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An Insured's Obligation To Reimburse Its Insurer For Costs Expended In The Defense Of Non-Covered Claims

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Commentary

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I. Introduction

One of the most vexing issues a liability insurer confronts is the question of defending an arguably covered claim against its insured. Most jurisdictions support, if not encourage, an insurer's decision to provide the insured with a defense subject to a reservation of its rights to later decline coverage if eventually warranted. The approach has benefits for both the insured and the insurer. It provides the insured with a defense and protects the insurer from arguably defaulting on its duty to provide a defense while enabling both parties to explore the coverage without prejudicing their respective positions.

The question of whether an insured is obligated to reimburse its insurer for defense costs expended by the insurer in the defense of an underlying litigation after there has been a determination of no coverage and no duty to defend is a common one.

Unfortunately, a few limited jurisdictions are adopting a new rule that has the effect of penalizing an insurer who agrees to provide a defense subject to a reservation. Those jurisdictions hold that an insurer who has agreed to provide a defense under a reservation of rights for a questionably covered claim against the insured, is prohibited from later seeking to recover the cost of the defense if the claim is ultimately shown not to have been covered. Such a rule is likely to have negative consequences since it encourages the insurer to decline to afford a defense to the insured for an arguably covered claim and pressures insurers into premature litigation for an early declaration on coverage. Moreover, the rule ignores the long standing recognition that a reservation of rights is a useful instrument to protect all parties' interests pending the ability to make a coverage determination. A rule prohibiting an insurer from recovering its expenditure defending a non-covered claim effectively eliminates what is generally encouraged as an acceptable place-holder to avoid potentially unnecessary litigation. Though statistics are not generally available, anecdotal information is that the large majority of defenses provided under a reservation either materialize in the acceptance of coverage or a compromised conclusion of the underlying claim inclusive of the related coverage issues. A rule discouraging an insurer from providing a defense subject to reservation, and depriving the insured of the benefit of that defense, ensures more contentious claims, premature impasses and precipitous litigation.

An insurer's entitlement to recoup the expenses incurred in funding a defense for a non-covered claim

is grounded in the recognition that, the insured would otherwise realizes a windfall benefit neither provided by the policy nor subsumed in the premium.

II. The Insurer's Reservation Of Rights

An insurer's duty to defend is generally recognized to be broader than the duty to indemnify. But, it is not boundless. The duty entails claims potentially covered in light of the facts alleged in the underlying complaint; i.e., those claims that, if proven based on the facts alleged, would trigger the insurer's duty to indemnify under the policy.[1]

Generally, the duty to defend is extinguished once the potentially covered claims are shown to be outside of the policy coverage or the claims are dismissed.[2] The insurer may then withdraw the defense. Alternatively, the duty to defend terminates upon a judgment declaring that there is no potential for coverage.

Complaints against insureds often allege facts that require investigation to determine if the claim is covered. The investigation is frequently contingent upon fact determinations in the liability litigation against the insured. For example, an investigation of an allegation of intentional wrong that may invoke a policy exclusion can remain an issue until the Court renders a dispositive ruling on the question.

The majority of courts encourage an insurer to defend its insured in such cases where coverage is unclear subject to a reservation of rights or to seek a declaratory judgment or both.[3] A reservation letter to the insured informs the insured of the insurer's coverage questions,[4] and preserves the insurer's right to assert those issues if investigation warrants. Forcing an insurer to decide at the outset to defend maintain allegations or otherwise forfeit a legitimate question of coverage, effectively mandates that the insurer decline coverage or else be deemed to have accepted a loss for a claim that may ultimately be proven never to have been within the scope of protection their policy affords.

Thus, insurers typically extend a defense reserving the right to later decline coverage and to seek reimbursement of costs advanced to defend claims later shown not to be covered.[5] Intrinsic to the reserved defense is insurer's entitlement to reimbursement if coverage is shown not to exist.

