Tressler LLP

A 50 STATE SURVEY

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Duty to Provide Independent Counsel

Linda Bondi Morrison
Partner
lmorrison@tresslerllp.com

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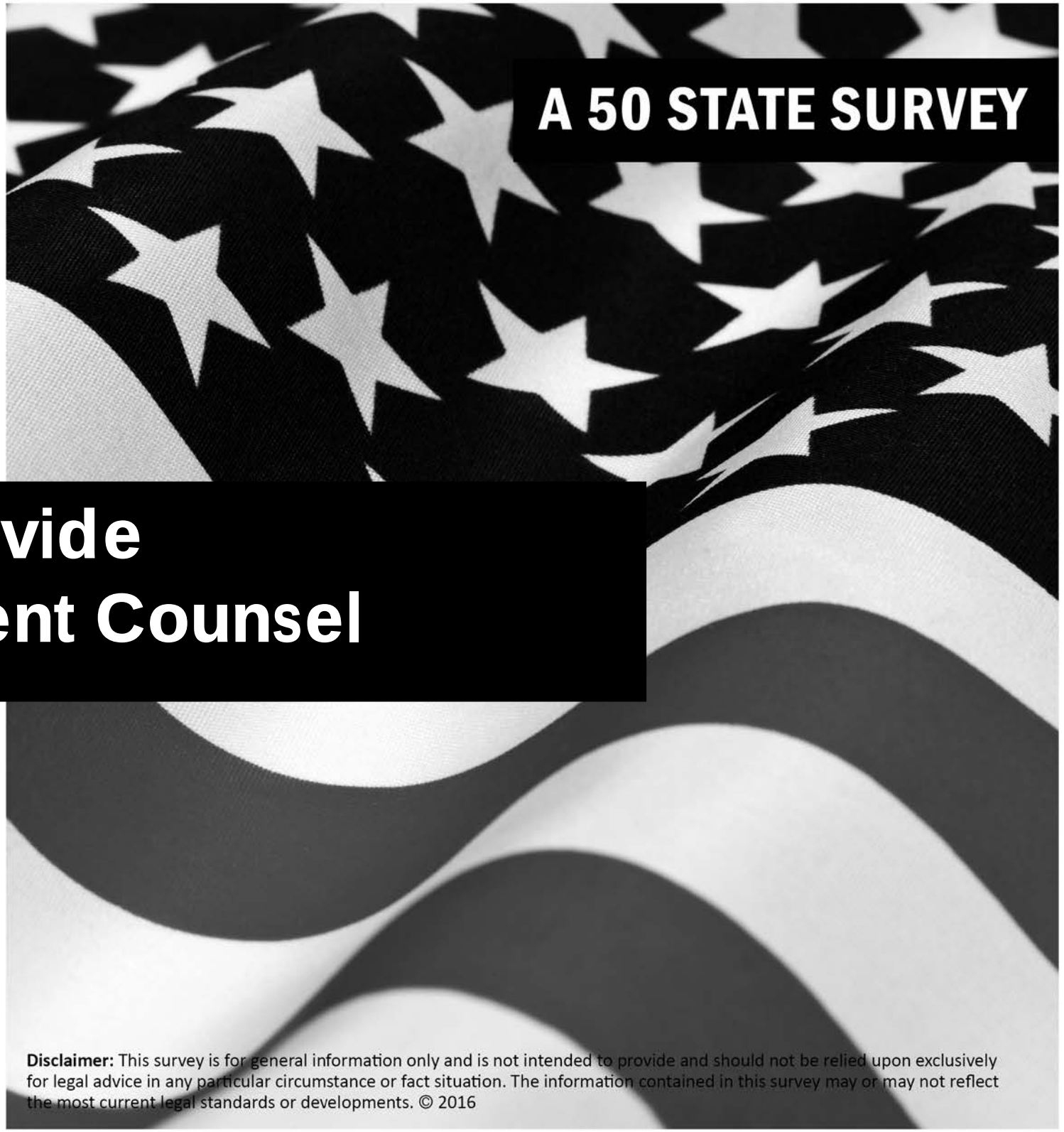
Todd M. Rowe
Partner
trowe@tresslerllp.com



State	Statutes	Case Law
Alabama	NONE	The mere fact that an insurer defends the insured under a reservation of rights does not raise such a conflict of interest that the insured is entitled at the outset to engage defense counsel of its choice at the expense of the insurer. *Lifestar Response of Ala., Inc. v. Admiral Ins. Co.*, 17 So. 3d 200, 217 (Ala. 2009) (following *L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298 (Ala. 1987). *L & S Roofing* adopted the "enhanced obligation of good faith" criteria as outlined in *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986). "First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the insured is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, but of all developments relevant to his policy coverage and the progress of this lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company. Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." When the referenced criteria have not been met in whole or in part, the insurer will not have met its enhanced obligation of good faith and the insured will be "entitled to retain defense counsel of its choice at the expense of the insurer." *L & S*

State	Statutes	Case Law
		Roofing, 521 So.2d at 1304.
Alaska	Alaska Stat. § 21.96.100 (renumbered from§ 21.89.100 2010; enacted 1995; amended 1997) Appointment of independent counsel; conflicts of interest; settlement (a) If an insurer has a duty to defend an insured under a policy of insurance and a conflict of interest arises that imposes a duty on the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to the insured unless the insured in writing waives the right to independent counsel. An insurance policy may contain a provision that provides a method of selecting independent counsel if the provision complies with this section. (b) For purposes of this section, the following do not constitute a conflict of interest: (1) a claim of punitive damages; (2) a claim of damages in excess of the policy limits; (3) claims or facts in a civil action for which the insurer denies coverage. (c) Notwithstanding (b) of this section, if the insurer reserves the insurer's rights on an issue for which coverage is denied, the insurer shall provide independent counsel to the insured as provided under (a) of this section. (d) If the insured selects independent counsel at the insurer's expense, the insurer may require that the independent counsel have at least four years of experience in civil litigation, including defense experience in the general subject area at issue in the civil action, and malpractice insurance. Unless otherwise provided in the insurance policy, the	In *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, the Alaska Supreme Court held that when a conflict of interest exists between the insurer and the insured, the insured has a right to independent counsel of the insured's choice. 844 P.2d 1113, 1125 (Alaska 1993). In *CHI*, the insurer defended its insured under a reservation of rights. The court found that the potential conflicts were numerous, including the possibility that the insurer might offer a token defense knowing that it could later assert non-coverage, that the insurer might steer the result to judgment under an uninsured theory of recovery, or that the insurer might gain access to confidential or privileged information which it could later use to its advantage. *Id.* at 1116. A two-counsel scheme, under which insured's personal attorney would handle only non-covered claims, does not satisfy insured's right to independent counsel. *Id.* at 1119. All conflicts of interest would not be resolved because under this scheme, counsel appointed by the insurer would likely have access to information possessed by the insured that may later be used against the insured in the coverage litigation.

