

High Stakes and Hard Decisions: Serving the Tripartite Relationship

An examination of the tripartite relationship among client, insurance carrier, and defense counsel and the impact of anticipated high exposure cases on that relationship

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I. INTRODUCTION

The tripartite relationship between insured, insurer and defense counsel is a delicate balance. An understanding of the nature of this relationship and the challenges it presents may go a long way in preserving the rights and interests of all parties in high stake cases. Some tend to forget that prior to the formation of the tripartite relationship, there were, more than likely, two distinctly different relationships in existence.

The relationship between the insured and the insurer is contractual in nature and initially limited in the exchange of information. The insured may or may not have a basic understanding of the size and financial condition of the insurer and a reasonable idea of the coverage offered under the terms of the policy. The insurer knows sufficient information about the insured to underwrite the risk, but this information is limited. Ironically, after the policy is issued, the relationship works “best” when there is no communication between the parties. When the insured has no need to report a claim and the insurer has no need to contact the insured, it’s evidence that no adverse situation has occurred. It is no wonder that a serious damage claim against the insured has an immediate impact on this relationship. The parties must place great reliance upon each other, despite the lack of significant interaction between them. There may be competing expectations, agendas, and emotions (yes, insurance companies have feelings too!).

On the other hand, the dynamics of the relationship between the insurer and defense counsel is quite different. Presumably, there is a history between the parties. The insurer has specifically selected the defense attorney because of its knowledge of the attorney's expertise, decision making processes, and work habits. The attorney has a reasonable understanding of the insurers claims handling philosophy and procedures.

These two "relationships" merge to form the tripartite relationship. Note that as respects the three parties involved, the insured is most likely the one to have the least information as to how the other two parties operate. Consequently, the insurer and the defense attorney have a considerable obligation to communicate with the insured and explain the probable consequences of certain actions or inactions that may occur through the claims process.

Perhaps the first step in maintaining a good relationship between the parties is an acknowledgement that each may have a different opinion as to what would constitute a "good result". When a serious damage case occurs, the insurer immediately focuses on the overall payment involved, weighing the components of settlement value, defense costs and likely damage awards. More likely than not, the insured's ultimate goal is a defense verdict. Both would prefer a speedy resolution. The defense attorney has a combination of these goals, in large part dependent on the facts and circumstances of the case. The ultimate obligation of the defense attorney is to determine the needs of both the insured and the insurer and somehow end up with a result that is in the best interests of all concerned.

II. RULES GOVERNING THE TRIPARTITE RELATIONSHIP

The rules governing the tripartite relationship are not uniform among jurisdictions and are still developing in some. The current status of these rules in any given jurisdiction must be determined through thorough venue-specific research. However, a serviceable introduction to

the basic issues is provided by the American Law Institute Restatement of The Law Governing Lawyers and the American Bar Association Rules of Professional Conduct.

The Restatement offers the following guidelines:

“(1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents under the limitations and conditions provided in Section 202 [provision concerning the nature of informed consent to conflicts of interest], with knowledge of the circumstances and conditions of the payment.

(2) A lawyer’s professional conduct on behalf of a client may be directed by someone other than the client when:

(a) The direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and

(b) The client consents to the direction under the limitations and conditions provided in Section 202.” (Restatement of The Law Governing Lawyers, Section 215.)

* * *

“A lawyer might be designated by an insurer to represent the insured under a liability insurance policy in which the insurer undertakes to indemnify the insured and to provide a defense . . . certain practices of designated insurance defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus, a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in non-insurance arrangements with significantly different characteristics.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under Section 26 [quoted in pertinent part below]” (Restatement, Section 215, comment f.)

* * *

“A relationship of client and lawyer arises when a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person . . . and either

- (a) the lawyer manifests to the person consent to do so; or
- (b) the lawyer fails to manifest consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.” (Restatement, Section 26(1).)

The ABA Rules offer the following similar guidelines:

“A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.” (ABA Rules of Professional Conduct, Rule 1.7(b).)

* * *

“A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty to the client . . . for example, 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.” (ABA Rules, Rule 1.7, comment 10.)

