

# Calif. High Court Arms Insurers In Fights Over Counsel

By **Bibeka Shrestha**

Law360, New York (December 03, 2013, 8:26 PM ET) -- The California Supreme Court last week rejected MBL Inc.'s challenge to a ruling that freed its insurers from paying for independent counsel to defend the chemical supplier against contamination claims, gifting insurers with several valuable holdings they will try to carry over to disputes outside of the environmental realm.

Despite a flurry of requests from policyholders to depublish or review the Sixth Appellate District's **opinion**, the state high court on Nov. 26 left alone a holding that MBL was not entitled to independent counsel because the defense counsel appointed by MBL's insurers did not have any conflicts of interest.

Barry Weissman, a partner at [Edwards Wildman Palmer LLP](#), said the decision will aid insurers in future cases over whether policyholders are entitled to independent counsel.

"It's an extremely well-written decision on Cumis counsel," Weissman said. "It will be helpful in every sphere, not just the environmental sphere."

Conflicts of interest can arise when insurers provide a defense to policyholders for the time being but reserve their right to file a lawsuit later over whether they actually owe coverage.

Policyholders sometimes demand independent counsel because of fears that the appointed defense counsel — who are paid by the insurers — might guide the underlying case in a way that helps the insurers avoid coverage.

Siding against MBL, California's intermediate appeals court found that policyholders cannot argue there is a conflict of interest by pointing to specific exclusions or other policy provisions when insurers did not raise those provisions while reserving their rights to challenge coverage down the road.

Even when insurers have pointed to specific policy language while reserving their rights, there can be no conflict of interest based on factual issues that defense counsel cannot control, the appeals court said.

For example, when one of MBL's insurers reserved its right to deny coverage under an absolute pollution exclusion for losses arising out of a government demand to monitor and clean up pollution, no conflict of interest arose because the appointed defense counsel could not control the outcome of that inquiry, the appeals court said.

It also held that the appointed defense counsel could not control the timing of underlying losses — an issue that could crop up in a coverage dispute because MBL's insurers might argue that the underlying damage did not occur within their particular policy period.

Arthur Schwartz, a [Gordon & Rees LLP](#) partner who represented an insurer that was formerly involved in the MBL dispute, said the decision provides guidance on the

independent counsel issue within the pollution context for the first time.

"The takeaway from all of this is that ... you really have to look at whether a particular issue in the case is within the control of defense counsel," Schwartz said.

Questions over the timing of losses comes up frequently in a wide variety of coverage cases, and the MBL decision will have effects that reach beyond the environmental context, according to Schwartz.

The court's holding — that when insurers represent multiple potentially responsible parties at pollution sites, it doesn't necessarily create a conflict of interest — could also be helpful to insurers in cases going forward, according to Paul Killion, a Duane Morris LLP attorney who represented an insurer in the case.

"When you have 25-30 [potentially responsible parties], it's not unusual for one insurance company to end up having insured multiple parties," Killion said.

But according to Raymond Hamrick, a Hamrick & Evans LLP attorney who represented MBL, the appeals court ruling was not consistent with attorney conduct rules.

"The Rules of Professional Conduct require that if there's a potential conflict, counsel can't accept the engagement," Hamrick said. "This decision says that even if it's a potential conflict, it has to be a substantial conflict before the carrier cannot appoint ... their own counsel."

Hamrick said recent appeals court decisions on the right to independent counsel have muddled the landscape and the Legislature may want to get involved to put forward more definitive rules.

"There [were] a lot of requests to depublish or to have the Supreme Court take it up," Hamrick said. "At a minimum, they probably should've taken a serious look at depublishing the decision."

MBL is represented by Raymond Hamrick III of Hamrick & Evans LLP.

The insurers are represented by Dominica Anderson, Paul Killion and Michael Dickman of Duane Morris LLP; Bryan Barber of Barber Law Group; and Elizabeth Brockman of Chamberlin Keaster & Brockman LLP.

The case is Federal Insurance Co. et al. v. MBL Inc., case number S213595, in the Supreme Court of California.

--Editing by Jeremy Barker and Edrienne Su.

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