1975

The Demise of the Declaratory Judgment Action as a Device for Testing the Insurer’s Duty to Defend: A Postscript

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For years the conflict of interest problem that occasionally arose out of the defense of an insured by his liability carrier denying coverage under the policy was, for the most part ignored. Now, within the last decade, it has surfaced as one of the most litigated questions in the field of insurance law. In the last issue of this Review,\(^1\) this author attempted an exegesis of *Motorists Mutual Insurance Co. v. Trainor*,\(^2\) then the latest pronouncement on the subject by the Supreme Court of Ohio. Soon after that article was published, the Supreme Court again addressed itself to the problem in *State Farm Fire & Casualty Co. v. Pildner*\(^3\) While the majority opinion in that case sustains the thesis expressed in the aforementioned article, the concurring opinion suggests a radical departure. This postscript, then, will examine *Pildner* in the light of *Trainor*, and attempt a critical analysis of the *Pildner* concurring opinion.

Before the appearance of the *Pildner* decision on January 6, 1975, *Trainor* had been the latest of a series of Ohio cases dealing with the conflict of interest problem. After reviewing *Trainor* in the context of these previous decisions, this author ventured three conclusions: First. Under the *Trainor* doctrine, the liability carrier has an absolute duty to defend whenever the allegations of the complaint bring the injured party’s claim within the policy coverage, even where the objective facts known to both the carrier and the insured clearly indicate that the claim does not arise out of a risk covered by the liability policy. If the carrier defends under a reservation or rights, or under a nonwavier agreement to which the insured freely consents, the carrier does not waive the coverage defense, and is neither bound by the decision in the injured party’s suit nor estopped from raising the coverage defense at a later time. Rather, it has the express right to assert the coverage defense in the injured party’s supplemental action brought under the provisions of Section 3929.06 of the Ohio Revised Code. Since the question of coverage is postponed until the supple-

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\(^2\) 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973).

\(^3\) 40 Ohio St. 2d 101, _____ N.E.2d _____ (1974). At the time of this writing the case is reported only in 48 Ohio Bar, No. 1 (January 6, 1975). The case was decided on December 31, 1974, a little over a month after this author’s previous article was published.
mental action, the carrier may not circumvent its duty to defend by attempting to resolve the coverage question in its favor through the device of a declaratory judgment action brought prior to the trial of the injured party’s claim. 4

Second. Since the carrier may raise the coverage defense in the supplemental action, and not until then, and since, with respect to that coverage defense, it is not bound by the result in the injured party’s action against its insured, it does not have any conflict of interest with the insured in the defense of that action. As long as the carrier defends the action against its insured in “good faith,” (i.e., as long as it puts forth its best efforts on behalf of its insured) the insured has no need of independent counsel. Hence the Socony-Vacuum 5 doctrine of reimbursement for independent counsel’s attorney fees and expenses is set aside and remains inoperable. The doctrine, however, is resurrected and becomes operable if the carrier begins to act in “bad faith” in its defense of the insured.

Third. Since the question of the carrier’s liability to pay under the coverage provisions of its policy remains open during the trial of the injured party’s claim, the carrier is not under a “good faith” duty to accept a settlement offer within the limits of the policy. It does, however, have the obligation of keeping the insured fully informed with respect to such offers, and if the insured is so inclined, he may accelerate a determination of coverage through the medium of a declaratory judgment action brought prior to the determination of the suit against him. If the declaration is in favor of coverage, the carrier must exercise “good faith” in considering the settlement offer.

4 The typical “defense” clause of a liability insurance policy relates the duty to defend directly to the duty to pay claims under the coverage provisions of the policy. Thus, the “defense” clause in the standard family combination automobile policy reads, in part:

The company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy. And it is generally held that there is no duty to defend a claim for loss arising out of a risk not covered by the policy. See, e.g., Socony-Vacuum Oil Co. v. Continental Cas. Co., 144 Ohio St. 382, 59 N.E.2d 199 (1945). Accordingly, if the carrier should obtain a declaration of no coverage prior to the trial of the injured party’s claim, it could legitimately refuse to defend its insured against that claim on the ground that since there is no coverage for the claim, there is likewise no duty to defend.

