



## Lowenstein Sandler's In the Know Series Video 25 – Defending Your Defense Against Insurer Tactics

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October 2024

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Hi, I'm Eric Jesse, partner in Lowenstein Sandler's [Insurance Recovery Group](#). Welcome to "[In the Know](#)."

Today we're going to discuss insurers using evidence and policyholder statements from the underlying litigation to disclaim their duty to defend. As if a policyholder doesn't already have enough to worry about when defending itself in an underlying case, a policyholder may also have to worry about an insurer, who is supposed to be aiding in the defense, taking the insured statements and possessions from the underlying litigation and using them against the insured in a coverage action.

In most jurisdictions, however, the insurer's duty to defend a lawsuit is broader than its duty to indemnify a settlement or a judgment. And that defense obligation arises purely on complaint allegations and whether they potentially fall within the policy's coverage.

When an insurer denies coverage, an early coverage action and an early duty to defend motion may be necessary to establish the insurer's defense obligation from day one of the underlying lawsuit.

It is unfortunate that insurers force their policyholders to simultaneously fight on two fronts of litigation—in the underlying action and in the coverage case. A quagmire can develop when a policyholder litigates the underlying action and then later litigates the insurer's duty to defend to recover their defense costs.

When a duty to defend motion is brought at the outset of an underlying action, the court deciding the coverage action can be focused exclusively on complaint allegations. But if a policyholder waits until the underlying action has progressed or ended, insurers will inevitably try to present the court with discovery and statements from the underlying case to distract the court from the complaint allegations that triggered the duty to defend. Even if a particular jurisdiction allows an insurer to later step away from its defense obligation because of the emergence of evidence in the underlying action, the duty to defend should at least exist from the day the complaint is filed until concrete evidence is discovered.

However, courts may nevertheless rule that there's no duty to defend at all because the court fails to delineate between the time periods when a

defense obligation existed based on the complaint and later, after it no longer existed because of evidence from the underlying case.

As we often recommend on "In the Know," policyholders, right or wrong, need to be proactive to protect their rights to coverage and to prevent insurers from clouding what may otherwise be clear-cut issues.

Thank you for joining us, and we look forward to seeing you next time on "[In the Know](#)."