Lessons Learned From Celebrity Trials

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INTRODUCTION

In today's world of 24/7 TV and internet coverage, celebrity trials are more interesting than insurance coverage. But celebrity trials can pose important insurance coverage issues, including:

- Choice of law;
- Duty to Defend;
- Right to Independent Counsel;
- Reasonable Hourly Rates; and
- Reimbursement of Defense Fees and Costs.

I. CHOICE OF LAW

Choice of law issues often arise because celebrities own multiple properties and own or invest in businesses in different states. Often, they get sued in jurisdictions other than where they live and other than were the policy was issued. A question may then arise regarding which jurisdiction's law should apply.

In insurance coverage cases, courts have generally applied one or more of the following choice of law rules:

1) *Lex loci contractus*: Place of Contract

2) Restatement (Second) Conflict of Laws: Most Significant Contacts;

3) Governmental Interest;

4) Statutory Provisions; or

5) Leflar's Five Choice-Influencing Factors.

A. *Lex loci contractus* (Place of Contract)

As applied to insurance contracts, the doctrine of *lex loci contractus*, or place of contract, provides that the law of the jurisdiction where the contract was executed governs the rights and liabilities of the parties in determining an issue of insurance coverage.

Alabama, Florida, Georgia, Maryland, New Mexico, North Carolina, Oklahoma, Rhode Island and Tennessee presently adhere to the strict *lex loci contractus* rule to some extent. *Harrison v. Ins. Co. of N. Am*., 318 So.2d 253 (Ala. 1975); *State Farm Mut. Auto. Ins. Co. v. Roach* (Fla. 2006) 945 So.2d 1160, 1163; *General Telephone Co. of Southeast v. Trimm,* 252 Ga. 95, 96, 311 S.E.2d 460, 462 (Ga. 1984); *Allstate Ins. Co. v. Hart*, 327 Md. 526, 611 A.2d 100 (1992); *Federal Deposit Ins. Corp. v. Hiatt*, 872 P.2d 879, 882 (N.M. 1994)(applying "traditional" lex loci contractus rule, but other approaches are not ruled out]; *Land Co. v. Byrd*, 261 S.E.2d 655 (N.C. 1980); *Bohannan v. Allstate Ins. Co*., 820 P.2d 787, 793 (Okla. 1991); *Crellin Technologies v. Equipmentlease Corp*., 18

F.3d 1, 5 (1st Cir. 1994) [concluding that Rhode Island follows Lex Loci Contractus, but Restatement could also be applied]; *Ohio Cas. Ins. Co. v. The Travelers Indem. Co*., 493 S.W.2d 465 (Tenn. 1973).

B. The Restatement (Second) Conflict of Laws: "Most Significant Contacts" Test

The Restatement (Second) Conflict of Laws appears to, at least to some extent, follow the Most Significant Contacts test. Both afford deference to the state whose interest is most critical is what the modern choice of law analysis. While the Most Significant Contacts test is framed slightly differently in different states, there are three sections to the Restatement that are relevant to choice of law.

Section 6(2)(a) – (g) of the Restatement (Second) Conflict of Laws lists seven choice of law principles designed to help a court determine the relative significance of the various contacts: 1) the needs of interstate commerce; 2) the relevant policies of the forum; 3) the relevant policies of other interested states; 4) the relative interests of those states in the determination of the particular issue; 5) the protection of justified expectations; 6) the basic policies underlying the particular field of law-certainty, predictability, and uniformity of result; and 7) the ease in determining and applying the law.

Section 188 of the Restatement (Second) Conflict of Laws sets out a general presumption which provides that unless another state has an overriding policy-based interest in the application of its law: The law of the state in which the bulk of the contracting transactions took place should be applied. Section 188(2) also sets forth five factors for courts to use in applying the § 6 principles: (a) the place of contracting; (b) the place of negotiating the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. Restatement § 188(2)(a)-(e) The above five factors are to be "evaluated according to their relative importance to a particular issue."

Section 193 sets out a special presumption for liability insurance contracts, which provides that unless another state has an overriding policy-based interest in the application of its law the law of the state in which the insured risk is located should be applied.

Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota [relevant contacts and *Leflar* factors], Ohio, Oregon, Pennsylvania, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming have adopted the Most Significant Contacts and/or Restatement view. *Long v. Holland America Line Westours, Inc*., 26 P.3d 430, 432-33 (Alaska 2001); *Cardon v. Cotton Lane Holdings, Inc*., 173 Ariz. 203, 207 (1992); *Hoosier v. Interinsurance Exchange of the Automobile Club*, 451 S.W.3d 206 (Ark. 2014); *Hansen v. GAB Business Services, Inc*., 876 P.2d 112, 113 (Colo. App. 1994); *Reichhold Chemicals, Inc. v. Hartford Acc. and Indem. Co.*, 243 Conn. 401, 414,703 A.2d 1132, 1138 (1997); *Travelers Indemnity Company v. Lake*, 594 A.2d 38, 41 (Del. Super. 1991);

Beals v. Kiewit Pacific Co., Inc., 825 F. Supp. 926 (D. Hawaii 1993); *Ryals v. State Farm Mut. Auto. Ins. Co*., 1 P.3d 803 (Idaho 2000); *Lapham-Hickey Steel Corp. v. Protection Mutual Ins. Co*., 655 N.E.2d 842 (Ill. 1995); *Hartford Acc. & Indem. Co. v. Dana Corp*., 690 N.E.2d 285 (Ind. App. 1997); *Veasley v. CRST Int'l., Inc*., 553 N.W.2d 896, 897 (Iowa 1996); *Lewis v. American Family Insurance Group*, 555 S.W.2d 579, 581 (Ky. 1977); *Auto Europe v. Connecticut Indem*., 321 F.3d 60, 64-65 (1st Cir. 2003) [applying Maine law]; *Levin v. Dalva Bros., Inc*., 459 F.3d 68, 74 (1st Cir. 2006) [applying Massachusetts law]; *Commercial Union Ins. Co. v. Porter Hayden Co*., 116 Md.App. 605, 698 A.2d 1167, 1204 (1997); *Chrysler Corp. v. Skyline Industrial Services*, Inc., 528 N.W.2d 698, 702-03 (Mich. 1995); *Boardman v. United States Auto. Assoc*., 470 So.2d 1024, 1031 (Miss. 1985);*Mertz v. Pharmacists Mutual. Ins. Co*., 625 N.W.2d 197 (Neb. 2001); *Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061 (Nev. 2014); *Cecere v. Aetna Ins. Co*., 766 A.2d 696 (N.H. 2001); *State Farm Mutual Automobile Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 37, 417 A.2d 488 (1980); *Certain Underwriters of Lloyd's of London v. Foster Wheeler*, 36 A.D.3d 17, 22 (1st Dept. 2006); *Nodak Mutual Insurance Company v. Wamsley*, 687 N.W.2d 226, 231 (2004) [applying North Dakota law, two steps; 1) Determine all of relevant contacts which might logically influence the decision of which law to apply; then 2) apply Leflar's choice-influencing factors]; *Ohayon v. Safeco Ins. Co. of Illinois*, 747 N.E.2d 206 (Ohio 2001); *Mid-Century Ins. Co. v. Perkins*, 149 P.3d 265 (Or. App. 2009); *Minn. Mining & Mfg. Co. v. Nishika, Ltd*., 955 S.W.2d 855, 856 (Tex. 1996); *Lake Tribune v. Management Planning*, 390 F.3d 684 (10th Cir. 2004) [applying Utah law]; *Am. Family Mut. Ins. Co. v. Powell*, 486 N.W.2d 537 (Wis. Ct. App. 1992) [To resolve conflicts regarding choice of law for disputed contracts, Wisconsin courts follows the Grouping of contacts approach (based upon Restatement (Second) Conflict of Laws and Leflar's Five Choice Influencing Factors]; *Resource Tech. Corp. v. Fisher Scientific Co*., 924 P.2d 972 (Wyo. 1996).

