
ARTICLES

One Client, One Defense: Revisiting *CHI* with the Alaska Rules of Professional Conduct

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This article analyzes and critiques the decision of the Alaska Supreme Court in CHI of Alaska, Inc. v. Employers Reinsurance Corp. In that case, a divided court held that whenever an insurance company reserves its right to deny coverage to one of its insureds, the insured has the unilateral right to select independent counsel, subject only to the implied covenant of good faith and fair dealing. After a brief examination of the context in which application of the rule arises, and a close reading of the rationale for the rule, the holding and premises are questioned. In the final section, the article proposes a less radical rule founded in the ethical requirements and guidelines that govern the legal profession. The recently adopted Alaska Rules of Professional Conduct provide a framework for the critique and resulting proposal.

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I. INTRODUCTION

In *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*,¹ a divided Alaska Supreme Court held that whenever an insurance company reserves its right to disclaim coverage, the insured has the unilateral right to select independent counsel.² This selection, the court concluded, is limited only by the implied covenant of good faith and fair dealing, which requires that the insured select an attorney who is reasonably competent, based on his experience and training, to conduct the defense.³

The *CHI* decision arose in the context of a dispute in insurance defense litigation. The plaintiff's complaint stated claims against an insured defendant. Some of these claims would have been covered by the defendant's insurance, while others would have been excluded under the listed exclusions of the insurance policy.⁴ Determining that an insurance company's reservation of rights entitles the insured to independent counsel for all alleged claims, the Alaska Supreme Court rejected an approach that would have allowed the insurer-appointed counsel⁵ to continue to represent the insured alongside independent counsel.⁶ Under this "dual-counsel" scheme, independent counsel would have defended the insured at the expense of the insurance company against claims that would be excluded under the policy, while appointed counsel would have remained involved in the defense of the covered claims.⁷ In *CHI*, the defendant, Employers Reinsurance, advocated the dual-counsel scheme both in the trial court and on appeal.⁸ Justice Compton, in his dissent, also argued for such an approach.⁹

The court also rejected an alternate method that would have permitted the insurance company to retain the right of reasonable

1. 844 P.2d 1113 (Alaska 1993) (three justice majority, with one justice concurring in part, dissenting in part, and one justice dissenting).

2. *Id.* at 1121.

3. *Id.*

4. *See id.* at 1115.

5. Throughout this article, the terminology of the *CHI* opinion will be utilized. Thus, the term "appointed counsel" shall refer to the lawyer selected by the insurer to defend its insured. The term "independent counsel" shall refer to a lawyer selected by the insured, unless context indicates otherwise. The choice of terminology, however, should not suggest that appointed counsel cannot be independent of the insurer's influence.

6. *CHI*, 844 P.2d at 1130 (Compton, J., dissenting).

7. *Id.* at 1119-20.

8. *Id.* at 1115, 1119-20.

9. *Id.* at 1129-31 (Compton, J., dissenting).

approval of the lawyer selected by the insured.¹⁰ Although this position was not advocated by the parties on appeal, Justice Moore, in a partially concurring and partially dissenting opinion, argued for this right.¹¹

The *CHI* decision postdates by nearly a decade the landmark California Court of Appeal decision in *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*¹² In *Cumis*, the court held that an insurer's defense of a lawsuit under a "reservation of rights" creates a conflict of interest between the insurer and its insured. Because of this conflict, the insurer is obligated to pay for independent counsel of the insured's choice,¹³ who is then authorized to control the defense of the lawsuit.¹⁴

The actual holding of the *Cumis* case, however, did not go so far as the holding in *CHI*. In *Cumis*, for example, the appointed counsel remained involved with the defense of the insured,¹⁵ a result rejected in *CHI*.¹⁶ Decisions subsequent to *Cumis* have also narrowed the breadth of its holding. In *McGee v. Superior Court*,¹⁷ for example, the California Court of Appeal held that a right to independent counsel arises only when a coverage dispute turns upon issues that the defense counsel has the power to control at trial.¹⁸ The Alaska Supreme Court failed to articulate such a limitation in *CHI*.

The *Cumis* decision has spawned considerable confusion for attorneys involved in insurance-related litigation. The opinion has also led to abuses by both insurers and attorneys selected by insured parties. Moreover, the holding has had an adverse economic impact on the public in California.¹⁹ Although holdings of Alaska courts on matters of state law seldom, if ever, have an

10. *Id.* at 1120-21.

11. *Id.* at 1122 (Moore, J., concurring in part, dissenting in part).

12. 208 Cal. Rptr. 494 (Cal. Ct. App. 1984).

13. *Id.* at 496.

14. *Id.* at 501, 506.

15. *Id.* at 497, 506.

16. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1118 (Alaska 1993).

17. 221 Cal. Rptr. 421 (Cal. Ct. App. 1985).

18. *Id.* at 423.

19. Sampson A. Brown & John L. Romaker, *Cumis, Conflicts and the Civil Code: Section 2860 Changes Little*, 25 CAL. W. L. REV. 45, 63-68 (1988). Section 2860 of the California Civil Code was a legislative response to the flood of litigation spawned by the decision in *Cumis*. *Id.* at 68; see CAL. CIV. CODE § 2860 (West 1993); see also Mark A. Saxon, *Conflicts of Interest: Insurers' Expanding Duty to Defend and the Impact of "Cumis" Counsel*, 23 IDAHO L. REV. 351 (1987) (analyzing the *Cumis* decision and its effects on insurance litigation).

impact comparable to analogous decisions of the California courts,²⁰ the Alaska Supreme Court, with its recognition of a unilateral right of the insured to select counsel and its rejection of a two-counsel scheme,²¹ has even “out-*Cumised*” the *Cumis* decision.

Given the extensive reaction to *Cumis* and similar decisions, it is unfortunate that the Alaska Supreme Court has embarked on the course selected in *CHI*. Most obviously, the court reached its decision with little reference to the Alaska Code of Professional Responsibility.²² The Code defined every lawyer’s obligation to his client—in this case, the insured. Wholly disregarding the ethical constraints imposed by the Code, the *CHI* court also made certain assumptions about the propensities of appointed counsel to favor the interests of the insurer over its insured. Implicitly embracing the dual-client doctrine to provide logical support for its holding,²³ the court assumed that a lawyer being paid by an insurance company either cannot or will not distinguish between his client, the insured and the insurer.

Seven months after *CHI*, the Alaska Supreme Court adopted the Alaska Rules of Professional Conduct to replace the Code of Professional Responsibility. The Rules require the lawyer, in every instance in which he is being paid by a third person, to obtain the consent of the client prior to accepting compensation for that representation.²⁴ The Rules also dictate that a lawyer must ensure that no one interferes with his independent professional judgment²⁵ and that information relating to the representation of the client must be protected from disclosure.²⁶ Consideration of such ethical rules should have provided the starting point for the court’s analysis.

This article suggests that the Alaska Supreme Court should revisit the holding of *CHI* and restrict its application. As one

20. This would seem self-evident given that Alaska ranks 49th in population amongst the states, while California ranks first. WORLD ALMANAC 1994 364 (1993) (“Population by State: 1990,” according to the Bureau of the Census).

21. Beyond the scope of the *CHI* rule are other conflicts of interest that can arise between insurer and insured, such as settlement demands at or in excess of policy limits.

22. The Alaska Code of Professional Responsibility, based upon the ABA Model Code, governed the conduct of lawyers in Alaska at the time of the *CHI* decision. The *CHI* court cites it only once, in a context that will be the subject of some criticism later in this article. See *infra* part IV.B.

23. See *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1116-17 (Alaska 1993).

24. ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.8(f)(1) (1993).

25. *Id.* Rule 1.8(f)(2).

26. *Id.* Rule 1.8(f)(3).

option, the court could simply more narrowly construe the phrase "right to independent counsel." Alternatively, the court could declare that if appointed counsel obtains the client's consent, appointed counsel can continue to represent that client despite the insurer's reservation of rights, consistent with the Rules of Professional Conduct.

Part II examines the way in which "CHI-type" issues arise, provides a classification scheme for these issues that assists in the analysis of the case and engages in a discussion of the Alaska case law that pre-dated the *CHI* decision. Part III examines the factual background and proceedings of the *CHI* case, as well as the resolution of those proceedings and the court's rationale. Part IV analyzes and critiques the principal bases for the recognition of a right to independent counsel, in part by comparing the *CHI* decision to *Cumis* and other decisions cited by the *CHI* court. As an alternative to the *CHI* holding, Part V suggests a less radical rule founded in the ethical requirements and guidelines that govern the legal profession.

II. THE BACKGROUND TO *CHI*

A. The Duties of Insurers in Alaska

Liability insurance policies typically provide the insured with two kinds of protection: (1) indemnity for amounts paid for covered losses and (2) payment for the costs of defending claims made against the insured.²⁷ The Alaska Supreme Court has long recognized that "an insurer's obligation to indemnify and its duty to defend are separate and distinct contractual elements."²⁸ Liability policies obligate the insurer to defend all actions against the insured that might arguably fall within the coverage of the policy, even though the allegations may ultimately be shown to be groundless, false or fraudulent.²⁹ Therefore, cases may arise in

27. "It is generally accepted that one of the most important benefits of an insurance policy is the insurer's duty to defend the insured. This is particularly true today as the expense of litigation continues to rise to prohibitive levels for individuals as well as large corporations." Saxon, *supra* note 19, at 351. In a sense, the insurer sells attorneys' services in advance to those who purchase liability policies.

28. *Sauer v. Home Indem. Co.*, 841 P.2d 176, 180 (Alaska 1992).

