

**DEFENDING UNDER A RESERVATION OF
RIGHTS: MISSISSIPPI INSURANCE
DEFENSE IN THE WAKE OF *MOELLER*
AND ITS PROGENY**

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INTRODUCTION

In 1996, the Mississippi Supreme Court issued its opinion in the case of *Moeller v. American Guarantee & Liability Insurance*

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Co.,¹ which addressed the scope of an insurer's duties when providing a defense to an insured under a reservation of rights. *Moeller's* declaration that an insurance company issuing a routine reservation of rights letter gave the insured the right to choose its counsel at the expense of the insurer was a radical departure from the Mississippi insurance defense status quo. Contemporary articles noted that *Moeller* was leading "many lawyers to re-examine the relationship between insurers and defense counsel," and worried that it could mark a death knell for Mississippi insurance defense.²

Contemporary legal scholars argued that the *Moeller* opinion was somehow imprecise, failing to "make clear whether every reservation of rights automatically creates a conflict of interest [.]"³ and stating that "the application of *Moeller* will require clarification by the courts in future litigation[.]"⁴ Other critics asserted:

Their decision, although it solves many problems, creates a great many more that will now plague the courts as practitioners attempt to implement this holding. There is no doubt that Mississippi needs a predictable way to ensure loyalty to insureds; however, the dual client approach as promulgated in *Moeller* is not a satisfactory solution.⁵

The Mississippi Supreme Court has remained quiet on the issues raised after the *Moeller* decision, but the federal courts in Mississippi, and the Fifth Circuit Court of Appeals, have not. Instead of retreating from the decision, or attempting to parse it to

¹ 707 So. 2d 1062 (Miss. 1996).

² J. Kevin Owens, *Wrestling With the Tar Baby: Ethical Obligations of Mississippi Insurance Defense Lawyers*, 17 MISS. C. L. REV. 359, 359 (1997). *Moeller*

may ultimately spell the demise of insurance defense in Mississippi [because] the Mississippi Supreme Court adopted a dual client approach while at the same time placing upon the insurer the contractual obligation of affording the insured the opportunity to select his own independent counsel to protect his interests at the expense of the insurer.

Id.

³ Amy Bland, *Insurance—Duty to Defend—Defense Under Reservation of Rights Requires Insurer to Provide Independent Counsel to Insured*, 66 MISS. L.J. 597, 608 (1997).

⁴ *Id.* at 609.

⁵ Owens, *supra* note 2, at 380.

lessen its impact, those courts have adhered to, and even extended, *Moeller* while addressing many of the concerns initially inspired by the opinion.⁶ While *Moeller* and the principal Fifth Circuit decision received notice by legal commentators, the district court decisions since then have seen little notice. Given the importance of the *Moeller* issues to Mississippi litigators, insurers, and insureds, the entire line of *Moeller* cases may warrant additional attention from commentators.

With Part I, this Article examines the *Moeller* decision itself, paying particular attention to the Mississippi Supreme Court's analysis of the insurer's duty to defend the insured. Part II evaluates the underpinnings of *Moeller*, including cases from other jurisdictions and earlier Mississippi Supreme Court cases addressing issues like those addressed in *Moeller*. Subsequently, Part III details how the *Moeller* holding has been interpreted, applied, and expanded by both the Fifth Circuit and Mississippi's federal district courts. The Article culminates with Part IV, which provides a framework of considerations for Mississippi practitioners to take into account when handling liability insurance issues in order to ensure compliance in an area that poses pitfalls for insurance companies and attorneys.

I. MOELLER IN DETAIL

In *Moeller v. American Guarantee & Liability Insurance Co.*, the Mississippi Supreme Court considered an insured's claim for attorney's fees from its insurer.⁷ *Moeller*, a former member of the law firm of Fuselier, Ott, McKee and Moeller, brought suit against the firm alleging, *inter alia*, damage to professional representation, wrongful discharge, breach of contract, and

⁶ See *infra* Part III. See generally *Am. Guarantee & Liab. Ins. Co. v. 1906 Co.*, 273 F.3d 605 (5th Cir. 2001); *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901 (5th Cir. 2002); *Lexington Ins. Co. v. Hattiesburg Med. Park Mgmt. Corp.*, No. 2:07CV26KS-MTP, 2007 WL 2011288 (S.D. Miss. July 6, 2007); *PIC Grp., Inc. v. LandCoast Insulation, Inc.*, 795 F. Supp. 2d 459 (S.D. Miss. 2011); *Liberty Mut. Ins. Co. v. Tedford*, 658 F. Supp. 2d 786 (N.D. Miss. 2009); *Liberty Mut. Ins. Co. v. Tedford*, 644 F. Supp. 2d 753 (N.D. Miss. 2009); *Scottsdale Ins. Co. v. Bungee Racers, Inc.*, No. 4:04CV376-P-B, 2006 WL 2375367 (N.D. Miss. Aug. 14, 2006).

⁷ 707 So. 2d 1062 (Miss. 1996). *American Guarantee & Liability Insurance Co.* provided the firm with a multi-peril liability insurance policy. *Id.* at 1064.

fraudulent misrepresentation.⁸ The law firm filed an answer and counterclaim to Moeller's suit.⁹ The firm's insurance policy with American Guarantee included coverage for "libel or slander or of other defamatory or disparaging material . . . conducted by or on behalf of the named insured[.]"¹⁰ As both Moeller's complaint and the firm's counterclaim included allegations of defamation, the pleadings triggered American Guarantee's duty to defend both Moeller and the firm.