C. Governmental Interest Test

California and the District of Columbia apply a "governmental interest" test in determining choice of law issues. Under this approach, the court is first required to determine if the law of the competing states differ, and, if so, whether each state has an interest in seeing its law applied. Having met these criteria, the court must then engage in a unique "comparative impairment analysis" to determine which state's interests would be more impaired if its law were not applied. The state whose interest would be more greatly impaired by not applying its law is the state whose law must apply. *Stonewall Surplus Lines Ins. Co. et. al. v. Johnson Controls, Inc*., 14 Cal.App.4th 637 (Cal. App. 1993); *Ledesma v. Jack Stewart Produce, Inc*., 816 F.2d 482 (9th Cir. 1987); *Fowler v. A & A Co*., 262 A.2d 344, 348 (D.C. 1970).

D. Statutory Provisions

State statutes can also govern choice of law decisions, regardless of what the outcome would be under a more traditional choice of law analysis.

Civil Code section 1646 provides: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

Louisiana Civil Code article 3515: ["Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue. [¶] That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state."]; 3537, 3540;

Montana: "A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." MCA § 28-3-102; *Modroo v. Nationwide Mut. Fire Ins. Co*., 345 Mont. 262 (2008).

North Carolina Gen. Statutes section 58-3-1: All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.

15 Oklahoma Statutes section 162: A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

South Carolina: Code 1976 §38-61-10: All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State.

South Dakota: S.D.C.L. 53-1-4: A contract is to be interpreted according to the law and usage of the place where it is to be performed or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

Virginia: § 38.2-313: Where certain contracts deemed made. — All insurance contracts on or with respect to the ownership, maintenance or use of property in this Commonwealth shall be deemed to have been made in and shall be construed in accordance with the laws of this Commonwealth.

E. Leflar's Five Choice-Influencing Factors

In a law review article, *Choice-Influencing Considerations in Conflict of Law*, 41 NYU L.Rev. 267, 282 (1966), Robert A. Leflar set out five choice-influencing factors which are similar to and incorporate many of the same principles set forth in the Restatement (Second), Conflict of Laws. However, three states, Minnesota, North Dakota and Wisconsin have held strongly to the application of the Leflar factors as opposed to simply following the Restatement. The Leflar choice-influencing factors are: (i) predictability of results; (ii) maintenance of interstate order;

(iii) simplification of judicial task; (iv) advancement of forum's governmental interests; and (v) better rule of law.

Jepson v. General Cas. Co. of Wisconsin, 513 N.W.2d 467 (Minn. 1994); *Daley v. American States Preferred Ins. Co.*, 587 N.W.2d 159 (N.D. 1998). *Am. Family Mut. Ins. Co. v. Powell*, 486 N.W.2d 537 (Wis. Ct. App. 1992) [To resolve conflicts regarding choice of law for disputed contracts, Wisconsin courts follows the Grouping of contacts approach (based upon Restatement (Second) Conflict of Laws and Leflar's Five Choice Influencing Factors].

The choice of law tests followed in each state are set forth below:

Lex loci contractus (Place of contract)	Restatement (Second) Conflict of Laws: Most Significant Contacts Test	Government Interest Test	Statutory Provisions	Choice Influencing Factors
Alabama; Florida; Georgia; Maryland; New Mexico; Rhode Island (but Restatement could be applied); Tennessee.	Alaska; Arkansas; Arizona; Colorado; Connecticut; Delaware; Hawaii; Idaho; Illinois; Indiana; Iowa; Kentucky; Maine; Maryland; Massachusetts; Michigan; Mississippi; Missouri; Nebraska; Nevada; New Hampshire; New Jersey; New York; North Dakota (combined with other factors); Ohio; Oregon; Pennsylvania (combined with government interest); Texas; Utah; Vermont; Washington; West Virginia; Wisconsin.	California; District of Columbia;	Civil Code section 1646 Louisiana Civil Code articles 3515, 3537, 3540; Montana Code Ann. section 28-3-103; North Carolina Gen. Statutes section 58-3-1; 15 Oklahoma Statutes section 162; South Carolina Code section 53-104; Virginia Code Ann. Section 38.2-313.	Minnesota; North Dakota; Wisconsin (along with Restatement).

F. Bill Cosby

1. Sexual Assault Claims

Bill Cosby purchased Homeowners and Personal Excess policies from AIG. The policies were negotiated in California, the applications were prepared in California, the policies were delivered in California, and premiums were paid by the broker to AIG in California. Coby was a Massachusetts resident, but the policies covered residences in Massachusetts and California. Under each policy, AIG had a duty to "pay damages [Cosby] is legally obligated to pay [due to] personal injury … caused by an occurrence covered[ ] by this policy anywhere in the world...." Both policies defined "personal injury" to include "[d]efamation," and oblige AIG to pay the cost of defending against suits seeking covered damages. The homeowners policy excluded "personal injury arising out of any actual, alleged or threatened by any person: … sexual molestation, misconduct or harassment; … or sexual, physical or mental abuse." The PEL policy excluded "liability…arising out of any actual, alleged or threatened:…sexual misconduct, molestation or harassment; … or sexual, physical or mental abuse."

Several women sued Cosby for sexual assault. The assaults allegedly occurred in California, Nevada, New York, Colorado, and Michigan. Cosby and his representatives made statements denying the assaults in international and national media sources such as the *Washington Post, Inside Edition*, and the *New York Daily News.* The statements included that the plaintiffs "completely fabricated the Story of alleged rape," that "the alleged rape never happened," and that plaintiffs' statement were "an outrageous defamatory lie."

In 2014 and 2015, nine of the women filed a series of lawsuits around the country for defamation, contending that Cosby's denials defamed them by denying their assault allegations and saying that their statements were fabrications constituted defamation. Cosby's insurer agreed to defend Cosby under a reservation of rights, but filed declaratory relief lawsuits in California and Massachusetts, asking the court to declare that it had no duty to defend based on a sexual assault exclusion.

