CAN INSURERS RECOUP DEFENSE COSTS FOR NONCOVERED CLAIMS? (135)

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Liability insurers have a duty to defend their insureds from suits alleging covered claims, even if the claims are meritless. When an insurer defends an insured in a suit containing allegations of both covered and noncovered claims (a "mixed" action) and when an insurer defends an insured in a suit where coverage is uncertain, because it is dependent either on facts not yet established or on an unsettled question of law, at the end of day, the insurer may have paid to defend against claims that are not covered under its policy.

This article will examine how various courts have resolved the question of whether the insurer can subsequently recoup from the insured defense costs attributable to the defense of noncovered claims. (This article does not address the related but not identical issue of whether an insurer may recoup payments made in settlement of noncovered claims.)

Authority among the courts that have examined this issue is almost evenly divided. At the time of this writing, a slight majority of courts appear to favor recoupment of defense costs. However, many jurisdictions have not ruled on the issue, and the balance of authority could easily tip the other way.

Duty To Defend and Reservation of Rights

The insurer's duty to defend is the platform on which any argument, whether for or against recoupment, must be based. The duty to defend is typically contained within the insuring agreement in a provision such as the following:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. [ISO Form CG 00 01, 12, 04, © ISO Properties, Inc., 2003]

The contractual duty to defend addresses only suits seeking damages that are covered. A majority of jurisdictions apply the eight-corners rule, requiring that if a comparison of the four corners of the complaint with the four corners of the policy reveals at least one potentially covered claim, the insurer must defend. Further, even though the policy language speaks only to the defense of suits seeking damages that are covered, it is an accepted premise that the duty to defend is broader than the duty to indemnify. Therefore, even though the insurer is not obligated to indemnify the insured for judgments or settlements "to which this insurance does not apply," the insurer is generally required to defend the entire suit, including noncovered claims, if the complaint contains claims that are potentially covered.

When there are questions about coverage from the outset of a suit, insurers commonly undertake the defense of the insured under a reservation of rights—that is, the insurer agrees to defend the insured in the case but reserves its right to deny coverage for all or part of the claim at some time in the future. In the reservation of rights letter, the insurer may also attempt to reserve a right to recoup costs expended in defense of all or part of the suit if it is

later determined that all or part of the plaintiff's claims were not covered. If the insurer does not include an unambiguous notice to the insured that it may later claim recoupment of defense costs from the insured, the insurer is normally barred from later asserting this right.

The *Buss* Case and Mixed Actions

Although not the first court to confront the issue, the California Supreme Court was the first court to thoroughly explore recovery of defense costs by an insurer and to articulate in detail a rationale for permitting insurer recoupment. In ***Buss v. Superior Ct.,*** 939 P.2d 766 (Cal. 1997) **[see summary at 175],** Buss, the owner of three Los Angeles professional sports teams, was sued by H&H Sports in a 27-count complaint stemming from Buss's unilateral termination of his business relationship with H&H. Only 1 of the 27 counts, a claim for defamation, was covered on the face of his commercial general liability (CGL) policy with Transamerica, rendering the case a so-called mixed action (a suit that includes covered and noncovered claims). Transamerica undertook the entire defense pursuant to a reservation of rights, in which it asserted, *inter alia,* that it reserved the right to seek reimbursement of defense costs "if it is determined that there is no coverage." Buss and Transamerica later entered into an agreement supported by consideration that if a court were to order that defense costs be shared pro rata, Buss would reimburse Transamerica for its pro rata share of the defense costs.

Following the conclusion of the case by settlement, Transamerica sought reimbursement of more than $1 million in defense costs incurred in defending Buss, minus approximately $50,000 it attributed to the defense of the covered defamation claim.

The California Supreme Court affirmed rulings below that Transamerica *could* seek reimbursement for defense costs for claims that were not even potentially covered (here, 26 of the 27 counts). The court reasoned that the insurance contract required the insurer to defend all claims that were at least potentially covered but did not oblige the insurer to defend the insured against claims that were not. The duty to defend the *entire* action, including claims that were not even potentially covered, has been imposed by caselaw on the grounds that it would impede a meaningful and prompt defense if the insurer were required to "parse the claims, dividing those that are at least potentially covered from those that are not." *Id.* at 49.