29. *Afcan v. Mutual Fire, Marine & Inland Ins. Co.*, 595 P.2d 638, 645 (Alaska 1979).

Although the precise language varies, the typical defense clause states: With respect to such insurance as is afforded by this policy, the company shall have the right and the duty to defend any suit against the insured alleging such act or omission and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit

which the insurer will be obligated to defend an insured even though it will have no eventual obligation to pay the judgment.³⁰

The presence of allegations in the complaint that are not within policy coverage, however, does not necessarily relieve the insurer of its duty to defend. If the complaint also contains claims that fall within the policy's coverage, then the insurer must defend the insured against both types of claims.³¹ This duty to defend mixed claims may also extend to a suit that alleges facts within an exception to the policy; if the "true facts" are potentially or actually within the policy coverage and are known or reasonably ascertainable by the insurer, then the insurer must provide a defense.³² Thus, the insurer's duty to defend arises in three distinct situations: (1) where the complaint states a claim within the policy and with supporting facts; (2) where the complaint states a claim within the policy, but the facts may indicate there is no coverage; and (3) where the complaint states a claim outside the policy, but the operative facts indicate the claim is actually covered.³³

Legal options are fairly clear under Alaska law when an insurer has doubts regarding its duty to defend, the scope of coverage or whether or not coverage is available to its insured. The Alaska Supreme Court outlined these alternatives in a case decided two months prior to *CHI*.³⁴ The coverage issue, unless it relates to the conduct of the insured person, is created by the allegations of the claimant. The liberal rules of pleading permit the claimant to allege a variety of legal theories that "[o]ften . . . bear little relationship to reality."³⁵ An insurer, however, is required to give

are groundless, false, or fraudulent. The Company may investigate and settle any claim or suit that it considers proper.

Saxon, *supra* note 19, at 352 n.4.

The contract in *CHI* provided that:

[Employers], in Insured's name and behalf, shall have the right to investigate, defend and conduct settlement negotiations in any claim or suit. The Insured shall not admit liability for, or make any voluntary settlement, or incur any costs or expenses in connection with any claim involving payment by [Employers], except with the written consent of [Employers].

CHI of Alaska, Inc. v. Employers Reinsurance Corp., 844 P.2d 1113, 1122 n.4 (Alaska 1993).

30. *Afcan*, 595 P.2d at 645.

31. *Sauer*, 841 P.2d at 181.

32. *Alaska Pac. Assurance Co. v. Collins*, 794 P.2d 936, 945 (Alaska 1990) (citations omitted).

33. *Afcan*, 595 P.2d at 646.

34. *See Sauer*, 841 P.2d at 182-84.

35. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1129 (Alaska 1993) (Moore, J., concurring in part, dissenting in part) (quoting RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 23.16 (3d ed. 1989)).

the insured prompt notice of any intention to deny liability or any refusal to defend.³⁶ The notice must also “provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.”³⁷

The insurer who questions its duty to defend or the scope of coverage may do so for a variety of reasons. The Alaska Supreme Court has not categorized or catalogued these reasons in any of the cases regarding conflicts of interest. The *CHI* rule, however, presumably applies whenever such an issue arises. The insurer’s decision to deny defense of the insured or its refusal to fulfill its indemnity obligations to an insured forms the basis for the conflict of interest that triggers the *CHI* rule. Thus, whenever an insurer reserves its right to question its obligations under the insurance policy, the rule in *CHI* instructs that the insured has the right to select independent counsel of its choice.

B. Types of Conflicts over Coverage

The Alaska Supreme Court has established a distinction between policy defenses and coverage defenses.³⁸ Under a policy defense, the insurer claims that some condition of an otherwise applicable policy has been breached by the insured. A typical example is the insured’s failure to give timely notice of a claim or to cooperate with the insurance company in conducting the defense.³⁹ If the insurance company continues to provide a defense to the insured, it can avoid paying the underlying claim either by conducting a successful defense of the insured or by successfully asserting a policy defense following a finding of liability on the part of the insured.⁴⁰

Coverage defenses arise when an insurer admits the validity of the policy but contends that it does not extend to a particular claim. According to the *CHI* court, the most typical example of a coverage defense involves a situation where alternative theories of negligent and intentional tort are pled, and the policy covers negligent, but not intentional, torts.⁴¹ Employers asserted this

36. *Sauer*, 841 P.2d at 182.

37. ALASKA STAT. § 21.36.125 (1993).

38. *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 288-89 (Alaska 1980).

39. *See CHI*, 844 P.2d at 1115.

40. *Id.*

41. *Id.* Although the basis for such an exclusion of coverage is sometimes embodied in a statute, *see, e.g.*, CAL. INS. CODE § 533 (West 1993) (“An insurer is not liable for a loss caused by the willful act of the insured . . .”), the principal reason for the exclusion of intentional or willful acts is based upon the rationale that insurance is generally designed to provide protection against random or

type of coverage defense in *CHI*.⁴²

Another category of issues regarding coverage deals with the type or extent of damages.⁴³ An insurance policy, for example, may not cover claims for punitive damages or those related to certain types of hazards.⁴⁴ Furthermore, bodily injuries may not be covered in a professional liability policy, as general liability insurance would ordinarily be relied upon to provide this type of protection.⁴⁵ The extent of damages may also be an issue if the claim exceeds the policy limits.⁴⁶

Another common source of disputes centers on the issue of whether a certain person qualifies as an insured.⁴⁷ The resolution of these issues may require a determination of both legal issues centering on the language of the policy, as well as factual issues pertaining to the relationship of the claimant with one who is clearly covered under the policy.⁴⁸

C. Insurer Options Under Alaska Law When It Has Doubts About Its Coverage

The Alaska Supreme Court recently set out, in *Sauer v. Home Indemnity Co.*,⁴⁹ the options available to an insurance company when it has doubts about its coverage. First, the insurer may provide an unconditional defense, ordinarily causing the doctrines of waiver and estoppel to bar the insurance company from later contesting coverage.⁵⁰ Second, if the insurance company can negotiate a non-waiver agreement with its insured, it may conduct the defense conditionally.⁵¹ The insurer also can accomplish this by sending a reservation of rights letter and receiving insured's

unforeseen events. Ronald E. Mallen, *A New Definition of Insurance Defense Counsel*, 53 *INS. COUNS. J.* 108, 112 (1986). The traditional definition of risk as something "neither expected nor intended from the standpoint of the insured," leads to the inclusion of coverage clauses requiring an "occurrence" or "accident" before coverage is activated. *Id.* Intended injuries generally do not fall within the traditional concept of risk because the insured would be consciously subjecting the insurer to a loss. *Id.*

42. *CHI*, 844 P.2d at 1114.

43. Mallen, *supra* note 41, at 113.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Sauer v. Home Indem. Co.*, 841 P.2d 176, 183 (Alaska 1992).

50. *Id.* at 182 (citing 7C JOHN A. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4692 (rev. vol. 1979)).

51. *Id.*

consent to a conditional defense.⁵² Providing a conditional defense under a reservation of rights allows the insurance company to retain its option to later disclaim coverage after a judgment has been entered.⁵³ The insured may, however, refuse to consent either to a non-waiver agreement or to a defense under a reservation of rights. The insurance company is then forced either to conduct an unconditional defense or pursue other courses of action.⁵⁴

Under one such course of action, the insurer simply may refuse to defend.⁵⁵ If the case involves a policy defense, the insurance company thus preserves its right to litigate the policy coverage question.⁵⁶ When the case involves a coverage defense, however, the consequences of the insurer's withdrawal make the situation more complex. According to the *Sauer* court, the complexity arises from the distinct contractual duty to defend whenever there is a cause of action even potentially within policy coverage, though the company may have no ultimate liability under the policy. A conundrum is created by conflicting decisions arising in this setting.⁵⁷

The second course of action available to the insurance company recounts the issue presented in *CHI*. As expressed by the *Sauer* court, the insurer may "permit the insured to exercise its right to reject the defense offered by the insurer and to obtain substitute counsel at the insurer's expense."⁵⁸ If the defense is handled by substitute counsel, the insurance company clearly preserves its right to challenge policy coverage in a subsequent proceeding.⁵⁹

52. *Id.*

53. *Id.*

54. *Id.* at 182-83.

55. *Id.* at 183.

56. *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 291 (Alaska 1980).

57. *Compare Theodore v. Zurich Gen. Accident & Liab. Ins. Co.*, 364 P.2d 51, 55 (Alaska 1961) (holding that where there is a refusal to defend, insurer is liable for full amount of settlement reached by insured, without right to claim liability is not covered by policy in subsequent litigation) *with Afcan v. Mutual Fire, Marine & Inland Ins. Co.*, 595 P.2d 638, 647 (Alaska 1979) (holding that when settlement is reached in suit which alleged several grounds for relief and settlement is not necessarily within coverage of policy, insurer that has wrongfully refused to defend may bring subsequent action on the policy to show that loss is not within coverage of policy).

58. *Sauer*, 841 P.2d at 183.

59. *Id.* (citing *Bayless & Roberts*, 608 P.2d at 291 n.17).

