

Finding No Conflict Of Interest, First Circuit Rules That Insured Is Not Entitled To Select Its Own Counsel

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The First Circuit affirmed a finding that an embezzlement counterclaim being pursued by independent counsel (rather than the insured's insurer-appointed counsel) did not create a conflict of interest that would allow the insured to replace its insurer-appointed defense counsel. *Mount Vernon Fire Ins. Co. v. VisionAid, Inc.*, 875 F.3d 716 (1st Cir. 2017).

The dispute arose out of an age discrimination lawsuit brought against VisionAid by an ex-employee. Mount Vernon defended the suit, initially under a reservation of rights, but later unconditionally. In the discrimination suit, VisionAid asserted a counterclaim of embezzlement against the former employee. In a previous ruling in this case, the Massachusetts Supreme Judicial Court ruled that Mount Vernon was not obligated to fund the prosecution of the counterclaim as part of its defense obligation. See [July/August 2017 Alert](#). Thus, VisionAid retained independent counsel for that particular purpose, while insurer-appointed counsel continued to defend VisionAid in the discrimination suit. During the course of litigation, the employee offered to drop his discrimination claim if VisionAid agreed not to pursue its embezzlement claim, which VisionAid refused. In the matter giving rise to the First Circuit appeal, Mount Vernon sought a declaration that there was no conflict of interest between the parties that would permit VisionAid to select its own counsel to defend the underlying suit. The court agreed, ruling that the presence of the embezzlement counterclaim did not create a conflict of interest sufficient to warrant independent counsel at Mount Vernon's expense.

Addressing a preliminary matter, the First Circuit ruled that under Massachusetts law, insurer-appointed counsel serves as counsel for both insured and insurer and owes both parties a duty of good faith and due diligence. Notwithstanding this finding, the First Circuit concluded that there was no conflict of interest by virtue of the embezzlement counterclaim. The court rejected VisionAid's contention that a conflict existed because Mount Vernon was motivated to devalue the embezzlement claim in order to achieve an expeditious settlement. The court reasoned that Mount Vernon and VisionAid shared a common goal of "crush[ing]" the employee's suit and that the factual record lacked any evidence that Mount Vernon sought to undermine the counterclaim. Further, the First Circuit held that even assuming Mount Vernon wanted to diminish the counterclaim, it would be unable to do so given that VisionAid's independent counsel has sole control over that issue. The court also noted that the consent-to-settlement provision protected VisionAid's rights to resolve the suit in the manner it deems just. Finally, the First Circuit rejected VisionAid's argument that the presence of two attorneys representing it in the underlying litigation was "unworkable," noting that tension between counsel does not establish a conflict of interest.

As the court noted, a Massachusetts appellate court rejected a conflict of interest argument last month, finding that differing views between insurer and insured as to defense tactics does not give rise to a conflict of interests sufficient to justify the insured’s refusal of the insurer’s defense. *See OneBeacon Am. Ins. Co. v. Celanese Corp.*, 84 N.E.3d 867 (Mass. App. Ct. 2017) (discussed in our [November 2017 Alert](#)).

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