



COVERAGE INSIGHTS

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Understanding Duty to Defend vs. Duty to Indemnify

Liability insurance policies typically promise two distinct things: a defense against a lawsuit and payment for a covered loss. Many business owners assume these are the same obligation. However, the duty to defend and the duty to indemnify arise at different points in a claim, and they can lead to different outcomes on the very same lawsuit. Understanding this distinction helps a business anticipate what its insurer will and won't do at each stage of a claim. The specific rules governing these duties can vary based on policy language and applicable state law.

What the Duty to Defend Means

The duty to defend is an insurer's obligation under many liability policies to provide a legal defense, typically including selecting and paying defense counsel, when a lawsuit alleges something that could potentially fall within the policy's coverage. This duty is generally broader than the duty to indemnify. A defense can be owed even for claims that turn out to be groundless, or for claims that are ultimately found not to be covered once the facts are known.

What the Duty to Indemnify Means

The duty to indemnify is an insurer's obligation to pay a covered loss on the insured's behalf once liability and damages are actually established. This obligation is narrower than the duty to defend, and it arises later in the process. Indemnity depends on the actual facts that establish liability and on whether the resulting loss falls within the policy's coverage, not just the allegations made in a complaint.

Why the Trigger Differs

Defense obligations are typically assessed by comparing the allegations in a complaint with the policy's terms. If a claim potentially falls within coverage, a defense is usually owed even if it later turns out coverage doesn't apply. Indemnity works differently, since it depends on the facts and coverage determination as the case unfolds. As a result, a business can receive a defense throughout litigation and still end up with no indemnity obligation if the underlying claim isn't covered.

Not every policy structures the defense obligation the same way, either. Commercial general liability policies give the insurer a duty to defend, meaning the insurer selects and pays defense counsel directly. Most directors and officers liability (D&O) policies and many other professional liability policies instead give the insurer a duty to advance or reimburse covered defense costs. Under this structure, the business selects its own defense counsel, often subject to the insurer's approval, and the insurer pays or reimburses those covered costs as they're incurred rather than managing the defense directly.

What This Means in Practice

A business may see its insurer defend a lawsuit for months, only to later determine that some or all of the underlying claim isn't covered once the facts are resolved. This is one reason insurers sometimes issue a reservation of rights letter early in a claim. The letter allows the insurer to continue the defense while reserving its position on indemnity until more facts become available. A continued defense is a meaningful benefit, but it is not a



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guarantee that a claim is, or will be, covered.

Business owners can prepare for this dynamic by:

- **Reading the reservation carefully**—If a reservation of rights letter arrives, it often signals that the duty to defend and the duty to indemnify may not move in lockstep on that claim.
- **Asking early, not late**—A broker can explain what triggered the duty to defend and what would need to be true for indemnity to follow.
- **Documenting the claim**—Clear records of communications and facts as they develop can support the business if a coverage question arises later.

Key Takeaways

The duty to defend and the duty to indemnify are separate obligations, and the gap between them matters. A business can receive a full legal defense for months and still end up with no guarantee that the underlying claim will be covered once the facts are resolved.

That gap looks different depending on the policy. Under a standard duty to defend, the insurer runs the defense. Under the reimbursement structure common in D&O and other management liability policies, the business selects its own counsel, and the insurer advances or reimburses the covered costs. Either way, staying in close contact with a broker is the best way to know what to expect at each stage of a claim.

Contact us today for additional coverage guidance.