5 Socony-Vacuum Oil Co. v. Continental Cas. Co., 144 Ohio St. 382, 59 N.E.2d 199 (1945). Essentially, the Socony-Vacuum doctrine is this: where, in the defense of an action, the interests of the insured and the interests of his liability insurance carrier are in conflict, the insured is entitled to independent counsel to represent his interests; the carrier is obligated to pay that counsel’s fees and expenses if the conflict is created by the carrier’s denial of coverage and the assumption of the defense under a reservation of rights or a non-waiver agreement.

The doctrine has application, however, only if the carrier will be bound by the results of the action it is defending, for only in such a case will it be tempted to slew the defense in favor of no coverage. On the other hand, in such a situation, the insured will be interested in directing the result of the case toward a finding of coverage. From this, the conflict arises. If the results in the tort action are immaterial as far as the coverage question is concerned, neither party will have any incentive to force those results one way or the other, and there is no conflict.
Of these three conclusions, the first has been confirmed by the Supreme Court's decision in *Pildner*; the second has been put in question by the concurring opinion in the case; and the third remains untested.

*Pildner* involved the liability coverage provisions of a homeowners policy issued to Richard C. Pildner by the State Farm Fire & Casualty Co. Suit was brought against Pildner by Mr. & Mrs. Harry William Bryan, the complaint alleging, in substance, that Pildner "negligently injured the plaintiff [Harry William Bryan] by firing a rifle shot which took effect in the body of said plaintiff." Shortly after this action was commenced Pildner was convicted of the felony of "shooting with intent to wound," and sentenced to a term of one to twenty years in the Ohio State Reformatory.

Pildner made demand upon State Farm to defend the civil action against him and to pay, up to the coverage limit, any judgment rendered against him in that action. State Farm refused to defend on the ground that coverage was precluded by exclusion (f) of the policy:

This policy does not apply: . . . (f) to bodily injury or property damage which is either expected or intended from the standpoint of the insured.

Thereafter, armed with Pildner's conviction of the felony "shooting with intent to wound", State Farm filed a declaratory judgment action against Pildner and the Bryans in which it sought a declaration of no coverage and, correspondingly, no duty to defend. Pildner filed a motion to dismiss the declaratory judgment action for failure to state a claim upon which relief could be granted; the Bryans later filed a similar motion. The common pleas court sustained the motions to dismiss; the court of appeals reversed; and the case came before the Supreme Court pursuant to State Farm's motion to certify the record.

Citing *Trainor* and other decisions, that court reversed the court of appeals and affirmed the decision of the court of common pleas:

The duty of an insurer, under a policy of liability insurance, to defend an action against an insured is dependent upon the scope of the allegations of the complaint in the action against the insured. Where the allegations of the complaint bring the

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action within the coverage of the policy, the insurer is re-
quired to defend, regardless of the ultimate outcome or its
liability to the insured.

In the present case, the Bryans’ complaint alleges only
negligent injury. Appellant admits that liability for negligent
injury is within the scope of coverage under the terms of its
homeowner’s policy, and appellant has a duty to defend the
insured in that action. The Court of Common Pleas was,
therefore, correct in dismissing appellant’s complaint for
declaratory judgment for failure to state a claim upon which
relief can be granted, since no facts giving rise to a justiciable
controversy were presented in the complaint.8 (citations
omitted).

