

TITLE 13 INSURANCE
CHAPTER 11 CASUALTY INSURANCE
PART 2 DEFENSE COSTS AND DEDUCTIBLES WITHIN LIMITS

13.11.2.1 ISSUING AGENCY: New Mexico Public Regulation Commission Insurance Division.
[7/1/97; 13.11.2.1 NMAC - Rn & A, 13 NMAC 11.2.1, 6/30/04]

13.11.2.2 SCOPE: This rule applies to all liability insurance policies as defined herein and supersedes all policies now in effect which contain defense cost offsets within the policy limits or, deductibles.
[10/13/88; 13.11.2.2 NMAC - Rn, 13 NMAC 11.2.2, 6/30/04]

13.11.2.3 STATUTORY AUTHORITY: Section 59A-2-9 and 59A-16-3 NMSA 1978.
[10/13/88; 13.11.2.3 NMAC - Rn & A, 13 NMAC 11.2.3, 6/30/04]

13.11.2.4 DURATION: Permanent.
[7/1/97; 13.11.2.4 NMAC - Rn, 13 NMAC 11.2.4, 6/30/04]

13.11.2.5 EFFECTIVE DATE: October 13, 1988, unless a later date is cited at the end of a section .
[10/13/88, 7/1/97; 13.11.2.5 NMAC - Rn & A, 13 NMAC 11.2.5, 6/30/04]

13.11.2.6 OBJECTIVE: The purpose of this rule is to prohibit the across-the-board use of legal defense cost offset provisions except for those exceptions found in 13.11.2.8 NMAC and 13.11.2.9 NMAC.
[10/13/88; 13.11.2.6 NMAC - Rn, 13 NMAC 11.2.6, 6/30/04]

13.11.2.7 DEFINITIONS: For the purpose of this rule, the following definitions apply.

A. "Legal defense costs" mean allocated attorney and all other litigation expenses that can be separately identified as arising from the defense of a specific claim.

B. "Liability insurance policy" means any insurance policy covering liability, even if it also contains other types of coverage.

C. "Self insured retention" for the purposes of this rule is an insurance program whereby the insured retains a deductible of at least \$100,000 per claim for his liability exposures.
[10/13/88; 13.11.2.7 NMAC - Rn, 13 NMAC 11.2.7 NMAC, 6/30/04]

13.11.2.8 GENERAL PROHIBITION OF DEFENSE COSTS WITHIN LIMITS: No liability insurance policy, unless specified in 13.11.2.9 NMAC, shall be issued in this state which contain provisions that:

A. reduce the limits of liability in the policy by the amount of legal defense costs; or

B. permit legal defense costs to be applied against the deductible, if any.

[10/13/88; 13.11.2.8 NMAC - Rn, 13 NMAC 11.2.8 NMAC, 6/30/04]

13.11.2.9 EXCEPTIONS TO GENERAL PROHIBITION:

A. This prohibition shall not apply to aircraft liability policies, fidelity and surety policies, nuclear liability policies, marine protection and indemnity policies, or prepaid legal service plans, reinsurance policies, or self-insured retentions.

B. A legal defense offset provision otherwise prohibited in 13.11.2.8 NMAC may be included in a liability insurance policy only for the following types of risks or coverages, and only where liability limits for all liability risks and coverages under the policy are at least:

(1) \$500,000:

- (a) pollution and environmental impairment liability;**
- (b) directors and officers liability;**
- (c) governmental entity liability;**
- (d) employee benefit liability;**
- (e) fiduciary liability;**
- (f) media, publishing and advertising liability;**
- (g) errors and omissions liability; and**

- (h) professional liability, other than medical malpractice liability; or
- (2) \$5,000,000: any kind of commercial liability risk or coverage except:
 - (a) motor vehicle liability; or
 - (b) medical malpractice liability.

[10/13/88; 13.11.2.9 NMAC - Rn, 13 NMAC 11.2.9 NMAC, 6/30/04]

13.11.2.10 REQUIREMENTS: A liability insurance policy as specified in Subsection B of 13.11.2.9 NMAC which contains a provision limiting legal defense costs shall be issued or renewed in this state only if the requirements of Subsections A and B of 13.11.2.10 NMAC are met, or if the requirement of Subsection C of 13.11.2.10 NMAC is met.

