J&CBLOG
Worthwhile Legal News and Commentary

Jackson & Campbell, P.C.
2300 N Street, N.W.
Suite 300
Washington, D.C. 20037-1194
202.457.1600 (p)

Seven Tips for Preparing an Effective Reservation of Rights Letter

30 Apr 2020

Peter J. Jenkins

An insurer's reservation of rights letter is often one of the most important documents in insurance coverage litigation. Insurers too often do not prepare coverage position letters that most effectively protect their interests. In a routine, low-value claim, this may not matter much. But in complex or potentially expensive cases, insurers should take extra care to prepare reservation of rights correspondence that does the most to protect their interests and achieve their goals. Keeping the following tips in mind when preparing coverage correspondence will be helpful.

1. Keep the Purpose in Mind

For most reservation of rights letters, the insurer's primary goal is to avoid an argument that the insurer has lost the right to assert some or all of its coverage defenses. But an RoR letter may also serve other purposes, such as:

- Persuading the insured to provide information or otherwise cooperate with the insurer;
- Documenting the insurer's coverage position for the insured, the claimant, the insurer's other employees, other insurers, reinsurers, and regulators;
- Demonstrating that the insurer acted reasonably and in good faith; or
- Setting up an argument that an insured waived or is estopped from asserting certain arguments.

The insurer's goals should shape the tone and content of the letter. When the goal is purely to avoid waiver and estoppel, the insurer should recognize that the primary audience for the letter is a reviewing court, and shape all aspects of the letter accordingly—including explaining reservations of rights in terms that can be understood by a generalist judge with no particular insurance experience.

The insurer's secondary goals can also shape the contents and tone of the letter. Perhaps the claim has been tendered by sophisticated coverage counsel, and the insurer anticipates a contentious coverage dispute. In those circumstances, a lengthy reservation of rights letter that discusses every conceivable coverage defense in detail and presses the insured to reveal its coverage positions early might be appropriate. On the other hand, perhaps the insured is unsophisticated and the coverage issues are unlikely to be complex, but the insurer urgently wants to know if the insured has other insurance coverage available. In such circumstances, a shorter letter that focuses on the insurer's information requests may serve the insurer's goals best.

2. Determine the Proper Recipients

An insurer's instinct is to address the coverage correspondence to whichever insured tendered the claim. While this is often sufficient (and arguably should always be sufficient), in some situations the insurer may find it advantageous to do more.

A cautious insurer will consider whether each defendant (or potential defendant) named in the underlying claim is or could be an insured. If the notice of claim contains any ambiguity on the point, the insurer could ask the insured to clarify which defendants seek coverage from the insurer. The insurer could also set out its own initial position as to whether each defendant is an insured, and what additional information may be necessary to resolve the question as to a

particular defendant.

The insurer may also need to confirm whether the insured that tendered the claim is acting as agent for other insureds, and potentially may want to separately contact those insureds. Failure to do so could lead to problems. For example, a Pennsylvania court considered a situation in which a claimant sued a daughter and her parents in connection with an accident. The daughter turned 18 shortly after the accident. The parents were named insureds under the relevant policy, and the daughter was an additional insured as a member of their household. The insurer sent its reservation of rights letters to the parents, but not to the daughter. The court held that because it had not sent reservation of rights correspondence to the daughter, the insurer was estopped from asserting its coverage defenses against her, even though she lived in the same household as and shared an attorney with her parents. *Erie Ins. Exch. v. Lobenthal*, 114 A.3d 832, 838-39 (Pa. Super. Ct. 2015).

Finally, the insurer in some circumstances may need to provide the claimant with a copy of its coverage position, either directly or indirectly through underlying defense counsel. *See, e.g.*, N.Y. Ins. Law § 3420(d)(2) (requiring notice of disclaimer to injured person in certain circumstances).

3. Address the Proper Policies

If the insurer issued more than one policy to the tendering insured, it may be wise to consider whether the insured has tendered to the proper policy or policies. When the insurer issued successive claims-made policies, the insured may not have properly identified when the policies deem the claim to have been made. When the insurer issued successive occurrence policies, the insured may not have properly identified which policy years are potentially triggered. In some situations, it may be wise to prepare a full reservation of rights as to policies to which the insured has not yet tendered. Even if not, a prudent insurer will usually specify in the RoR that it reserves all rights as to any policies not specifically addressed in the letter, and invite the insured to properly tender to any other policies under which it may seek coverage.