State	Statutes	Case Law
	obligation of the insurer to pay the fee charged by the independent counsel is limited to the rate that is actually paid by the insurer to an attorney in the ordinary course of business in the defense of a similar civil action in the community in which the claim arose or is being defended. In providing independent counsel, the insurer is not responsible for the fees and costs of defending an allegation for which coverage is properly denied and shall be responsible only for the fees and costs to defend those allegations for which the insurer either reserves its position as to coverage or accepts coverage. The independent counsel shall keep detailed records allocating fees and costs accordingly. A dispute between the insurer and insured regarding attorney fees that is not resolved by the insurance policy or this section shall be resolved by arbitration under AS 09.43. (e) If the insured selects independent counsel at the insurer's expense, the independent counsel and the insured shall consult with the insurer on all matters relating to the civil action and shall disclose to the insurer in a timely manner all information relevant to the civil action, except information that is privileged and relevant to disputed coverage. A claim of privilege is subject to review in the appropriate court. Information disclosed by the independent counsel or the insured does not waive another party's right to assert privilege. (f) An insured may waive the right to select independent counsel by signing a statement that reads substantially as follows: "I have been advised of my right to select independent counsel to represent me in this lawsuit and of	

State	Statutes	Case Law
	my right under state law to have all reasonable expenses of an independent counsel paid by my insurer. I have also been advised that the Alaska Supreme Court has ruled that when an insurer defends an insured under a reservation of rights provision in an insurance policy, there are various conflicts of interest that arise between an insurer and an insured. I have considered this matter fully and at this time I am waiving my right to select independent counsel. I have authorized my insurer to select a defense counsel to represent me in this lawsuit." (g) If an insured selects independent counsel under this section, both the counsel representing the insurer and independent counsel representing the insured shall be allowed to participate in all aspects of the civil action. Counsel for the insurer and insured shall cooperate fully in exchanging information that is consistent with ethical and legal obligations to the insured. Nothing in this section relieves the insured of the duty to cooperate fully with the insurer as required by the terms of the insurance policy. (h) When an insured is represented by independent counsel, the insurer may settle directly with the plaintiff if the settlement includes all claims based upon the allegations for which the insurer previously reserved its position as to coverage or accepted coverage, regardless of whether the settlement extinguishes all claims against the insured.	
Arizona	NONE	When a liability insurer assigns an attorney to represent an insured, the lawyer owes a duty to the insurer arising from the understanding that the lawyer's services are ordinarily

State	Statutes	Case Law
		intended to benefit both insurer and insured when their interests coincide. *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001). However, actual conflict between insurer and insured are quite common. "Conflicts may arise over the existence of coverage, the manner in which the case is to be defended, the information to be shared, the desirability of settling at a particular figure or the need to settle at all, and an array of other factors applicable to the circumstances of a particular case. . . . [W]hen a conflict actually arises, and not simply when it potentially exists, the lawyer's duty is exclusively owed to the insured and not the insurer. Because a lawyer is expressly assigned to represent the insured, the lawyer's primary obligation is to the insured, and the lawyer must exercise independent professional judgment on behalf of the insured." *Id.* at 597. An insurer can select defense counsel in a conflict of interest, but the insured and its attorney control the litigation. *Safeway Ins. Co., Inc. v. Guerrero*, 106 P.3d 1020 (Ariz. 2005).
Arkansas	NONE	Insured was entitled to select its own legal counsel to represent it and then receive reimbursement by insurer because of conflict of interest. Coverage turned on when the damage to the vehicle occurred. If the damage occurred while the vehicle was in the insured's care, custody and control, the policy exclusion applied. Accordingly, it was to the insurer's benefit to defend the case on a bailment theory and to the insured's benefit to defend on a negligence theory. The conflict of interest entitled the insured to select its own

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		counsel. *Northland Ins. Co. v. Heck's Service Co.*, Inc., 620 F. Supp. 107 (E.D. Ark. 1985). In *Union Ins. Co. v. The Knife Co., Inc.*, 902 F. Supp. 877, 881 (W.D. Ark. 1995), the court observed 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." In following the reasoning in *Howard v. Russell Stover Candies, Inc.,* 649 F.2d 620 (8th Cir. 1981), the court found that the insured was entitled to select its own counsel because "the conflict situation cannot be eliminated so long as the insurance company selects the counsel. It is simply a matter of human nature." *Id.*
California	Cal. Civ. Code § 2860 (enacted 1987; amended 1988). Conflict of interest; duty to provide independent counsel; waiver; qualifications of independent counsel; fees; disclosure of information (a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.	**Independent Counsel** Insureds have a right to independent counsel paid for by the insurer whenever "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." *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 208 Cal. Rptr. 494, 506 (Cal. Ct. App. 1984). "Not every reservation of rights creates a conflict of interest" creating an obligation to appoint independent counsel. *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 93 Cal. Rptr. 2d 534, 545-546 (2000). Instead, "[t]he potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled . . . or whether an actual conflict of interest

State	Statutes	Case Law
	(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; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist. 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. (c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees. Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.	precludes insurer-appointed defense counsel from presenting a quality defense for the insured." *Dynamic Concepts, Inc. v. Truck Ins. Exchange*, 71 Cal. Rptr. 2d 882, 888 (Cal. Ct. App. 1998); *see also Endurance Am. Specialty Co. v. Lance-Kashian & Co.*, 2011 U.S. Dist. LEXIS 129330 (E.D. Cal. 2011); *Sierra Pac. Indus. v. American States Ins. Co.*, 2011 U.S. Dist. LEXIS 77756, at *12 (E.D. Cal. 2011); *Centex Homes v. St. Paul Fire and Marine Insurance Company*, 237 Cal.App.4th 23, 30 (Cal. Ct. App. 2015). **Arbitration under § 2860** Fee disputes are subject to mandatory and exclusive arbitration even in the face of non fee-related issues such as bad faith allegations or other breach of contract claims. *Compulink Management Center, Inc. v. St. Paul Fire & Marine Ins. Co*., 169 Cal.App.4th 289, 296-97 (2008). Where a total breach of the duty to defend is alleged, § 2860's mandate for judicial arbitration's exclusive jurisdiction over the fee dispute may not apply. *Intergulf Development LLC v. Superior Court*, 183 Cal.App.4th 16 (2010). *See also, Janopaul + Block Cos., LLC v. Superior Court*, 200 Cal. App. 4th 1239, 1251 (2011) ("However, when, as here and as in *Intergulf*, an insured raises in a bad faith action the duty to defend, breach and bad faith by an insurer, those issues must be resolved first in the trial court before any section 2860, subdivision (c) arbitration because a determination of one or more of those issues in favor of the insured *may* eliminate altogether the need for arbitration under section 2860.").

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	(d) 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. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party. (e) The insured may waive its right to select independent counsel by signing the following statement: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit." (f) Where the insured selects independent counsel pursuant to the provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.	An insurer's obligation to pay independent counsel fees is for only those fees which are reasonably necessary and reasonable in amount, as determined by an arbitrator in the event of a dispute under § 2860(c). *Behnke v. State Farm General Ins. Co.*, 196 Cal. App. 4th 1443 (2011). When an insurer breaches its defense obligations to an insured, but has a court order expressly stating insurer has the right to recover "unreasonable and unnecessary" expenses billed by independent counsel, insurer has a right to recover directly from independent counsel. *Hartford Cas. Ins. Co. v. J.R. Marketing, L.L.C.*, 353 P.3d 319, 324-25 (Cal. 2015).
Colorado	NONE	In *Hartford Ins. Group v. District Court*, 625 P.2d 1013, 1018 (Colo. 1981), the Colorado Supreme Court chose not to

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		address under what circumstances insurers had to furnish separate counsel for the insured, or to pay the fees of counsel chosen by them. In fact, no Colorado court has addressed whether an insurer must provide independent counsel for its insured under a reservation of rights. *See, e.g.*, *Hecla Min. Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1098 n.7 (Colo. 1991).
Connecticut	NONE	The trial court abused its discretion when it viewed the defense attorney as a representative of the insurer, rather than as a representative of the insured, thus ignoring the settled principle that an attorney's allegiance is to his client and not the person paying for his services. *Higgins v. Karp*, 687 A.2d 539, 543 (Conn. 1997).
Delaware	NONE	If conflicts develop between the insurer and insured, the insurer runs the risk that it may lose its right to designate counsel and control the defense of the third party claim. *Shephard v. Reinoehl*, No. C.A. 99C-06-030-JTV, 2000 WL 973079, at *2 (Del. Super. March 29, 2000) (unpublished opinion).
District of Columbia	NONE	A policy should make clear whether the insurer or the insured can designate the "separate counsel" when insurer decides to defend under a reservation of right. *O'Connell v. Home Ins. Co.*, CIV. A. No. 88-3523, 1990 WL 137386, at *4 (D.D.C. Sept. 10, 1990) (unpublished opinion). Where a policy does not state and the insurer does not make clear that it will not compensate the insured for attorney fees incurred to retain separate counsel, the ambiguity in an insurance contract must

