



**Lowenstein Sandler's Insurance Recovery Podcast:  
Don't Take No For An Answer**

**Episode 64**

**The Difference between the Duty to Defend and the Duty to Reimburse: What Policyholders Need to Know**

By [Lynda Bennett](#), [Eric Jesse](#)

**MAY 2023**

---

**Kevin Iredell:** Welcome to the Lowenstein Sandler podcast series. I'm Kevin Iredell, Chief Marketing Officer at Lowenstein Sandler. Before we begin, please take a moment to subscribe to our podcast series at [lowenstein.com/podcasts](https://lowenstein.com/podcasts). Or find us on iTunes, Spotify, Pandora, Google podcast, and SoundCloud. Now let's take a listen.

**Lynda Bennett:** Thank you for joining us on, Don't Take No for an Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery Practice here at Lowenstein Sandler, and I'm joined by my co-host and partner, Eric Jesse. Thanks for coming back, Eric.

**Eric Jesse:** Anytime. Happy to be here.

**Lynda Bennett:** All right. Today we're going to be discussing defense coverage, which is available in liability insurance policies. And frankly, this coverage is really a fundamental reason why policy holders buy liability insurance policies. It's designed to provide the policy holder with defense coverage immediately after a lawsuit gets filed against them by a third party. And when you read these liability policies, sure enough, there it is in black and white that the insurers either have a duty to defend explicitly stated in the policy, or sometimes it will say the insurer has a duty to reimburse the payment of defense costs.

And that's really what we're going to be discussing today. Is there an actual difference between a duty to defend versus a duty to reimburse? How do courts look at that and what do our listeners need to know before they buy the policy as to whether it benefits them to have a "duty to defend" or duty to reimburse policy? So Eric, let's get started with some of the basics. What do we mean when we talk about the duty to defend versus the duty to reimburse, or sometimes it'll be referred to as the duty to advance defense costs? Let's set the table.

**Eric Jesse:** This is one of the common themes here on "Don't Take No For An Answer," because the words matter. If it is a duty to defend policy, those words will appear in the policy. It's almost always going to be found in a commercial

general liability policy, duty to defend, but it can be in other policies as well, D&O policies, E&O policies, cyber policies. They can be duty to defend policies. There is meaning behind those three words, and that means that the insurer needs to provide a defense if any of the claims or allegations are potentially covered, even if those allegations might be groundless or false. And that's because the duty to defend is going to be broader than the duty to indemnify in terms of settlements or damages.

**Lynda Bennett:** Yes. Just hold on there, because this is a really important concept that our listeners need to understand. You said it. The claim doesn't have to actually be covered, it has to be potentially covered and just one count of a 12-count complaint has to be potentially covered. And then in most jurisdictions, the insurer has the duty to defend the entire action. I really wanted to drive that point home because not all of our clients understand that.

**Eric Jesse:** Yeah. That is why this coverage is so fundamental and if it's a duty to defend, it's more than just paying defense costs. That is basic to all the different defense obligations we're going to discuss today. But when there's a duty to defend, it often gives the insurance company the right to control the defense of the claim. It typically means that the insurer can appoint counsel, they can direct the strategy of the defense and potentially control settlement opportunities. Insurers like this, or the reason they might like it is because it allows them to play an active role in protecting their financial obligations and interest.

**Lynda Bennett:** Right. One of the things that we want our clients to do to the greatest extent possible is make an intentional choice as to whether they want a duty to defend or a duty to reimburse policy. Because while it is beneficial when an insurance company steps up and immediately appoints a lawyer and then starts handling the nuts and bolts of the case, all of our clients like that because they think, "Okay, the insurance company's handling this, I don't need to worry about it," but we'll come to that later. But point being want to make sure that when you have a duty to defend policy, you understand why and that you've made that choice intentionally. You are ceding a certain level of control to the carrier when you agree to a duty to defend policy. There, as you said, Eric, they're picking the lawyers, they're largely controlling the strategy of the defense.