D. Pre-CHI Decisions on the Issue of Independent Counsel

In three previous decisions, the Alaska Supreme Court had alluded to the insured's right to independent counsel. In *National Indemnity Co. v. Flesher*,⁶⁰ the court considered an insurer's assertion of a coverage defense and merely noted, in dictum, that "[i]n such circumstances, the insurer must provide the insured with independent counsel."⁶¹

Ten years later, in *Continental Insurance Co. v. Bayless & Roberts, Inc.*,⁶² the court held that when a policy defense is asserted, "the insured is fully within its rights and does not breach the policy's cooperation clause when it insists that an insurer either defend unconditionally or withdraw from the defense of the insured."⁶³ The court also noted that:

The possibility of a conflict might be avoided in such cases if the insurance company were to offer its insured the right to retain independent counsel to conduct his defense, and agree to pay all the necessary costs of that defense. In that event, it would seem that the company should be entitled to reserve the right to later litigate and allege a policy defense.⁶⁴

Most recently, in *Criterion Insurance Co. v. Velthouse*,⁶⁵ the court noted "potential problems" where the insurer had appointed counsel for its insured and reserved the right to contest coverage.⁶⁶ The court expressed no opinion on the insured's right to select independent counsel at that time, however, leaving the issue to arise again in *CHI*.⁶⁷

III. THE CHI CASE

In the following sections, the facts and proceedings leading up to the decision in *CHI* are described. By way of comparison, the parallel developments in *Cumis* are noted.

60. 469 P.2d 360 (Alaska 1970).

61. *Id.* at 367 n.22.

62. 608 P.2d 281 (Alaska 1980).

63. *Id.* at 291.

64. *Id.* at 291 n.17.

65. 751 P.2d 1 (Alaska 1986).

66. *Id.* at 2 n.2 (citing *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 208 Cal. Rptr. 494, 506 (Cal. Ct. App. 1984)).

67. *Id.*

A. The Facts of *CHI*

The dispute in *CHI* arose when a seaman on board a ship owned by Oceanic Research Services, Inc., was accidentally injured.⁶⁸ Oceanic carried an insurance policy, issued through CHI of Alaska, Inc., with a bodily injury limit of \$100,000.⁶⁹ Oceanic believed, however, that it was insured against such losses for up to \$500,000.⁷⁰ To resolve this coverage dispute, Oceanic sued CHI, seeking both compensatory and punitive damages.⁷¹ Oceanic asserted contract and negligence claims and a claim that CHI had intentionally misrepresented that the policy coverage was \$500,000.⁷² CHI tendered the defense of the suit to its liability insurer, Employers Reinsurance Corporation.⁷³ Employers offered to provide CHI with a conditional defense, stating that it would reserve its right to disclaim coverage with respect to Oceanic's cause of action for intentional misconduct.⁷⁴ Employers elected to choose counsel to represent CHI.⁷⁵ In informing CHI of this decision, Employers also advised CHI to consider retaining separate counsel for the claims allegedly excluded under the policy.⁷⁶ Through this offer, Employers proposed the two-counsel

68. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1114 (Alaska 1993).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* By way of comparison, the *Cumis* case, *San Diego Navy Federal Credit Union v. Cumis Insurance Society*, 208 Cal. Rptr. 494 (Cal. Ct. App. 1984), arose in May 1981 when the San Diego Navy Federal Credit Union and several of its officers were named as defendants in a lawsuit filed by a former employee. *Id.* at 496. The complaint sought compensatory and punitive damages for a tortious wrongful discharge, breach of contract, and other related claims. *Id.* The credit union tendered the defense of the lawsuit to its insurance carrier, Cumis Insurance Society, Inc. *Id.* In response to the tender of defense, Cumis sent a reservation of rights letter to the credit union which stated that Cumis had retained defense counsel for the credit union but that Cumis was reserving its right to disclaim coverage at a future date. The letter specifically denied coverage for punitive damages. *Id.*

75. Brief for Appellant at 5, *CHI* (No. S-4323).

76. *Id.* In *Cumis*, upon receipt of the reservation of rights letter, the credit union became concerned about its insurance coverage and the potential exposure from the employee's lawsuit. *Cumis*, 208 Cal. Rptr. at 497. The credit union retained its own attorneys to protect its interests. *Id.* That firm became co-counsel of record with the appointed counsel that Cumis had retained to provide the defense. *Id.* Independent counsel presented a claim to Cumis seeking

scheme discussed earlier.⁷⁷

“Employers’ original choice of counsel withdrew from the case after a dispute arose as to whether that firm was attempting to represent both CHI and Employers at the same time.”⁷⁸ Employers then notified CHI that it would void the insurance policy for non-cooperation if CHI refused to agree to Employers’ choice of counsel.⁷⁹ CHI insisted that Employers pay for independent counsel unilaterally selected by CHI.⁸⁰ Employers was dissatisfied with the attorney CHI wished to retain due to the attorney’s lack of experience in handling the type of claims being litigated. When Employers suggested that CHI furnish a list of other more experienced attorneys who might be retained by Employers to defend CHI, CHI refused to agree.⁸¹ Employers further suggested it would pay the lawyer selected by CHI to defend the intentional misconduct claim, while, at the same time, selecting an “independent” law firm to act as co-counsel to CHI’s attorney on the defense of all claims.⁸² CHI also declined this offer.⁸³

B. CHI: In the Trial Court

CHI filed suit for declaratory relief, seeking allowance to retain its own choice of counsel in the *Oceanic* case.⁸⁴ Both

payment of attorneys’ fees in the litigation. *Id.* Cumis agreed with the demand and began paying the attorneys’ fees incurred by the credit union for independent counsel. *Id.*

77. See *supra* text accompanying notes 6-9.

78. Brief for Appellant at 5, *CHI* (No. S-4323). In *Cumis*, while the lawsuit was proceeding and Cumis was paying both the defense counsel it had retained and the credit union’s independent counsel, Cumis asked appointed counsel for an opinion as to whether there was a conflict of interest which might require Cumis to pay for the independent counsel fees of the credit union. Saxon, *supra* note 19, at 356. The appointed counsel advised Cumis that they found no such conflict of interest. *Id.* Cumis then informed the independent counsel of the credit union that they did not believe there was a sufficient conflict of interest to justify Cumis continuing to pay for the independent counsel. *Id.* Cumis further indicated that the credit union would have to defend itself on the punitive damages claim because it was excluded from coverage under the Cumis policies and by California law. *Id.*

79. Brief for Appellant at 5, *CHI* (No. S-4323).

80. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1114 (Alaska 1993).

81. *Id.*

82. This law firm was “independent” of Employers in that it had not previously represented that company. Brief for Appellee at 4-5, *CHI* (No. S-4323).

83. *CHI*, 844 P.2d at 1114.

84. *Id.*

parties moved for summary judgment.⁸⁵ “CHI contended that there was necessarily a conflict of interest between CHI and Employers respecting the defense of Oceanic’s claim because Employers could either win by defeating all claims of liability *or by establishing that CHI was liable for intentional misconduct.*”⁸⁶ CHI demanded that Employers be precluded from participating in the selection of defense counsel, arguing that, as a result of the conflict of interest, any attorney selected by an insurance company “will attempt to help his real client, the insurance company, at the expense of the insured.”⁸⁷ In opposition to CHI’s motion and in support of its own motion for summary judgment, “Employers argued the potential conflicts were eliminated by allowing CHI to have its personal attorney handle the non-covered claim at Employers’ expense.”⁸⁸

The superior court granted Employers’ motion for summary judgment, holding that Employers’ offer to allow CHI to retain its choice of counsel to defend it on the intentional tort claim adequately resolved potential conflicts of interest.⁸⁹ CHI appealed this decision.⁹⁰

C. The Appeal

1. *The Arguments of the Parties.* The issues presented for review in CHI’s brief included: (1) whether a reservation of rights by an insurer triggers a right to independent counsel for the insured; (2) whether the selection of independent counsel was prohibited by the insurance contract and (3) whether any require-

85. *Id.*

86. *Id.* (emphasis added).

87. *Id.* In *Cumis*, the credit union filed a declaratory relief action against Cumis before the underlying lawsuit was tried. Saxon, *supra* note 19, at 357. The credit union “requested that the trial court declare that Cumis was required by law and contract to pay for the fees of its independent counsel.” *Id.* The trial court found in favor of the credit union and held that Cumis was required to pay for independent counsel. *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc’y*, 208 Cal. Rptr. 494, 497 (Cal. Ct. App. 1984). The trial court found that the actions of the defense attorney in the third party case have an impact on the issue of coverage, since questions of coverage depend on the development of facts in that case. *Id.* The trial court judge expressed a concern that appointed counsel “would be tempted to develop the facts to help his real client, the Carrier company, as opposed to the insured for whom he will never likely work again.” *Id.* The trial court opinion was clearly influenced by the fact that appointed counsel had advised Cumis while representing the insured. *Id.* at 499.

88. *CHI*, 844 P.2d at 1115.

89. *Id.*

90. *Id.*

ment of independent counsel is satisfied “by allowing independent counsel to defend only those claims arising outside the scope of the insurance policy coverage.”⁹¹ In its brief, Employers argued that the court could eliminate any potential conflicts of interest by simply refusing to apply the judgment by estoppel rule⁹² in any subsequent litigation between insurer and insured.⁹³ Alternatively, Employers asserted that it was entitled to set certain qualifications for independent counsel,⁹⁴ that the appointment of independent counsel would not reduce the amount of litigation,⁹⁵ and that “the claims for which reservations of rights were made [were] such a minor part of the underlying case that extraordinary relief such as that requested was not warranted.”⁹⁶ The most detailed section of Employers’ brief was devoted to an argument in favor of the dual-counsel scheme.⁹⁷

2. *The Alaska Supreme Court Decision.* The Alaska Supreme Court defined three issues in the appeal:

1. Did Employers’ reservation of rights to disclaim coverage give CHI a right to retain independent counsel?

91. Brief for Appellant at 3, *CHI* (No. S-4323).

92. The effects of abrogating the judgment by estoppel rule are discussed at *infra* text accompanying notes 157-160. In essence, “not using the judgment by estoppel rule” in this context means that the findings of facts in the underlying action are not binding in a subsequent coverage action.

