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The Demise of the Declaratory Judgment Action as a Device for Testing the Insurer's Duty to Defend

J. Patrick Browne*

When a liability insurer defends claims brought against its insured, its interests frequently come in conflict with those of the insured. Over the years, courts and litigants have attempted to alleviate or eliminate this problem by several methods: providing the insured with independent counsel to represent his interests; a declaratory judgment action to test the insurer's duty to defend; direct actions by the injured claimant against the insurance company; and through the imposition on the insurer of an absolute duty to defend with a reserved right to test coverage at a later date. The second of these four methods — the declaratory judgment action — has been the most frequently used and the most effective from the insurer's point of view.

Heretofore, Ohio has recognized the first two methods, and has rejected the third and fourth. But a recent decision of the Ohio Supreme Court has reversed this traditional stand, and has adopted the fourth method as the exclusive device for eliminating the conflict of interest in the defense of claims by liability insurers.

The Problem: The Duty to Defend and Conflicts of Interest

The ordinary policy of liability insurance imposes upon the insurer the duty of defending claims made against the insured and reserves to the company the sole right to settle such claims. Typically, the language of the policy stipulates that the company shall defend any suit alleging a loss arising out of the risks insured against, even if the allegations of the suit are groundless, false or fraudulent, and that the company may make a settlement of the suit as it deems expedient. Thus, the language of the “defense” clause relates the

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1 Not all liability policies place the sole right of settlement in the company. Professional liability policies for example, frequently stipulate that the company may settle a claim only with the written consent of the insured. Some of these policies, however, go on to state that if the insured does not consent, and the judgment against him is in excess of the amount the company would have paid in settlement, the company will not be liable for that excess amount. Under such a provision the company retains effective control over all settlements, and the "written consent" provision becomes more illusory than real.

2 The "defense" clause in the standard family combination automobile policy is illustrative of the point:

[T]he company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

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duty to defend directly to the coverage provided by the policy, and it has long been held that there is no duty to defend a claim for loss arising out of a risk not covered by the policy.³

Where the allegations of the complaint are such that it clearly appears that the injured party’s loss does not arise out of a covered risk, the company has no duty to defend.⁴ But that is the easy case. Difficulties arise where the allegations of the complaint are insufficient to relate the loss directly to the coverage provided, where they are vague on that point, or where they deliberately misstate the facts so as to bring the claim within the coverage of the policy (e.g., an intentional shooting described as the negligent discharge of a firearm). The latter case is not infrequent since complaints may describe an intentional act in terms of negligence solely for the purpose of maintaining the company as a party, and thereby enhancing the plaintiff’s chance of a large settlement—a chance he might not have if he had to look to the insured’s resources alone. In such cases an investigation may reveal objective facts which show that the loss is not one arising out of a covered risk. If that be the case, may the company refuse a defense on the basis of the objective facts?

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The language of Section II of the standard homeowners policy is similar, but shows a slight variation:

This Company shall have the right and duty, at its own expense, to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, but may make such investigation and settlement of any claim or suit as it deems expedient. This Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of this Company’s liability has been exhausted by payments of judgments or settlements.

³ See Commonwealth Casualty Co. v. Headers, 118 Ohio St. 429, 161 N.E. 278 (1928); Socony-Vacuum Oil Co. v. Continental Casualty Co., 144 Ohio St. 382, 59 N.E.2d 199 (1945). In Socony-Vacuum, supra, the court indicated as follows:

It is axiomatic that a policy which contains a provision that the insurer shall make defense of an action brought to recover damages for which indemnity is payable even though such action may be groundless, does not require the insurer to defend a groundless action which is not within the coverage of the policy. 144 Ohio St. at 393, 59 N.E.2d at 203.

⁴ Thus, in Commonwealth Casualty Co. v. Headers, 118 Ohio St. 429, 161 N.E. 278 (1928), the injured party sued for assault and battery committed by an agent of the insured. The company refused to defend and, after successful defense of the suit, the insured brought an action against the company to recover his costs of defense. In holding the company not liable, the Supreme Court concluded:

If the insurance company was not required under this policy to reimburse Headers for damages recovered against him, if any had been recovered, by reason of this assault, then manifestly the insurance company could not be obligated thereby to reimburse Headers for attorneys’ fees paid by him in defending an action of the kind here mentioned. The conclusion of the insurance company that the policy did not cover these injuries was correct. Id. at 433, 161 N.E. at 279.

Again, in Burger v. Continental National American Group, 441 F.2d 1283 (6th Cir. 1971), the court stated:

If it is clear from the petition that there is no potential liability that falls within the coverage of the policy written by the insurer, then the insurer is not required to defend the action. 441 F.2d at 1294.
The generally accepted answer is that it may not, even when the objective facts make it clear beyond any doubt that the loss is not covered by the policy. The duty to defend is controlled by the allegations of the complaint, not by objective facts. If the allegations of the complaint bring the claim within the coverage of the policy, the company must provide a defense. As stated in paragraph 1 of the syllabus of Socony-Vacuum Oil Co. v. Continental Casualty Co.:

The duty of a liability insurance company under its policy to defend an action against its insured is determined from the plaintiff's petition, and when that pleading brings the action within the coverage of the policy of insurance, the insurer is required to make defense regardless of its ultimate liability to the insured.

The allegations of the complaint are said to be the "sole" test of the company's duty to defend.

This being the case, an inevitable conflict of interest must exist between the company and its insured where the allegations of the complaint bring the action within the policy coverage, but the objective facts show that the loss is not covered. Although the company must defend, its interests will best be served if the defense can be handled in such a way that the facts finally established by the injured

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5 See Bloom-Rosenblum-Kline Co. v. Union Indemnity Co., 121 Ohio St. 220, 167 N.E. 884 (1929): If an action be brought to recover damages for injuries claimed to have been inflicted by the owner of an automobile, which, as a matter of fact was nowhere in the vicinity of the accident and was therefore in no wise involved in the accident, the owner is nevertheless compelled to make a defense, though the claim against him be entirely groundless — whether it be groundless because the owner was in no wise at fault, or because his automobile was in fact not involved in the collision. It would of course be absurd to claim that the insurance company having entered into an agreement such as contained in the policy in question would not be liable for the expenses incurred in making such defense, because, as a matter of fact, the automobile covered by its policy was not involved in the accident. 121 Ohio St. at 227, 167 N.E. at 886.

6 144 Ohio St. 382, 59 N.E.2d 199 (1945).