Because the insurer and insured in the insurance contract bargained only for payment of defense costs of claims that were at least potentially covered, the California Supreme Court found that when an insurer is forced to undertake the complete defense of the suit, the insured receives the benefit of unbargained-for defense costs for which it paid no premium. Thus, the insured is "unjustly enriched," and the insurer has a reimbursement right implied in the law of restitution. The court went on to hold that the insurer is only entitled to recoup defense costs that can be allocated solely to the claims that are not even potentially covered, and the insurer bears the burden of proving the allocation by a preponderance of the evidence.

The Opposing View in Mixed Actions

The opposing viewpoint is well represented by the Wyoming Supreme Court's decision in ***Shoshone First Bank v. Pacific Employers Ins. Co.,*** 2 P.3d 510 (Wyo. 2000) **[see summary at 170],** another "mixed" action. There, the court considered a question certified to it by the U.S. District Court for the District of Wyoming as to whether Wyoming law permitted an insurer to allocate to its insured and recoup the costs of defending noncovered claims, where there was at least one covered claim, and the insurer had already paid for the defense. The court rejected the reasoning of *Buss* and elected to follow what it termed "the minority rule," which does not allow allocation of defense costs to the insured. The court observed that allowing an insurer to pick and choose among claims would be problematic. Further, in many instances, the costs incurred for the defense of a noncovered claim would have had to be incurred to defend the covered claim.

The policy required the insurer to defend any "suit" seeking covered damages, not just to defend specific claims. No language in the policy made a distinction between covered and noncovered claims so far as the defense of the claims was concerned. Addressing policy considerations, the Wyoming Supreme Court quoted from an unpublished federal district court opinion as follows:

> [T]o allow the insurer to force the insured into choosing between seeking a defense under the policy, and

> run the potential risk of having to pay for this defense if it is subsequently determined that no duty to defend existed, or giving up all meritorious claims that a duty to defend exists, places the insured in the position of making a Hobson's choice. Furthermore, endorsing such conduct is tantamount to allowing the insurer to extract a unilateral amendment to the insurance contract. If this became common practice, the insurance industry might extract coercive arrangements from their insureds, destroying the concept of liability and litigation insurance.

Although the insurer stated in its reservation of rights letter that it reserved the right to allocate defense costs for noncovered claims to the insured when the case was resolved, the court held that the insurer could not unilaterally amend policy coverage in a reservation of rights letter.

Recoupment in Other Legal and Factual Contexts

Both ***Buss*** and ***Shoshone*** dealt with "mixed" actions—cases in which, on the face of the policy and the pleadings, it was obvious that some claims fell within coverage and some did not. But what of cases in which the demarcation is not so clear-cut? Recoupment cases in which coverage is uncertain at the outset usually fall into one of two categories: (1) cases in which the claims appear to be potentially covered, but at some point down the line, facts are conclusively established that make it clear there is no coverage; and (2) cases in which the facts are clear, but the law is unsettled as to whether there is coverage applicable to those facts.

Uncertain Coverage Due to Fact Issues

An example of the first type of case is ***Liberty Mut. Ins. Co. v. FAG Bearings Corp.,*** 153 F.3d 919 (8th Cir. 1998). There, FAG, the operator of a ball bearings parts manufacturing plant, was sued by neighbors who claimed their water supply had been contaminated by the release of the solvent trichloroethylene (TCE) from the FAG plant. FAG's insurer, Liberty Mutual, undertook FAG's defense but filed an action seeking a declaration that it had no duty to defend or indemnify FAG in the underlying actions because the policy's pollution exclusion barred coverage unless the release of the pollutant (here, the TCE) was "sudden and accidental." Liberty Mutual obtained summary judgment in the declaratory judgment action that the TCE releases were not "sudden and accidental" and therefore there was no coverage and no duty to defend FAG in the underlying actions. Liberty Mutual then argued that because, in retrospect, it had proven that the claims against FAG were not covered, not only was it entitled to discontinue its defense of FAG prospectively, but it was also entitled to recoup all defense costs it had paid before the determination that the TCE release was not "sudden and accidental."