After the Hinds County Chancery Court determined that the firm breached the contract and committed tortious interference,¹¹ American Guarantee filed a complaint against the firm and Moeller "seeking a declaratory judgment that it had properly fulfilled its duty to defend the law firm against Moeller's claims, that it had properly reserved its rights . . . and that it was not responsible for any portion of the judgment obtained against the firm."¹² The firm and Moeller each counterclaimed, seeking attorney's fees, expenses, and damages.¹³ The chancellor found in favor of American Guarantee,¹⁴ and both the firm and Moeller appealed the decision.¹⁵

In rendering its opinion, the Mississippi Supreme Court revisited a touchstone of Mississippi liability insurance law, stating that "whenever a lawsuit filed against an insured contains an allegation or claim which is covered under the policy, the insurance carrier has a contractual duty to furnish a legal defense,

⁸ *Id.*

⁹ *Id.*

The counterclaim sought recovery of a sum due on a promissory note and a sum due from an advancement to Moeller and repayment of sums due under the stock redemption agreement if it were rescinded, and charged Moeller with wrongful solicitation of clients of the firm, interference with the firm's relationships with its clients, and defamation.

Id.

¹⁰ *Id.* at 1065 (emphasis in original omitted).

¹¹ *Id.* at 1064. The Mississippi Supreme Court subsequently affirmed the contract damages, but reversed and rendered Moeller's tort claims. *See* Fuselier, Ott & McKee, P.A. v. Moeller, 507 So. 2d 63, 66-70 (Miss. 1987).

¹² *Moeller*, 707 So. 2d at 1067.

¹³ *Id.*

¹⁴ *Id.* at 1068.

¹⁵ *Id.*

whether the claim later proves to be meritorious or not.”¹⁶ The court recognized that the duty to defend is absolute when the complaint contains allegations specifically mentioned in the policy; conversely, this duty does not exist at all when a claim is clearly outside the coverage of the policy.¹⁷

When the allegations in a complaint fall between those two extremes, however, the scope of an insurer’s duty to defend is less clearly defined. In an effort to elucidate the full scope of an insurer’s responsibility to an insured, the *Moeller* court addressed the “duty to defend” in two instances: (1) “where the allegations of the complaint are covered by the liability policy, but the facts are such that it may very well develop at trial that the conduct of the insured was not covered by the policy[.]” or (2) where “the allegations of the complaint themselves are ambiguous so that read in one way there is no coverage, but read in another there is[.]”¹⁸ In these situations, the court determined, “[u]nquestionably, the insurance carrier has a right to offer the insured a defense, while at the same time reserving the right to deny coverage in [the] event a judgment is rendered against the insured.”¹⁹

The court went on to hold that when defending under a reservation of rights, an insurer must provide the insured the opportunity to select its own counsel to defend the claim at the insurer’s expense.²⁰ The court reasoned that in cases where the insurer defends under a reservation of rights, a conflict of interest

¹⁶ *Id.* at 1069 (citing *S. Farm Bureau Cas. Ins. Co. v. Logan*, 119 So. 2d 268, 270-71 (Miss. 1960)).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Acosta*, 479 So. 2d 1089, 1092 (Miss. 1985)).

²⁰ *Id.* An insurer writes a reservation of rights letter to inform “the insured that for various reasons the insurer may later refuse to pay an adverse judgment against the insured and that the insurer’s investigation and defense of the third party’s claim against the insured do not waive the insurer’s reserved right to refuse to pay such a judgment.” DENNIS J. WALL, *Informing the insured: Reservation of rights, in LITIGATION AND PREVENTION OF INSURER BAD FAITH* 54 (3rd ed. 2011). Generally, “[a]n insurer’s defense of its insured under a reservation of rights avoids breaching its duty to defend while seeking to avoid waiver and estoppel allegations.” *Holly Mountain Res., Ltd. v. Westport Ins. Corp.*, 104 P.3d 725, 734 n.8 (Wash. Ct. App. 2005) (citing *Truck Ins. Exch. v. VanPort Homes, Inc.*, 58 P.3d 276 (Wash. 2002)).

arises between the insurer and insured.²¹ The Mississippi Supreme Court instructed attorneys employed by insurers to ask themselves the following questions:

[I]s [there] any reason there might be a conflict in representing the carrier and the insured[?]

Is the carrier defending under a reservation of rights?

Is the amount sued for in excess of the policy limits?

Is it possible that a portion of the claim may be covered, and another not, or that the policy covers one theory of liability, but not another one?²²

The Mississippi Supreme Court stated that if the answer to any of these questions is “yes,” then the attorney “should undertake to represent only the interest of the insurance carrier for the part covered, and the insurance carrier should afford the insured ample opportunity to select his own independent counsel to look after his interest.”²³ The court further instructed that, “if during the representation of both parties a conflict of interest arises, defense counsel should withdraw from representation of either if there is any possibility that representing one and not the other may be injurious to the client the attorney ceases to represent.”²⁴

²¹ *Moeller*, 707 So. 2d at 1069.

[T]here are various conflicts of interest between the insurer and the insured. . . . First, if the insurer knows that it can later assert non-coverage, or if it thinks that the loss which it is defending will not be covered under the policy, it may only go through the motions of defending Second, if there are several theories of recovery, at least one of which is not covered under the policy, the insurer might conduct the defense in such a manner as to make the likelihood of a plaintiff's verdict greater under the uninsured theory. . . . Third, the insurer might gain access to confidential or privileged information in the process of the defense which it might later use to its advantage in litigation concerning coverage.

Id. (quoting *CHI of Alaska, Inc. v. Emp'rs Reinsurance Corp.*, 844 P.2d 1113, 1116 (Alaska 1993)).

