Reservation About Reservation of Rights?" Strategic Considerations

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Reservations of rights letters are an essential tool for investigating coverage, or lack thereof, of insurance claims. Reservation of rights letters put the insured on notice of the potential causes for a denial of coverage. Reservation of rights letters also give the insurer an effective resource to act in good faith by avoiding the denial of coverage prematurely, which could potentially expose the insurer to claims of breach of contract, bad faith, and unfair dealing.

To be effective, reservation of rights letters should fairly inform the insured of potential coverage limitations including exclusions that may be applicable. The letter should also set forth the conditions to coverage that have not been met, potential non-covered claims, and any limitations to the defense of a claim. Reasonable notice should be given to the insured of potential coverage issues through the reservation of rights. A failure to timely inform the insured of potential coverage defenses could result in a waiver of the defense.

Defending an insured under a reservation of rights while pursuing a coverage denial based on a coverage limitation is a challenging task and must be done with care. The failure to defend an insured appropriately under a reservation of rights and make appropriate declarations in the reservation of rights letter can eliminate an insurer's ability to later recoup costs and fees. Such a failure may also result in the insurer being bound by a settlement agreement between the insured and a third-party tortfeasor. The following will provide strategic considerations for effective reservation of rights letters and the pitfalls that loom when the reservation of rights is not used properly.

I. Background on Reservation of Rights

A. Reservation of Rights Defined

A reservation of rights letter is a declaration by an insurer delivered to its insured stating, in effect, that the insurer reserves its rights to context liability. Insurers generally use reservation of rights letters to preclude inferences that might otherwise be drawn by an insured from the conduct of the insurer.[1] A reservation of rights is notice given by the insurer that it will

[1]Keeton & Widiss, Reservation of Rights and Nonwaiver Agreements, *Insurance Law*, § 6.7(a).

defend a suit, but it reserves all rights it has based on a potential lack of coverage under the policy.[2] By providing a reservation of rights letter, an insurance company "reserves" its right "to deny coverage at a later date based on the terms of the policy."[3]

B. Two Types of Reservation of Rights

There are two types of reservation of rights: a bilateral non-waiver agreement, and a unilateral reservation of rights. A bilateral non-waiver agreement disclaims liability under the terms of the policy, reserves to each party his respective rights, and provides that the insurer will defend the suit at its own expense, and nothing that is done under the agreement will be deemed to constitute a waiver of his respective rights.[4] The insurer typically drafts the bilateral non-waiver agreement explaining terms of the defense under a reservation of rights and obtains the consent of the insured, in writing.

A unilateral reservation of rights is a notice given by the insured that it will defend the suit, but reserves all rights it has based on noncoverage under the policy. In other words, a reservation of rights letter. A reservation of rights letter in any state should clearly explain the insurer's coverage position and should fairly inform the insured by specifically quoting from the policy each reason for possible coverage denial under the policy.[5] The clarity of the letter will enable the insured to decide if he thinks an independent defense may be necessary because the likelihood for valid coverage appears bleak.

Most insurers would favor a unilateral reservation of rights because it would not require consent from the insured, but still meets the requirements under most state laws. In Kansas, an insurer may inform the insured of its defense under a reservation of rights by either unilateral or bilateral agreement.[6] Conversely, under Missouri law, an insured has the right to reject a

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[2] *Motorists Mut. Ins. Co. v. Trainor,* 33 Ohio St.2d 41, 294 N.E.2d 874, 877 (1974).

[3] *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 884 N.E.2d 1130, 2008-Ohio-311, fn. 7.

[4] *Trainor*, 294 N.E.2d at 877.

[5] *Compare* 1 Law and Prac. of Ins. Coverage Litig. § 8:2 (Last updated June 2014) *and Dietz-Britton v. Smythe, Cramer Co.*, 743 N.E.2d 960, 970 (Ohio Ct. App. 2000).

[6] *See Bogle v. Conway,* 433 P.2d 407, 412 (Kan. 1967) ("If unilateral notice is employed and the insured makes no objection to his further defense of the action by his insurer, his consent may be inferred from such acquiescence.").

tendered defense with a reservation of rights.[7] Therefore, in Missouri, an insurer has one of three options when the insured rejects the tendered defense: (1) represent the insured without a reservation of rights defense; (2) withdraw from representing the insured altogether; or (3) file a declaratory judgment action to determine the scope of the policy's coverage. As such, insurers should be mindful of the applicable laws of the state where a claim is pending to ensure that coverage defenses are not waived.