7 See Lessak v. Metropolitan Casualty Ins. Co. of New York, 168 Ohio St. 153, 151 N.E.2d 730 (1958). Paragraph 2 of the Lessak syllabus expands somewhat on paragraph 1 of the Socony-Vacuum syllabus, but does not materially change it: The sole test as to the duty of an insurance company, under a policy of liability insurance, to defend an action against the insured is the allegations of the petition in the action against the insured, and where such petition brings the action within the coverage of the policy, the insurer is required to make defense, regardless of the ultimate outcome of the action or the liability to the insured. (Socony-Vacuum Oil Co. v. Continental Casualty Co., 144 Ohio St. 382, approved and followed.) This language was followed in paragraph 2 of the syllabus of Motorists Mutual Insurance Co. v. Traitor, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973), but again, the Socony-Vacuum case is said to be "approved and followed," so it would be reasonable to suppose that the additional language put in the syllabus was not intended as a material change to the Socony-Vacuum test. Just as a matter of interest, it might be noted that Burger v. Continental National American Group, 441 F.2d 1293 (6th Cir. 1971) reverts to the language of Socony-Vacuum, but all that this probably indicates is that the language of the two syllabi may be used interchangeably.
party’s suit remove the case from coverage. The insured on the other hand, will be equally interested in the opposite result. In addition, if the insured is impecunious, the injured party will share his interest against that of the company, and the situation is ripe for collusion between them to the company’s detriment.

This places an insufferable burden upon defense counsel. Despite the old adage that no man can serve two masters, defense counsel is held to be counsel to both the insured and the insurer. He must treat both equally, giving to each any and all information, analysis, aid, or advice relating to the conduct of the defense. In a conflicts case the defense counsel selected by the company must walk a very thin line; any favoritism shown to one of his two clients may be a breach of ethics which might justify the other in bringing a malpractice action against him.

The Solutions to the Problem

The Independent Counsel Ploy

Over the years, the insurance companies have cast about for various ways to avoid the conflict of interest situation. One such method, and the least expensive from the company’s point of view, is the assumption of the defense under a reservation of rights or a nonwaiver agreement, with a recommendation to the insured that

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8 Thus, in Netzley v. Nationwide Mut. Ins. Co., 34 Ohio App. 2d 65, 296 N.E.2d 550 (1971), the court said:

Here, by the terms of the liability insurance policy, Nationwide was obligated to defend with counsel of its choice any damage action brought against the insured Mr. Netzley, which action sought damages for personal injury or destruction of property. Nationwide informed Mr. Netzley that he could obtain additional counsel to represent him, but he did not choose to do so but, rather, relied upon legal counsel for Nationwide to protect his interests. In furtherance of such attorney-client relationship, it appears from the record that Mr. Netzley had several conferences with counsel, attended a deposition with counsel, and reviewed the scene of the accident with counsel.

I do not believe that it can be effectively argued that trial counsel for Nationwide was only incidentally legal counsel for the insured. Even though Nationwide may have only been specifically interested in the law suit to the extent of its liability under the contract of insurance, the legal counsel retained by Nationwide was, or should have been, interested in the handling and trial of the cause in its totality.

We hold that both Nationwide as well as Mr. Netzley, its insured, were clients of the legal counsel retained by Nationwide. Further, we hold that both clients had a mutuality of interest in all of the affairs related to such cause of action, and both were equally entitled to any and all information, analysis, aid, or advice relating to such matter. 34 Ohio App. 2d at 78-79, 296 N.E.2d at 561-562.


An unqualified assumption of the defense will result in a waiver or estoppel against the company with respect to the question of coverage. See Fidelity & Casualty Co. of New York v. Blausey, 49 Ohio App. 556, 197 N.E. 385 (1934); Borovich v. Fountain, 94 Ohio L. Abs. 377, 199 N.E.2d 753 (Ct. App. 1964). But the assumption of the defense pursuant to a timely reservation of rights or nonwaiver agreement will not work an estoppel or waiver. Motorists Mutual Insurance Co. v. Trainor, 33 Ohio St. 2d 41, 294

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he obtain independent counsel to represent his interests. In such case, however, the company retains direction and control of the defense.

This does not provide a completely trouble-free solution. If the insured does hire his own independent counsel, the presence of two defense counsel, at least partially contending against each other, presents the plaintiff with a ready-made "divide and conquer" situation. Further, this could lead to collusion between plaintiff's counsel and the insured's own counsel. Again, even if the facts established at the trial of the injured party's action bring the claim within the coverage of the policy, the insured will still have to bear the cost of retaining independent counsel to represent him, and he will thus have lost the full benefit of the policy's "defense" clause, a benefit for which he has paid a premium, and to which he is entitled. In short, he will have to pay, at least partially, the cost of defense, and, to the extent of that payment, he has not received that which is due him under the policy. Finally — and perhaps this is the most damning objection of all — the average insured cannot afford the cost of independent counsel, and is thus forced by economic necessity to forego the protection such counsel might give his interests, and to rely for protection on the counsel selected by the company.11

The Supreme Court of Ohio has supplied a palliative to this latter situation by holding that when the company recommends to the insured that he employ independent counsel, the company must pay that counsel's fees and expenses. Thus, in Socony-Vacuum Oil Co. v. Continental Casualty Co., the Court said:

If the plaintiff, Harper, were to recover, it would be to the insurer's interest to have the recovery based on the sole ground that Northam was an employee of insured and guilty of negligence in the course of his employment, because the policy did not cover loss for injuries caused by any employee

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N.E.2d 874 (1973). However, the consent of the insured to a bilateral nonwaiver agreement cannot be made a condition precedent to the assumption of the defense where the allegations of the complaint clearly bring the claim within the policy coverage. If the insured will not freely consent to the bilateral nonwaiver agreement, the company must defend under a reservation of rights. Motorists Mutual Insurance Co. v. Trainor, supra. This latter case describes these two devices:

A bilateral nonwaiver agreement disclaims liability under the terms of the policy, reserves to each party his respective rights, and provides that the insurer will defend the suit at its own expense, and that nothing which is done under the agreement will be deemed to constitute a waiver of his respective rights. A unilateral reservation of rights is a notice given by the insurer that it will defend the suit, but reserves all rights it has based on noncoverage under the policy. 33 Ohio St. at 45, 294 N.E.2d at 877.

of the insured; but it would be to insured's interest to have such recovery based upon a ground that brought the judgment within the coverage of the policy.

Thus in making defense the interest of the insurer came into conflict with the interest of the insured. The insurer sought to avoid any liability to indemnify insured for recoverable damages by giving notice of claimed nonliability, inviting the insured to employ counsel of its own choice for its own protection and allowing them to participate in the case and by attempting at the same time to perform its (insurer's) conceded contractual obligation to defend by requiring its own counsel to keep control of the defense at all times.

As a result, the insured was confronted with a hazard which justified it in employing its own counsel for its protection — protection the insurer plainly indicated it would not give. The insured met the hazardous situation by employing counsel under protest and notifying the insurer that it must bear the expense.

. . . .

