CLM 2018 Annual Conference
Houston, Texas

Does Sophie have a Choice?
Ethical Considerations that Trigger A Right of Independent Counsel and the Consequences of Unethical Conduct in Litigation and Mediation

I. How Coverage Issues Effect The Duty to Defend Obligation When Defending an Insured and Triggers a Right of Independent Counsel – When Do I have a Choice?

A. Understanding the Duty to Defend, Reservations of Rights and When an Actual Conflict of interest Arises, Triggering a Right to Independent Counsel

You have an insured. The policy was just issued with a $1 million limit. A month later, your insured notifies you that they have been sued in a complex lawsuit asserting 17 causes of action against the insured. Punitive damages are being alleged and $3 million in compensatory damages. Only one of the causes of action appears to be potentially covered. The insured is asking for a defense. You look at the insurance application and wonder whether the insured knew the lawsuit before the policy was issued.

You appoint panel defense counsel to defend the insured and issue a reservation of rights letter. In the reservation of rights letter, you reserve the right to disclaim indemnity for punitive damages or a judgment in excess of the policy limits. You also reserve rights to deny coverage for certain policy exclusions. Moreover, you reserve rights to rescind the policy in the event the insured did not disclose knowledge of material facts in the policy application.

The insured responds that they have a right to independent counsel.

Where an insurance company defends its insured unequivocally and without reservation, a conflict of interest does not exist. The insurance company has the right to control the defense through the appointment of counsel selected by the insurance company. Insurance companies have both the right and duty to defend covered claims and the right to control the defense. The reasoning, the insurance

company is ultimately obligated to pay for indemnification. What is commonly called a "tripartite relationship" is created when an insurance company retains counsel to defend the insured without reservation. However, where an insurance company defends its insured through a reservation of its rights to later deny indemnity coverage, a potential for a conflict of interest arises between the insured and the insurance company. In this situation, the question arises as to whether the insured is entitled to be represented by independent counsel.

In the well- known case of California, *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc*. the appellate court found that a conflict of interest existed and therefore the insured had a right to retain independent counsel paid for by the insurance company. In supporting this holding, the Cumis court observed:

> [T]he 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 of 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 noncoverage under the insurance policy, the insurer must pay the reasonable cost for hiring independent counsel by the insured. The insurer may not compel the insured to surrender control of the litigation. Disregarding the common interests of both insured and insurer in finding total nonliability in the third party action, the remaining interests of the two diverge to such an extent as to create an actual, ethical conflict of interest warranting payment for the insureds' independent counsel.

The reservation of rights approach often results in conflicts of interest between the insurance company and the insured concerning the defense in the underlying action. The following jurisdictions have recognized the insured's right to independent counsel where a conflict of interest exists:

laska, Arkansas, California, Connecticut, Florida, Illinois, Indiana, Louisiana, Maine, Maryland, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Virginia, and Wisconsin.

In several jurisdictions where the insured has the right to select independent counsel, the legislature and courts have given significant guidance on what is required. As an example, California Civil Code § 2860 (1996) provides that the insurance company need only pay the customary hourly rate for defense counsel and may require that the counsel selected by the insured possess minimum qualifications that includes five years of civil litigation experience. Additionally, California's Civil Code defines the nature

of the conflict of interest that must exist to permit the insured's retention of independent counsel at the insurer's expense.

The California courts have found that there is no entitlement to independent counsel where the damages are only partially covered by the policy or where only some aspects of the claim are covered while others may not be covered.

The Alaska courts have also placed restrictions upon the selection of independent counsel that were subsequently codified into Alaska Stat. § 21.89.100 (1995). In Alaska, independent counsel must have at least four years of experience in civil litigation including defense experience in the general area, which is the subject of the defense. The rate charged by independent counsel is limited to the rate that the insurance company would pay an attorney in the ordinary course of business in the defense of a similar civil action in the subject community where the claim arose.