Recently, a few jurisdictions have held an insurer may not recoup the advanced defense costs, even under reservation of rights, if the Policy does not expressly so provide. Those courts hold that if the policy is silent as to reimbursement, a reservation of rights does not imply an insurer's right to reimbursement.

III. Jurisdictional Trends: Reimbursement Or No Reimbursement?

1. The Traditional View: Reimbursement Permitted

The great majority of jurisdictions recognize an insurer is entitled to recoup its costs in the defense of the insured for claims ultimately determined to be outside the policy coverage.[6] This view properly recognizes that the insurer did not contract to pay defense costs for claims not covered:

> the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs. To attempt to shift them would not upset the arrangement [between the insurer and the insured]. . .[7]

It recognizes that the insurer does not bargain to assume the cost of defense of claims not covered.

The rule correctly recognizes that a right to reimbursement exists even absent a policy provision:

> That the insurer does not have a right of reimbursement express in the policy does not mean that it does not have one implied in law. Rather, that it has an implied-in-law right helps explain why it does not have an express-in-policy one. The former renders the latter unnecessary. This is proved by the fact that, with an implied-in-law right and without an express-in-policy one, insurers have sought, and obtained, reimbursement-and have done so, on the evidence of

> reported decisions, for much more than a decade. To be sure, an express right could have been introduced into the policy. But that it was not is not dispositive.[8]

The rule provides both the insurer and the insured with protections. It recognizes the insurer's reservation of rights must specifically state that the insurer may later seek to recoup defense costs and permits the insured with the option of accepting the defense offered.[9] Courts historically recognized that a reservation of rights creates an implied contract when the insured accepts the defense.[10] The insured's acceptance of the defense proffered per the reservation without objection is deemed acceptance and consent to the insurer's reservation of rights.[11] One court has required that the insured to specifically agree to the reservation of rights for it to be effective.[12]

The majority view recognizes that entitling an insured to the benefit of a defense of a claim eventually shown not to be covered is an inequitable and unjustified expansion of the coverage afforded by the Policy contract.

The California Supreme Court recognized the right of reimbursement almost fifteen years ago in a case in which only one out of twenty-seven claims asserted against the insured was potentially covered under the Policy.[13] Specifically, in *Buss v. Superior Court*, the court confirmed that an insurer is entitled, under a reservation of rights, to recoup defense costs it incurred in defending against third party claims that are not potentially covered.[14] Under the *Buss* reasoning, an insurer can properly agree to defend claims while at the same time reserving its right to recoup the costs if it is later found the claims are not covered. *Buss* explained that the right to reimbursement is implied in law as quasi-contractual under the theory of unjust enrichment:

> [ ] under the law of restitution such a right [of reimbursement] runs against the person who benefits from "unjust enrichment" and in favor of the person who suffers loss thereby. The "enrichment" of the insured by the insurer through the insurer's bearing of unbargained-for defense costs is inconsistent with the insurer's freedom under the policy and therefore must be deemed "unjust."[15]

The court further explained:

> It is like the case of A and B. A has a contractual duty to pay B $50. He has only a $100 bill. He may be held to have a prophylactic duty to tender the note. But he surely has a right, implied in law if not in fact, to get back $50. Even if the policy's language were unclear, the hypothetical insured could not have an objectively reasonable expectation that it was entitled to what would in fact be a windfall. [16]

While *Buss* involved a third-party action with "mixed" covered and non-covered claims, the rationale also applies in cases "where the insurer, acting under a reservation of rights, defended an action in which, as it turns out, no claim was ever potentially covered."[17]

The majority of jurisdictions align with the reasoning in *Buss* to hold an insured is obligated to reimburse its insurer for claims that were never covered.[18] Following California's lead, these courts properly find that an insured who accepts its insurer's defense subject to a unilateral reservation of right to seek reimbursement of defense costs is required to reimburse the insurer where it is later established that there is no duty to defend.[19]

