

COVERAGE INSIGHTS



When businesses face liability insurance claims, they may mistakenly assume that the insurer decides when to reach a final settlement amount. However, this isn't always the case. Some liability policies, particularly professional liability coverage, include a consent to settle clause. This policy provision requires an insurer to obtain the insured's approval before officially settling a claim. The consent to settle clause can cause a considerable shift in control during the claims process and pose various financial trade-offs. While this policy provision can empower insureds and give them a stronger voice amid claims resolution, its implementation can also influence overall business reputation, claims strategy and out-of-pocket exposures. As such, it's crucial for businesses to better understand this provision and how to apply it. This article provides more information on the consent to settle clause, explains why it matters and offers related best practices for policyholders.

Most commonly found in professional liability policies, the consent to settle clause gives an insured two choices during the claims process. Specifically, once the insurer investigates the claim and recommends taking a settlement offer from a third party, the policyholder can either:

1. **Accept.** If the insured approves the insurer's recommendation, the claim will be resolved, and the insurer will pay the final settlement amount.
2. **Reject.** If the insured refuses the insurer's recommendation, the claim will proceed. In these instances, the risk of litigation often increases.

It's worth noting that some consent to settle provisions also include a hammer clause. Under this clause, a policyholder may encounter the following ramifications after rejecting a settlement recommendation:

- **Capped payouts**—Although the claim will proceed, the insurer may cap payment at the initially proposed settlement amount, leaving the insured to cover any additional claim expenses.
- **Loss of defense coverage**—Especially if the claim results in litigation, the insurer may not cover any legal defense costs incurred following a rejected settlement proposal. Consequently, the insured may have to pay out of pocket for attorney fees, excess judgments and damages awarded beyond the refused settlement amount.

A hammer clause may be hard or soft in nature. A hard clause typically halts any and all insurer payments exceeding the original settlement offer, while a soft clause may include specific coinsurance terms that allow the insurer and insured to split the remaining claim costs (e.g., 50/50, 70/30 or 80/20) following a settlement refusal. Altogether, the consent to settle clause provides policyholders with additional decision-making power and enables them to play a more active—though sometimes difficult—role in claims management.

Without a consent to settle clause, liability policies generally permit insurers to settle claims at their own discretion. In the professional liability space, this can create a number of challenges for policyholders, as even a relatively low settlement amount could imply wrongdoing on an insured's behalf and prompt lasting reputational risks. This is particularly relevant among businesses that rely heavily on a strong reputation and trusted public image to attract clients and maintain successful operations, including those in the health care, law, financial, engineering and contracting sectors. In these cases, a single settlement could undo years of positive community engagement and client loyalty, forcing the affected business to rebuild stakeholder trust and threatening its ongoing financial stability. Although rejecting a recommended settlement offer may result in additional claims costs, it can allow a business to continue defending against allegations of wrongdoing and potentially reach more favorable long-term outcomes.

When purchasing liability coverage with a consent to settle clause, it's important for policyholders to keep the following best practices in mind:

- **Review clause specifics.** Every consent to settle clause is different. Insureds should closely evaluate the unique elements of these provisions (e.g., terms, hammer clauses and coinsurance requirements) when selecting coverage to ensure they comprehend the full financial risks of refusing a recommended settlement offer.
- **Compare policies.** Insureds should browse coverage options across insurers before making a final decision, thereby securing a policy (and a consent to settle clause) that suits their specific needs. Key items to consider include premiums, deductibles, whether the policy has a hammer clause and, if so, whether it's hard or soft.
- **Consult the experts.** Consent to settle clauses can be complex. Insureds should work with trusted insurance professionals and legal counsel to clearly understand these provisions and make more informed decisions throughout settlement processes. This can make all the difference in ensuring a positive and cost-effective claims experience.

Consent to settle clauses are designed to strike a careful balance between an insurer's financial interests and a policyholder's reputational concerns. While these provisions may help give insureds meaningful control over claim settlement decisions, they also carry real risks. Understanding how these clauses operate before a claim arises is essential. With this in mind, businesses should carefully assess their liability coverage, paying close attention to any conditions or penalties tied to settlement consent. When in doubt, consulting knowledgeable professionals can help businesses ensure their coverage aligns with their particular needs and risk tolerance. Contact us today for additional insurance guidance and solutions.

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