

10 Tips for When You Receive a Reservation of Rights Letter

by David A. Shaneyfelt

Your company has just been sued. You tender the suit to your insurance company. You then get a letter in return, agreeing to defend you against the suit, but concluding with this language (in various formulations):

“Nothing herein, nor any action taken by us, including but not limited to, investigation, defense, settlement, or adjustment, shall be construed as a waiver of any right to deny coverage, and is subject to a full reservation of rights.”

What are you supposed to make of that? Brace yourself. You may be facing a denial of coverage. What can you do in response? Here are ten quick tips to keep in mind:

1. Offer immediate disagreement. Write back to say you disagree and indicate you will follow up later. Avoid saying nothing, as your silence could be used against you, especially if you find this language buried in the letter: “Unless we hear otherwise, we assume you agree with our approach.”

2. Consult your own counsel immediately. If the claim is large enough, count on your insurance company looking for ways to deny it. If so, retain counsel immediately to press your claim.

3. Request commitment before investigation. If your insurance company wants to investigate before committing to coverage, request a commitment first. You want to minimize the possibility they will build a coverage case against you.

4. Comply with all reasonable requests. You have a duty to cooperate with the insurance company in defense of the claim. If you fail to cooperate reasonably, you could lose coverage. Grant interviews; produce documents; allow on-site visits. Don't settle the claim without the insurance company's consent. Don't assume contract duties or assignments. Don't compromise the defense (such as admit liability).

5. Give information to defense counsel only. Your insurance company's right to investigate the claim is limited to defense issues. Be sure the information they ask you for relates to defense issues, and is not being used to build a case you. If defense counsel has been appointed for you, provide information only to counsel, as that information is privileged; information you give to your insurance company may not necessarily be so protected. If you must turn over information, request a

confidentiality agreement.

6. Endure the stall. You may face the “Big Stall” - a seemingly endless delay in commitment, or a replacement of one claims adjuster after another, each of whom needs to “get up to speed.” Be patient and create a paper trail. Avoid the politics of appeasement. A serious attitude will effect a serious response.

7. Avoid requests for waiver of defense costs. You may be asked to waive your right to recover your own separate defense costs as a condition of insurance company defense. Avoid signing. This was not part of your original policy bargain. If they insist, sign and declare you were acting under duress.

8. Request appointment of independent counsel. A policyholder's right to independent counsel is a matter of separate discussion, but it is often compelled by an insurer's defense under a reservation of rights. As a general rule, the more clearly you can demonstrate your defense counsel is capable of steering the defense of your case away from covered claims and toward non-covered claim, you will be able to claim this right.

9. React early and often. Evaluate your risks early. Involve your broker and the underwriter. Request face-to-face meetings with your adjuster. If they refuse your requests, document your continued need. If they claim no conflict of interest exists, highlight the conflict. Ask for their interim liability evaluation; it may demonstrate the existence of a conflict of interest. Sometimes you can wear them down.

10. Demonstrate conflict with panel counsel. This advice is not for the squeamish. To the extent your insurance company puts you at increased risk, write to your appointed defense counsel and ask for protection against liability for non-covered claims. Document conflicts of interest you perceive. Ask counsel to provide you with proof of malpractice coverage limits. Your requests are legitimate, however annoying. Your counsel is subject to ethical restraints that your insurance company is not, and which may at last compel protection of your rights. ■

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