K&B
KROKIDAS & BLUESTEIN LLP

617.482.7211
kb-law.com

# *Having Reservations?*
# Navigating an Insurer's Reservation of Rights in Litigation

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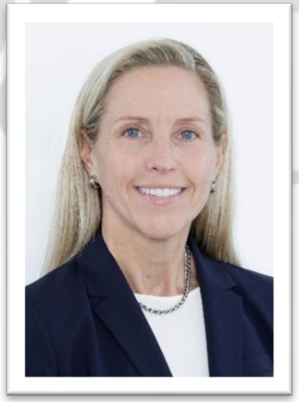
# Today’s Presenters

**Jill Brenner Meixel**

jmeixel@kb-law.com

**Bettina Toner**



btoner@kb-law.com

# Agenda



- **Setting the Stage**
  - Basic Principles of Insurance Law
    - Duty to Defend vs. Duty to Indemnify
    - What is a Reservation of Rights?
- **Conflicts of Interest and Reservations of Rights**
  - Generally
  - Right to Select Independent Counsel
  - Obligation of Insurer to Pay Reasonable Attorneys' Fees
  - Navigating Insurer's Guidelines
- **When All Else Fails: Claims under M.G.L. c. 93A/c. 176D**
- **Additional Tips**

# Setting the Stage

# Basic Principles of Insurance Law: Insurer's Duty to Defend



- An insurer has a duty to defend where a claim is or may be covered under an insurance policy.
- The duty to defend is broader than a duty to indemnify.
  - e.g., duty to pay a judgment for damages.

# Basic Principles of Insurance Law: Insurer's Duty to Defend



- "An insurer's duty to defend is triggered when the allegations in a third party's complaint against an insured are '**reasonably susceptible** of an interpretation that states or roughly sketches a claim covered by the policy terms.'" John Moriarty & Assoc. v. Zurich, 102 Mass. App. Ct. 474 (2023).
  - In other words, a duty to defend arises when there is a ***possibility, not a probability***, of recovery under an insurance policy.
  - "[T]he underlying complaint need only show, through general allegations, a possibility that the liability claim falls within the insurance coverage. There is no requirement that the facts alleged in the complaint specifically and unequivocally make out a claim within the coverage." Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., *439 Mass. 387 (2003)*.

# Basic Principles of Insurance Law: Reservation of Rights



- An insurer may agree to defend the insured but issue a reservation of rights if coverage (defense and indemnity) is not unequivocal.
  - e.g., Insurer could decide not to cover the claims at any time.
- A reservation of rights could come into play where:
  - insurer has duty to defend but not indemnify (e.g., where some claims are covered and others are not).
  - claim may not ultimately be covered depending on how facts play out in litigation.
  - Plaintiff seeks injunctive or non-monetary relief.

# The Scenario: How to Navigate an Insurer's Reservation of Rights



- Insured receives demand letter or is sued by third party regarding a potential claim.
- *Step 1*: Take stock of insurance policies to assess whether you may have insurance to cover the claim.
  - If you have insurance policies, **do not** make this decision alone – contact your insurance broker or the carrier directly and quickly.
- *Step 2*: Report claim to the insurer (through broker or directly).
  - Even if you think the claim may not be covered, report it, especially if it seeks damages above the retention amount.

# The Scenario: How to Navigate an Insurer's Reservation of Rights, <u>continued</u>



- <u>*Step 3*</u>: Insurer reviews the claim and provides a coverage determination, typically through a letter (although this can be done more informally, such through an email).
- <u>*Step 4*</u>: ***Critical** to read the fine print of the coverage letter/email to determine whether the insurer is issuing a reservation of rights. Typically, some form of the words "reservation of rights"* ***will*** *appear and you will not need to read between the lines.*
- <u>*Step 5*</u>: If a reservation of rights is issued, it is important to:
  - **Know your rights as the insured;**
  - **Understand insurer's obligations; and**
  - **Act promptly to avoid waiving your rights.**

# What Does A Reservation of Rights Look Like? Some Real Examples:



- This letter addresses only those Policy provisions that appear pertinent at this time in light of the facts currently known and available to us, without accepting or implying that the allegations have any factual or legal merit. We reserve the right to review all coverage issues and not merely those raised by any additional information or evidence. By limiting Policy references to those cited, we do not waive any other Policy provisions. We will re-evaluate our coverage position if there are any material changes in the allegations or in the facts. If you have any additional information that you believe may have bearing upon our analysis of coverage in this matter, please advise us immediately.

