

# ELECTRICAL AND ELECTRONICS ENGINEERS PROFESSIONAL LIABILITY INSURANCE INSIGHTS

## Defining Your Insurer's Duty to Defend and Duty to Indemnify

Suppose a former client accuses you of making an error and demands that you fix it. Worse yet, suppose the former client files suit against you. Either one is likely a “claim” against you, and once you tender a claim to your professional liability insurer, the two duties the insurer typically owes to you as its insured are the duty to defend and the duty to indemnify. What do those duties require of your insurer?

### Duty to Defend

- The “duty to defend” means that, when you timely report a potentially covered claim against you:
  - The insurer must appoint and pay for defense counsel to defend you against the claim, unless you select your own counsel.
  - If you have selected your own counsel, the insurer must reimburse you for your attorney’s fees to defend yourself (an insured’s right to select its own counsel is dependent on the policy language and state law).
- To determine the duty to defend, many jurisdictions only allow the insurer to review the policy and the lawsuit petition against the insured, and as long as any allegation is even potentially covered by the policy, the insurer has a duty to defend. This is often referred to as the “eight corners” or “four corners” rule, because the insurer is limited to reviewing what is within the “four corners” of the policy and the “four corners” of the petition. Some jurisdictions, however, allow the insurer to consider evidence that is extrinsic to (not asserted in) the petition in evaluating whether there is a duty to defend.
- After an insurer agrees to defend you, sometimes you will receive a “reservation of rights” letter. Such letters alert the insured that while the insurer is furnishing a defense, there may be coverage issues that could preclude its duty to indemnify the insured, or, potentially, even its duty to defend.
- Note that not all professional liability policies include a duty to defend. There are “indemnity only” policies, under which the insured handles (and often pays for) its own defense. Each policy must be carefully reviewed to confirm whether the policy includes a duty to defend the insured.

### Duty to Indemnify

- The “duty to indemnify” means the insurer’s duty to pay the claim, by funding a settlement or paying a judgment against the insured.
- Unlike the duty to defend, which is typically determined by the policy and petition, the duty to indemnify is based on any and all information developed in the underlying suit or claim.
- An insurer’s duty to indemnify or pay the claim is limited to the amount of the policy limit, which, in many professional liability policies, may be eroded by payment of defense costs.
- Jurisdictions are split on whether a finding of no duty to defend means there is no duty to indemnify. Some jurisdictions hold that even if there is a duty to defend, there may be no duty to indemnify, and vice versa. Other jurisdictions hold that if there is no duty to defend, there can be no duty to indemnify.
- In some cases, an insurer and insured may disagree on whether a claim should be paid. Most policies contain a provision explaining that the insured must obtain insurer consent before settlement. These are often called “voluntary payment” provisions. Some policies allow an insurer to unilaterally settle without insured consent, while others have “consent to settle” provisions, which require insured consent as well.



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