

# Why You Should Choose Your Own Lawyer When Your Insurer Issues a Reservation of Rights

By Adam C. Ponte, Esquire

You or your business is served with a lawsuit. It could be for a slip-and-fall, construction defect or even wrongful death. In any event, you paid those hefty insurance premiums for this very moment – right? After receiving the plaintiff’s Complaint, you likely send it to your insurance agent or your carrier. In the next week or so, the insurer could (i) agree that the claim is fully covered and agree to defend you; (ii) notify you that the claim is not covered, at all; or (iii) reserve its right to disclaim coverage, but provide you with a legal defense (at least for the time being).

Under the last scenario, the insurer will send you a letter telling you all of the reasons why your insurance policy may not cover the plaintiff’s claims. This letter, also known as the insurer’s Reservation of Rights, is the insurer’s message, to you, that it is reserving the right to disclaim coverage. In the meantime, the insurer undertakes your defense by providing you with a lawyer. Yes, the insurer would be paying your legal fees, but significant conflicts could arise between you and the insurer. That is, the insurer could contend that the loss, or a portion of the loss, is not covered under the policy. You, on the other hand, want the entire loss covered. This awkward situation could cause the insurance defense lawyer to defend your case in a manner that better suits the insurer, perhaps winning against the plaintiff on the covered claims and losing on the non-covered claims. Under this scenario, although the insurer may have footed the legal bill, the insured would pay the plaintiff for the non-covered damages, and the insurer would have no further liability. Additionally, a lawyer frequently hired by the same insurer will have an incentive to please the insurer, not the insured. There is nothing like a steady stream of business.

Under a Reservation of Rights, the insured must be wary of the possibility that the insurer-provided attorney may favor the insurer over the insured in the course of litigation. The good news for insureds in Massachusetts is that you may be entitled to choose your lawyer, with the insurer paying the bill. Therefore, when the insurer issues a Reservation of Rights, you should choose your own lawyer.

## STANDARD GENERAL LIABILITY POLICIES AND MASSACHUSETTS LAW

Standard general liability policies provide that the insurer will (i) defend the insured against claims, including attorney’s fees; and (ii) pay damages for which the insured is held liable. This is known as the insurers’ “duty to defend” and “duty to indemnify.” Of course, the insurer narrows its duty to defend and/or indemnify only to policy-covered claims.

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 the insured against 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, Section I (1)(a)*.

Generally, an insurer’s duty to defend is broader than its duty to indemnify the insured. See *Boston Symphony Orchestra v. Commercial Union Ins. Co.*, 406 Mass. 7, 10 (1989) (“It is axiomatic that an insurance company’s duty to defend is broader than its duty to indemnify ... the duty to defend is based on the facts alleged in the complaint and those facts which are known by the insurer”); *Doe v. Liberty Mut. Ins. Co.*, 423 Mass. 366, 368-69 (1996).

Accordingly, if the plaintiff’s complaint against the insured contains multiple claims, only one of which is covered by the policy, the insurer likely remains obligated to defend the entire action, including the non-covered claim. *Aetna Cas. & Sur. Co. v. Cont’l Cas. Co.*, 413 Mass. 730, 732 n. 1 (1992) (“[T]he weight of authority places the duty to defend all counts on an insurer which has a duty to defend at least one count of a complaint, barring a contrary agreement with the insured”); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 394 (2003) (“[I]f the allegations of the complaint are reasonably susceptible of an interpretation that they state or adumbrate a claim covered by the policy terms, the insurer must undertake the defense.”).

## THE INSURER’S RESERVATION OF RIGHTS CREATES THE INSURED’S RIGHT TO CHOOSE COUNSEL

In the scenario where some of the plaintiff’s claims arguably are not covered, the insurer is required to notify the insured of such potential lack of coverage. See *DiMarzo v. Am. Mut. Ins. Co.*, 389 Mass. 85, 112 (1983); *Salonen v. Paanenen*, 320 Mass. 568, 573 (1947) (“Where an insurer seasonably notifies its insured that it is continuing to defend the case subject to its right to disclaim later, the insured is in no position to say that he has been misled, and can take the necessary steps to protect his rights”); *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 276 (1970) (“A reservation of rights ... notifies the insured that the insurer’s defense is subject to the later right to disclaim liability.”).

Hence, after the insured notifies the insurer of the claims, the insurer likely will send the Reservation of Rights to the insured. Upon receiving the Reservation of Rights, you, the insured, now have the right to select your lawyer. See *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 684 (1964) (“Where the insured’s interest in controlling tort 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”); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 407 (2003) (“[T]he 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.”).

Forcing the insurer to allow you to select counsel certainly is in your best interest. An attorney hired by the insurer likely will not represent you with an eye toward maximizing coverage of the claims asserted against you. In fact, insurance defense counsel probably cannot assist you with coverage-related issues, because he or she would be representing both you and the insurer. Increasing the insured’s chances for maximum coverage would run afoul of that same attorney’s obligation to the insurer. Thus, you should choose your own counsel, who not only will defend the claims against you, but also will keep tabs on maximizing coverage – all while the insurer pays the bill.

### MAKE SURE TO ASSERT THE RIGHT TO CHOOSE COUNSEL PROPERLY

If you receive an insurer’s Reservation of Rights, you should immediately contact your attorney so that he or she can begin to create a record establishing coverage of the claims and to preserve your right to demand your own counsel. Your attorney should promptly send a letter to the insurer, opposing the Reservation of Rights and stating the insured’s intention to engage an independent attorney, at the insurer’s expense. Indeed, failure to timely oppose the insurer’s selection of

counsel could prohibit the insured’s right to seek his or her own attorney. See *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 407 (2003) (“There is no indication in the record that [insured] either insisted on having the reservation of rights removed or, in the alternative, insisted on assuming control of its own defense ... [a]s such, we conclude that [insured] acquiesced in the legal representation provided by [insurer].”).

Of course, by opposing the Reservation of Rights and demanding your own attorney, this could compel the insurer to drop its reservation to disclaim coverage and accept full coverage of the claim. To that end, the insurer essentially would indemnify the insured up to the policy limits.

### CONCLUSION

If your insurer reserves its right to disclaim coverage via a Reservation of Rights, it is imperative that you oppose such reservation and notify your insurer of your intent to select independent counsel to represent you. Your attorney will defend the actual claim and keep an eye toward preserving insurance coverage. Do not let the insurer control the defense of the claim against you if the insurer will not commit to full coverage.

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