# INSURED'S COUNTERCLAIM AGAINST CLAIMANT DID NOT CREATE CONFLICT OF INTEREST BETWEEN INSURED AND INSURER

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On November 15, 2017, a panel of the First Circuit Court of Appeals (Thompson, J.) ruled in the case of *Mount Vernon Fire Insurance Company v. VisionAid, Inc.*, 875 F.3d 716, that no conflict of interest existed between an employment liability insurer and its insured that entitled the insured to independent counsel at the insurer's expense to defend against an age discrimination suit brought by a former employee.

The insured, VisionAid, Inc., alleged that it fired its former employee for poor performance, insubordination and suspicion that the employee had misappropriated company funds. The former employee filed suit at the Massachusetts Commission Against Discrimination ("MCAD") alleging age discrimination. VisionAid put its employment liability insurer, Mount Vernon Fire Insurance Company ("Mount Vernon") on notice of the suit and Mount Vernon appointed panel defense counsel to defend VisionAid. When the former employee removed his age discrimination suit from the MCAD to the Superior Court, VisionAid demanded for the first time that Mount Vernon prosecute a counterclaim against the employee related to his alleged misappropriation of funds. Mount Vernon advised VisionAid that it would defend VisionAid in the Superior Court suit without a reservation of rights, but also informed VisionAid that it would not fund the prosecution of VisionAid's counterclaim because it was beyond its obligations under the Policy. Mount Vernon advised VisionAid that it was free to pursue its misappropriation counterclaim against the employee at its own expense. Mount Vernon also declined VisionAid's demand that it pay for VisionAid's personal attorney to defend the age discrimination suit, Mount Vernon's position being that appointed panel counsel was fully capable of representing VisionAid's interest in the suit. VisionAid disagreed and argued that panel counsel had a conflict of interest to the extent that VisionAid's counterclaim posed an obstacle to settling the employee's age discrimination suit.

After cross-motions for summary judgment were filed in the U.S. District Court, Judge Nathaniel Gorton ruled that "an insurer ought not to bear any obligation to prosecute affirmative counterclaims asserted by the insured." Judge Gorton also ruled that Mount Vernon's appointed panel counsel did not have a conflict of interest and could adequately defend VisionAid against the age discrimination claim while VisionAid's personal attorney prosecutes the counterclaim.

VisionAid appealed the U.S. District Court's ruling to the First Circuit, which in turn certified questions to the Supreme Judicial Court of Massachusetts. On June 22, 2017, the court (Gaziano, J) ruled that under Massachusetts law, (1) the applicable insurance policy did not require Mount Vernon to pay for prosecution of the counterclaim, and (2) the "in for one, in for all" rule concerning an insurer's duty to defend did not require Mount Vernon to prosecute the counterclaim.

After the case was remanded back to the First Circuit from the Supreme Judicial Court, VisionAid argued that even though Mount Vernon had no obligation to fund the prosecution of VisionAid's counterclaim, VisionAid was entitled to independent counsel at Mount Vernon's expense to handle the defense of the former employee's age discrimination claim, rather than panel counsel appointed by Mount Vernon. VisionAid argued that Mount Vernon wanted to "devalue" the counterclaim because VisionAid refused the employee's proposal to settle the age discrimination claim and the counterclaim for an exchange of releases. The First Circuit (Thompson, J.) disagreed, recognizing that both Mount Vernon and VisionAid "… want to crush [the employee's] suit." *See* 875 F.3d at 724. The First Circuit also recognized that "[a] muscular counterclaim will go a long way in making that happen. But a weak one certainly will not." *Id.*

The First Circuit also ruled that even if Mount Vernon wanted to "devalue" the counterclaim, it could not do so because VisionAid's personal counsel would handle the prosecution of the counterclaim, while Mount Vernon's panel counsel would handle the defense of the age discrimination claim. "VisionAid's personal attorney can make sure that no one devalues the counterclaim in any way, shape, or form." 875 F.3d at 725. The First Circuit also recognized that "… neither Mount Vernon nor [panel counsel] can settle [the employee's] suit- regardless of how low the settlement figure is (even if it is zero!)- without VisionAid's consent." *Id.* Also,

> …an exchange of release requires VisionAid's signature and because VisionAid's own lawyer will be in the case prosecuting the counterclaim, neither Mount Vernon nor [panel counsel] can push a settlement through without VisionAid's acceptance and assistance.

*Id.*

The First Circuit also rejected VisionAid's argument that two attorneys could not effectively represent VisionAid in the underlying suit, holding that "… there is nothing unworkable or 'schizophrenic' about having two attorneys representing [VisionAid] in the [underlying] litigation." 875 F.3d at 726. The First Circuit also found that there was no evidence in the summary judgment record to support VisionAid's suggestion that panel counsel will act unethically to harm VisionAid in favor of Mount Vernon.

## About the Author

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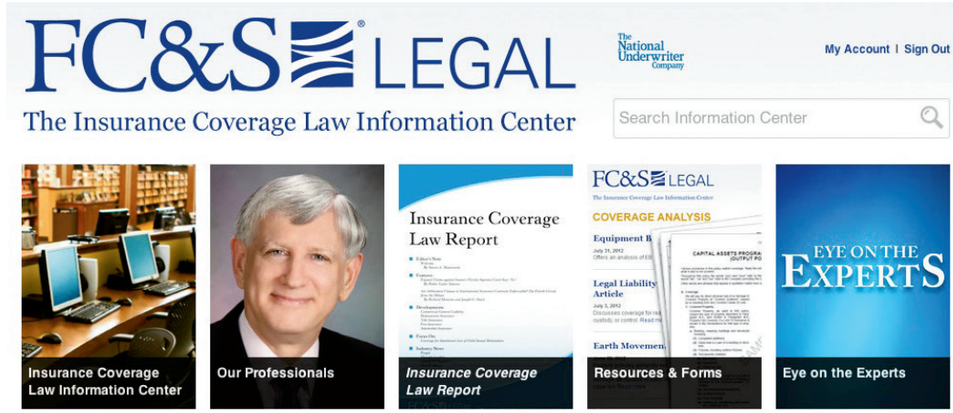


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