4. Clearly Convey the Insurer's Decisions

An insurer's instinct is often to reserve all rights and try to keep all of its options open. Nevertheless, some decisions cannot be postponed. An effective reservation of rights letter will clearly spell out the decisions that the insurer has made. These might include:

- Entirely disclaiming coverage as to certain causes of action, or as to certain defendants, rather than merely reserving the right to do so.
- Agreeing to appoint defense counsel, fund the insured's chosen counsel, or otherwise participate in the defense.
- Waiving certain coverage defenses, policy conditions, or other rights held by the insurer.

If the coverage correspondence does not clearly convey that that the insurer has made such decisions, a court might estop the insurer from implementing such decisions later in the case.

5. Convey Key Defense Information

An insurer that agrees to defend often simply states that it will do so, without more. While this may suffice in simple cases, insurers should be aware of the potential need to think more deeply about defense issues in early coverage correspondence.

In some states, an insurer's reservation of rights might also require the insured to specifically notify the insured that the

insured may select defense counsel. *See, e.g.*, *Utica Mut. Ins. Co. v. David Agency Ins., Inc.*, 327 F. Supp. 2d 922, 931 (N.D. Ill. 2004) (faulting insurer for telling insured that it could hire counsel at its own expense to protect against uncovered losses instead of volunteering to pay for independent defense counsel). In such states, an insurer that does not adequately inform the insured of the applicable judge-created rule might face an argument that it has waived its coverage reservations.

While considering defense counsel issues, an insurer also might profitably consider whether multiple insured defendants might have conflicting interests with each other such that defense counsel cannot ethically represent them without informed consent. Although defense counsel is primarily responsible for complying with its professional obligations, an insurer might find it advantageous to encourage the insureds and defense counsel to address potential conflict issues early—and to document its claim file that the insureds had an early chance to assert that separate defense counsel would be needed.

A majority of states to consider the issue allow insurers to recoup uncovered defense costs in some circumstances. But these states also require the insurer to specifically tell the putative insured that the insurer reserves the right to do so before expending the defense costs to be recouped. *See, e.g.*, *Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460, 467-68 (2005); *Colony Ins. Co. v. G & E Tires & Serv., Inc.*, 777 So. 2d 1034, 1039 (Fla. Dist. Ct. App. 2000). Accordingly, if the insurer might have any desire to try to recoup defense costs, it is advisable to specifically reserve the right to do so early, and in each later coverage letter.

6. Tie Reservations to Underlying Allegations

Some recent court decisions have harshly criticized some coverage letters as insufficiently specific to effectively reserve the insurer's rights. The Supreme Court of South Carolina recently stated that an RoR that "merely provides the insured with a copy of the policy, coupled with a general statement that the insurer reserves all of its rights," is not "sufficient." *Harleysville Group Ins. v. Heritage Communities, Inc.*, 803 S.E.2d 288, 296 (S.C. 2017). The court criticized the insurer's "general denials of coverage" coupled with a "cut-and-paste" copy of "all or most of the policy provisions." *Id.* at 297. Despite including a ten-page excerpt of various policy terms, the coverage correspondence "included no discussion of [the insurer]'s position as to the various provisions or explanation of its reasons for potentially denying coverage." *Id.* at 299. Because the court found the reservation of rights correspondence ineffective (except as to one issue), it did not allow the insurer to assert coverage defenses to the underlying judgments. *Id.* at 301.

A Montana trial court made similar criticisms to a letter that "sets forth pages of policy provisions but does not explain why [the insurer] believed the insurance policy would possibly not cover [the insured] for the shooting incident." As such, the insurer "did not 'apply' the sole fact stated to the policy's legal terms." *Safeco. Ins. Co. of Am. v. Liss*, NO. 29-99-12, 2005 WL 7137967, at *10 (Mont. Dist. Mar. 11, 2005). The court complained that the insurer's generic reservation of rights had not explained which of the underlying claims "are potentially uncovered and why." *Id.*

And a Pennsylvania appellate court recently found an insurer's generic reservation of all rights ineffective when the insurer did not quote or apply an exclusion that "was evident on the face of the Policy" and obviously applied to the underlying claim. *Selective Way Ins. Co. v. MAK Servs., Inc.*, 2020 WL 1973964, at *6-*7 (Pa. Super. Ct. Apr. 24, 2020).