* * *

“A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) The client consents after consultation;
- (2) There is no interference with the lawyer’s independence of professional judgment or with the lawyer-client relationship; and

(3) Information relating to representation of a client is protected as required by Rule 1.6.” (ABA Rules, Rule 1.8(f).)

In most jurisdictions, the law requires a defense attorney hired by an insurance company to fulfill attorney-client obligations to the insurance company and the insured. It is this “dual client” concept which is the foundation of the tripartite relationship and the source of the many practical and ethical dilemmas which arise when the interests of the lawyer’s two clients diverge.¹

No special ethical rules apply to high stakes cases, but full compliance with the rules in high stakes cases is often more challenging. In high stakes cases, the insured and the insurer have more to lose, and the pressure upon the defense attorney to avoid or minimize the loss is correspondingly greater. The insurer is interested in conserving defense costs and preserving as much of its indemnity limits as possible, but the insured is primarily interested in keeping any judgment or settlement within the policy limits. In a serious case, the potential conflicts between these goals become amplified, because the probability of saving the insurer’s limits is diminished and the likelihood of an excess verdict is increased.

In high stakes cases monetary thresholds of the insurance policy (i.e., deductibles, self-insured retentions, indemnity limits, aggregate limits) are also more likely to be exceeded. Those thresholds are typically established by agreement between the insurer and the insured, based upon a shared vision of the expected claims. When a high stakes claim threatens to prematurely exhaust the insured’s deductible, the self-insured retention, the indemnity limit or aggregate limit, the interests of the parties may diverge as actual claims supplant the expected claims which served as the underwriting model.

¹ A minority of jurisdictions do not subscribe to the dual client concept. See, Atlanta International Insurance Co. v. Bell, 448 N.W.2d 804 (Mich. Ct. App. 1989), modified, 475 N.W.2d 294 (1991); Continental Casualty Co. v.

Although the same basic ethical rules apply to small and large cases alike, the potential conflicts that may only be theoretical in smaller cases more often become actualized in high stakes cases. The insurer and the insured demand more of their attorney in serious cases because their needs are greater.

III. LITIGATION HURDLES FOR THE TRIPARTITE RELATIONSHIP

It is important to understand the tensions that may arise within the tripartite relationship in high stakes cases, because the urgency for an appropriate response is so great in these cases. The downside potential of mishandling big cases can be catastrophic, for the attorneys and the parties. Scrutiny of the attorney's conduct is exacting. Emotions on all sides run high in serious damages cases. The extremity of the risk naturally tends to magnify the divergence of the interests between the insurer and the insured. The pressure for a prompt and proper resolution of perceived conflicts in these cases is typically intense.

The best approach, of course, is to avoid conflicts at the outset. The next best thing is to be prepared to deal with the conflicts that cannot be avoided. These goals demand early recognition and analysis of the hurdles that can disrupt the tripartite relationship in high stakes cases. In this paper, we examine the most common challenges to the tripartite relationship and examine what makes them particularly demanding in high stakes cases.

A. Source of Conflict: Reasonable Likelihood of Verdict Beyond Policy Limits.

One of the most common scenarios under which a potential conflict can arise is where there is a reasonable likelihood that a judgment will exceed the indemnity limits of the insured's policy.

Pullman, Comley, Bradley & Reeves, 929 F.2d 103 (2nd Cir. 1998); In re A.H. Robins Co., Inc., 880 F.2d 709 (4th Cir. 1989); Colorado Bar Association Formal Ethics Opinion 91 (1993).

The perception of such a damages potential in a case can influence the approach of an insurer in several ways. A verdict potential at or near the policy limits may compel the insurer to be particularly aggressive in its efforts to save some of its limits. On the other hand, a verdict potential that clearly exceeds the policy limits may lead the insurer to believe that its limits will be lost no matter what manner of defense is raised, so it will discourage elaborate defense strategies or tactics that will only raise the cost of the defense. From another perspective, a verdict potential clearly in excess of the policy limits may induce the insurer to be particularly interested in settling quickly, since the only savings it can realize are those associated with the cost of defense. Or, if the insurer views the claim as being marginally defensible, that may induce the insurer to try the case, based on the limited possibility that a not guilty verdict will be obtained.