C. Timing of Reservation of Rights

A reservation of rights may be issued in response to a notice of occurrence, notice of claim, or in response to a notice of the suit. Upon receipt of notice of occurrence, claim, or suit, an insurer should issue a reservation of rights to preserve any coverage positions available to it at law or under the insurance policy.[8] A delay in giving notice may be excused where traceable to an insurer's lack of actual or constructive knowledge of an available defense to coverage.[9]

Absent a lack of knowledge, an insurer must give "reasonable notice" to its insured that it disclaims liability.[10] If reasonable notice is not given, an insurer waives the right to avoid liability because of an exception under the policy. The purpose of requiring "reasonable notice" is to avoid prejudice to the insured. Where an insured surrenders the defense of a suit to the insurer, and the insurer undertakes the defense for a "considerable period of time" without any notice of its reservation of rights, it is conclusively determined that the insured has been prejudiced. When a reservation of rights is noticed to an insured "so late that it prejudices the insured's ability to defend the matter," a court may find the insurer waived its reservation of rights.[11]

Unfortunately, there is no bright line rule regarding the definition of "reasonable notice." There are some examples, however, that provide a general timeframe in which a reservation of rights should be provided. In *Socony-Vacuum Oil Co.*, the insurer initially took charge of the insured's defense, but one year after the injured employee filed a suit against the insured, the

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[7] *Kinnaman-Carson v. Westport Ins. Corp.,* 283 S.W.3d 761, 765 (Mo. 2009).

[8] *Trainor*, 294 N.E.2d at 877.

[9] *Brugnoli v. United Nat'l Ins. Co.*, 426 A.2d 164 (Pa. Super. Ct. 1981).

[10] *Socony-Vacuum Oil Co. v. Cont'l Cas. Co.,* 67 N.E.2d 836, 839 (Ohio Ct. App. 1944) aff'd, 59 N.E.2d 199 (1945).

[11] *Dietz-Britton,* 743 N.E.2d at 966.

insurer asserted a reservation of rights stating that this type of loss was not covered based on a policy exclusion. [12] The court held that the insurer's conduct in assuming to handle the insured's defense "for a little over a year without giving notice of a reservation of right claiming a limit to its liability under the policy, constitute[d] a waiver of any exemption to which it might be entitled."[13]

In *Dietz-Britton,* the insurer undertook the defense of its insured for over two years before providing a reservation of rights that it would not indemnify the insured due to fraud being excluded from coverage.[14] The court held that the late notice precluded the insurer from denying coverage and further noted that if the insurer was "*saddled with coverage it may not have intended or desired, it is of its own making*."[15]

Therefore, it is clear from *Socony-Vacuum Oil Co.* and *Dietz-Britton* that one or two years to assert a reservation of rights is too long. However, it is still not entirely clear what "reasonable notice" is. The safest bet is to notify an insured of a reservation of rights as soon as the insurer has enough facts to know a coverage defense may be applicable and continue to update the insured periodically on the status of the coverage investigation.

D. Contents of the Reservation of Rights Letter

There are no specific statutory or regulatory requirements mandating the contents of a reservation of rights letter.[16] An insurer, however, may be deemed to have waived conditions not referenced in the reservation of rights letter, including exclusions.[17] Because there are no specific rules explaining what content is sufficient for a reservation of rights letter, the adequacy of a reservation of rights letter is determined on a case-by-case basis.

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[12] *Socony-Vacuum Oil Co.,* 67 N.E.2d at 837-39.

[13] *Id.* at 839-40.

[14] *Dietz-Britton,* 743 N.E.2d at 966.

[15] *Id.* at 968.

[16] "A review of the letters shows that they clearly reserved the right to raise all defenses and preserved all terms and conditions under the policy." *Efficient Lighting Sales Co. v. Neverman*, 2009 WL 348826 *4 (Ohio Ct. App. 2009).

[17] *Collins v. Grange Mut. Cas. Co.*, 706 N.E.2d 856, 860 (Ohio Ct. App. 1997).