The New Jersey courts limit the hourly rate to be charged for independent counsel to a reasonable hourly rate for the defense work of the nature involved in defending the type of claim being presented. In Texas, the insurance company's obligation to pay for independent counsel is limited to the reasonable costs of defense. In Rhode Island, an insured is not required to accept the appointed defense counsel of the insurance company where a conflict of interest exists.

Other courts have denied the obligation to appoint independent counsel in conflict of interest situations. *See, e.g.,* Hawaii, Oregon, Vermont, and Washington. In Arizona, defense counsel appointed by the insurance company that is defending its insured under a reservation of rights owes the insured "undeviated allegiance whether compensated by the insurer or the insured and cannot act as an agent of the insurance company." Because of this undivided loyalty to the insured above the interests of the insurance company, the insurance company is not required to retain independent counsel because of the inherent conflict of interest that may otherwise exist with respect to the reservation of rights defense.

In Michigan, the insurance company is not obligated to pay for the insured's own attorney in cases where a reservation of rights has been issued unless the nature of the conflict of interest is such that it is impossible for counsel to act independently.

In Michigan, the insured has no absolute right to select its own independent counsel provided that the insurance company exercises good faith in its selection of defense counsel and defense counsel is truly independent. In Minnesota, insurance companies that reserve their rights on one or more coverage issues are still permitted to appoint defense counsel unless an actual conflict of interest arises. An actual conflict of interest is one that permits the manipulation of evidence towards non-covered bases

for liability. Where an actual conflict of interest exists, the insurance company is required to pay for independent counsel of the insured's choosing.

In North Carolina, an insured can refuse a reservation of rights defense and hire its own independent counsel. The insured can recover its defense costs associated with the retention of independent counsel if a court ultimately determines that the insurance company had a duty to defend. However, North Carolina law does not require the insurance company to offer independent counsel to the insured if the insurance company also offers a defense under reservation of rights.

B. It all Starts with the Duty to Defend Obligation and Reservation of Rights

It all starts with the duty to defend the insured when the insured is sued. The duty to defend is broader than the duty to indemnify from which is must be distinguished. (*Montrose Chemical Corp. v. Admiral Ins. Co.,* 10 Cal.4th 645, 659, fn. 9 (1995) *Montrose II*); *Montrose Chemical Corp. v. Superior Court,* 6 Cal.4th 287, 299–300, 303–304 (1993) (*Montrose I*)

The duty to defend exists whenever an insurer ascertains facts which give rise to the *potential* of liability to indemnify. Unlike the obligation to indemnify, which is only determined when the insured's underlying liability is established, the duty to defend must be assessed at the very outset of a case. An insurer may have a duty to defend even when it ultimately has no obligation to indemnify, either because no damages are awarded in the underlying action against the insured, or because the actual judgment is for damages not covered under the policy. (*Montrose Chemical Corp. v. Admiral Ins. Co.,* 10 Cal.4th 645, 659, fn. 9 (1995) (*Montrose II*); *Montrose Chemical Corp. v. Superior Court,* 6 Cal.4th 287, 299–300, 303–304 (1993) (*Montrose I*).

Thus, when a suit against an insured alleges a claim that potentially could subject the insured to liability for covered damages, an insurer must defend unless and until the insurer can demonstrate, by reference to undisputed facts, that *the claim cannot be covered.* In order to establish a duty to defend, an insured need only establish the existence of a potential for coverage; while to avoid the duty, the insurer must establish the *absence* of any such potential. (*Montrose I,* 6 Cal.4th at 300, 324)

The insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot.* Facts merely tending to show that the claim is not covered, or may not be covered, but [which] are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage.

C. Duty of the Claims Handler to Determine Whether the Reservation of Rights Letter Triggers an Actual Conflict of Interest and a Right to Independent Counsel

An insurer may agree to defend a suit subject to a reservation of rights. (*Truck Ins. Exchange v. Superior Court,* 51 Cal.App.4th 985, 994 (1996).) In this manner, an "insurer meets its obligation to furnish a defense without waiving its right to assert coverage defenses against the insured at a later time." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2000) ¶ 7:723, p. 7B–61.) As stated 35 years ago, "if the insurer adequately reserves its right to assert the noncoverage defense later, it will not be bound by the judgment. If the injured party prevails, that party or the insured will assert his claim against the insurer. At this time the insurer can raise the noncoverage defense previously reserved." (*Gray v. Zurich Insurance Co.,* 65 Cal.2d 263 (1966)).