²² *Id.* at 1070.

²³ *Id.* (citing *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255, 269 (Miss. 1988); *State Farm Mut. Auto. Ins. Co. v. Commercial Union Ins. Co.*, 394 So. 2d 890, 894 (Miss. 1981); *Anthony v. Frith*, 394 So. 2d 867 (Miss. 1981)).

²⁴ *Id.* (citing *Hartford*, 528 So. 2d at 270).

II. UNDERPINNINGS OF *MOELLER*

Although *Moeller* signaled a departure from the traditional rules of insurance practice, the principles guiding the decision were not without precedent. In fact, the court's decision in *Moeller* had a foundation not only in prior Mississippi decisions, but also took inspiration from a number of cases from other jurisdictions as well.

In *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*,²⁵ the Alaska Supreme Court held that the insurer's reservation of rights gave the insured a right to retain independent counsel.²⁶ The court noted that "[m]erely because the insurer and the insured have divergent interests when the insurer seeks to defend under a reservation of rights does not necessarily mean that appointed counsel also has conflicting interests."²⁷ However, the court also recognized that, if a conflict exists between an insurer and the insured, "appointed counsel may tend to favor the interests of the insurer[.]"²⁸ That tendency is what gives rise to the insured's right to obtain independent counsel and the insurer's responsibility to pay the reasonable value of that representation.²⁹

The *CHI* court identified three potential conflicts of interest in this situation: (1) "if the insurer knows that it can later assert non-coverage, or if it thinks that the loss which it is defending will not be covered under the policy, it may only go through the motions of defending"; (2) "if there are several theories of recovery, at least one of which is not covered under the policy, the insurer might conduct the defense in such a manner as to make the likelihood of a plaintiff's verdict greater under the uninsured theory"; and (3) if "the insurer might gain access to confidential or privileged information in the process of the defense which it might later use to its advantage in litigation concerning coverage."³⁰

²⁵ 844 P.2d 1113.

²⁶ *Id.* at 1115.

²⁷ *Id.* at 1116.

²⁸ *Id.* at 1116-17.

²⁹ *Id.* at 1117.

³⁰ *Id.* at 1116. The court pointed out that although

[a]ll three general types of conflicts of interests between insurer and insured . . . apply in coverage defense cases[.] . . . [T]he second reason does not apply in policy defense cases. Policy defenses, such as lack of notice or non-cooperation, involve facts which are generally irrelevant to the litigation

Accordingly, the court incorporated into Alaskan law the rule that an insured has a right to select independent counsel, subject to the implied covenant of good faith and fair dealing, but the insurer is only required to pay the reasonable cost of the defense.³¹ The Alaska Supreme Court found this rule a way to “fairly balance[] the interest of the insured—being defended by competent counsel of undivided loyalty—with the interests of the insurer—having the defense of the insured conducted by competent counsel.”³²

The Ninth Circuit, applying California law, reached a similar conclusion in *Previews, Inc. v. California Union Insurance Co.*³³ There, Previews obtained a one million dollar professional liability policy from Cal Union.³⁴ When a class action was filed against Previews, the insurer offered to provide a defense, but sought to apply the \$5,000 deductible clause to every member of the class.³⁵ Previews subsequently obtained its own counsel and sought payment for its legal fees from Cal Union based on the duty to defend. In its discussion of the scope of an insurer’s duty to defend, the *Previews* court noted that an insurer’s desire for control over any litigation was subordinate to its duty to defend its insured and pay for the reasonable costs of representation.³⁶

Three years after the Ninth Circuit’s application of California law in the *Previews* case, the California appellate court held that

between the plaintiff and the insured. . . . Thus, the need for independent counsel is, if anything, greater in coverage than in policy defense cases.

Id. at 1118. In a later analysis of how to analyze these potential conflicts, an Illinois appellate court noted that in order to determine whether a conflict of interest exists, you “must compare the allegations of the underlying complaint against the insured to the terms of the insurance policy at issue.” *Am. Family Mut. Ins. Co. v. W.H. McNaughton Builders, Inc.*, 843 N.E.2d 492, 498 (Ill. App. Ct. 2006) (citing *Ill. Masonic Med. Ctr. v. Turegum Ins. Co.*, 522 N.E.2d 611 (Ill. App. Ct. 1988)).

³¹ *CHI*, 844 P.2d at 1121. “In our view the covenant of good faith and fair dealing in this context requires that the insured select an attorney who is, by experience and training, reasonably thought to be competent to conduct the defense of the insured.” Requiring an insurer to reimburse only the *reasonable* cost of defense “provides a measure of protection for insurers against overbilling—and overlitigating—by independent counsel.” *Id.*

³² *Id.*

³³ 640 F.2d 1026 (9th Cir. 1981).

³⁴ *Id.* at 1027.

³⁵ *Id.*

³⁶ *Id.* at 1028.

the rules of professional ethics require insurer-appointed counsel to explain “the full implications of joint representation” when the insurer defends under a reservation of rights in *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*³⁷ They further held that, if the insured does not give informed consent to the continued joint representation, “counsel must cease to represent both.”³⁸ In this case, Cumis provided defense counsel under a reservation of rights for their insured, San Diego Navy, in a third-party action.³⁹ San Diego Navy subsequently obtained independent counsel, for which the trial court required Cumis to pay.⁴⁰ Due to the presence of this conflict of interest, the court held that an insured has a right to independent counsel paid for by the insurer in instances where the insurer provides its own counsel but reserves its right to assert non-coverage at a later date.⁴¹

The *Cumis* decision was subsequently superseded by statute in California Civil Code § 2860, which provides the following:

If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the

³⁷ *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc’y, Inc.*, 208 Cal. Rptr. 494, 506 (Cal. Ct. App. 1984). “Disregarding the common interests of both insured and insurer in finding total nonliability in the third party action, the remaining interests of the two diverge to such an extent as to create an actual, ethical conflict of interest warranting payment for the insureds’ independent counsel.” *Id.*

³⁸ *Id.*

³⁹ *Id.* at 496.