The Eighth Circuit, interpreting Missouri law, held that Liberty Mutual could *not* recoup past defense costs. Although Liberty Mutual's duty to defend FAG expired upon determination that the pollution was not "sudden and accidental," before that time, the facts alleged in the complaint potentially brought the underlying claim within coverage, and Liberty Mutual had a duty to defend, which was not subject to reimbursement.

In a similar fact scenario, the Montana Supreme Court held that an insurer did have a right to recover defense expenses. In ***Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.,*** 108 P.3d 469 (Mont. 2005), the court upheld a finding that the intentional disposal of hazardous wastes into a landfill that resulted in the unintentional migration of the wastes into groundwater was not "sudden and accidental," and therefore Ribi, a biopharmaceutical products company that had dumped the solvents, was not entitled to coverage under Ribi's liability policy with Travelers. Travelers had defended Ribi in suits brought by neighboring property owners under a reservation of rights in which it stated that it intended to seek reimbursement of its defense costs.

The Montana Supreme Court affirmed the district court's determination that the release was not "sudden and accidental" and concluded that Travelers had the right to recoup its entire defense costs from Ribi. Travelers timely and explicitly reserved its right to recoup defense costs if a court determined that it had no duty to provide such costs. When Ribi accepted Travelers' defense without objection, it was fully apprised that it might have to reimburse the costs to Travelers.

The theme of consent or waiver by acceptance of a defense under a reservation of rights referencing future recoupment of defense costs has been repeated in other cases favoring a right of recoupment, as shown in Exhibit 1 below.

Uncertain Coverage Due to Unsettled Law

A different type of uncertainty exists when the facts are reasonably clear, but the application of the law to those facts is unsettled. In ***Scottsdale Ins. Co. v. MV Transp.,*** 115 P.3d 460 (Cal. 2005) **[see summary at 135],** the California Supreme Court considered such a case. There, Laidlaw, a transit services company, sued MV and several MV employees who had previously worked for Laidlaw for various claims including misappropriation of trade secrets. MV and its employees tendered their defense to MV's insurer, Scottsdale.

Scottsdale undertook the defense pursuant to a reservation of rights, citing caselaw casting doubt as to whether this type of trade secret misappropriation claim fell within the scope of advertising injury liability coverage. Scottsdale incurred $340,000 defending the suit before it was settled. Scottsdale then sought reimbursement of its defense costs from MV.

Scottsdale lost at the trial level and at the first hearing before the court of appeals, with both courts holding that on the face of the complaint, and considering the uncertain state of the law, there was, at the very least, the potential that misappropriation of trade secrets could constitute "advertising injury" and thus be covered. Thereafter, the California Supreme Court rendered a decision in ***Hameid v. National Fire Ins. of Hartford,*** 71 P.3d 761 (Cal. 2003) **[see summary at 1400],** in which it held that "advertising" as used in a standard liability policy meant "widespread promotional activities usually directed to the public at large."

The California Court of Appeals then reconsidered the ***Scottsdale*** case in light of the pronouncement in ***Hameid.*** The court found that although the ***Hameid*** case had clarified that the Scottsdale policy never covered the allegations of Laidlaw's suit, Scottsdale still had a duty to defend MV until the time the trial court "extinguished" that duty by holding that no potential for coverage existed. Thus, Scottsdale's reimbursement claim was an impermissible attempt to terminate its defense duty retroactively.

The California Supreme Court reversed and held that Scottsdale never had a duty to defend MV in the Laidlaw action, and therefore Scottsdale had a right to recoup all of its defense expenses in the Laidlaw suit from day one. The court distinguished between the situation in which facts influencing coverage are uncertain and where a question of pure law is unsettled. In the former situation, the insurer must assume the duty to defend, and that duty continues until and unless facts are established that negate the potential coverage. The insurer in this situation has no further duty to defend but cannot recoup defense costs expended before the insurer established that the duty had *ended.* On the other hand, when a subsequent legal opinion clarifies a question of law and establishes that the insurer, albeit in hindsight, never owed a duty to defend in the first place, the insurer may recover all of its defense costs, provided it reserved its right to do so.

