No. 15-1351

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOUNT VERNON FIRE INSURANCE COMPANY,

Plaintiff/Defendant-In-Counterclaim/Appellee

v.

VISIONAID, INC.

Defendant/Plaintiff-In Counterclaim/Appellant

MOTION FOR LEAVE OF COURT TO FILE AMICUS BRIEF

Pursuant to Federal Rules of Appellate Procedure 29(c)(3), United Policyholders (the "*amicus*") request the court's permission to file an *amicus curiae* brief, submitted herewith. As grounds for this motion *amicus* states:

1. This Court issued an order for supplemental briefing by the parties on July 14, 2017, contemplating that *amici* could seek leave to file *amicus* briefs on the issue to be briefed by the parties.

2. *Amicus* is a voice and an information resource for insurance consumers in Massachusetts and throughout the United States. *Amicus* represents the interests of policyholders and is completely independent from the insurance industry. *Amicus* has a significant interest in the judicial interpretation of insurance

policies to ensure that policyholders obtain the full measure of the insurance they purchase. *Amicus* will show that, consistent with Massachusetts law and the approach of numerous courts across many jurisdictions, when an insurance company has an interest in impairing or otherwise devaluing a policyholder's counterclaim, a conflict of interest arises entitling the policyholder to independent counsel.

3. *Amicus* seeks to assist courts in the determination of important questions facing insurance customers such as those at issue in this appeal. *Amicus* previously has appeared before Massachusetts courts in insurance causes, including this case and *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813 (2014); *AllAmerica Fin. Corp. v. Certain Underwriters at Lloyd's of London*, 449 Mass. 621 (2007); *Western Alliance Ins. Co. v. Gill*, 426 Mass. 115 (1997); *Clark Equip. Co. v. Mass. Ins. Insolvency Fund*, 423 Mass. 165 (1996).

4. *Amicus* respectfully submits that its proposed *amicus curiae* brief will assist the Court in its consideration of the issues presented in this appeal.

Conclusion

For the foregoing reasons, United Policyholders respectfully requests permission to file the *amicus* brief submitted with this motion.

Dated: September 5, 2017

Respectfully submitted,

UNITED POLICYHOLDERS

By its attorney,

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Certificate of Service

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No. 15-1351

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOUNT VERNON FIRE INSURANCE COMPANY,

Plaintiff-Appellee

v.

VISIONAID, INC.

Defendant-Appellant

AMICUS BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT-APPELLANT VISIONAID, INC.

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September 5, 2017

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I. INTRODUCTION

United Policyholders respectfully submits this *amicus* brief for the Court's consideration because the resolution of this case is highly important to policyholders in Massachusetts who rely upon their liability insurance policies for defense of potentially covered claims. Although the immediate case pertains to a commercial entity, the outcome will affect the full spectrum of policyholders, from automobile and homeowners insurance to commercial general liability insurance and beyond.

II. IDENTITY AND INTEREST OF AMICUS

United Policyholders[1] is a voice and an information resource for insurance consumers in Massachusetts and throughout the United States. *Amicus* represents the interests of policyholders and is completely independent from the insurance industry. *Amicus* has a significant interest in the judicial interpretation of insurance policies to ensure that policyholders obtain the full measure of the insurance they purchase. *Amicus* will show that, consistent with Massachusetts law and the approach of numerous courts across many jurisdictions, when an insurance company has an interest in impairing or otherwise devaluing a policyholder's

[1] Pursuant to Fed. R. App. P. 26.1, United Policyholders states that it is a non-profit 501(c)(3) organization and has no parents, subsidiaries, or affiliates. Pursuant to Fed. R. App. P. 29(a)(4)(E), United Policyholders states that no party's counsel authored this brief in whole or in part, and that no party or party's counsel, and no person other than the *amicus* or its counsel, contributed money that was intended to fund preparing or submitting this brief.

counterclaim, a conflict of interest arises entitling the policyholder to independent counsel.

Amicus seeks to assist courts in the determination of important questions facing insurance customers such as those at issue in this appeal. *Amicus* previously has appeared before Massachusetts courts in insurance causes, including this case and *Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813 (2014); *AllAmerica Fin. Corp. v. Certain Underwriters at Lloyd's of London*, 449 Mass. 621 (2007); *Western Alliance Ins. Co. v. Gill*, 426 Mass. 115 (1997); *Clark Equip. Co. v. Mass. Ins. Insolvency Fund*, 423 Mass. 165 (1996).

III. ARGUMENT

A. Panel Counsel Appointed By Mount Vernon Has a Conflict of Interest That Entitles VisionAid to Select Independent Counsel.

In its split decision resolving the first two questions certified by this Court, the Supreme Judicial Court of Massachusetts acknowledged the facts creating a conflict for defense counsel representing the policyholder, VisionAid, Inc., and appointed as panel counsel by its liability insurance company, Mount Vernon Fire Insurance Company. Yet it failed to rule on the critical issue arising from the conflict facing counsel chosen and paid by a liability insurance company to defend a claim, but simultaneously pursuing a counterclaim at the policyholder's expense which arguably is against the insurance company's interest. Consistent

with the rules of professional conduct and Massachusetts law, the policyholder should choose its own attorney, not the insurance company.