As the hazard was created by the action of the insurer in placing itself in a position in which it could not and did not fully and completely perform its contractual obligation to make defense, the insured is entitled to recover reasonable attorney fees, and proper expenses on the ground that insurer breached its contract. . . . The insurer, having agreed in its contract of insurance to make defense at its own expense, could not in such manner pass part of the expense thereof on to the insured.12

During the course of its opinion the Court pointed out that the question of coverage could not be finally determined until the injured party's suit was concluded, and said:

Accordingly in respect to coverage the situation that confronted the insurer in determining its course in defending the Harper suit, related to potential rather than ultimate liability for indemnification.13

Thus, it might be argued that the Socony-Vacuum rule has application only where the issue of coverage is in doubt and cannot be resolved prior to the disposition of the injured party's suit. Further, it has no application where the objective facts, known to both the insured and the company, clearly reveal a lack of coverage for the loss.

12 144 Ohio St. at 396, 59 N.E.2d at 204-05 (1945).

13 Id.
There is nothing in the language of the decision, however, that would warrant such a conclusion. Paragraphs 3 and 4 of the syllabus of the case are phrased in absolute terms. They state:

3. A liability insurance company breaches its contract to defend by making to the insured such a claim of nonliability for indemnification as to render it impossible for such company, in making defense, to protect both its own interests and those of the insured.

4. Where there is such a breach of contract, accompanied by an invitation to insured to employ its own counsel to participate in the defense for its own protection, the insured, protesting against such action, may employ counsel with notice to the insurance company that it must bear the expense, and the company will be liable for reasonable attorney fees and proper expenses incurred in making defense.\(^\text{14}\)

The syllabus is the law of the case in Ohio,\(^\text{15}\) and it is clear from the language used therein that this rule applies whenever the conflict of interest between the insured and the company is so great as to make it impossible for the company to give equal attention to its own interests and those of the insured. Thus, the application of the rule does not turn upon the result in the injured party's suit, but upon the quality of the company's disclaimer of liability.

The *Socony-Vacuum* rule had the potential of a bomb,\(^\text{16}\) but its effect has been that of the fizzle of a wet firecracker. Arguably, a logical extension of the Rule could be that in a *Socony-Vacuum* conflicts situation the company has the duty of furnishing independent counsel to the insured at the company's expense. But as far as can be determined, this argument has not been made in any reported case. At the very least, it could be argued that the company, in fulfillment of its implied covenant of good faith and fair dealing,\(^\text{17}\) must not only

\(^{14}\) *Id.* at 382, 59 N.E.2d at 199.

\(^{15}\) *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).


The case of *Socony-Vacuum Oil Company v. Continental Casualty Company* ... presents a problem of prime importance to attorneys representing casualty insurance companies, and the actual decision leaves in doubt many questions concerning the proper procedure to be followed when counsel is confronted with a situation such as was found in the instant case. ... It is a matter of conjecture under this decision how far an insurance company may safely go in defending under a reservation of rights and still avoid the later possibility of having to pay its insured's own personal counsel fees and costs.


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inform the insured that he may have independent counsel to represent his interests, but also that the company will pay all reasonable attorney fees and expenses incurred in such representation by independent counsel. But again, as far as can be determined, no such argument has been made in any reported case.\textsuperscript{18} As a matter of fact, when the rule has been used in argument, it has been used inappropriately,\textsuperscript{19} and in the only reported case in which it was used correctly, the Supreme Court of Ohio shrugged it off with a platitude. Thus, in \textit{Motorists Mutual Insurance Co. v. Trainor},\textsuperscript{20} the Supreme Court said:

Finally, the Trainors argue that Motorists should pay additional attorney fees and expenses because of the conflict of interest which they say will be inserted in the forthcoming negligence action.

“\textit{When the insurer acts in good faith and considers the welfare of the insured as well as its own, there is no real or substantial conflict of interest.}” 1 Long, Law of Liability Insurance, Section 5.06 [sic]. See \textit{Farm Bureau Mut. Auto Ins. Co. v. Violano} (Cir. 2, Vt. 1941), 123 F.2d 692, certiorari denied, 316 U.S. 672 [sic].\textsuperscript{21}

\textit{(Continued from preceding page)}

First, we feel that the underlying requirement attendant to an exercise of good faith in the acts, conduct, and circumstances of the defense of an action, including the negotiation for settlement of the claim, is that the insurer in the consideration of the conflicting interests of both the insurer and the insured exert at least an equal degree of attention and concern for the interests of the insured as it would for its own interests in the matter. 34 Ohio App.2d at 73, 296 N.E.2d at 558.

\textsuperscript{18} Despite the fact that the language quoted from \textit{Netzley} in note 16 supra would support such an argument, it is questionable whether the argument would succeed. The Ohio Supreme Court has taken a very conservative view of the “good faith—bad faith” question, as illustrated by the second paragraph of the syllabus of Slater v. Motorists Mutual Ins. Co., 174 Ohio St. 148, 187 N.E.2d 45 (1962):

A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

The Court shows no inclination to budge from this position. Wasserman v. Buckeye Union Cas. Co., 32 Ohio St. 2d 69, 290 N.E.2d 857 (1972). While it might be argued that the failure to inform the insured that he may have independent counsel \textit{at the company’s expense} is a “breach of a known duty,” it would be difficult to establish that it was “through some ulterior motive or ill will \textit{partaking of the nature of fraud}.” Difficult, but in any given case, not impossible; and the argument is there to be made.

\textsuperscript{19} In Toms v. Hartford Fire Ins. Co., 75 Ohio App. 181, 61 N.E.2d 98 (1945) and Travelers Insurance Company v. Motorists Mutual Insurance Company, 88 Ohio L. Abs. 129, 178 N.E.2d 613 (Ct. App. 1961), it was used to support a claim for attorney fees and expenses incurred by the insured after the company had absolutely refused to defend. While the \textit{Socony-Vacuum} rule certainly supports this position by logical inference, it has no direct application to such a situation. Nationwide Mutual Ins. Co. v. General Accident Fire & Life Assurance Corp., 23 Ohio App. 2d 263, 262 N.E.2d 885 (1970).

\textsuperscript{20} 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973).

\textsuperscript{21} \textit{Id.} at 47, 294 N.E.2d at 878, \textit{quoting} 1 \textit{LONG LAW OF LIABILITY INSURANCE}, Section 5.06., and \textit{citing} Farm Bureau Mut. Auto Ins. Co. v. Violano, 123 F.2d 692 (2d Cir. 1941), cert. denied, 316 U.S. 672 (1942).
Of course, this may be more than a mere platitude. It may be a finding, albeit obscure, that no conflict exists, and thus there is no occasion to apply the *Socony-Vacuum* rule. On the other hand, this rather vague language may represent the view that the insured is entitled to such fees and expenses only if there is a conflict of interest. This question, however, cannot be determined until after the injured party's action has been tried because it is not until such time that the company's conduct can be fairly scrutinized. In other words, a *Socony-Vacuum* action brought prior to the termination of the injured party's action is premature because, until such time, it cannot be determined that a conflict of interest did, in fact, exist.

