COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12142

MOUNT VERNON FIRE INSURANCE COMPANY,
Plaintiff/Appellee

vs.

VISIONAID, INC. f/k/a Bouton Co. Inc.,
Defendant/Appellant

Certified Questions to the Supreme Judicial Court
from the United States Court of Appeals for the
First Circuit, No. 15-1351

Brief of *Amicus Curiae* United Policyholders

November 21, 2016

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CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a federal 501(c)(3) tax-exempt non-profit organization founded in 1991. UP is not publicly held and does not have any public company affiliates.

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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 effects of the Court's decision would have impact across the spectrum of policyholders, from automobile and homeowners insurance to commercial general liability insurance and beyond.

I. Questions Presented

The First Circuit has certified the following three questions to the Supreme Judicial Court for the Commonwealth of Massachusetts:

(1) Whether, and under what circumstances, an insurance company (through its appointed panel counsel) may owe a duty to its policyholder - whether under the insurance contract or the Massachusetts "in for one, in for all" rule - to prosecute the policyholder's counterclaim(s) for damages, where the insurance contract provides that an insurance company has a "duty to defend any Claim," *i.e.*, "any proceeding initiated against [the policyholder]"?

(2) Whether, and under what circumstances, an insurance company (through its appointed panel counsel) may owe a duty to its policyholder to fund the prosecution of the policyholder's counterclaim(s) for damages, where the insurance contract requires the insurance company to cover "Defense Costs," or the "reasonable and necessary legal fees and expenses incurred by [the insurance company,] or by any attorney designated by [the insurance company] to defend [the policyholder], resulting from the investigation, adjustment, defense, and appeal of a Claim?"

(3) Assuming the existence of a duty to prosecute the policyholder's counterclaim(s), in the event it is determined that an insurance company has an interest in devaluing or otherwise impairing such counterclaim(s), does a conflict of interest arise that entitles the policyholder to control and/or appoint independent counsel to control the entire proceeding, including both the defense of any covered claims and the prosecution of the subject counterclaim(s)?

II. Statement of Interest of Amicus Curiae

United Policyholders ("UP") is a federal 501(c)(3) tax-exempt non-profit organization founded in 1991 that is a voice and an information resource for insurance consumers in Massachusetts and throughout the United States. In its dedication to educating the public on insurance issues and consumer rights, UP serves a diverse range of insurance consumers, from low income homeowners to international businesses. Donations, foundation grants, and volunteer labor support the organization's work, which is divided into three program areas: Roadmap to Preparedness (promoting disaster preparedness and insurance literacy for homeowners and businesses), Roadmap to Recovery (helping disaster victims navigate the insurance claim process and recover fair settlements), and Advocacy and Action (advancing the interests of insurance consumers in courts of law and before regulators). UP does not accept funding from insurance companies. UP is based in California but operates nationwide.

UP serves an important purpose by representing the interests of policyholders. Most consumers can scarcely afford legal counsel to pursue their rights

under their insurance policies, whereas insurance companies have extensive resources to retain lawyers at major law firms to oppose providing coverage to their policyholders. In coverage disputes, insurance companies also enjoy a significant advantage because their policies are written on standardized forms that individual policyholders have no power to revise. UP seeks to level the playing field by offering similar resources and comparable counsel to represent otherwise vulnerable policyholders in cases raising important insurance coverage issues. Since its founding, UP has filed amicus curiae briefs in numerous federal and state courts in over 415 cases, including at least five cases before Massachusetts appellate courts.

III. Summary of Argument

UP submits that under Massachusetts law and the language of the insurance policy at issue here, an insurance company has a duty to a policyholder to prosecute that policyholder's counterclaims. Pp. 9-22.

Under Massachusetts' "in for one, in for all" rule, an insurance company is legally obligated to provide a full defense for a policyholder that

includes the prosecution of compulsory counterclaims or those that would lessen or defeat liability. The duty to defend encompasses the prosecution of counterclaims that are "inextricably intertwined" with the defense of the claim. This is because such counterclaims may lessen or eliminate the liability for the claim against the policyholder. Numerous other jurisdictions have held as much, and this Court should adhere to such a finding. Pp. 9-15.