Such judicial criticisms are probably impossible to avoid entirely. A result-oriented court can always claim that a letter either did not have enough detail or had so much detail that it was unreadably long. But even if a complete safe harbor is impossible, an insurer can do more to avoid such critiques by striving to provide an appropriate amount of detail in connection with each specific issue upon which it reserves rights.

(CONTINUED)

SEVEN TIPS FOR PREPARING AN EFFECTIVE RESERVATION OF RIGHTS LETTER

For each issue on which the insurer wants to reserve rights, an effective RoR should include three ingredients in the operative paragraph or paragraphs: (1) the relevant underlying allegation; (2) the relevant coverage limitation; and (3) a specific reservation that connects (1) and (2). The precise order of these ingredients does not matter, but they should all be present.

As to allegations, the part of the letter that expressly reserves rights as to a coverage issue should mention the underlying allegation or other fact that prompts the reservation. This need not and should not involve extensive quotations from underlying complaints—the insured (and the reviewing court) will have copies of the pleadings. But the letter should concisely summarize the allegations (or facts) that prompted the insurer to reserve rights on the issue under discussion. Although most RoRs contain an early discussion of the underlying facts, it is helpful to recap the most relevant facts as to the coverage issue under discussion in the part of the letter that addresses that issue. The recap need not be long, but is necessary to orient the reader as to why the coverage issue is under discussion in the first place.

The letter should also discuss the relevant coverage limitation. Some insurers like to quote the language in full, but this is not always necessary, and may impede readability if the relevant policy text is lengthy or complex. Again, the insured (and court) will have copies of the policy, so as long as the letter fairly summarizes policy language available elsewhere it should be effective.

Finally, the insurer should specify that it reserves the right to enforce the coverage limitation in a manner that connects the allegation to the coverage limitation. Done properly, this clearly conveys to the insured and to the reviewing court why the insurer is raising this particular coverage issue, as well as the circumstances in which the insured could expect to see the insurer disclaim coverage.

To illustrate, consider the following paragraphs addressing a hypothetical *Smith v. Jones* battery case, where Acme Insurer wants to reserve the right to invoke an intentional acts exclusion:

Effective: Mr. Smith alleges that Mr. Jones struck him intentionally as well as negligently, and elsewhere accuses Mr. Jones of "deliberate" conduct. The Policy contains an exclusion for damages arising out of intentional conduct. Acme Insurer accordingly reserves the right to disclaim coverage for any portion of a judgment or settlement representing compensation for damages caused by Mr. Jones's intentional conduct.

Note that the order of the first and second sentences is not important, but both are necessary. The third sentence ties the two together and conveys the insurer's coverage position.

Less Effective—Minus (1): The Policy excludes coverage for "damages expected or intended from the standpoint of the insured, or caused intentionally, or maliciously, or arising out of reprehensible conduct." Policy, COMMERCIAL LIABILITY COVERAGE PART, Sections III(A)(2)(b) and III(A)(2)(b)(iii), as amended by Endorsements 4, 23, and 27. Acme Insurer accordingly reserves the right to disclaim coverage for any portion of a judgment or settlement representing compensation for damages caused by Mr. Jones's intentional conduct.

Without ingredient (1), the reader has to guess why the insurer brings up the exclusion. Is there a connection to the underlying case, or is this paragraph just boilerplate that the insurer always includes?

Less Effective—Minus (2): Mr. Smith alleges that Mr. Jones "intentionally and/or negligently struck him with his knuckles, elbow, and/or club, and acted willfully, wantonly, maliciously, recklessly, and/or negligently in his conduct during the Incident." Third Amended Complaint, Paragraph 23(b). Acme Insurer accordingly reserves the right to disclaim coverage for any portion of a judgment or settlement representing compensation for damages caused by Mr.

Jones's intentional conduct.

Without ingredient (2), the letter does not provide the policy language basis for the insurer's reservation, and thus a court may find that it does not adequately inform the insured of the basis for the insurer's position.