What is known is that a reservation of rights letter should "fairly inform" the insured of the insurer's position with regard to a tendered claim.[18] The reservation of rights letter should also set forth the reasons why the insured may not be entitled to coverage, based on the information reasonably known to date.[19] The purpose of the reservation of rights letter is to allow the insured to make an informed decision between proceeding with the tendered counsel and a possible conflict of interest or obtaining independent counsel.

Each reservation of rights letter should be based upon the specific facts of the particular claim. When possible, it is best to fully inform the insured of a coverage position when reserving rights as opposed to relying upon a general reservation. Consideration should be given to including the following in a reservation of rights:

- The specific allegations that may not be covered by the policy. One should not paraphrase or interpret the pertinent allegations, quote them directly;
- The specific policy provisions upon which the insurer bases its opinion that coverage may not be afforded in whole or in part, and an affirmative statement adopting by reference the entire policy;
- A discussion that generally applies those policy provisions to the claim, indicating why they may apply to preclude coverage;
- A reservation of the right to terminate the defense if warranted by a determination of no coverage;
- A reservation of the right to recover defense costs to the extent permitted by applicable law, in the event it is determined that the claim is not covered by the policy;
- A request for additional information about facts and circumstances of the claim;
- Effective catch – all reservation of rights affirmatively preserving all rights in the event of information or facts been disclosed through the claim investigation that may further impact coverage; and
- An affirmative statement asking the insured to forward any information that they believe may impact coverage for the claim.

Therefore, even though there is no explicit precedent on what constitutes sufficient content in a reservation of rights letter, providing as much detail as possible to fairly inform the

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[18] *Newby Int'l, Inc. v. Nautilus Ins. Co.*, 112 Fed. App'x 397, 305-406 (6th Cir.2004).

[19] *Knight v. Ind. Ins. Co.*, 871 N.E. 2d 357, 359-60 (Ind. Ct. App. 2007).

insured of the potential lack of coverage under the policy is the general rule to follow. A good approach is to ask yourself whether or not a person with no coverage background would understand the potential coverage issue the letter is trying to convey.

II. Duty to Defend

A. General Duty to Defend Principles

An insurer's duty to defend is both broader than and distinct from the duty to indemnify.[20] Under the standard "pleading test," when an insurer's duty to defend is not apparent from the pleadings in the action against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or where there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim.[21]

B. Scope of Duty for Covered and Uncovered Claims

In Ohio, if a complaint sets forth both covered and noncovered claims, the insurer is required to defend all claims until the claims implicating coverage are resolved.[22] A narrow exception to this general principle was recognized in *Sanborn Plastics Corp. v. St. Paul Fire and Marine Insurance Company.*[23] In *Sanborn,* the plaintiff alleged two separate and distinct events which allegedly caused pollution: one which arose from a gradual release of pollution into the environment over many years and one which was alleged to arise from a separate and distinct episodic event involving a ruptured pipe.

Under these unique circumstances, the *Sanborn* court held that the carrier did not have to defend the gradual pollution claim based on the policy pollution exclusion but did have an obligation to defend the separate episodic event. The court justified this holding on the fact that the two claims arose from separate and distinct "occurrences."

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[20] *Red Head Brass, Inc. v. Buckeye Union Ins. Co.,* 735 N.E.2d 48, 54 (Ohio Ct. App. 1999).

[21] *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 459 N.E.2d 555 (1984).

[22] *Preferred Mut. Ins. Co. v. Thompson*, 23 Ohio St.3d 78, 491 N.E.2d 688 (1986).

[23] *St. Paul Fire and Marine Insurance Company*, 84 Ohio App. 3d 302, 616 N.E.2d 988 (11th Dist. 1993).

C. Limitations on Duty to Defend

While the duty to defend is broad, it is not without limits. An insurer is not required to defend any claim that is clearly and undisputedly outside of the contracted policy coverage. Further, "[w]here the insurer does not agree to defend groundless, false or fraudulent claims, an insurer's duty to defend does not depend solely on the allegations of the underlying tort complaint. Absent such an agreement, the insurer has n[o] duty to defend or indemnify its insured where the insurer demonstrates in good faith in the declaratory judgment action that the act of the insured was intentional and therefore outside the policy coverage." [24]

In sum, the duty to defend arises when there is a potential for coverage, but there are limitations to when an insurer must provide a defense. An insurer is not required to provide a defense when the true facts of a claim are clearly outside the coverage terms in the policy. The pleadings alone may not be determinative on whether or not a defense is owed, so it is advantageous to proceed with caution depending on the facts of the case on whether or not to defend under a reservation of rights.