⁴⁰ *Id.* at 497.

⁴¹ *Id.* at 503.

[I]n a conflict of interest situation, the insurer’s desire to exclusively control the defense must yield to its obligation to defend its policy holder. Accordingly, the insurer’s obligation to defend extends to paying the reasonable value of the legal services and costs performed by independent counsel, selected by the insured We conclude that the insured here is entitled to the reasonable value of the legal services rendered by its independent counsel[.]

Id. (citing *Exec. Aviation, Inc. v. Nat’l Ins. Underwriters*, 94 Cal. Rptr. 347, 354 (Cal. Ct. App. 1971)).

right to independent counsel. . . . For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist.⁴²

Two prior Mississippi cases that led most directly to *Moeller* are *Hartford Accident & Indemnity Co. v. Foster*,⁴³ and *Southern Farm Bureau Casualty Insurance Co. v. Logan*.⁴⁴ In *Hartford*, the court addressed, “for the first time in this state, difficult questions pertaining to the duties of lawyers retained by the insurance carrier to represent the insured.”⁴⁵ There, the insured sued his insurance carrier for bad faith refusal to settle, and also sued the defense attorney for breach of fiduciary duty.⁴⁶

In its analysis, the Mississippi Supreme Court noted that “the absolute right to defend an action against the insured . . . created an obligation on the part of Hartford, akin to a fiduciary duty, to ‘consider fairly the interests of the insured as well as its own.’”⁴⁷ The court also recognized that this fiduciary duty included an obligation to make “an honest, intelligent and knowledgeable evaluation” of the claim.⁴⁸ Ultimately, the court held that if an insurer provides its insured with an attorney, and the counsel breaches his fiduciary duty by undertaking the representation in a way that favors the insurer at the expense of the insured, the

⁴² CAL. CIV. CODE § 2860 (West 1988).

⁴³ See generally *Hartford Accident & Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988).

⁴⁴ See generally *S. Farm Bureau Cas. Ins. Co. v. Logan*, 119 So. 2d 268 (Miss. 1960).

⁴⁵ *Hartford*, 528 So. 2d at 257.

⁴⁶ *Id.* at 260.

⁴⁷ *Id.* at 263 (quoting *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 323 A.2d 495, 505 (N.J. 1974)). “Our own jurisprudence accords with the majority view that the insurer is the champion of the insured’s interests; that the interests of the insured are paramount to those of the insurer, and that the insurer may not gamble with the funds and resources of its policyholders.” *Id.* at 265 (quoting *Cousins v. State Farm Mut. Auto. Ins. Co.*, 294 So. 2d 272, 275 (La. Ct. App. 1974)).

⁴⁸ *Id.* at 264.

insurance “carrier is legally liable along with the attorney for any ensuing damage to the insured.”⁴⁹

Furthermore, the court recognized that, if an insurer-insured conflict arises, the attorney “may be required to withdraw from the case altogether, or restricted in his continuing representation with the insurance company furnishing at its expense an independent counsel chosen by the insured to represent his own interests.”⁵⁰ Either way, *Hartford* found that the attorney would need to obtain informed consent from all his clients if he wished to continue representation.⁵¹

The *Hartford* court, however, eventually determined that neither the attorney nor the insurer breached their fiduciary duty to cause harm to their insured, and found against the insured.⁵² Despite the fact that the court’s later opinion in *Moeller* took practitioners aback, a close reading of Justice Robertson’s dissent in *Hartford* indicates that the judiciary, if not the practitioners, were experiencing the beginnings of a shift that would ultimately culminate in *Moeller*.

Justice Robertson believed that the majority’s determination that the insurance carrier and its attorney did not breach a duty constituted a “surrender [of] counsel’s code of conduct to the real or imagined fears of insurers’ insistence.”⁵³ In his dissenting opinion from *Hartford*, Justice Robertson stated that at the time a conflict arose, pursuant to its duty to defend, the insurer “had a

⁴⁹ *Id.* at 268 (citing *Nat’l Farmers Union Prop. & Cas. Co. v. O’Daniel*, 329 F.2d 60, 65 (9th Cir. 1964); *Petersen v. Farmers Cas. Co.*, 226 N.W.2d 226 (Iowa 1975); *Evans v. Steinberg*, 699 P.2d 797 (Wash. Ct. App. 1985)).

The policy requires the company to defend any lawsuit charging negligence, and also authorizes the company to select the attorney and conduct the defense of the action. The insured is required to fully cooperate with the company in undertaking the defense. Because the company is footing the bill for the defense, and will be obligated to pay any judgment rendered (if it does not settle the case), it is clearly entitled to select the attorney and conduct the defense. This does not, and indeed could not, authorize the company to undertake or pursue any defense prejudicial to the monetary interest of the insured. It hardly needs to be added that no insurance policy can validly diminish a lawyer’s duty to his insured client.

Id. at 269.

⁵⁰ *Id.* at 270.

⁵¹ *Id.* at 268.

⁵² *Id.* at 276.