Less Effective—Minus (3): Mr. Smith alleges that Mr. Jones "intentionally and/or negligently struck him with his knuckles, elbow, and/or club, and acted willfully, wantonly, maliciously, recklessly, and/or negligently in his conduct during the Incident." The Policy excludes coverage for "damages expected or intended from the standpoint of the insured, or caused intentionally, or maliciously, or arising out of reprehensible conduct." Policy, COMMERCIAL LIABILITY COVERAGE PART, Section III(A)(2)(b)(iii), as amended by Endorsements 4, 23, and 27. Acme Insurer reserves all rights accordingly.

Without ingredient (3), the reader has to do the work of applying the exclusion to the allegations. A court might conclude that without a more specific explanation of the insurer's position, the reservation is not effective as to this exclusion.

While the three-ingredient method may take a bit more work than merely copying and pasting allegations and policy terms, done properly it results in easily-readable RoR letters that courts are more likely to find effectively preserved the insurer's rights.

7. Be Specific About Potential Indemnity Issues

Whether or not the insurer is defending, it should consider whether the case presents any complex issues as to indemnification.

If the underlying case will likely result in a judgment or settlement that includes both covered and uncovered losses, the insurer would be wise to alert the insured to a need for allocation early and often. *See, e.g.*, *Heritage Communities*, 803 S.E.2d at 297-98, 299 (faulting insurer for failing to advise insured of need for allocated verdict).

If the insurer wants to preserve the common-law restitutionary right to recoup from the putative insured the uncovered portion of any judgment or settlement payment that it advances, it should likewise reserve the right to do so early and often.

Similarly, if the insurer will require particular information about exhaustion of underlying insurance or other insurance before it will make payments, it should highlight the need for that information as early as possible.

***

A "perfect" coverage letter does not exist, and a hostile insured or court examining a reservation of rights letter with the benefit of hindsight will likely always find something to criticize. Nevertheless, care and attention to issues such as those identified above can do much to protect insurers' interests.

This summary is not intended to contain legal advice or to be an exhaustive review. If you have any questions regarding this article, please contact Peter J. Jenkins at Jackson & Campbell, P.C.

J&CBLOG
Worthwhile Legal News and Commentary

Seven Tips for Preparing an Effective Reservation of Rights Letter

30 Apr 2020
Peter J. Jenkins

An insurer's reservation of rights letter is often one of the most important documents in insurance coverage litigation. Insurers too often do not prepare coverage position letters that most effectively protect their interests. In a routine, low-value claim, this may not matter much. But in complex or potentially expensive cases, insurers should take extra care to prepare reservation of rights correspondence that does the most to protect their interests and achieve their goals. Keeping the following tips in mind when preparing coverage correspondence will be helpful.

1. Keep the Purpose in Mind

For most reservation of rights letters, the insurer's primary goal is to avoid an argument that the insurer has lost the right to assert some or all of its coverage defenses. But an RoR letter may also serve other purposes, such as:

- Persuading the insured to provide information or otherwise cooperate with the insurer;
- Documenting the insurer's coverage position for the insured, the claimant, the insurer's other employees, other insurers, reinsurers, and regulators;
- Demonstrating that the insurer acted reasonably and in good faith; or
- Setting up an argument that an insured waived or is estopped from asserting certain arguments.

The insurer's goals should shape the tone and content of the letter. When the goal is purely to avoid waiver and estoppel, the insurer should recognize that the primary audience for the letter is a reviewing court, and shape all aspects of the letter accordingly—including explaining reservations of rights in terms that can be understood by a generalist judge with no particular insurance experience.

The insurer's secondary goals can also shape the contents and tone of the letter. Perhaps the claim has been tendered by sophisticated coverage counsel, and the insurer anticipates a contentious coverage dispute. In those circumstances, a lengthy reservation of rights letter that discusses every conceivable coverage defense in detail and presses the insured to reveal its coverage positions early might be appropriate. On the other hand, perhaps the insured is unsophisticated and the coverage issues are unlikely to be complex, but the insurer urgently wants to know if the insured has other insurance coverage available. In such circumstances, a shorter letter that focuses on the insurer's information requests may serve the insurer's goals best.

2. Determine the Proper Recipients

An insurer's instinct is to address the coverage correspondence to whichever insured tendered the claim. While this is often sufficient (and arguably should always be sufficient), in some situations the insurer may find it advantageous to do more.