Furthermore, the "in for one, in for all" rule covers compulsory counterclaims. These types of counterclaims are necessary and, under Massachusetts' Rules of Civil Procedure, do not have to directly impact potential liability. Compulsory counterclaims - particularly those brought by VisionAid - may regardless be defensive in nature and ultimately aid in defeating the claim brought against a policyholder. Pp. 15-19.

In addition to Massachusetts law, the policy language anticipates the prosecution of counterclaims as part of the duty to defend. Defense costs in the policy at issue here, promised by the insurance company, are for "reasonable and necessary" fees and expenses in defending the claim. There is no doubt

that compulsory counterclaims are "necessary." Thus, a reasonable policyholder would expect the prosecution of counterclaims to be part of a "reasonable and necessary" defense. Further, the insurance company, which is the writer of the policy and, thus, the master of the language contained in it, did not specifically exclude from coverage the prosecution of counterclaims. This Court should join with other jurisdictions that have found that the language in an insurance policy may give rise to the prosecution of counterclaims as part of the duty to defend. Pp. 19-22.

Finally, the Court should hold that when an insurance company has an interest in devaluing or otherwise impairing the policyholder's counterclaim, the policyholder is entitled to retain independent counsel. A reservation of rights clearly gives rise to a conflict of interest, but Massachusetts does not limit conflicts of interest to the presence of a reservation of rights. When an insurance company has an interest in devaluing or otherwise impairing the policyholder's counterclaim, there is a conflict of interest, because the insurance company's interest in devaluing or otherwise impairing the counterclaim

forces an untenable ethical dilemma on the lawyer hired by the insurance company. When a lawyer cannot fairly and wholeheartedly represent a policyholder due to an insurance company's conflicting interest, the lawyer should step aside so that the policyholder may properly retain independent counsel to control the case. Pp. 22-27.

IV. Statement of the Case

United Policyholders hereby adopts the "Statement of the Case" set forth in the Brief of Appellant VisionAid, Inc., filed on August 31, 2016, and refers the Court thereto for a detailed recitation of the factual history of this case.

V. Argument

UP has a particular interest in promoting the rights of policyholders and seeing that policyholders obtain the full measure of the insurance they purchase. The questions presented in this case are of importance to policyholders across the nation, particularly policyholders of employment liability insurance policies. Here, the policyholder purchased all necessary levels of insurance for employment-related defense costs for the relevant period, therefore it should reasonably expect the benefit of

that bargain, which includes coverage for the prosecution of compulsory counterclaims and those that are intertwined with the defense of covered claims. The trial court held that Mount Vernon had no duty to provide coverage for the prosecution of VisionAid's counterclaim, and that there was no conflict of interest giving rise to the right to independent counsel. A decision to hold this policyholder responsible for the costs of pursuing its counterclaim, and thus responsible for a *pro rata* share of defense costs, would have detrimental consequences for policyholders of all types in Massachusetts going forward.

UP therefore respectfully submits that the United States Court of Appeals for the First Circuit may properly reverse both of the trial court's determinations. As shown herein: (1) the duty to defend encompasses the prosecution of compulsory counterclaims and counterclaims that may limit or defeat liability; (2) the prosecution of counterclaims is anticipated by policy language as part of a "reasonable and necessary defense;" and (3) where an insurance company has an interest in devaluing or impairing the policyholder's counterclaim, there is a

conflict of interest entitling the policyholder to control the defense through independent counsel at the insurance company's expense.

A. The Duty To Defend Encompasses the Prosecution of Counterclaims

"It is axiomatic that an insurance company's duty to defend is broader than its duty to indemnify." *Ruggerio Ambulance Serv. v. Nat'l Grange Ins. Co.*, 430 Mass. 794, 796 (2000) (quoting *Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 10-11 (1989)). As this Court has noted, an insurance company's duty to defend is of great importance to policyholders who depend on such defense in critical situations:

> There is a meaningful difference between an insurer's duty to defend (and in insured's reliance on that duty) and a duty to indemnify. The duty to defend arises in situations involving threatened or actual litigation by a third party, a context in which time is of the essence, and in which cost and complexity can compound each passing day.