For the insured, the perception of a verdict potential in excess of the policy limits means something quite different. Since the insurer pays for the defense, the insured has no interest in conserving defense expense. To the contrary, the insured normally would like to see a five star defense waged on its behalf, particularly in a case with a large potential for damages. Nor does the insured have any interest in conserving the indemnity limits of the policy. Most insureds are interested primarily in only one thing: avoiding personal liability. As a result, it is in the clear financial interest of the insured for the insurer to settle the case, so long as the settlement falls within the indemnity limits of the policy.

The type of conflict that arises from a possibility of an excess verdict normally does not require the appointment of independent counsel for the insured. (See, e.g., Allstate Insurance Co. v. Campbell, 334 Md. 381, 693 A.2d 652 (Md. App. 1994).) In these cases, the defense attorney appointed by the insurer must attempt to represent the interests of both the insurer and

the insured. In most instances, the insured's expressed interest will be to settle the case quickly. However, in many of those same instances, the insurer may strongly resist settlement.

In substantial damages cases, the positions of the insured and insurer become increasingly polarized as their interests diverge as the exposure grows beyond the policy limits. The potential conflict of interests between insured and insurer may remain in the background until a settlement demand within the policy limits is made. This represents the moment of truth for the defense attorney representing the interests of the insurer and the insured:

“A plaintiff's offer to settle within the policy limits presents a different conflict of interest problem to the defense lawyer. His clients' previously parallel interests then clearly diverge. This moment calls for a halt, and a decision may be made by his two clients, to settle or not to settle. The lawyer's own professional problem depends upon the course of action he then takes. If the offer is accepted, the insured cannot be monetarily harmed because he will not have to pay anything. The company may or may not stand to lose, depending upon the merit and magnitude of the claim. Until the attorney receives the offer of settlement, his entire activity has been devoted towards winning the case or minimizing the damages. Now he must ask the court and opposing counsel for 'time out,' for a decision to be made by his clients on this offer.

His first professional and ethical obligation is to see that both their interests are protected insofar as he can do so, and that he does nothing to harm either . . . [T]he first thing he should do is to attempt to halt trial proceedings so that no trial development will harm either until a decision on the settlement offer has been made by his clients.

His next obligation is to fully inform each client of the terms of the settlement offer . . .

But following this, what should the attorney say to his clients?

* * *

If an offer has been made to settle for the policy limits, and he advises the company to settle, he has most certainly helped the insured, but he may have harmed the carrier, which has nothing to gain by accepting the offer, and the case could be worth much less.

On the other hand, if he advises the company to refuse, he must certainly be placing the insured at some risk.

* * *

If there is a settlement offer made, our view is that the attorney after accurately informing each client of its terms, should advise the insured that he cannot offer him any legal advice as to the offer other than it is obviously to his monetary advantage that the offer be accepted, and that he should promptly inform the carrier what he wants the carrier to do regarding the offer. If there is any *objective* reason for the insured to have additional legal counseling, defense counsel should promptly advise him to go seek it.

* * *

As to the carrier, the attorney should make it clear that the company is presented with a conflict of interest, and has a legal duty to carefully protect the interests of the insured to the same extent as its own.” (Hartford Accident & Indemnity Co. v. Foster, 528 So.2d 255, 270-273 (Sup. Ct. Miss. 1988).)

The nature of the conflict that arises from a potential excess verdict exposure is such that it requires continuous reexamination and reevaluation by counsel. As discovery proceeds, the defense assessment of the value of the case can often change in ways that will affect the competing interests of the parties and the representation owed by the attorney. The presentation of a demand within the policy limits may immediately actualize dormant conflicts. In addition, during the course of negotiations, the balance of competing interests between insured and insurer may change abruptly. Counsel must remain ever mindful of her dual role and the sometimes competing interests of her clients. The issue is not closed until the case has been finally concluded.

