MASSACHUSETTS
LAWYERS WEEKLY

Volume 46
Issue No. 44
October 30, 2017

A policyholder's right to select counsel — at insurer's expense

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Earlier this month, the Appeals Court in *OneBeacon America Insurance Company v. Celanese Corporation* clarified the obligation of an insurer to allow its insured to select its own counsel when the carrier agrees to coverage without a reservation of rights.

The insured, Celanese Corp., had sought reimbursement from its insurance carrier, OneBeacon, for millions of dollars of defense costs arising from numerous legal actions involving claims of bodily injury from asbestos and chemicals allegedly contained in Celanese's products or facilities.

OneBeacon agreed to "cover" those claims without reservation and argued that, as such, Celanese had no right to control its own defense at OneBeacon's expense. Despite OneBeacon's withdrawal of its reservation of rights, Celanese claimed that OneBeacon still had an obligation to allow Celanese to defend itself at OneBeacon's expense.

The Appeals Court began by noting the well-settled proposition in Massachusetts that "when an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs."

In *Celanese*, OneBeacon offered to defend Celanese without a reservation of rights, thus arguing that it had the right to control Celanese's defense of those claims including the authority to choose counsel and make decisions related to control of the defense.

After examining authorities in other jurisdictions, which found that there were no exceptions to an insurer's right to control the defense of its insured if the insurer offered to defend without a reservation, the Appeals Court rejected those cases, holding that the insurer's right to defend without a reservation is "not absolute."

The court stated that "Massachusetts courts have recognized that an insured may rightfully refuse the insurer's control of the defense when a conflict of interest arises."

It then observed that there was an issue of first impression before the court: What circumstances would create a conflict of interest sufficient to justify an insured's refusal of an insurer's control of the defense when the insurer has offered to defend without a reservation of rights?

The Appeals Court concluded that an insured may justifiably refuse an insurer's control of the defense under Massachusetts law if one of the following conflicts of interest exists:

1. When the defense tendered is not a complete defense under circumstances in which it should be;
2. When the attorney hired by the insurer acts unethically and, at the insurer's direction, advances the insurer's interest at the expense of the insured's;
3. When the defense tendered does not satisfy the insurer's duty to defend under the governing law;
4. When, even though the defense is otherwise proper, the insurer attempts to obtain some type of concession from the insured before it will defend; and
5. When the defense provided by counsel selected by the insurer is materially inadequate.

In *Celanese*, the issue was whether OneBeacon's defense of Celanese would satisfy its duty to defend under governing law. While Celanese offered several reasons to support its argument, the crux of the issue was that the parties had disparate viewpoints as to how the defense should be conducted.

Celanese argued that the defense should rebut any and all claims that its products or premises contained carcinogenic and other poisonous materials, a serious challenge to its corporate reputation.

OneBeacon argued that its view was more pragmatic and focused on reducing the volume and cost of pending cases wherever possible.

The court centered its analysis of Celanese's contention by looking at the language of the insurance contract, and observed that Celanese's reputation was not something that OneBeacon was required to insure or defend.

The Appeals Court therefore concluded, and held, that those opposing tactics of defense do not give rise to a sufficient conflict of interest under Massachusetts law to justify Celanese's refusal of OneBeacon's control of the defense.

Stated differently, the court observed that Celanese did not obtain insurance for the defense of its reputation.

While the court ultimately ruled against the insured, it established the grounds on which it would consider allowing an insured to control its defense at the expense of the insurer when the insurer covers a claim without reservation.

The full text of the 22-page Appeal Court's ruling in *OneBeacon America Insurance Company v. Celanese Corporation,* Lawyers Weekly No. 11-134-17, can be found at masslawyersweekly.com. MLW

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