# What Does A Reservation of Rights Look Like? Some Real Examples:



- Coverage letter including a section heading entitled "Reservation of Rights" heading, and further stating that "all rights under the Policy, at law and/or in equity are reserved fully and mutually."
- "[Insurer] continues to reserve all rights and defenses available under the Policy and law including the right to supplement this letter as the matter develops."
- "I will be providing a coverage letter **in the form of a reservation of rights**, which simply spells out the insurance coverages that apply and don't apply to the current facts and the coverages that may not apply to future facts that may crop up."
- "Pursuant to a complete reservation of rights, this matter constitutes a **Claim** under the Policy. Pursuant to . . . the Policy, [the insurer] has the right and duty to defend any **Claim** to which this insurance applies."

# Conflicts of Interest Stemming from Reservations of Rights

# Conflicts of Interest Generally



- Where an insurer issues a reservation of rights, the Supreme Judicial Court has described a "binary choice" framework:
  - "When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, **the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs.**"

Herbert A. Sullivan, Inc. v. Utica Mutual Insur. Co., 439 Mass. 387 (2003).

# Conflicts of Interest Generally



- **If insurer wants to maintain control over the litigation, it must lift the reservation of rights and unequivocally agree to defend and indemnify.**
- An insurer's right to control the insured's defense is limited by defense counsel's ethical obligations to the insured, and is tempered where a concurrent conflict exists:
  - Rule 1.7(a) of the MA Rules of Professional Conduct Concerning the Attorney-Client Relationship prohibits representation of a client when:
    - (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one of more clients will be materially limited by the lawyer's responsibilities to another client.

# Conflicts of Interest Generally



- **Where an insurer will not lift the reservation of rights, an insured has the right to maintain control of its defense to avoid a conflict of interest.**
  - "Where [the insurer] insisted on proceeding subject to a reservation of rights, [the insured] was entitled to maintain control of its defense and to seek payment of its legal bills from [the insurer]. At that point, [the insurer] was required to reimburse [the insured] for reasonable attorney's fees incurred by [the insured's] chosen counsel." John Moriarty & Assoc. v. Zurich, 102 Mass. App. Ct. 474, 480 (2023).

# Conflicts of Interest Generally



- If insurer issues a reservation of rights and the insured does not push back and allows insurer to maintain control, insured likely is **waiving its right to control.**
- For example, in Herbert A. Sullivan, Inc. (SJC 2003), the insurer issued a reservation of rights and the court determined:
  - "There is no indication in the record that [the insured] either insisted on having the reservation of rights removed or, in the alternative, insisted on assuming control of its own defense. As such, we conclude that [the insured] acquiesced…."].

# A Reservation of Rights Quandary



- What if an insurance company **does not** issue a reservation of rights in a case that clearly requires it, where it will be harmful to the insured for it not to have control of the litigation.
- This, too, presents a conflict of interest for the insurer.
- ***Example***: A case that includes claims for both monetary and equitable/injunctive relief. Injunctive relief against the insured will be extremely harmful, and insurer only focused on the dollars $$$.

# Reservation of Rights: When the Insured Controls Its Defense



Under Massachusetts law, the insured has the right to:

Select independent counsel

With the reasonable costs of paid by the insurer

# Reservation of Rights: Insured's Right to Select Independent Counsel



- An insured's right to reject insurer-controlled defense when a reservation of rights issued was established in the foundational cases of Three Sons, Inc. v. Phoenix Ins. Co., 357 Mass. 271 (1970) and Magoun v. Liberty Mut. Ins. Co., 346 Mass. 677 (1964).
- In recognition of the "potential conflicts" presented where an insurer asserts a reservation of rights, the Massachusetts Supreme Judicial Court has held that where an insurer offers to defend under a reservation of rights, the insured has a right to object to the counsel selected by the insurer and insist on having its own counsel control the defense at the insurer's expense.