Summary of Jurisdictional Views

As this sampling of cases indicates, whether an insurer is entitled to recoup defense costs depends on a number of factors on which courts in different jurisdictions reached divergent results. These factors include:

- How the court interprets the contractual duty to defend
- Whether a reservation of rights can amend an insurance policy or effect a waiver by the insured of policy rights
- Whether the suit is a "mixed" action
- Whether a suit is one in which coverage is uncertain either because of factual issues or because of unsettled law

Exhibits 1 and 2 illustrate the variety of rulings on the recoupment issue.

EXHIBIT 1
RECOUPMENT OF DEFENSE COSTS ALLOWED

State Law Applied	Citation	Remarks
Alaska	***UnionAmerica Ins. Co. v. General Star Indem. Co.,*** 2005 U.S. Dist. LEXIS 46337 (D. Alaska Mar. 7, 2005)	Insurer has right to recoupment of defense expenses paid under a specific reservation of rights if there was no coverage and hence no

		duty to defend.
California	***Buss v. Superior Ct.,*** 939 P.2d 766 (Cal. 1997) **[see summary at 175]**	Recognized right of recoupment exists in "mixed" action (see discussion above).
California	***Scottsdale Ins. Co. v. MV Transp.,*** 115 P.3d 460 (Cal. 2005) **[see summary at 135]**	Recognized right of recoupment exists where coverage uncertain due to unsettled law (see discussion above).
Connecticut	***Security Ins. Co. of Hartford v. Lumbermans Mut. Cas. Co.,*** 826 A.2d 107 (Conn. 2003)	Recognized right of recoupment exists in "mixed" action where gaps existed in years of coverage in long-term exposure case.
Florida	***Colony Ins. Co. v. G&E Tires & Serv., Inc.,*** 777 So. 2d 1034 (Fla. App. 2000)	Insurer agreed to provide defense after four requests by insured but reserved recoupment rights. Insured's acceptance indicated agreement to insurer's terms.
Florida	***Jim Black & Assocs., Inc. v. Transcontinental Ins. Co.,*** 932 So. 2d 516 (Fla. App. 2006) **[see summary at 175]**	Followed ***Colony*** by stating that insurer had not been paid premiums to defend uncovered claims.
Hawaii	***Scottsdale Ins. Co. v. Sullivan Props., Inc.,*** 2007 U.S. Dist. LEXIS 57021 (D. Haw. Aug. 2, 2007)	Predicted Hawaii courts would recognize the right of insurers to recoup defense costs when defending under a reservation of rights letter expressly reserving the insurer's right to reimbursement.
Michigan	***NCMIC Ins. Co. v. Dailey,*** No. 267801, 2006 Mich. App. LEXIS 2260 (Mich. App. 2006)	Court applied equitable remedy of restitution and allowed recoupment by insurer of reasonable (but not actual) defense costs.
Minnesota	***Knapp v. Commonwealth Land Title Ins. Co., Inc.,*** 932 F. Supp. 1169 (D. Minn. 1996), *disagreed with by* ***Employers Mut. Cas. Co. v. Indus. Rubber Prods., Inc.,*** No. 04–3839, 2006 U.S. Dist. LEXIS 9242 (D. Minn. Feb. 23, 2006) (See Exhibit 2.)	Where an insurer has properly met its duty and subsequently successfully challenges policy coverage, it should be entitled to be reimbursed for the benefits it bestowed on its insured.
Montana	***Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.,*** 108 P.3d 469 (Mont. 2005)	Insurer is entitled to full reimbursement of defense costs even absent express agreement by the insured to insurer's reservation of rights (see discussion above).
New Jersey	***Hebela v. Healthcare Ins. Co.,*** 851 A.2d 75 (N.J. Super. 2004)	Insurer that breached duty to defend in "mixed" action was still entitled to seek allocation of defense costs to noncovered claims in retrospect.
New Mexico (as interpreted by Louisiana federal court)	***Resure, Inc. v. Chemical Distribs., Inc.,*** 927 F. Supp. 190 (M.D. La. 1996), *aff'd,* 114 F.3d 1184 (5th Cir. 1997), *cert. denied,* 523 U.S. 1072, 118 S. Ct. 1511, 140 L. Ed. 2d 665 (1998)	Insurer is entitled to recoupment where insured made no objection to specific reservation of rights.
Ohio	***United Nat'l Ins. Co. v. SST Fitness Corp.,*** 309 F.3d 914 (6th Cir. 2002) **[see summary at 410]** , but see ***American Motorist Ins. Co. v. Custom Rubber Extrusions, Inc.,*** 2006 U.S. Dist. LEXIS 59436 (N.D.	Insured entered into an implied-in-fact contract when it accepted defense costs subject to a reservation of right to recoupment.