And if it's a fully covered claim, that's great, but as we'll learn later, that's not always the case. Duty to defend policy may not be ideal. And we should note, as we always do, this is another bedrock principle on Don't Take No for an Answer. And that is that choice of law always matters. We're talking in generalities right now, but of course the law of the land is different and slightly different in states. You're going to have to take a careful look at that when you've got a claim presented. Eric, let's move on to talk about what is the difference between that duty to reimburse or duty to advance defense costs? Is there a difference?

**Eric Jesse:** Yeah. Between those two, the duty to reimburse defense costs will require the carriers to pay the defense costs as they are submitted to the insurance company. It's like an indemnification obligation that insurers have. In terms of the duty to advance defense costs, they will, for all intents and purposes, be

fronting any defense costs, but they often try and reserve the right to recoup defense costs later on if it turns out that the claim is not covered. And again, to your point about choice of law, that's where this is critically important because in many states, the insurance company has to specifically reserve those recruitment rights. They can't just claim it without having a policy language to point to.

**Lynda Bennett:** When an insurer has put in the contract the duty to reimburse or the duty to advance defense costs, what rights does the carrier actually have?

**Eric Jesse:** Yeah, so this is where I hate to give the lawyerly answer, but it's going to depend. At a minimum, they're going to be obligated to pay defense costs, but because they don't have that duty to defend language and the case law that stands behind it, they don't necessarily have the control rights or the right to appoint counsel. The rights that the insurance company will have need to be spelled out elsewhere in the policy. If it's spelled out in the policy, it can include the right to consent to defense counsel. You can have a duty to reimburse or duty to advance with a requirement to use panel counsel. There is also just I think, a common requirement that defense costs be "reasonable and necessary," so that an insurers try to use that as a hook to dispute line items in defense counsel's bill. Those additional rights that the insurers want, they need to be spelled out. And those are some of them.

**Lynda Bennett:** And again, those can be negotiated. We've talked on past episodes as to the extent and whether you're going to be bound by litigation guidelines, whether you're going to be bound by the panel. Sometimes our clients will specifically negotiate to include a pre-approved law firms that they're comfortable using. Sometimes they'll even negotiate agreed upon hourly rates. And we've dealt with that in prior podcast episodes. I'll just headline that to say, be careful in thinking about putting in pre-approved rates because sometimes they get carried forward and they're not always competitive rates, or depending on the particular claim that gets presented, you may need a different type of counsel if it's a super complex claim, and they will likely charge a lot more than what's in the endorsement on the approved rates. But why is it, Eric, that many policy holders think that the duty to defend, the duty to reimburse, the duty to advance defense laws are all mashed up and they're all the same thing? Where are the myths and misunderstandings there?

**Eric Jesse:** Well, I think that there is a key similarity among all these defense that we always advocate for and try and advance as policy holder zealots. And that is that these liability policies do more than just insure against liability. They are, as courts have said, litigation insurance. For these policies to really bring true value, when an insurer is first sued, the one thing they all need is a defense, and they need an immediate defense. That is something we are, whether it's the duty to defend or the duty to reimburse or the duty to advance, insurance companies need to be paying defense costs from day one if their policy is triggered.

**Lynda Bennett:** You've hit on one of the things that irritates me when we're dealing with claim disputes and we do so often, which is the insurers, they contract to provide a duty to defend, and they understand the breadth of that, the case law pretty uniform across the country, that if, as we mentioned earlier, if there's a

potential for coverage, the carrier has to immediately step up and defend the whole thing. When we get into these policies that have the duty to advance or the duty to reimburse, all of the sudden, the carriers try to start telling us that this is a totally special and different type of policy, and they're not going to do what you just said, which is immediately jump in there and start paying the defense cost seamlessly. Are the carriers right?