B. Source of Conflict: A Prayer for Punitive Damages.

Another common scenario under which a potential conflict can arise is where the plaintiff seeks punitive damages. Many insurance policies expressly exclude coverage for punitive

damages. In some jurisdictions, coverage for punitive damages is prohibited as a matter of law for certain types of claims.

Where there is no coverage for punitive damages (due to exclusionary language in the policy or by force of public policy), the insurer has no financial interest in defending or potentially indemnifying on the punitive aspect of the case. The insured may retain her own attorney to defend the punitive prayer. More often, however, the defense attorney appointed by the insurer remains to defend the entire case (because an insurer is obligated to defend the entire complaint where any part of the pleading is covered). The insured, of course, is intensely interested in vigorously defending against the punitive damages claim, because the exposure for any punitive damages award is hers alone.

Most often, the defense of the covered damages claims is consistent with the defense of the uncovered punitive damages claim (e.g., where the defendant denies that she was negligent *or* willful and wanton, or denies that her conduct was a proximate cause of the injury). However, the interests of the insured and insurer may diverge in such a case where the best tactic for limiting compensatory damages may be to admit liability. Admitting liability may help contain compensatory damages by keeping evidence of the defendant's improper conduct from the jury. However, it may aggravate the punitive damages phase of the trial by relieving the plaintiff of his burden to prove liability, without any corresponding benefit to the defense.

Some jurisdictions hold that the existence of a claim for punitive damages creates a potential conflict of interest requiring the appointment of independent counsel. (See, e.g., Nandorf, Inc. v. CNA Insurance Companies, 134 Ill.App.3d 134, 479 N.E.2d 988, 992 (1st Dist. 1985); Illinois Municipal League Risk Management Association v. Seibert, 223 Ill.App.3d 864, 585 N.E.2d 1130, 1137 (4th Dist. 1992).) Others expressly provide that the existence of a

punitive damages claim does *not* create a conflict requiring independent counsel. (See, e.g., Cal. Civil Code, §2860(b); Alaska Stat. §21.89.100(b).)

When negotiating a case involving a claim for both covered compensatory damages and non-covered punitive damages, the role of counsel may be somewhat clearer. The insurer under these circumstances owes a duty of good faith to the insured, notwithstanding that it has no duty to indemnify a potential punitive damages award. It has been held that this duty of good faith encompasses a duty to negotiate the entire case in good faith, even though the insurer has no independent obligation to pay for punitive damages.

“[T]he duty to defend is distinct from, and broader than, the duty to indemnify When an insurer owes or undertakes the duty to defend its insured in a suit seeking both insured and uninsurable damages, it has the duty to conduct settlement negotiations in good faith as part of that defense. For one thing, this includes warning the insured of any potential exposure to him and apprising him of settlement opportunities within a reasonable time after they are presented

We hold that here, where both compensatory and uninsurable punitive damages are sought, and CNA assumed the defense of the entire suit under the obligations of the policies, the presence of the punitive claim did not absolve CNA from its obligation of good faith in handling the entire case. That duty of good faith does not include settlement or contribution to settlement by CNA of the uninsurable punitive claim. We are convinced, however, that CNA’s duty of good faith included working cooperatively with [the insured] throughout in both defending and attempting to settle the entire case, with fair consideration given to [the insured’s] concerns because of its exposure to the uninsured punitive claim. The good faith duty of CNA thus required cooperative efforts by CNA with [the insured] throughout to handle and settle the entire case.” (Magnum Foods, Inc. v. Continental Casualty Co., 36 F.3d 1491, 1506 (10th Cir. 1994).)

The insurer’s obligation to exercise good faith in the defense and negotiation of the case does not entirely eliminate the occurrence of conflicts for defense counsel, but it helps. Where actual conflicts arise as to the approach to the defense (e.g., where the insured resists admitting

liability when the insurer wishes to admit liability), it may be beyond the ken of the defense attorney to either resolve the conflict or continue in her role as the attorney for both interests. Thus, again, the analysis of potential conflicts and the assessment of the attorney's proper response should be an ongoing process throughout the life of the file.

