

## Massachusetts Supreme Judicial Court Rules Duty To Defend Does Not Include Duty To Prosecute Counterclaims

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Does the duty to defend require an insurer to prosecute an insured's counterclaims or fund the insured's counterclaims? The First Circuit certified these questions to the Massachusetts Supreme Judicial Court. In *Mount Vernon Fire Insurance Company v. Visionaid, Inc.*, issued on June 22, 2017, the Massachusetts Supreme Judicial Court answered them, concluding that the duty to defend – under either contract or the common law – encompasses no duty either to prosecute a counterclaim or to fund the prosecution of a counterclaim.

Visionaid, Inc. (Visionaid) was an insured under an employment practices liability policy from Mount Vernon Fire Insurance Company (Mount Vernon). The policy insured on a claims made basis. It provided that Mount Vernon had the right and duty to defend any claim, and obligated Mount Vernon to pay one hundred percent of the defense costs of a covered claim, in excess of a retention.

Visionaid terminated an employee, Gary Sullivan, after it appeared he had misappropriated several hundred thousand dollars. Sullivan brought a wrongful termination action, claiming that his age prompted his firing. Visionaid tendered. Panel counsel were appointed. A settlement was negotiated, but failed because Visionaid would not agree to a mutual release that covered the misappropriation. Sullivan sued Visionaid in Massachusetts state court, where panel counsel filed an answer that did not include a counterclaim for misappropriation. Mount Vernon and Visionaid disputed whether the policy required Mount Vernon to prosecute the counterclaim. Visionaid further maintained that this dispute over whether the counterclaim had to be pursued by Mount Vernon created a conflict of interest requiring Mount Vernon to appoint independent counsel for Visionaid.

Mount Vernon filed a complaint for a declaratory judgment in the United States District Court for the District of Massachusetts, seeking a ruling that it did not need to prosecute or fund the prosecution of the misappropriation claim. Visionaid, meanwhile, counterclaimed against Mount Vernon, seeking a declaration that the conflict of interest required Mount Vernon to appoint independent counsel. The District Court held for the insurer and, on appeal, the First Circuit certified three questions to the Massachusetts Supreme Judicial Court: 1) whether the contract or Massachusetts' "in for one, in for all" rule required an insurer to prosecute a counterclaim; 2) whether an insurer must fund the prosecution of a counterclaim as part of "Defense Costs"; and 3) when such a duty might give rise to a conflict of interest.

On the first question, the Supreme Judicial Court concluded that Massachusetts law does not require an insurer with a duty to defend to prosecute an affirmative counterclaim, either pursuant to the contractual language or the common-law "in for one, in for all" rule. Contractually, the court held that to defend is to work to defeat a claim that could create liability and no more; legal representation where the insured is the plaintiff is not bargained for. The "in for one, in for all" rule, which requires the insurer to defend the insured on all counts, including those that are not covered, does not extend to affirmative claims on behalf of the insured.

On the second question, the court noted that the insurer's obligation to pay defense costs is co-extensive with the duty to defend. Under Massachusetts law, the scope of the duty to defend and the scope of the duty to pay defense costs are identical. The court did not reach the third question, in light of its responses to the first two questions.

Two justices dissented from the court's opinion, in a dissent by Chief Justice Gants, joined by Justice Lenk. The dissent argued that where a covered claim is intertwined with a compulsory counterclaim, and the insured agrees that any recovered damages will offset damages that the insurer is required to indemnify, the duty to defend the insured in "any proceeding" should include prosecuting a compulsory counterclaim.

## IMPLICATIONS

As the Supreme Judicial Court noted in its opinion, courts are split on the interpretation of the word "defend." Some states view it as an unambiguous word, excluding representation for claims by the insured. Other jurisdictions view "defend" as ambiguous, requiring insurers to prosecute affirmative counterclaims in some instances, such as where the counterclaim would reduce liability on, or is factually intertwined with, the underlying claim. Massachusetts now firmly stands with those states following the literal and narrow reading of "defend." This opinion also resolves any ambiguity about the scope of defense cost payments under Massachusetts law by clearly stating that the duty to defend and the duty to pay defense costs are co-extensive.

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