	Ohio Aug. 23, 2006) (distinguishing rule in context of payment of uncovered judgment)	
Ohio	***Columbia Cas. Co. v. City of St. Clairsville,*** 2007 U.S. Dist. LEXIS 16797 (S.D. Ohio Mar. 8, 2007)	Follows ***SST*** case above in mixed action.
Tennessee	***Cincinnati Ins. Co. v. Grand Pointe, LLC,*** 501 F. Supp. 2d 1145 (E.D. Tenn. Aug. 10, 2007)	Recoupment is available to insurer, provided insurer has adequately and timely reserved its rights.
Texas (as interpreted by 8th Cir.)	***St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.,*** 457 F.3d 766 (8th Cir. 2006)	Insured agreed to insurer's reservation of rights to recoupment in return for insurer's relinquishment of its right to veto insured's choice of counsel. Thus, reservation of rights was not unilateral but created bilateral agreement.

EXHIBIT 2
RECOUPMENT OF DEFENSE COSTS *NOT* ALLOWED

State Law Applied	Citation	Remarks
	Nobel Ins. Co. v. Austin Powder Co., 256 F. Supp. 2d 937 (W.D. Ark. 2003)	Court recognized right of recoupment but denied in this particular case because insurer failed to reserve right to recoupment.
Florida	***Wendy's of N.E. Fla., Inc. v. Vandergriff,*** 865 So. 2d 520 (Fla. App. 2003)	Recognized right under ***Colony*** but held ***Colony*** inapplicable where insurer failed to reserve right to recoupment.
Illinois	***General Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.,*** 828 N.E.2d 1092 (Ill. 2005) **[see summary at 135]**	Insurer was obligated to defend as long as any questions remained concerning whether the underlying claims were covered and could not recoup defense costs prior to a determination of noncoverage.
Iowa	***Pekin Ins. Co. v. Tysa, Inc.,*** 2006 U.S. Dist. LEXIS 93525 (S.D. Iowa Dec. 27, 2006)	Insurer cannot unilaterally modify policy terms through reservation of rights; the insured is not unjustly enriched when provided with a defense for claims that are at least possibly within the coverage terms.
Louisiana	***Yount v. Maisano,*** 627 So. 2d 148 (La. 1993) **[see summary at 110]**	Insurer that refused to defend insured had to reimburse insured his defense costs because, even though it was ultimately determined there was no coverage, the facts alleged in the complaint did not unambiguously preclude coverage.
Louisiana	***Riley Stoker Corp. v. Fidelity & Guar. Ins. Underwriters, Inc.,*** 26 F.3d 581 (5th Cir. 1994) **[see summary at 315]**	Followed ***Yount.***
Maryland	***Perdue Farms, Inc. v. Travelers Cas. & Sur. Co. of Am.,*** 448 F.3d 252 (4th Cir. 2006) **[see summary at**	A partial right of reimbursement would serve only as a backdoor narrowing of the duty to defend. Permitting a defense under