Most recently, the District of Connecticut upheld an insurer's right to be reimbursed for non-covered claims *Scottsdale Ins. Co. v. R.I. Pools, Inc.*[20] *R.I. Pools* sought defense and indemnity from Scottsdale Insurance Co. under a commercial liability policy for lawsuits brought by owners of swimming pools claiming the concrete pools built by the insured were cracking. Scottsdale agreed to defend the insured subject to a reservation of rights, including the right to recoup defense costs expended defensing non-covered claims. Scottsdale filed suit for a declaration that it owed no duty to defend or to indemnify the insured in connection with the claims. The court first found there was no coverage under the policy, and hence no duty to defend, since the third-party claims were for faulty workmanship and not an "occurrence" as the term was defined by the Policy. The court then found that

the insured was obligated to reimburse Scottsdale for the costs of the defense provided, concluding that "Scottsdale has a cognizable right to reimbursement under Connecticut law."[21] The court properly recognized that to hold otherwise would unjustly enrich the insured who had not bargained with Scottsdale to cover faulty workmanship claims:

> A cause of action for reimbursement is cognizable to the extent required to ensure that the insured not reap a benefit for which it has not paid and thus be unjustly enriched. Where the insurer defends the insured against an action that includes claims not even potentially covered by the insurance policy, a court will order reimbursement for the cost of defending the uncovered claims in order to prevent the insured from receiving a windfall.[22]

The court rejected the insured's position that the policy's provision for "Supplementary Payments" mandated that the fees and expenses for which Scottsdale claimed were wholly Scottsdale's obligation.

Similarly, over a decade ago in *Colony Ins. Co. v. G & E Tires & Service, Inc*, the Florida appellate court held as a matter of first impression that the insurer was entitled to reimbursement for claims brought against the insured which were held, by declaratory judgment, not to be covered by the policy.[23] Specifically, the court found there was no duty to defend or to indemnify because the claims against the insured were excluded in the policy. Consequently, the insurer was entitled to reimbursement for the defense costs because the claims were never covered by the policy. The court reasoned that the insured was no worse off, even after having to reimburse the insurer, than it would have been if the insurer had declined in the first instance and forced the insured to retain its own counsel.

Overall, in the large majority of jurisdictions, an insurer may recover the costs it expended to provide a defense from its insured which, under its contract of insurance, it was never obliged to fund in the first instance.

2. Reimbursement Not Permitted

Recently, a few states such as Pennsylvania, Illinois, Minnesota and Wyoming have adopted a new rule prohibiting insurers from reimbursement absent an express provision in the policy permitting same, even where there is a judicial declaration that there is no duty to defend.[24] These courts "have refused to recognize claims by insurers for reimbursement of defense costs expended under a unilateral reservation of rights, absent a provision for such reimbursement in the insurance policy."[25]

The courts hold that if the policy does not specifically authorize reimbursement, the right does not exist.

Jurisdictions adopting this view find that the insured is not unjustly enriched if the insurer is tendering a defense to protect its own interests and to "avoid the risks that an inept or lackadaisical defense of the underlying action may expose it to if it turns out there is a duty to indemnify."[26] The rationale is that an offer to pay for the defense is at least as much for the insurer's own benefit as for the insured's.

These jurisdictions reason that an ultimate determination that the claim against the insured is not covered does not "retroactively eliminate the insurer's duty to defend during the period of uncertainty" where coverage is a question.[27] But, the position ignores that coverage issues often concern inchoate legal questions, or independent fact issues, which can only be resolved when the allegations against the insured are decided.

The new line of reasoning departs from established standards concerning an insurer's duty to defend and appears to support a novel position that a mere dispute between the insurer and the insured over whether the insurer has a duty to defend — and thus the parties subjective conjecture about the probable outcome of alleged facts underpinning coverage issues — triggers the duty to defend. These rulings create a windfall for the insured by finding that the insurer must pay for defense costs even where there is a declaratory judgment that no coverage exists and the allegations in the underlying complaint *never* alleged any facts falling within the coverage of the policy.