(1) Whether Reserving Rights to Seek Reimbursement of Defense Costs or Settlement Costs Creates an Actual Conflict Triggering a Right to Independent Counsel

In *Buss,* 16 Cal.4th 35, 65, the Supreme Court held an insurer may seek reimbursement from the insured for defense costs that can be allocated solely to claims not even potentially covered. Reimbursement should be available because the insurer had not bargained to bear these costs and the insured had not paid the insurer premiums for the risk. "The insurer therefore has a right of reimbursement that is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual. As stated, under the law of restitution such a right runs against the person who benefits from 'unjust enrichment' and in favor of the person who suffers loss thereby."

As established in *Dynamic Concepts,* 61 Cal.App.4th at 1007-1008, independent counsel is not required where the insurer issues a "so-called 'global reservation of rights" or reserves the right to seek reimbursement of defense costs from the insured for uncovered claims. California courts reject any right to independent counsel based on general reservation of rights.

The California Supreme Court ruled that Blue Ridge satisfied the prerequisites for seeking reimbursement for noncovered claims included in a reasonable settlement payment: (1) a timely and express reservation of rights; (2) an express notification to the insureds of the insurer's intent to accept a proposed settlement offer; and (3) an express offer to the insureds that they may assume their own defense when the insurer and insureds disagree whether to accept the proposed settlement. *Blue Ridge Ins. Co. v. Jacobsen*, 25 Cal.4th 489, 502 (2001).

Seeking reimbursement of a reasonable settlement if it is not covered will not trigger a right of independent counsel.

(2) Whether Reserving Rights to Disclaim Indemnity for Punitive Damages or No Coverage in Excess of Policy Limits Creates an Actual Conflict Triggering a Right to Independent Counsel

California Civil Code § 2860 provides:

(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;
. . .
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.

(3) Whether Defense Counsel Can Steer the Outcome of a Coverage Determination Triggering A Right of Independent Counsel

When the manner in which the action is defended can affect the outcome of any coverage determination, the insured will be entitled to independent counsel. *Gafcon, Inc. v. Ponsor & Assoc*., 98 Cal.App.4th 1388, 1423 (2002). If the conflict does not prevent counsel from providing a diligent and complete defense, then there is no need for independent counsel. As quoted in *Gulf Ins. Co. v. Berger et al* (2000) 79 Cal.App.4th 114, 132, "[a] disqualifying conflict exists if '[i]nsurance counsel had … incentive to attach liability to [the insured].' " *Blanchard v. State Farm Fire & Casualty Co*., 2 Cal.App.4th 345, 350 (1991).

Any time an attorney who represents both the carrier and its insured finds "his or her representation of the one is rendered less effective by reason of his [or her] representation of the other," a conflict of interest sufficient to require independent counsel may be present. The "paradigm case" requiring independent counsel is where the defense strategy of counsel retained by the insurance carrier can affect an underlying coverage dispute between the carrier and its insured. *James 3 Corp. v. Truck Ins. Exch*., 91 Cal.App.4th 1093 (2001)

D. Ethical Considerations for Claims Adjusters that May Trigger A Right of Independent Counsel

(1) An Insurer Who Insures Multiple Adverse Interests

If the insurer has a duty to defend two insureds who are adverse to one another, this may cause both insureds to be adverse to the insurer. Such instances are common in an auto accident case where an insurer insures both automobiles involved. Both

insureds would have a right to independent counsel if both insureds are adverse to one another and to the insurer.

(2) Choice of Independent Counsel

Jurisdictions have a very diverse way of determining whether the insurer or the insured may choose independent counsel. The majority of jurisdictions allow the insured to choose.