Also, be mindful that jurisdiction matters. The stakes can be higher depending on the jurisdiction you are in. For example, in Missouri, it is not only important for insurers to be aggressive on coverage investigations, but it is also important to think through all the possibilities of not defending, defending under a reservation of rights, or proceeding with a declaratory judgment action. Otherwise, the insurer may be bound to coverage or precluded from asserting the coverage defenses at a later time.

III. Ramifications of Reserving Rights

Providing a defense to an insured under a reservation of rights can have many ramifications. The most common ramifications that occur when defending under a reservation of rights are the conflict of interests between the insurer and the insured when selecting defense counsel, independent counsel, and the resolution of coverage issues.

A. Selection of Counsel

While the majority position in Ohio is that a carrier may select counsel to defend its insured under a reservation of rights, other states have recognized that such situations may

[24] *Preferred Risk Ins. Co. v. Gill*, 507 N.E.2d 1118, 1124 (Ohio 1987).

create a conflict thereby entitling the policyholder to select independent counsel to provide a defense at the carrier's expense.[25] Some jurisdictions have found that when a material limitation arises based on a conflict of interest due to the nature of a coverage issue, an insured may be entitled to select its own independent counsel.[26] This approach is often referred to as the "conflict of interest approach."[27]

Thus, some states recognize that the policy defenses identified in the reservation of rights could create an insurmountable conflict with respect to the litigation strategy to be presented on behalf of the insured. For example, if a suit contains a negligence and intentional tort claim, the defense counsel's strategy in seeking dismissal of the negligence claim could leave the insured without coverage. There is also a potential conflict if defense counsel recognizes that the coverage defense of the insurer is flawed or mistaken.

There are several states that follow the "reject the defense" approach and allow an insured to reject a tendered defense or defense attorney under a reservation of rights.[28] Recently, the Superior Court of Pennsylvania held that when an insurer tenders a defense subject to a reservation of rights, the insured has the option of rejecting the insurer's tender, funding his or her own defense, and settling the case without the insurer's consent.[29] If coverage is later found, the insured may recover the cost of defense and settlement from the insurer to the text the cost are fair, reasonable, and non-collusive. In Missouri, the insurer may select counsel, but the insured still has the right to reject the defense under a reservation of rights completely, or can later discharge counsel.[30]

Therefore, some states will allow the insured to select their own counsel with a defense is tendered under a reservation of rights. But even if your jurisdiction typically does not entitle

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[25] *See e.g. Lusk v. Imperial Cas. & Indemn. Co.,* 603 N.E.2d 420, 425 (Ohio Ct. App. 1992).

[26] *Armstrong Cleaners, Inc. v. Erie Ins. Exch*., 364 F. Supp. 2d 797, 816 (S.D. Ind. 2005).

[27] William T. Barker, *Insurer Control of Defense: Reservations of Rights and Right to Independent Counsel Insurer Loses Right to Defend Only When There Is Conflict of Interest, and Even in the Independent Counsel Setting, the Insurer Retains*, 71 Def. Couns. J. 16, 17 (2004).

[28] *Id.*

[29] *Babcock & Wilcox Co. v. American Nuclear Insurers*, 76 A.3d 1, 2013 PA Super 174 (2013).

[30] *Auto-Owners Ins. Co. v. Ennulat* , 231 S.W.3d 297, 300, 301 (Mo. Ct. App. 2007).

an insured to select its own independent counsel, it is important to be mindful that if a defense could be materially limited by conflicting interests between the insured and insurer, a court may agree that the insured would be entitled to its own selection of counsel in those circumstances.

B. Independent Counsel

The most important thing from the insured's perspective while being provided defense counsel under a reservation of rights is limiting the damages on their potential uninsured exposure. Retained counsel must be cognizant of his client's potential uninsured exposure when evaluating risks associated with taking the matter to trial and/or making settlement recommendations. The insured will want his counsel to put pressure on the insurer to enter into a settlement when a demand for policy limits has been made and the insurer has had a reasonable opportunity to complete a coverage investigation and evaluate the claim. Sometimes this is done through a "hammer letter," which demands that the insurer settle a claim within policy limits. However, this will need to be done by personal counsel as it creates a conflict of interest for independent counsel paid for by the insurer under a reservation of rights to send the letter to the insurer.

