816–17.

[40] U.S. Fidelity & Guaranty Co. v. Louis A. Roser Co., Inc., 585 F.2d 932 (8th Cir.1978).

[41] *U.S. Fidelity & Guaranty Co.*, 585 F.2d at 938 & n.5.

[42] *U.S. Fidelity & Guaranty Co.*, 585 F.2d at 938. *See also Armstrong Cleaners*, 364 F. Supp. 2d at 815 (court conducted "close look" inquiry and found "significant risk" of conflict existed to warrant allowing the insured to select counsel paid for by insurer); *A & M Associates*, 200 F. Supp. 2d at 92–93 ("the [Rhode Island] Rules of Professional Conduct establish that the duty of loyalty is owed to the insured, not the insurer.").

[43] Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Company of South Carolina, LP, 336 F. Supp. 2d 610 (D.S.C. 2004), *affirmed*, 433 F.3d 365 (4th Cir. 2005).

[44] *Twin City Fire Ins. Co.*, 336 F. Supp. 2d at 615 (*quoting* S.C. Rules of Professional Conduct, Rule 407; SCACR, Rule 5.4(c)).

[45] *Twin City Fire Ins. Co.*, 336 F. Supp. 2d at 616 (*quoting*, Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 788 N.E. 2d 522, 540 (2003)); *see also* Higgins v. Karp, 239 Conn. 802, 687 A.2d 539, 543 (1997) (holding duty of loyalty lies exclusively with the insured); Trau-Med. of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 697 (Tenn. 2002) (same).

[46] *Twin City Fire Ins. Co.*, 336 F. Supp. 2d at 621.

[47] *Twin City Fire Ins. Co.*, 336 F. Supp. 2d at 621 (*citing* Fed. Ins. Co. v. X-Rite Inc., 748 F. Supp. 1223 (W.D. Mich. 1990) (holding that conflict of interest posed by reservation of rights did not automatically entitle insured to select counsel of its choice at insurer's expense); Cardin v. Pac. Employers Ins. Co., 745 F. Supp. 330, 336–38 (D.Md.1990) (rejecting *per se* disqualification where only possibility of conflict exists); *Finley*, 90 Haw. 25, 975 P.2d 1145 (holding reservation of rights does not automatically entitle insured to counsel of its own choosing); *L & S Roofing*, 521 So. 2d 1298 (finding that insurer's decision to defend under reservation of rights did not create a conflict of interest so as to entitle insured at the outset to engage defense counsel of its choice at insurer's expense); Red Head Brass, Inc. v. Buckeye Union Ins. Co., 135 Ohio App. 3d 616, 735 N.E.2d 48 (1999) (holding that insurer defending under reservation of rights not required to pay for independent counsel retained by insured); Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 71 Cal. Rptr. 2d 882 (1998) (finding that reservation of rights did not create automatic conflict of interest); Littlefield v. McGuffey, 979 F.2d 101 (7th Cir. 1992) (determining that possibility of conflict of interest not sufficient to trigger obligation of insurer to pay for independent counsel); Foremost Ins. Co. v. Wilks, 206 Cal. App. 3d 251, 253 Cal. Rptr. 596 (1988) (finding reservation of rights letter alone not sufficient to trigger insurer's duty to pay for independent counsel)).

[48] *Finley*, 975 P. 2d at 1151–52 (internal footnote omitted).

[49] *Finley*, 975 P. 2d at 1152; *accord*, Michigan Millers Mut. Ins. Co. v. Bronson Plating Co., 197 Mich. App. 482, 496 N.W.2d 373, 378 (1992) ("the attorney's sole loyalty and duty is owed to the client, not the insurer").

[50] North Carolina State Bar RPC 92 (January 17, 1991).