

# ANDERSON KILL POLICYHOLDER ADVISOR

The Policyholder Law Firm



## Signs Your Insurance Company is Leaving You TWISTING IN THE WIND (And How You Can Protect Against It)

By David A. Shaneyfelt and Ted Mechtenberg

There is no coverage for this claim under your policy.” These words can fill a policyholder with dread. Could you have seen these words coming? Could you have *prevented* their coming? Possibly. Here are some signs to look for — and some counter-strategies to ward off a coverage denial.

### Huge Potential Liability

Brace yourself if you are facing a large claim. The larger the claim, the more incentive the insurance company has to avoid paying it.

**Counter-Strategy:** Be on guard at the outset — don’t assume that every request for information is intended to help you. Communicate with the insurance company only through counsel. Your communications will be privileged and you can treat requests for information with the same degree of business interests your insurance company will be treating its communications with you.

### The Delayed Response

You notify your insurance company of a claim. No response. You have litigation deadlines due. Did the insurance company receive

your notice? Are its personnel disorganized? Are they planning a negative response? All three are open questions.

**Counter-Strategy:** Confirm your notice was received. Call and talk to a live person. Get a name and contact information. Send your notice again and again, if necessary, keeping track of your submissions, and include reminders about looming deadlines. Do not let a litigation deadline lapse. Get counsel involved to manage the initial litigation response. Advise the insurance company of your intentions. Tell them that if you do not hear from them by a certain date, you will assume they agree with your plan. Then execute your plan. If you fear a negative response is forthcoming, anticipate it by stating your position in advance, or explain why further investigation is necessary to confirm coverage. If the company refuses you this opportunity, this could be powerful evidence in a bad faith action later.

### The Pointed Investigation

When the claims handlers say, “Please provide us with all facts when you first learned of the events giving rise to this claim,” assume

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they are looking to disclaim coverage on grounds the claim preceded the policy period or that your application for insurance was deficient. "Please provide us with information regarding similar claims made against you" signals that they are looking to disclaim coverage on grounds the claim is interrelated to other excluded claims. "Please tell us what actions you have taken to settle this matter before the claim was filed" suggests they are looking to disclaim coverage on grounds you compromised your defense of the case.

**Counter-Strategy:** Answer the questions honestly, but carefully. Realize that such questions are designed to build a case against coverage. Answer questions to build a case *for* coverage.

### The Detailed Reservation of Rights Letter

Your insurance company cannot accept your defense and abandon you later without having given you fair notice of that possibility. They therefore typically send a letter at the outset saying they will accept your defense now, but are reserving the right to not pay for it, or for certain damages, later. This "reservation of rights" letter can be highly detailed and will be used to justify their exit strategy later.

**Counter-Strategy:** Pay close attention to this letter. Read your policy and your claim; know exactly what claims and damages they believe are covered or not covered. If you think the non-covered claims have merit, be concerned, because your insurance company will be sure to magnify the strength of those claims later — when they remind you they will not be paying for them. You will want to magnify the strength of the covered claims instead. Have counsel determine whether your insurance-appointed counsel has the ability to marshal proof of the case away from covered claims and toward non-covered claims. If so, most states give you a right to independent counsel.

### Defense Counsel Says: "I Don't Do Coverage Work"

If you ask insurance-appointed counsel about your coverage rights, and they say they don't have anything to do with coverage — watch out. They most emphatically *do* have everything to do with coverage, whether they

admit it or not. Depending on how they do their job, you can find yourself without coverage as the case develops.

**Counter-Strategy:** Ask your counsel about your coverage rights. Sometimes you will get a fair, albeit guarded, response. More often, you will get deflection. If so, retain independent counsel immediately and determine how vulnerable you are to loss of coverage. Again, depending on how vulnerable you are, most states give you the right to demand that your insurance company pay for your independent counsel, who will defend you against the claim and help protect against the loss of coverage rights.

### The Warning In Advance Of Mediation

Your insurance company has been defending your claim. Your defense counsel arranges for mediation and says you need to attend. Your insurance company then reminds you of the reservation of rights letter and adds that because this claim seeks damages not covered by this policy, you will need to fund any settlement reached at mediation.

**Counter-Strategy:** This is a declaration of war. Get coverage counsel immediately. Call the mediator and explain the new complexity. Be sure the mediator has a background in insurance coverage; if not, demand one that does. Present a strong case for coverage back to the insurance company. Consider using the mediator to work with the plaintiff on the claim. Can the claim be amended to confirm coverage? Is personal bankruptcy an option to threaten the plaintiff (or the insurance company)? Would the plaintiff rather take your coverage rights and agree to collect only against your insurance company? In the end, you may have to cut the best deal you can, in a three-way negotiation between you, the plaintiff and the insurance company. If you cannot, consider your options for litigating your coverage rights against the insurance company.

### Conclusion

While you cannot control what your insurance company will actually do, you can look for signs of what they *might* do. Knowing those signs will help you protect against the potential loss of important rights and interests.▲