It is now well-settled in Ohio that the question of coverage under
a liability insurance policy, as well as the question of duty to defend,
may be tested via a declaratory judgment action.9 Thus, the court’s
conclusion that such an action challenging coverage and the duty to
defend does not state a claim upon which relief can be granted is
incomprehensible unless it is also understood that, as a matter of
public policy, when the allegations of the complaint bring the claim
within the coverage of the policy, the carrier has an absolute duty
to defend. Since the duty to defend is contingent upon the duty to
pay the claim, any judicial determination that there is no coverage
under the policy, made while the action to be defended is still unre-
solved, would circumvent the duty to defend and frustrate the public
policy requiring such defense. Accordingly, the judicial determination
of coverage must be postponed until such time as the duty to defend
is satisfied. A fortiori, the carrier’s action seeking a declaration of no
coverage, brought during the pendency of the injured party’s action
against the insured, is premature, and for that reason does not state
a claim upon which relief can be granted.10

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8 40 Ohio St. 2d at 104, N.E.2d at .......
10 Since the public policy requiring a defense is for the benefit of the insured, the prohibition
against challenging coverage during the pendency of the injured party’s suit applies only
to the carrier. The insured may waive his benefit by bringing his own declaratory judg-
ment action seeking a resolution of the coverage dispute at any time prior to the termina-
tion of that action. If he does so, and the coverage question is resolved against him, it would
seem to follow that the carrier is entitled to withdraw from the defense of the action.
Likewise, since the obligation to defend assumed by the carrier is an obligation to defend
"any suit" which, from the face of the complaint, falls within the coverage of the policy,
it would seem to follow that the carrier is not precluded from seeking a declaration of no
coverage prior to the filing of suit against the insured. The carrier’s obligation to defend,
and the public policy which makes that obligation absolute, does not come into play until
suit is commenced. Of course, if the insured party’s suit is commenced while the carrier’s
declaratory judgment action is still pending, the carrier’s right to maintain the action is
lost, and it must either be continued until such time as the injured party’s suit is resolved.
The foregoing is not readily gleaned from the majority opinion in *Pildner* alone, but it becomes apparent when that case is read in conjunction with *Trainor*. Further, this reading is confirmed by Chief Justice O'Neill's concurring opinion in *Pildner*:

> [A]n insurance company’s duty to defend an insured against a civil action [is] ascertained solely from the allegations of the complaint. In determining the existence or nonexistence of this duty, neither the outcome of the litigation nor the ultimate liability of the insurer is relevant. By informing the insured that it is reserving its right to assert noncoverage, the insurance company can defend the action without waiving this right.\(^\text{11}\)

In footnote 1 to the above remark, the Chief Justice continues:

> The insurance company can assert noncoverage by refusing to pay any judgment rendered against the insured in the damage action, thus forcing the judgment creditor to utilize the procedure set forth in R.C. 3929.06 for collecting money from an insurance company. In a R.C. 3929.06 proceeding, the insurance company can assert against the judgment creditor any defense which it has against the insured.\(^\text{12}\)

Thus, this author's first conclusion drawn from the *Trainor* decision, and his expression of what is here called the *Trainor* doctrine, is sustained by the majority and concurring opinions in *Pildner*.

The second conclusion of this author drawn from *Trainor*, however, has not fared as well, albeit it is questioned only in Chief Justice O'Neill's concurring opinion. Since that concurring opinion will no doubt point the way for future litigation in this area, it requires examination.

Apparently, the Chief Justice does not concur in the *Trainor* view that the carrier is not bound by the result in the injured party's action against the insured, and that as a consequence thereof, as long as the carrier defends that action in "good faith," there can be no conflict of interest between it and the insured. To support this conclusion, he notes that

Canon 5 of the Code of Professional Responsibility, as adopted by this court on October 5, 1970, states that "a lawyer should exercise independent professional judgment on behalf of a client." This rule is made more specific by E.C. 5-14, which states:

\[\text{(Continued from preceding page)}\]

\(\text{or it must be dismissed without prejudice to the carrier's rights to raise the defense of no coverage in the injured party's supplemental action.}\)

\(^{11}\) 40 Ohio St. 2d at 104-05, ......... N.E.2d at .........

\(^{12}\) Id. at 105 & n.1, ......... N.E.2d at ......... citing Bennett v. Swift & Co., 170 Ohio St. 168, 163 N.E.2d 362 (1959).
"Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant."

E.C. 5-17 specifically lists among "typically recurring situations involving potentially differing interests" a lawyer representing an insured and his insurer. This factual pattern exists whenever an insurance company which asserts non-coverage is allowed to select an attorney to represent an insured in a damage action.