> Certainly, if an insurer wishes to retain its right to seek reimbursement of defense costs in the event it later is determined that the underlying claim is not covered by the policy, the insurer is free to include such a term in its insurance

> contract. Absent such a provision in the policy, however, an insurer cannot later attempt to amend the policy by including the right to reimbursement in its reservation of rights letter.[28]

Consistent with this view is the position in such jurisdictions that a reservation of rights letter cannot create a right of reimbursement that is not present in the policy. Thus, an insurer may only obtain reimbursement when the policy contains an express provision.

VI. Comment: The Better Reasoned Decisions Recognize A Right Of Reimbursement

The traditional rule permitting the parties to preserve the status quo while enabling the insured to benefit from an insurer provided defense renders the fairest and most beneficial approach for the insured and insurer alike. Directing that an insurer effectively expand its policy coverage by unqualifiedly by bearing the cost to defend an action only potentially covered unnecessarily prejudices the insurer and creates a contentious claim when none necessarily exists. The better reasoned decisions recognize the right of reimbursement.

First, such decisions recognize the equitable theories underpinning an insurer's right to reimbursement where there is no coverage under the policy. Such an approach protects insurers from expanding coverage never agreed, avoids a windfall for the insured, and prevents the insured from becoming unjustly enriched.

Second, reimbursement jurisdictions properly recognize that a valid contract implied in law is formed when an insured accepts, without protest, the defense costs advanced by the insurer subject to the insurer's reservation of rights to later seek reimbursement. By accepting the benefit of a defense, the insured manifests its intent to be bound by the terms presented by the insurer. A contract is formed because the insurer also suffers a loss by advancing defense costs for claims not covered under the policy.

Third, the traditional approach encourages and enables a full understanding of the claim for coverage to be determined. It encourages insurers to provide a defense under a reservation or rights when there is a dispute about whether a claim is covered under the policy, rather than denying coverage from the outset. The insured otherwise will be required to pay for its own defense leaving a determination as to whether the insurer is obligated to reimburse it for defense costs until the underlying case is over.[29] This may raise issues of bad faith claims treatment against the insurer if the claims are ultimately determined to be covered. As one court explains:

> An insurer facing unsettled law concerning its policies' potential coverage of the third party's claims should not be forced either to deny a defense outright, and risk a bad faith suit by the insured, or to provide a defense where it owes none without any recourse against the insured for costs thus expended. The insurer should be free, in an abundance of caution, to afford the insured a defense under a reservation of rights, with the understanding that reimbursement is available if it is later established, as a matter of law, that no duty to defend ever arose.[30]

Allowing reimbursement appropriately addresses the issues by permitting the insurer to initially fund the defense but later seek reimbursement if the claims are not covered. Both the insurer and the insured benefit since the insured's obligation to pay for its defense is deferred and it does not have to advance defense costs until the coverage determination is finalized.

The more recent approach by a few courts improperly extends the defense coverage for non-covered claims — coverage that was never agreed to under the policy. The insured is unjustly enriched by a defense not contemplated by the premium coverage under the policy.

Nonetheless, the developing authority which requires the contract of insurance to specify a right to reimbursement, the recommended approach is for the policy to include an express provision that provides for the reimbursement of defense costs in the event it is shown there is no coverage under the policy for a claim the insurer defends under reservation. Moreover, the insurer should always express its intention to recoup defense costs in the event it is subsequently determined there is no coverage in the reservation of rights to the insured.

Endnotes

1. Ostrager & Newman, *Handbook on Insurance Coverage Disputes*, § 5.01(a) (15th ed. Aspen Publishers 2010).

2. *Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 649 (Cal. 2005).

3. Ostranger, § 2.02.

4. *Id. at* § 2.02(a) (citing *Fidelity & Cas. Co. v. Holdeman*, 23 A.D.2d 878, 878-79, 259 N.Y.S.2d 896 (2d Dep't 1965).

5. *Buss v. Superior Court*, 939 P.2d 766, 776 (Cal. 1997).