⁵³ *Id.* at 288 (Robertson, J., dissenting).

duty to act timely to employ someone else to represent [the insured.]”⁵⁴ This duty, Justice Robertson felt, was unequivocal and absolute:

In the overwhelming majority of cases such as this, the insurer and insurance defense counsel will be more aware of the insured’s predicament than the insured himself. They should in law be presumed so. All of this is particularly so in light of the insurer’s contractual authority to control the defense.⁵⁵

Justice Robertson further noted that, if an individual hires and pays for an attorney on his own, they are “entitled to the absolute, unswerving loyalty of that lawyer.”⁵⁶ He stated that an insured is due that same unswerving loyalty from a lawyer provided by his insurer because by paying the insurance carrier, an insured is indirectly paying for the attorney’s legal services and all the fiduciary duties that such services include.⁵⁷ Justice Robertson argued that one of the basic purposes of paying for liability insurance is to “afford[] the insured the same zealous advocate he would have if he hired counsel on his own.”⁵⁸

Prior to *Hartford*, in *Logan*, a third party obtained a judgment against an insured, and subsequently sued the insurer to recover their damages.⁵⁹ Throughout the initial trial, the insurer neither provided its insured with defense counsel nor reimbursed the insured for damages covered under the policy.⁶⁰ The court acknowledged that “the unjustified refusal to defend, as is the case here, is itself a breach of the obligations of contract which renders insurer liable to the insured for all damages

⁵⁴ *Id.* at 289 (Robertson, J., dissenting).

⁵⁵ *Id.* at 289-90 (Robertson, J., dissenting).

⁵⁶ *Id.* at 288 (Robertson, J., dissenting).

⁵⁷ *Id.*

I begin simply. Suppose that Royce Foster, sued by John L. Sims, had hired a lawyer to defend him, and had paid that lawyer with his own funds. Foster would have been entitled to the absolute, unswerving loyalty of that lawyer. Foster is due no less from defense counsel for whose services he has paid indirectly by paying periodic premiums to his liability insurance carrier.

Id.

⁵⁸ *Id.*

⁵⁹ *S. Farm Bureau Cas. Ins. Co. v. Logan*, 119 So. 2d 268, 270 (Miss. 1960).

⁶⁰ *Id.*

resulting as a result of the breach[.]”⁶¹ The court held that “[t]he general rule is well settled that the obligation of a liability insurance company under a policy provision requiring it to defend an action brought against the insured by a third party is to be determined by the allegations of the complaint in such action.”⁶² This instruction was echoed by the *Moeller* court.

In rendering its decision, the *Logan* court equated a refusal to defend with untimely withdrawal, noting that “the fact that the insurer assumes the defense may give rise to a duty to continue with the defense and make the insurer liable for its withdrawal therefrom, though it would not have been liable if it had not assumed the defense in the first instance.”⁶³ The court further noted that “the general rule is that an insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured[.]”⁶⁴ These instructions would eventually give teeth to the decisions in *Twin City* and *Bungee Racers* (discussed *infra*), which expanded the *Moeller* rules.

III. APPLYING AND EXTENDING *MOELLER*

As the commentary and the earliest federal district court cases show, some federal district courts questioned the holding in *Moeller* and seemed initially reticent to follow it in actual practice. Even the Mississippi Supreme Court itself seemed to have doubts about the matter, holding the case on petition for rehearing nearly eighteen months before denying the petition.⁶⁵ Beyond that denial, the court has not provided additional guidance related to an insurer’s *Moeller* duties since their 1996 opinion. However, the initial reluctance to implement *Moeller*’s directives began to wane

⁶¹ *Id.* at 272 (citing 29A AM. JUR. *Insurance* 570-71).

⁶² *Id.* at 271.

⁶³ *Id.* at 272.

⁶⁴ *Id.*

⁶⁵ *Moeller v. Am. Guarantee & Liab. Ins. Co.*, 707 So. 2d 1062 (Miss. 1996). A direct history of the case is available at [https://a.next.westlaw.com/RelatedInformation/I4b43f7560ec211d998cacb08b39c0d39/CaselawAppellateHistory.html?originationContext=documentTab&transitionType=History&contextData=\(sc.History*oc.Search\)&docSource=0d33195cd41e4924b94b0b8a1e9b07c4&rank=7](https://a.next.westlaw.com/RelatedInformation/I4b43f7560ec211d998cacb08b39c0d39/CaselawAppellateHistory.html?originationContext=documentTab&transitionType=History&contextData=(sc.History*oc.Search)&docSource=0d33195cd41e4924b94b0b8a1e9b07c4&rank=7).

after five years, beginning with the Fifth Circuit's decision in *American Guarantee & Liability Insurance Co. v. The 1906 Co.*⁶⁶

There, the Fifth Circuit reversed a decision of the United States District Court for the Southern District of Mississippi, holding that pursuant to *Moeller*, the insureds were entitled to reimbursement for the reasonable costs of obtaining a separate attorney where the insurer defended them under a reservation of rights.⁶⁷ After *The 1906 Co.*, a series of cases before the Fifth Circuit and the Mississippi federal district courts resulted in further examination of the implications of *Moeller*, and in an application and extension of its holding.

A. *The Fifth Circuit*

The Fifth Circuit again followed *Moeller* in *Twin City Fire Insurance Co. v. City of Madison, Miss.*, reversing the District Court for the Southern District of Mississippi.⁶⁸ Specifically, the Fifth Circuit overturned the district court's grant of summary judgment after finding that triable issues existed regarding whether the insurer's reservation of rights letters were sufficient to provide the insured with notice of a possible conflict of interest.⁶⁹

The court, citing *Moeller*, stated that “[w]hen an insurer is defending under a reservation of rights, the carrier ‘should afford the insured ample opportunity to select his own independent counsel to look after his interest.’”⁷⁰ The court observed that the reservation of rights letter at issue “offered no opportunity to the insured to select its own independent counsel. . . . With this evidence [the insured] demonstrates an issue for trial, i.e.,

⁶⁶ 273 F.3d 605 (5th Cir. 2001).

