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Insured's Right to Independent Counsel: Navigating Texas Case Law Since the *Davalos* Decision

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Education

Duquesne University School of Law, 2011, J.D., cum laude, Associate Notes & Comments Editor of *Duquesne Law Review*; Participant in the Electronic Discovery Simulation Clinic

Elmira College, 2008, B.A., summa cum laude, Psychology

Professional Admissions / Qualifications

Pennsylvania

New Jersey

Court Admissions

U.S. District Court - Western District of Pennsylvania

U.S. Court of Appeals - Third Circuit

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Overview

Caitlin is an associate in Reed Smith's Philadelphia office, where she is a member of the firm's Insurance Recovery Group. She focuses her practice on representing corporate policyholders in resolving insurance coverage disputes under directors and officers, professional liability, and general liability insurance policies – among other types of coverage – by way of litigation, counseling and dispute resolution. With regards to these policies and coverage, Caitlin serves a wide array of clients, including financial institutions, manufacturers and private equity firms.

Caitlin has also practiced in the area of general civil litigation, including product liability and mass tort litigation. She has developed an extensive pro bono practice, representing clients in civil rights proceedings and name change hearings.

In addition, Caitlin has provided clients with research and advice concerning e-discovery and records management. In this area, she has drafted and helped implement records retention schedules and programs for clients in the retail, manufacturing and banking industries.

Publications

- 13 April 2016 "Court Upholds Coverage Under General Liability Policy for Claim Alleging Failure to Protect Data"
  The Policyholder Perspective; Co-Authors: Brian T. Himmel, Michael H. Sampson, Brian J. Willett
- 7 March 2016 "3rd Circ. Says Insurers Can't Evade Defense Obligations"
  Law360; Co-Authors: Michael H. Sampson, Jay M. Levin, Andrew J. Muha, Douglas R. Widin
- 22 February 2016 "Finding coverage for "additional insured," Third Circuit cautions that "insurer cannot bury its head in the sand""
  Reed Smith Client Alerts; Co-Authors: Michael H. Sampson, Jay M. Levin, Andrew J. Muha, Douglas R. Widin
- 2015-2016 "Representations and Warranties Insurance Fundamentals"
  Insurance Matters! (Volume 4, Issue 1); Co-Author: Courtney C. T. Horrigan
- 30 September 2015 "Disease Outbreaks May Bode Ill For Your GCL Coverage"
  Law360; Co-Author: Michael H. Sampson

Speaking Engagements

- "Insurance Coverage in the Event of a Disease Outbreak," Reed Smith University, Pittsburgh, Pennsylvania, 18 November 2015
- "The Employment Practices Minefield: What Does Your Policy Cover?" Reed Smith University, Pittsburgh, Pennsylvania, 24 September 2015

Insurers and policyholders frequently struggle over the control of the defense of third-party claims. While numerous companies may prefer to select counsel of their choosing, many policies (regardless of form or type) are written as "duty to defend" policies, where the insurer has the right and obligation to control the defense of a claim and directly appoint counsel to defend their insured. However, the insurer's right to appoint counsel gives way when a disqualifying conflict of interest exists. Prior to specific guidance from the Texas Supreme Court, any time a conflict of interest arose – most commonly when an insurer offered a defense under a reservation of rights – policyholders could choose independent counsel to represent them at their insurer's expense. However, in 2004, the Texas Supreme Court refined this rule and provided more specific instructions as to when an insured may select its own counsel.

The *Davalos* Opinion

In *Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004), the insured, Davalos, was injured in a car accident in Dallas County and sued the driver of the other car in Matagorda County. When the other driver sued Davalos in Dallas County, Davalos notified his insurer and requested a defense. However, before insurer-appointed counsel appeared in the case, Davalos' Matagorda counsel moved to transfer venue of the Dallas case to Matagorda County. The insurer informed Davalos that it opposed the transfer of venue. Davalos refused to accept the insurer-appointed defense counsel, taking the position that the insurer's opposition to transfer created a conflict that Davalos believed gave him the right to independent counsel.

The coverage dispute thus centered around whether the insurer's disagreement with its insured over the proper venue of the case created the type of conflict that triggered the insured's right to independent counsel and the insurer's obligation to pay that lawyer's fees. The Texas Supreme Court accepted the proposition that the insurer may be precluded from insisting on its contractual right to control the defense where there is a "conflict of interest" between the insurer and its insured. The Court acknowledged that the most common situation giving rise to such a conflict occurs when an insurer issues a reservation of rights letter that questions the existence or scope of coverage. However, the Texas Supreme Court was careful to make clear that "[e]very disagreement about how the defense should be conducted cannot amount" to a disqualifying conflict of interest. *Id.* at 689.

The conflict alleged by Davalos concerned a disagreement over the appropriate venue for the defense of a third-party claim, not Davalos' independent right to pursue his own remedy. According to the Court, the insurer's actions did not actually deprive Davalos of the defense attorney's independent counsel on any issue and, thus, did not amount to a disqualifying conflict of interest. Because Davalos rejected the insurer's defense without a sufficient conflict, he lost his right to recover the costs of that defense.

Importantly, the Court provided guidance with respect to those conflicts of interest that may justify an insured's refusal of a defense offered by its insurer:

1. When the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends.

2. When the defense tendered is not a complete defense under circumstances when it should have been.

3. When the attorney hired by the carriers acts unethically and, at the insurer's direction, advances the insurer's interest at the expense of the insured's.

4. When the defense would not, under the governing law, satisfy the insurer's duty to defend.

5. When, although the defense is otherwise proper, the insurer attempts to obtain some type of concession from the insured before it will defend.

A summary of courts' treatment of each potential conflict and additional conflicts not identified by the *Davalos* court follows.

A. When the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends.

While the *Davalos* court established that a disqualifying conflict of interest exists where "the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends," the Texas Supreme Court did not offer any further clarity on what is meant by the "same facts" requirement or how that requirement is to be applied. Several courts interpreting Texas law have since had the opportunity to analyze this requirement, primarily in the context of deciding whether a reservation of rights letter creates a potential conflict of interest. This article discusses the most significant cases in chronological order.

1. *Hous. Auth. of City of Dallas, Tex. v. Northland Ins. Co.*, 333 F. Supp. 2d 595 (N.D. Tex. 2004)

One of the first courts to analyze the "same facts" requirement was *Hous. Auth. of City of Dallas, Tex. v. Northland Ins. Co.*, 333 F. Supp. 2d 595 (N.D. Tex. 2004). In that case, the insured housing authority ("DHA") was sued for alleged violations of Title VII. DHA forwarded the lawsuit to its insurer, Northland, for a defense. Because only six days before its answer was due the insurer had yet to respond to its request, DHA retained counsel to protect its interests. Shortly thereafter, Northland assigned counsel to represent DHA in the underlying lawsuit. In response, DHA requested that its chosen counsel be permitted to defend it as DHA was unsatisfied with the handling of its defense in other lawsuits by that same insurer-appointed counsel. Northland denied this request in part because its appointed counsel had more experience and lower hourly rates. The parties were unable to come to an agreement and, after DHA's chosen counsel successfully defended it, Northland refused to pay any defense costs.

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