... In such case, although the company has a duty to defend the insured, there is an undeniable conflict between the insurance company and the insured. The insured, if he cannot totally escape liability, will desire to show that his liability is based on negligent conduct which is covered by his insurance policy. The insurance company will, on the other hand, desire to prove that the insured's actions were... not within the scope of the policy.\(^\text{13}\)

What has been said so far is really nothing new; the courts, the bar, and the insurance industry have been struggling with this problem almost since the inception of liability insurance. This author's previous article dealt with the various ways of neutralizing this conflict.\(^\text{14}\) Chief Justice O'Neill appears to reject these traditional methods, including the Trainor solution, in favor of a more radical approach.

\(^\text{13}\) Id. at 105-06, ______ N.E.2d at ______

\(^\text{14}\) To the methods there discussed, there should, perhaps be added the action for breach of the covenant of good faith and fair dealing, a developing concept which imposes a stringent burden of fairness upon the insurance carrier in all its transactions with its insured. The concept that a contract of insurance is one of utmost good faith, and that the parties to such a contract must deal with each other fully and fairly, is as old as insurance itself. It would appear that the concept was first categorized as an implied covenant of the contract in Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958), in which it was held that the carrier's failure to accept a reasonable settlement offer was a breach of "an implied covenant of good faith and fair dealing... that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." Id. at 658, 328 P.2d at 200. The reach of this covenant was expanded in Gruenberg v. Arena Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973), and its burden was imposed on the individual agents of the carrier in Eagan v. Mutual of Omaha Ins. Co., Wall Street Journal, Nov. 27, 1974 at 7, col. 2 (Eastern ed.).

An action for breach of this covenant of good faith and fair dealing has received some recognition in Ohio, albeit under the cognomen of tortious breach of contract. See Kirk v. Safeco Ins. Co., 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. 1970).
His concurring opinion in *Pildner* goes on to say:

Under these facts, I believe that D.R. 5-105, which is mandatory, dictates that the insurance company not be allowed to select counsel to defend the insured. The adversity between the insurance company and the insured, coupled with the pressure which the insurance company could exert on counsel selected by it, simply presents too great a possibility that that counsel's loyalty to the insured will be diluted.

The insurance company, when it notifies an insured who is being sued that it denies coverage, should invite the insured to select his own counsel to represent him in the damage action. If the action is one in which the insurance company has a duty to defend, reasonable attorney fees and other proper costs incurred by the insured in making his defense will ultimately have to be assumed by the insurance company.15

The essential difficulty with this solution is that the conflict of interest between the insured and the carrier is a two-edged sword. If this solution interposes a shield between the carrier and the insured, it also leaves the carrier defenseless. If the insured is represented solely by counsel of his own choice — an attorney with neither ties nor obligations to the carrier — what is to prevent that counsel from so presenting the defense of the case as to establish coverage?16 To say that this will not happen because the insured's counsel will honor his ethical and professional responsibilities is to condemn the attorneys regularly selected by the insurance carrier as unethical and unprofessional, since the Chief Justice's argument assumes that they will

15 *40* Ohio St. 2d at 106, ______ N.E.2d at _______, citing Socony-Vacuum Oil Co. v. Continental Cas. Co., 144 Ohio St. 382, 59 N.E.2d 199 (1945). D.R. 5-105, to which the quote makes reference, is Disciplinary Rule 5-105, and reads as follows:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

23 Ohio St. 2d 1, 34 (1970).

16 It is presumed here that the coverage question is open to honest debate and that the carrier has not arbitrarily denied coverage.
succumb to the pressures imposed by the conflict of interest. If such an assumption is valid (and there is no real evidence that it is), there is no apparent reason why it does not apply both ways. Indeed, it might well be argued that the insured's independent counsel would be doing less than his duty if no attempt was made to secure for the insured the protection afforded by the policy. Thus, Chief Justice O'Neill's solution does not solve the conflict of interest problem; rather, it loads the coverage question against the carrier and practically predetermines that question otherwise honestly open to dispute, in favor of the insured.