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		be construed in favor of the insured. *Id.*
Florida	Fla. Stat. § 627.426(2) (enacted 1982). Claims administration. (2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless: (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand delivery; and (b) Within 60 days of compliance with paragraph (a) or receipt of a summons and complaint naming the insured as a defendant, whichever is later, but in no case later than 30 days before trial, the insurer: 1. Gives written notice to the named insured by registered or certified mail of its refusal to defend the insured; 2. Obtains from the insured a nonwaiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation; or 3. Retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, shall be set by the court.	When an insurer offers to defend under a reservation of rights, Florida law provides that the insured may, at its election, reject the defense and retain its own attorneys without jeopardizing its right to seek indemnification from the insurer for liability. *Travelers Indem. Co. v. Royal Oak Enters., Inc.*, 344 F. Supp. 2d 1358, 1370 (M.D. Fla. 2004). "[T]he penalty for a violation of the Claims Administration Statute is not an award of attorney's fees and costs, . . . but the preclusion of 'coverage defenses.'" *Id.* at 1371 (citation omitted). "Whether a conflict of interest between the insurer and its insured entitles the insured to select counsel of its choice to supplement or monitor the defense at the expense of the insurer is apparently an issue of first impression for Florida courts." *Id.* at 1371-72. Aside from the requirement of independent counsel under the Claims Administration Statute, no other situation requires independent counsel in Florida. *Id.* at 1373. An insured must actually reject the liability insurer's offer of defense under a reservation of rights, before retaining its own attorney to avoid jeopardizing the right to seek indemnification from insurer. *Aguero v. First American Ins. Co.*, 927 So.2d 894, 898 (Fla. Ct. App. 2005). "If the defense if not adequate and it is reasonable for an insured to retain its own counsel, then an insured my recoup attorney's fees from an insurer because it has, in effect, forced

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		the insured to retain its own counsel." *Maronda Homes, Inc. of Florida v. Progressive Exp. Ins. Co.*, 118 F.Supp. 1332, 1335 (M.D. Fla. 2015)(appeal filed).
Georgia	NONE	Independent counsel may not be required because attorneys, whether or not paid by insurance companies, owe their allegiance to the insured they are employed to defend. *Mead Corp. v. Liberty Mut. Ins. Co.*, 129 S.E.2d 162, 171 (Ga. Ct. App. 1962), *rev'd on other grounds*, 131 S.E.2d 534 (Ga. 1963). However, an insurer may not issue a unilateral reservation of rights and proceed with a complete defense of the main claim absent the insured's express or implied consent. "Upon learning of facts reasonably putting [an insurer] on notice that there may be grounds for noncoverage and where the insured refuses to consent to a defense under a reservation of rights, the insurer must thereupon (a) give the insured proper unilateral notice of its reservation of rights, (b) take necessary steps to prevent the main case from going into default or to prevent the insured from being otherwise prejudiced, and (c) seek immediate declaratory relief including a stay of the main case pending final resolution of the declaratory judgment action." *Richmond v. Georgia Farm Bureau Mut. Ins. Co.*, 231 S.E.2d 245, 248 (Ga. Ct. App. 1976).
Hawaii	NONE	An insured does not have right to select counsel to represent its interest solely due to an insurer's reservation of rights; any conflict of interest arising from reservation of rights is not grounds to interfere with the insurer's contractual right to select counsel. The interests of the insured will be protected by the retained attorney's adherence to the Hawaii Rules of

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		Professional Conduct (HRCP). The insured has recourse to remedies against both the retained counsel and the insurer in the event the attorney violates the HRCP. *Finley v. Home Ins. Co.*, 975 P.2d 1145, 1151-52 (Haw. 1998). *Finley* adopts the Washington Supreme Court's "enhanced" standard of good faith when an insurer defends under a reservation of rights. *Id.* at 1156. An insured that "chooses to conduct its own defense is responsible for all attorneys' fees related thereto. [H]aving refused the contractual terms of the policy, the insured foregoes its right to compensation for defense fees." *Id*. at 1155; *see also Anastasi v. Fidelity Nat. Title Ins. Co.*, -P.3d-. 2016 WL 462380 (Haw. February 4, 2016) (insurer has an enhanced standard of good faith when defending a claim under a reservations of rights).
Idaho	NONE	NONE
Illinois	NONE	**Independent Counsel** An insurer must decline to defend an insured with counsel of its choosing where there is conflict of interest between it and an insured and, instead of participating in the defense itself, must pay costs of independent counsel for insured. *Murphy v. Urso*, 88 Ill. 2d 444 (1981); s*ee also, Santa's Best Craft, L.L.C. v. Zurich Am. Ins. Co.*, 408 Ill. App. 3d 173, 181 (N.D. Ill. 2010). Where a conflict of interest exists between the insurer and the insured, absent (i) acceptance of defense by the insured or (ii) the insurer waives its defenses of noncoverage and defends without asserting a reservation of rights or nonwaiver agreement, the insured has a right to be defended by counsel

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		of her own choice and she must be reimbursed by the insurer. *Maryland Cas. Co. v. Peppers,* 64 Ill.2d 187 (1976). The insured has sole discretion in the selection of conflict counsel, without any consideration for the insurer's preferences. *Id.* "In determining whether a conflict of interest exists, Illinois courts have considered whether, in comparing the allegations of the complaint to the policy terms, the interest of the insurer would be furthered by providing a less than vigorous defense to those allegations. 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. However, a 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." *Nandorf, Inc. v. CNA Ins. Companies*, 479 N.E.2d 988, 992 (Ill. App. Ct. 1985); *see also, National Cas. Co. v. Forge Indus. Staffing, Inc.*, 567 F.3d 871, 875 (7th Cir. 2011) (stating that conflict counsel must be appointed when the underlying complaint contains two mutually exclusive theories of liability, one which the policy covers and one which the policy excludes). There is a conflict of interest where proof of certain facts would move liability from insurer to insured. *Pekin Ins. Co. v. Home Ins. Co.*, 479 N.E.2d 1078, 1081-82 (Ill. App. Ct. 1985). When a conflict of interest develops between insurer and insured, insurer must decline to defend and, instead of participating in defense itself, must pay costs of independent

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		counsel for insured. *Illinois Tool Works Inc. v. Home Indem. Co.*, 998 F. Supp. 868, 873 (N.D. Ill. 1998). A liability insurer's interest in negating policy coverage, without more, is not serious enough conflict to require it to give up its right to defend insured. *Id.* at 874. While "insurer's duty to defend necessarily includes the right to control the litigation," where there is conflict of interest, the insured is entitled to retain independent counsel hired by the insurer. *Mobil Oil Corp. v. Maryland Cas. Co.*, 288 Ill. App. 3d 743 (1st Dist. 1997). Where there is a conflict of interest between a liability insurer and the insured, the insurer must decline to defend the insured, and, instead of participating in the defense, must pay for independent counsel for the insured. If, however, the insurer goes ahead and defends its insured without disclosing the conflict of interest in its reservation of rights, the insurer will be estopped from raising coverage defenses. *Stoneridge Development Co., Inc. v. Essex Ins. Co.*, 382 Ill. App. 3d 731 (2008). A reservation of rights must adequately inform the insured of the rights the insurer intends to reserve, because it is only when the insured is adequately informed of the potential policy defense that the insured can intelligently determine whether to retain his or her own counsel or accept the tender of defense counsel from the insurer. *American Family Mut. Ins. Co. v. Westfield Ins. Co.*, 962 N.E.2d 993 (Ill. App. 2011). Bare notice of a reservation of rights is insufficient; the notice must specifically reference the policy defense that ultimately may be asserted by the insured and the potential conflict of