C. Source of Conflict: A Substantial Deductible or Self-Insured Retention.

Another scenario in which a conflict may arise is the situation where the insured has a substantial deductible or self-insured retention, allocating first dollar risk to the insured rather than the insurer. Where this occurs, the usual interests of the insured and insurer are initially reversed.

Depending upon the perceived exposure in the case, the insured may initially resist settlement where there is a substantial deductible or self-insured retention in place, because she has the primary obligation to fund settlements. On the other hand, the insurer may be very interested in settling, precisely because it is the insured's money that will fund the settlement.

“The difference between the exposure-to-excess verdict and the settlement-including-deductible situations as it may affect a carrier's discharge of its good-faith duty to its insured is obvious. In the former, the insured's funds are put in jeopardy when, in the face of the probability of an adverse verdict in excess of the policy limits, the carrier rejects a claimant's demand to settle for a figure within the limits of the liability coverage . . . However, where the insured has contracted away the right to control settlement and has agreed, through a 'deductible' clause, that the carrier's funds are not at risk until the deductible amount has been exhausted, there may be a conflict in the sense that the insured's money may be paid without the insured's knowledge, approval or permission. But that is exactly what the contract calls for.” (American Home Assurance Co., Inc. v. Hermann's Warehouse Corp., 117 N.J. 1, 563 A.2d 444, 447 (N.J. Sup. Ct. 1989).)

In a high stakes case, the insured may more readily recognize that a prompt settlement is in its best interest simply because there is no realistic likelihood of preserving the deductible or

self-insured retention by the time the case concludes. When the insured realizes that its deductible or self-insured retention will be consumed no matter what, the dynamics may revert to the scenario in which there is no deductible or self-insured retention on the policy. Losing hope that its deductible or self-insured retention can be conserved, the insured's interests focus upon avoiding a judgment in excess of the policy limits. Since the interests of the insured and insurer are largely measured by the parties' *perceptions* of the value of the case, a sensitivity to potential conflicts must continue throughout the lifetime of the file, because the perceptions change.

D. Source of Conflict: Insured Resists Settlement Despite Economic Interest.

The analysis of conflicts typically involves an examination of the insured's and the insurer's divergent *economic* interests. However, insureds sometimes resist settlement, even when it would seem to be in their clear financial interest. Sometimes this resistance is based on principle. (The insured says, "Don't pay anything, because I didn't do anything wrong.") Other times, the resistance is based upon the insured's interest in maintaining her reputation. (The insured tells her attorney, "A settlement would have disastrous consequences for my personal reputation or my professional reputation in the business community.")

While some liability policies expressly require the consent of the insured before the insurer may settle a claim, most do not. Rather, most liability policies grant the insurer exclusive control over the defense and the settlement of claims, within the carrier's discretion. Under such policies, the insurer is authorized to settle a claim, even over the objection of the insured. (See Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828, 839 (3rd Cir. 1985).) A liability policy provides a defense and indemnity for claims within the scope of the coverage, not to insure the entire range of the insured's well-being. (Western Polymer Technology, Inc. v. Reliance Insurance Co., 32 Cal.App.4th 14, 38 Cal.Rptr.2d 78, 84-85 (Cal. App. 1995).) Nor

will the insurer be held liable for any injury to the insured's reputation as a result of the settlement of a third party claim. (Id.)

Emotions can run very high when an insured demands that a claim not be settled. The insurer, wishing to limit its defense and indemnity exposure, may insist that the attorney seize the opportunity to settle the claim. At the same time, the insured, wishing to preserve principle or reputation, may insist that the opportunity to settle be ignored, demanding that the case be tried for vindication.

It is important for the defense attorney to remember that even where the policy clearly allocates the control over settlements to the insurer, the insured still has a choice. As the party to the suit, it is always the insured's decision whether to settle or proceed to trial. Choosing to proceed to trial when the insurer wishes to settle may jeopardize the insured's insurance coverage, but this is a choice to be made by the insured nonetheless.

