



Sen. John G. Mulroe

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LRB099 10112 JLS 34136 a

1 AMENDMENT TO SENATE BILL 1296

2 AMENDMENT NO. _____. Amend Senate Bill 1296 by replacing
3 everything after the enacting clause with the following:

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" means an insurance policy coverage issue
16 upon which the insurer has reserved its rights and that the

1 outcome of that insurance policy coverage issue can be
2 controlled by the insured's counsel's defense of the lawsuit. A
3 "significant and actual conflict of interest" does not include:

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

6 (2) the mere issuance of a reservation of rights letter
7 by the insurer;

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

9 (4) a claim of punitive damages; or

10 (5) any other conflict that is not significant and
11 actual.

12 Section 10. Independent counsel selection.

13 (a) If a significant and actual conflict of interest arises
14 that requires appointment of independent counsel, the insurer
15 shall provide the insured with a list of 3 attorneys who are
16 independent of the insurer's approved law firm panel and meet
17 the criteria set forth in subsection (b). The insured must
18 either select one attorney from the list or select alternative
19 counsel of its choosing who also meets the criteria set forth
20 in subsection (b) to defend the insured.

21 (b) Independent counsel retained under this Act must have:

22 (1) significant defense litigation experience in the
23 general subject areas at issue in the civil action; and

24 (2) malpractice insurance.

25 (c) The insurer may also require that the independent

1 counsel follow any guidelines the insurer has in place for
2 counsel it retains in the defense of similar civil actions in
3 the ordinary course of business. The obligation of the insurer
4 to pay the fee charged by the independent counsel is limited to
5 the rate that is actually paid by the insurer to an attorney in
6 the ordinary course of business in the defense of a similar
7 civil action in the community in which the claim arose or is
8 being defended. In providing independent counsel, the insurer
9 may not be responsible for the fees and costs of defending an
10 allegation for which coverage is properly denied and may only
11 be responsible for the fees and costs to defend those
12 allegations for which the insurer either reserves its position
13 as to coverage or accepts coverage. The independent counsel
14 shall keep detailed records allocating fees and costs
15 accordingly. Nothing in this Section shall require the insured
16 to hire separate independent counsel to defend the insured for
17 counts for which coverage has been properly denied. Independent
18 counsel may defend the insured on all counts filed against the
19 insured.

20 (d) An insurance policy may contain a provision that
21 provides a method of selecting independent counsel which
22 complies with this Section.

23 Section 15. Other counsel. Any counsel the insured may
24 retain in addition to the independent counsel selected under
25 Section 10 of this Act shall be hired at the insured's sole

1 expense.

2 Section 20. Duties of independent counsel; privileged
3 information. Independent counsel hired under this Act shall
4 timely consult with the insurer on all matters relating to the
5 civil action and shall disclose to the insurer in a timely
6 manner all information relevant to the civil action, except
7 privileged information solely related to the significant and
8 actual conflict of interest. A claim of privilege is subject to
9 review in the appropriate court. Information disclosed by the
10 independent counsel or the insured to the insurer does not
11 operate as a waiver of any applicable privilege or work product
12 protection.

13 Section 25. Waiver of right to select independent counsel.
14 An insured may waive the right to select independent counsel by
15 signing a statement that reads substantially as follows: "I
16 have been advised of my right to select independent counsel to
17 represent me in this lawsuit and of my right under State law to
18 have all reasonable expenses of an independent counsel paid by
19 my insurer. I have considered this matter fully and at this
20 time I am waiving my right to select independent counsel. I
21 have authorized my insurer to select a defense counsel to
22 represent me in this lawsuit."

23 Section 30. Cooperation between insurer, insured, and

1 independent counsel. Independent counsel shall cooperate fully
2 in exchanging information that is consistent with ethical and
3 legal obligations to the insured. Nothing in this Act is
4 intended nor shall restrict independent counsel's exercise of
5 professional judgment in rendering legal services for the
6 insured or otherwise interfere with any ethical directive
7 governing the conduct of counsel. Nothing in this Act relieves
8 the insured of the duty to cooperate fully with the insurer as
9 required by the terms of the insurance policy.

10 Section 35. Insurer's counsel. The insurer has the right
11 to retain its own counsel in addition to the independent
12 counsel selected under Section 10 of this Act to associate in
13 and participate in all aspects of the lawsuit at the insurer's
14 own expense.".