2. *AIG Property Casualty Co. v. Cosby* (C.D. Cal. 2015) 2015 W.L. 9700994

In the declaratory relief case filed in California federal district court, the court found no conflict between the law of California and Massachusetts regarding the interpretation of the exclusion, so it the court applied California law as the law of the forum:

> California law governs this diversity case. (See FAC ¶ 5.) A federal court exercising diversity jurisdiction decides issues of state law as it believes the state's highest court would decide them.… Here, **the Policies arose in both California and Massachusetts**. However, where the applicable rules of law of the potentially concerned jurisdictions do not materially differ, the Court may proceed to apply the law of the forum…. "The party arguing that foreign law governs has the burden to identify the applicable foreign law." Plaintiff asserts that Massachusetts and California law ought to govern this case, but represents that the

laws of those states do not conflict. Therefore, the Court will apply California law, the law of the forum here.

Applying California law, the court found that the sexual assault exclusion was ambiguous, and found that the insurer had a duty to defend.

3. ***AIG Property Casualty Co. v. Cosby*** **(1st Cir. 2018) 892 F.3d 25**

In a declaratory relief action filed in federal court in Massachusetts, that district court likewise found no conflict between Massachusetts and California law. The First Circuit agreed:

> The parties debate whether Massachusetts or California law governs the interpretation of the relevant insurance policies, with AIG arguing for Massachusetts on its understanding that its law requires a finding of no coverage. But we have no need to resolve that dispute because, simply by applying the law of Massachusetts as AIG asks, we conclude that AIG has a duty to defend Cosby.

Applying Massachusetts law, the First Circuit held that a sexual assault exclusion was ambiguous under the facts of the case and held the insurer had a duty to defend.

Thus, in two declaratory relief actions filed in two different jurisdictions, both courts found the laws of California and Massachusetts did not conflict with regard to interpretation of the exclusion. One court applied California law. One court applied Massachusetts law. Both found the exclusion was ambiguous as applied to the facts.

II. DUTY TO DEFEND

Duty To Defend is a term used to describe an insurer's obligation to provide an insured with defense to claims made under a liability insurance policy. As a general rule, an insured need only establish that there is potential for coverage under a policy to give rise to the insurer's duty to defend. Therefore, the duty to defend may exist even where coverage is in doubt and ultimately does not apply. Implicit in this rule is the principle that an insurer's duty to defend an insured is broader than its duty to indemnify. Moreover, an insurer may owe a duty to defend its insured against a claim in which ultimately no damages are awarded, and any doubt as to whether the facts support a duty to defend is usually resolved in the insured's favor.

Restatement of the Law of Liability Insurance Section 13 (2019)

> § 13 Conditions Under Which the Insurer Must Defend
>
> (1) An insurer that has issued an insurance policy that includes a duty to defend must defend any legal action brought against an insured that is based in whole or in part on any allegations that, if proved, would be covered by the policy, without regard to the merits of those allegations.

(2) For the purpose of determining whether an insurer must defend, the legal action is deemed to be based on:

(a) Any allegation contained in the complaint or comparable document stating the legal action; and

(b) Any additional allegation known to the insurer, not contained in the complaint or comparable document stating the legal action, that a reasonable insurer would regard as an actual or potential basis for all or part of the action.

(3) An insurer that has the duty to defend under subsections (1) and (2) must defend until its duty to defend is terminated under § 18 by declaratory judgment or otherwise, unless facts not at issue in the legal action for which coverage is sought and as to which there is no genuine dispute establish that:

(a) The defendant in the action is not an insured under the insurance policy pursuant to which the duty to defend is asserted;

(b) The vehicle or other property involved in the accident is not covered property under a liability insurance policy pursuant to which the duty to defend is asserted and the defendant is not otherwise entitled to a defense;

(c) The claim was reported late under a claims-made-and-reported policy such that the insurer's performance is excused under the rule stated in § 35(2);

(d) The action is subject to a prior-and-pending-litigation exclusion or a related-claim exclusion in a claims-made policy;

(e) There is no duty to defend because the insurance policy has been properly cancelled; or

(f) There is no duty to defend under a similar, narrowly defined exception to the complaint-allegation rule recognized by the courts in the applicable jurisdiction.

A. <u>May Extrinsic Evidence Be Considered, and If So, For What Purpose?</u>

Some states use a version of Texas' "Eight Corners Rule," under which the duty to defend is measured by looking at the four corners of the complaint and the four corners of the insurance policy. Other states allow consideration of extrinsic evidence. Of those states, some allow extrinsic evidence to establish a duty to defend; some allow extrinsic evidence to establish no duty to defend applies; and some allow extrinsic evidence for both.

Extrinsic Evidence Allowed to Establish But Not Negate Coverage	Extrinsic Evidence May Be Allowed to Both Establish or Negate Coverage	Extrinsic Evidence Is Not Allowed to Establish The Duty To Defend or Can Only Be Used By An Insurer To Negate Coverage
Alabama, Alaska, Connecticut, District of Columbia, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New York,	Arizona, California, Colorado, Georgia, Illinois, Iowa, Kentucky, Minnesota, Missouri, Montana, New Hampshire, New Mexico, Ohio,	Arkansas, Delaware, Florida, Idaho, Louisiana, Maine, North Carolina, North Dakota, Oregon,

Oklahoma, Vermont, Washington	Pennsylvania, South Carolina, South Dakota, Utah, West Virginia, Wisconsin	Rhode Island, Tennessee, Texas, Virginia, Wyoming