6. See e.g. *Valley Forge Insurance v. Health Care Management Partners*, 616 F.3d 1086 (10th Cir. 2010); *Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 532 (Pa. 2010); *Westport Ins. v. Ong*, No. 1:07CV10 DAK, 2008 WL 892941, at *4 (D.Utah Mar. 28, 2008) (slip op.) ("[N]umerous courts recognize an insurer's right to reimbursement of defense fees paid where it is determined that the insurer had no duty to defend. Indeed, many cases refer to this holding as the majority position.").

7. *Buss*, 939 P.2d at 776.

8. *Id.* at 776-77 n. 13 (internal citations omitted).

9. *See e.g. United Nat'l Ins. Co. v. SST Fitness Corp.*, 309 F.3d 914, 919 (6th Cir. 2002).

10. *Walbrook Ins. Co. v. Goshgarian & Goshgarian*, 726 F.Supp. 777, 784 (C.D.Cal.1989).

11. *Ostranger*, § 5.07; *see also Gotham Ins. Co. v. GLNX*, No. 92 Civ. 6415, 1993 WL 312243(S.D.N.Y. Aug. 6, 1993) ("insured offered no evidence that it expressly refused to consent to [insurer's] reservation of rights as to reimbursement.").

12. *Id.*; *see also SST Fitness Corp.*, 309 F.3d at 920 (finding insurer must prove that insured accepted the defense with the reservation of rights).

13. *Buss*, 939 P.2d at 766.

14. *Id.*

15. *Id.* at 766 (emphasis added).

16. *Id.* at 776.

17. *MV Transp.*, 36 Cal. 4th at 649.

18. *See e.g.*, *UnionAmerica Ins. Co. v. General Star Indem. Co.*, No. A01-0317-CV, 2005 WL 757386 *8 (D. Alaska Mar. 7, 2005) ("The court predicts that the Alaska Supreme Court would decide that Unionamerica has a right to seek reimbursement of defense expenses paid under a reservation of that right if there was no coverage and hence no duty to defend"); *MV Transp.*, 115 P.3d 460 (California) (upholding Buss); *HECLA Mining Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991) (insurer can seek reimbursement of defense costs if it undertakes defense subject to reservation of rights); *First Fed. Sav. & Loan Ass'n of Fargo N.D.* v. *Transamerica Title Ins. Co.*, 793 F. Supp. 265, 269 (D. Colo. 1992) (same); *Security Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 264 Conn. 688, 826 A.2d 107, 125 (Conn. 2003) ("A cause of action for reimbursement is cognizable to the extent required to ensure that the insured not reap a benefit for which it has not paid and thus be unjustly enriched."); *Scottsdale Ins. Co. v. R.I. Pools, Inc.*, 2011 WL 3563169 (D. Conn. 2011) (same); *Nationwide Mut. Ins. Co. v. Flagg*, 789 A.2d 586, 597 (Del. Super. Ct. 2001) (insurer "may seek reimbursement . . . on those claims which may be proven later to fall outside the policy coverage."); *Colony Ins. Co. v. G & E Tires & Serv., Inc.*, 777 So. 2d 1034, 1038 (Fla. Dist. Ct. App. 1st Dist. 2000) ("Having accepted Colony's offer of a defense with a reservation of the right to seek reimbursement, G & E ought in fairness make Colony whole, now that it has been judicially determined that no duty to defend ever existed."); *Jim Black & Associates, Inc. v. Transcontinental Ins. Co.*, 932 So.2d 516, 517 (Fla. App 2006); *Scottsdale Ins. Co. v. Sullivan Prop. Inc.*, 2007 WL 2247795 (D. Hawaii 2007) ("reservation of rights allows [insurer] to seek reimbursement of defense costs in light of the Court's determination that it had no duty to defend because no possibility of coverage existed"); *Travelers Prop. Cas. Co. v. Hillerich v. Bradsby Co.*, 598 F.3d 257, 268 (6th Cir. 2010) (Kentucky law) (insurer entitled to reimbursement where: the reservation of rights is timely, the insurer has