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		interest. *Id*. "The mere possibility that punitive damages might be sought in future litigation does not create an actual conflict of interests. However, great disparity between the punitive and compensatory damages possible in the underlying litigation can create an actual conflict warranting the appointment of conflict counsel." *National Cas. Co. v. Forge Indus. Staffing, Inc.*, 567 F.3d at 875. **Reasonable Fees** An insurer's attorney may have closer ties to insurer than to insured and more compelling interest in protecting insurer's position, by reason of which there arises conflict of interests; in such cases, insured, rather than insurer, is entitled to assume control of defense of underlying action, but insurer must underwrite reasonable costs incurred by insured in defending action with counsel of his own choosing. *Illinois Masonic Medical Center v. Turegom Ins. Co.,* 168 Ill. App. 3d 158 (1988); *see also R.C. Wegman Construction Co. v. Admiral Ins. Co.*, 629 F.3d 724, 729 (7th Cir. 2011). The insured has the initial burden of establishing the reasonableness of the fee for which reimbursement is sought, as the insurer's obligation to reimburse incurred defense costs is limited and defined by the reasonable fee. *Int'l Ins. Co. v. City of Chicago Heights*, 643 N.E.2d 1305 (Ill. App. 1994).

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		An attorney's regular rate is strongly presumed to be the market rate for his or her services. *Arquest Inc. v. Tracy*, 2003 WL 22012688 (N.D. Ill. 2003).
Indiana	NONE	**Independent Counsel** When an insurer questions whether an injured party's claim falls within the scope of policy coverage or raises a defense that its insured has breached a policy condition, the insurer essentially has two options: (1) file a declaratory judgment action for a judicial determination of its obligations under the policy; or (2) hire independent counsel and defend its insured under a reservation of rights. *Gallant Ins. Co. v. Wilkerson*, 720 N.E.2d 1223, 1227 (Ind. Ct. App. 1999). "[C]ounsel should not be called upon suddenly to 'change hats' and speak in and for the insurer's interests when his role has previously been and should remain that of a zealous advocate for his client, the insured." *Gallant Ins. Co. v. Oswalt*, 762 N.E.2d 1254, 1262 (Ind. Ct. App. 2002). When a conflict of interest arises, the insurer is not relieved of this responsibility. The insurer must either provide an independent attorney to represent the insured or pay for the cost of defense incurred by the insured hiring an attorney of his or her choice. The insured must be informed of the nature of the conflict and given the right either to accept an independent attorney selected by the insurer or to select an attorney for himself or herself. *Sitek v. J. Cerna Trucking, Inc.*, 2009 WL 624345 (N.D. Ind. 2009).

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		Reasonable Fees: Insureds are entitled to select their own counsel to defend the underlying claim, subject to reasonable approval by the insurer, with *reasonable fees* and expenses paid by the insurer. *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 Supp. 2d 797, 807 (S.D. Ind. 2005).
Iowa	NONE	If there is an "inherent conflict of interest" between an insurer and an insured, the insurer can allow the insured to retain its own counsel and then reimburse it for the cost of the entire defense. *First Newton Nat'l. Bank v. General Cas. Co.*, 426 N.W.2d 618, 630 (Iowa 1988) (c*iting Howard v. Russell Stover Candies, Inc.* 649 F.2d 620, 625 (8th Cir. 1981) (the insurer must either provide an independent attorney to represent the insured OR pay the costs incurred by the insured in hiring counsel of its own choice).
Kansas	NONE	When there is a conflict of interest between the insured and the insurer in a civil action, the insurer should hire independent counsel to defend the insured and notify the insured that it was reserving all rights under the policy. This procedure protects both the insured's and the insurer's interests and rights and eliminates the necessity of multiple suits to determine the same issues. *Bell v. Tilton*, 674 P.2d 468 (Kan. 1983).
Kentucky	NONE	"[W]hen the insurer reserves a right to assert its nonliability for payment there is little or no reason to require the insured

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		to surrender defense of the claim to a company which asserts that it has no obligation to satisfy the claim. Under such conditions the insured has the right to refuse the proffered defense and conduct his own defense." *Medical Protective Co. v. Davis*, 581 S.W. 2d 25, 25 (Ky. Ct. App. 1979).
Louisiana	NONE	When an insurer agrees to defend but denies an indemnity obligation based on policy exclusions, there is a conflict of interest between the insured and the insurer. Further, a denial of coverage by the insurer is an event which entitles the insured to select independent counsel to represent it at the insurer's expense. The insurer must underwrite the reasonable costs incurred by an insured in defending an action with counsel of its own choosing. *Belanger v. Gabriel Chems., Inc.*, 787 So. 2d 559, 566 (La. Ct. App. 2001); *see also Cunard Line Ltd. Co. v. Datrex, Inc.*, 26 So. 3d 886 (La. Ct. App. 2009)(insurer was liable for costs of independent counsel obtained by insured and the court refused to place a cap on the hourly rates charged by independent counsel). Where an insurer fails to timely appoint separate counsel, it waives its right to raise coverage defenses in the matter. *Emery v. Progressive Cas.*, 40 So. 3d 17, 21 (La. Ct. App. 2010). Insurer is not required to appoint independent counsel when settling case within policy limits even if insured objects to settlement amount. *Lynch-Ballard v. LAMMICO Ins. Agency, Inc.*, 176, So.3d 651, 658 (La. App. Ct. 2015)
Maine	NONE	"[T]he insurers' obligation to defend can lead to a serious dilemma for the insurer. [Citation omitted.] In some cases, the

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		parties may agree that the insurer hire independent counsel for the insured. The difficulties which these cases may pose will have to be addressed as they arise." *Travelers Indem. Co. v. Dingwell*, 414 A.2d 220, 227 (Me. 1980). It is the "well-established policy that an insurer who reserves the right to deny coverage cannot control the defense of a lawsuit brought against its insured by an injured party." *Id.*
Maryland	NONE	"When a conflict of interest arises, the insured must be informed of the nature of the conflict and given the right either to accept an independent attorney selected by the insurer or to select an attorney himself to conduct his defense. If the insured elects to choose his own attorney, the insurer must assume the reasonable costs of the defense provided." *Brohawn v. Transamerica Ins. Co.*, 347 A.2d 842, 854 (Md. 1975). An insurer must assume the reasonable costs of the defense provided by an independent attorney where independent counsel is necessary because there exists a conflict of interest between the insurer and the insured. *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 657 (Md. 1994). "[W]here there is the possibility of a judgment in excess of policy limits, it is appropriate for the appointed counsel to make the insured aware that there exists a potential for a conflict of interest and to advise the insured to consult independent counsel regarding any excess liability. But the existence of a potential conflict does not require the insurer to pay for independent counsel to take over the defense of the insured. In the absence of a conflict of interest on other

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		grounds that would necessitate the retention of independent counsel for the insured, the defense of the claim in such a situation remains in the control of the insurer." *Id.* at 659-60.
Massachusetts	NONE	**Independent Counsel** "Where the insured's interest in controlling tort litigation against him conflicts with the similar interest of the insurer, the insured may have good cause to ask that he be represented by counsel independent of the insurer." *Magoun v. Liberty Mut. Ins. Co.*, 195 N.E.2d 514, 519 (Mass. 1964). "Although an insured is under a duty to cooperate, the insured may refuse to allow the insurer to defend the case, with full control, under a reservation of rights." *Three Sons, Inc. v. Phoenix Ins. Co.*, 257 N.E.2d 774, 776-777 (Mass. 1970). "When a liability insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs." *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 788 N.E.2d 522, 539 (Mass. 2003). Insured is not entitled to independent counsel at its insurer's expense to assert a counter claim if there is no conflict of interest and insured is not defending under a reservations of rights. *Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 91 F. Supp.3d 66, 73 (D. Mass. 2015) (appeal filed). **Reasonable Fees:** Where there is a divergence of interests, an insurer may be