If this latter point is what the Supreme Court did have in mind, then it is, in effect, a repudiation of the *Socony-Vacuum* rule. While it is true that in the *Socony-Vacuum* case the action to recover fees and expenses was not brought until after the termination of the injured party's suit, there was nothing in that case which would indicate that the question could not be raised prior to that event. Rather, just the opposite would appear to be the case. In *Socony-Vacuum* the court emphasized that it was the denial of coverage plus the recommendation to employ independent counsel that gave rise to a presumption of a conflict of interest which amounted to a breach of contract. Thus, the cause of action accrued when the company gave its notice. Of course, the exact amount of damages for the breach—the attorney fees and expenses—could not be ascertained until the termination of the injured party's suit, so in that sense, an action for damages could not be brought until that time. But an action for a declaratory judgment respecting the company's liability for such fees and expenses should be available to the insured immediately upon the breach; without it being available, the insured is not likely to be

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22 The injured party's action was for blindness resulting from a scuffle between the plaintiff and the insured's son. The company took the position that there was no coverage since the blow to the plaintiff's eye was an intentional act, and as such, was not a risk covered under the insured's homeowner's policy. It refused to defend the case unless the insureds entered into a quasi-bilateral nonwaiver agreement. When the insureds failed to respond to this offer, the company brought a declaratory judgment action in which they sought a declaration to the effect that an assumption of the defense would not constitute a waiver or estoppel with respect to the coverage issue. The insureds cross-petitioned for a declaration that they were entitled to attorney fees for independent counsel, who would protect them in what they stated to be a conflict of interest situation. In other words, they evoked the *Socony-Vacuum* rule. The trial court did not pass on the conflict of interest question, but on appeal, the Court of Appeals determined that a conflict of interest was present. The Supreme Court may simply be reversing the Court of Appeals on this point without expressly saying so. In any case, the *Violano* case cited by it has no application to this problem; it is merely the source of the quotation taken from Long's Law of Liability Insurance.

In passing, it is interesting to note that the West Publishing Company took the view that this remark simply meant that there was no apparent conflict of interest. Thus, the 10th headnote in its report of the case reads:

Insureds failed to establish entitlement to additional attorney fees and expenses based on alleged conflict of interest with liability insurer anticipated with respect to litigation of personal injury action. See 294 N.E.2d 874 at 875 (1973).

As will be demonstrated at a later point in this article, this explanation, while plausible, really misses the mark.
able to take advantage of the *Socony-Vacuum* rule (unless he is moneyed), because he could not otherwise pay independent counsel, or have any way of assuring independent counsel that fees would be forthcoming. If the *Trainor* gloss is read to preclude the bringing of a declaratory judgment action until after the termination of the injured party's suit, it will gut the *Socony-Vacuum* rule, and leave it practically worthless as a device for protecting the rights and interests of the insured.\textsuperscript{23}

Perhaps it is not necessary to become too concerned over this particular interpretation of the *Trainor* platitude. First of all, no part of the remark was carried over into the syllabus, so it is not the law of the case and does not have much greater standing than *dictum.*\textsuperscript{24} Second, there is a third explanation for the remark, which will be dealt with at a later point in this article, which may obviate the previous two explanations. Of course, if the reader finds this third explanation unpersuasive, the prior two must be taken into account.

Whatever the present status of the *Socony-Vacuum* rule may be, it has not served much of a useful purpose. Obviously, it has not endeared itself to the insurance companies, since it would require them to bear a double expense in the defense of lawsuits, and they

\textsuperscript{23} A third party claim under Civil Rule 14 is equally unavailable to the insured. First of all, we are stipulating a situation in which the company, through counsel, is defending the action, and is controlling the defense of the action. Thus it is hardly likely that the company will permit a third party claim against itself, and this is especially true since it would not want the jury to know that it was lurking in the background, no matter how confident it might be with respect to its coverage defense. Secondly, even though the claim for expenses and attorney fees is a claim in the nature of indemnity, it is not such as is contemplated by Civil Rule 14. That Rule describes a third party claim as a claim against

\textsuperscript{24} Haas v. State, 103 Ohio St. 1, 132 N.E. 158 (1921):

If that proposition of law had been embodied in the syllabus of that case, and thereby the declaration of Sutliff, J., had become the declaration of the supreme court of Ohio, it would become the duty of this court to either follow and approve the principle or overrule the same, but the court at that time did not see fit to endorse the principle there laid down. . . . The proposition then does not rise to the dignity of obiter by the court, but as an authority is entitled to such credit only as the opinion of a single member of such court upon a subject not before him for consideration. 103 Ohio St. at 7-8, 132 N.E. at 159-60.

See also Thackery v. Helfrich, 123 Ohio St. 334, 336, 175 N.E. 449, 450 (1931):

This court adheres to Rule VI of the Rules of Practice of the Supreme Court (see Volume 122, Ohio State Reports, lxviii), and announces the law only through the syllabi of cases and through *per curiam* opinions. Individual opinions speak the conclusions of their writer. What useful purpose they serve is an open question.
have been very quiet about it. It has not been much used by insureds, probably because it is unknown to them and their independent counsel, in cases where they retain counsel. Further, as a rule most insureds pass up the opportunity of retaining independent counsel and rely upon the appointed defense counsel to represent their interests. Thus, the rule is potent in principle but impotent in practice, and, from the point of view of the insured, it has been a most unsatisfactory device for solving the conflict of interest problem.

The Direct Action Development

From time to time it has been suggested that matters could be greatly simplified if the injured party could sue the company directly, with the company being either the sole defendant, or a joint defendant with the insured, on the theory that the company is the real party in interest. In general, the injured party is delighted with this development, since there is some evidence that juries return higher verdicts when they know an insurance company has covered the risk. Because of this, Ohio has always had a strong public policy against direct actions against the insurance company. In recent years, however, the Ohio courts have taken a few tentative and hesitant steps toward allowing a direct action against the company.

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25 Unless, of course, the companies think they can use it to their own ends, as they attempted to do in Travelers Insurance Company v. Motorists Mutual Insurance Company, 88 Ohio L. Abs. 129, 178 N.E.2d 613 (Ct. App. 1961), and Nationwide Mutual Ins. Co. v General Accident Fire & Life Assurance Corp., 23 Ohio App. 2d 263, 262 N.E.2d 885 (1970).


