

# How To Read and Understand Your Insurance Policies: Part IV

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An earlier post regarding insurance policies left off with insuring clauses. This last post in the series addresses the remaining key portions of your insurance policy and the defense of claims.

## Exclusions.

Exclusions describe matters not covered. Some exclusions are designed to avoid coverage for risks the insurer does not wish to insure at all (including risks that cannot legally be insured, such as protection from the consequences of your own fraud) and others are designed to limit coverage for risks normally covered by other insurance. To be given effect, an exclusion must be “conspicuous, plain and clear.” It is also normally interpreted strictly so that any ambiguity therein will be resolved against the insurer.



Some exclusions are subject to exceptions, which restore some of the coverage otherwise taken away by the exclusion. “Exceptions” to exclusions are somewhat analogous to coverage provisions for purposes of policy interpretation, and are therefore interpreted broadly in favor of coverage. Some exclusions apply only to particular insuring agreements in the policy while some exclusions apply to any and all coverages in the policy.

Exclusions only come into play if the loss otherwise falls within the insuring agreement.

CGL policies commonly exclude coverage for intentional acts, contractually assumed liability, and dozens of others such as worker’s compensation, pollution, damage to the insured’s own property, and professional services.

D&O or E&O policies commonly exclude coverage for breach of contract; personal gain; dishonest, criminal or fraudulent conduct; willful or intentional wrongdoing; fines, penalties and punitive damages; and known wrongful acts already the subject of litigation.

## Conditions.

Conditions outline the general duties of the insured and insurer under the policy, including in connection with the issuance of the policy and the presentation and adjustment of the claim. They can be a trigger for coverage to even begin, or they can be obligations that continue throughout the existence of the claim.

Common conditions include:

**Notice.** Notice by you to your insurer is a prerequisite for an insurer’s duties to arise. Claims-made policies typically require “prompt” notice of any claim.

**Cooperation.** The clause requires you to give “full cooperation and all information and particulars” the insurance company may reasonably request from the Insureds “in order to conduct its investigation or to reach a settlement of the Claim.”

**No voluntary payments.** The clause provides that “the Insurer shall not be liable for any settlement, Defense Costs, assumed obligation, admitted liability, voluntary payment, or confessed or agreed Damages or judgment to which it has not consented.” The purpose is to prevent collusion between the injured party and the insured, as well as to give the insurer control over the outcome of the case.

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## Endorsements.

These can be additional terms that apply to the policy which are wholly new, or they can be changes to the policy. For example, they can change a definition or even an insuring clause. *Make sure you have all of the endorsements and forms identified by name or number on the declarations page!*

## Duty to Defend versus Duty to Indemnify for Defense Costs.

Primary CGL policies frequently allocate the duty to defend to the insurer. The insurer must defend the claim if there is any possibility of coverage. And the costs of defense are generally separate from policy limits. But, the insurer controls the defense and will almost always appoint its own counsel of choice to defend the claim. The law is clear that the insurance company must defend even if the claim is only *potentially* covered by the policy and even if only some of the claims are covered, and the insurer ordinarily must defend the entire action even if uncovered claims are joined with the covered claims. So the duty to defend a claim is broader than the duty to ultimately pay out on a claim.

In contrast, D&O policies and E&O policies frequently allocate the duty to defend to the insured. That means you will be responsible for retaining counsel (subject to the insurance company's approval) and "defense costs" reasonably incurred to defend against a covered claim will be defined in the policy as an element of loss. When there is no separate duty to defend, defense costs are considered an element of a covered loss and eat into the amount available to pay a claim.

We hope that this series has given you a better understanding about liability insurance and helps you navigate your own policies. And we doubly hope that your need to *use* your liability insurance never arises.

