

COMMISSIONER OF SECURITIES & INSURANCE

MONICA J. LINDEEN
COMMISSIONER



OFFICE OF THE MONTANA
STATE AUDITOR

ADVISORY MEMORANDUM

To: All Property and Casualty Insurance Companies

From: MONICA J. LINDEEN
Commissioner of Securities and Insurance,
Montana State Auditor

Date: January 23, 2013

FORM PROVISIONS LIMITING COVERAGE OF DEFENSE EXPENSES, INCLUDING DEFENSE WITHIN LIMITS PROVISIONS – MONTANA CODE § 33-1-502

The Commissioner of Securities and Insurance, Montana State Auditor (Commissioner), possesses the authority under Mont. Code Ann. § 33-1-502 to disapprove forms containing defense within limits provisions. Management of defense expenses facilitates the availability of high-risk liability insurance by providing insurers added expense predictability. In the opinion of the Office of the Commissioner of Securities and Insurance, Montana State Auditor (CSI), however, such coverage limitations are not appropriate for all policy forms. The CSI institutes the following requirements and limitations regarding defense expense coverage. These requirements and limitations apply prospectively, and do not affect forms already filed with the CSI.

UNLIMITED DEFENSE COVERAGE POLICY FORMS

Forms relating to any kind of "personal insurance" as defined under Mont. Code Ann. § 33-18-603 may neither limit coverage of defense expenses, nor reduce available policy limits by incurred defense expenses. All other forms may contain such provisions so long as those provisions are otherwise consistent with the terms of this Advisory Memorandum and Montana law.

DEFENSE WITHIN LIMITS POLICY FORMS

Certain forms not relating to personal insurance may include provisions expressly providing for defense within limits. Specifically, non-personal insurance forms containing at least \$1 million in aggregate policy limits may include such provisions. Likewise, non-personal insurance forms filed by captive insurance companies or risk retention groups may expressly provide for defense within limits.

MINIMUM DEFENSE EXPENSE COVERAGE POLICY FORMS

Forms not otherwise addressed in this Advisory Memorandum may limit defense expense coverage after covering a minimum amount of such expenses. Specifically, in addition to the indemnity coverage, all of these forms must provide a minimum of \$50,000 in defense expense coverage per policy period. This does not prevent forms from providing defense expense coverage in an amount greater than \$50,000. Additionally, those policies that calculate defense coverage on a percentage-of-policy-limit basis need not state a specific dollar amount of such coverage, so long as the effect of the provision is to grant at least \$50,000 in defense expense coverage per policy period. Finally, a form may reduce available policy limits by incurred defense expenses so long as the insurer provides at least \$50,000 in defense expense coverage before such reductions occur.

Example: A commercial general liability form provides \$500,000 in aggregate policy limits and \$50,000 in defense expense coverage. During the coverage period, the insurer pays an indemnity loss equal to the aggregate policy limits. An additional \$50,000 in defense expenses is incurred in settling the claim. In this situation, the insurer would be responsible for \$550,000: \$500,000 in indemnification coverage, and \$50,000 in defense expense coverage.

CONSPICUOUS DISCLOSURE

A form limiting coverage of defense expenses must conspicuously disclose such a limitation on both the insurance application and the declaration page. This disclosure statement must appear in a bold font at least two points larger than the body of the respective document. It must describe, in plain language, the nature and extent of the coverage limitation. For example, if a form provides a set dollar amount of defense expense coverage, the form must identify that dollar amount and clarify whether the limitation applies on a per-claim or aggregate basis. Additionally, any form limiting defense expense coverage must define what constitutes a defense expense; however, it need not do so on the application or declaration page.

For any questions regarding this advisory memorandum, call the CSI Legal Bureau at (406) 444-2040.