Other jurisdictions allow the insured to choose with insurer participation. Cal. Civ. Code § 2860 (West 1999); *New York State Urban Dev. Corp. v. VSL Corp.*, 738 F.2d 61, 65 (2d Cir. 1984) ("it is not inherently objectionable to permit an insurer to participate in the selection of independent counsel for the insured so long as the insurer discharges its obligation in good faith and the attorney chosen is truly independent and otherwise capable of defending the insured."); Employers Fire Ins. Co. v. Beals, 240 A.2d 397, 404 (R.I. 1968) (insurer approval is justified "[b]ecause the insurer has a legitimate interest in seeing that any recovery based on a finding of negligence on the part of its insured is kept within the reasonable bounds, and since the total expense of this defense is to be assumed by the insurer under its promise to defend").
See, e.g., *Burd v. Sussex Mut. Ins. Co., 267 A.2d 7, 12 (N.J. 1970)*

Courts in other jurisdictions are more solicitous of the insurer's contractual right to control the defense of an underlying lawsuit. Specifically, courts in certain states, put the decision-making power in the hands of the insurer. *See e.g., Finley v. The Home Ins. Co.,* No. 20830, 1998 WL 905218 (Hawaii Dec. 30, 1998) (even after a reservation of rights, the insurer can select defense counsel); *Patrons Mut. Ins. Co. v. Harmon*, 732 P.2d 741, 745 (Kan. 1987) (holding that where conflict arises, "the proper procedure to protect the rights of both parties under their contract... [is to] hire independent counsel to defend the insured in the civil action and notif[y] the insured that it was reserving all rights under the policy").

Some courts have adopted a per se ban on the use of staff counsel.
See *e.g., American Ins. Ass'n v. Kentucky Bar Ass'n*, 917 S.W.2d 568, 573 (Ky. 1996) (use of insurer's staff counsel would violate state ethics law prohibiting corporations from engaging in the practice of law); *Gardner v. North Carolina State Bar*, 341 S.E.2d 517 (N.C. 1986) (rejecting the use of staff counsel on the grounds that North Carolina law prohibits salaried counsel from representing the corporation and the insured). While others have merely held that staff counsel may not be used when a conflict of interest arises. *See, e.g., Illinois Mun. League Risk Management Ass'n v. Seibert,* 585 N.E.2d 1130, 1136 (Ill. App. Ct. 1992) ("conflict between the insurer's interest and those of the insurer requires outside counsel paid for by the insurer ... If the insured could be prejudiced by the insurer's representation, the insurer meets its obligation to defend by reimbursing the insured for outside counsel")

(3) Control Over Settlement

When a conflict of interest between the insured and the insurer arises due to the insurer's assumption of the defense under a reservation of rights, there is some question as to whether the insured, who unquestionably assumes control over the litigation, may also assume control over the settlement negotiations and decisions. Although there are numerous decisions regarding the insured's right to control the litigation, the case law addressing which party maintains control over settlement is scarce.

There are logical arguments to support both sides of this issue. On the one hand, it may be argued that the insured, who assumes control over the litigation when a conflict arises, should logically be invested with authority over settlement decisions as well. Several courts have adopted this line of reasoning. *See, e.g., Tank*, 715 at 1138 (Wash. 1986) ("[i]n a reservation of rights defense, it is the insured who may pay any judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding the settlement."); *see also L&S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1304 (Ala. 1987) (adopting the *161 Tank court's approach to resolving conflicts arising from an insurer's assumption of the defense of its insured subject to a reservation of rights).

On the other hand, given that the duty to defend is distinct from the duty to indemnify, there is no logical reason that the control over the settlement — which derives from the contractual obligation to indemnify — should be accorded the same treatment as the control over the defense. Several courts have adopted this analysis. *See Western*, 38 Cal. Rptr. At 82 (Ct. App. 1995) (rejecting the insured's argument that Cal. Civ. Code § 2860 precludes the insurer from assuming control over the settlement, stating "neither the statute nor the case law suggest that independent counsel's control of the insured's defense extends to preventing the insurer from exercising its contractual right to settle a claim as the insurer deems expedient"); *Orion Ins. Co. v. General Elec. Co.*, 493 N.Y.S.2d 397 (Sup. Ct. 1985) (insurer was authorized to settled lawsuit involving two of its policyholders represented by independent counsel, because it would otherwise be unable to make settlement offers).