29 From the foregoing, it becomes evident that the issue now presented is whether the service obtained upon the decedent's liability insurer, under the facts before us, was sufficient to commence appellant's action below. By operation of law, the decedent's liability insurer is now the sole entity that can be required to respond in possible damages to the appellant's allegations. As such, it is the only defendant below which has any interest in the outcome of this litigation. It arrives at this position by virtue of the contract it made with the decedent and the consideration which supports that contract. The presence of a legal representative of the estate under these facts become perfunctory; a methodical posture which is maintained out of a desire to obviate any possibility

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A recent commentator\textsuperscript{30} has suggested that the present Ohio Civil Rules now permit the joinder of the company and the insured as parties defendant in the injured party's action. The argument may be summarized as follows: If the injured party obtains a judgment against the insured, he must then file a supplemental action against the company under the provisions of Section 3929.06 of the Ohio Revised Code\textsuperscript{31} if he wishes to collect that judgment from the company. But Civil Rule 18(B) provides that:

Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action. . . .

And Civil Rule 20(A) provides that:

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Therefore, since the supplemental action is cognizable only after the injured party's action has been prosecuted to conclusion, and since the insured and the company have a common interest in the action, the company may be joined as a party defendant.

The essential difficulty with the argument is that it is founded on the false premise that in every case, in order to collect the judgment, the injured party will have to bring a supplemental action under Section 3929.06. As a matter of fact, such supplemental actions are relatively rare. In the vast majority of cases the company either settles the injured party's suit, or pays the judgment if one is obtained against its insured.

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that the existence of an insurer as a party defendant could influence the verdict of the jury. . . .

It has not been alleged or shown that a failure to obtain service upon some representative of the estate of Wetzel Crum would prejudice appellee State Farm in any way in a trial on the merits of this case. 31 Ohio St. 2d at 93, 285 N.E.2d at 343.

See also Rasmussen v. Vance, 34 Ohio Misc. 87, 293 N.E.2d 114 (C.P. 1973). Both of these situations are, of course, distinguishable from the ordinary civil action, but they may point a trend.


\textsuperscript{31} OHIO REV. CODE ANN. §2937.06 (Page 1960).
Thus, the joinder of the company as a party defendant, with all its attendant prejudice, although easing the burden of only a few plaintiffs in a few cases, might substantially increase verdicts in all cases because of that prejudice. Of course, the cost of the probable increase in verdicts would only be passed on to the insuring public in the form of higher premiums. It might well be asked whether the majority of the populace should bear an increased financial burden so that a relative few of their number may have their path to judgment satisfaction eased. That is a question of public policy, and to date, it has been answered in the negative.

Finally, another theory favoring the direct action against, or joinder of, the company is bottomed on the thesis that the injured party is a third party beneficiary of the liability insurance contract. This theory, too, has been rejected by the Ohio courts.

Accordingly, at the present time, the direct action against the company, whether as the sole defendant or as a joint defendant with the insured, is not available in this state. But even if it were, it would not solve the conflict of interest problem. If the company were the sole defendant in the action, it would be free to maneuver the development of the facts so that the final judgment would preclude coverage. If it is joined with the insured, and the insured is represented by independent counsel, the happy plaintiff has the same "divide and conquer" situation that was found under the Socony-Vacuum rule. Finally the situation may be such that the insured cannot afford independent counsel, and is thus left to the mercy of the company. Thus, the direct action is not a suitable solution to the conflicts problem.

The Declaratory Judgment Device and its Demise

Some states have taken the position that, where the objective facts show coverage to be lacking, the company should not be obliged to defend the action, even where the allegations of the complaint bring the claim within the coverage of the policy. Representative of this view is Burd v. Sussex Mutual Insurance Company, wherein it is said:

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1. An injured person is not a third party beneficiary of a liability insurance contract between an insurer and its insured and may not sue the insurer under that theory.

2. An injured person may sue a tortfeasor's liability insurer, but only after obtaining judgment against the insured. R.C. 3929.05 and R.C. 3929.06.

But when coverage, i.e., the duty to pay, depends upon a factual issue which will not be resolved by the trial of the third party's suit against the insured, the duty to defend may depend upon the actual facts and not upon the allegations in the complaint...

... But if the trial will leave the question of coverage unresolved so that the insured may later be called upon to pay, or if the case may be so defended by a carrier as to prejudice the insured thereafter upon the issue of coverage, the carrier should not be permitted to control the defense.

Whenever the carrier's position so diverges from the insured's that the carrier cannot defend the action with complete fidelity to the insured, there must be a proceeding in which the carrier and the insured, represented by counsel of their own choice, may fight out their differences. That action may, as here, follow the trial of the third party's suit against the insured. Or, unless for special reasons it would be unfair to do so, a declaratory judgment proceeding may be brought in advance of that trial by the carrier or the insured, to the end that the third-party suit may be defended by the party ultimately liable. 35

The essence of this view is that when the conflicts problem is substantial, the company should not be permitted to defend unless there is some other way in which the conflicts problem can be eliminated from the case. Several conflicts-elimination options are made available to the company.

First, prior to the trial of the injured party's action, it may bring a declaratory judgment action to have the coverage question resolved. If the declaration is in favor of coverage, the company is bound by that declaration, and must defend the action with full fidelity to the interests of the insured.

Second, if the company assumes the defense of the injured party's action without qualification, it is estopped from later raising the question of coverage, so it may just as well defend with a view to the insured's interest alone.

Third, if the company defends under a reservation of rights, a judgment in the injured party's action will not bind it on the question of coverage, and it may later litigate that question in an action on the policy. Since it will not be bound by the injured party's judgment, it may defend with complete fidelity to the insured.

35 Id. at 388-91, 267 A.2d at 9-11.
Finally if the conflicts problem is substantial, the company may refuse to defend on the ground of lack of coverage and conflict of interest. In such a case, it will not be bound by the judgment in the injured party's action, but may litigate that question in an action on the policy. Since it does not defend, the conflicts problem is eliminated from the injured party's suit.\textsuperscript{36}

Of these four options, only the first—the pre-trial declaratory judgment action—is of importance here.

At first, Ohio did not permit the use of a declaratory judgment action as a device for testing an insurer's duty to defend, on the ground that such an issue did not raise a question of construction or validity of the policy;\textsuperscript{37} but within seven years of that holding, the Ohio Supreme Court changed its mind. Thus, in paragraph 1 of the syllabus of \textit{The Travelers Indemnity Co. v. Cochrane}\textsuperscript{38} the court indicated that:

\begin{quote}
[A] controversy between an insurer and his insured under an automobile liability insurance policy as to the fact or extent of liability thereunder to persons injured as a result of the operation of the insured automobile or as to the insurer's obligation to defend the insured in an action for damages against him is an actual or justiciable controversy determinable by a declaratory judgment.\textsuperscript{39}
\end{quote}

The point is more clearly made in \textit{Ohio Farmers Indemnity Co. v. Chames},\textsuperscript{40} where it is said:

Moreover, it has been held in a number of cases that the pendency of an action or even the threat of an action affords a sufficient basis to permit an insurer to invoke declaratory-judgment statutes, where the object is to secure a determination as to the insurer's obligation to defend an action or to pay a judgment which might be rendered in such action. (Emphasis added.)\textsuperscript{41}

\textsuperscript{36} Id. at 394, 267 A.2d at 13:
[1] If the carrier does not defend the tort claim because a plaintiff's verdict will not resolve the coverage problem in the insured's favor or because the carrier cannot defend with complete fidelity to the insured's sole interest, then the carrier may be heard upon the coverage issue in a proceeding upon the policy.

