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NEWSLETTER

Insurer's Reservation of Rights Does Not Automatically Give Rise to Right to Independent Counsel

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Applying Texas law, the United States Court of Appeals for the Fifth Circuit has held that an insurer's reservation of rights does not create a conflict of interest that would give rise to an insured's right to independent counsel where the facts to be adjudicated in the underlying action are not the same facts upon which coverage depends. *Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 2012 WL 2477846 (5th Cir. June 29, 2012).

The insured, a service provider for the oil drilling industry, was sued for allegedly causing damage to an oil well. The insured sought a defense and coverage for the claim under its commercial general liability policy. The insurer accepted the defense subject to a reservation of the right to deny coverage based on the applicability of various exclusions in the policy, including an "expected or intended injury" exclusion, a "property damage" exclusion, and a "testing or consulting" exclusion. The insured rejected the defense and argued that the reservation of rights gave it the right to select independent counsel.

In the subsequent coverage litigation, the district court granted summary judgment for the insurer. The appellate court affirmed, holding that no conflict of interest exists because the facts to be adjudicated in the underlying suit were not the same facts upon which coverage depends. The court rejected the insured's argument that a conflict arose because the insurer-appointed defense counsel could steer the insured's defense to develop facts that would support the insurer's coverage defenses. The court stated that the Texas Supreme Court has never held "that a conflict arises any time the attorney offered by the insurer could be tempted–in violation of his duty of loyalty to the insured–to develop facts in the underlying lawsuit that could be used to exclude coverage." As such, the court held that no conflict existed and thus the insured had no right to independent counsel.