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		responsible for the reasonable costs of the defense provided by an independent attorney. *Magoun v. Liberty Mut. Ins. Co.*, 195 N.E.2d 514, 519 (Mass. 1964). The reasonableness of the attorney's fees is to be viewed in the context of the market price. *Citation Ins. Co. v. Newman*, 80 Mass. App. Ct. 143, 154 (2011) (footnote 4: "[i]n a recent decision of this court, it has been clarified that reasonable charges are to be assessed with reference to market rates; an insurer may not insist upon paying only the discounted rate it has been able to negotiate with its panel of attorneys."); *see also, Northern Sec. Ins. Co. v. R.H. Realty Trust*, 941 N.E.2d 688, 692 (Mass. Ct. App. 2011) (stating that an insurer "could have included in the [policy] explicit provisions concerning the cost of defense in various situations . . . , that uncertainty should be resolved against the insurer").
Michigan	NONE	"An insurance company may tender a defense under a reservation of rights and retain independent counsel to represent its insured. [Citation omitted.] No attorney-client relationship exists between an insurance company and the attorney representing the insurance company's insured. The attorney's sole loyalty and duty is owed to the client, not the insurer." *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.*, 496 N.W.2d 373, 378 (Mich. Ct. App.1992). "When the insurer creates a conflict of interest with its insured, the insured obtains the right to control the defense, and the duty to provide defense services becomes a duty to reimburse independent counsel for the reasonable and necessary costs incurred in defending the insured." *Aetna Cas.*

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		& Sur. Co. v. Dow Chemical Co., 44 F. Supp. 2d 847, 860 (E.D. Mich. 1997). Although the Supreme Court has not directly addressed this issue, it quoted with approval the suggestion that in a conflict situation "the insured must be informed of the nature of the conflict and given the right either to accept an independent attorney selected by the insurer or to select an attorney himself to conduct his defense; if the insured elects to choose his own attorney, the insurer must assume the reasonable costs of the defense provided." *Allstate Ins. Co. v. Freeman*, 443 N.W.2d 734, 756 n.3 (Mich. 1989). If the insured, upon notice of the reservation of rights, is not content to proceed with the defense provided and controlled by the insurer, insured was not entitled to insist on counsel of its choice, at insurer's expense, once insurer assumed its contractual duty to defend but reserved its right to contest its liability under comprehensive general liability policy; insurer was entitled to make good-faith selection of independent counsel. *Federal Ins. Co. v. X-Rite, Inc.*, 748 F. Supp. 1223 (W.D. Mich. 1990).
Minnesota	NONE	**<u>Independent Counsel</u>** A conflict of interest exists when the insurer would be required to take opposing positions at trial to defend the insured against a claim and, at the same time, to defend itself on the coverage question. *Prahm v. Rupp Const. Co.*, 277 N.W.2d 389, 391 (Minn. 1979). This conflict does not relieve the insurer of its duty to defend, but rather transforms that duty into the duty to reimburse the insured for reasonable

State	Statutes	Case Law
		attorneys' fees incurred in defending the lawsuit. *Id.* But a conflict of interest might be avoided by bringing a declaratory judgment action on the coverage issue prior to trial. *Id.* An actual conflict of interest, rather than an appearance of a conflict of interest, must be established before an insured will be entitled to counsel of its own choice. *Mutual Service Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368 (Minn. Ct. App. 1991). "A conflict of interest will not be established simply by showing that the insurer wished to remain fully informed of the progress of litigation in the main action while also litigating a declaratory judgment action." *Id.* **Reasonable Fees** An insurer was obligated to reimburse insured for fair and reasonable value of the services rendered by the insured's independent counsel in defending the action. *United States Fid. & Guar. Co. v. Louis A. Roser Co.,* 585 F.2d 932, 941 (8th Cir. 1978). Minnesota law only imposes a duty to reimburse for reasonable attorney fees when insurer accepts tender of defense but denies coverage. *Chicago Title Ins. Co. v. F.D.I.C.*, 172 F.3d 601 (8th Cir. 1999). Where insurer is obligated to defend its insured and contests coverage in the same suit, insurer must pay reasonable attorney fees for its insured rather than conduct defense itself. *Prahm v. Rupp Const. Co.*, 277 N.W.2d 389 (1979).

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Mississippi	NONE	**Independent Counsel** In cases where an insurer asserts either policy or coverage defenses, and defends its insured under a reservation of rights, there are various conflicts of interest between the insurer and the insured . . . . First, if the insurer knows that it can later assert non-coverage, or if it thinks that the loss which it is defending will not be covered under the policy, it may only go through the motions of defending: 'it may offer only a token defense . . . . [I]t may not be motivated to achieve the lowest possible settlement or in other ways treat the interests of the insured as its own.' . . . Second, if there are several theories of recovery, at least one of which is not covered under the policy, the insurer might conduct the defense in such a manner as to make the likelihood of a plaintiff's verdict greater under the uninsured theory . . . . Third, the insurer might gain access to confidential or privileged information in the process of the defense which it might later use to its advantage in litigation concerning coverage." *Moeller v. American Guar. and Liability Ins. Co.*, 707 So. 2d 1062, 1069 (Miss. 1996). "When defending under a reservation of rights, however, a special obligation is placed upon the insurance carrier. While this Court has not been called upon to address this issue, other jurisdictions have generally held that in such a situation, not only must the insured be given the opportunity to select his own counsel to defend the claim, the carrier must also pay the legal fees reasonably incurred in the defense." *Id.* If a liability insurance policy covers only a portion of the claim

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		against the insured or covers only one theory of liability, the attorney should undertake to represent only the interest of the insurer for the part covered, and the insurer should afford the insured ample opportunity to select his own independent counsel to look after his interest. *Id.* at 1070. **Reasonable Fees** If a law firm selected and hired by an insured provides a defense under a reservation of rights, then fees incurred by the insured's *Moeller* counsel are reasonable – barring the presence of other factors affecting reasonableness. *PIC Group, Inc. v. LandCoast Insulation, Inc.*, 795 F. Supp. 2d 459, 464 (S.D. Miss. 2011). "[W]here the policy specifies that defense costs are included in the deductible, the insurer is not responsible for defense costs until the deductible has been paid." *Southern Healthcare Services, Inc. v. Lloyd's of London*, 110 So.3d 735, 748 (Miss. 2013).
Missouri	NONE	Insurers cannot force insureds to accept a reservation of rights defense. [Citation omitted.] When insureds exercise their right to reject the defense, insurers can act in one of three ways: (1) They may represent the insured without a reservation of rights defense; (2) They may withdraw from representing the insured altogether; or (3) They may file a declaratory judgment action to determine the scope of their policy's coverage." *Ballmer v. Ballmer*, 923 S.W.2d 365, 369 (Mo. Ct. App. 1996).