93. Brief for Appellee at 8, *CHI* (No. S-4323).

94. *Id.* at 12.

95. *Id.* at 21.

96. *Id.* at 22.

97. *Id.* at 17-24. Comparison of the briefing in *CHI* with that in *Cumis* reveals an interesting contrast between the little attention given to this issue in Alaska as opposed to California. *CHI*’s brief contained 31 pages, Brief for Appellant, *CHI* (No. S-4323); Employers’ 25 pages, Brief for Appellee, *CHI* (No. S-4323); and *CHI*’s reply 13 pages, Appellant’s Reply Brief, *CHI* (No. S-4323). By contrast, in response to the trial court opinion in *Cumis*, the following organizations filed *amici curiae* briefs with the California Court of Appeal: Association of Defense Counsel, Association of Southern Defense Counsel, American Insurance Association, Association of California Insurance Companies, National Association of Independent Insurers, and California Land Title Association. Saxon, *supra* note 19, at 358 n.28. This phenomenon provides support for the observation regarding the relative impact of Alaska and California decisions. *See supra* note 20 and accompanying text. Although the holding in *CHI* could have significant ramifications for insurance defense practice in Alaska, the appeal received little attention. The briefing on both sides also failed to address the question of whether the ethical framework set out in the Alaska Code of Professional Responsibility provided adequate safeguards in a potential conflict of interest situation if truly independent counsel was appointed by an insurer to defend the insured.

2. Does the two-counsel scheme proposed by Employers and approved by the superior court satisfy CHI's right to independent counsel?

3. Does CHI have the unilateral right to select independent counsel?⁹⁸

The following sections review and critique the majority's disposition of these issues. The sections also analyze (1) Justice Compton's dissenting opinion in favor of a dual-counsel scheme and (2) Justice Moore's separate concurring and dissenting opinion, which would give the insurer the right to approve the insured's choice of counsel.

a. An Insurer's Reservation of Rights to Disclaim Coverage Gives an Insured a Right to Retain Independent Counsel. First and most importantly, the *CHI* court held that Employers' reservation of the right to disclaim coverage gave CHI a right to retain independent counsel.⁹⁹ In reaching this conclusion, the court reviewed some of the basic principles governing the insurer's duty to defend¹⁰⁰ and then considered situations in which the insurer might seek to avoid paying the underlying claim.¹⁰¹

In reaching its decision, the *CHI* court analyzed the three basic types of conflicts of interest that can arise between the insurer and the insured when the insurer issues a reservation of rights letter. First, the insurer may only "go through the motions" of defending the insured when the insurer knows (1) it can later assert a non-coverage defense or (2) thinks the loss which it is defending will not be covered.¹⁰² Second, when there are different theories of recoverability, the insurer might be prone to conduct the defense in such a manner that the plaintiff would be more likely to obtain a verdict based on a theory that would deny coverage.¹⁰³ Third, in defending the insured, the insurer might discover confidential or privileged information that it could later use to its advantage in litigation concerning coverage.¹⁰⁴ The *CHI* court reasoned that because policy defenses rarely involve facts of significance in the

98. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1115 (Alaska 1993).

99. *Id.*

100. *Id.*

101. *Id.* at 1115-16.

102. *Id.* at 1116 (citing *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 289 (Alaska 1980)).

103. *Id.* Interestingly, the *CHI* court conceded that this argument really does not apply in the setting of a "policy defense," such as that presented in *Bayless & Roberts*, 608 P.2d 281 (Alaska 1980), the case in which the court listed the conflicts for the first time. *CHI*, 844 P.2d at 1118.

104. *Id.* at 1116 (citing *Bayless & Roberts*, 608 P.2d at 291).

underlying litigation,¹⁰⁵ situations are unlikely to arise in which an attorney will conduct the insured's defense with the goal of obtaining a verdict that will allow the insurance company to later assert a successful policy defense.¹⁰⁶ Such a conflict could arise, however, in cases involving a coverage dispute. The court concluded, therefore, that the "need for independent counsel is, if anything, greater in coverage than in policy defense cases"¹⁰⁷ and extended the right to independent counsel to cases involving coverage disputes.¹⁰⁸

The Alaska Supreme Court, in support of its conclusion that Employers' reservation of the right to disclaim coverage gave CHI a right to retain independent counsel,¹⁰⁹ also observed that most courts have held that in conflict of interest situations, the insured has the right to have independent counsel conduct its defense.¹¹⁰ Moreover, the right to independent counsel in cases involving a coverage defense had been alluded to previously in dictum.¹¹¹ To

105. *Id.* at 1118.

106. *Id.*

107. *Id.* (citing Michael A. Berch & Rebecca W. Berch, *Will the Real Counsel for the Insured Please Rise?*, 19 ARIZ. ST. L.J. 27, 38 (1987)).

108. *Id.* at 1118-19 (citing *Sauer v. Home Indem. Co.*, 841 P.2d 176, 182-83 (Alaska 1992)). The right to independent counsel in cases involving a policy defense was established in *Continental Insurance Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281 (Alaska 1980). The *Bayless* court declined to address the question of whether the same right existed in coverage defense cases. *CHI*, 844 P.2d at 1118-19.

109. *Id.* at 1115.

110. *Id.* at 1120 (citations omitted). Justice Moore, however, correctly observes in his vigorous separate opinion that:

Although the court purports to align itself with what it considers to be the "majority view" an analysis of the cases it relies on reveals that most courts which have recognized the insured's "right to independent counsel" have not explicitly analyzed the scope of this right or fully considered its impact on the rights of the insurer.

Id. at 1123 (Moore, J., concurring in part, dissenting in part).

For purposes of this discussion, it is conceded that the prevailing view in other jurisdictions is that the presence of the coverage issue enables the insured to reject appointed counsel and select his own lawyer at the expense of the insurer. By contrast, the minority view relies upon the integrity of defense counsel to ensure that coverage issues do not interfere with the quality of the defense provided to the insured. *Siebert Oxidermo, Inc. v. Shields*, 430 N.E.2d 401, 403 (Ind. Ct. App. 1982), *aff'd*, 446 N.E.2d 332 (Ind. 1983); *Motorists Mut. Ins. Co. v. Trainor*, 294 N.E.2d 874, 878 (Ohio 1973); *Norman v. Insurance Co. of N. Am.*, 239 S.E.2d 902, 907-08 (Va. 1978).

111. *CHI*, 844 P.2d at 1118 (citing *National Indem. Co. v. Fleisher*, 469 P.2d 360, 367 n.22 (Alaska 1977)).

further bolster its conclusion, the court cited two cases¹¹² and four law review articles¹¹³ to support its proposition that “appointed counsel may tend to favor the interests of the insurer primarily because of the prospect of future employment.”¹¹⁴ The court suggested that:

Merely because the insurer and the insured have divergent interests when the insurer seeks to defend under a reservation of rights does not necessarily mean that appointed counsel also has conflicting interests. If appointed counsel makes it clear at the outset of his engagement that he is going to be involved only in the defense of the liability claim, not in coverage issues, and that his client is the insured, not the insurer, conflicts should be rare.¹¹⁵

Similarly, the California Court of Appeal in *Cumis* had also analyzed the types of conflicts that could arise between insurer and insured.¹¹⁶ Unlike the situation in *CHI*, however, the lawyer appointed to represent the insured in *Cumis* also rendered coverage advice on the same matter to the insurer.¹¹⁷ This created a situation in which counsel was giving advice to the insurer contrary to his client’s interests. This conflict provided the crucial underpinning for the *Cumis* court’s determination that every time such a situation arises “the lawyer is placed in the dilemma of helping one of his clients concerning insurance coverage and harming the other. No matter how honest the intentions, counsel cannot discharge inconsistent duties.”¹¹⁸ By contrast, the counsel appointed by Employers to defend *CHI* had never represented Employers in court.¹¹⁹ Thus, despite the lack of any evidence in *CHI* that an actual conflict of interest had developed—as compared to the facts in *Cumis*—the court premised the balance of its discussion and resolution of the potential conflict of interest issue¹²⁰ on the view

112. *United States Fidelity & Guar. Co. v. Lewis A. Roser Co.*, 585 F.2d 932, 938 n.5 (8th Cir. 1978); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc’y*, 208 Cal. Rptr. 494, 498 (Cal. Ct. App. 1984).

113. *Berch & Berch*, *supra* note 107, at 29-30; Arthur P. Berg, *Losing Control of the Defense—The Insured’s Right to Select His Own Counsel*, FOR THE DEF., July 1984, at 10, 15; *Brown & Romaker*, *supra* note 19, at 54; *Saxon*, *supra* note 19, at 353.

114. *CHI*, 844 P.2d at 1117.

115. *Id.* at 1116 (citation omitted).

116. *Cumis*, 208 Cal. Rptr. at 498.

117. *Id.* at 497.

118. *Id.* at 499.