Further, in this age of ever-increasing insurance premiums, there is a multi-faceted economic argument which militates against this solution. First, since the "defense bar" is to some extent dependent upon the insurance industry for continued business, and since there is intense competition within the "bar" for this business, each firm or attorney is constrained to keep his or its fees as low as possible in order to obtain that business. But the insured's independent counsel, knowing full well that he is not likely to be selected by the insurance carrier as counsel in any other case it might be obligated to defend, is under no such constraint. The only limitation upon the fees charged by such counsel is that they be "reasonable," and that is a question for determination by the court. Since insurance companies are not thought to be impoverished, it is not unlikely that a "reasonable" fee, in any given case, would be higher than that charged by a defense "regular".

Secondly, insurance companies make every effort to keep the costs of defense as low as possible. Defense firms are well aware of this and, in order to retain these companies as clients, they, too, keep defense costs down by refraining from, for example, filing unnecessary motions or taking unnecessary depositions. But the insured's independent counsel, not being subject to these restraints of the marketplace, and having his fees and costs practically guaranteed, is free to indulge in those marginally productive maneuvers and devices which would be prohibitive to counsel selected by the company. This can unnecessarily increase the costs of defense, but it can also impose unnecessary and time-consuming burdens on a court that is already in despair over a hopelessly backlogged civil docket. This likely increased cost can also result from a want of skill and experience; that is, it may simply take independent counsel more time to perform work which an experienced defense counsel could perform with greater dispatch and, to a certain extent, as a matter of routine. Independent counsel, for example, might have to

17 See How Companies Fight Soaring Legal Costs, BUS. WEEK, Nov. 16, 1974, at 104.
18 See, e.g., a series of articles and opinions appearing under the cover title of Crisis in the Courts, 45 CLEVE. J. 352, et. seq. (1974).
spend many hours researching a point of law while the regularly appointed defense counsel might have that same research ready at hand, in a "brief file" maintained by his office.

Third, even in the absence of so much as a hint of chicanery on the part of independent counsel, the defense "regular" can most probably defend the case at a lower hourly cost to the insurance carrier. Much of the routine work on a case can be done by associates in the defense firm, with the actual trial, perhaps, reserved to a partner. The hourly charge for an associate's work is less than that for a partner's work, and the bulk of the work will most likely be done by associates under the partner's supervision. But that is not likely to be the case with the independent counsel, who is apt to be a sole practitioner, or an attorney in association with two or three other attorneys. In all probability, such an attorney will have to do all of the preparation and trial by himself, at a uniform hourly charge which will most likely not be less than the hourly charge of a partner in a defense firm, and most probably slightly more. Moreover, a regular defense firm in competition for the defense business will occasionally not charge hours of work actually done if the over-all fee bill seems higher than the insurance company is likely to accept with equanimity. But independent counsel, who will not again be "retained" by the insurance company, is under no such constraint. While lower fees do not necessarily mean lower premiums, higher fees most certainly mean higher premiums, and the insurance consumer will be the ultimate victim of this solution to the conflict of interest problem.

Irrespective of the economic considerations, there is also the possibility that the defense "regular" will perform with greater skill — at least in the majority of cases. Over the years, the members of the insurance defense bar have built up a degree of skill and expertise in trial advocacy that is matched only by their opponents in the plaintiffs' bar. Even the young associate in such a firm, with only one or two years' experience, is likely to have more trial skill and ability than the average lawyer who rarely has occasion to try a case to its conclusion. On the whole, in any sizeable community, most trial work is conducted by a small fraternity of experienced trial lawyers, and the practicing bar in general has little or no experience in trial advocacy.

Yet if, as the Chief Justice suggests, the insured is free "to select his own counsel to represent him in the damage action," who is he most likely to select? It is safe to say that the average insured is not personally acquainted with any lawyer, let alone an experienced trial lawyer. While the Yellow Pages are open to the perspective client, they do not, as yet, list specialties. He may obtain some referral assistance from the Bar Association, but he may not know of its
existence or of its referral system. In short, left to his own devices, the insured is likely to select an attorney unskilled in trial advocacy.

