



## 99TH GENERAL ASSEMBLY

### State of Illinois

2015 and 2016

SB1296

Introduced 2/18/2015, by Sen. John G. Mulroe

#### SYNOPSIS AS INTRODUCED:

New Act

Creates the Insured's Independent Counsel Act. Provides that if an insurer has a duty to defend an insured under a policy of insurance and a significant and actual conflict of interest arises that imposes a duty on the insurer to provide independent counsel to the insured, unless the insured waives the right to independent counsel in writing, the insurer shall provide independent counsel to the insured. Provides that the phrase "significant and actual conflict of interest" excludes specified circumstances. Adds provisions governing: the selection of independent counsel; retention of other counsel by an insured; duties of the independent counsel; privileged information; waiver of the right to select independent counsel; and cooperation between the insurer, insured, and independent counsel.

LRB099 10112 HEP 30335 b

1 AN ACT concerning insurance.

2 **Be it enacted by the People of the State of Illinois,**  
3 **represented in the General Assembly:**

4 Section 1. Short title. This Act may be cited as the  
5 Insured's Independent Counsel Act.

6 Section 5. Provision of independent counsel required.

7 (a) If an insurer has a duty to defend an insured under a  
8 policy of insurance and a significant and actual conflict of  
9 interest arises that imposes a duty on the insurer to provide  
10 independent counsel to the insured, the insurer shall provide  
11 independent counsel to the insured as provided in this Act  
12 unless the insured waives the right to independent counsel in  
13 writing.

14 (b) For purposes of this Act, "significant and actual  
15 conflict of interest" does not include:

16 (1) claims or facts in a civil action for which the  
17 insurer denies coverage;

18 (2) the mere issuance of a reservation of rights letter  
19 by the insurer;

20 (3) a claim of damages in excess of the policy limits;

21 (4) a claim of punitive damages; or

22 (5) any other conflict that is not significant and  
23 actual.

1 Section 10. Independent counsel selection.

2 (a) If a significant and actual conflict of interest arises  
3 that requires appointment of independent counsel, the insurer  
4 shall provide the insured with a list of 3 attorneys, from  
5 separate law firms, who are independent of the insurer's  
6 approved law firm panel. The insured must select one attorney  
7 from the list to defend the insured.

8 (b) An independent counsel retained under this Act must  
9 have:

10 (1) at least 10 years of experience in civil litigation  
11 that includes defense experience in the general subject  
12 areas at issue in the civil action; and

13 (2) malpractice insurance.

14 (c) The insurer may also require that the independent  
15 counsel follow any guidelines the insurer has in place for  
16 counsel it retains in the defense of similar civil actions in  
17 the ordinary course of business. The obligation of the insurer  
18 to pay the fee charged by the independent counsel is limited to  
19 the rate that is actually paid by the insurer to an attorney in  
20 the ordinary course of business in the defense of a similar  
21 civil action in the community in which the claim arose or is  
22 being defended. In providing independent counsel, the insurer  
23 is not responsible for the fees and costs of defending an  
24 allegation for which coverage is properly denied and is  
25 responsible only for the fees and costs to defend those

1 allegations for which the insurer either reserves its position  
2 as to coverage or accepts coverage. The independent counsel  
3 shall keep detailed records allocating fees and costs  
4 accordingly.

5 (d) An insurance policy may contain a provision that  
6 provides a method of selecting independent counsel which  
7 complies with this Section.

8 Section 15. Other counsel. Any counsel the insured may  
9 retain in addition to the independent counsel selected under  
10 Section 10 of this Act shall be hired at the insured's sole  
11 expense.

12 Section 20. Duties of independent counsel; privileged  
13 information. Independent counsel hired under this Act shall  
14 timely consult with the insurer on all matters relating to the  
15 civil action and shall disclose to the insurer in a timely  
16 manner all information relevant to the civil action, except  
17 information that is privileged and solely relevant to disputed  
18 coverage. A claim of privilege is subject to review in the  
19 appropriate court. Information disclosed by the independent  
20 counsel or the insured does not waive another party's right to  
21 assert privilege or work product protection.

22 Section 25. Waiver of right to select independent counsel.  
23 An insured may waive the right to select independent counsel by

1 signing a statement that reads substantially as follows: "I  
2 have been advised of my right to select independent counsel to  
3 represent me in this lawsuit and of my right under State law to  
4 have all reasonable expenses of an independent counsel paid by  
5 my insurer. I have considered this matter fully and at this  
6 time I am waiving my right to select independent counsel. I  
7 have authorized my insurer to select a defense counsel to  
8 represent me in this lawsuit."

9 Section 30. Cooperation between insurer, insured, and  
10 independent counsel. Independent counsel shall cooperate fully  
11 in exchanging information that is consistent with ethical and  
12 legal obligations to the insured. Nothing in this Act relieves  
13 the insured of the duty to cooperate fully with the insurer as  
14 required by the terms of the insurance policy.