	175]	reservation of rights benefits both the insured and the insurer.
Massachusetts	***Dash v. Chicago Ins. Co.,*** 2004 U.S. Dist. LEXIS 17309 (D. Mass. Aug. 23, 2004), *modified in part on other grounds,* 2004 U.S. Dist. LEXIS 20682 (D. Mass. Oct. 18, 2004)	Predicting Massachusetts law would not allow reimbursement in "mixed" action, particularly where insurer refused to defend at the outset and sought allocation of defense costs to noncovered claims in retrospect
Minnesota	***Employers Mut. Cas. Co. v. Industrial Rubber Prods., Inc.,*** No. 04–3839, 2006 U.S. Dist. LEXIS 9242 (D. Minn. Feb. 23, 2006)	Rejecting ***Knapp,*** court holds where insured did not explicitly respond to insurer's reservation of right to recoupment, insurer was not entitled to recoup defense costs incurred before a determination of no coverage.
Missouri	***Liberty Mut. Ins. Co. v. FAG Bearings Corp.,*** 153 F.3d 919 (8th Cir. 1998)	No recoupment of defense costs is allowed before the point at which it was determined that the claims against the insured were not covered (see discussion above).
Pennsylvania	***Terra Nova Ins. Co., Ltd. v. 900 Bar, Inc.,*** 887 F.2d 1213 (3d Cir. 1989)	Predicting Pennsylvania would not recognize recoupment right, court notes that duty to defend under reservation of rights is as much for insurer's benefit as for insured's.
Pennsylvania	***LA Weight Loss Ctrs., Inc. v. Lexington Ins. Co.,*** 2006 Phila. Ct. Com. Pl. LEXIS 127 (Pa. Com. Pl. Mar. 1, 2006)	Following ***Terra Nova's*** prediction, court finds an insured is not unjustly enriched when insurer tenders a defense in order to protect its own interests. Policy cannot be unilaterally amended by reservation of rights letter.
Texas	***Matagorda County v. Texas Ass'n of Counties County Gov't Risk Mgmt. Pool,*** 975 S.W.2d 782 (Tex. App. 1998) **[see summary at 175]**, *aff'd,* 52 S.W.3d 128 (Tex. 2000)	Insurer not entitled to recoupment of defense costs absent explicit reservation of right to seek such costs from insured
West Virginia	***Medical Protective Co. v. McMillan,*** 2002 U.S. Dist. LEXIS 25638 (W.D. Va. Dec. 16, 2002)	Insurer has no right to reimbursement under policy in case where coverage was uncertain due to fact questions.
Wyoming	***Shoshone First Bank v. Pacific Employers Ins. Co.,*** 2 P.3d 510 (Wyo. 2000) **[see summary at 170]**	No right of recoupment exists in "mixed" action (see discussion above).

Conclusion

Insurers see recoupment as a means of controlling spiraling defense costs; they contend that they have not been paid premiums to defend noncovered claims. Insureds, on the other hand, see the duty to defend as a valuable component of their liability coverage and expect to be protected against the cost of litigation, which can exceed the settlement or judgment value of the case. Is recoupment an equitable remedy for an insurer that has conferred a benefit that the insured has not paid for? Or does it present a Hobson's choice for the insured, which must either accept the defense with the risk that it may have to reimburse the insurer or give up the insurer-funded defense and advance the defense costs itself—thus undermining the broad protection of the duty to defend?

In those jurisdictions that recognize the right of recoupment, the requirement that the recoupment remedy be explicitly posted in the reservation of rights letter serves the purpose of flagging the issue for the insured at the outset of the litigation. However, as a practical matter, insurers must recognize that, except in the cases of multimillionaire insureds such as Mr. Buss, many insureds are financially unable to bear defense costs, and recoupment may be an empty right.

2012 Update

When the original article was written in 2007, the author noted that the cases on recoupment were almost evenly split with a slight majority favoring a right of recoupment. Since that time, many additional decisions have been written on the issue, and now, in 2012, the pendulum has swung decidedly in the opposite direction. Many courts now reject any right of an insurer to recoup defense costs when it has defended an action for the insured that included noncovered claims. The tables below supplement the tables from the original article with new cases.