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		Where the insured rejects the insurance company's offer of defense under a reservation of rights, the insurer has the opportunity to control the litigation by defending without a reservation of rights. *Truck Ins. Exchange v. Prairie Framing, LLC*, 162 S.W.3d 64, 88 (Mo. Ct. App. 2005). If the insurer decides to file a declaratory judgment action, the decision is treated as a refusal to defend and, if the decision was unjustified, the insurance company will be treated as if it waived its right to control the defense in the underlying action. *Ballmer*, 923 S.W.2d at 369. An insured has the right to reject a tendered defense made by an insurer with a reservation of rights. Should the insured reject the defense offered by an insurer with a reservation of its rights regarding any policy defense it may have, the insurer then has one of three options: (1) represent the insured without a reservation of rights defense; (2) withdraw from representing the insured altogether; or (3) file a declaratory judgment action to determine the scope of the policy's coverage. *Kinnamon-Carson v. Westport Ins. Corp.*, 20009 WL 1211259 (Mo., May 5, 2009).
Montana	NONE	"Where an insurer, without reservation and with actual or presumed knowledge, assumes the exclusive control of the defense of claims against the insured, it cannot thereafter withdraw and deny liability under the policy on the ground of noncoverage, prejudice to the insured by virtue of the insurer's assumption of the defense being, in this situation, conclusively presumed . . . the loss of the right of the insured to control and manage the case is itself prejudicial." *Safeco Ins.*

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		Co. v. Ellinghouse, 725 P.2d 217, 221 (Mont. 1986). The insured is the sole client of defense counsel appointed by the insurer to represent the insured. *In re Rules of Prof'l Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806, 814 (Mont. 2000).
Nebraska	NONE	No state or federal authority.
Nevada	NONE	"When a conflict of interest exists between an insurer and its insured, Nevada law requires the insurer to satisfy its contractual duty to provide representation by permitting the insured to select independent counsel and by paying the reasonable costs of such counsel." *State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P.3d 338, 341-42 (Nev. 2015). "There is also respectable authority for the proposition that in a conflict of interest situation the right of the insurer to control the defense, investigation and settlement of the action includes the obligation to pay the reasonable value of the legal services and costs incurred for independent counsel for the insured." *Crystal Bay General Imp. Dist. v. Aetna Cas. & Sur. Co.*, 713 F. Supp. 1371, 1379 (D. Nev. 1989). This is not stated as a final determination because neither party discussed these issues in their briefs. *Id.*
New Hampshire	NONE	If there is a conflict of interest, an insurer may not control the insured's defense. "Controlling the defense, however, is not synonymous with providing a defense. Having a duty to defend, and faced with a conflict of interest, the [insurer] could have hired independent counsel to defend the [insured]

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		while intervening on its own behalf. In the alternative, the [insurer] could have provided the defense but reserved its right to later deny coverage." *White Mountain Cable Const. Co. v. Transamerica Ins. Co.*, 631 A.2d 907, 912-13 (N.H. 1993).

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New Jersey	NONE	"There may be cases in which the interests of the carrier and the insured coincide so that the carrier can defend such an action with complete devotion to the insured's interest. But if the trial will leave the question of coverage unresolved so that the insured may later be called upon to pay, or if the case may be so defended by a carrier as to prejudice the insured thereafter upon the issue of coverage, the carrier should not be permitted to control the defense. . . . In such circumstances the carrier should not be estopped from disputing coverage because it refused to defend. On the contrary the carrier should not be permitted to assume the defense if it intends to dispute its obligation to pay a plaintiff's judgment, unless of course the insured expressly agrees to that reservation. This is not to free the carrier from its covenant to defend, but rather to translate its obligation into one to reimburse the insured if it is later adjudged that the claim was one within the policy covenant to pay." *Burd v. Sussex Mut. Ins. Co.*, 267 A.2d 7, 10 (N.J. 1970). Where underlying pleadings set forth mutually exclusive covered and noncovered claims, and insured has not expressly agreed to reservation of rights, a liability insurer cannot be permitted to control the defense; rather, the insurer may be obligated to finance costs of defense, subject to right of reimbursement. *Morrone v. Harleysville Mut. Ins. Co.*, 662 A.2d 562, 567 (N.J. Super. Ct. App. Div. 1995).

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		Reasonable Fees An "insurer is not required to pay whatever fee the insured's retained attorney happens to charge; rather, the insured is required to pay a reasonable fee for those services reasonably related to the defense of any covered claims." *Szelc v. Stanger*, 2010 U.S. Dist. LEXIS 73600 (N.J. Dist. Jul. 10, 2010).
New Mexico	NONE	Where a serious conflict of interests exists between an insurer and its insured, "there are several methods of resolving the conflict." *American Employers' Ins. Co. v. Crawford*, 533 P.2d 1203, 1209 (N.M. 1975) (quoting *American Employers' Ins. Co. v. Cont'l Cas. Co.*, 512 P.2d 674, 679 (1973)). "[A] conflict could be resolved by insisting that the insured hire independent counsel, or the [insurer] could hire two sets of attorneys, one to represent the insured and the other [insurer]." *Id.* (citing *Employers' Fire Inc. Co. v. Beals*, 240 A.2d 397, 404 (1968)).
New York	NONE	"Independent counsel is only necessary in cases where the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds which would render the insurer liable. When such a conflict is apparent, the insured must be free to choose his own counsel whose reasonable fee is to be paid by the insurer." *Public Service Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 815 n.* (N.Y. 1981). Further, the insurer has an affirmative obligation to advise the

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		insured of its right to independent counsel. *Elacqua v. Physicians' Reciprocal Insurers*, 800 N.Y.S.2d 469, 473 (A.D. 2005). An insurer who fails to advise its insured that it is entitled to retain independent counsel commits a deceptive business practice, under N.Y. GEN. BUS. LAW § 349. *Elacqua v. Physicians' Reciprocal Insurers,* 860 N.Y.S.2d 229, 231-32. (N.Y. App. Div. 2008); *but see Tower Ins. Co. of New York v. Sanita Const. Co., Inc.*, 129 A.D.3d 430, 431 (N.Y. App. Div. 2015)(right to independent counsel does not establish an affirmative duty to advise insured of that right). Where an insurer defends under reservation of rights, the insured is entitled to retain its own counsel. *Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co.*, 807 N.Y.S.2d 62, 66 (N.Y. App. Div. 2006). When counsel is assigned to defend insured, the paramount interest independent counsel represents is that of insured, not insurer, and if there is conflict of interest between carrier and insured, counsel cannot represent both. *Federal Ins. Co. v. North American Specialty Ins. Co.*, 847 N.Y.S.2d 7, 12 (N.Y. App. Div. 2007) (rev'd on other grounds by *Federal Ins. Co. v. North Am. Specialty Ins. Co.*, 921 N.Y.S.2d 28 (N.Y. App. Div. 2011)).
North Carolina	NONE	The insured is not required to accept a conditional tender of defense of an action because the insurer may not be motivated to provide a vigorous defense despite its duty to use good faith in its undertaking. *National Mortgage Corp. v. American Title Ins. Co.*, 255 S.E.2d 622, 629 (N.C. Ct. App. 1979) (rev'd on other grounds by *National Mortg. Corp. v. American Title Ins. Co.*, 261 S.E.2d 844 (N.C. 1980)). When an

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		insured rejects the insurer's defense under a reservation of rights, the insured may select counsel, but is limited to seek indemnity for the costs of defending that action. *Id.* at 630.
North Dakota	NONE	If an insurer wishes to retain control of the litigation in a case involving a coverage dispute, the appropriate response is for the insurer to continue to defend the insured and bring a declaratory judgment action to determine coverage. *D.E.M. v. Allickson*, 555 N.W.2d 596, 602 (N.D. 1996).
Ohio	NONE	"An insurer breaches its contract to defend by making to the insured such a claim of nonliability for indemnification as to render it impossible for such company, in making defense, to protect both its own interests and those of the insured." *Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 59 N.E.2d 199, 199 (Ohio 1945). The insured "may employ counsel with notice to the insurance company that it must bear the expense, and the company will be liable for reasonable attorney fees and proper expenses incurred in making defense." *Id.* "Therefore, the test is whether the insurer's reservation of rights renders it impossible for the company to defend both its own interests and those of its insured." *Lusk v. Imperial Cas. & Indemn. Co.*, 603 N.E.2d 420, 424 (Ohio Ct. App. 1992). "An insurer's reservation of rights is important because insurers often find themselves in positions that might create a conflict of interest. In some circumstances, an insurer might believe that its insured's conduct constitutes excluded conduct under an insurance policy. Hence, it may be to the insurer's financial advantage to see that the conduct is excluded, thus precluding indemnification. This constitutes a potential (though not