Of course, it can be argued that his insurance company must supply him with a list of attorneys from which he may choose. However, the company is most likely to select those attorneys which it regularly seeks out for defense work, which would be only one small step removed, if any, from the pressure and resulting conflict of interest which the Chief Justice envisions. In any case, since the insurance carrier has already intimated that it will deny coverage to the insured under the policy, the insured would not be likely to trust the selection proffered.

In summary, the insured's free choice of an attorney is not calculated to provide him with the best defense available, and it seems anomalous, at a time when the Chief Justice of the United States Supreme Court is lamenting the lack of skilled trial advocates, that the insured is deprived of access to a pool of the most skilled defense attorneys in his community.

Finally, the proposed solution to the conflict of interest problem is bound to produce fraud and collusion in some cases. Suppose for example, that the shooting in *Pildner* was unquestionably an intentional act and the insured did intend to kill or seriously injure the plaintiff. And suppose further that the plaintiff's complaint alleged such an intentional act rather than negligence. Such an act would not be covered by the policy of insurance and the carrier would be within its rights to reject the defense of the civil action. The insured has retained an attorney to represent him in that action. But the insured is personally without assets, and the attorney chosen is concerned about his fee. How might the attorney seek to remedy the situation? One answer may be a telephone call to the plaintiff's attorney suggesting an amended complaint substituting an allegation of negligence for the allegation of intentional shooting, or adding such an allegation as an alternative claim. The amendment of the complaint should not tax his conscience overmuch, since justification can exist for it.20 Such a maneuver will bring the insurance carrier


20 See, e.g., Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 177, 54 Cal. Rptr. 104, 113 (1966), where it is said:

Jones' complaint dearly presented the possibility that he might obtain damages that were covered by the indemnity provisions of the policy. Even conduct that is traditionally classified as "intentional" or "wilful" has been held to fall within indemnification coverage. Moreover, despite Jones' pleading of intentional and wilful conduct, he could have amended his complaint to allege merely negligent conduct. Further, plaintiff might have been able to show that in
into the case, albeit on a reservation of rights basis. But it is that very basis, under Chief Justice O'Neill's proposed solution, that will insure the original attorney's retention as defense counsel in the case. This action would also appeal to plaintiff's counsel, since at the very least the presence of the insurance company will enhance his chances for settlement if not a greater recovery on the claim. And if the defense attorney is careful and clever, he can so manipulate the defense of the suit as to insure an ultimate finding of coverage, thus guaranteeing his fee.

Examples could be multiplied, but without any useful purpose, since they all lead to the same result — a strained or false allegation to bring the case within the coverage of the policy. The insurance carrier is then given Hobson's choice: if it defends without reserving its rights or obtaining a voluntary nonwaiver agreement, it waives the coverage defense;21 and if it asserts its reservation of rights or obtains a nonwaiver agreement, it loses control of the defense of the action, while the plaintiff and the insured collusively or fraudulently maneuver themselves into a position to raid its treasury. Under the Chief Justice's proposed solution, the plaintiff has every incentive to reach that treasury; the insured has no incentive to prevent him; and the carrier has no means of imposing a check on either.

In short, the chief difficulty with the proposed solution to the conflict of interest problem is that it is one-sided. It protects the insured from the adverse interests of the insurance company, but gives the company no protection from the adverse interests of the insured and all too readily lends itself to fraud and collusion. In addition, it is economically wasteful, and potentially deprives the insured of the best defense counsel available to him. In the long run, of

(Continued from preceding page)

physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit wilful and intended injury, but engaged only in nonintentional tortious conduct. Thus, even accepting the insurer's premise that it had no obligation to defend actions seeking damages not within the indemnification coverage, we find, upon proper measurement of the third party action against the insurer's liability to indemnify, it should have defended because the loss could have fallen within that liability.