Meanwhile, the insurer's concern focuses on advising the insured that while it is paying for independent counsel, the defense is limited (often to just defending on damages), and the insured may seek independent counsel at the insured's cost. A paramount concern for the insurer is to avoid involving the insurance defense counsel in the coverage issue. If the insurance defense counsel becomes involved in the coverage issue, this would create a conflict of interest as the counsel being paid by the insurer would be looking to provide coverage for the insured client, while the insurer has stated under a reservation of rights that it does not believe coverage applies and is likely moving forward with a declaratory judgment action to finalize the coverage denial.

C. Impact of Litigation Management Guidelines

Insurers often require retained counsel to abide by litigation management guidelines while providing a defense for an insured under a reservation of rights. The Ohio Board of Commissioner's on Grievances and Disciplinary Advisory held that it is improper for an

insurance defense attorney to abide by an insurance company's litigation management guidelines when the guidelines interfere with the professional judgment of the attorney.[31]

This interference can occur based on the insurer's unwillingness to pay for legal research and restrictions on what work can be allocated to paralegals, associates, and senior attorneys. These are decisions for the attorney to make and should not be interfered with by litigation management guidelines.[32] Guidelines that require approval for conducting discovery and filing of motions can also interfere with a defense attorney's professional judgment and should not deter the attorney from doing what is in the best interest of their client.[33] As such, insurers and retained counsel should be cognizant that litigation management guidelines may present a conflict of interest.

IV. CONSIDERATIONS—TRIAL STRATEGY

A. Insured Perspective

1. Discovery

As a plaintiff's response to discovery may impact coverage issues, consideration should be given to phrasing of discovery requests. For example, submission of a request for admission and/or interrogatory which is designed to rule out the existence of a potentially covered claim should not be issued absent discussion/analysis of potential impact on coverage with insured.

2. Summary Judgment/Motion Practice

As an insurer's duty to defend may be extinguished when all potentially covered claims are removed from the case, consideration/analysis should be made when filing a summary judgment which is likely to dismiss only the potentially covered claims.

3. Trial Strategy

Consideration should also be given to the submission of jury interrogatories which permits a jury to issue separate awards on covered and non-covered claims. It may be in the insured's best interest to have a jury verdict rendered under a general verdict form.

B. Insurer Perspective

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[31] *The Bd. of Commissioners on Grievances and Disciplinary Advisory,* Opinion, 2000-3.

[32] *Id.*

[33] *Id.*

1. Discovery

An insurer must be mindful of the status of discovery in an underlying tort action against an insured. Particular attention should be paid to reviewing depositions of relevant witnesses and other discovery responses to determine whether facts have been developed which may implicate an insurer's coverage position.

2. Summary Judgment/Motion Practice

Similarly, an insurer must be aware of and analyze the ramifications of rulings on dispositive motions. An insurer's obligation to defend continues while covered claims remain pending in the litigation. If a trial court dismisses all covered claims, an insurer may have an opportunity to withdraw its defense.

3. Trial Strategy

An insurer must be mindful of the factual issues to be decided at trial. In the event the resolution of certain factual issues will impact the insurer's coverage position, consideration should be given to intervening in the action to submit jury interrogatories requiring the jury to answer specific questions. For example, if both negligent and intentional torts are alleged, the insurer may seek an interrogatory asking the jury to determine which claims, if any, an insured is liable. Failure to intervene and seek specific factual findings may preclude the insurer from re-litigating these issues in a subsequent coverage action.

V. CONSIDERATIONS—SETTLEMENT

A. Insurer Perspective

An insurer should proactively seek to address and resolve coverage issues as expeditiously as possible. If coverage issues are left unresolved, an insurer will inevitably face a demand from its insured to settle a claim which may or may not be covered under a policy of insurance. If an insurer has not sought clarification of its coverage obligation, it will be required to make a decision as to whether to participate in settling the claim or risk an insured confessing judgment and potentially pursuing bad faith remedies.

In circumstances where there are both covered and uncovered claims asserted against an insured, consideration should be given to requesting a personal contribution from the insured to settle the claim. An insurer must proceed cautiously and its conduct must be reasonably justified so as to avoid exposure for bad faith.

