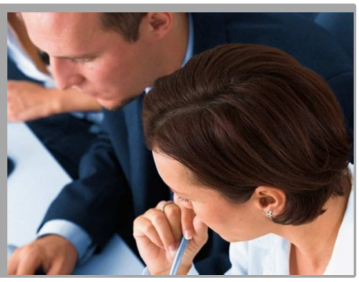
Duty to Defend



This article discusses a few of the important features of the defense provisions of a typical management or professional liability policy. The defense features come in to play when a claim is tendered to the insurance company and are important to understand before purchasing any management or professional liability policy.

Duty-to-Defend vs Non-Duty-to-Defend – In a duty to defend policy, the Insurer typically has the duty to defend a claim once it is tendered regardless if the claim groundless, fraudulent or has merit. In a non-duty to defend policy, the Insured typically has the obligation to defend the claim. This basically means the Insured has the responsibility to retain counsel and pay their bills, and thereafter, these bills then can be tendered to the carrier for reimbursement. Most small to middle market PL/D&O/EPL policies for private and non-profit companies are written on a duty to defend basis. In contrast, most public company D&O forms are written on a non-duty to defend basis

The following are some pros and cons of each:

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Pros:

- The insured can access the insurance companies' panel counsel list. These panels are usually experienced attorneys who have pre-negotiated hourly rates that are lower than the insured could obtain on their own.
- The Insured hands the claim over to the insurer who does most of the heavy lifting and handles the day-to-day work in managing and settling the claim.
- The insurer is obligated to defend "all four corners of the complaint" which means if there are covered and uncovered allegations, the insurer cannot allocate defense costs and must pay the tab for the entire defense. However, if there are uncovered claims, the carrier can still allocate certain indemnity payments.

Cons:

- The insured **will most likely be unable** to use their own counsel. In most cases they will be forced to use the law firm the carrier chooses for them.
- The counsel given to the insured will have to take time to become familiar with the Insured' business and to build an initial relationship/trust with the Insured.
- The insured may have less control over the day to day progression of the claim.

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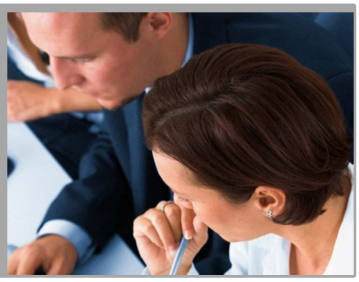

Non-Duty to Defend

Pros:

- The insured typically has the ability to choose their defense counsel (subject to the insurer's final approval **and agreement to follow carrier's litigation management guidelines**).
- The insured typically retains greater control over the handling of the claim.

Cons:

- The insured typically must accept a higher retention for this option.
- The Insurer typically will allocate defense costs between covered and uncovered matters as well as between **covered and uncovered individuals/entities.**
- The insurer may be much tougher with regard to what are "reasonable" attorney's fees billed by the law firm and might decline to reimburse the insured for various expenses and entries billed **typically including attorney hourly rates above what the carrier deems "reasonable".**

Choice of Counsel is an issue that comes up often during the underwriting and/or claims process. In many circumstances the insured may have a relationship with a law firm that they would want to use to defend them. However, most insurance carriers have a panel of pre-approved firms that they insist that the insured use. Some carriers are flexible with their panels, whereas, other carriers will not deviate from their preapproved list. During the underwriting process is when an Insured has the most leverage to ask about adding their favorite firm to the carrier's panel or to make an exception for a particular account or claim. Accordingly, if choice of counsel is important to your insureds, this issue should be brought up during the pre-binding underwriting/negotiation process, not at the time of the first claim.

In many circumstances the ability for the insured to use their counsel of choice will depend on the size of the account, retention size, nature of services, venue, whether that firm is already on the carrier's panel counsel, counsel's rates and whether the policy is written on a duty to defend basis or not (see above). It may be beneficial for the insured to be flexible with regards to choice of counsel in order to secure a broader policy form with better coverage. However, some of our clients have been willing to accept less broad terms and harsher conditions in order to be able to use their own counsel to defend their claims, even if this results in extra costs for the insured. Again, these discussions/decisions should be conducted early during the underwriting process in order to avoid unpleasant surprises when a claim does arise.

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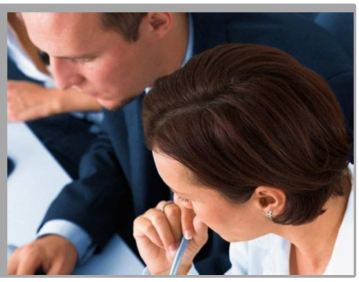

Hammer or Consent to Settle Clause is included in almost all policy forms. There is actually no section of the policy labeled the "hammer clause", but there is usually a paragraph that talks about what happens when the plaintiff has made a written settlement demand that the carrier is willing to accept, but that the insured refuses to consent to settle. In such a situation, the hammer / Consent to settle clause states that if the insured does not agree to the settlement then the insurer is then no longer obligated to pay any additional settlement or defense costs over the amount they could have settled the claim for. At that time the carrier will notify the insured in writing of their invocation of the hammer clause, and will soon thereafter, tender the amount that the case counsel have been settled for as well as defense fees incurred up to that date, and will withdraw from the case.

Many carriers are willing to "soften" the hammer clause to 70/30 or 80/20 so that in the same scenario noted above, the carrier would be obligated for 80% (or 70%)of any additional costs and the insured would be obligated for 20% (or 30%) which give the insured some skin in the game going forward. By making the insured responsible for at least a portion of future expenses, it is the carrier's desire to "hammer" them into agreeing to the settlement recommended by the insurer. Some carriers will remove the hammer clause completely, when offering Duty to defend coverage, which is optimal if you can obtain it. If there is no hammer clause, the insurer would be obligated for the full amount of any settlement and will stand by the insured and continue to fight until the insured agrees to a settlement. As most policies require the insured consent to any settlement, with **typical** language in the policy that" *no settlement shall be made without the consent of the **Parent Company**, such consent not to be unreasonably withheld*", insured's usually must be on board with any settlement that is agreed to.

Please don't hesitate to contact us with any questions. We invite you to like us on Facebook, follow us on Twitter, and connect with us on LinkedIn.

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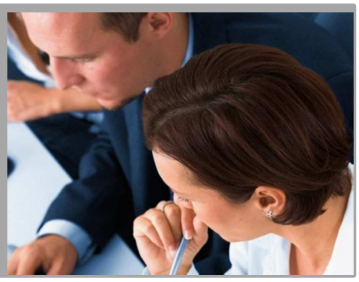

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