notified the insured of its intent to seek reimbursement, and the insured has meaningful control of the defense); *Cincinnati Ins. Co. v. Interlochen Ctr. for the Arts*, 2003 U.S. Dist. LEXIS 13288 *16-17 (W.D. Mi. July 31, 2003) (allowing reimbursement for non-covered claims); *Travelers Cas. & Surety Co. v. Ribi ImmunoChem Research*, Inc., 326 Mont. 174 (Mont. 2005) (can recoup with reservation of rights as insured's silence in face of reservation of rights indicates assent); *Capitol Indem. Corp. v. Blazer*, 51 F. Supp. 2d 1080, 1090-91 (D. Nev. 1999) (can recoup fees for defense of claims if clear in the reservation of rights letter); *Hebela v. Healthcare Ins. Co.*, 370 N.J. Super. 260, 279 (App. Div. 2004) (indicating "right of reimbursement exists because the insured would be unjustly enriched in benefiting by, without paying for, the defense of a non-covered claim"); *Electric Ins. Co. v. Marcantonis ex rel. Marcantonis*, 2011 WL 883282 (D.N.J., March 11, 2011); *Resure, Inc. v. Chemical Distribs., Inc.*, 927 F. Supp. 190, 194 (M.D. La. 1996) (applying New Mexico law); *GLNX, Inc.*, 1993 WL 312243 at *4-5 (finding reimbursement proper where insurer issued letter reserving right to seek reimbursement); *SST Fitness Corp.*, 309 F.3d at 919 (Ohio); *Permanent Gen. Ins. Co. v. Bedwell, 111 Ohio Misc.* 2d 8, 14-15 (Mun. Ct. Hamilton County 2001); *Auto-Owners Ins. Co. v. Prairie Auto Group, Inc.*, 2008 U.S. Dist. LEXIS 45327, *9 (D. S.D. June 10, 2008); *Cincinnati Ins. Co. v. Grand Pointe, LLC*, 501 F. Supp. 2d 1145, 1151-52 (E.D. Tenn. 2007).

19. *In Colony Ins.*, 777 So. 2d 1034.

20. *Scottsdale Ins. Co. v. R.I. Pools, Inc.*, No. 3:09cv1319, 2011 WL 3563169 (D. Conn. Aug. 15, 2011).

21. *Id.* at *4.

22. *Id.* at * 3 (citing *Lumbermens Mut. Cas. Co.*, 264 Conn. at 717–18).

23. *Colony Ins. Co.*, 777 So.2d 1034.

24. *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc.*, 606 Pa. 584, 597 (Pa. 2010); *Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, Nos. 08-8068, 08-8064 (10th Cir. Sept. 7, 2010) (Wyoming law); *Gen. Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146 (2005) ("We . . . refuse to permit an insurer to recover defense costs pursuant to a reservation of rights absent an express provision to that effect in the insurance contract between the parties."); *Blue Cross of Idaho Health Svs. Inc. v. Atlantic Mut. Ins. Co.*, 734 F. Supp. 2d 1107, 1112-13 (D. Idaho 2010); *Pekin Ins. Co. v. Tysa, Inc.*, No. 3:05-cv-00030, U.S. Dist. LEXIS 93525 (S.D. Iowa Dec. 27, 2006); *Westchester Fire Ins. Co. v. Wallerich*, 563 F.3d 707 (8th Cir. 2009) (Minnesota) (insurer was not entitled to reimbursement of fees incurred in defense of insured prior to judicial determination of no coverage).

25. *Gen. Star Indem. Co. v. V.I. Port Auth.*, 564 F. Supp. 2d 473, 477 (D.Vi. 2008).

26. *Jerry's Sport Ctr., Inc.*, 2 A.3d 526 at 532.

27. *Id.* at 532.

28. *Gen. Agents*, 828 N.E.2d at 1103.

29. *See e.g. Hebela v. Healthcare Ins. Co.*, 370 N.J. Super. 260 (App. Div. 2004).

30. *MV Transp*, 115 P.3d at 470. ■

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