119. Brief for Appellee at 4-5, *CHI* (No. S-4342).

120. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1116-18 (Alaska 1993).

that "appointed counsel represents both the insured and the insurer."¹²¹

b. *The Two-Counsel Scheme Does Not Satisfy an Insured's Right to Independent Counsel Under the CHI Decision.* The trial court had determined that neither CHI nor Employers would be bound by any findings of fact in the underlying suit concerning the nature of the conduct of CHI.¹²² As a result, the trial court concluded that the two-counsel plan proposed by Employers would resolve the conflict of interest between the insurer and the insured.¹²³ The supreme court agreed that "issues determined in the initial action as to which a conflict of interest exists between the insurer and insured may be subsequently relitigated."¹²⁴ The access of appointed counsel to information possessed by the insured, however, concerned the court, as it potentially could be used against the insured in subsequent proceedings regarding coverage.¹²⁵ The court also posited that "the opportunity to direct a case through witness selection, interrogation, and discovery may afford a dispositive advantage in subsequent litigation,"¹²⁶ primarily because the testimony of the witness would be made under oath in the initial litigation, leaving little opportunity in later proceedings to "mold" the evidence regarding coverage.¹²⁷ Thus, based on these concerns, the court concluded that the two-counsel scheme does not satisfy the right of an insured to retain independent counsel.¹²⁸

Both Justice Moore and Justice Compton, however, were disturbed by the complete negation of the insurer's ability to participate in the litigation. Justice Moore, in his concurring and

121. *Id.* at 1116.

122. *Id.* at 1119.

123. *Id.*

124. *Id.*

125. *Id.* (citing Berch & Berch, *supra* note 107, at 32 n.23). The *Cumis* court also recognized that this ethical dilemma could arise during pretrial discovery, when defense counsel investigates all possible theories of liability. *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 208 Cal. Rptr. 494, 499 (Cal. Ct. App. 1984). Such investigations and client communications, according to the *Cumis* court, often produce facts directly relating to the issue of coverage and may lead to the formation of an opinion by the defense counsel regarding the credibility of the insured. *Id.* Noting that "confidentiality is essential where communications can affect coverage," the California Court of Appeal found that insurance defense counsel is "forced to walk an ethical tightrope, and not communicate relevant information which is beneficial to one or the other of his clients." *Id.*

126. *CHI*, 844 P.2d at 1119.

127. *Id.* at 1119-20.

128. *Id.* at 1120.

dissenting opinion, observed that two of the cases relied upon by the majority in recognizing the right of the insured to select independent counsel also implicitly support the right of an insurer to participate in the defense of its insured.¹²⁹ In *Cumis*, the insurer was required to pay the fees of an attorney retained by the insured to act as co-counsel with the insurer-selected attorney.¹³⁰ Similarly, in *American Family Life Assurance Co. v. United States Fire Co.*,¹³¹ the Eleventh Circuit affirmed an award of attorneys' fees to an insured who had hired co-counsel to "monitor and aid in the defense" provided by the insurer.¹³² In his separate dissenting opinion, Justice Compton instead advocated the two-counsel scheme.¹³³ Under such an approach, the insurer would pay the fees of the insured-selected independent counsel, but only to the extent of defenses for claims that the insurer asserted fell outside of policy coverage.¹³⁴

The two-counsel scheme, however, also presents practical problems regarding discovery and trial strategy. As noted by the *CHI* court, a respected commentator has stated that "[t]he role of a second lawyer with clearly antagonistic coverage interests to the insured is uncertain and seems inappropriate."¹³⁵ For this reason, this article does not recommend the two-counsel approach advocated by Employers in the appeal and by Justice Compton in his dissent.

c. An Insured Has the Unilateral Right to Select Independent Counsel Subject to the Implied Covenant of Good Faith and Fair Dealing. The *CHI* majority found that most courts that recognize the right to independent counsel also extend this thinking one step further: the opinions additionally support the proposition that the insured has the right to select independent counsel of its choice.¹³⁶

129. *Id.* at 1123 (Moore, J., concurring in part, dissenting in part) (citing *American Family Life Assur. Co. v. United States Fire Co.*, 885 F.2d 826 (11th Cir. 1989); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 208 Cal. Rptr. 494 (Cal. Ct. App. 1984)).

130. *Cumis*, 208 Cal. Rptr. at 497.

131. 885 F.2d 826 (11th Cir. 1989).

132. *Id.* at 132. Similarly, "other cases cited in support of the majority view do not hold that an insured has the unilateral right to select defense counsel to the exclusion of any right of the insurer to participate in the defense." *CHI*, 844 P.2d at 1123 n.6 (Moore, J., concurring in part, dissenting in part).

133. *Id.* at 1130-31 (Compton, J., dissenting).

134. *Id.* at 1130 (Compton, J., dissenting).

135. *Id.* at 1120 n.13 (quoting Mallen, *supra* note 41, at 119). The numerous problems associated with the two-counsel scheme are outside the scope of this article.

136. *Id.* at 1120 (citations omitted).

Guided by a recent California case,¹³⁷ the *CHI* court found that the covenant of good faith and fair dealing implied in every insurance contract¹³⁸ requires the insured to "select an attorney who is, by experience and training, reasonably thought to be competent to conduct the defense of the insured."¹³⁹ The court asserted that the implied covenant would provide a "measure of protection for insurers against overbilling and overlitigating by independent counsel."¹⁴⁰ Unfortunately, the court failed to specify by whose standards the competency of replacement counsel should be measured.¹⁴¹

Consequently, it was not surprising that the court found the record unclear as to whether or not the lawyer selected by CHI to serve as its independent counsel was a reasonable selection.¹⁴² Accordingly, the court remanded the case for a hearing to determine whether that selection was reasonable.¹⁴³ If the trial court found the choice unreasonable, it was directed to order CHI to select qualified counsel.¹⁴⁴

IV. THE MERE RESERVATION OF RIGHTS TO DISCLAIM COVERAGE SHOULD NOT NECESSARILY GIVE AN INSURED A RIGHT TO RETAIN INDEPENDENT COUNSEL

In announcing the sweeping rule that confers upon the insured the unilateral right to select independent counsel, the Alaska Supreme Court did not adequately consider the actual degree of impact that appointed counsel could have upon the outcome of the litigation. Analysis of that effect suggests that a mere reservation of rights to disclaim coverage should not necessarily give an insured a right to retain independent counsel. The *CHI* court based its holding, in large part, upon serious doubts about the ethical character of appointed counsel. Because insurer-appointed counsel

137. *Center Found. v. Chicago Ins. Co.*, 278 Cal. Rptr. 13, 21 (Cal. Ct. App. 1991) (holding that the implied covenant of good faith and fair dealing requires that the insured act reasonably to select attorney capable of presenting effective defense and who will bill reasonably for services).

138. *Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979). For a more comprehensive analysis of the doctrine of the implied covenant of good faith and fair dealing in Alaska, see Jason R. Erb, Note, *The Implied Covenant of Good Faith and Fair Dealing in Alaska: One Court's License to Override Contractual Expectations*, 11 ALASKA L. REV. 35 (1994).

139. *CHI*, 844 P.2d at 1121 (footnote omitted) (emphasis added).

140. *Id.*

141. *Id.* at 1125 (Moore, J., concurring in part, dissenting in part).

142. *Id.* at 1121.

143. *Id.*

144. *Id.*

may not be able or have an incentive to influence the defense of the underlying tort action in favor of the insurer, this article concludes that not all coverage issues have the potential to affect the quality of the defense.

A. Even Assuming the Validity of the Court's Premises, the Resulting Conclusion Does Not Logically Follow.

In analyzing the conflicts of interest that can exist between an insurer and its insured when a reservation of rights has been issued, the *CHI* court found that "appointed counsel may tend to favor the interests of the insurer" for a variety of reasons, none of which are professional¹⁴⁵ and most of which are related to the generation of future business.¹⁴⁶ In 1980, the Alaska Supreme Court in *Bayless & Roberts* explained, in some detail, the types of conflicts of interest that can arise between insurer and insured.¹⁴⁷ Although the court did not evaluate the ability of appointed counsel to further the interests of the insurer, these enumerated conflicts ultimately formed the basis for *CHI*'s recognition of the insured's right to select its own counsel.

1. *Appointed Counsel Will Be Unable to Slant His Efforts to Prejudice the Insured.* Even assuming that the *CHI* decision has articulated the nature of the conflict between the insurer and the insured accurately,¹⁴⁸ it fails to explain the manner in which appointed counsel could "slant his efforts"¹⁴⁹ in favor of the insured. The court also fails to detail how an attorney could "covertly frame a defense to achieve a verdict upon a theory under which no coverage would result so that the insurer could later assert that the defense was not covered."¹⁵⁰ Moreover, as suggested by Justice Compton in his dissent, the *CHI* court never addresses a logical extension of its reasoning: just as insurer-appointed counsel may have tendencies toward bias and preferential treatment in favor of the party that selected them, so may attorneys chosen by the insured.¹⁵¹

145. The term "professional" here means related to professional responsibility or conduct and governed by the ethics rules.

146. *CHI*, 844 P.2d at 1116-17.

147. *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 289 (Alaska 1980).

148. This article subsequently examines this assumption. See *infra* part IV.A.2.

149. *CHI*, 844 P.2d at 1116-17 (citing *United States Fidelity & Guar. Co. v. Lewis A. Roser Co.*, 585 F.2d 932, 938 n.5 (8th Cir. 1988)).

150. *Bayless & Roberts*, 608 P.2d at 289.

151. *CHI*, 844 P.2d at 1130 (Compton, J., dissenting).