(4) Duty to Maintain Confidential Information and Ramifications for Failure to Do So

Defense counsel also owes the insured a duty of confidentiality. In particular, defense counsel may not reveal "privileged materials relevant to coverage disputes." *See also Farmers Ins. Co. v. Vagnozzi*, 675 P.2d 703, 708 (Ariz. 1983) ("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"); Michael A. Berch and

Rebecca W. Berch, *Will the Real Counsel for the Insured Please Rise*?, 19 Ariz. St. L.J. 27, 32 n.23 (1987) ("a heavy burden of silence falls on the attorney the insurer selects to defend the insured"); ABA Code of Professional Responsibility DR 4-101(B)(stating in pertinent part that "a lawyer shall not knowingly (1) [r] eveal a confidence or secret of his client; [or] ... (3) use a confidence or secret of his client for the advantage ... of a third person, unless the client consents after full disclosure"). Further, disclosure of client billing information to legal audit agencies might waive the attorney-client privilege.

Statutes and case law clarify that privileged communications and information pertaining to issues relating specifically to whether the insured's conduct is covered under the insurance contracts are not subject to disclosure. It is equally clear that non-privileged information pertinent solely to insured's liability for (as opposed to coverage issues relating to) the underlying case should be provided by the defense counsel to the insurer. *See e.g.,* Cal. Civ. Code § 2860(d) (Michie 1999) ("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."); *CHI, Inc. v. Employers Reinsurance Corp.,* 844 P.2d 1113, 1127 n.12 (Alaska 1993)

Difficulty arises in determining how to treat information and materials generated in the underlying actions which relate to the insurer's liability, but which may also affect the insurer's coverage determination. Insurers seeking discovery of these materials generally argue either that (1) the insured and the insurer share a "common interest" obviating any expectation of confidentiality required for a privilege to attach; or (2) the insured's contractual duty to cooperate removes any expectation of confidentiality with respect to materials generated in the underlying case. Insureds and defense counsel seeking protection of these materials argue on the other hand that the intended independence of the defense counsel in a conflict situation defeats any claim of common interest. Also, the cooperation clause in insurance contracts simply does not overcome the privilege. Cases addressing these arguments have come to no uniform conclusion.

Some courts find that the "common interest" doctrine overcomes the attorney-client privilege for such materials. *See, e.g., Thomas Solvent v. Auto Owners*, No. 90-2779-CK (Mich. Cir. Ct., Calhoun County, Feb. 22, 1995) (rejecting the insured's attempts to block discovery of underlying materials on attorney-client privilege grounds because the parties have "a clear common interest on the underlying action" and "no expectation of secrecy by either party from inquiries from the other"); *Kentucky Fried Chicken Corp. v. The Travelers Indem. Co.*, No. C92-0106-L(J) (W.D. Ky. June 21, 1994) (because the insured and the insurer had "an identical interest" in defeating the underlying claims, "[e]ven after the insurer denied coverage, the insured cannot rely on

the attorney-client privilege to withhold any communications with its counsel that were made in connection with the underlying action."); *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 579 N.E.2d 322, 328 (Ill. 1991) ("the cooperation clause imposes a broad duty of cooperation and is without limitation or qualification .... both insurers and insureds had a common interest either in defeating or settling the claim against [the] insureds in the *165 [underlying action] ... the communications by insureds with defense counsel is of a kind reasonably calculated to protect or further those common interests.").

Other courts held that when an insurer furnishes a defense under a reservation of rights to deny coverage, the interests of the insurer and the insured are no longer "common" which is precisely why the appointment of independent counsel becomes necessary. These courts find that the insured's contractual duty to cooperate does not justify requiring the disclosure of privileged information. *See, e.g., Rockwell Int'l Corp. v. Superior Court of L.A.,* 32 Cal. Rptr. 2d 153, 158 (Ct. App. 1994) ("[w]here, as here, a conflict exists because an insurer has reserved its rights, the insured is entitled to independent counsel and to a relationship with that counsel free from the fear of disclosure of privilege communications.").