The defense attorney plays a critical role in advising the insured and the insurer of their options regarding settlement. By carefully explaining the practical importance of taking advantage of an opportunity to settle, the attorney is also in the best position to reconcile the potential conflicts that may divide the insured and insurer. Particularly in high stakes cases, where the insured's personal financial exposure may be great, the attorney can be instrumental in shepherding the case to a negotiated resolution using the insurer's money to settle a case.

However, if the insured sticks to his guns and demands that the case not be settled, the attorney may face an irresolvable conflict of interests. When one of the attorney's clients tells her to settle the case, and the other client tells the attorney not to settle the case, and these positions cannot be reconciled, the attorney has no choice but to withdraw. Handling these

potential conflicts requires the attorney to carefully monitor the attitudes of the insured and insurer throughout the litigation and to identify any potential conflicts when they arise.

E. Source of Conflict: Insurer Defends Under a Reservation of Rights.

Probably the most common conflict that faces a defense attorney in a case involving liability insurance is where the insurer agrees to defend under a reservation of rights. Under this scenario, the insurer undertakes to defend the suit against its insured but reserves the right to deny indemnity coverage for some or all of the counts pleaded against the insured.

If the insurer's only duty in question were its duty to indemnify, this situation might create nothing more than a potential conflict, the actualization or neutralization of which would await the final resolution of the underlying claim. However, the insurer's right and duty to defend creates a conflict long before the ultimate indemnity question is resolved. A conflict immediately arises because the insurer does not have a financial interest in defending those parts of a claim that it believes will fall outside of the coverage of the policy. As far as its financial interest is concerned, the insurer would be just as glad to leave the uncovered claims undefended, since it would have no ultimate indemnity liability for those aspects of the case. Moreover, the insurer theoretically might use its control over the defense to steer the trier of fact to find in favor of the defendant on the covered counts, but to find against the defendant on the uncovered counts. (For example, an insurer might wish to present no defense on liability, but focus on the defense of the compensatory damages claim, while allowing punitive damages allegations to go unanswered and undefended.)

Jurisdictions differ in the way that they deal with conflicts created by an insurer's reservation of rights. Some hold that a reservation of rights automatically gives the insured a right to independent counsel. (State Farm Mutual Automobile Insurance Co. v. Ballmer, 899

S.W.2d 523, 526 (Mo. 1995); National Union Fire Insurance Co. v. Circle, Inc., 915 F.2d 986, 991 (5th Cir. 1990); Fla. Stat. Ann. §627.426(2)(b)(3) (West 1999).) Others do not employ such a *per se* rule, but will allow independent counsel where it appears that there may be a realistic opportunity for the insurer to steer the defense toward the uncovered aspects of the case. (Public Service Mutual Insurance Co. v. Goldfarb, 425 N.E.2d 810 (N.I. 1981); Burd v. Sussex Mutual Insurance Co., 267 A.2d 7, 10 (N.J. 1970); Cal. Civ. Code §2860(b).)

The best course for defense counsel in such cases is to avoid potential conflicts by disregarding the coverage implications of the case. Defense counsel cannot take or abet either the insured's or the insurer's positions regarding coverage. Typically, defense counsel is retained to defend the entire case and must strive to do so without any design to either implicate or to avoid the coverage of the insurance policy. In high stakes cases this is more difficult, only because the greater exposure in the case compels greater scrutiny of the conduct of the defense attorney. The same principles are at work in smaller cases, but the interest in potential conflicts in high stakes cases is naturally greater.

F. Source of Conflict: Insurer Restricts Defense Efforts and Expense.

Very difficult conflicts may arise when the insurer directs defense counsel to take a less than aggressive approach to the defense, does not authorize defense measures recommended by the defense attorney, or refuses to pay for defense work done during the course of the pendency of the file. As between the insurer and the insured, the right to control the defense is typically allocated to the insurer by the insurance policy. Nevertheless, the attorney has an independent duty to zealously and skillfully defend the insured in the underlying litigation. A conflict may arise when the thing that the insurer wants done and the thing that the attorney believes she must do are inconsistent.

