

ELECTRICAL AND ELECTRONICS ENGINEERS PROFESSIONAL LIABILITY INSURANCE INSIGHTS

Consent to Settle Provisions – Sharing Settlement Decisions Between Insured and Insurer

Consent to settle provisions ensure that professional liability insureds have a say in the settlement of their claims, while the insurer typically has a voice as well. In this bulletin, we describe the balance between the intentions of the insurer and the insured when considering settlement subject to a consent to settle clause.

What is a consent to settle clause?

- A consent to settle clause generally requires that an insurer obtain its insured's consent before settling a claim, where the insured's consent shall not be unreasonably withheld.
- These clauses are included in most professional liability policies and are often found within a policy's defense and settlement provisions.
- While common in professional liability policies, these clauses are less likely to be found in general liability policies, where insurers often have the discretion to settle as they see fit.
- As with most insurance coverage considerations, the enforcement and interpretation of consent to settle clauses vary from state to state, especially as to the "reasonableness" of an insured's refusal to consent to settlement.

Why are these clauses frequently included in professional liability policies?

- In the professional liability context, even though a proposed settlement amount may be relatively low, the insured may feel that the reputational risk may not justify the settlement amount.
- On the other hand, the insurer (and often the insured as well) may see a proposed settlement as a means of minimizing the cost and risk of litigation and achieving finality.
- Consent to settle clauses seek to give both insured and insurer some amount of control in the settlement process—the insured is entitled to give or withhold its consent to the settlement, while, depending on the policy language at issue, the insurer may have some tools at its disposal to encourage the insured's consent.

So it empowers insureds?

- Yes, consent to settle provisions guarantee that an insured has a voice in settling its claim.
- By providing at least some amount of control regarding the settlement of a claim to the insured, these clauses reflect that insurers understand that professional liability insureds have reputational interests and considerations when it comes to settling their claims.

What can insurers do to persuade the insured to agree to a settlement?

- Some consent to settle provisions contain a settlement cap provision (often referred to as a "hammer" clause).
- These provisions are designed to urge the insured to consent to settlement by providing financial consequences if it does not consent, where the insurer and the claimant agree that the settlement is acceptable.
- For example, if an opportunity to settle exists that the insurer wants to accept, and which is acceptable to the claimant, but the insured declines to consent, in the event the ultimate judgment or settlement is higher than the proposed settlement, some such clauses operate to reduce the policy's limit of liability to the amount for which the claim could have been settled.
- Such clauses may also provide for the sharing (typically 50% each by insured and insurer) of damages and/or claims expenses incurred after the settlement was recommended but rejected by the insured, or some other limitation on the insured's available coverage under the policy.



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