# Reservation of Rights: Insurer's Obligation to Pay the Reasonable Rates of Insured's Independent Counsel



- "Through its reservation of rights, an insurer's duty to defend is transformed into a duty to reimburse its insured for reasonable attorney's fees incurred by the insured's chosen counsel."

  Rass Corp. v. The Travelers Cos., 90 Mass. App. Ct. 643, 657 n.16 (2016).

- Insurers must pay the insured's reasonable attorneys' fees when insureds select independent counsel.
  - "Where the insured's interest in controlling … litigation against him conflicts with the similar interest of the insurer, the insured may have good cause to ask that he be represented by counsel independent of the insurer." Magoun v. Liberty Mut. Ins. Co., 346 Mass. 677 (1964) (with principle reaffirmed as recently as 2023 in John Moriarty & Assoc. v. Zurich, 102 Mass. App. Ct. 474 (2023).

# Reservation of Rights: Insurance Panel Rates Do Not Dictate What Constitutes a "Reasonable" Rate



- Market rates, **not** panel counsel rates, control.
  - "[R]easonable charges are to be assessed with reference to market rates; an insurer may not insist on paying only the discounted rate it has been able to negotiate with its panel of attorneys." Citation Ins. Co. v. Newman, 80 Mass. App. Ct. 143, 144 n.4 (2011).
  - The "legal standard for determining the reasonableness of legal fees" is "not the usual price paid by insurance companies to other attorneys," but "what a reasonable person in the insured's position would pay for capable attorneys it chose to retain." Watts Water Techs. v. Fireman's Fund Ins. Co., 22 Mass. L. Rptr. 659, 666 (Superior Ct. 2007).

# Reservation of Rights: Insurance Panel Rates Do Not Dictate What Constitutes a "Reasonable" Rate



- "Panel rates . . . often reflect
  - first, what [the insurance company] was able to bargain for as a large insurance company handling various cases involving many attorneys, who presumably wish to continue receiving referrals;
  - and second, the justifiable interest of a company such as [this insurance company] to keep its legal costs down, especially in routine cases, which may be at odds with an insured's desire to pay more for legal representation in the hope of minimizing legal exposure." <u>Northern Security v. R.H. Realty</u>, 78 Mass. App. Ct. 691 (2011).
- Reasonableness not established by "artificially reduced rates negotiated by insurance companies in exchange for a "substantial volume of legal work," nor by the carrier's option to select "lower-priced attorneys" to achieve a savings in legal costs in cases in which it expects that such a savings will exceed any anticipated increase in damages. <u>Watts Water Techs.</u> (2007).

# Caution!!



- It is critical for an insured not to agree to carrier-imposed rates before the coverage determination is issued.
  - e.g., In Northern Security v. R.H. Realty, 78 Mass. App. Ct. 691 (2011), the Massachusetts Appeals Court confirmed that an insurer defending under a reservation of rights must reimburse its insured for reasonable attorney's fees based on market rates, **but** it held that a trial court's $350/hour award was excessive where the insured had **agreed** to a $225/hour rate, emphasizing that "compensatory damages may not exceed this amount. Anything beyond that amount is a windfall." The lower court had determined that the $350/hour award was reasonable.