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		necessarily actual) conflict of interest. [Citation omitted.] Under such circumstances, the insurer is obligated to defend the action but reserve its rights to indemnification. This way, the client can make a knowing choice whether to proceed with representation and the possible conflict, or obtain independent counsel." *Dietz-Britton v. Smythe, Cramer Co.*, 743 N.E.2d 960, 966 (Ohio Ct. App. 2000).
Oklahoma	NONE	"[N]ot every perceived or potential conflict of interest automatically gives rise to a duty on the part of the insurer to pay for insured's choice of independent counsel." *Nisson v. American Home Assur. Co.*, 917 P.2d 488, 490 (Okla. Ct. App. 1996). Moreover, absent threat of divided loyalty between insured and insurer, no need for retention of independent counsel arises where the issue of coverage is separate from issue of liability. "However, an insurer may demand their insured obtain independent counsel when the insurer perceives a conflict of interest." *Id.* n.1.
Oregon	"If the provisions of a general liability insurance policy impose a duty to defend upon an insurer, and the insurer has undertaken the defense of an environmental claim on behalf of an insured under a reservation of rights, or if the insured has potential liability for the environmental claim in excess of the limits of the general liability insurance policy, the insurer shall provide independent counsel to defend the insured who shall represent only the insured and not the insurer." O.R.S. § 465.483(1)(2013) "The obligation of the insurer to pay fees to independent counsel and environmental consultants is based on the	"It is argued that a conflict or divergence of interests may exist even though the insurer is free to set up the defense of noncoverage in a subsequent action. It is feared that if the insurer knows that it can later assert non-coverage, it may offer only a token defense in the action brought against the insured, or be less prone to effect a settlement advantageous to the insured. We think that this danger is minimal. The insurer knows that when it is the defendant in a lawsuit brought by one of its policyholders the jury's sympathy for the insured frequently produces a plaintiff verdict even when the insurer's case is

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	regular and customary rates for the type and complexity of environmental claim at issue in the community where the underlying claim arose or is being defended." O.R.S. § 465.483(3)(a)(2013).	strong. Knowing this, the insurer is not likely to relax its efforts in defending the action against the insured. If the insurer feels certain that it can successfully defend an action brought against it by the insured, it is not likely to accept the insured's tender of the defense in the first place." *Ferguson v. Birmingham Fire Ins. Co.*, 460 P.2d 342, 349 (Or. 1969). "Oregon statutes provide an insurer who has undertaken the defense of an environmental claim under reservation of rights or has potential liability in excess of policy limits, 'shall provide independent counsel to defend the insure who shall represent only the insured and not the insurer.'" *Century Indem. Co. v. Marine Group, LLC*, 2015 WL 810987 at *11 (U.D. D. Oregon February 25, 2015).
Pennsylvania	NONE	A conflict of interest arises between an insured and insurer when the company's pursuit of its own best interests in the litigation is incompatible with the best interests of the insured. *St. Paul Fire & Marine Ins. Co. v. Roach Bros. Co.*, 639 F. Supp. 134, 138-139 (E.D. Pa. 1986). Courts have concluded that one appropriate resolution in this circumstance is for the insurer to obtain separate, independent counsel for its insured, or to pay the costs incurred by an insured in hiring counsel. *Id.* "With respect to the existence of both covered and uncovered claims or theories of liability, the potential for conflict is much greater, but actual conflict is not inevitable." *Id.* at 139. "[W]here liability can rest on either of two causes of action, one of which is covered and the other not," an insurer "would be tempted to construct a defense which would place any damage award outside policy coverage." *Pennbank v. St. Paul*

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		Fire & Marine Ins. Co., 669 F. Supp. 122, 127 (W.D. Pa. 1987). Punitive damages are uninsurable in Pennsylvania, therefore, the insurer's denial of coverage for punitive damages did not constitute a conflict of interest requiring that the insurer provide independent counsel to the insured. *Id.*
Rhode Island	NONE	Where a conflict of interest exists between an insurer and its insured, the problem may be solved by allowing the insured to select its own defense attorney with the insurer assuming the reasonable costs incurred for the attorney's services. Alternatively, the insurer could retain two different attorneys; one for the insured and one for the insurer. This would avert the conflict of interest where an attorney attempts to represent both parties. *Employers' Fire Ins. Co. v. Beals*, 240 A.2d 397, 404 (R.I. 1968) (*rev'd on other grounds* by *Peerless Ins. Co. v. Viegas,* 667 A.2d 785 (R.I. 1995)). The engagement of an independent counsel to represent the insured should be approved by the insurer, which approval should not be unreasonably withheld. *Id.*

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South Carolina	NONE	A federal court predicted that the Supreme Court of South Carolina would not adopt a per se disqualification rule that would entitle an insured to select independent counsel at its insurer's expense any time the insurer attempts to defend a lawsuit under a reservation of rights. It believed South Carolina would reject a per se disqualification rule because it rests upon the presumption that whenever a lawyer is confronted with a potential conflict of interest, the lawyer will always compromise the interests of the client. *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co.*, 336 F. Supp. 2d 610, 612-13 (D. S.C. 2004). Pursuant to South Carolina Rules of Professional Conduct, a lawyer's duty of loyalty prohibits him or her from representing conflicting interests. *Id.* at 615. It is the responsibility of the attorney, not the insured, to determine whether a conflict of interest exists. *Id.* at 616. Bar grievance committees have actively ferreted out misconduct by "attorneys who 'sell out' and do not put their client's interests first." *Id.* at 619. "[T]he 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." *Id*. at 620.
South Dakota	NONE	A liability insurer has a conflict of interest with its insured when the injured person's claim against the insured is such that it could be sustained on different grounds, one of which is within the insurer's obligation to indemnify and another of which is not. *St. Paul Fire and Marine Ins. Co. v. Engelmann*,

State	Statutes	Case Law
		639 N.W.2d 192, 200 (S.D. 2002). An insurer does not have a right, without consent of the insured, to retain control of a defense of action against the insured and at same time reserve a right to disclaim liability. *Connolly v. Standard Cas. Co.*, 73 N.W.2d 119, 122 (S.D. 1955).
Tennessee	NONE	The Tennessee Supreme Court suggested that an insured does not have a right to independent counsel because counsel retained by an insurer to defend its insured must "exercise professional judgment and devote complete loyalty to the insured regardless of the circumstances." *Petition of Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995). Conflicts of interest include situations "where a defense is afforded under a reservation of rights, where there is a defense of alternative claims, one with coverage and the other with no coverage, where there is a defense of claims for damages in excess of the policy limits, and where the defense involves multiple insureds." *Id.* "Following our decision in *Youngblood*, no doubt can exist that the insured is the sole client of an attorney hired by an insurer pursuant to its contractual duty to defend, and in the typical attorney-client relationship, the client maintains a significant right to control the objectives of the representation. Indeed, Ethical Consideration 7-7 states that the client retains "exclusive authority" to direct all areas of the representation that affect the merits of the cause or substantially prejudice his or her rights." *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 396 (Tenn. 2002).