\textsuperscript{37} Ohio Farmers Ins. Co. v. Heisel, 143 Ohio St. 519, 56 N.E.2d 151 (1944).

\textsuperscript{38} 155 Ohio St. 305, 98 N.E.2d 840 (1951).

\textsuperscript{39} Id. at 306, 98 N.E.2d at 841.

\textsuperscript{40} 170 Ohio St. 209, 163 N.E.2d 367 (1959).

\textsuperscript{41} Id. at 214, 163 N.E.2d at 371. In addition, the court indicated as follows:
The use of the declaratory judgment action to establish whether there was coverage under the provisions of a liability insurance policy has often been resorted to by insurers in recent years. In many instances this type of action will deter- (Continued on next page)
The insured, of course, has equal access to the declaratory judgment, and it has been held that an excess carrier may use the device against the primary carrier in order to test their respective duties to defend. The injured party may be made a party defendant to the action, and should be, if the declaration is to bind him and preclude him from bringing a subsequent supplemental action under Section 3929.06 of the Ohio Revised Code.

But it is this latter point that is symptomatic of the weakness of the declaratory judgment device as a test of the company's duty to defend — it is expensive. At least two of the parties to this triangle, and more often than not, all three, are compelled to bear the financial burden of two suits: the declaratory judgment action first, and then later, the injured party's action. The average insured is seldom sufficiently affluent to be able to fight both the injured party and his own insurance company at the same time, and, as a consequence, he is either at the mercy of the company in such a suit, or he is driven into the arms of plaintiff's counsel, thereby laying himself open to a later charge of collusion. Even to the company the declaratory judgment device may be more expensive than a defense of the injured party's action, even a defense under the Socony-Vacuum yoke. But in the "big case" it may be the most advantageous device; a technical coverage defense, later asserted, looks awfully shakey when placed alongside a bad injury, a large verdict, and an insured who has no assets from which that verdict may be satisfied. Accordingly, the best move is to get out of the case before it goes to judgment, and the declaratory judgment action is the best vehicle for accomplishing this.

While the declaratory judgment device has the virtue of certainty, its vice — economic wastefulness and oppression of the insured — far outweigh that virtue. But whatever its virtues and

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mine in advance the advisability of instituting or continuing the prosecution of negligence actions against the insured or others which may come within the protection of the policy and often accomplishes the speedier and more economical disposition of cases of this kind and the avoidance of a multiplicity of actions. Consequently, the remedy should be applied liberally whenever the result will be to settle the controversy one way or the other. A primary purpose of the declaratory judgment action is to serve the useful end of disposing of uncertain or disputed obligations quickly and conclusively. Id. at 213, 163 N.E. at 371.


ervices, the pre-trial declaratory judgment device may no longer be
used by the company in this state. It has been laid to rest by the de-
cision in Motorists Mutual Insurance Co. v. Trainor.\textsuperscript{45}

The bare bones of the case will suffice as an introduction to the
new rule. Motorists had issued a homeowners policy to the Trainors.
On June 7, 1966, their 11-year old son was involved in a childhood
fight with his 8-year old playmate, Thomas Harvilla. The fight left
Harvilla totally blind in one eye. The incident was properly reported
to Motorists, and that company began its investigation. In time, Har-
villa filed suit against the Trainors, the claim for recovery being prem-
ised on negligence. Suit papers were properly forwarded to Motor-
ists, but that company denied coverage on the ground that the blow
to Harvilla’s eye was “voluntary.”\textsuperscript{46} The company also refused to de-
fend the action unless the Trainors entered into a bilateral nonwaiver
agreement which gave the company the option of withdrawing from
the case at any time before or after judgment, without thereby in-
curring any liability for the judgment. The Trainors did not reply to
this proposal, and thereafter, a default judgment was taken in the
action. The Trainors then had their own counsel take up the defense
for them, but they continued to demand a defense from Motorists,
and informed Motorists that they would look to it for payment of the
judgment, if any, as well as for reimbursement of their attorney fees
and expenses.

At this point, Motorists filed a declaratory judgment action in
which it set up the pertinent policy provisions, denied coverage, ad-
mitted its duty to defend, and prayed for a declaration that its as-
sumption of the defense without the Trainors’ assent to its proposed
nonwaiver agreement would not amount to a waiver of its right to
contest the coverage question, or work an estoppel against it on that
point.

The Trainors cross-petitioned for their attorney fees to date, as
well as attorney fees for independent counsel to protect them in the
conflict of interest situation — fees to which they claimed entitlement
under the Socony-Vacuum rule.

The trial court granted the declaration sought by Motorists, but
held Motorists liable for the defense costs to the date of judgment,
as well as for the Trainors’ costs in the declaratory judgment action.

\textsuperscript{45} 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973).

\textsuperscript{46} The report of the decision does not give the language of the exclusion, but since the policy
was in effect in 1966, the probable language was: “Section II of this policy does not
apply: . . . (c) under coverages E and F, to bodily injury or property damage caused
intentionally by or at the direction of the insured.” The exclusionary language presently
used in the standard form reads: “This policy does not apply: 1. Under Coverage E —
Personal Liability and Coverage; F — Medical Payments to Others: . . . (f) to bodily
injury or property damage which is either expected or intended from the standpoint
of the insured.” The Trainors’ 11-year old son qualified as an “insured” insasmuch as he was
a resident of their household.
The court did not pass on the conflict of interest problem, and did not award the Trainors their Socony-Vacuum fees and expenses. Motorists appealed the award of fees and expenses, and the Trainors cross-appealed on the denial of their request for Socony-Vacuum fees and expenses.

The court of appeals affirmed on Motorists appeal, but — and here the report of the decision is rather vague — apparently reversed the trial court on the Trainors' cross-appeal, found a conflict of interest to exist and, presumably, granted the Trainors' request for reimbursement of their costs and expenses in retaining independent counsel to represent them in that conflicts situation. The case then went to the Ohio Supreme Court.