Wilkinson v. Citation Ins. Co., 447 Mass. 663, 671 (2006). In this case, Mount Vernon has acknowledged

its duty to defend VisionAid without a reservation of rights.[1]

Moreover, under Massachusetts' "in for one, in for all" rule, an insurance company's duty to defend extends to all the claims alleged in a case, not just some—and not just to covered claims only. *See GMAC Mortg., LLC v. First. Am. Title Ins. Co.*, 464 Mass. 733, 738 (2013) (noting that "if an insurer has a duty to defend one count of a complaint, it must defend them all", and holding that "[i]t is not uncommon for a lawsuit against an insured to assert some claims that are covered by the insurance policy and others that are not"); *see also Palermo v. Fireman's Fund Ins. Co.*, 42 Mass. App. Ct. 283, 289-90 (Mass. App.

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[1] Normally, the initial process by which an insurance company determines the scope of the duty to defend a claim or case against the policyholder "is one of envisaging what kinds of losses may be proved as lying within the range of the allegations of the complaint, and then seeing whether any such loss fits the expectation of protective insurance reasonably generated by the terms of the policy." *Sterilite Corp. v. Continental Cas. Co.*, 17 Mass. App. Ct., 316, 318 (1983). However, "when the allegations of the underlying complaint 'lie expressly outside the policy coverage and its purpose, the insurer is relieved of the duty to investigate' or defend the claimant." *Id.* (quoting *Timpson v. Transamerica Ins. Co.*, 41 Mass. App. Ct. 344, 347 (1996)). The underlying complaint against VisionAid plainly includes allegations inside the policy coverage and its purpose, and Mount Vernon therefore is required to provide a full defense.

Ct. 1997) (holding that insurance company had "duty to defend all of the counts" of complaint against policyholders).

In Massachusetts, the general rule is that "an insurer must defend *the entire lawsuit* if it has a duty to defend any of the underlying counts in the complaint." *GMAC*, 464 Mass. at 738 (emphasis added). Although there is a limited exception to the "in for one, in for all" rule in the title insurance context (because title insurance is not directed at future risks, but rather risks already in existence on the date the policy is issued, *see id.* at 739-40), the rule clearly extends to employment liability policies such as the one Mount Vernon issued to VisionAid.

An insurance company's duty to defend its policyholder should encompass, at the least, the prosecution of compulsory counterclaims and counterclaims that may limit or defeat liability. Therefore, UP respectfully requests the Court to apply the "in for one, in for all" rule here to encompass the prosecution of counterclaims when those counterclaims (1) might lessen or defeat liability or (2) are compulsory pursuant to applicable rules of civil procedure.

1. Counterclaims That May Limit or Defeat Liability

It should go without saying that an insurance company's duty to defend encompasses the prosecution of counterclaims that may lessen or defeat liability. When such counterclaims exist, they have been deemed by other courts to be "inextricably intertwined" with the defense of the claim. *See, e.g., Ultra Coachbuilders, Inc. v. Gen. Sec. Ins. Co.*, 229 F. Supp. 2d 284, 289 (S.D.N.Y. 2002) (finding that counterclaims which would bar the claim against the policyholder were "inextricably intertwined with the defense of [defendant's] claims and necessary to the defense of the litigation as a strategic matter").

It is entirely reasonable to expect "inextricably intertwined" counterclaims to be covered by an insurance company's duty to defend, and this Court should so hold. *See Trustees of Tufts Univ. v. Commercial Union Ins. Co.*, 415 Mass. 844, 847-49 (1993) (applying the rule that a court should "consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered"). Courts in other jurisdictions have reached just that conclusion, and this Court should

adopt it too.[2] *See, e.g.*, *Hartford Fire Ins. Co. v. Vita Craft Corp.*, 911 F. Supp. 2d 1164, 1183 (D. Kan. 2012) (holding that insurance company's duty to defend included payment of attorney's fees for counterclaims intertwined with plaintiff's claims and part of the policyholder's defensive strategy); *Oscar W. Larson Co. v. United Capitol Ins. Co.*, 845 F. Supp. 458, 461 (W.D. Mich. 1993) (holding that expenses for claims for affirmative relief are encompassed by the duty to defend if they "are expenses which are reasonable and necessary to limit or defeat liability"); *Potomac Electric Power Co. v. Cal. Union Ins. Co.*, 777 F. Supp. 980, 984-85 (D.D.C. 1991) (fees incurred for prosecution of claim in affirmative action are not *per se* unrecoverable as defense costs); *cf. Perchinsky v. State*, 660 N.Y.S.2d 177, 181 (N.Y. App. Div. 1997) (holding that costs should include those incurred for defense of the main claim in addition to pursuing third-party actions, because the third-party actions