Insurers should consider the costs associated with its ongoing duty to defend when analyzing whether to participate in settling a claim against its insured when coverage issues exist. Often times, the financial burden of providing a defense may outweigh the costs to settle a claim and settlement may provide the most cost effective means at resolving a disputed claim. Lowest ultimate cost (LUC) is a primary concern for the insurer when defending any claim.

B. Insured Perspective

The demand that a carrier settle a matter within policy limits places a carrier at potential risk for a bad faith claim should the trial end up in a verdict which exceeds policy limits and results in uninsured exposure to the insured. A written demand known as a "hammer letter" should be issued by personal counsel who can more effectively articulate the coverage/bad faith concerns. Retained counsel cannot ethically get directly involved in such issues which are beyond mere liability concerns.

This is of paramount importance to the insured because in states like Ohio, where bad faith can only be brought on a first-party claim, an insured could assign his right to a bad faith claim in lieu of an accord and satisfaction agreement not to enforce the excess judgment against the insured with the plaintiff. The hammer letter from the insured and failure to settle on the part of the insurer, especially when a settlement could have been reached within the policy limits, is key evidence to show bad faith on the part of the insurer.

Furthermore, the insured is often put in a precarious position when a settlement demand is presented and the insurer does not render a decision on coverage. This is because a plaintiff may be willing to negotiate for a lower settlement, however, the insured's policy may have a condition requiring the carrier's consent to any settlement with the injured party, or the insured waives coverage. Stated differently, a risk arises that the insured may act to "cut a deal" with the plaintiff to insulate or limit the policyholder's personal exposure. Ohio law is split on whether such conduct would violate the policy's cooperation clause.

C. Potential bad faith and punitive damage exposure

In Ohio, bad faith is only recognized on first-party claims; however, it is common practice for plaintiff's who receive an excess judgment to take an assignment of the insured's bad-faith

claim in lieu of enforcing the judgment. Then, the plaintiff steps into the shoes of the insured and pursues the bad-faith claim including punitive damages against the insurer.

In Ohio, a bad-faith claim is judged under a "lack of reasonable justification" standard.[34] Ohio also follows the "exposure rule" which subjects a carrier's potential exposure for an excess judgment based solely on the insured's exposure, not on any amount actually paid by the insured.[35] Insurers in Ohio try to combat potential bad faith claims by developing processes that support proactive resolution of claims where a coverage issue exists.

Some of the ways insurers in Ohio ensure proactive resolution of claims that are defended under a reservation of rights is to file a declaratory judgment action, ensuring policy limit demands are addressed timely, and including the insured in settlement discussion for possible contribution from the insured. Intervention into a tort action when the insurer believes coverage does not exist is another form of proactive resolution. This gives the insurer the opportunity to enter into the case as a third-party defendant to defeat liability on its part.[36] This is a difficult decision for the insurer; however, by entering into the action and providing a defense for the insured under a reservation of rights, the insurer can ensure it has an opportunity to litigate all issues that are paramount to its coverage defense.

Ultimately, it is important to look at the coverage issue from all angles and not just rely on the outcome of a declaratory judgment action because it can result in waiving other coverage defenses including damages, and this can be significant depending on the exposure to the insured.

VI. CONCLUSION

Reservations of rights protect both the insured and the insurer in claims where the insurer may potentially deny coverage. There are many challenges when defending under a reservation of rights including timeliness, retention of independent counsel, and settlement negotiations between the plaintiff, insured, and insurer.

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[34] *Zoppo v. Homestead Ins. Co.,* 644 N.E.2d 397 (Ohio 1994).

[35] *Carter v. Pioneer Mut. Cas. Co.,* 423 N.E.2d 188, 192 (Ohio 1981).

[36] *Howell v. Richardson*, 544 N.E.2d 878, 881 (Ohio 1989) *opinion corrected sub nom. Grange Mut. Cas. Co. v. Uhrin*, 550 N.E.2d 950 (Ohio 1990).

Failure to defend an insured appropriately under a reservation of rights and make appropriate declarations in the reservations of rights letter can eliminate an insurer's ability to recoup costs and fees later or being bound to a settlement amount agreed to by the insured and third-party. The best strategy in defending under a reservation of rights is to proceed with caution and think through the ramifications at each stage of the defense on how to proceed to the next.