The court fails to examine whether appointed counsel could act on alleged tendencies towards bias. Certainly a coverage dispute between an insurer and the insured presents some level of conflict. Appointed counsel, by virtue of some longstanding relationship with the insurer, may somehow be inclined to favor that party's interests. If a defense attorney does not have the opportunity to further the interests of the insurer, however, the rationale for allowing the insured to designate independent counsel is hollow. One pair of commentators, summarizing the California case law, state that "where the attorney can affect coverage by the tactical decisions he makes, the attorney has a conflict of interest. But when the attorney cannot affect the coverage issue, there is no conflict."¹⁵²

At a minimum, the inquiry should consider how the actions of defense counsel in defending the underlying tort action could affect the ultimate resolution of the coverage issue. Alaska decisions leading up to *CHI* failed to explore that question in depth. *Bayless & Roberts* alluded in dictum to this problem of pro-insurer manipulation, focusing on how findings made in the underlying tort action could affect subsequent coverage litigation between the insurer and the insured.¹⁵³ However, the *CHI* court held that the rationale underlying this dictum did not apply to policy defense situations, as a policy defense rarely involves facts germane to litigation between the insurer and the insured.¹⁵⁴

In coverage defenses, as well, insurer-appointed counsel will not likely be able to meaningfully slant their efforts in favor of the insurer. Consider the typical coverage conflict scenario, present in *CHI*,¹⁵⁵ where both negligent and intentional tort claims are litigated, but the policy covers only the former.¹⁵⁶ The doctrine of collateral estoppel bars a party from relitigating an issue that a court has previously resolved against him.¹⁵⁷ This rule is justified

152. Brown & Romaker, *supra* note 19, at 67. This limitation is not recognized in the sweeping rule announced by the court in *CHI*. In this respect, among others, the court appears to have surpassed *Cumis*.

153. *Bayless & Roberts*, 608 P.2d at 289-91.

154. *CHI*, 844 P.2d at 1118.

155. *Id.* at 1115.

156. *Id.* Other types of conflicts present similar issues. See *supra* part II.B. (categorizing types of conflicts).

157. *Murray v. Feight*, 741 P.2d 1148, 1153 (Alaska 1987). In order for the doctrine to apply, three factors must be present: (1) there must be a final judgment on the merits for the issue in question; (2) the question in the prior action must be identical to that presented in the later proceeding; and (3) the person against whom the estoppel is sought must have been a party, or in privity with a party, in the prior action. *Id.*

on the ground of judicial economy, as it eliminates the need for multiple trials of the same issues. It is considered equitable to the estopped party, since he has already had one full opportunity to litigate the issue.¹⁵⁸

The Alaska Supreme Court, however, has declined to apply the doctrine to disputes between an insurer and an insured.¹⁵⁹ Although findings made in the underlying tort action generally bind an insurer, the Alaska Supreme Court has held that the principle of collateral estoppel does not apply to issues with respect to which the insurer has a conflict of interest with its insured.¹⁶⁰ Thus, regardless of how the attorney may try to affect the particular outcome of the underlying action, the result will bar neither the insurer nor the insured in its subsequent coverage litigation.

Consequently, the *CHI* decision must rest upon some less substantial way in which the defense counsel appointed by an insurer could conceivably "slant his efforts." The *CHI* court's concern that insurance counsel would "covertly frame the defense" is not well founded.¹⁶¹

2. *Because All Coverage Issues Do Not Factor into the Quality of the Defense, the CHI Rule Confers an Overbroad Right to Independent Counsel.* Although straightforward, the approach of the *CHI* court ignores the fact that not all coverage issues have a potential to affect the quality of the defense. As observed by Justice Moore, because not all coverage issues will even potentially affect the incentives of insurer-appointed counsel, "it is far from clear that the scope of the conflict of interest problem in the defense context is so broad or the frequency of harm to the insured so great as to warrant such a drastic curtailment of the insurer's contract rights."¹⁶²

The *CHI* decision fails to examine critically whether it is realistic to assume that an insurer will strive to protect its coverage interests at the expense of the insured.¹⁶³ In many cases, the

158. *Id.* at 1154

159. *See CHI*, 844 P.2d at 1119 n.12. "The view that issues determined in the initial action as to which a conflict of interest exists between insurer and insured may be subsequently relitigated appears to be sensible and in accordance with a number of authorities." *Id.* at 1119 (citations omitted).

160. *Id.* at 1113; *Continental Ins. Co. v. Bayless & Roberts, Inc.*, 608 P.2d 281, 290 (Alaska 1980) (dictum) (citing *Ferguson v. Birmingham Fire Ins. Co.*, 460 P.2d 342, 348-49 (Or. 1969)).

161. *See CHI*, 844 P.2d at 1118.

162. *Id.* at 1126 (Moore, J., concurring in part, dissenting in part).

163. This issue differs from the earlier question of the appointed counsel and his allegiances, but ultimately, it focuses on the same issue: whether the appointed

coverage issue develops as a result of the plaintiff's allegations in the complaint.¹⁶⁴ Those allegations, however, may in fact bear little relationship to reality, as a complaint may contain several alternative claims, some likely to be outside the scope of coverage.¹⁶⁵ Tactical concerns may underlie a plaintiff's decision to make multiple claims, as the creation of a coverage issue may create damaging tensions in the relationship between the insurer and insured.¹⁶⁶ If the insured has reason to doubt his coverage, for example, he may agree to a settlement that is unwarranted or excessive in an effort to ensure that the suit is settled on terms that place him within the coverage of his policy.¹⁶⁷ In such a situation, the insured unwittingly aligns himself with the claimant, who is the true adversary of both the insured and the insurer.¹⁶⁸

The coverage issue does not arise until the insurer informs the insured of either a reservation or denial of rights. Under well-established Alaska law, however, the doctrine of good faith compels the insurer to inform the insured of all apparent coverage problems.¹⁶⁹ The insurer must promptly "give the insured such notice of its intention to deny liability and of its refusal to defend as will give the insured a reasonable time to protect himself"¹⁷⁰ and "provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim."¹⁷¹ Thus, "although the insurer is obligated to inform the insured of a coverage issue, pursuing the issue may not be in the interest of the insurer."¹⁷² The *CHI* court incorrectly makes the broad presumption that the insurer will sacrifice the insured's interests in the tort case to advance its own interests in the coverage case. This presumption ignores the fact that if the tort claimant loses, the dispute over coverage becomes irrelevant.

CHI's broad rule also fails to consider that some bases for a reservation of rights do not pose a potential for conflicts of interest. Unlike the common conflicts of interest that occur in a coverage dispute over whether conduct was negligent or intentional, "a claim

counsel will ethically represent an insured.

164. Mallen, *supra* note 41, at 108.

165. *Id.* (citing *Parker v. Agricultural Ins. Co.*, 440 N.Y.S.2d 964 (1981)).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Sauer v. Home Indem. Co.*, 841 P.2d 176, 182 (Alaska 1992).

170. *Id.* (quoting 7C JOHN A. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4686 (rev. vol. 1979)).

171. *Id.*

172. Mallen, *supra* note 41, at 109 (discussing risks for the insurer in that situation).

for punitive damages differs from that [situation] in that no alternative, whether of fact or theory, is presented for the defense counsel."¹⁷³ Regardless of whether the policy covers a claim for punitive damages, "the ethical obligation of defense counsel[, appointed or independent,] is simply to resist the claim."¹⁷⁴ It is difficult under the rationale of the *CHI* opinion to perceive the conflict of interest for defense counsel in this situation, since no alternative course of action is presented.

Despite a demonstrated concern about the disclosure of confidences by a lawyer hired to conduct the insured's defense, the *CHI* court also fails to consider that such disclosure can actually prejudice the insurer's interests. Such disclosure could potentially lead to an estoppel ruling on the insurer's coverage defense.¹⁷⁵ Disclosure of confidences also directly contravenes Alaska Rule of Professional Conduct 1.6.¹⁷⁶

Parsons v. Continental National American Group,¹⁷⁷ an Arizona case, illustrates how behavior designed to benefit the insurer can backfire.¹⁷⁸ In *Parsons*, defense counsel informed the insurer of both the content of the insured's confidential psychiatric file, as well as confidential disclosures by the insured that concerned the willful nature of his acts.¹⁷⁹ In a later proceeding, the insurer was estopped from asserting a willful acts exclusion because it obtained the relevant information from an attorney who had violated his duty of confidentiality.¹⁸⁰

Unethical behavior can be disastrous not only for the attorney but also for the insurer.¹⁸¹ A well-known commentator has catalogued the potential for disaster:

Such [unethical] assistance can result in a waiver or estoppel of the insurer's otherwise valid policy or coverage defenses. If the insurer ratifies this conduct, the attorney's "favored client" may also be subjected to punitive damages. The attorney may lose

173. *Id.* at 116.

174. *Id.* at 112.

175. Ronald E. Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 *INS. COUNS. J.* 244, 247 (1978).

176. ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993). Rule 1.6 provides that a lawyer shall not disclose information relating to representation unless the client consents to disclosure after consultation, but the lawyer may disclose such information to prevent the client from committing certain criminal acts or to establish a defense in a controversy between the lawyer and the client.
Id.

177. 550 P.2d 94 (Ariz. 1976).

178. Mallen, *supra* note 175, at 247.

179. *Id.*

180. *Id.*

181. *Id.*

an important client, and face disciplinary charges, and malpractice claims from the insured and even from the client he favored, the insurer.¹⁸²

Nevertheless, in support of the *CHI* rationale, Professors Berch and Berch argue that an insured should be allowed to select independent counsel even when the complaint against the insured merely alleges non-covered punitive damages.¹⁸³ These commentators suggest that the appointed attorney would “shape the case to prejudice the insured and relieve the insurer from the obligation to indemnify.”¹⁸⁴ In so doing, they suggest that a lawyer would so completely ignore his professional responsibility as to “show the jury that the insured acted so wantonly as to justify an award of punitive damages”¹⁸⁵ and thus “relieve the insurer from liability to indemnify.”¹⁸⁶ The authors further contend that a defense lawyer might engage in some trial strategy to “highlight” intentional conduct to benefit the insurer.¹⁸⁷ These arguments are flawed, however, in that they effectively assume that a lawyer will blatantly ignore his ethical duties to his client, the insured. The *CHI* court’s reliance on a similar set of sweeping assumptions about the legal profession provides a basis for challenging that decision.

