



COMMISSIONER OF SECURITIES AND INSURANCE

Troy Downing
Commissioner

Office of the
Montana State Auditor

ADVISORY MEMORANDUM

To: ALL INTERESTED PERSONS

From: TROY DOWNING 
Commissioner of Securities and Insurance, Office of the Montana State Auditor

Date: April 27, 2023

Advisory Memorandum Regarding Form Provisions Limiting Coverage for Defense Expenses Including Defense Within Limits Provisions - § 33-1-502, MCA

Background

Generally, §33-1-501, Montana Code Annotated (MCA) provides that any document which constitutes an insurance policy, insurance contract, or a form document related in any way to an insurance policy or contract must be approved by the Commissioner of Securities and Insurance, Montana State Auditor (Commissioner) prior to delivery or issuance for delivery in Montana.

Section §33-1-502, MCA provides:

Grounds for disapproval. The commissioner shall disapprove any form filed under 33-1-501 or withdraw any previous approval of a form only if the form:

- (1) is in any respect in violation of or does not comply with the laws of this state;
- (2) contains or incorporates by reference, where the incorporation is otherwise permissible, any inconsistent, ambiguous, or misleading clauses or exceptions and conditions that deceptively affect the risk purported to be assumed in the general coverage of the contract, ***including a provision in a casualty insurance form permitting defense costs within limits, except as permitted by the commissioner;***
- (3) has any title, heading, or other indication of its provisions that is misleading;
- (4) is printed or otherwise reproduced in a manner that renders any provision of the form substantially illegible;

(5) contains any provision that violates the provisions of 49-2-309 (generally prohibiting discrimination in the issuance or operation of an insurance policy or plan based on sex or marital status).

(emphasis added)

Thus, the Commissioner is authorized under § 33-1-502, MCA to disapprove forms containing defense within limits (DWL) provisions. On January 23, 2013, former Commissioner Monica Lindeen issued an Advisory Memorandum prohibiting DWL provisions relating to any kind of “personal insurance” as defined in § 33-18-603, MCA. The January 23, 2013 memo advised that all other forms could contain DWL provisions if: the form provided for at least \$1 million in aggregate policy limits or was a non-personal form filed by a captive insurance company or risk retention group; the form provided for a minimum of \$50,000 in defense expense coverage per policy period prior to any reduction in policy limits by the insurer; and, the form conspicuously disclosed the DWL provision in terms of both describing the effect of the provision and the appearance of the provision in the form.

The foregoing Advisory Memorandum was rescinded by then Commissioner Matt Rosendale on November 2, 2020.

The purpose of this Advisory Memorandum is to clarify the current conditions under which forms containing DWL provisions or any provisions limiting coverage for defense expenses will either be approved or prohibited by the Commissioner.

Guidance

DWL or like provisions are not acceptable in “personal insurance” policies as defined in § 33-18-603. The Commissioner will disapprove any proposed personal insurance form containing a DWL or provision limiting coverage for defense expenses.

DWL or like provisions in forms for non-personal, commercial lines of insurance (e.g. property insurance as defined in § 33-1-210, MCA and casualty insurance as defined in § 33-1-206, MCA) will be permitted and not disapproved by the Commissioner provided the provision is conspicuously disclosed in terms of both: (1) its appearance within the form and (2) the practical meaning and effect of the provision (that the money available under the policy to pay settlements or judgments will be reduced and may be exhausted by defense expenses). DWL provisions that lack adequate conspicuous disclosure may mislead or violate an insurance consumer’s reasonable expectations. § 33-1-502(3)

For all future forms submitted to CSI for approval, conspicuous disclosure of any DWL provision should occur prominently on the first page of the declaration page and policy application. The disclosure should be easily identifiable with bold typeface, increased font size and, capitalization, and should appear as follows:

DEFENSE WITHIN LIMITS: The amount of money available under the policy to pay settlements or judgments will be reduced and may be exhausted by defense expenses, including but not limited to fees paid to attorneys to defend you.

Upon issuance of this Advisory Memorandum, insurers who comply with the guidance set forth herein need no longer rely on or assert historical exceptions granted under §33-1-502(2) by previous administrations.

Finally, the Commissioner reserves future authority under § 33-1-502 to reevaluate any proposed DWL or like provision or practice associated therewith to ensure the interests of Montana insurance consumers are protected. § 33-3-311(3)

This advisory memorandum is informational only and does not enlarge, delimit, or otherwise modify any requirements of applicable law or in any way limit the authority of CSI under applicable law. CSI encourages interested persons to consult with independent legal counsel for guidance on the application of law to any particular circumstances.