BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow

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Arizona Appeals Court Takes Different Tack In Addressing Independent Counsel Fees

Will The Decision Now Go From Phoenix, Arizona All The Way To Tacoma, Philadelphia, Atlanta, L.A.?

"I say put money in thy purse."

Othello Act 1, scene 3

Don't be fooled by the Shakespeare quote. I'm not that smart. I wouldn't know Shakespeare if he sat down next to me at the salad place in the food court where I go for lunch. But I know how to do a Google search. And these days, that's all it takes to sound like a genius.

"Put money in thy purse." A lot has changed in 400 years – but not that. At its core, all insurance coverage disputes are about putting money in someone's purse. But perhaps none as challenging, and contentious, as when the pursue is that of an attorney seeking to be paid for work performed.

It's the oldest story in the book and one that we've all encountered. A claim comes in, the insurer decides that a defense is owed, it retains panel counsel and then issues a reservation of rights. Not long after a letter arrives from the insured's attorney -- stating that the insured would rather be defended by its own counsel than the insurer's panel selection. The insured will likely maintain that, on account of the reservation of rights being asserted, the insured is in fact legally entitled to choose counsel for its defense, at the insurer's expense.

Let's assume that the insured is correct – sometimes it is and sometimes it isn't. [And many times, even if the insured is not correct, there are still very good reasons for agreeing to pay for the insured's choice of counsel. This is something I speak on constantly – but that's a whole other discussion.]

So you've decided that the insured can choose its own counsel and the insurer will pay for it. You know where this is going… Personal counsel now informs you that his hourly rate starts with the number 5 -- and panel counsel's rate starts with a 2 (or maybe even a 1). Let the letter writing begin!

This is not an easy situation. There is not a lot of law on it (surprisingly) and the cases that have addressed it are not consistent. At issue is usually what is the appropriate rate for the insured's personal counsel. In other words, the focus of the dispute is on a number. Last week the Arizona Court of Appeals approached the issue differently. Having looked at every conflict of interest – independent counsel case in the country, for the purposes of writing "Key Issues," I have never seen a court resolve the issue as this Arizona panel did.

At issue in *Lennar Corp. v. TIG* was Gerling's obligation to pay for Lennar's personal counsel fees in a construction defect case. Gerling agreed to appoint defense counsel. Lennar accepted Gerling's defense but also chose to be represented by its own counsel who had already been in the case. Lennar sought payment from Gerling, for its personal counsel, and that's where the problem arose.

There was generally no dispute that the two lawyers could serve as co-counsel. The issue was whether Gerling was obligated to pay for Lennar's counsel. Lennar maintained that Gerling was so obligated because it needed "independent counsel" in light of the conflict of interest created by the reservation of rights. Gerling offered to pay for Lennar's personal counsel to act as sole counsel, but at Gerling's counsel's rate. This was not accepted.

Putting aside some other issues and the court's discussion of reservation of rights and conflict of interest in general, the Arizona appeals court crafted the following solution:

There is no suggestion in the record that Herman [Gerling's counsel] was acting in any manner as an agent of Gerling or the insurers collectively. Nor is there any evidence that Herman was "captive counsel" or that Lorber [Herman's firm] was a "captive firm." Herman was specifically directed by Gerling to disregard any issues or facts related to coverage, and there is no evidence that she faced conflicting loyalties. The only ground for the argument that a conflict existed was Gerling's reservation of rights upon agreeing to defend Lennar. But even if the reservation of rights gave rise to a conflict between Gerling and Lennar, such a conflict would not justify the role that Fennemore [Lennar's counsel] actually played in Lennar's defense. Given the potential for conflict that existed between Gerling and Lennar because of the reservation of rights, Lennar could reasonably have reshaped Fennemore's role to that of an independent guardian of its rights concerning coverage. But Lennar chose instead to have two lead defense attorneys equally participating in the decision-making and workload. Because such an arrangement

was not justified by a conflict of interest -- actual or potential -- we find no legal authority upon which Lennar was entitled to reimbursement for Fennemore's continued service as co-counsel after it accepted Lorber's representation.

Lennar Corp. v. TIG at 10.

This is an interesting approach to the independent counsel issue. The issue is usually viewed as all or nothing – if a conflict exists because of a reservation of rights, the insured wants to defend itself and be paid fully for the defense, at a rate that is higher than the insurer's chosen counsel's rate.

But the Arizona appeals court crafted a different solution. It concluded that the insurer's chosen counsel was independent -- and she had been instructed to disregard any issues or facts related to coverage. With an appropriate defense in place for Lennar, there was no need for its personal counsel to take on such a large role as co-counsel, equally participating in the decision making and workload. Instead, Lennar's counsel's role could have been limited to that of **"independent guardian of its rights concerning coverage."** As such, Lennar's rights would be protected vis-à-vis any conflict of interest created by the reservation of rights. And perhaps with Lennar's personal counsel now having this much more limited role in the case, it may be easier for the insurer to agree to a rate that is higher than that of its own selected counsel.

If the *Lennar* idea takes off, perhaps there will be another term used to describe lawyers in the context of a reservation of rights that creates a conflict. *Cumis Counsel, meet Independent Guardian Counsel.*

A copy of the Arizona Court of Appeals's November 8th decision in *Lennar Corp. v. TIG* can be accessed here:

http://azcourts.gov/Portals/89/memod/CV/CV100686.pdf

If you have any questions, please let me know.

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