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[2] Although this issue is one of first impression for this Court, a Massachusetts trial court has previously rendered a decision on it. *See Nashua Corp. v. Liberty Mut. Ins. Co.*, 6 Mass. L. Rep. 433, 1997 Mass. Super. LEXIS 541, at *33-34 (Super. Ct. Norfolk Cty. Feb. 18, 1997) (holding that policyholder's affirmative suit covered by duty to defend because that suit "was inextricably intertwined with its defense to" claims in different but related action).

were an essential component of the defense of the main action, pursued in good faith, and not contrary to the language of the contractual indemnity provision). This is because such counterclaims are recognized as "defensive in nature." *Int'l Ins. Co. v. Rollprint Packaging Prods.*, 312 Ill. App. 3d 998, 1015 (Ill. Ct. App. 2000); *see also Great West Cas. Co. v. Marathon Oil Co.*, 315 F. Supp. 2d 879, 881 (N.D. Ill. 2003) (observing that "the authority appears virtually uniform in holding that there is a class of affirmative claims which, if successful, have the effect of reducing or eliminating the insured's liability and that the costs and fees incurred in prosecuting such 'defensive' claims are encompassed in an insurer's duty to defend").[3]

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[3] Other courts have reached contrary results in distinguishable cases. *See, e.g., Spada v. Unigard Ins. Co.*, 80 F. App'x 27, 29-30 (9th Cir. 2003); *St. Paul Fire & Marine Ins. Co. v. Nat'l Computer Sys., Inc.*, 490 N.W.2d at 632 (Ct. App. Minn. 1992), *review denied*, 1992 Minn. LEXIS 590. In *Spada*, the policyholders' counterclaims and cross-claims were almost entirely unrelated to the underlying claim against them, fell under a policy coverage exclusion, and would not have limited liability in any way. *Spada*, F. App'x at 29-30. And, in *National Computer Systems*, the court provided no discussion of the counterclaim asserted by the policyholder and set forth no reasoning why it agreed that the insurance company was not obligated to pay the costs of the

Although the insurance industry has argued that if the duty to defend encompasses counterclaims, premiums will necessarily increase, that argument is unsupported by any evidence. Even if litigation costs might increase through extending the duty to defend to counterclaims, those increased costs might be offset by smaller payouts for indemnification. Thus, a counterclaim that may offset or defeat liability could very well benefit both the policyholder and the insurance company.

2. The Duty to Defend Includes Prosecuting Compulsory Counterclaims

There should be no question that an insurance company's duty to defend also includes prosecuting its policyholder's compulsory counterclaims. Massachusetts Rule of Civil Procedure 13(a) provides the requirements for a "Compulsory Counterclaim":

> A pleading shall state as a counterclaim any claim for relief the court has power to give which at the time of serving the pleading the pleader has against the opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not either require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction or constitute an action required by law to be brought in a county or

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counterclaim. *See Nat'l Computer Sys.*, 490 N.W.2d at 632.

> judicial district, as the case may be, other than the county or judicial district in which the court is sitting.

Mass. R. Civ. P. 13(a). In other words, a defendant to a lawsuit must plead any related counterclaims it has against the plaintiff, or those claims will forever be foreclosed. *See GMAC*, 464 Mass. at 743 ("A title insurer may have a duty to defend an insured against compulsory counterclaims because failure to raise a compulsory counterclaim results in its permanent forfeiture."); *see also Keystone Freight Corp. v. Bartlett*, 77 Mass. App. Ct. 304, 309-10 (2009) ("Thus, failure to raise a compulsory counterclaim bars a party from later maintaining a separate action.").