Gunnin v. State Farm and Cas. Co., 508 F. Supp. 2d 998 (M.D. Ala. 2007); *Pharmacists Mut. Ins. Co. v. Godbee Med. Distribs., Inc*., 733 F. Supp. 2d 1281 (M.D. Ala. 2010); *Williams v. GEICO Cas. Co.*, 301 P.3d 1220 (Alaska 2013); *Afcan v. Mut. Fire, Marine & Inland Ins. Co*., 595 P.2d 638 (Alaska 1979); *Northern Ins. Co. v. Morgan*, 918 P.2d 1051 (Ariz. Ct. App. 1995); *U.S. Fid. & Guar. Corp. v. Advance Roofing & Supply Co*., 788 P.2d 1227 (Ariz. Ct. App. 1989); *Scottsdale Ins. Co. v. Morrow Land Valley Co., LLC*, 411 S.W.3d 184 (Ark. 2012); *Tri-State Ins. Co. v. B & L Prods., Inc*., 964 S.W.2d 402 (Ark. Ct. App. 1998); *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153 (Cal. 1993); *Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460 (Cal. 2005); Compare, *Thompson v. Md. Cas. Co.,* 84 P.3d 496 (Colo. 2004) with *Pompa v. Am. Family Mut. Ins. Co*., 520 F.3d 1139 (10th Cir. Colo. 2008); *Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co*., 876 A.2d 1139 (Conn. 2005); *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246 (Del. 2008); *Cont'l Cas. Co. v. Alexis I Du Pont Sch. Dist*., 317 A.2d 101 (Del. 1974); *Navigators Ins. Co. v. Baylor & Jackson, PLLC*, 888 F. Supp. 2d 55 (D.D.C. 2012); *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289 (11th Cir. Fla. 2006); *Colony Ins. Co. v. G & E Tires & Serv. Inc*., 777 So.2d 1034 (Fla. Dist. Ct. App. 2000); Compare, *Anderson v. S. Guar. Ins. Co. of Ga*., 508 S.E.2d 726 (Ga. Ct. App. 1998), with *Hoover v. Maxum Indem. Co*., 730 S.E.2d 413 (Ga. 2012); *Burlington Ins. Co. v. Oceanic Design & Constr., Inc*., 383 F.3d 940 (9th Cir. Haw. 2004); *Weight v. USSA Cas. Ins. Co*., 782 F. Supp. 2d 1114 (D. Haw. 2011); *Amco Ins. Co. v. Tri-Spur Inv. Co*., 101 P.3d 226 (Idaho 2004); *Hoyle v. Utica Mut. Ins. Co*., 48 P.3d 1256 (Idaho 2002); *Pekin Ins. Co. v. Wilson*, 930 N.E.2d 1011 (Ill. 2010); *Am Econ. Ins. Co. v. Holabird & Root*, 886 N.E.2d 1166 (Ill. App. Ct. 2008); Compare, *Transam. Ins. Co. v. Kopko*, 570 N.E.2d 1283 (Ind. 1991), with *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279 (Ind. 2006); see also, *Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc*., 917 N.E. 2d 1258 (Ind. Ct. App. 2009); *Talen v. Emp'rs Mut. Cas. Co*., 703 N.W.2d 395 (Iowa 2005); *Scottsdale Ins. Co. v. Attys. Process & Investigation Servs*., 778 N.W.2d 218 (Iowa App. 2009); *Miller v. Westport Ins. Corp*., 200 P.3d 419 (Kan. 2009); *Hartford Fire Ins. Co. v. Vita Craft Corp*., 911 F. Supp. 2d 1164 (D. Kan. 2012); Compare, *James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co*., 814 S.W.2d 273 (Ky. 1991), with *Lenning v. Commer. Union Ins. Co*., 260 F.3d 574 (6th Cir. Ky. 2001); *Elliott v. Cont'l Cas. Co*., 949 So.2d 1247 (La. 2007); *Grimaldi Mech. L.L.C. v. Gray Ins. Co*., 933 So. 2d 887 (La. Ct. App. 2006); *York Ins. Group v. Lambert*, 740 A.2d 984 (Me. 1999); *Aetna Cas. & Sur. Co. v. Cochran*, 651 A.2d 859 (Md. 1995); *Brohawn v. Transam. Ins. Co*., 347 A.2d 842 (Md. 1975); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co*., 788 N.E.2d 522 (Mass. 2003); *Millipore Corp. v. Travelers Indem. Co*., 115 F.3d 21 (1st Cir. 1907); *Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co*., 550 N.W.2d 440 (Mich. 1996); *Matthew T. Szura & Co. v. Gen. Ins. Co. of Am*., 543 Fed.Appx. 538 (6th Cir. 2013); *Pedro Cos. v. Sentry Ins*., 518 N.W.2d 49 (Minn. Ct. App. 1994); *MGM Resorts Miss., Inc. v. ThyssenKrupp Elevator Corp*., 58 F. Supp. 3d 697 (N.D. Miss. 2014); *Auto Ins. Co. v. Lipscomb*, 75 So. 3d 557 (Miss. 2011); *Allen v. Cont'l W. Ins. Co*., 436 S.W.3d 548 (Mo. 2014); *Standard Artificial Limb v. Allianz Ins. Co*., 895 S.W.2d 205 (Mo. Ct. App. 1995); *Revelations Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P.3d 919 (Mont. 2009); *Landa v. Assur. Co. of Am*., 307 P.3d 284 (Mont. 2013); *Peterson v. Ohio Cas. Group*, 724 N.W.2d 765 (Neb. 2006); *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 497 P.3d 625 (Nev. 2021); *Webster v. Acadia Ins. Co*., 934 A.2d

567, 570 (N.H. 2007); *Ross v. Home Ins. Co*., 773 A.2d 654 (N.H. 2001); *Abouzaid v. Mansard Gardens Assocs., LLC*, 23 A.3d 338 (N.J. 2011); but see, *Flomerfelt v. Cardiello*, 997 A.2d 991 (N.J. 2010); *W. Heritage Bank v. Fed. Ins. Co*., 938 F. Supp. 2d 1219 (D.N.M. 2013); but see, *Sw. Steel Coil, Inc. v. Redwood Fire & Cas. Ins. Co*., 140 N.M. 720 (N.M. Ct. App. 2006); *QBE Ins. Corp. v. Adjo Contr. Corp*., 121 A.D.3d 1064 (N.Y. App. Div. 2d Dep't 2014); *Fitzpatrick v. Am. Honda Motor Co., Inc*., 575 N.E.2d 90 (N.Y. 1991); *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C*., 692 S.E.2d 605 (N.C. 2010); *Erie Ins. Exch. v. Builders Mut. Ins. Co*., 742 S.E.2d 803 (N.C. Ct. App. 2013); *Tibert v. Nodak Mut. Ins. Co.*, 816 N.W.2d 31 (N.D. 2012); *Ward v. United Foundaries, Inc*., 951 N.E.2d 770 (Ohio 2011); but see, *Brush Wellman, Inc. v. Certain Underwriters at Lloyd's, London*, No.03-CVH-08, 2006 WL 4455491(Ohio Com. Pl. Aug. 30, 2006); *Poteau Ford Mercury, Inc. v. Zurich Am. Ins. Co*., No. 06-1030, 2009 WL 9508739 (Okla. Civ. App. May. 8, 2009); *First Bank of Turley v. Fid. & Deposit Ins. Co*., 928 P.2d 298 (Okla. 1996); *Ledford v. Gutoski*, 877 P.2d 80 (Or. 1994); *Insenhart v. Gen. Cas. Co*., 377 P.2d 26 (Or. 1962); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co*., 908 A.2d 888 (Pa. 2006); *Am. & Foreign Ins. Co. v. Jerry's Sport Center, Inc*., 2 A.3d 526 (Pa. 2010); *Unitrin Direct Ins. Co. v. Esposito*, 280 F. Supp. 3d 666, 670-71 (E.D. Pa. 2017); *Quality Concrete Corp. v. Travelers Prop. Cas. Co. of Am*., 43 A.3d 16 (R.I. 2012); *Med. Malpractice Joint Underwriting Ass'n of R.I. v. Charlesgate Nursing Ctr., L.P.*, 115 A.3d 998 (R.I. 2015); *Jessco, Inc. v. Builders Mut. Ins. Co*., 472 Fed. Appx. 225 (4th Cir. 2012); *Town of Duncan v. State Budget & Control Bd*., 482 S.E.2d 768 (S.C. 1997); but see, *USAA Prop. & Cas. Ins. Co. v. Clegg*, 661 S.E.2d 791 (S.C. 2008); *State Farm Fire & Cas. Co. v. Harbert*, 741 N.W.2d 228 (S.D. 2007); *Travelers Indem. Co. of Am. v. Moore & Assocs*., 216 S.W.3d 302 (Tenn. 2007); *Forrest Const., Inc. v. Cincinnati Ins. Co*., 703 F.3d 359 (6th Cir. 2013); *Clark v. Sputniks*, 368 S.W.3d 431 (Tenn. 2012); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co*., 279 S.W.3d 650 (Tex. 2009); *Basic Research, LLC v. Admiral Ins. Co*., 297 P.3d 578 (Ut. 2013); but see, *Fire Ins. Exch. v. Estate of Therkelsen*, 27 P.3d 555 (Ut. 2001); *R.L. Vallee, Inc. v. Am. Int'l Specialty Lines Ins. Co*., 431 F. Supp. 2d 428 (D. Vt. 2006); *Davis v. Liberty Mut. Ins. Co.*, 19 F. Supp. 2d 193 (D. Vt. 1998); *The AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d 532 (Va. 2012); *Marks v. Scottsdale Ins. Co*., 791 F.3d 448 (4th Cir. 2015); *Campbell v. Ticor Title Ins. Co*., 209 P.3d 859 (Wash. 2009); *Truck Ins. Exch. v. VanPort Homes, Inc*., 58 P.3d 276 (Wash. 2002); *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 557 S.E.2d 801 (W. Va. 2001); but see, *State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc*., 542 S.E.2d 876 (W. Va. 2000); *Fireman's Fund Ins. Co. v. Bradley Corp*., 660 N.W.2d 666 (Wis. 2003); but see, *Olson v. Farrar*, 809 N.W.2d 1 (Wis. 2012); *First Wyo. Bank, N.A. v. Cont'l Ins. Co*., 860 P.2d 1094 (Wyo. 1993); *Reisig v. Union Ins. Co*., 870 P.2d 1066 (Wyo. 1994).