EXHIBIT 1 SUPPLEMENT
RECOUPMENT OF DEFENSE COSTS ALLOWED

State Law Applied	Citation	Remarks
Michigan	***Travelers Prop. Cas. Co. v. R.L. Polk & Co.,*** No. 06–12895, 2008 U.S. Dist. LEXIS 62151 (E.D. Mich. Mar. 24, 2008)	For those claims that clearly and unequivocally do not give rise to a duty to defend, the insurer may recoup defense costs incurred. Notice of intent to recoup subsequent to reservation of rights letter is sufficient. However, for all claims that even arguably fall under the insurance policy, the insurer may not recoup defense costs, even if it is later determined that the duty to defend did not exist.

EXHIBIT 2 SUPPLEMENT
RECOUPMENT OF DEFENSE COSTS *NOT* ALLOWED

State Law Applied	Citation	Remarks
Arkansas	***Medical Liab. Mut. Ins. Co. v. Alan Curtis Enters., Inc.,*** 285 S.W.3d 233 (Ark. 2008)	Without statutory or rule authority allowing for such, an insurer may not recoup attorney fees under a unilateral reservation of rights.
Idaho	***St. Paul Fire & Marine Ins. Co. v. Holland Realty, Inc.,*** No. 07–390, 2008 U.S. Dist. LEXIS 28108 (D. Idaho Aug. 6, 2008)	An insurer may not seek reimbursement of defense costs for noncovered claims unless there is an express provision in the policy allowing for such an event.
Idaho	***Blue Cross of Idaho Health Serv., Inc. v. Atlantic Mut. Ins. Co.,*** 734 F. Supp. 2d 1107 (D. Idaho 2010)	Following ***St. Paul,*** the insurer had no right of reimbursement absent a reservation of such a right in the policy. An insured's ability to hire and pay for its own lawyers until its insurer steps in to defend does not eliminate the insured's choice to hire independent counsel when rights are reserved or excuse the insurer's duty to defend, even if no coverage is ultimately found.
Illinois	***General Agents Ins. Co. of Am., Inc. v. Midwest Sporting Goods Co.,*** 828 N.E.2d 1092 (Ill. 2005)	If the insurance policy does not allow a right of reimbursement, then no right exists even if asserted in a reservation of rights letter, because the insurer is not permitted to unilaterally modify the policy coverage.

Massachusetts	***Welch Foods, Inc. v. National Union Fire Ins. Co.,*** No. 09–12087, 2010 U.S. Dist. LEXIS 110004 (D. Mass. Feb. 9, 2011), *aff'd,* 659 F.3d 191 (1st Cir. 2011)	Upon receipt of the complaint, an insurer must make the sometimes difficult decision as to whether the allegations state a claim that is potentially covered. The insurer, not the insured, bears the risk that its decision may be wrong. Therefore, there can be no right of reimbursement if the insurer undertakes the insured's defense, and the insurer cannot create a right of reimbursement by asserting same in a reservation of rights letter.
Minnesota	***Westchester Fire Ins. Co. v. Wallerich,*** 563 F.3d 707 (8th Cir. 2009) **[see summary at 175 and 1850]**	Unless there is an express agreement in the policy language authorizing reimbursement, a unilateral reservation of rights letter cannot create rights not contained within the insurance policy—namely, reimbursement of costs and expenses prior to a declaratory judgment that determines there is no duty to defend or indemnify.
Pennsylvania	***American & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.,*** 2 A.3d 526 (Pa. 2010) **[see summary at 410]**	The insurer has an absolute duty to defend claims that are potentially covered, and a court's later determination that the claims are not covered does not extinguish this duty. Thus, the insurer is not entitled to reimbursement for advanced defense costs.
Virgin Islands	***General Star Indem. Co. v. Virgin Islands Port Auth.,*** 564 F. Supp. 2d 473 (D.V.I. 2008)	Insurer cannot reserve rights to seek reimbursement of defense costs in the event of no coverage, because no such right exists in the policy.

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