(CONTINUED)

SEVEN TIPS FOR PREPARING AN EFFECTIVE RESERVATION OF RIGHTS LETTER

A cautious insurer will consider whether each defendant (or potential defendant) named in the underlying claim is or could be an insured. If the notice of claim contains any ambiguity on the point, the insurer could ask the insured to clarify which defendants seek coverage from the insurer. The insurer could also set out its own initial position as to whether each defendant is an insured, and what additional information may be necessary to resolve the question as to a particular defendant.

The insurer may also need to confirm whether the insured that tendered the claim is acting as agent for other insureds, and potentially may want to separately contact those insureds. Failure to do so could lead to problems. For example, a Pennsylvania court considered a situation in which a claimant sued a daughter and her parents in connection with an accident. The daughter turned 18 shortly after the accident. The parents were named insureds under the relevant policy, and the daughter was an additional insured as a member of their household. The insurer sent its reservation of rights letters to the parents, but not to the daughter. The court held that because it had not sent reservation of rights correspondence to the daughter, the insurer was estopped from asserting its coverage defenses against her, even though she lived in the same household as and shared an attorney with her parents. *Erie Ins. Exch. v. Lobenthal*, 114 A.3d 832, 838-39 (Pa. Super. Ct. 2015).

Finally, the insurer in some circumstances may need to provide the claimant with a copy of its coverage position, either directly or indirectly through underlying defense counsel. *See, e.g.*, N.Y. Ins. Law § 3420(d)(2) (requiring notice of disclaimer to injured person in certain circumstances).

3. Address the Proper Policies

If the insurer issued more than one policy to the tendering insured, it may be wise to consider whether the insured has tendered to the proper policy or policies. When the insurer issued successive claims-made policies, the insured may not have properly identified when the policies deem the claim to have been made. When the insurer issued successive occurrence policies, the insured may not have properly identified which policy years are potentially triggered. In some situations, it may be wise to prepare a full reservation of rights as to policies to which the insured has not yet tendered. Even if not, a prudent insurer will usually specify in the RoR that it reserves all rights as to any policies not specifically addressed in the letter, and invite the insured to properly tender to any other policies under which it may seek coverage.

4. Clearly Convey the Insurer's Decisions

An insurer's instinct is often to reserve all rights and try to keep all of its options open. Nevertheless, some decisions cannot be postponed. An effective reservation of rights letter will clearly spell out the decisions that the insurer has made. These might include:

- Entirely disclaiming coverage as to certain causes of action, or as to certain defendants, rather than merely reserving the right to do so.
- Agreeing to appoint defense counsel, fund the insured's chosen counsel, or otherwise participate in the defense.
- Waiving certain coverage defenses, policy conditions, or other rights held by the insurer.

If the coverage correspondence does not clearly convey that that the insurer has made such decisions, a court might estop the insurer from implementing such decisions later in the case.

5. Convey Key Defense Information

An insurer that agrees to defend often simply states that it will do so, without more. While this may suffice in simple

cases, insurers should be aware of the potential need to think more deeply about defense issues in early coverage correspondence.

In some states, an insurer's reservation of rights might also require the insured to specifically notify the insured that the insured may select defense counsel. *See, e.g.*, *Utica Mut. Ins. Co. v. David Agency Ins., Inc.*, 327 F. Supp. 2d 922, 931 (N.D. Ill. 2004) (faulting insurer for telling insured that it could hire counsel at its own expense to protect against uncovered losses instead of volunteering to pay for independent defense counsel). In such states, an insurer that does not adequately inform the insured of the applicable judge-created rule might face an argument that it has waived its coverage reservations.

While considering defense counsel issues, an insurer also might profitably consider whether multiple insured defendants might have conflicting interests with each other such that defense counsel cannot ethically represent them without informed consent. Although defense counsel is primarily responsible for complying with its professional obligations, an insurer might find it advantageous to encourage the insureds and defense counsel to address potential conflict issues early—and to document its claim file that the insureds had an early chance to assert that separate defense counsel would be needed.

A majority of states to consider the issue allow insurers to recoup uncovered defense costs in some circumstances. But these states also require the insurer to specifically tell the putative insured that the insurer reserves the right to do so before expending the defense costs to be recouped. *See, e.g.*, *Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460, 467-68 (2005); *Colony Ins. Co. v. G & E Tires & Serv., Inc.*, 777 So. 2d 1034, 1039 (Fla. Dist. Ct. App. 2000). Accordingly, if the insurer might have any desire to try to recoup defense costs, it is advisable to specifically reserve the right to do so early, and in each later coverage letter.