B. <u>Kim Kardashian</u>

In an underlying action, Tria sued competitor Radiancy for false advertising, unfair competition, and trademark infringement. Radiancy counterclaimed against Radiancy and its celebrity spokesperson, Kim Kardashian, alleging Tria made false and misleading statements about its own products which damaged Radiancy. Tria and Kardashian claimed:

- The Tria Hair product was "safe," "effective," and "painless"
- The Tria Hair product is equivalent to professionl laser hair removal
- The Tria Hair product is the "first" and "only" at-home laser hair removal device cleared by the FDA

- The Tria Skin product is “faster,” “superior,” “more powerful,” and more “advanced” than other acne treatment products on the market
- The Tria Skin product is the “first and only” blue light acne treatment equivalent to blue light therapy available from dermatologists.

Tria’s insurance policy provided coverage for publication of material that disparages goods, products or services. In *Tria Beauty, Inc. v. National Union Fire Ins. Co*. (2013) 2013 W.L. 2818649, the federal district court found that these alleged statements constituted “implied disparagement,” because they implied that Radiancy’s products were inferior, and thus presented potential liability falling within the insuring language. *Id*., at *6.

However, the court also found that no publications were made during the insurer’s policy period, and that an intellectual property exclusion precluded coverage. Thus, the insurer had no duty to defend. *Id*., at *8.

III. RIGHT TO INDEPENDENT COUNSEL

A “tripartite relationship” is created when an insurance company retains counsel to defend the insured without reservation. However, where an insurance company defends its insured through a reservation of its rights to later deny indemnity coverage, a potential for a conflict of interest may arise between the insured and the insurance company. In this situation, the question arises as to whether the insured is entitled to be represented by independent counsel.

A. Does a Conflict of Interest Give Rise to a Right to Independent Counsel?

1. Twenty Five States Say Yes

Twenty-five states have recognized the insured's right to independent counsel where a conflict of interest exists: Alaska, Arkansas, California, Connecticut, Florida, Illinois, Indiana, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Virginia, and Wisconsin. See, *CHI of Alaska, Inc. v. Employers Reinsurance Corp*., 844 P.2d 1113 (Alaska 1993), codified in Alaska Stat. § 21.89.100 (1995); *Union Ins. Co. v. Knife Co., Inc*., 902 F. Supp. 877, 880 (W.D. Ark. 1995); *San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc*., 162 Cal.App.3d 358 (1984), codified in Civil Code § 2860 (1996); *Berlinski v. Ovellette*, 164 Conn. 482, 325 A.2d 239 (1973); Fla. Stat. § 627.426(2)(b)(3) (1996); *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24 (1976); *Armstrong Cleaners, Inc. v. Erie Ins. Exchange*, 364 F. Supp. 2d 797 (S.D. Ind. 2005); *Dugas Pest Control of Baton Rouge, Inc. v. Mutual Fire, Marine and Inland Ins. Co*., 504 So. 2d 1051, 1054 (La.App. 1st Cir. 1987); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638–39 (1st Cir. 1989) [applying Maine law]; *Brohawn v. Transamerica Ins. Co*., 276 Md. 396, 347 A.2d 842, 854 (1975); *Prahm v. Rupp Const. Co*., 277 N.W.2d 389, 391 (Minn. 1979) *Moeller v. American Guar. and Liability Ins. Co*., 707 So. 2d 1062 (Miss. 1996); *Safeco Ins. Co. of America v. Rogers*, 968 S.W.2d 256, 258 (Mo.App. 1998); *Hawkeye Cas. Co. v. Stoker*, 154 Neb. 466, 48 N.W.2d 623 (1951); *Crystal Bay General Imp. Dist. v. Aetna Cas. & Sur. Co*., 713 F. Supp. 1371, 1379 (D. Nev. 1989);

Battista v. Olson, 250 N.J. Super. 330, 594 A.2d 260 (App. Div. 1991); *69th Street and 2nd Ave. Garage Associates, L.P. v. Ticor Title Guarantee Co.*, 207 A.D.2d 225, 622 N.Y.S.2d 13, 14 (1st Dept. 1995); *Fetch v. Quam*, 530 N.W.2d 337, 361 (N.D. 1995); *Socony-Vacuum Oil Co. v. Continental Cas. Co*., 144 Ohio St. 382, 29 Ohio Op. 563, 59 N.E.2d 199 (1945); *Rector, Wardens and Vestryman of St. Peter's Church in City of Philadelphia v. American National Fire Ins. Co*., 2002 WL 59333 (E.D. Pa. 2002), aff'd, 97 Fed. Appx. 374 (3d Cir. 2004); *Employers' Fire Ins. Co. v. Beals*, 103 R.I. 623, 240 A.2d 397 (1968); *Steel Erection Co. v. Travelers Indem. Co*., 392 S.W.2d 713, 716 (Tex. Civ. App. San Antonio 1965); *Norman v. Insurance Co. of North America*, 218 Va. 718, 239 S.E.2d 902, 907 (1978); *American Motorists Ins. Co. v. Trane Co*., 544 F. Supp. 669, 686 (W.D. Wis. 1982), judgment aff'd, 718 F.2d 842 (7th Cir. 1983).