Some courts have agreed that the attorney-client privilege protects even arguably noncoverage related information and materials generated in the underlying action, rejecting insurers' reliance on common interest and cooperation clause arguments. *See, e.g., In re Environmental Insurance Declaratory Judgment Actions*, 612 A.2d 1338, 1342 (N.J. Super. Ct. App. Div. 1992) (rejecting insurer's common interest argument, explaining that this exception to the attorney-client privilege applies only when both parties "have employed a lawyer to act for them in common"); *Bituminous Cas. Corp. v. Tonka Corp.,* 140 F.R.D. 381, 386 (D. Minn. 1992) ("to hold that an insurance policy creates a contractual waiver of the attorney-client privilege, even when the insurance company later sues the insured... would completely eviscerate the attorney-client privilege .... there is nothing about an insurance contract or the relationship between an insurance company and its insured which compels a court to ignore the express statutory language of Minnesota's attorney-client privilege").

Just as the tripartite relationship imposes a duty on the insured and defense counsel to disclose non-privileged information to the insurer, so too, does it impose obligations on the insurer to communicate with the insured, most specifically when the insurer defending under a reservation of rights learns of facts supporting the denial of coverage. Under these circumstances, courts have concluded that the insurer s failure to inform the insured promptly of the defense and its intention to deny coverage may be estopped from asserting or be deemed to have waived the defense. *See, e.g., Shelby Steel Fabricators v. United States Fidelity & Guar. Ins. Co.*, 569 So. 2d 309, 312 (Ala. 1990) ("Because [insured] was not kept informed as to the status of its case between the initial notice of the reservation of rights ... and [the insurer's] denial of

coverage 29 months later, we conclude that [the insurer] has failed to meet its enhanced obligation to [the insured] and therefore, that it must indemnify the [the insured] for any liability in the underlying action"); *Continental* at 292 (Alaska 1980) (when the insurer failed to inform the policyholder of an alleged breach of the cooperation clause until well after trial began, the insurer waived this policy defense as a matter of law); *State Farm Fire & Cas. Co. v. First Nat'l Bank Trust*, 277 N.E. 2d, 536, 540 (Ill. App. 1972) ("[t]he failure of an insurer to inform the insured promptly of its intention to deny liability, upon discovering facts [amounting to] a breach of the co-operation clause by the insured, constitutes a waiver of the breach.")

E. Consequences for Failing to Appoint Independent Counsel

Unreasonable denial of benefits [such as denial of *Cumis* counsel when a conflict arises] constitutes bad faith. *Id*. An insurer acting in bad faith may also be subject to estoppel.

Estoppel may arise from a variety of circumstances in which the insurer's conduct threatens to unfairly impose a forfeiture of benefits upon the insured. Indeed, California courts have long held that "equitable relief" may be broadly available in a proper case to relieve an insured of a forfeiture under a contractual condition of coverage. *Root v. American Equity Specialty Ins. Co.,* 130 Cal.App.4th 926, 929 (2005).

If the insurer denies benefits unreasonably it may be exposed to the full array of tort remedies, including possible punitive damages. *Morris v. Paul Revere Life Ins. Co.,* 109 Cal.App.4th 966, 977 (2003). An insurer is said to act in "bad faith" when it not only breaches its policy contract but also breaches its implied covenant to deal fairly and in good faith with its insured. A covenant of good faith and fair dealing is implied in every insurance contract. *Jordan v. Allstate Ins. Co.*, 148 Cal.App.4th 1062, 1071–1072 (2007).

F. Alternatives to Appointing independent Counsel

There are practical solutions to avoiding the need to appointing independent counsel. Allowing the insured to have their own personal counsel defend and appointing monitoring counsel is one alternative. In addition, withdrawing the reservation of rights letter and the coverage defenses.