With respect to Motorists' appeal, the Supreme Court affirmed the court of appeals and the trial court, and in so doing laid down the prohibition against pre-trial declaratory judgment actions. It concluded that:

[A]lthough the policy between the Trainors and Motorists provides that “the company shall defend any suit against the insured” (emphasis added), the Common Pleas Court and the Court of Appeals have well stated that the law does not require an insurer to waive its contract rights when it has a duty to defend, as follows: “The plaintiff Motorists Mutual Insurance Company is obligated to defend the Trainors in the Harvilla action . . . in good faith toward its insured, without waiving its right to assert at any later time the policy defenses it believes it has.” Motorists could reserve its right through a bilateral nonwaiver agreement with the Trainors, or through a unilateral reservations of rights. It chose to try to set up a bilateral nonwaiver agreement even though the petition alleged a pure negligence action. . . .

The policy and the tenor of the Harvilla petition gave [the Trainors] a clear right to expect a defense by the insurer, and the Trainors had paid a premium for this service. . . .

Motorists took the litigious course of filing the within action for declaratory judgment; then, upon trial, stipulated its responsibility to defend, which had been its requested relief, and asked the trial court to make a determination of its rights to pay under the policy before the negligence action was litigated. This course of conduct is hardly what either side bargained for under the terms of the policy. The Trainors had the right to a prompt and diligent defense under this contract. We determine that Motorists had a duty to defend, and failed to carry out that duty.47

47 33 Ohio St. 2d at 44-46, 294 N.E.2d at 877-878 (1973).

https://engagedscholarship.csuohio.edu/clevstlrev/vol23/iss3/5
What can be made of all this? The following points seem obvious: If the policy contains a stipulation that the company shall defend any suit against its insured; and, if the insured has paid a premium for this service; and, if the allegations of the complaint bring the claim within the coverage provided by the policy; then the company is obligated to defend the suit; and, if it defends under a reservation of rights or a nonwaiver agreement; then, it may assert at any later time the policy defenses it believes it has; but, it may not take the litigious course of filing a declaratory judgment action before trial of the injured party's suit in order to contest its duty to defend and/or its duty to provide coverage; and if it does, it breaches its contract with the insured.

Accordingly, where the allegations of the complaint bring the claim within the coverage provided by the policy, and thereby impose upon the company the duty to defend, the company may not bring a pre-trial declaratory judgment action to contest that duty. In short, the pre-trial declaratory judgment device as a test of the company's duty to defend is abolished.

But if the direct action against the company, or the joinder of the company in the injured party's suit, is unavailable, and if the pre-trial declaratory judgment device is abolished, is the only solution to the conflicts problem the unsatisfactory Socony-Vacuum rule? No, because not even that survives the Trainor decision.

The Ultimate Solution — The Absolute Duty to Defend

Some courts have taken the position that when a claim falls within the broad coverage of the policy, the company has an absolute duty to defend. The conflict of interest problem is avoided by the further holding that if the company defends under a reservation of rights, it will not be bound on the coverage issue by the judgment in the injured party's suit, but may litigate that issue at a later time. Typical of the reasoning in support of this thesis is the following from Gray v. Zurich Insurance Company:48

Although insurers have often insisted that the duty arises only if the insurer is bound to indemnify the insured, this very contention creates a dilemma. No one can determine whether the third party suit does or does not fall within the indemnification coverage of the policy until that suit is resolved; . . . . The carrier's obligation to indemnify inevitably will not be defined until the adjudication of the very action which it should have defended. Hence the policy contains its own seeds of uncertainty; the insurer has held out a promise that by its very nature is ambiguous. . . .

Since we must resolve uncertainties in favor of the insured and interpret the policy provisions according to the layman's reasonable expectations, ... we hold that in the present case the policy provides for an obligation to defend and that such obligation is independent of the indemnification coverage. ... Similarly, we find no merit in the insurer's third contention that our holding will embroil it in a conflict of interests. According to the insurer our ruling will require defense of an action in which the interests of insurer and insured are so opposed as to nullify the insurer's fulfillment of its duty of defense and of the protection of its own interests. ... 

Since, however, the court in the third party suit does not adjudicate the issue of coverage, the insurer's argument collapses. ... 

In any event, if the insurer adequately reserves its right to assert the noncoverage defense later, it will not be bound by the judgment. If the injured party prevails, that party or the insured will assert his claim against the insurer. At this time, the insurer can raise the noncoverage defense previously reserved. In this manner the interests of insured and insured in defending against the injured party's primary suit will be identical; the insurer will not face the suggested dilemma.49

The Trainor decision places Ohio squarely within this camp.

As was shown above, the Ohio Supreme Court has stated that when the allegations of the complaint bring the claim within policy coverage, the company has an absolute duty to defend. If it defends under a proper reservation of rights or a nonwaiver agreement, it may litigate the question of coverage at a later time, but its duty to defend is absolute. These points are manifested in paragraphs 1 and 2 of the syllabus, which are here quoted in reverse order to better illustrate the proposition.

2. The test of the duty of an insurance company, under a policy of liability insurance, to defend an action against an insured, is the scope of the allegations of the complaint in the action against the insured, and where the complaint brings the action within the coverage of the policy the insurer is required to make defense, regardless of the ultimate outcome of the action or its liability to the insured. (Socony-Vacuum Oil Co. v. Continental Cas. Co., 144 Ohio St. 382, approved and followed [sic]) (emphasis added).

49 Id. at 268-270, 419 P.2d at 173-75, 54 Cal. Rptr. at 109-10.
1. 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 (emphasis added).\(^5\)

But if the company does defend when the objective facts indicate a lack of coverage, is it not in the same conflicts situation, and should not the Socony-Vacuum rule apply? The Trainors thought so, and thus asked for additional attorney fees and expenses. And this brings us to that enigmatic remark that gave so much difficulty in the first part of this article. It should be remembered that the Court said:

Finally, the Trainors argue that Motorists should pay additional attorney fees and expenses because of the conflict of interest which they say will be inserted in the forthcoming negligence action.

"When an insurer acts in good faith and considers the welfare of the insured as well as its own, there is no real or substantial conflict of interest." 1 Long, Law of Liability Insurance, Section 5.06. See Farm Bureau Mut. Auto Ins. Co. v. Violano (Cir. 2, Vt. 1941), 123 F.2d, 692, certiorari denied, 316 U.S. 672 [sic].\(^5\)

In understanding this remark it should first be noted that the quote from Long, as well as the cited case, is inapposite. When put in context,\(^5\) the quote has reference to the company's duty with respect to settlement, and not to the defense of the action against the insured. The Violano case likewise has to do with settlement, not defense. Thus, the quote is not to be taken literally, rather, it is symbolic of a principal.

When this is understood, and when the quote is read in conjunction with paragraph 1 of the syllabus, its meaning becomes clear. The company has an absolute duty to defend. Assuming a proper reservation of rights, if the company defends in "good faith," that is, if it puts forth its best effort on behalf of the insured, there can be no conflict of interest, since it will not be bound by any judgment in the injured party's suit, but may litigate the question of coverage at

\(^{50}\) 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973).