B. The Premises Underlying the *CHI* Holding Are Not Valid With Regard to the Ethical Character of Attorneys

1. *Appointed Counsel Can Ethically Represent an Insured.* The *CHI* court posits that any participation by the insurer in the appointment of independent counsel automatically taints the outcome. Taken to its logical extension, the rationale of the court, in recognizing the right to retain independent counsel, suggests that an appointed attorney would neglect his professional responsibility to the insured by favoring the interests of the insurer. Given the magnitude of such an ethical breach, however, the validity of this premise is questionable.

Courts in other jurisdictions have rejected the notion that appointed attorneys will not fulfill their ethical obligations.¹⁸⁸ The decision of the Indiana Supreme Court in *Siebert Oxidermo*,

182. *Id.* at 252-53.

183. Berch & Berch, *supra* note 107, at 38, cited with approval in *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1118 n.9 (Alaska 1993).

184. Berch & Berch, *supra* note 107, at 38.

185. *Id.*

186. *Id.*

187. *Id.*

188. Mallen, *supra* note 41, at 109.

*Inc. v. Shields*¹⁸⁹ illustrates such an opposing view. That court stated:

We consider the argument impertinent, if not scandalous. Without considering the respected reputation of the attorney involved, we point out that on a daily basis defense attorneys employed by insurance carriers on behalf of policyholders are called upon to deal with matters in litigation where the interests of the policyholder and the carrier do not fully coincide. Under such circumstances the attorney's duty is, of course, to the insured whom he has been employed to represent. In response the defense bar has exhibited no inability to fully comply with both the letter and spirit of Canon 5 of the Code of Professional Responsibility. If it were otherwise we suspect the desirability of requiring carriers to supply defense counsel would have long since disappeared as a term of the policy.¹⁹⁰

The authorities relied upon by the *CHI* court, however, are less optimistic. An examination of those articles calls into question their utility as a foundation for the recognition of the insured's right to independent counsel. A close reading of the Berchs' article,¹⁹¹ for example, reveals a cynical attitude towards the ethics of lawyers. Without citing any authority, the authors state:

At all times, the attorney must remain completely loyal to the insured. If the insured elects to use the attorney that the insurer selected, then that attorney should not do anything to prejudice the insured's rights, unless required to do so by the Rules of Professional Responsibility. *The difficulty, well-nigh impossibility, of adhering to the precepts in the real world* should caution counsel who are selected and retained by, but who are not truly independent of, the insurer against ever representing insureds.¹⁹²

The *CHI* court could not have ignored this cynicism¹⁹³ in developing its resolution of the case.

A comparison of this observation about the "real world" with the Indiana court's view in *Siebert Oxidermo* supports Justice Moore's position in his separate opinion in *CHI*. Justice Moore stated:

[T]he rule adopted by the court today presupposes that no counsel selected or approved of by an insurer can represent an insured without consciously or unconsciously compromising the insured's interests in favor of those of the insurer. My confidence in the integrity of the members of the Alaska Bar will not

189. 430 N.E.2d 401 (Ind. Ct. App. 1982), *aff'd*, 446 N.E.2d 332 (Ind. 1983).

190. *Id.* at 403.

191. Berch & Berch, *supra* note 107, at 27.

192. *Id.* at 29 (emphasis added).

193. The commentators appear "cynical" through their suggestion of the "difficulty, well-nigh impossibility" of following ethical standards. Lawyers are obliged to follow these standards by oath, training and law.

allow me to support the adoption of a rule of law based on such an assumption.¹⁹⁴

In a similar vein, Justice Compton, in dissent, forcefully questioned why the court failed to apply the same standard to independent counsel selected by the insured, observing:

If counsel selected by the insured "slants" efforts in favor of the insured, is this a less disturbing result? If ongoing contractual relationships, strong financial ties, and sincere friendships between the insured and independent counsel influence counsel's conduct, is this a less disturbing result? Worse, if an insured does not happen to be a significant factor in independent counsel's financial well-being, counsel selected by the insured may (consciously or subconsciously) curry favor with the insurer in order to establish an ongoing contractual, financially rewarding relationship with the insurer. Is this a less disturbing result? The dollar still comes out of the same pocket. *Once the [Rules of Professional Conduct are] discarded as setting ethical guidelines for the profession, no attorney/client relationship is safe from manipulation.*¹⁹⁵

The Alaska Rules of Professional Conduct provide the framework for the insurer to retain the right, as well as the duty, to defend its insured. The Rules can provide the mechanism for checking any abuses by the insurer-selected attorneys. Regardless of coverage status, representation of the insured by appointed counsel requires the consent of the insured under the Rules of Professional Conduct.¹⁹⁶ The implied covenant of good faith and fair dealing between the insurer and its insured prevents the insured from unreasonably withholding that consent. The reasonableness of withholding consent would depend on both the relationship between the proposed counsel and the insurer—which presumably must be disclosed—and, most importantly, the particular coverage issue in the underlying case. This approach realistically asks less of the implied covenant than the *CHI* court's approach.

As observed by one set of commentators in connection with the *Cumis* decision, attorneys could potentially abuse the position of "*Cumis* counsel."¹⁹⁷ Counsel selected by the insured has little incentive to minimize defense costs, as the insurer pays the bill for

194. *CHI of Alaska Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1129 (Alaska 1993) (Moore, J., concurring in part, dissenting in part); *see also id.* at 1130 (Compton, J., dissenting) (characterizing the majority's opinion as "the court's view of the willingness of counsel to follow the dollar and not the Code of Professional Responsibility").

195. *Id.* at 1130 (Compton, J., dissenting) (emphasis added).

196. ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1993); *see also id.* Rule 1.7 cmt. ("Interest of Person Paying for a Lawyer's Service").

197. Brown & Romaker, *supra* note 19, at 64.

these legal services.¹⁹⁸ The only reviewing authority is the insurance company, and although the insurer is required to pay only the “reasonable costs” of the independent counsel services,¹⁹⁹ the line between an excessively costly defense and aggressive advocacy is not easily established.²⁰⁰ The “measure of protection” purportedly provided by the implied covenant of good faith and fair dealing against overbilling and overlitigating²⁰¹ has been criticized as “inadequate and unworkable.”²⁰²

The blanket rule enunciated in *CHI* will prove over-inclusive and will fail to remedy the problem it attempts to address. The ethical rules, however, and the fiduciary obligations established by case law provide adequate safeguards, direction and guidance to resolve potential conflict of interest situations.²⁰³ Favoring the coverage interests of the insurer, whether deliberately or subconsciously, constitutes a breach of ethical duty and fiduciary obligation exposing the attorney to discipline and malpractice liability.²⁰⁴ Because existing rules of law adequately protect the insured’s interests, as Justice Moore observed, “the broad prophylactic rule adopted by the court seems superfluous.”²⁰⁵

2. *Recognizing That Appointed Counsel Has One Client, the Insured, Provides the Starting Point to Rethinking CHI.* The “dual-

198. *Id.*

199. *CHI*, 844 P.2d at 1121.

200. *Brown & Romaker, supra* note 19, at 64; *see also Doe v. Hughes, Thorsness, Gantz, Powell & Brundin*, 838 P.2d 804 (Alaska 1992) (holding that avoidance of unnecessary fees and costs is part of every attorney’s ethical responsibility to client, but attorney is not free to neglect measure that will protect client from clearly foreseeable risk of harm merely because there will be some additional cost to client if measure is taken).

201. *CHI*, 844 P.2d at 1121.

202. *Id.* at 1126 (Moore, J., concurring in part, dissenting in part).

203. As compared to the Alaska Supreme Court’s doubt of the integrity of attorneys, the Alaska Rules of Professional Conduct place full faith in the integrity of attorneys, serving only to guide their ethical decisions: “Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment, guided by the basic principles underlying the Rules.” ALASKA RULES OF PROFESSIONAL CONDUCT Preamble: A Lawyer’s Responsibilities (1993). Moreover, this confidence in the ethical character of the attorney is essential to sustain the self-regulating nature of the legal profession: “To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination.” *Id.*

204. *CHI*, 844 P.2d at 1128 (Moore, J., concurring in part, dissenting in part).

205. *Id.* (Moore, J., concurring in part, dissenting in part).

client" doctrine rests upon the assumption that appointed counsel has two clients in any given case: the insurer and the insured.²⁰⁶ The acceptance of the "dual-client" doctrine by the authorities relied upon by the *CHI* court constitutes the chief shortcoming of the opinion. Although the dual-client doctrine appears to be the view adopted in the majority of jurisdictions, other courts and commentators have recognized that the insured is deemed to be the defense counsel's sole client.²⁰⁷

The dual-client doctrine is flawed on both ethical and public policy grounds.²⁰⁸ Both the Code of Professional Responsibility, in force at the time of the *CHI* opinion, and the recently adopted Alaska Rules of Professional Conduct assume that insurance defense counsel can and will act ethically. Subsequent to the *CHI* decision, the Alaska Supreme Court adopted Rule 1.8(f), which provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to the representation of a client is protected as required by Rule 1.6.²⁰⁹

Furthermore, the comment to Rule 1.7 states:

A lawyer may be paid from a source other than the client, if the client is informed of that factor and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interest in a matter arising from a liability insurance agreement, and the insurer is required to

206. See, e.g., *United States Fidelity & Guar Co. v. Lewis A. Roser Co.*, 585 F.2d 932, 938 n.5 (8th Cir. 1978) ("the real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company"); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y*, 208 Cal. Rptr. 494, 498 (Cal. Ct. App. 1984) ("dual representation by counsel").