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		An insured is not entitled to reimbursement for costs incurred when it chooses to hire independent counsel. *Town of Bell Buckle v. Home Ins. Co.*, 1986 WL 2583, at *3 (Tenn. Ct. App. Feb. 26, 1986).
Texas	NONE	Where there is a conflict of interest between the insurer and its insured on the issue of whether coverage exists, the insurer is obligated to immediately notify the insured of the conflict and thus allow the insured to protect himself by obtaining his own counsel. Such responsibility is not relieved by a nonwaiver agreement. *Employers Cas. Co. v. Scott Elec. Co.*, 513 S.W.2d 642, 648 (Tex. App. 1974). The insurer properly notified the insured that representation would be made on the condition that it was reserving its rights, which served as notice to the insured of a potential conflict of interest, and the insured had a privilege of rejecting limited representation and hiring a lawyer of his choosing and looking to the insurer for payment of attorney's fees. *Britt v. Cambridge Mut. Fire Ins. Co.*, 717 S.W.2d 476, 481 (Tex. App. 1986). "Ordinarily, the existence or scope of coverage is the basis for a disqualifying conflict. In the typical coverage dispute, an insurer will issue a reservation of rights letter, which creates a potential conflict of interest. And when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense. On the other hand, when the disagreement concerns coverage but 'the insurer defends unconditionally, there is, because of the application of

State	Statutes	Case Law
		estoppel principles, no potential for a conflict of interest between the insured and the insurer.'" *Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004).
Utah	NONE	"[I]n the unique situation in which the lawyer actually represents two clients, he must give primary allegiance to one (the insured) to whom the other (the insurer) owes a duty of providing not only protection, but of doing so fairly and in good faith.' [Citation omitted.] Thus, where no actual conflict exists or is foreseeable, an attorney will ordinarily represent both the interests of the insured and the insurer. However, where actual conflict exists or is likely to arise, the attorney's allegiance is to the insured because of an insurer's duty to provide a defense in good faith." *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 607 (Utah 2003).
Vermont	NONE	When an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence." Vt. Rules of Prof'l Conduct R. 1.7 cmt. Where there is a failure on the part of an insurer to seek assent from the insured regarding its reservation of rights, a conflict of interest may exist. *Northern Security Ins. Co. v. Pratt*, No. 838-11-10 Wncv, 2011 Vt. Super. LEXIS 36 (Vt. Super. May 19, 2011). There was a conflict in that the underlying complaint contained both covered and uncovered claims. *Id.* at *15-17.

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		The insured is not entitled to appoint its own independent counsel so long as the insurer appoints truly independent representation. *Id*. at *21 ("So long as control over the defense is released, the conflict is remedied once [insurer] appoints a truly independent counsel. If there was any question beforehand, the law of Vermont has been settled since 1933 that a lawyer appointed to represent an insured owes all allegiances to the insured.").
Virginia	NONE	"No one questions the fact that the standards of the legal profession require undeviating fidelity of a lawyer to his client, and no exceptions can be tolerated. A client may presume that his attorney has no interest which will interfere with his devotion to the cause confided in him. And an insurer's attorney, employed to represent an insured, is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured." *Norman v. Insurance Co. of N. America*, 239 S.E.2d 902 (Va. 1978). An insurer defending an insured under a reservation of rights is not collaterally estopped from raising its coverage defenses by any finding of fact in the underlying liability action. *State Farm Fire & Cas. Co. v. Mabry*, 497 S.E.2d 844, 846-847 (Va. 1998).
Washington	NONE	"In Washington, there is simply no presumption . . . that a reservation of rights situation creates an automatic conflict of interest. Therefore, the insurer has no obligation before-the-fact to pay for its insured's independently hired counsel." *Johnson v. Continental Cas. Co.*, 788 P.2d 598, 601 (Wash. Ct.

State	Statutes	Case Law
		App. 1990); *see also Weinstein & Riley, P.S. v. Westport Ins. Corp.*, 2011 U.S. Dist. LEXIS 26369, at *50-51 (W.D. Wash. Mar. 14, 2011). The Washington Supreme Court held "that the duty of good faith of an insurance company defending under a reservation of rights includes an enhanced obligation of fairness toward its insured. Potential conflicts between the interests of insurer and insured, inherent in a reservation-of-rights defense, underlie this enhanced obligation." *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1135 (Wash. 1986). Insurer selecting the counsel may be precluded from raising collateral estoppel against the insured concerning coverage issues remaining after the resolution of the underlying action. *Id.* The insurer may be required to select counsel for the insured who are not the insurer's usual "panel counsel." *Id.* The insurer may also have heightened obligation to report to the insured of the progress and status of the defense, including settlement demands and other issues. *Id.* An insurer must fulfill this "enhanced obligation of fairness" in a reservation of rights defense by meeting specific criteria: (1) the company must thoroughly investigate the claim; (2) it must retain competent defense counsel for the insured, and both retained defense counsel and the insurer must understand that only the insured is the client; (3) the company must inform the insured of the reservation of rights defense and all developments relevant to policy coverage and progress of the lawsuit; (4) the company must refrain from any activity that would show a greater concern for its monetary interest

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		than for the insured's financial risk. *Id.* at 1137. However, in *Hamilton v. State Farm Mut. Auto. Ins. Co.*, an insurer-appointed counsel represented the insurer and insured in a settlement negotiations and failed to properly apprise the insured of the effect of settlement exceeding policy limit. 511 P.2d 1020 (Wash. Ct. App. 1973). If the attorney employed by the insurer cannot properly represent the insured because of a conflict of interest, it is incumbent upon the insurer to furnish the insured with an attorney who can do so. *Id.* at 1023.
West Virginia	NONE	A defense attorney, employed to represent an insured in a liability matter, is not an agent of the insurance company, because the attorney is professionally obligated to represent only the interests of the client/insured, not the interests of the insurance company. *Barefield v. DPIC Companies, Inc.*, 600 S.E.2d 256, 268 (W. Va. 2004). Because a defense attorney is ethically obligated to maintain an independence of professional judgment in the defense of a client/insured, an insurance company possesses no right to control the methods or means chosen by the attorney to defend the insured. *Id.* at 270.
Wisconsin	NONE	**Independent Counsel** "An insurer has several options available when it wants to raise a coverage issue and retain its right to challenge coverage. One option requires the insurer to request a bifurcated trial on the issues of coverage and liability or a declaratory judgment on the coverage issue. Another option

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		requires the insurer to give the insured notice of the insurer's intent to reserve its coverage rights. This allows the insured the opportunity to a defense not subject to the control of the insurer although the insurer remains liable for the legal fees incurred." *Jacob v. West Bend Mut. Ins. Co.*, 553 N.W.2d 800, 805 (Wis. Ct. App. 1996). Regardless whether the Supreme Court of Wisconsin would find that an insured may choose its own defense counsel upon an insurer's reservation of rights or instead, that the insurer retains the right to either choose independent defense counsel or allow the insured to choose, the supreme court would find that the insurer's responsibility for defense costs extends only to a reasonable charge. Further, a reasonableness limitation comports with this court's role in hearing a diversity case, i.e., liability should be controlled rather than expanded. *HK Systems, Inc. v. Admiral Ins. Co.*, 2005 WL 1563340 (E.D. Wis. June 27, 2005); *see also Haley v. Kolbe Millwork Co., Inc.*, 97 F. Supp. 3d 1047,1055 (W.D. Wis. 2015). Insurer had continuing duty to finance independent counsel selected by insured and accepted by insurer, even though insured had rejected counsel selected by insurer, where insurer was defending under reservation of rights which presented conflict of interest with insured's position, and counsel insurer selected to defend insured after its objection to counsel insured had retained was counsel which insured claimed had no expertise in subject matter of litigation and had long standing relationship with insurer. *Fireman's Fund*

State	Statutes	Case Law
		Ins. Co. v. Waste Mgmt., 777 F.2d 366 (7th Cir. 1985). **Reasonable Fees** The insurer's responsibility for defense costs extends only a reasonable charge. *HK Sys. Inc.,* 2005 WL 1563340 at *18.
Wyoming	NONE	In *Insurance Co. of North America v. Spangler*, the district court held that "the Wyoming Supreme Court would adopt the rationale of those cases holding that an insurer who reserves the right to deny coverage loses the right to control the litigation." 881 F. Supp. 539, 544 (D. Wyo. 1995)

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