

# Whose Choice Is It Anyway?

July 18, 2011

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## **The Right to Select Independent Defense Counsel**

*Michigan Lawyers Weekly - July 18 edition*

Many liability insurance policies provide that the insurer has a duty to defend its insured for lawsuits asserted against the insured seeking damages to which the insurance applies. When the allegations in a suit are undisputedly covered by the terms of the policy, the insurer chooses defense counsel to defend the insured in the lawsuit, usually panel or “captive” counsel who may be employed by the insurer or who takes cases exclusively on behalf of the insurer.

However, when there is a question about whether the policy provides coverage for the damages alleged in the lawsuit, the insurer may agree to defend the insured under a reservation of its right to ultimately deny coverage. In that case, some courts have said that there is an inherent conflict of interest between the insurer and the insured, such that it is inappropriate for the insurer to assign its panel counsel to defend the insured. But, if the insured has the right to independent counsel, does the insurer or the insured have the right to choose the attorney?

This question was considered in *Federal v. X-Rite*, 748 F. Supp. 1223 (W.D. Mich. 1990), where the court noted that no Michigan appellate court had directly decided the issue of whether the insurer or the insured has the right to select counsel in that situation. The court reviewed dicta from two cases decided under Michigan law. First, in *Allstate Ins. Co. v. Freeman*, 432 Mich. 656 (1989), the Michigan Supreme Court had quoted from an annotation in A.L.R., stating that when a conflict of interest arises between the insurer and insured due to the insurer’s reservation of rights:

“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.”

432 Mich. 656, 703 n. 3 (1989) (quoting 31 A.L.R. 4th 957, 976 (1984)). The second case the *X-Rite* court reviewed was *American Home Assurance Co. v. Evans*, 589 F. Supp. 1276, 1286 (E.D. Mich. 1984), *vacated on other grounds* 791 F.2d 61 (6th Cir. 1986), in which the federal district court explained that “[t]he insurer should provide independent counsel to control the defense or [the insurer

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may choose to] allow the insured to hire his own counsel to be paid by the insurer.” (emphasis added). Therefore, the two cases differed about whether it was the insurer or the insured that ultimately would select independent counsel.

The *X-Rite* court followed the reasoning of *Evans* and held that the insurer may choose whether to select independent counsel or allow the insured to select its own counsel. So long as the insurer acts in good faith, it has the right to select independent counsel for the insured.

The court was unwilling “[t]o hold that the insurer who, under reservation of rights, participates in selection of counsel, automatically breaches its duty of good faith” because such a holding would “indulge the conclusive presumption that counsel is unable to fully represent its client, the insured.” 748 F. Supp. at 1229. Since the insured made no showing that the law firm chosen for it “was not independent or that representation by [the law firm] represented a breach of [the insurer’s] duty of good faith or resulted in an actual conflict or created a substantial risk of prejudice to [the insured’s] interests, [the insured] was not justified in refusing the tendered representation of [the law firm].” *Id.* at 1230. See also *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 44 F. Supp. 2d 847, 860-61 (E.D. Mich. 1997) (independent counsel is required where conflict of interest is present due to insurer’s defense under reservation of rights).

In *Central Michigan Board of Trustees v. Employer Reinsurance Corp.*, 117 F. Supp. 2d 627 (E.D. Mich. 2000), the court followed *X-Rite* and held that the insurer who had agreed to defend the insured under a reservation of rights must appoint independent counsel to represent the insured, but may select the attorney. The court explained:

... under Michigan law an insurer complies with its duty to defend when, after it has reserved its rights to contest its obligation to indemnify, it fully informs the insured of the nature of the conflict and selects independent counsel to represent the insured in the underlying litigation. The insured has no absolute right to select the attorney himself, as long as the insurer exercises good faith in its selection and the attorney selected is truly independent.

*Id.* at 634-35. The court noted that an insurer will breach its duty to defend “if the law firm selected was not truly independent and capable of defending” the insured. *Id.* at 635.

In an unpublished decision, *Lynn v. Detroit Edison*, No. 258943, 2006 WL 1408443 (Mich. Ct. App. May 23, 2006), the Michigan Court of Appeals cited *Central Michigan* and *Aetna Casualty* and set forth the rule as follows: “[a]n insurer complies with the duty to defend when after a reservation of rights to contest its indemnity obligation, the insurer fully informs the insured of the nature of the conflict and selects independent counsel to represent the insured in the underlying litigation and the attorney is truly independent.” *Id.* at \* 9.

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Under Michigan law, then, the insurer may select independent counsel when it defends the insured under a reservation of rights so long as that attorney is truly independent and the insurer exercises good faith in making the choice. There are situations where the insurer may wish to allow the insured to select its own counsel, for example, when the attorney has a long-standing relationship with the insured and would require little time (and expense) to get up to speed for the defense of the lawsuit. Still, the insurer makes the choice.