The California court held, as one ground for its decision, that the carrier was obligated to defend because under modern pleading an allegation of intentional wrong carries inherently the "potential" of a recovery upon the lesser thesis of a negligent injury. Hence, the court held, the charge on its face came within the policy coverage notwithstanding that ultimately it might be found the injury was intentionally inflicted within the meaning of the express exclusion from coverage.

Thus, negligence becomes something of a "lesser included offense" of intentional act, and may be alleged in good conscience, even if the pleader believes that the defendant's act was intentional.

course, it is the insuring public that must suffer from this solution's defects, since they will pay for them through the medium of higher insurance premiums.

A better solution is that espoused by Trainor and found by implication in the majority opinion in Pildner. This solution is built upon a rejection of the two assumptions which underlie Chief Justice O'Neill's solution: (1) that factual determinations made in the injured party's action against the insured will be binding on the insurance carrier in the injured party's supplemental action against it; and (2) that the attorney who defends the insured in the injured party's action will be the same attorney who represents the insurance company in that supplemental action.

The first supposition is logically inconsistent with the Trainor doctrine as well as with the Chief Justice's own view of the carrier's rights, as expressed in his concurring opinion in Pildner. An understanding of the two-fold nature of coverage defenses is essential for an understanding of the Trainor doctrine as necessary background for illustrating this inconsistency. Basically, coverage defenses are of two types: factual defenses and policy defenses. Factual defenses arise out of the facts and circumstances of the incident upon which the claim for coverage is based. Policy defenses arise out of fraud or misrepresentation on the part of the insured which justifies recission or cancellation of the policy; or out of a failure to pay premiums when due which results in a lapse of the policy; or out of some breach of condition on the part of the insured22 which warrants the carrier in denying coverage. In almost all cases, these policy defenses are wholly independent of the facts and circumstances surrounding the incident which fosters the charge against the insured. On the contrary, factual defense are wholly dependent upon those facts and circumstances.

Accordingly, if the concurring opinion in Pildner addresses itself to policy defenses when it says that the carrier may deny coverage, under a reservation of rights or nonwaiver agreement, without waiving these defenses, and that the carrier may assert these defenses in the judgment-creditor's supplemental action over, the opinion is meaningless, since, in the ordinary cases, these defenses cannot be affected by the decision in the injured party's action against the insured. Therefore, the remark must have reference to factual defenses. And indeed, both Trainor and Pildner have to do with factual defenses rather than policy defenses.

22 E.g., late notice of the incident, failure to forward suit papers, or failure to cooperate with the carrier.
But, with respect to factual defenses, the assumption that the factual determinations in the injured party's action are binding on the insurance carrier, thereby creating the conflict of interest, is wholly inconsistent with the assertion that the carrier may assert these defenses in the supplemental action. If the factual determinations in the injured party's action are binding on the carrier, and go against the carrier on the question of coverage, then the carrier has nothing left to assert in the supplemental proceeding. Yet the carrier's absolute duty to defend the insured, without opportunity for testing that duty by means of a declaratory judgment action or otherwise, is imposed on the carrier with the promise that the carrier can, at a later time, test its duty to provide coverage. If the carrier is denied that right by the binding results in the injured party's action, that promise is hollow. Therefore, if that promise is to have meaning, the factual determinations made in the tort action cannot be binding on the carrier with respect to its factual coverage defenses. Rather these questions of fact remain open and are to be decided in the supplemental action if the carrier asserts them. As it is said in paragraph 1 of the syllabus of Trainor:

An insurance company, which by contract is obligated to defend its insured in a negligence action, may defend in good faith without waiving its right to assert at a later time the policy defenses it believes it has, provided that it gives its insured notice of any reservation of rights.23 (Emphasis added.)

However, if the factual determinations made in the tort action are not binding on the carrier vis-à-vis its factual coverage defenses, where is the conflict of interest? Since the carrier will gain nothing by manipulating the defense one way or the other, it can afford to be disinterested in the action against the insured — in all respects save one. That one exception is that the carrier will be as intensely interested in winning the tort suit as will the insured, since a judgment for the insured will automatically eliminate the coverage controversy and save the carrier money.

