

## What Does a Reservation of Rights Mean?

Here's the scenario: a problem arises on a project, either a claim or pre-claim that prompts you to report the matter to your professional liability carrier. Within the first couple of weeks following the notice, you're likely to receive a very ominous letter that tells you all the things that your professional liability policy may not cover. Why does an insurance carrier, who is supposed to protect you, start the relationship of trying to establish whether a claim has merit, begin the process on this unpleasant and adversarial footing? Simply put, that's part of the internal procedure carriers have to protect themselves. This is primarily due to internal corporate pressure to ensure they're protected in the future should something unanticipated arise so they can preserve their rights under the policy. Adjusters are subject to quality control review, and part of that review includes memorializing potential coverage issues that may arise. If they fail to outline the issues at the onset, they may be estopped from citing them, should they become more serious as the matter progresses.

### So, what should you do when you receive one of these ominous letters?

These routine letters rarely affect the way a claim is approached or how it is resolved. In my experience, I can't remember a single time the progression of a claim has been any different in how it is approached after the letter goes out, nor has the outcome been affected. This is true even when the policy doesn't cover all counts of a lawsuit.

Most carriers recognize that the duty to defend is paramount, and they understand and honor this obligation. Should you receive a disclaimer, or even a partial disclaimer, it may be reason to obtain counsel's advice about your coverage and rights.

Disclaimers are different from Reservation of Rights, which outline issues that might cause a problem in the future. An example of a partial disclaimer might be a situation that counts in a lawsuit alleging a warranty or an intentional act. Although this may be an actual coverage issue, if there are also counts that **are** covered, again, the outcome is rarely affected.

Next, if you have questions, you should talk to your adjuster about them. Even though the letter may seem very adversarial, they are routine. Try not to be adversarial in the conversation; instead, try to get answers, should you have questions. Whether this is a good idea as one of the first formal

methods of communication has been the subject of debate, but essentially, they are now a fact of life. Recognize that carriers evaluate adjusters as part of their performance reviews on how they address potential coverage issues, in addition to their general investigation of the merits of a claim and an analysis of the damages alleged. Ask the adjuster to keep you informed should coverage issues arise as the case develops, and then send a brief email thanking them for taking the time to speak with you and agreeing to keep you apprised should issues arise as the matter develops. Doing so should protect you, and may well be the last time that coverage issues are discussed. This approach will also allow your relationship with the adjuster to continue in a positive manner.

Another thing that can assist in avoiding a situation where potential problems become real problems is making sure that the defense counsel assigned is fully apprised of any potential coverage situations. Both defense counsel and brokers should be copied on all such correspondence, but sometimes that doesn't always occur. Make sure that both receive copies of whatever you receive from the carrier. Although the carrier may have retained your counsel, you are their client, and it is their duty to protect your interests, not the carrier. So, take a deep breath, which is likely to be one of many deep breaths you will need to take as you maneuver through a claim, and be an active participant, asking any questions you may have throughout the process. Disputes are unpleasant, but they can be maneuvered in a way that makes them tolerable; and they always come to an end.

*Ames & Gough, as your insurance and risk management advisor, is providing this update to assist you in your risk management efforts. While insurance is a critical component of any risk management and risk financing plan, the most important thing your organization can do is to work to prevent or minimize losses before they occur. If you have any questions or need further information about this topic and related issues, please contact your Ames & Gough client executive.*

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