The Policyholder's Right to Select Defense Counsel

Attorneys chosen by insurer sometimes have conflicts of interest

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Liability insurance policyholders likely feel a sense of relief when their insurer agrees to defend them in connection with an underlying liability claim. After all, liability insurance is sometimes referred to as litigation insurance, meant to keep a policyholder from spending hundreds of thousands of dollars defending claims, if not more, even when such claims are completely without merit. A policyholder's relief may be short-lived, however.

Many times, the defense provided by an insurer is not a guarantee that the policyholder will ultimately be protected for any judgment in underlying litigation. For this reason, policyholders sometimes feel more comfortable choosing their own defense counsel, instead of accepting the insurer's chosen counsel. Unfortunately for policyholders, liability policies typically grant the insurer the right to control the defense, and do not typically expressly grant a policyholder the right to select counsel. If there is no selection-of-counsel provision in a policy, the policyholder's right to select counsel will depend on the circumstances of the particular claim and the insurer's position regarding coverage.

When insurers agree to provide a defense to a policyholder under a liability insurance policy, they will many times defend the policyholder under a reservation of rights. Generally, a reservation of rights is intended to preserve the insurer's ability to deny all or part of a liability claim brought against the policyholder, depending on how the allegations and facts develop in the underlying litigation. An inherent danger in the context of a reservation of rights is the differing interest between the policyholder and the insurer regarding covered and uncovered claims.

An oft-cited example is the scenario in which two causes of action are alleged against a policyholder, and one is covered, but the other is not. The insurer has an interest in having the covered claim dismissed. Under these circumstances, a conflict of interest could arise between the policyholder and the insurer-selected defense counsel, requiring independent counsel for the policyholder at the insurer's expense.
The requirement for independent counsel differs from state to state. In Massachusetts, for example, the mere existence of a reservation of rights is sufficient to trigger a policyholder's right to select counsel. See *Northern Security Insurance v. R.H. Realty Trust*, 78 Mass. App. Ct. 691 (2011). In some jurisdictions, however, such as New York, a reservation of rights must result in a conflict of interest before the policyholder may insist on its own choice of counsel. See, e.g., *Public Service Mutual Insurance v. Goldfarb*, 53 N.Y.2d 392 (1981). The insurer may even have an affirmative requirement to notify the policyholder of the right to independent counsel. See *Elacqua v. Physicians' Reciprocal Insurers*, 860 N.Y.S.2d 229 (N.Y. App. Div. 2008).

In Connecticut, it is clear that defense counsel owes a duty of loyalty only to the policyholder, regardless of whether the insurer selects or pays for counsel. See *Metropolitan Life Insurance v. Aetna Casualty & Surety*, 249 Conn. 36 (1999).

Yet, it is unclear in Connecticut as to whether, and when, a policyholder has a right to select independent counsel. At least one Connecticut Superior Court judge has observed, however, that "where an insurer perceives a conflict of interest between itself and its insured prior to or during the course of a trial, it is customary, legally appropriate, and often legally necessary for the insurer to provide independent counsel to the insured so as to not jeopardize the insured's rights under the terms of the contract." *Aetna Life & Casualty v. Gentile*, No. 0122259, 1995 WL 779102 (Conn. Super. Ct. Dec. 12, 1995), abrogated on other grounds; see also *Steadfast Insurance v. Purdue Frederick*, No. X08 CV 020191697S, 2005 WL 3624482 (Conn. Super. Ct. Dec. 6, 2005).

Even if a conflict does not exist, there are other reasons to support a policyholder's request to choose counsel. When an insurer has not been involved with the defense of a suit since the very beginning, it could be prejudicial to the policyholder to bring in new counsel in the middle of active litigation. Moreover, if an insurer wants to replace counsel that has already been defending a policyholder, acclimating new counsel to the matter can be time-consuming and costly. Also, a policyholder's personal counsel may be better suited to defend the policyholder because of such counsel's knowledge of the policyholder. Personal counsel for a corporate policyholder, for instance, will likely have a better understanding of the corporation's operations, which could be critical to the corporation's defense, depending on the allegations.

To the extent a policyholder is able to select counsel, there still may be disputes regarding the rates an insurer must pay. Insurers may argue that they need only pay those rates typically paid to panel counsel. The proper measure of rates, however, should not be what the insurer would have paid had it been allowed its choice of counsel. Instead, rates should be based on what is reasonable. See *R.H. Realty Trust*. Consideration should be given as to a defense counsel's experience and reputation, as well as to the location and nature of underlying litigation, among other things.

In the end, allowing the policyholder to choose counsel may benefit both the policyholder and the insurer, but policyholders should also be open-minded, as defense counsel chosen by the insurer could very well be the best choice for the policyholder. Both should work together to resolve any dispute regarding the selection of counsel, and concentrate instead on defending the claims. Generally speaking, when there is no liability, coverage issues go away. In any event, policyholders who want to ensure a right to choose counsel should consider whether a selection of counsel provision can be included in their liabilities policies.
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