Where, as in the present matter, a policyholder holds a claim against the plaintiff in a case filed against it at the time of the filing, and a logical relationship exists between the plaintiff's case and the defendant-policyholder's counterclaim, the duty to defend must encompass that compulsory counterclaim. *See Bartlett*, 77 Mass. App. Ct. at 310 (holding that the inquiry rests on whether the controversies at issue arise out of a common subject and are "so closely connected as appropriately to be combined in

one trial in order to prevent duplication of testimony, to avoid unnecessary expense to the parties and to the public, and to expedite the adjudication of suits"). This Court should hold that a compulsory counterclaim is a part of the entire defense of the suit, anticipated by and included in the "in for one, in for all" rule.

Such a holding would be especially important for non-commercial policyholders, such as homeowners and automobile owners. Those types of policyholders are less likely to have the resources of a commercial enterprise and may be less well-versed in the law, and, therefore, unaware of the need to raise a compulsory counterclaim in an action brought against them.

Further, it is irrelevant whether the compulsory counterclaim limits or defeats liability. Significantly, the Massachusetts Rules of Civil Procedure sets forth that "[a] counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." Mass. R. Civ. P. 13(c). Thus, a compulsory counterclaim must be

raised, and covered by an insurance company's duty to defend, regardless of whether it limits or defeats a policyholder's ultimate liability, if any. This is because under Massachusetts law "an insurer must defend *the entire lawsuit* if it has a duty to defend any of the underlying counts in the complaint." *GMAC*, 464 Mass. at 738 (emphasis added).

Here, in any event, the compulsory counterclaim asserted by VisionAid in the underlying case is both "necessary" and defensive in nature. As VisionAid has argued, that counterclaim provides a valid defense against the employment claim asserted against VisionAid. *Cf. Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 465-68 (2010) (holding that duty to defend includes counterclaim for self-defense in case seeking damages due to alleged intentional torts). Because the counterclaim is inextricably intertwined with the defense, it may be difficult to distinguish costs associated with prosecuting the counterclaim from the costs of the defense, and any separate costs likely are marginal. Although VisionAid could recover damages if it successfully proves the counterclaim, success on the counterclaim would almost certainly defeat liability. The Court, therefore, should hold

that Mount Vernon's duty to defend extends to the prosecution of VisionAid's counterclaim.

B. The Insurance Policy Language Encompasses the Prosecution of Counterclaims Within Covered Defense Costs

There is another reason Mount Vernon should provide coverage for the prosecution of VisionAid's counterclaim: the language of the insurance policy issued to VisionAid by Mount Vernon anticipates it.

The insurance policy defines "Defense Costs" as "reasonable and necessary legal fees and expenses incurred by the Company, or by any attorney designated by the Company to defend any Insured, resulting from the investigation, adjustment, defense and appeal of a Claim." A. 35.

The Court should find that the policy definition of "Defense Costs" anticipates the prosecution of counterclaims. That definition of "Defense Costs" includes "reasonable and necessary legal fees and expenses." Clearly, the policy covers "necessary legal fees." By definition, a compulsory counterclaim is "necessary". Accordingly, the cost of litigating counterclaims falls within the policy's plain language defining covered "defense costs."

Indeed, it is reasonable that a policyholder would expect the phrase "reasonable and necessary legal fees and expenses" to encompass the prosecution of compulsory counterclaims, particularly when they assist the defense of the policyholder. *See Trs. of Tufts*, 415 Mass. at 849 (it is "appropriate 'to consider what an objectively reasonable insured, reading the relevant policy language, would expect to be covered.'"). While that precise phrase has not been interpreted by a Massachusetts court, other courts that have addressed the issue here found for the policyholder.

For example, in *IBP, Inc. v. Nat'l Union Fire Ins. Co.*, 299 F. Supp. 2d 1024, 1030 (D. S.D. 2003), the insurance policy defined "Defense Costs" similarly to the Mount Vernon policy, as "reasonable and necessary fees, costs and expenses consented to by the Insurer . . . resulting solely from the investigation, adjustment, defense and appeal of a Claim against the Insured. . . ." On summary judgment, the *IBP* court addressed the issue of whether the policyholder was entitled to coverage for asserting affirmative claims against its adversary in a second underlying case. *See IBP*, 299 F. Supp. 2d at 1026-29. Although the