The result would not be different in the case of a loss. If the determination in the injured party's suit cannot bind the carrier as to the factual coverage defense, neither can it bind the insured or the injured party. Since neither party can assert that result against the other, neither party can gain by manipulating the defense, and neither party can have any incentive for doing so.

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23 Here, of course, the Supreme Court is using the term "policy defenses" in the sense of "coverage defenses" rather than in the restricted sense given to the term "policy defenses" in the text of this article.
Therefore, if the *Trainor* doctrine is to have meaning, the Chief Justice’s first assumption must fail, and with it must fail his conclusion that there is a conflict of interest; that is, unless his second assumption, that the same attorney will be involved in both actions, is true.

Yet the second supposition would be inconsistent with the *Trainor* requirement that the carrier defend its insured in “good faith.” This assumption presupposes that the attorney selected to defend the insured in the damage action will abandon that cause on the conclusion of that action, and adhere to the cause of the insurance company in the supplemental proceeding. If such were to be the case, the possibility, if not the probability, of a conflict of interest would remain. In the defense of the first action, the defense attorney would most probably receive confidences and information from the insured which he could not, in good conscience, use against the insured’s interest in the supplemental proceeding. If those confidences and that information would establish the carrier’s case for no coverage, the attorney can neither divorce himself from his knowledge of them nor can he refrain from using what he knows and remain loyal to his new “client.” Accordingly, he can very well find himself in an impossible situation; to serve one client he may have to betray the other. And this he may not do if, as Chief Justice O’Neill points out, he is to adhere to Canon 5 of the Code of Professional Responsibility. Accordingly, the same defense attorney may not represent both the insured in the injured party’s action and the insurance carrier in the supplemental proceeding; if the insurance carrier wishes to retain its right to control the defense of the injured party’s action, it must select one attorney to represent the insured exclusively, and another attorney to represent its own interests.

Indeed, this result is mandated by the *Trainor* doctrine’s insistence that the company must defend the insured in “good faith” if it wishes to retain the right to control that defense. Good faith requires nothing less than the selection of an attorney who will represent the insured’s interests to the exclusion of the interests of the carrier. As long as the carrier adheres to this standard it may retain the right to select the defense attorney; but if it falls short, it not only breaches its covenant of good faith and fair dealing, but it loses its right to select the defense attorney, and its concomitant control of the defense, and must, under the *Socony-Vacuum* rule, reimburse the insured for his costs in retaining an independent counsel of his choice as well as the other costs of the defense.

**Conclusion**

Concededly, there is no perfect solution to the conflict of interest problem. The two-fold *Trainor* solution is subject to corruption by either the insurance carrier or the attorney it selects to defend the
insured. But the *Trainor* solution is less subject to corruption than the solution proposed by Chief Justice O'Neill in his concurring opinion in *Pildner*. *Trainor* provides each party more equal protection against betrayal while affording the insured an opportunity for better representation than he might have if left to select a defense attorney on his own.

Even though it requires the employment of not less than two independent and highly skilled attorneys, it is most likely to be less expensive and less economically wasteful than the O'Neill solution. But even if it is not, since it affords the insurance carrier some protection in the control of the insured's defense, it is likely to be accepted by the carrier with better grace than would the solution proposed by Chief Justice O'Neill.

In conclusion, since the O'Neill solution is no better than that advanced in *Trainor*, and is in many ways worse, the latter should be retained at least until such time as it clearly proves to be unworkable. As it stands now, its retention is squarely in the hands of the insurance companies. Chief Justice O'Neill has proffered the warning: if the companies do not provide the insured with wholly independent counsel, or if they attempt to pressure that counsel, or obtain from him information which he is not privileged to give, they will not be defending in "good faith," and will, under the Chief Justice's logical extension of the *Socony-Vacuum* doctrine, forfeit the right to select the counsel to represent the insured. While the Chief Justice's concurring opinion is not yet the law in this State, it will no doubt become so, either universally, or on a case by case basis, if the companies prove recalcitrant with respect to their good faith duty to defend the insured whenever the allegations of the complaint bring the case within the policy coverage.