

Paying For ‘Cousin Vinny’: The insured’s right to independent counsel

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Every liability insurer undertakes two obligations in exchange for the payment of a premium: a duty to indemnify and a duty to defend. The insurer’s duty to indemnify requires the carrier to compensate third parties for any amounts its insured is found liable to pay on a covered claim. The duty to defend obligates an insurer to pay the costs and fees necessary to defend claims brought against its insured.

In a perfect world, the interests of the insurer and its insured are aligned. However, when claims are asserted that fall outside the scope of coverage, those interest can become adverse.

Consider this example. An insured participates in a physical altercation and is sued for negligence and battery. The insured tenders the claim to the liability carrier. While negligence is a covered claim, battery is an intentional act which is excluded under the policy. It is in the insured’s interest that any adverse judgment be entered on the negligence claim which the insurer must pay. Conversely, it is in the insurer’s interest that the plaintiff prevails on battery for which no coverage exists. Because these claims are mutually exclusive, an actual conflict of interest exists between insurer and insured.

Maryland’s courts have uniformly held that in such circumstances the insurer must defend the entire case. How is this duty fulfilled when the interests of the party responsible for paying the defense costs are adverse to those of the party being defended? Maryland’s answer may come as a surprise. In *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396 (1975), the Maryland Court of Appeals ruled that when an actual conflict of interest exists, the insured can retain independent counsel to defend the claim at the cost of the insurer.

This scenario presents several interesting questions. How much does an insurer have to pay an attorney it did not select? Must independent counsel comply with reporting and billing guidelines? Can the insured select the most experienced (or expensive) lawyer in town to defend a simple matter when the potential liability is only a few thousand dollars? Are there minimum standards which independent counsel must meet? Can the insured hire “Cousin Vinny,” fresh out of law school, to defend a complex case with exposure of several million dollars?

Although most of these questions have not been definitively answered, several courts addressing the fee issue have concluded that independent counsel is entitled to be paid a reasonable fee based upon the complexity of the case, the experience of the lawyer and the rate typically charged by practitioners for handling similar cases.

This, of course, does not end the debate. One may ponder: What is a similar case?

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