6. Tie Reservations to Underlying Allegations

Some recent court decisions have harshly criticized some coverage letters as insufficiently specific to effectively reserve the insurer's rights. The Supreme Court of South Carolina recently stated that an RoR that "merely provides the insured with a copy of the policy, coupled with a general statement that the insurer reserves all of its rights," is not "sufficient." *Harleysville Group Ins. v. Heritage Communities, Inc.*, 803 S.E.2d 288, 296 (S.C. 2017). The court criticized the insurer's "general denials of coverage" coupled with a "cut-and-paste" copy of "all or most of the policy provisions." *Id.* at 297. Despite including a ten-page excerpt of various policy terms, the coverage correspondence "included no discussion of [the insurer]'s position as to the various provisions or explanation of its reasons for potentially denying coverage." *Id.* at 299. Because the court found the reservation of rights correspondence ineffective (except as to one issue), it did not allow the insurer to assert coverage defenses to the underlying judgments. *Id.* at 301.

A Montana trial court made similar criticisms to a letter that "sets forth pages of policy provisions but does not explain why [the insurer] believed the insurance policy would possibly not cover [the insured] for the shooting incident." As such, the insurer "did not 'apply' the sole fact stated to the policy's legal terms." *Safeco. Ins. Co. of Am. v. Liss*, NO. 29-99-12, 2005 WL 7137967, at *10 (Mont. Dist. Mar. 11, 2005). The court complained that the insurer's generic reservation of rights had not explained which of the underlying claims "are potentially uncovered and why." *Id.*

And a Pennsylvania appellate court recently found an insurer's generic reservation of all rights ineffective when the insurer did not quote or apply an exclusion that "was evident on the face of the Policy" and obviously applied to the underlying claim. *Selective Way Ins. Co. v. MAK Servs., Inc.*, 2020 WL 1973964, at *6-*7 (Pa. Super. Ct. Apr. 24, 2020).

(CONTINUED)

SEVEN TIPS FOR PREPARING AN EFFECTIVE RESERVATION OF RIGHTS LETTER

Such judicial criticisms are probably impossible to avoid entirely. A result-oriented court can always claim that a letter either did not have enough detail or had so much detail that it was unreadably long. But even if a complete safe harbor is impossible, an insurer can do more to avoid such critiques by striving to provide an appropriate amount of detail in connection with each specific issue upon which it reserves rights.

For each issue on which the insurer wants to reserve rights, an effective RoR should include three ingredients in the operative paragraph or paragraphs: (1) the relevant underlying allegation; (2) the relevant coverage limitation; and (3) a specific reservation that connects (1) and (2). The precise order of these ingredients does not matter, but they should all be present.

As to allegations, the part of the letter that expressly reserves rights as to a coverage issue should mention the underlying allegation or other fact that prompts the reservation. This need not and should not involve extensive quotations from underlying complaints—the insured (and the reviewing court) will have copies of the pleadings. But the letter should concisely summarize the allegations (or facts) that prompted the insurer to reserve rights on the issue under discussion. Although most RoRs contain an early discussion of the underlying facts, it is helpful to recap the most relevant facts as to the coverage issue under discussion in the part of the letter that addresses that issue. The recap need not be long, but is necessary to orient the reader as to why the coverage issue is under discussion in the first place.

The letter should also discuss the relevant coverage limitation. Some insurers like to quote the language in full, but this is not always necessary, and may impede readability if the relevant policy text is lengthy or complex. Again, the insured (and court) will have copies of the policy, so as long as the letter fairly summarizes policy language available elsewhere it should be effective.

Finally, the insurer should specify that it reserves the right to enforce the coverage limitation in a manner that connects the allegation to the coverage limitation. Done properly, this clearly conveys to the insured and to the reviewing court why the insurer is raising this particular coverage issue, as well as the circumstances in which the insured could expect to see the insurer disclaim coverage.