\(^{51}\) Id. at 47, 294 N.E.2d at 878.

\(^{52}\) R. LONG, LAW OF LIABILITY INSURANCE, §5.06, at 5-47 (Rel. No. 2) (1973). The full quote reads:

When an insurer acts in good faith and considers the welfare of the insured as well as its own, there is no real or substantial conflict of interest. In such a situation an insurer cannot be required to settle rather than litigate a doubtful issue; nor is the insurer required in such a situation to bear the excess if the defense fails and the verdict exceeds the policy limits.

And cited in support of this proposition is the Violano case.
a later time. Therefore, since there can be no conflict of interest when the company acts in this sense of the term good faith, there is no requirement that the insured obtain independent counsel and no need to award the insured attorney fees and expenses for that independent counsel. In addition, since there is no longer need for independent counsel as long as the company is acting in good faith, there is no longer any need for the Socony-Vacuum rule. It must necessarily follow, then, that the Trainor decision has likewise done away with the Socony-Vacuum rule as well as the pre-trial declaratory judgment device. 53

At this point, it might be well to ask: when is this “later time” when the coverage question will be decided? If the insured is successful in the injured party’s action there will be no “later time,” since there will be no need to test the coverage provisions; he will have been provided with a defense, and he will have incurred no costs in that regard. On the other hand, if the injured party is successful, and the verdict is such that the company, in its own economic interest, is not willing to compromise or pay it, the logical “later time” is in the supplemental action over under the provisions of Section 3929.06. 54

It has long been held that the company may assert, in that supplemental action, any coverage defenses that it may have. 55 Further, since the supplemental action is a continuation of the principle action, and because the company becomes a new party defendant thereto, the insured, as the defendant in the principle action, may cross-claim against the company under the provisions of Civil Rule 13(G), and thereby, dispose of all of the claims concerning coverage in a single action.

53 Of course, the Socony-Vacuum does not disappear entirely. It becomes resurrected and applicable if the company begins to act in “bad faith” in the defense of the insured.

54 In its essential elements, that statute provides:

Upon the recovery of a final judgment against any . . . person . . . by any person, . . . if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest is entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment. If the judgment is not satisfied within thirty days after it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file a supplemental [complaint] in the action in which said judgment was rendered, in which the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action.

55 See paragraph 1 of the syllabus of Bennett v. Swift & Co., 170 Ohio St. 168, 163 N.E.2d 362 (1959):

The rights of the plaintiff against an insurer named a defendant in a supplemental petition filed under the provisions of Section 3929.06, Revised Code, cannot rise above those of the insured, and any defenses which would have been available to the insurer in an action by the insured are available to the insurer in the proceeding on such supplemental petition. (Luntz et al., Exrs., v. Stern, 135 Ohio St., 225, Stacey v. Fidelity & Casualty Co. of New York, 114 Ohio St. 633.)
Finally, a word must be said about the company’s duty to settle, if a settlement offer is made within the policy limits. Assuming all of the requisites for the imposition of the “good faith” duty to settle, it would seem that when the company is defending under a Trainor compulsion, it has absolutely no duty to accept a settlement offer. It would be wholly inconsistent to demand that the company defend with the promise that it can litigate the coverage question “at a later time,” and at the same time demand that it settle the case, if settlement would be in the best interest of the insured. The demand to settle would make a mockery of the whole process; the promise with respect to the coverage question would be a hollow promise and at least a cruel deception if not an outright hoax. But, as it is said in Netzley, the company must keep the insured fully informed of any settlement offers. Then, if the insured feels that a settlement is to his best advantage, he may accelerate the determination of the coverage question by means of a declaratory judgment action. The Trainor prohibition against the declaratory judgment device is applicable to the company only, not to the insured. He remains free to use that device as he sees fit. If the coverage question is determined against the company, then it must consider the settlement offer in “good faith;” but as long as the coverage question remains open, it has no duty to accept such a settlement offer.

Thus, in Ohio, the solution to the conflict of interest problem is the company’s absolute duty to defend every case in which the allegations of the complaint bring the claim within the policy coverage. This is somewhat unfair to the company, but it is in a better position to meet the economic burden than is the insured, since it need only make some slight premium adjustment. In any case, with the advent of no-fault automobile liability insurance, the economic burden on the company will be substantially lessened.

Conclusion

The Trainor decision is a radical new approach to the liability insurer’s duty to defend lawsuits brought against its insured. In addition, it is the most fair and equitable way of solving the conflict of interest problem that sometimes occurs in the exercise of that duty to defend. Under the Trainor rule, the company has an absolute duty to defend whenever the allegations of the complaint bring the claim within the policy coverage, even when the objective facts known to both the company and the insured clearly indicate that the claim does

56 See Netzley v. Nationwide Mut. Ins. Co., 34 Ohio App. 2d 65, 296 N.E.2d 550 (1971): In addition, we hold to the view that an offer of settlement of the claim at, or near, the policy limits should be conveyed to the insured — this for the purpose of giving the insured the opportunity to engage in the discussion of a settlement, and to make appropriate offers of contribution toward settlement. 34 Ohio App. 2d at 74, 296 N.E.2d at 559.
not arise out of a risk covered by the policy. If the company defends under a reservation of rights, or under a nonwaiver agreement to which the insured freely consents, the company does not waive the coverage defense, nor is it estopped from raising it at a later time. Rather, it has the express right to assert that coverage defense in the injured party's supplemental action under the provisions of Section 3929.06. Since the company may raise the coverage defense in the supplemental action, it does not have any conflict of interest with the insured in the defense of the injured party's action. Further, as long as the company defends that action in "good faith," that is, as long as it puts forth its best efforts on behalf of the insured, the insured has no need of independent counsel. Accordingly, the Socony-Vacuum rule of reimbursement for independent counsel's attorney fees and expenses is set aside, and remain inoperable as long as the company is defending in "good faith." Also, since the question of coverage is postponed until the supplemental action, the company is forbidden to employ the pre-trial declaratory judgment action as a device for testing the duty to defend. But that prohibition flows to the company only, not to the insured. While the company need not accept a settlement offer while the coverage question remains open, the insured may employ the declaratory judgment device to test coverage at an early stage and, if successful, impose upon the company the good faith duty of entertaining the settlement offer.

As it is noted in paragraph 3 of the syllabus of Motorists Mutual Insurance Co. v. Trainor 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973):

Where a clear duty to defend an action against an insured is admitted by the insurer, and is obvious from the complaint filed, the insurer cannot excuse itself from that duty by seeking to require the insured to enter into a bilateral non-waiver agreement as a condition precedent to making such a defense.