⁶⁷ *Id.* at 621.

We are bound by the Mississippi Supreme Court's decision in *Moeller*. The insureds hired separate counsel because American Guarantee only agreed to defend [them] under a reservation of rights Because we have determined that the claims contained allegations covered under [the policy], *Moeller* mandates that [the insureds] be reimbursed for the reasonable costs of obtaining a separate attorney.

Id.

⁶⁸ *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901 (5th Cir. 2002).

⁶⁹ *Id.* at 909-10.

⁷⁰ *Id.* at 907 (citing *Moeller*, 707 So. 2d at 1070).

whether the notice to the insured of the conflict of interests was adequate, clear, and timely.”⁷¹ The court further noted that “[t]he foregoing might also support an inference that [the insurer] effectively withdrew the defense or breached the duty to defend.”⁷²

In *Twin City*, the Fifth Circuit reasoned that, under Mississippi law, a breach of the duty to defend could result in coverage ramifications. The court noted that, when the allegations against the insurer “concerns the duty to defend, the insurer may be liable despite an exclusion otherwise applicable. Upon withdrawal from the defense of an action, for example, an insurer may be estopped from denying liability under a policy, if its conduct results in prejudice to the insured.”⁷³ The *Twin City* opinion further stated that:

Even if the insurer would not have been liable had it not assumed the defense in the first instance, it may become liable for withdrawing, because the assumption of the defense may give rise to a duty to continue with the defense. . . . Additionally, a breach of the duty to defend renders the insurer liable to the insured for all damages, including in a proper case the amount of the judgment rendered against the insured.⁷⁴

The court also noted that the insurer’s conduct “could give rise to application of equitable estoppel, preventing the insurer from denying liability under the policy, if [the insured] can show that the conduct resulted in prejudice to the insured.”⁷⁵ In sum, the court found that the failure to issue a reservation of rights letter that adequately informs the insured of its *Moeller* rights could prevent the insurer from denying liability under the policy. This decision caught the attention of practitioners and commentators.⁷⁶ The years since the *Twin City* decision have seen

⁷¹ *Id.*

⁷² *Id.* at 907-08.

⁷³ *Id.* at 906 (citing *S. Farm Bureau Cas. Ins. Co. v. Logan*, 119 So. 2d 268, 272 (Miss. 1960)).

⁷⁴ *Id.* (internal citations omitted).

⁷⁵ *Id.* at 908 (citing *S. Farm Bureau*, 119 So. 2d at 272).

⁷⁶ See, e.g., Edward “Ned” Currie, Jr., John G. Farnan & Laura “Megan” Faust, *Splitting Files: Implications on Handling Liability and Coverage Claims* (2011), available at <http://www.thefederation.org/documents/11.Splitting%20Files-Currie.pdf>. This paper was prepared for the Federation of Defense and Corporate Counsel Annual

Mississippi's federal district courts take the Fifth Circuit's ruling and apply it to several situations that are instructive for insurers and attorneys dealing with *Moeller* issues.

B. The Southern District

Since the two Fifth Circuit decisions of *The 1906 Co.* and *Twin City*, Mississippi's Southern District has shown its adherence to *Moeller*. In 2007, in *Lexington Insurance Co. v. Hattiesburg Medical Park Management Corp.*, the insurer sent the insured a letter indicating that it would provide a defense for the insured unless told otherwise.⁷⁷ It thereafter sent a second letter to the insured declaring that it would be providing a defense while still reserving its right to deny coverage later.⁷⁸ The Southern District held that pursuant to *Moeller*, a conflict of interest arose when the first letter was sent.⁷⁹ Accordingly, at that time, the insurer had a duty to allow the insured to retain its own independent counsel.⁸⁰

In 2011, in *PIC Group, Inc. v. LandCoast Insulation, Inc.*, the Southern District rejected the argument that fees attributable to *Moeller* counsel were not reasonable after noting that "*Moeller* has been the law in Mississippi for almost fifteen years."⁸¹ The court further stated that "[i]t is reasonable for a party being defended by an insurance company under a reservation of rights to retain *Moeller* counsel."⁸²

Meeting held in Williamsburg, Virginia, on July 24-31. Stephen E. Whitehead & Jennifer W. Wall, *The Insurance Tripartite Relationship: "Who Is My Client Anyway?"*, LLOYD GRAY WHITEHEAD MONROE (Sept. 21, 2010), <http://www.lgwmlaw.com/the-insurance-tripartite-relationship--who-is-my-client-anyway.php>; *Financial Gain Exclusion Bars Coverage for E&O Claim; Insurer May Be Estopped from Asserting Exclusion*, WILEY REIN LLP (Nov./Dec. 2002), <http://www.wileyrein.com/publications.cfm?sp=articles&id=2929>.

⁷⁷ *Lexington Ins. Co. v. Hattiesburg Med. Park Mgmt. Corp.*, No. 2:07CV26KS-MTP, 2007 WL 2011288, at *8-9 (S.D. Miss. July 6, 2007).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *PIC Grp., Inc. v. LandCoast Insulation, Inc.*, 795 F. Supp. 2d 459, 464 (S.D. Miss. 2011).

