

N.Y. Court Takes Contrary Position on Insurers' Right to Recoup Defense Costs, Insurance Journal

By Eric B. Stern, partner and co-chair of the KD Data Privacy & Cybersecurity Practice Group and Andrew Lipkowitz, KD attorney

It has long been understood that under New York law, an insurance company may recoup defense costs paid on behalf of an insured once it has been ultimately determined that there was no coverage in connection with the underlying action, provided that the insurer reserved its rights to seek such reimbursement.

*Multiple New York courts at both the trial and Appellate Division levels (New York's intermediate appellate court), have adopted such a rule. However, a recent decision by the Appellate Division, Second Department in *American W. Home Ins. Co. v. Gjonaj Realty & Mgt. Co.*, declined to follow these prior decisions, holding that the insurer could not recoup defense costs paid under a duty to defend policy after it was determined that the insurer did not owe coverage, despite the insurer's express reservation of rights with respect to recoupment.*

This ruling is clearly significant for those insurers that issue duty to defend policies in New York. Moreover, this new ruling creates a distinction between New York's First and Second Appellate Departments with respect to an insurer's right to recoupment of defense costs.