Again, it must be remembered that the insured, as the party defendant to the underlying action, always has a choice. Even if the insured must pay for the defense work that it desires, and even if to demand such additional efforts might jeopardize the insurance coverage, the insured still has a choice as to how the underlying claim against it will be defended. This choice requires that counsel carefully advise the insured and the insurer of their options and do nothing to favor either until the potential conflict can be resolved by mutual agreement. If agreement cannot be achieved, and the insurer and insured demand inconsistent acts from the attorney, the attorney has no choice but to withdraw.

Sometimes there may be direct evidence of an insurer restricting the efforts of defense counsel to conserve defense expense. More often, the allegations are borne of inference after a bad trial result. These cases may be difficult to distinguish from run of the mill professional negligence cases. For example, in Kooyman v. Farm Bureau Mutual Insurance Co., 315 N.W.2d 30 (Iowa Sup. Ct. 1982), bad faith charges were advanced against the liability insurer after an excess verdict was returned against the insured in the underlying case. Although the defense attorneys believed that it was a probable liability case and that the verdict would exceed the policy limits, it appeared that almost no investigation had been conducted on behalf of the insured (the insured had been interviewed, but none of the other eyewitnesses had been interviewed). The defense attorney also scheduled no depositions, relying entirely upon the depositions noticed by the other defendants. The defense attorney also refused to contribute to the deposition of a physician whose testimony was critical on the issue of prognosis. At trial, the defense attorney inadvertently elicited testimony damaging to the insured from two of its own witnesses. Initially the trial court had granted a directed verdict in favor of the carrier, but on

review the case was remanded for trial on the numerous factual issues concerning the insurer's conduct.

These conflicts are particularly difficult in high stakes cases because they can pit the insurer's efforts to conserve defense expense against the defense attorney's litigation judgment. In a serious case, the insurer may face tremendous defense expense, consequently containing those expenses is a high priority for the insurer. However, from the insured's perspective, a high exposure case is exactly the kind of case where extraordinary defense efforts seem most needed. The attorney must follow her professional judgment, advising insurer and insured alike as to her recommendations on how the case should be defended. Where there are disputes concerning who will pay for the recommended defense measures, those disputes must be resolved between the insurer and the insured.

G. Source of Conflict: Insurer Reserves Right to Seek Reimbursement of Defense Expense.

In an action that encompasses covered aspects and aspects that are not covered, an insurer may reserve its right to seek reimbursement from the insured for a portion of the defense expense, following Buss v. Superior Court, 16 Cal.4th 35, 939 P.2d 766 (Cal. Sup. Ct. 1993). This also can create a variety of potential conflicts for the defense attorney.

For all concerned, the reservation of a Buss reimbursement claim raises interesting questions. When an insurer recognizes its duty to pay for the defense, it seems natural that the insurer should also have the right to control the defense. However, if the ultimate defense cost will be thrust upon the insured, it seems less intuitively clear that the insurer should be in control of the defense. This is especially a question with respect to the aspects of the case as to which the insurer has raised questions about coverage. Where there is a Buss reservation and the stakes

are high, there is a greater likelihood of conflicting interests expressed by the insurer and the insured.

A Buss reimbursement claim also raises questions concerning how the attorney records and charges for her time. If an insurer has agreed to defend a three-count complaint but reserves its rights under one count, what obligation does the attorney have to preserve a record to facilitate such an allocation of the defense expense? Presumably, the more detailed the attorney's recordkeeping, the better it will be for the insurer, since the burden of the allocation rests upon the insurer. On the other hand, less detailed and specific recordkeeping by the attorney would presumably benefit the insured. Does the attorney have obligations concerning recordkeeping in light of a Buss reservation, and if so, to whom are those duties owed? In a serious case, where the defense expenses are more likely to be high, these questions take on particular importance.

With these potential conflicts, as with many others, the critical thing for the defense attorney is to recognize the potential for actual conflicts. The attorney obviously must keep track of her time and bill for her services, but it is important for her to realize that the way she does this may have important consequences for the insured and insurer under Buss. The nature of these disputes is no different in large cases than it is in small cases, but again the volume of the exposure makes these questions more urgent and serious for all involved.