2. **Six Say No:**

Six states, Arizona, Hawaii, Michigan, North Carolina, Oregon, Vermont and Washington, have denied the obligation to appoint independent counsel in conflict of interest situations. See, *Farmers Ins. Co. of Arizona v. Vagnozzi*, 138 Ariz. 443, 675 P.2d 703, 708 (1983) [Because of this undivided loyalty to the insured above the interests of the insurance company, the insurance company is not required to retain independent counsel because of the inherent conflict of interest that may otherwise exist with respect to the reservation of rights defense.]; *Finley v. Home Ins. Co*., 90 Haw. 25, 975 P.2d 1145 (1998); *Federal Ins. Co. v. X-Rite, Inc*., 748 F. Supp. 1223 (W.D. Mich. 1990) [the insured has no absolute right to select its own independent counsel provided that the insurance company exercises good faith in its selection of defense counsel and defense counsel is truly independent]; National Mortg. Corp. v. American Title Ins. Co., 41 N.C. App. 613, 255 S.E.2d 622, 629–30 (1979), judgment rev'd on other grounds, 299 N.C. 369, 261 S.E.2d 844 (1980); *Ferguson v. Birmingham Fire Ins. Co*., 254 Or. 496, 460 P.2d 342, 348 (1969) [however, insurer has an enhanced duty of good faith]; *In re Lynch*, 226 B.R. 813 (Bankr. D.Vt. 1998) [however, insurer has a duty of full candor and complete honesty]; *Tank v. State Farm Fire & Cas. Co*., 105 Wash. 2d 381, 715 P.2d 1133 (1986) [however, insurer has an enhanced duty of good faith].

B. <u>Does A Reservation of Rights Create A *Per Se* Conflict of Interest?</u>

Courts are split on the effect of an insurance company's provision of a reservation of rights defense for its insured.

1. **States That Say Yes:**

Where an insurer defends its insured under a reservation of rights, courts in Alaska, Arkansas, California, Illinois, Maine, Massachusetts, Mississippi, Missouri, New York, Texas and Wyoming have adopted a *per se* rule that an inherent conflict of interest exists requiring the selection of independent counsel to be provided at the insurer's expense. *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 610-11 (Alaska 2003); *Union Ins. Co. v. Knife Co., Inc*., 902 F. Supp. 877, 880 (W.D. Ark. 1995) (predicting Arkansas law); *Kroll & Tract v. Paris & Paris*, 72 Cal. App. 4th 1537, 86 Cal. Rptr. 2d 78, 82 (4th Dist. 1999) (citing Cal. Civ. Code § 2860); *Nandorf, Inc. v. CNA*

Ins. Companies, 134 Ill. App. 3d 134, 88 Ill. Dec. 968, 479 N.E.2d 988, 994 (1st Dist. 1985); *Patrons Oxford Ins. Co. v. Harris*, 2006 ME 72, 905 A.2d 819 (Me. 2006); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co*., 439 Mass. 387, 788 N.E.2d 522, 539 (2003); *Moeller v. American Guar. and Liability Ins. Co*., 707 So.2d 1062, 1069 (Miss. 1996), as corrected, (Sept. 19, 1996); *Howard v. Russell Stover Candies, Inc*., 649 F.2d 620, 625 (8th Cir. 1981) (predicting Missouri Law); *Federated Dept. Stores, Inc. v. Twin City Fire Ins. Co*., 28 A.D.3d 32, 807 N.Y.S.2d 62, 66 (1st Dep't 2006); *Rhodes v. Chicago Ins. Co., a Div. of Interstate Nat. Corp*., 719 F.2d 116, 120 (5th Cir. 1983) (applying Texas law); *Insurance Co. of North America v. Spangler*, 881 F. Supp. 539, 544-45 (D. Wyo. 1995) (predicting Wyoming law).

2. **States That Say "It Depends"**

Other courts have held that defending an insured with a reservation of rights concerning coverage does not create a *per se* conflict that gives the insured the right to independent counsel. Alabama, California, Florida, Hawaii, Indiana, Louisiana, Maryland, Michigan, Minnesota, New Jersey, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Washington.

Typically these courts utilize a case by case assessment as to whether a conflict exists. The type of conflict of interest often requiring independent counsel involves situations where the outcome of a coverage issue can be affected by the defense of the underlying action. Some courts have held that an insurance company must provide independent counsel when it is defending its insured under a reservation of rights where the manner in which the case is defended can affect coverage.

L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298, 1304 (Ala. 1987); *Long v. Century Indem. Co.,* 163 Cal.App.4th 1460 (2008); *Travelers Indem. Co. of Illinois v. Royal Oak Enterprises, Inc.*, 344 F.Supp.2d 1358, 1374 (M.D. Fla. 2004), aff'd, 171 Fed.Appx. 831 (11th Cir. 2006); *Finley v. Home Ins. Co*., 90 Haw. 25, 975 P.2d 1145, 1150-1155 (1998); *Armstrong Cleaners, Inc. v. Erie Ins. Exchange*, 364 F.Supp.2d 797, 816 (S.D. Ind. 2005); *Hartford Underwriters Ins. Co. v. Foundation Health Services Inc*., 524 F.3d 588, 593 (5th Cir. 2008) [applying Louisiana law]; *Driggs Corp. v. Pennsylvania Mfrs. Ass'n Ins. Co*., 3 F. Supp. 2d 657, 659 (D. Md. 1998), aff'd, 181 F.3d 87 (4th Cir. 1999); *Central Michigan Bd. of Trustees v. Employers Reinsurance Corp.*, 117 F.Supp.2d 627, 634-635 (E.D. Mich. 2000); *Mutual Service Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368-69 (Minn. Ct. App. 1991); *Township of Readington v. General Star Ins. Co.,* 2006 WL 551404, at *4 (N.J. Super. Ct. Law Div. 2006); *Red Head Brass, Inc. v. Buckeye Union Ins. Co*., 135 Ohio App. 3d 616, 735 N.E.2d 48, 55 (9th Dist. Wayne County 1999); *Nisson v. American Home Assur. Co*., 1996 OK CIV APP 40, 917 P.2d 488, 490 (Ct. App. Div. 1 1996); *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C*., 433 F.3d 365, 366 (4th Cir. 2005) [applying South Carolina law]; *Tyson v. Equity Title & Escrow Co. of Memphis, LLC*, 282 F.Supp.2d 829, 831-32 (W.D. Tenn. 2003); *Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc*., 261 S.W.3d 24, 40 (Tex. 2008); *Tank v. State Farm Fire & Cas. Co*., 105 Wash.2d 381, 715 P.2d 1133, 1137-38 (1986).

3. **Restatement View**

The American Law Institute's Restatement was approved in May 2018. The Restatement addresses the duty to provide independent counsel under Sections 16 and 17, which state:

> § 16 – The Obligation to Provide an Independent Defense
>
> When an insurer with the duty to defend provides the insured notice of a ground for contesting coverage under § 15 [Reserving the Right to Contest Coverage] and there are facts at issue that are common to the legal action for which the defense is due and to the coverage dispute, such that the action could be defended in a manner that would benefit the insurer at the expense of the insured, the insurer must provide an independent defense of the action.
>
> § 17 – The Conduct of an Independent Defense
>
> When an independent defense is required under § 16: 1) The insurer does not have the right to defend the legal action; 2) The insured may select defense counsel and related service providers; 3) The insurer is obligated to pay the reasonable fees of the defense counsel and related service providers on an ongoing basis in a timely manner; 4) The insurer has the right to associate in the defense of the legal action under the rules stated in § 23 [The Right To Associate In The Defense]; and 5) The rules stated in § 11 [Confidentiality] govern the insured's provision of information to the insurer.
>
> Under these sections, if an insurer reserves its rights and there are facts at issue that are common to the action being defended and the disputed coverage issue such that the action could be defended "in a manner that would benefit the insurer at the expense of the insured," an insurer must provide independent counsel.