issue arose under South Dakota law, the court surveyed other jurisdictions and concluded that, "even though an insured initiates a lawsuit, that fact does not automatically preclude coverage for defense-type legal fees where the insured is resisting a contention of liability for damages." *Id.* at 1030-31 (collecting cases). The *IBP* court therefore found no genuine issue of material fact on the question of whether the legal fees incurred by the policyholder in asserting its affirmative claims were "defense costs" as defined under the policy. *Id.* at 1031; *see also Ultra Coachbuilders, Inc. v. Gen. Sec. Ins. Co.*, 229 F. Supp. 2d 284, 289 (S.D.N.Y. 2002) (policyholder awarded attorney's fees incurred for prosecution of counterclaims that were "inextricably intertwined with the defense of [the policyholder's] claims and necessary to the defense of the litigation as a strategic matter"); *cf. State ex rel. Dann v. Nacional*, 2012-Ohio-5300, 2012 Ohio Misc. LEXIS 176, at *12 (Ct. Claims Ohio Mar. 16, 2012) (finding that defendant "incurred reasonable and necessary legal fees and expenses . . ., both in the defense of the complaint and in prosecution of its counterclaim").[4]

[4] To the extent insurance companies argue

Further, there is no indication in Mount Vernon's policy language that counterclaims are not included as a part of "reasonable and necessary legal fees and expenses." Mount Vernon had the opportunity to expressly exclude coverage of any counterclaims, and also could have expressly limited coverage for counterclaims to those that would limit or defeat liability, but it did not do so. Thus, the Court should find that the prosecution of a compulsory counterclaim—particularly one that provides a defense to the underlying plaintiff's claim—is part of "reasonable and necessary legal fees and expenses."

C. A Conflict of Interest Facing Defense Counsel Entitles the Policyholder to Independent Counsel

Where an insurance company has an in interest in impairing or otherwise devaluing a policyholder's counterclaim, a conflict of interest arises entitling

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otherwise relying on *Red Head Brass v. Buckeye Union Ins*, 735 N.E.2d 48, 57 (Ct. App. Ohio 1999), that reliance is misplaced. In *Red Head*, the insurance company did not have an obligation under the policy language to compensate the policyholder for the expense of prosecuting its counterclaim. 735 N.E.2d at 57. However, the policy language stated only that the insurance company would pay as defense costs "[a]ll reasonable expenses incurred. . . ." *Id.* at 56. The word "necessary" was not in the policy language, as it is in Mount Vernon's "reasonable and necessary" policy language here. *See id.*

the policyholder to appoint independent defense counsel at the insurance company's expense. Such a conflict entitles the policyholder to control and/or appoint independent counsel to control the defense.[5]

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

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[5] This Court has long recognized a policyholder's right to appoint independent defense counsel at the insurance company's expense when there is a conflict of interest between the policyholder and insurance company's control of the defense. *See Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 684 (1964).

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 unfair to the policyholder. *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 and the policyholder be entitled to retain independent counsel for the defense at the insurance company's expense.

An analogous situation arose in *Gorman v. Pattengell*, 535 N.Y.S.2d 402, 403 (App. Div. N.Y. 1988). There, because the policyholder's "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 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).

If panel counsel serves two masters, the policyholder and the insurance company, and the insurance company has an interest in devaluing or otherwise impairing the policyholder's counterclaim, then panel counsel may favor the insurance company's interest by taking steps that harm the policyholder's counterclaim. That is a patent conflict of interest.

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.

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. That conflict of interest entitles the policyholder to retain independent counsel to defend the case at the insurance company's expense.

VI. Conclusion

For all of the foregoing reasons, UP respectfully requests that the Court hold that an insurance company's duty to defend encompasses the prosecution of counterclaims that may defeat or diminish liability or counterclaims that are compulsory. This duty arises under Massachusetts' "in for one, in for all" rule and pursuant to the broad language of the policy. UP further requests that the Court hold that a conflict of interest arises where an insurance company has an interest in devaluing or otherwise impairing a policyholder's counterclaim, giving rise to the policyholder's right to appoint independent defense counsel at the insurance company's defense.

Respectfully submitted,

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Certificate of Service

I, Marshall Gilinsky, hereby certify that on November 21, 2016, I served two copies of the *amicus curiae* brief of United Policyholders in support of the appellant, on the following parties by regular mail:

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Certification

In accordance with Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I hereby certify that the brief complies with the rules of the court that pertain to the filing of briefs.

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