⁸² *Id.* The court further stated: "Indeed, the Mississippi Supreme Court noted that a law firm chosen and hired by an insurer to defend claims against an insured under a reservation of rights 'offers no defense at all.'" *Id.* (citing *Moeller v. Am. Guarantee & Liab. Ins. Co.*, 707 So. 2d 1062, 1071 (Miss. 1996)). Furthermore, the court recognized

In *Maryland Casualty Co. v. Nestle*, the District Court for the Southern District of Mississippi denied the insurer's motion for summary judgment after finding that a question of fact existed as to whether the insurer was estopped from denying coverage.⁸³ The court noted that the insured was not informed of the potential conflict of interest related to the insurer's attorney representing it, nor was it informed of the right to choose independent counsel pursuant to *Moeller*.⁸⁴ The court further noted that an adverse state court judgment could potentially form the basis for prejudice required by a claim of equitable estoppel.⁸⁵

C. The Northern District

Much like the Southern District, the District Court for the Northern District of Mississippi has followed *Moeller* and *Twin City* in a number of cases.⁸⁶

The Northern District has noted that the court's holding in *Twin City* is limited, and that the insured's knowledge of its *Moeller* rights is germane to a determination of the scope of an insurer's duties. In *Tedford I*, the Northern District held that the insured's knowledge of its *Moeller* rights was relevant and therefore its communications with counsel were discoverable.⁸⁷ The court noted that "[a]lthough the *Twin City* case found that coverage can exist even in circumstances where a policy would otherwise deny it, the exception is extremely limited."⁸⁸ It further found that "[k]nowledge or lack of knowledge is necessary to prove the reasonableness of [the insured's] reliance on [the insurer's] representations."⁸⁹

that if the options for the insured are either "no defense at all" or retaining their own counsel, fees incurred by the insured in retaining that counsel will be reasonable. *Id.*

⁸³ Md. Cas. Co. v. Nestle, No. 1:09cv644-LG-RHW, 2010 WL 3735756, at *1 (S.D. Miss. Sept. 17, 2010).

⁸⁴ *Id.* at *6.

⁸⁵ *Id.* at *7.

⁸⁶ See Liberty Mut. Ins. Co. v. Tedford, 658 F. Supp. 2d 786, 794, 797 (N.D. Miss. 2009) [hereinafter *Tedford II*]; Liberty Mut. Ins. Co. v. Tedford, 644 F. Supp. 2d 753, 757, 762 (N.D. Miss. 2009) [hereinafter *Tedford I*]; Scottsdale Ins. Co. v. Bungee Racers, Inc., No. 4:04CV376-P-B, 2006 WL 2375367, at *8 (N.D. Miss. Aug. 14, 2006).

⁸⁷ *Tedford I*, 644 F. Supp. 2d at 763, 768-69.

⁸⁸ *Id.* at 762-63 (citing *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901, 906 (5th Cir. 2002)).

⁸⁹ *Id.* at 763.

Similarly, in *Tedford II*, the Northern District denied the insurer's motion for summary judgment on the insured's equitable estoppel claim after finding that a genuine issue of fact existed as to whether the insurer should be equitably estopped from denying coverage.⁹⁰ In doing so, the court found that pursuant to *Twin City*, the insured was not made aware of specific conflicts of interest that existed between it and its insurer.⁹¹

In another important case, *Scottsdale Insurance Co. v. Bungee Racers, Inc.*, the District Court for the Northern District of Mississippi granted the insured's motion for summary judgment and held that the insurer was estopped pursuant to *Moeller* and *Twin City* from denying its duty to defend and indemnify.⁹² The insurer had issued a reservation of rights letter to the insured and hired counsel to defend the insured in response to a lawsuit filed against the insured by Adventureland in Alabama.⁹³ The insured asserted its right to independent counsel, but the insurer refused for two months before finally paying for the insured's independent counsel.⁹⁴ The Alabama suit was voluntarily dismissed and the insured filed suit against Adventureland in Mississippi.⁹⁵ Adventureland counterclaimed with the exact allegations of the original Alabama suit.⁹⁶ The insurer denied coverage and filed a declaratory judgment action against the insured.⁹⁷

The District Court for the Northern District of Mississippi granted the insured's motion for summary judgment and held that the insurer was estopped pursuant to *Moeller* and *Twin City* from denying its duty to defend and indemnify.⁹⁸ Specifically, the court held:

[E]ven if there were no coverage under the policy, [the insurer] would owe [the insured] the duty to defend given

⁹⁰ *Tedford II*, 658 F. Supp. 2d at 798.

⁹¹ *Id.* at 796-97. Namely, the conflict the court determined to exist was that the insurer had contacted another lawyer regarding its coverage position. *Id.* at 797.

⁹² *Scottsdale Ins. Co. v. Bungee Racers, Inc.*, No. 4:04CV376-P-B, 2006 WL 2375367, at *9 (N.D. Miss. Aug. 14, 2006).

⁹³ *Id.* at *1.

⁹⁴ *Id.*

⁹⁵ *Id.* at *2.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at *8-9.

they had started to do so both in the Alabama and Mississippi cases, while doing so created and possibly profited from a conflict of interest given their refusal to provide independent *Moeller* counsel, and then withdrew that defense while the Mississippi case was and is still pending.⁹⁹

In sum, the Northern District determined that—regardless of the extent of coverage under the policy—the insurer was estopped from refusing to provide its insured a defense where it had started to do so in a separate but related action.¹⁰⁰

IV. PRACTICAL CONSIDERATIONS FOR MISSISSIPPI PRACTITIONERS

In light of the above case law, attorneys must thoroughly investigate the scope of their ethical obligations and study the directives imposed by *Moeller* to ensure they both comply with all applicable professional mandates and provide the best possible representation for clients being defended under reservation of rights. Because failing to comply with *Moeller* could prejudice the insured and subsequently prevent the insurer from denying coverage under the policy,¹⁰¹ Mississippi practitioners should be cognizant of the following issues when a potential insurer-insured conflict arises.