C. ***Depp v. Heard*, Circuit Court of Fairfax County, Virginia, Case No. CL-2019-0002911.**

In Depp v. Heard, one insurer accepted Heard's defense subject to a reservation of rights, including the right to disclaim coverage based on the intentional act exclusion. Based on that reservation of rights, that insurer agreed to provide Heard with independent counsel.

A second insurer accepted Heard's defense subject to a reservation of rights based on California Insurance Code Section 533, which precludes coverage for (and a duty to defend against) conduct that constitutes a "wilful act," but declined to provide Heard with independent counsel.

The first insurer is currently suing the second insurer for reimbursement of fees and costs that it paid to Heard's independent counsel.

The second insurer is currently suing Heard for reimbursement of ALL defense fees and costs, because the jury verdict establishes that Heard acted willfully, and as such, California public policy and California Insurance Code Section 533 preclude coverage and any duty to defend.

The end result remains to be seen.

IV. REASONABLE HOURLY RATES FOR INDEPENDENT COUNSEL

A. What is a "Reasonable Hourly Rate"?

Several states have adopted multi-factor tests for the reasonableness of an attorney's fee award at the conclusion of a case. Most of those tests include consideration of the result received. However, such a test is not useful for determining reasonable hourly rates to be paid to independent counsel at the beginning of the case. Others state that rates must be reasonable, but provide no useful test for what is "reasonable." See, e.g., *Golotrade Shipping & Chartering, Inc. v. Travelers Indent. Co*., 706 F. Supp. 214, 219 (S.D.N.Y. 1989) [stating that once a conflict of interest arises, "the duty to defend includes a duty to provide independent defense counsel to the insured, whose reasonable fee is to be paid by the insurer but who is to be appointed by the insured"]; *U.S. Fid. & Guar. Co. v. Louis A. Roser Co.*, 585 F.2d 932, 941 (8th Cir. 1978) ["USF&G must now reimburse appellant for the fair and reasonable value of the services rendered by appellant's independent counsel in defending…."]; *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 F. Supp 2d 797, 801 (S.D. Ind, 2005) ["the policyholders are entitled to select their own counsel to defend the underlying claim, subject to reasonable approval by the insurer, with reasonable fees and expenses paid by the insurer."]; *HK Sys. Inc. v Admiral Ins. Co.*, 2005 WL 1563.340, at *18 (E.D. Wis. June 27, 2005) [opining that the Wisconsin Supreme Court "would find that the insurer's responsibility for defense costs extends only to a reasonable charge"].

California and Alaska have adopted similar statutes which govern reasonable rates for independent counsel. In California, Civil Code § 2860 permits insurers to limit the rates for independent counsel "to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the [third party] claim arose or is being defended.

Similarly, Alaska Stat. §21.89.100(d) provides that: "Unless otherwise provided in the insurance policy, the obligation of the insurer to pay the fee charged by the independent counsel is limited to the rate that is actually paid by the insurer to an attorney in the ordinary course of business in the defense of a similar civil action in the community in which the claim arose or is being defended."

B. ***Depp v. Heard*, Circuit Court of Fairfax County, Virginia, Case No. CL-2019-0002911.**

In Depp v. Heard, In Depp v. Heard, two insurers agreed to defend Amber Heard. The insurers initially set an hourly rate for partners, associates and paralegals, at amounts the insurer paid in the ordinary course of business.

Heard's lawyers proposed a budget, and proposed SIGNIFICANTLY HIGHER hourly rates for specific attorneys, and for law clerks and paralegals. (*Their proposed rates for law clerks was higher than one of your panelist's hourly rate after 35 years of experience and who is a member of both ACCOC and ABOTA.*)

Later, the insurers and Heard negotiated a cap of a set amount through post-trial motions, plus another cap of another set amount for an attorney to travel with Heard to the defamation trial of Depp v. Sun newspaper in the UK.

The second insurer did not agree to provide Heard with independent counsel. However, both insurers agreed to hire separate counsel to handle subpoenas, and other counsel to represent third party witnesses (most of whom were in California), both under separate capped fees.

By the time the trial date was continued to 2022, the cap for Heard's attorneys had been already been exhausted. Heard's attorneys still wanted to take up to 80 more depositions, retain 15 experts, and review over 1.3 million documents.

The parties then negotiated agreed hourly rates for her counsel that are consistent with what the insurers pay in the ordinary course of business for similar types of cases.

To help why Heard had not made certain donations to charity, Heard's attorney argued in closing that Heard had incurred over $7 million in attorney fees and costs.

The first insurer is currently suing the second insurer for reimbursement of fees and costs that it paid to Heard's independent counsel.

The second insurer is currently suing Heard for reimbursement of ALL defense fees and costs [next topic below], contending that the jury verdict and resulting judgment establish that Heard acted willfully, and as such, California public policy and California Insurance Code Section 533 preclude coverage and any duty to defend

The end result remains to be seen.

V. REIMBURSEMENT OF DEFENSE FEES AND COSTS

In 1997, the California Supreme Court held that an insurer may recoup defense costs for claims that are not potentially covered by the policy in *Buss v. Superior Court*, 939 P.2d 766, 778 (Cal. 1997), noting that to seek such reimbursement in a "mixed action" - - one involving claims that are potentially covered and ones that are not even potentially covered - - the insured bears the

burden of proving by a preponderance of the evidence which defense costs are attributable to the claims that are not even potentially covered. The *Buss* court recognized that an insurer has no duty to defend claims that are not potentially or arguably covered by the policy. *Id*. at 776. The court reasoned that "[t]he insurer therefore has a right of reimbursement [for the defense costs for such claims] that is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual." *Id*. at 776. According to the California Supreme Court, the implied right of reimbursement works to prevent unjust enrichment to the insured. *See id*. at 777.

