

Defense Costs Under Alaska Law Are Sunk

Much like the vessels often at issue in Alaska litigation, the costs incurred defending insureds for uncovered claims are “sunk.” On March 25, 2016, the Alaska Supreme Court concluded that insurers cannot seek reimbursement for defense costs incurred defending uncovered claims. *Attorneys Liability Protection Society, Inc. v. Ingaldson Fitzgerald, P.C.* (Alaska S.C. No. 7095 S-15683, Mar. 25, 2016). This exacerbates the difficulty insurers already face in defending claims in Alaska, where an insured’s statutory right to independent counsel is among the most rigorous in the country. Under this new case law, to avoid bad faith, an insurer operating in Alaska must not only be prepared to appoint independent counsel in **every** reservation of rights defense, but must also now recognize that its insured has no obligation to reimburse costs incurred defending claims that are ultimately uncovered.

Alaska courts typically look to California for guidance on insurance coverage issues. In this respect, one might expect that Alaska and California would treat independent counsel obligations in a similar fashion. To the contrary, although the history of independent counsel in Alaska closely mirrors the *Cumis* obligation in California, the Alaska statute (and subsequent appellate court analysis) differs in three significant ways.

Independent Counsel in Alaska is Mandatory in Reservation of Rights Defenses

Under Alaska law, when an insurer defends under a reservation of rights, it is required to concurrently provide independent counsel. In *CHI of Alaska v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993), the Alaska Supreme Court held that when an insurer reserves its rights based upon either a coverage or a policy defense, the insurer must provide independent counsel. Alaska responded to *CHI* by enacting legislation to codify the rule set forth by the court. The Alaska statute is similar to California’s statute: “If an insurer has a duty to defend an insured under a policy of insurance and a conflict of interest arises that imposes a duty on the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to the insured unless the insured in writing waives the right to independent counsel.” Alaska Stat. § 21.96.100(a). Alaska parts company with California, however, in that Alaska’s statute goes on to state “if an insurer reserves the insurer’s rights on an issue for which coverage is denied, the insurer shall provide independent counsel to the insured ...” Alaska Stat. § 21.96.100(c). Notably, California’s statute does not include this blanket requirement, but instead requires independent counsel in situations where “a conflict may exist.” Cal. Civ. Code § 2860(b). Accordingly, California’s statute provides some level of discretion in determining which conflicts justify independent counsel and which do not. Alaska’s definitive language, however, imposes a strict requirement that leaves no room for discretion. Thus, when an insurer in Alaska issues a reservation of rights based on a policy defense or a coverage defense, the statute requires the insurer to pay for independent counsel.

An Insured in Alaska Cannot Be Required to Reimburse an Insurer for Defense Costs, Even Where It Is Later Determined That Coverage Did Not Exist



Kevin A. Michael

Member

kmichael@cozen.com
Phone: (206) 373-7244
Fax: (866) 433-3992

Related Practice Areas

- Bad Faith
- Insurance Coverage

The Alaska Supreme Court's recent decision in *Ingaldson* concluded that insurers have no right to reimbursement. Ingaldson Fitzgerald, an Alaskan law firm, was accused of malpractice. Ingaldson Fitzgerald was insured by Attorneys Liability Protection Society (ALPS). ALPS defended Ingaldson Fitzgerald under a reservation of rights and specifically reserved ALPS's right to reimbursement of any fees incurred in defending claims that were ultimately deemed to be not covered by the policy. In a subsequent coverage action, the U.S. District Court for Alaska concluded the reimbursement provision was unenforceable under Alaska Stat. § 21.96.100. The Ninth Circuit certified the issue to the Alaska Supreme Court, asking whether reimbursement was available where "the parties agreed to a policy that allows reimbursement, and the insurer reiterated the possibility it would seek reimbursement in its reservation of rights letter."

In response, the Alaska Supreme Court restated the questions before it to be: "First, does Alaska law generally require insurers to pay defense costs, without reimbursement, when they reserve rights? And second, if so, does Alaska law bar attempts to contract around that requirement?" The Supreme Court answered "YES" to both questions. The court concluded that state law prohibits enforcement of such reimbursement provisions both 1) if coverage for a claim is ultimately determined to be unavailable, and 2) even if it is later discovered that there was never a possibility of coverage in the first place. "The duty to defend attaches, if at all, on the basis of the complaint and known or reasonably ascertainable facts at the time of the complaint" and a later determination that coverage was not afforded "has no retroactive effect on the duty to defend."

This, too, is where Alaska and California part company, since under *Buss v. Superior Court*, 939 P.2d 766 (1997), insurers in California have the right to seek reimbursement of uncovered defense fees. The Alaska Supreme Court found this unavailing, noting that the California statute provides that "[t]his subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees." According to the *Ingaldson* court, that phrase means the California statute allows reimbursement, while the Alaska statute provides for no such recovery.

Alaska Law Only Requires Independent Counsel Be Paid for the Defense of the Specific Claims That Are Subject to the Reservation

Despite the more onerous requirements of the Alaska statute, it does provide one modest benefit to insurers not found in California's statute. The Alaska statute contains the following allocation provision: "In providing independent counsel, the insurer is not responsible for the fees and costs of defending an allegation for which coverage is properly denied and shall be responsible only for the fees and costs to defend those allegations for which the insurer either reserves its position as to coverage or accepts coverage. The independent counsel shall keep detailed records allocating fees and costs accordingly." Alaska Stat. § 21.96.100(d). The California statute does not contain a direct equivalent to § 21.96.100(d). This suggests that an insurer in Alaska can accept or deny coverage for portions of a claim and independent counsel, in theory, should not bill the insurer for any work undertaken on the claims where no reservation applies. Of course, allocation of defense fees between covered and uncovered claims is often a difficult and uncertain task. Nonetheless, it provides insurers with one basis to monitor and manage independent counsel fees in Alaska.