The conflict arose because VisionAid had a defense and compulsory counterclaim against a wrongful termination claim asserted by its former employee, Gary Sullivan, based on Sullivan's apparent misappropriation of several hundred thousand dollars from the company. *Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 477 Mass. 343, 345, 76 N.E.3d 204, 206-07 (2017). While the Supreme Judicial Court majority held that Mount Vernon's duty to defend did not encompass pursuing or paying the costs of the counterclaim, it failed to address whether the policyholder was entitled to control both the defense and the counterclaim due to the conflict of interest. *See id.* at 354, 76 N.E.3d at 213.

The conflict is clear on the stated facts:

> Bennett [defense counsel appointed by Mount Vernon] then attempted to reach a settlement with Sullivan. Initially, Sullivan demanded $400,000, but eventually agreed to dismiss his complaint if Visionaid signed a mutual release agreement that it would not pursue him for the misappropriated funds. Visionaid would not agree to the mutual release, as it intended to bring a claim against Sullivan for the misappropriation.

Id. at 345, 76 N.E.3d at 206-07. Thus, the insurance company, responsible only for defending the claim against its policyholder, had a clear interest in releasing or devaluing the policyholder's counterclaim, to satisfy the claimant's condition for

dismissing his complaint. The policyholder, in contrast, had an equally clear interest in pursuing its counterclaim in order to recover the misappropriated funds.

Panel counsel appointed by the insurance company cannot ethically represent the policyholder given those conflicting interests. A conflict of interest clearly exists when an insurance company seeks to defend its policyholder under a reservation of rights, to the objection of the policyholder. *See, e.g.*, *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass 271, 275-76 (1970); *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 684-685 (1963). In such an instance, the policyholder is entitled to require the insurance company to either relinquish its reservation of rights or relinquish its defense of the policyholder and reimburse the policyholder for its defense costs. *See Three Sons, supra; Magoun, supra*.

But the law should not limit the right to appoint independent counsel due to conflicts of interest to those instances when a reservation of rights letter has been issued. The policyholder's right to control the litigation and retain independent counsel should arise for any conflict of interest facing panel counsel. *See McCourt Co. v. FPC Props., Inc.*, 386 Mass. 145, 146 (1982) ("A lawyer shall not continue multiple employment . . . if it would be likely to involve him in representing differing interests."). In any situation where counsel hired by the insurance company is placed in a conflicted position ethically, that attorney should step aside. *See Commonwealth v. Shraiar*, 397 Mass. 16, 20 (1986) ("An 'actual'

or 'genuine' conflict of interest arises where the 'independent professional judgment' of trial counsel is impaired, either by his own interests, or by the interests of another client.").

When an attorney selected by an insurance company has an ethical conflict it is both unfair to the policyholder and improper for the attorney to continue without the policyholder's informed consent. *See McInerney v. Massasoit Greyhound Assoc., Inc.*, 359 Mass. 339, 354 (1971) ("the court holds attorneys to a high standard and frowns on behavior that 'indicates a greater interest in [the attorney's] personal financial welfare than in his professional conduct in relationship to both his clients and the court"); *see also Beets v. Collins*, 65 F.3d 1258, 1270 (5th Cir. 1995) (citing ABA Model Professional Rule 1.7 cmt.) ("If the lawyer stints on his work or is not sufficiently diligent for a client either because he is not well paid by that client or because of an extrinsic influence, he has potentially breached the duty of loyalty."). The duty to defend should encompass conflict-free, uncompromised representation of the policyholder. Accordingly, panel counsel faced with a conflict should withdraw in favor of independent counsel selected by the policyholder.

B. Consistent With Fundamental Rules Applied In Massachusetts, Foreign Authorities Allow the Policyholder to Select Independent Counsel in Comparable Circumstances.

An analogous situation arose in *Gorman v. Pattengell*, 535 N.Y.S.2d 402, 403 (App. Div. N.Y. 1988). There, because a liability insurance company "would not be obligated to pay any money if [the policyholder] was found to be 100% liable for the accident on the counterclaim, it was to its advantage to concede that [the policyholder] was negligent." *See id.* The court observed that the law firm hired by the insurance company to defend the policyholder "was thus faced with a choice: whether to put forth its best effort on behalf of its client, the [policyholder], or on behalf of the insurance company which retained it and paid its fees." *Id.* The *Gorman* court determined that because the policyholder's and the insurance company's interests were adverse to each other, the continued representation on the counterclaim by the law firm hired by the insurance company "creates a conflict of interest requiring its disqualification." *Id.* at 404. Therefore, the court held that the policyholder was "entitled to retain, at her insurance carrier's expense, an attorney with no business connection to her insurance carrier and who will defend solely her interests." *Id.* (citations omitted).