To illustrate, consider the following paragraphs addressing a hypothetical *Smith v. Jones* battery case, where Acme Insurer wants to reserve the right to invoke an intentional acts exclusion:

Effective: Mr. Smith alleges that Mr. Jones struck him intentionally as well as negligently, and elsewhere accuses Mr. Jones of "deliberate" conduct. The Policy contains an exclusion for damages arising out of intentional conduct. Acme Insurer accordingly reserves the right to disclaim coverage for any portion of a judgment or settlement representing compensation for damages caused by Mr. Jones's intentional conduct.

Note that the order of the first and second sentences is not important, but both are necessary. The third sentence ties the two together and conveys the insurer's coverage position.

Less Effective—Minus (1): The Policy excludes coverage for "damages expected or intended from the standpoint of the insured, or caused intentionally, or maliciously, or arising out of reprehensible conduct." Policy, COMMERCIAL LIABILITY COVERAGE PART, Sections III(A)(2)(b) and III(A)(2)(b)(iii), as amended by Endorsements 4, 23, and 27. Acme Insurer accordingly reserves the right to disclaim coverage for any portion of a judgment or settlement representing compensation for damages caused by Mr. Jones's intentional conduct.

Without ingredient (1), the reader has to guess why the insurer brings up the exclusion. Is there a connection to the underlying case, or is this paragraph just boilerplate that the insurer always includes?

(CONTINUED)

SEVEN TIPS FOR PREPARING AN EFFECTIVE RESERVATION OF RIGHTS LETTER

Less Effective—Minus (2): Mr. Smith alleges that Mr. Jones "intentionally and/or negligently struck him with his knuckles, elbow, and/or club, and acted willfully, wantonly, maliciously, recklessly, and/or negligently in his conduct during the Incident." Third Amended Complaint, Paragraph 23(b). Acme Insurer accordingly reserves the right to disclaim coverage for any portion of a judgment or settlement representing compensation for damages caused by Mr. Jones's intentional conduct.

Without ingredient (2), the letter does not provide the policy language basis for the insurer's reservation, and thus a court may find that it does not adequately inform the insured of the basis for the insurer's position.

Less Effective—Minus (3): Mr. Smith alleges that Mr. Jones "intentionally and/or negligently struck him with his knuckles, elbow, and/or club, and acted willfully, wantonly, maliciously, recklessly, and/or negligently in his conduct during the Incident." The Policy excludes coverage for "damages expected or intended from the standpoint of the insured, or caused intentionally, or maliciously, or arising out of reprehensible conduct." Policy, COMMERCIAL LIABILITY COVERAGE PART, Section III(A)(2)(b)(iii), as amended by Endorsements 4, 23, and 27. Acme Insurer reserves all rights accordingly.

Without ingredient (3), the reader has to do the work of applying the exclusion to the allegations. A court might conclude that without a more specific explanation of the insurer's position, the reservation is not effective as to this exclusion.

While the three-ingredient method may take a bit more work than merely copying and pasting allegations and policy terms, done properly it results in easily-readable RoR letters that courts are more likely to find effectively preserved the insurer's rights.

7. Be Specific About Potential Indemnity Issues

Whether or not the insurer is defending, it should consider whether the case presents any complex issues as to indemnification.

If the underlying case will likely result in a judgment or settlement that includes both covered and uncovered losses, the insurer would be wise to alert the insured to a need for allocation early and often. *See, e.g.*, *Heritage Communities*, 803 S.E.2d at 297-98, 299 (faulting insurer for failing to advise insured of need for allocated verdict).

If the insurer wants to preserve the common-law restitutionary right to recoup from the putative insured the uncovered portion of any judgment or settlement payment that it advances, it should likewise reserve the right to do so early and often.

Similarly, if the insurer will require particular information about exhaustion of underlying insurance or other insurance before it will make payments, it should highlight the need for that information as early as possible.

***

A "perfect" coverage letter does not exist, and a hostile insured or court examining a reservation of rights letter with the benefit of hindsight will likely always find something to criticize. Nevertheless, care and attention to issues such as those identified above can do much to protect insurers' interests.

This summary is not intended to contain legal advice or to be an exhaustive review. If you have any questions regarding this article, please contact Peter J. Jenkins at Jackson & Campbell, P.C.

(CONTINUED)

SEVEN TIPS FOR PREPARING AN EFFECTIVE RESERVATION OF RIGHTS LETTER

TAGGED: Insurance Coverage Case Concepts, Reservation of Rights, N.Y. Ins. Law § 3420(d)(2)