A. Legal defense costs charged against the stated limit of liability shall not exceed fifty percent (50%) of such limits and, except as authorized by Subsection B of 13.11.2.10 NMAC, the insurer shall assume any legal defense cost over the amount of percentage specified in the policy.

B. Legal defense costs charged against the deductible shall not exceed fifty percent (50%) of such deductible and, except as authorized by Subsection A of 13.11.2.10 NMAC, the insurer shall assume any legal defense cost over the amount or percentage specified in the policy in regard to such deductible.

C. The limitation specified in Subsections A and B of 13.11.2.10 NMAC may be omitted if the policy provides that the insured shall have the option to:

- (1) select the defense attorney or to consent to the insurer's choice of defense attorney, which consent shall not be unreasonably withheld;
- (2) participate in, and assist in the direction of the defense of any claim with such participation and assistance not limiting the insurer's right to control the defense; and
- (3) consent to a settlement, which consent shall not be unreasonably withheld.

[10/13/88; 13.11.2.10 NMAC - Rn & A, 13 NMAC 11.2.10 NMAC, 6/30/04]

13.11.2.11 REQUIRED NOTIFICATION:

A. Any policy issued or renewed in this state containing legal defense cost offset provisions must print such provisions in bold type on the face of the application for insurance and on the face of the policy.

B. Any policy containing legal defense cost offset provisions specified in Subsection A of 13.11.2.10 NMAC must contain a statement signed by the insured acknowledging that the insured is aware that the limits of liability contained in the policy shall be reduced up to the amount or percentage stated in the policy by legal defense costs and, in such event, the insurer shall be liable for legal defense costs (except those due to any offset against the deductible) exceeding that amount or percentage.

C. Any policy containing legal defense cost offset provisions specified in Subsection B of 13.11.2.10 NMAC must contain a statement signed by the insured acknowledging that the insured is aware that legal defense costs that are incurred shall be applied against the deductible up to the amount or percentage stated in the policy and, in such event, the insurer shall be liable for legal defense costs (except those due to any offset against policy limits) exceeding that amount or percentage.

D. Any policy containing legal defense cost offset provisions specified in Subsection C of 13.11.2.10 NMAC must contain a statement signed by the insured acknowledging that the insured is aware that the limits of liability contained in the policy shall be reduced, and may be completely exhausted by legal defense costs, and to the extent that policy limits are thereby exceeded, the insurer shall not be liable for legal defense costs or for any judgment or settlement.

E. Any signed statement required by Subsection B of 13.11.2.11 NMAC shall be attached to and made a part of the policy.

[10/13/88; 13.11.2.11 NMAC - Rn, 13 NMAC 11.2.11 NMAC, 6/30/04]

13.11.2.12 ACCOUNTING: Where the liability limits of the policy are reduced by legal defense costs or where legal defense cost are applied against the deductible, the insurer shall notify the insured of the insured's right, upon written request, to an accounting of legal defense costs actually expended.

[10/13/88; 13.11.2.12 NMAC - Rn, 13 NMAC 11.2.12 NMAC, 6/30/04]

13.11.2.13 COST OFFSET: The premium and rate for any policy issued or renewed in this state containing legal defense cost offset provisions shall be commensurate with the coverage provided.

[10/13/88; 13.11.2.13 NMAC - Rn, 13 NMAC 11.2.13 NMAC, 6/30/04]

13.11.2.14 EXCEPTIONS TO THIS RULE: If the superintendent finds that application of this rule unduly hinders the availability of insurance or does not significantly benefit the consumers, he may grant such exemptions as he sees fit.

[10/13/88; 13.11.2.14 NMAC - Rn, 13 NMAC 11.2.14 NMAC, 6/30/04]

HISTORY OF 13.11.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center as:

SCC 88-186-IN, Defense Costs and Deductibles Within Limits, Insurance Department Regulation 18, Rule 1, filed 9/13/88.

History of Repealed Material: [RESERVED]

Other History:

SCC 88-186-IN, Defense Costs and Deductibles Within Limits, Insurance Department Regulation 18, Rule 1 (filed 9/13/88) renumbered, reformatted and replaced by 13 NMAC 11.2, Defense Costs and Deductibles Within Limits, effective 7/1/97.

13 NMAC 11.2, Defense Costs and Deductibles Within Limits (filed 5/27/97) renumbered, reformatted and amended by 13.11.2 NMAC, Defense Costs and Deductibles Within Limits, effective June 30, 2004.