Panel counsel serves two masters, the policyholder and the insurance company. *See McCourt*, 386 Mass. at 146 ("The law firm is attorney for the insured as well as the insurer."). Where, as here, the insurance company has an

interest in devaluing or otherwise impairing the policyholder's counterclaim, counsel may favor the insurance company's interest by taking steps that harm the policyholder's counterclaim.

That is a conflict of interest under the ABA Model Rules and Massachusetts Rule of Professional Conduct 1.7(a)(1), which states that "[a] concurrent conflict of interest exists if … the representation of one client will be directly adverse to another client." It also is a conflict under Rule 1.7(a)(2), which states that a concurrent conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited … by a personal interest of the lawyer," given the lawyer's personal interest in the long term economic benefits of continuing as panel counsel in order to receive repeated appointments from the insurance company, which may lead the lawyer to favor the insurance company's interest over any particular policyholder client. "Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client the one who is paying his fee and from whom he hopes to receive future business the insurance company." *United States Fid. & Guar. Co. v. Louis A. Roser Co.*, 585 F.2d 932, 938 n.5 (8th Cir. 1978).

Such circumstances are analogous to when an insurance company issues a reservation of rights but impermissibly insists on controlling the defense:

this "means that the insured's rights may be adversely affected." *Three Sons*, 357 Mass. at 276. The policyholder "has no opportunity to control aspects of the case essential to determination of liability or settlement," *id.*, because panel counsel may bind the policyholder's position resulting in a devalued or impaired counterclaim. A lawyer chosen by the insurance company under such circumstances cannot fulfill "the full measure of the fiduciary duties of loyalty and independent judgment that would have been mandatory had he been retained directly by the insured." *Palermo v. Fireman's Fund Ins. Co.*, 42 Mass. App. Ct. 283, 291, 676 N.E.2d 1158, 1164 (1997).

C. This Court Should Rule That VisionAid Is Entitled to Select Independent Counsel, Absent Guidance from the Supreme Judicial Court.

The Supreme Judicial Court offered no guidance for the defense lawyer facing these conflicts. The majority apparently assumed a single lawyer would handle both the defense and counterclaim, with the defense paid by the insurance company but the policyholder paying for the counterclaim. *See Visionaid*, 477 Mass. at 351- 54, 76 N.E.3d at 211-13, without considering the quandaries that lawyer would face. Failure to plead the policyholder's compulsory counterclaim would constitute malpractice. Once the counterclaim is pleaded, the lawyer would be compelled to balance potentially irreconcilable interests of the policyholder and the insurance company, in circumstances like VisionAid's, where

a plaintiff conditions dismissal of his claim against the policyholder on a release of the policyholder's counterclaim, or on other strategic matters. Moreover, the lawyer would be compelled to allocate fees between the insurance company for "defense" services and the policyholder for "counterclaim" services, when as a practical matter many services could be allocated to either or both the defense and counterclaim.

The majority did not hold that the policyholder was required to obtain separate counsel to assert the counterclaim, nor did it address the dissent's cogent discussion of the impracticality of dividing representation of a policyholder in a single action between two different lawyers for covered and uncovered costs. *See id.*, 477 Mass. at 356-57, 76 N.E.3d at 214-15 ("… it would be impractical and deleterious to an effective defense to parse the various counts and have one attorney appointed by the insurer defend against some and an attorney retained by the insured defend against others. … '[i]n almost all situations it is totally impracticable to have two lawyers defending the same client.'") (quoting Neumeier, Serving Two Masters: Problems Facing Insurance Defense Counsel and Some Proposed Solutions, 77 Mass. L. Rev. 66, 80 (1992)).

Likewise, this Court's statement of the issue for supplemental briefing assumes that the policyholder will be represented by "one counsel," not separate lawyers for the defense and for the counterclaim. *See* Order entered July 14, 2017

("we conclude that an issue does remain: whether — now that we know that Mt. Vernon has no duty to prosecute VisionAid's counterclaim or to pay for the counterclaim's — a conflict of interest still exists that entitles VisionAid to choose the one counsel who will defend against Sullivan's claim (at Mt. Vernon's expense) and prosecute the counterclaim … , even if Mt. Vernon is duty-bound, absent the conflict of interest, to defend only against Sullivan's claim.") (emphasis added). Given the conflicts that clearly could bedevil that "one counsel," the overwhelming disparity between the resources of policyholders and insurance companies, and the obvious temptation for even the best-intentioned lawyers to favor the interests of the insurance companies who designate panel counsel and appoint them to defend a new cases that could generate a steady stream of business for the law firm, the policyholder should be entitled to select independent counsel in these circumstances.

IV. CONCLUSION

Accordingly, the Court should recognize that a conflict of interest exists when an insurance company has an interest in devaluing or otherwise impairing a policyholder's counterclaim, as in the present matter. That conflict of interest should entitle the policyholder to select the attorney who defends the claim against it, at the insurance company's expense, and who prosecutes the counterclaim against the underlying claimant.

Dated: September 5, 2017

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