**Eric Jesse:** I don't think so. In many jurisdictions, the trigger is the same. It is in order to trigger a defense obligation, whether it's the duty to defend or duty to advance or reimburse, you need two things. You need the complaint against the insured and a copy of the policy. If there's the potential for coverage, it should be triggered. Coverage to the defense obligation should be triggered, and you don't have to take my word for it. Take this New York Court for example, that said, "The duty to provide defense costs must be construed broadly in favor of the policy holder and exists whenever a complaint against the insured alleges claims that may be covered under the insurer's policy." And that's how you bring real value to the defense obligation when an insurer can access defense costs immediately rather than have to defend a lawsuit for years and incur millions of dollars of defense cost out of pocket, the value comes from having this insurance on day one.

**Lynda Bennett:** Here's what I'm going to tell our listeners. If you've got a claim and you think that the carrier should be in there day one defending it, and they try to start going down this road of, "Well, this is special, it's different," essentially you have to prove full coverage for the claim before we'll pay your defense costs, Paul, Lynda, or Eric will help you figure it out. Now we've moved past these issues and the insurer has finally acknowledged that it's going to pay defense costs. Am I correct, I say tongue in cheek, Eric, in assuming that they'll just pay a hundred percent of my costs?

**Eric Jesse:** We wish, but no. I mean, look, the reality is that there are other issues that are going to come up after the insurer acknowledges their defense obligations. There may be rate issues that we've talked about. There may be selection of counsel issues, there might be nickel and diming of the tasks that are performed. And another area where insurers try to go is they don't think they should pay one cent more than they have to. They'll try and allocate defense costs and say: "Alright, policy holder, you're responsible for X percent of these costs as well."

**Lynda Bennett:** Right. I've seen that movie before. We get the lawsuit that has 10 legal causes of action. They think only one is potentially covered. They graciously agree to pay 10% of your defense costs. And oh, by the way, if you've got a self-insured retention of \$500,000, they're also going to recognize exhaustion of that at a 10% rate. In other words, you won't see a dime of coverage for many, many years. What is a policy holder to do in that circumstance, Eric? How does that work?

**Eric Jesse:** Yeah, so I mean, part of this is trying to be proactive before the claim even comes in. One thing you can do, and we'll talk about this, is if you want to try and get a hundred percent of defense costs coverage, then maybe you want a "duty to defend" policy, especially if you're an estate that recognizes that an

insurer has to cover a hundred percent of defense costs if even one count is covered. That's one thing to consider.

**Lynda Bennett:** Great point.

**Eric Jesse:** Yeah. The other thing is if you can negotiate for endorsements, one thing we always try and get added to D&O policy, cyber policy, E&O policy, is a requirement that says if there are uncovered aspects of the claim, the insurance company still has to pay a hundred percent of defense costs. And then there are other things that you mentioned earlier, you might want to endorse onto your policy, your preferred counsel that you can use. You might want to endorse on your policy, the hourly rates that the insurer is going to be paid, but obviously just exercise caution to make sure that those rates are appropriate. Maybe silence is better, but those are things that companies can do on the front end to minimize any potential allocation.

**Lynda Bennett:** All right, Eric, you've given us a lot to think about and there's still a little bit more that we have to peel back. Why don't we wrap it up for today and then we'll come back in a future episode and take a little bit of a further dive into the difference between the duty to defend versus the duty to reimburse versus the duty to advance defense coverage? But thanks today for the insights. Appreciate that.

**Eric Jesse:** Sounds good. Talk to you again soon.

**Kevin Iredell:** Thank you for listening to today's episode. Please subscribe to our podcast series at [lowenstein.com/podcast](https://lowenstein.com/podcast) or find us on iTunes, Spotify, Pandora, Google Podcasts and SoundCloud. Lowenstein Sandler Podcast series is presented by Lowenstein Sandler and cannot be copied or rebroadcast without consent. The information provided is intended for a general audience and is not legal advice or a substitute for the advice of counsel. Prior results do not guarantee a similar outcome. Content reflects the personal views and opinions of the participants. No attorney-client relationship is being created by this podcast and all rights are reserved.