



Lowenstein Sandler's In the Know Series Video 27 – Challenging Unwarranted Insurer Reservations of “Rights”

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Hi, I'm Eric Jesse, partner in Lowenstein Sandler's [Insurance Recovery Group](#). Welcome to “[In the Know](#).”

Today we're going to discuss three rights that insurers frequently reserve without any basis for doing so. Insurers acknowledging a defense obligation often do so alongside a reservation of rights letter that identifies coverage defenses that may or may not impact their obligation to ultimately indemnify the insured.

Although the insurer's offer of a defense may seem like good news, that does not warrant a response. Policyholders should carefully examine the insurer's reservations to determine whether they are grounded in the language of the policy. Insurers frequently try to minimize their coverage obligation through the reservation of rights that they have no valid basis to invoke.

Here are a few examples:

First, insurers commonly reserve the right to recoup defense costs if it's later determined that the claim is excluded from coverage. While some policies contain language to that effect, many forms are silent on the recoupment of uncovered defense costs. The majority approach to this issue is that the insurer may not create rights that are not part of the policy, through a unilateral reservation of rights letter.

Further, in the minority of states that permit recoupment of defense costs for non-covered claims, the insurer may not recoup overlapping costs that benefit both covered and non-covered claims. Policyholders should not leave a reservation of the right to recoupment unanswered.

Second, insurers issuing policies with a duty to advance or reimburse defense costs often claim that they have no obligation to pay more than they would pay panel counsel to defend the same claim. Policies do not usually contain language limiting the insurer's defense obligation to a specified hourly rate. Rather, the policies require the insurer to pay all reasonable attorney's fees and expenses incurred in defending a potentially covered claim.

Policyholders are entitled to reimbursement of attorney's fees that are within the hourly rates commonly charged by counsel in a given geographic and practice area.

Third, insurers may seek to allocate defense costs among covered and non-covered claims. Again, while some policies contain language requiring the allocation of defense costs in accordance with relative legal liability or exposure, we often see insurers demanding an allocation even where the policy has no such language. The law ordinarily requires insurers to defend the entire claim, and rejects insurers' attempts to allocate, in the absence of an agreement to do so.

Thank you for joining us, and we look forward to seeing you next time on "[In the Know](#)."