# Case Examples of Rates Determined to be Reasonable



- $475 per hour for an experienced attorney. Bridges v. Comm. of Mass. Alcoholic Beverages Control Comm'n, No. 02-BEM-01551 (MCAD Oct. 28, 2008).
- $400 per hour for work performed in 2003, noting that rate was "well within the range of rates charged by attorneys in Boston with similar experience." MCAD and James Blue v. Aramark Corp., 27 MDLR 73 (2005).
- $400 per hour for work performed in 2002. MCAD and Jill Mercurio v. Atamian Volkswagen et al., 25 MDLR 427 (2003).
- $495 per hour for experienced attorney and $300 per hour for junior attorney in Superior Court wage and hour matter. Parker v. EnerNoc, Inc., 35 Mass. L. Rptr. No. 9, 174, 177 (October 1, 2018).
- $650 per hour for partners of small firm in wage case. Davis v. Footbridge Eng'g Servs., LLC, No. 09CV11133-NG, 2011 WL 3678928 (D. Mass. Aug. 22, 2011).
- $560-$600 per hour for partner with 29 years' experience; $345-$375 for associate with 5 years' experience in Federal Court in Eighth Amendment/ADA matter. Alexander v. Mass. Dept. of Corrections, 734 F. Supp.3d 133 (D. Mass. 2024).

# Conflicts of Interest Created By Insurance Company Litigation Management Guidelines



- Insurers frequently require defense counsel, even where there is a reservation of rights, to sign off on their internal Guidelines.
- Prior to agreeing to the Guidelines, review carefully to ensure that they do not create a conflict of interest.
  - For example, Guidelines can limit ability of counsel to spend money on certain tasks, such as online legal research through Westlaw or ordering deposition transcripts, in order to save money.
  - Defense counsel has an obligation to zealously defend the insured; to the extent the Guidelines limit the ability for the lawyer to engage in that defense, it creates a conflict of interest.

# Conflicts of Interest Created By Insurance Company Guidelines



- ABA Standing Committee on Ethics and Professional Responsibility has stated in ABA Comm. On Ethics and Professional Responsibility, Formal Op. 01-421:
  - "that lawyers representing insured clients must not permit the client's insurance company to require compliance with litigation management guidelines the lawyer reasonably believes will compromise materially the lawyer's professional judgment or result in [his or] her inability to provide competent representation to the insured….If the lawyer reasonably believes [his or] her representation of the insured will be impaired materially by the insurer's guidelines or if the insured objects to the defense counsel provided by a lawyer working under insurance company's guidelines, the lawyer must consult with both the insured and the insurer….If the insurer does not withdraw or modify the limitation on the lawyer's representation and the insured refuses to consent to the limited representation, the resulting conflict implicates Rule 1.7(b) and unless the lawyer is willing to present the insured without compensation from the insurer, requires the lawyer to terminate the representation of both clients."

# When All Else Fails: Asserting Claims, including under M.G.L. c. 93A and c. 176D



- Claim for unfair or deceptive acts or practices in the business of insurance under G.L. c. 176D, § 3 because, for example:
  - The insurer has failed to, e.g.:
    - acknowledge and act reasonably promptly upon communications with respect to claims arising under the Policy and
    - effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear under the Policy.

# When All Else Fails: Asserting Claims, including under M.G.L. c. 93A and c. 176D



- Insured's right to recover costs associated with prosecution of coverage action.
- An insured "is entitled to the reasonable attorney's fees and expenses incurred in successfully establishing the insurer's duty to defend under the policy." John Moriarty & Associates v. Zurich, 102 Mass. App. Ct. 474, 482 (2023) (quotations omitted).
- The court in John Moriarty & Associates allowed insureds to recover attorneys' fees for bringing coverage litigation when insurers wrongfully withhold defense funding. Court stated that insured is "entitled to maintain control of its defense and to seek payment of its legal bills" and that insurers who breach this duty cannot enjoy "the usual freedom to litigate without concern about the possibility of having to pay the insured's attorney fees."
- Breach of insurer's duty to defend where "the insurer concedes the existence of a duty to defend but the insured is forced to bring an action to compel the insurer to actually satisfy its duty."
- Court determined that insured stated claim for violation of c. 93A and 176D in light of insurer's non-payment of defense costs.

# Problem Solving:
# What Should an Organization Do When…



- The insurer automatically sends a case to their panel counsel notwithstanding the reservation of rights?
- The insured reports the claim to insurance and does not get any response regarding coverage prior to a case deadline?
- The adjuster in a case changes and they take a different stance and revert their position on rates?





**Jill Brenner Meixel**

jmeixel@kb-law.com

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www.kb-law.com
600 Atlantic Avenue
Boston, MA 02210
(617) 482-7211