Pursuant to *Moeller*, Mississippi law recognizes three circumstances that create a conflict of interest which may prevent an attorney from jointly defending the insurer and insured: (1) where the insurer is defending under a reservation of rights or where there are likely coverage defenses; (2) where the amount sued for is in excess of the policy limits; and (3) where it is possible that a portion of the claim may be covered, and another not, or that the policy covers one theory of liability, but not another one. Additionally, *Moeller* makes it clear that the insured should be allowed to select its own counsel to defend the suit where the insurer is defending under a reservation of rights. Given the wording of the *Moeller* opinion—as well as the holdings

⁹⁹ *Id.* at *8.

¹⁰⁰ *Id.*

¹⁰¹ *See supra* notes 30-33 and accompanying text.

from the federal district courts—there does not seem to be any room for debate on this issue.

Practitioners should be aware of the principles of *Moeller* if there is any possibility that Mississippi law will apply to a dispute regarding the relevant policy. Mississippi law may apply even if the dispute arose in or was related to activity in another jurisdiction.¹⁰² If Mississippi law governs a *Moeller* situation, practitioners representing the insurer need to make certain that the reservation of rights letter is “adequate, clear, and timely.”¹⁰³ The reservation of rights letter must inform the insured of its right to select its own independent counsel. While there is some suggestion in the cases that the knowledge of the insured regarding its *Moeller* rights may mitigate the sanctions a court may impose for getting the reservation of right letter wrong, the better course is to inform the insured as if it had no such knowledge.

A practical reading of *Moeller* and its progeny teaches that where the allegations of the complaint are clearly outside the policy, an insurer should consider simply denying coverage rather than issuing the reservation of rights letter that will give rise to the rights discussed in this Article. In these situations, and where coverage is doubtful but a reservation of rights is determined to be the more prudent course, the practitioner may recommend that the insurer file a declaratory judgment action requesting that the court determine whether it has an obligation to defend or indemnify the insured.¹⁰⁴

¹⁰² In *Hartford Underwriters Insurance Co. v. Foundation Health Services, Inc.*, the Fifth Circuit affirmed the decision of the District Court for the Northern District of Mississippi, which found that Mississippi law applied to the dispute and that the insured was entitled to attorney’s fees. 524 F.3d 588, 598-99 (5th Cir. 2008). In making its determination that Mississippi law applied, rather than Louisiana, the court noted that Louisiana law does not have an equivalent to *Moeller* and that the “relevant policies of the forum state” weighed in favor of the application of Mississippi law. *Id.* at 598.

¹⁰³ *Twin City Fire Ins. Co. v. City of Madison, Miss.*, 309 F.3d 901, 907 (5th Cir. 2002).

¹⁰⁴ For example, in *Security National Insurance Co. v. Broadhead Building Supplies, Inc.*, the insurer brought a declaratory judgment action, and the District Court for the Southern District of Mississippi granted the insurer’s motion for summary judgment, holding that the insurer was not obligated to defend or indemnify the insured. No. 2:05CV2104KS-MTP, 2006 WL 2990493, at *4 (S.D. Miss. Oct. 19, 2006). The court noted that the insurer had denied coverage, but agreed to provide a

CONCLUSION

Although *Moeller* was initially met with hesitance and was described as problematic and unclear, the court opinions enforcing and expanding *Moeller* show its importance to Mississippi insurance law and that it should not be disregarded. An insurer's failure to properly satisfy its duty to defend could potentially result in negative ramifications, including a determination that the insurer is estopped from denying coverage even where the policy would not otherwise provide such coverage.

As *Moeller* and these subsequent decisions show, successfully balancing the duty to defend with the right to later deny coverage is not always a straightforward task. In order to navigate the difficulties *Moeller* imposes on insurers and counsel, practitioners need to consider a variety of issues and determine whether a conflict of interest may exist. As the court in *LandCoast Insulation*¹⁰⁵ recently noted, *Moeller* is the law in Mississippi. Only by knowing, understanding, and following the rules laid out therein can a practitioner provide effective and ethical representation in this context.

defense under a reservation of rights. *Id.* at *2. The court held that “[t]he allegations in the State Court Complaint are simply not covered by the plain, unambiguous language of the Policy and therefore [the insurer] has no duty to defend or indemnify [the insureds] in the State Court Action.” *Id.* at *4. Similarly, in *Walton v. First American Title Insurance Co.*, the Indiana Court of Appeals instructed that

[t]he law in this jurisdiction is well settled that where an insurer's independent investigation of the facts underlying a complaint against its insured reveals a claim patently outside of the risks covered by the policy, the insurer may properly refuse to defend. However, an insurer refusing to defend must protect its interest by either filing a declaratory judgment action for a judicial determination of its obligations under the policy or hire independent counsel and defend its insured under a reservation of rights.

844 N.E.2d 143, 146 (Ind. Ct. App. 2006) (internal citations omitted). *See also* *Lexington Ins. Co. v. Hattiesburg Med. Park Mgmt. Corp.*, No. 2:07CV26KS-MTP, 2007 WL 2011288, at *5 (S.D. Miss. July 6, 2007) (finding that the allegations of the lawsuit were arguably within the coverage of the Policy and therefore, the insurer had a duty to defend the insureds).

¹⁰⁵ *PIC Grp., Inc. v. LandCoast Insulation, Inc.*, 795 F. Supp. 2d 459, 464 (S.D. Miss. 2011).