207. See, e.g., Robert E. O'Malley, *Ethics Principals for the Insurer, the Insured and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511, 512 (1991).

208. Most courts and scholars appear to have accepted the dual-client doctrine. However, at least four scholars have challenged the validity of the doctrine and its corollary that defense counsel cannot be trusted to provide loyal and competent representation to the insured. Mallen, *supra* note 41, at 108; John K. Morris, *Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution*, 1981 UTAH L. REV. 457; O'Malley, *supra* note 207; Debra A. Winarski, *Walking the Fine Line: A Defense Counsel's Perspective*, 28 TORT & INS. L. J. 596, 597 (1993).

209. ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1993).

provide special counsel for the insured, the arrangement should assure the special counsel's professional independence.²¹⁰

The proposal suggested in this article could assure the insured of the independence of counsel. The solution advocated by Justice Moore in his separate opinion would do so as well. Although the insurer's right to control the litigation must yield to the insured's right to independent representation when a conflict arises, this should not mean that the insurer's right to participate in the defense is completely extinguished. The *CHI* holding, however, accomplishes just that.

Ironically, with the promulgation of the Rules of Professional Conduct in July 1993, the Alaska Supreme Court implicitly recognizes that attorneys can distinguish between their client and the person who pays the bill, exactly what the *CHI* court found that attorneys could not do.²¹¹

V. A PROPOSAL

The recognition of an attorney's ability to protect the client first and foremost in the Rules of Professional Conduct, together with the weakness of the logical premises that underlie the *CHI* opinion, support the argument that the Alaska Supreme Court should revisit the *CHI* holding and restrict its application.²¹²

One simple approach would be to construe more narrowly the phrase "right to independent counsel." As Justice Moore points out, "courts and commentators recognize that cases permitting an insured to select independent counsel have not defined what is meant by [the right to select independent counsel]."²¹³ At the

210. *Id.* Rule 1.7 cmt. ("Interest of Person Paying for a Lawyer's Service").

211. In contrast to the distrust shown to insurer-appointed counsel by the *CHI* majority, the United States Supreme Court has stated that in the context of representation of criminal codefendants by a single attorney, even when capital punishment is at stake, "we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client. Trial courts appropriately and necessarily rely in large measure upon the good faith and good judgment of defense counsel." *Burger v. Kemp*, 483 U.S. 776, 784, *reh'g denied*, 483 U.S. 1056 (1987) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980)); *see also* *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978) ("Requiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel.").

212. It is worth noting that Justice Burke, one of the three justices who made up the *CHI* majority, has since retired.

213. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1124 (Alaska 1993) (Moore, J., concurring in part, dissenting in part) (citing *Federal Ins. Co. v. X-Rite, Inc.*, 748 F. Supp. 1223, 1228 n.1 (W.D. Mich. 1990); ALLEN D. WINDT, *INSURANCE CLAIMS AND DISPUTES—REPRESENTATION OF INSURANCE*

same time:

[C]ourts have also recognized "a right in the insurer to determine whether to provide independent counsel of its choosing or to reimburse the insured for counsel of its choice." . . . [M]any cases recognize the insurer's right to select replacement "independent counsel," or at a minimum, to participate in the defense of the insured alongside counsel selected by the insured . . .²¹⁴

The Alaska Rules of Professional Conduct, adopted since the *CHI* opinion, require that any insurer-appointed lawyer defending an insured must first obtain the consent of that client. Thus, a framework is already in place that provides a starting point for a more reasonable method of ensuring that the insured receives independent counsel. Regardless of the existence of any reservation of rights, all appointed counsel must obtain the consent of the insured to the proposed representation.²¹⁵ If the appointed counsel has represented the insurer in the past, the lawyer must consider whether that fact requires disclosure or necessitates a waiver by the insured.²¹⁶ It is equally clear that if the insured unreasonably withholds consent where no coverage issue exists and for no other legitimate reason, then that action would constitute a violation of the cooperation clause of the typical insurance policy, as well as of the implied covenant of good faith and fair dealing. Thus, the requirement that the insurer should have an opportunity to propose such counsel does not entail any additional burdens upon any of the parties to the tripartite relationship.

Creative approaches to the situation might include other steps. First, the insurer could give the insured recommendations regarding several attorneys rather than an assignment of one.²¹⁷ The insurer could therefore be certain that whichever attorney is chosen will be competent in the field of insurance defense litigation.²¹⁸

The insurer could also prepare biographies of the lawyers on the list of proposed counsel and provide them to the insured.²¹⁹ One commentator has urged the following approach: "The company should develop and utilize guidelines for defense counsel

COMPANIES AND INSURED § 4.20, at 179 (2d ed. 1988)).

214. *Id.* (Moore, J., concurring in part, dissenting in part) (quoting *Federal Ins. Co. v. X-Rite, Inc.*, 748 F. Supp. 1223, 1228 (W.D. Mich. 1990)). Justice Moore opted for a scheme where the insurer would have the right to approve counsel selected by the insured.

215. ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (1993).

216. *See, e.g., id.* Rules 1.7-1.9.

217. Mallen, *supra* note 41, at 123.

218. *Id.*

219. *Id.*

which set forth and implement the philosophy that counsel's principal activities are for the benefit of the insured."²²⁰

All three options—the *CHI* majority rule, the proposal of Justice Moore and the proposal put forth in this article—rely at least in part on the implied covenant of good faith and fair dealing.²²¹ They differ, however, in emphasizing the extent of the protection afforded by the implied covenant and on what conduct triggers a breach. The majority's rule gives the insured the power to choose.²²² If the insurer is dissatisfied, it must prove that the lawyer selected lacks reasonable competence.²²³ Under the plan proposed by Justice Moore, the insurer carries the veto power.²²⁴ To thwart the exercise of that discretion, there must be an unreasonable refusal by the insurer to agree to the lawyer so selected.²²⁵ Finally, the Rules of Professional Conduct give the insured the last word on consent to appointed counsel.²²⁶ The insurer, however, can vindicate its contractual right to defend by proving that the insured unreasonably refused to consent.

Both Justice Moore's proposal and the proposal submitted herein ask less of the implied covenant than the position adopted by the majority in *CHI*. California case law recognized such an implied covenant.²²⁷ So many people abused the *Cumis* rule, however, that California passed legislation to address the problem.²²⁸

Given a lawyer's ethical obligations, together with guidelines and reporting requirements, the insured could be confident that the lawyer would act solely as counsel for it and not as counsel to the insurer.

220. *Id.* Another commentator also provides a detailed proposal of this sort. O'Malley, *supra* note 207, at 520-25.

221. *See* Erb, *supra* note 138.

222. *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, 1121 (Alaska 1993).

223. *Id.*

224. *Id.* at 1122 (Moore, J., concurring in part, dissenting in part).

225. *Id.* (Moore, J., concurring in part, dissenting in part).

226. *See* ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.8. (1993).

227. *Center Found. v. Chicago Ins. Co.*, 278 Cal. Rptr. 13, 21 (Cal. Ct. App. 1991).

228. *See CHI*, 844 P.2d at 1126 n.10 (Moore, J., concurring in part, dissenting in part). Moore notes that the majority opinion "is likely to have similar effects in Alaska and will probably require legislative intervention to ultimately bring fairness and order to this complex area of law." *Id.* (Moore, J., concurring in part, dissenting in part).

VI. CONCLUSION

The Alaska Supreme Court in *CHI* has gone as far as any court in the nation in recognizing an insured's right to independent counsel. Whenever an insurer reserves its right to dispute coverage, the court has bestowed upon the insured the ability to select counsel unilaterally. This right is subject to only the requirement that the lawyer so selected be reasonably competent to handle the matter. Thus, the court has extinguished the contractually negotiated right of the insurer to defend its insured or, at least, to retain some involvement in that defense whenever the insurer reserves its right to contest coverage.

This sweeping rule is flawed for a variety of reasons. It proceeds from a cynicism about defense counsel's ethics, unwarranted by reason or experience. It fails to recognize the many inappropriate situations in which this rule will be invoked. It ignores the Rules of Professional Conduct that govern the legal profession in Alaska.

The Alaska Supreme Court's promulgation of the Alaska Rules of Professional Conduct, subsequent to the decision in *CHI*, provides the insured with an adequate remedy for the potential abuses by lawyers and insurers of the insured's interests. Under Alaska Rule of Professional Conduct 1.8(f)(1), in every instance in which an insurer appoints counsel, the insured must consent to that representation after consultation.²²⁹ This mechanism can provide the means by which the insurer would appoint independent counsel to represent the insured, subject to the implied covenant of good faith and fair dealing. This approach is closely related to that proposed by Justice Moore in his separate opinion, although he would reserve the right of the insured to choose. Either approach is preferable to the blanket rule announced in *CHI*.

The proposal made in this article seeks to strike a more favorable balance between the interests of the insurer and the insured. Otherwise, given the liberal nature of the pleading rules in Alaska, the *CHI* holding could all but consume not just a right of the insurer to defend its insured, but also any right of the insurer to participate in the formulation of that defense.

229. ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.8(f)(1) (1993).