Some states have permitted reimbursement only if the policy contains an express provision regarding reimbursement. Other states have permitted reimbursement if the insurer and insured agree via a non-waiver agreement or bilateral reservation of rights. Some have refused to permit reimbursement in any circumstances, reasoning that reimbursement is inconsistent with the insurer's duty to provide a complete defense. The chart below breaks down those positions by jurisdiction:

Reimbursement Allowed with Non-Waiver Agreement or Bilateral Reservation of Rights	Reimbursement Allowed with Unilateral Reservation of Rights	Reimbursement Allowed if Express Policy Provision	Reimbursement Not Allowed	Undecided
Alabama; Florida; Georgia; Hawaii; Nevada;	California; Colorado; Connecticut; Delaware; Kentucky; Michigan; Montana; New Jersey; New Mexico; Ohio; Tennessee	Idaho; Illinois; Minnesota; Mississippi; New York; Pennsylvania; Texas; Utah; Virginia; Washington; Wyoming	Alaska; Arizona; Arkansas; Maine; Missouri;	District of Columbia; Indiana; Kansas; Louisiana; Maine; Massachusetts; Nebraska; New Hampshire; North Carolina; North Dakota; Oklahoma; Oregon; Rhode Island; South Carolina; South Dakota; Vermont; West Virginia; Wisconsin

Mount Airy Ins. Co. v. The Doe Law Firm, 688 So.2d 534, 538 (Ala. 1995); *Attorneys' Liability Protection Society, Inc. v. Ingaldson Fitzgerald*, No. S-15683, 2016 W.L. 1171299 at *9 (Alaska 2016); *Medical Liab. Mut. Ins. Co. v. Alan Curtis Enterprises*, 373 Ark. 525, 529, 285 S.W.3d 233, 237 (2008); *Great American Ins. Co. v. PCR Venture of Phoenix, LLC*, No. 13-00570, 2015 W.L.

10008627, at *6 (D. Ariz. 2015); *Med. Liability Mut. Ins. Co. v. Alan Curtis Enterprises, Inc*., 285 S.W.3d 233, 239 (Ark. 2008); *Buss v. Superior Court*, 16 Cal. 4th 35, 61, 939 P.2d 766, 784 (1997); *Hecla Min. Co. v. N.H. Ins. Co*., 881 P.2d 1083, 1089 (Colo. 1991); *Security Ins. Co. v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 124, 264 Conn. 688, 716 (2003); *Nationwide Mut. Ins. Co. v. Flagg*, 789 A.2d 586, 597 (Del. Super. Ct. 2001); *Colony Ins. Co. v. G & E Tires & Serv., Inc.*, 777 So. 2d 1034, 1039 (Fla. App. 2000); *Illinois Union Ins. Co. v. NRI Constr., Inc.,* 846 F.Supp.2d 1366 (N.D. Ga. 2012); *Scottsdale Ins. Co. v. Sullivan Properties, Inc.,* No. 04-00550-2, 7 W.L. 2247795 at *7 (D. Haw. 2007); *General Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.*, 828 N.E.2d 1092, 1101, 215 Ill. 2d 146, 160 (2005); *Pekin Ins. Co. v. Tysa*, 3:05-CV-00030, 2006 W.L. 3827232 at *19 (S.D. Iowa 2006); *Travelers Prop. Cas. Co. of America v. Hillerich & Bradsby Co*., 589 F.3d 257, 268 (6th Cir. 2010); *Perdue Farms, Inc. v. Travelers Cas. & Sur. Co*., 448 F.3d 252, 258 (4th Cir. 2006) [applying Maryland law]; *Travelers Prop. & Cas. Co. v. R.L. Polk & Co., Inc*., No. 06-2895, 2008 W.L. 786678 at * 1-2 (E.D. Mich. 2008); *Westchester Fire Ins. Co. v. Wallerich*, 563 F.3d 707, 719 (8th Cir. 2009) [applying Minnesota law]; *Certain Underwriters at Lloyd's, London v. Magnolia Mgmt. Corp*., No. 3:04-CV-540, 2009 W.L. 1873026 at * 1 (S.D. Miss. 2009); Liberty Mut. Ins. Co. v. FAG Bearings Corp., 153 F.3d 919, 924 (8th Cir. 1998) [applying Missouri law]; *Horace Mann Ins. Co. v. Hanke*, 312 P.3d 429, 436 (Mont. 2013); *Nautilus Ins. Co. v. Access Med., LLC*, 2021 Nev. LEXIS 11, *18, 137 Nev. Adv. Rep. 10, 2021 WL 936076; *Hebela v. Healthcare Ins. Co*., 370 N.J. Super. 260, 279 (App. Div. 2004); *Resure, Inc. v. Chemical Distributors, Inc*., 927 F.Supp. 190, 194 (M.D. La. 1996); *Hebela v. Healthcare Ins. Co.*, 851 A.2d 75, 86, 370 N.J. Super. 260, 278-279 (2004); *American West Home Ins. Co. v Gjonaj Realty & Mgt. Co.,* 192 A.D.3d 28, 36 (N.Y. App. Div. 2020); *Chiquita Brands Int., Inc. v. National Ins. Co. of Pittsburgh*, No. C-140492, 2015 W.L. 9594035 at *5 (Ohio App. 2015); *American & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 606 Pa. 584, 618, 2 A.3d 526, 546 (2010); *Cincinnati Ins. Co. v. Grand Pointe, LLC,* 501 F.Supp.2d 1145, 1166 (E.D. Tenn. 2007); *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 54 (Tex. 2008); *U.S. Fidelity v. U.S. Sports Specialty*, 270 P.3d 464, 468 (Utah 2012); *Protection Strategies, Inc. v. Starr Indem. & Liab. Ins. Co*., No. 1:130CV-00763, 2014 W.L. 1655370 at *9 (E.D. Va. 2014); *National Surety Corp. v. Immunex Corp.*, 176 Wn.2d 872, 884, 297 P.3d 688, 693 (2013); *Shoshone First Bank v. Pac. Emp. Ins. Co*., 2 P.3d 510, 513-514 (Wyo. 2000).

A. Dr. Jerry Buss

By the time the California Supreme Court decided Buss v. Superior Court (Transamerica Ins. Co.) (1997) 16 Cal.4th 35, Dr. Jerry Buss owned the Lakers (basketball), Kings (hockey), Lazers (soccer), Great Western Forum (arena), Forum Entertainment Network, Box Seat, and Prime Ticket Network (cable networks). Buss contracted with H&H Sports for advertising. In short, he had money.

H&H sued Buss for 27 causes of action, most dealing with breach of contract, but one cause of action for defamation. Buss' insurer agreed to defend based on potential coverage for one cause of action, defamation. However, as required by California law, the insurer provided a full defense, but reserved the right to seek reimbursement of defense fees and costs incurred to defend non-covered claims.

Buss settled with H & H for $8.5 million. Transamerica refused to contribute to the settlement, but paid over $1 million in defense fees and $20,000 to $55,000 for expert fees.

Buss sued Transamerica for breach of contract and bad faith, alleging Transamerica was obligated to pay the settlement. Transamerica cross-complained for recovery of its defense fees and costs, other than for the defamation cause of action.

The California Supreme Court summarized its holdings:

> The questions we shall address, and the answers we shall give, are these: First, may the insurer seek reimbursement from the insured for defense costs? Yes, as to claims that are not even potentially covered, but no, as to those that are. Second, for what specific costs may the insurer obtain reimbursement? Those that can be allocated solely to claims that are not even potentially covered. Third, when the insurer seeks reimbursement, which party must carry the burden of proof? The insurer. Fourth and final, what is the burden of proof? Proof by a preponderance of the evidence.

Why don't courts summarize their holdings this clearly all the time? It would have made law school a whole lot easier!

VI. CONCLUSION

Celebrity trials can pose important insurance coverage issues. And boring coverage issues are a little more interesting when they involve celebrities.