

## Policyholder Playbook Episode 19: Consider Whether the Insured Is Entitled to Independent Defense Counsel

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March 5, 2024 Greg Van Houten

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**PRACTICES** Insurance Recovery, Litigation

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**Quick Overview of the Play** – When an insurer has a duty to defend against an underlying claim, consider whether there is a conflict of interest between the insurer and insured such that the insured may obtain independent defense counsel at the insurer’s expense.

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When an insurer with a duty to defend appoints defense counsel to defend against an underlying lawsuit, an intelligent insured might question whose interests that defense counsel will put first—the insurance company who pays its bills, or the insured whom it was appointed to represent. Ethically the answer is the latter, but lawyers are humans and might find it difficult to ignore the hands who feed them. The law recognizes this, and indeed a federal court in Illinois did so recently in a high-profile case captioned *Tribune Publishing, LLC v. ACE American Insurance Co.*, No. 22-cv-7327 (N.D. Ill. Feb. 20, 2024).

The *Tribune* matter arises out of a horrible incident occurring in June 2018 at the offices of the Capital Gazette, a newspaper based in Annapolis, Maryland. Some of the victims filed a lawsuit against the Capital Gazette’s parent company, the Baltimore Sun, and against the Sun’s parent, Tribune Publishing. The Sun and the Tribune tendered the suit to their insurer, ACE, and asked that ACE exercise its duty to defend. ACE agreed that the lawsuit triggered its duty to defend, yet it nevertheless refused to defend or to reimburse any incurred defense costs upon several arguments, including that the Sun and the Tribune had breached their insurance policy by unilaterally retaining their own defense counsel in violation of the voluntary payments provision.

The Sun and the Tribune countered with an apt argument—they were entitled to hire their own defense counsel because there was a conflict of interest between them and ACE. They pointed out that the underlying plaintiffs sought to avoid workers compensation exclusivity by alleging that the Sun and the Tribune were not their employers, while ACE had asserted that, if the Sun and the Tribune were not their employers, there was no coverage. The Sun and the Tribune noted that ACE therefore “had an incentive to defend the employer status issue ‘less than vigorously,’ because a ruling that [the Sun and the Tribune] were not employers would have relieved ACE of the defense it accepted.” They added that this conflict entitled the insureds “to independent counsel of their choice, paid for by ACE, who would be loyal solely to [the Sun and the Tribune].”

The court agreed. The court cited a robust body of law that stands for the proposition that, if “it appears that factual issues will be resolved in the underlying suit that would allow insurer-retained counsel to ‘lay the groundwork’ for a later denial of coverage, then there is a conflict between the interests of the insurer and those of the insured.” The court held that because there was such a conflict, the Sun and the Tribune were entitled to select their own independent counsel and ACE’s voluntary payments defense therefore failed.

The lesson here is simple. When an insurer appoints defense counsel to defend against an underlying claim, and if a factual issue will be resolved in that claim that may support an insurer’s

limitation or denial of coverage, seek independent defense counsel loyal to the insured and the insured only.

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