

## Insurer Not Required to Pay Insured's Independent Counsel Where Defense Was Offered But Unjustifiably Declined by Insured

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By Tamara Smith Holtslag on November 2, 2017

The Massachusetts Appeals Court recently issued a decision in *OneBeacon America Insurance Company v. Celanese Corporation* (2017 WL 4583266) relating to an insurer's right to control the defense after it had withdrawn its reservation of rights. Despite this being a fairly basic concept, heretofore, the appellate courts of Massachusetts had not explicitly commented on an insurer's rights when defending an insured without a reservation of rights; nor had the appellate courts laid out what circumstances would create a conflict of interest that would justify an insured's refusal of an insurer's control of the defense once a reservation had been withdrawn. As the Court states, an insured would be justified in refusing the insurer's control of the defense in the following scenarios: (1) when the defense tendered is not a complete defense under circumstances in which it should have been; (2) when the attorney hired by the carrier acts unethically and, at the insurer's direction, advances the insurer's interests at the expense of the insured's; (3) when the defense would not, under the governing law, satisfy the insurer's duty to defend; (4) when, though the defense is otherwise proper, the insurer attempts to obtain some type of concession from the insured before it will defend; or (5) when the defense provided by the insurer is materially inadequate.

The Appeals Court upheld summary judgment for OneBeacon, finding that: (a) OneBeacon had satisfied its duty to defend under its policy by affording a defense to the insured without a reservation of rights; (b) absent demonstrable evidence that there exists a conflict of interest between the insurer and the insured, the insured may not refuse an insurer's offer to defend, unless it wishes to pay for the defense itself; and (c) OneBeacon was not liable for the attorney's fees that the insured incurred during the period that it was conducting its own defense, after its "unjustified refusal of OneBeacon's control of that defense." With that, the Appeals Court vacated that portion of Judge Roach's earlier ruling that awarded the insured defense costs for the period of time that it conducted its own defense.