

The Duty to Defend: A Unique Insurance Coverage You May Want to Evaluate

by Stephen van Wert, Founders Specialty
and Jeff Cavignac, CPCU, RPLU, ARM

One of the more challenging issues facing a Design Professional (DP) is the contractual obligation to defend their client. This is not covered by a DP's Professional Liability practice policy. Assuming the risk without insurance could expose the firm to uninsured defense expenses and potential negative impacts on project profit margins. Alternatively, it could result in lost business and lost income because the DP felt they had to walk away from an otherwise desirable project.

Aspen Insurance, through Founders Specialty, has come up with a unique product they call Contractual Defense Protection (CDP). In simple terms, this policy works in conjunction with the Design Professionals Practice policy and covers the gap created when a DP agrees to defend their client.

This coverage would come in to play when a DP's client has a claim against them and they ask the DP to provide a defense for them, for which the DP is contractually obligated to do. The DP tenders the claim to their practice policy insurer and the practice policy insurer rejects such tender based on the contractual liability exclusion or the fact that the client is not an insured under the DP's policy. At that point, the DP would tender the claim to Aspen. Aspen will help the DP perform its duty to defend the DP's



client, such as suggesting a qualified defense attorney. Aspen would be responsible for paying the **Client Defense Expenses** subject to the policy limit and to a "reasonableness" standard, i.e. they will only reimburse the DP for "reasonable" attorney fees in light of the locality where such legal services are performed. Although there is no deductible on this program, there is a 20% coinsurance provision. The coinsurance amount is capped at a specific dollar amount depending on the size of the DP.

The premiums for this coverage are fairly modest, averaging about .005%- .0075% of fees, subject to the following minimum premiums: \$3,500 for \$500,000 limit in CDP coverage and \$5,000 for \$1,000,000 (plus taxes and fees). In other words, DP firms with up to \$10,000,000 in revenue would likely hit the \$5,000 minimum for a \$1,000,000 limit for a retro inception policy. [CLICK HERE](#) for a brochure on the program.

The CDP policy closes a gap in coverage for DPs at a relatively modest cost, however, there are some other issues that should be considered. We put the question to several professional liability claims adjusters and attorneys who specialize in the defense of design professionals. Below you will find their comments and Aspen's response:

Comment from Adjustors and Attorneys

It is not unusual for our insureds who have signed a contract requiring them to defend their client to receive a tender of defense demanding the insured pay for the client's defense. Since the immediate defense costs are excluded, we generally deny the client's defense. While it is theoretically possible the client could make some motion in court to get a ruling that the insured is obligated to pay for the defense, in my 6 or so years with adjusting claims, I have never seen that actually occur, or a motion even be made. In my over 30 years in the practice of law defending A&Es, I saw the motion be made twice. The motion was granted one time and denied the other.

Response from Aspen

Every scenario is different, but we recognize that many DPs will not want to adversely affect their relationship with their client and want to honor their duty to defend provision rather than force the client to sue them in court. As such, the CDP policy can provide significant financial assistance to the DP in paying for these immediate defense costs, thus mitigating the hit to a DP's cash flow.

Comment from Adjustors and Attorneys

If the insured is at fault, and that fault caused the client to be sued, the client's defense costs could be awarded as damages against the insured and would be covered. Since most claims settle in mediation, the exposure for these defense costs as damages is taken into account in the settlement process. On the other hand, having the coverage could be a marketing tool for the insured. The insured could point out to prospective clients that it actually has contractual liability coverage which other competitors may not have.



Response from Aspen

There is typically no guarantee that Client Defense Costs will be awarded as damages as part of a settlement under the DP's practice policy. Even if there is specific language addressing the issue, such costs are typically not awarded until the claim is finally resolved. In the meantime, the DP may have to incur significant defense costs on an immediate and upfront basis. This is why many DPs have elected to walk away from deals with a duty to defend prior to the availability of the CDP policy.

Comment from Adjustors and Attorneys

This product may set a precedent that we don't want to set. For years, DPs have been fighting the obligation to defend their clients. Recognizing now that there is a product to insure this, it gives the DP less leverage in fighting against it. In addition, we don't know how sustainable and viable this product is. What happens if it goes away?

Response from Aspen

Unfortunately, over time, DPs have been less able to successfully fight the duty to defend as their argument that it is an uninsured exposure, and thus should not be agreed to, has not been persuasive enough to prevail in too many instances. The CDP policy was introduced to give DPs a solution to handle the duty to defend exposure instead of being faced with agreeing to this uninsured exposure or walking away from the deal altogether. If the client is insistent on the provision, the DP can now negotiate to include the cost of the CDP policy in the bid for the project, which is typically only a very small percentage of the overall project cost.

As for product viability, Aspen has every intention to continue to provide the coverage in the future. The DP can also take some assurances by the fact that the Aspen policy has a three year ERP which will be available in the future. In addition, it could be argued that the existence of the coverage is a "bonus" to the DP in those cases that they would have agreed to the duty to defend in the absence of such coverage anyways.

We also asked some specific questions of our own and you will find the responses from the Aspen Underwriters below.

- 1. Question:** *The Aspen Duty To Defend (DTD) coverage is triggered by a denial of coverage from the practice policy. Would a Reservation Of Rights (ROR) by the practice policy insurer count as a denial?*

Risk Management Seminar Series



Sexual Harassment Prevention Training

Wednesday, September 25 - CARLSBAD

7:30am Registration

8:00am - 10:00am Program

Subcontractor Pre-Qualification Process for Safety

Wednesday, Oct. 2 - DOWNTOWN

7:30am Registration

8:00am - 10:00am Program

Human Resources Legal Update

Wednesday, Nov. 6 - DOWNTOWN

7:30am Registration

8:00am - 10:00am Program

To register, click on the 'register now' button in the announcement email, or contact Bethany Mongold at Mongold@cavnac.com or call 619-234-6848.

Response: Yes, that is correct. We say coverage is triggered by exclusion by the practice policy of Client Defense Expenses which is what the ROR would exclude.

2. **Question:** What happens when an indemnity provision has both an upfront duty to defend as well as reimbursement of defense costs if the insured is negligent. If Aspen defends the matter and it turns out the DP was negligent, would Aspen subrogate back against the practice policy carrier for the defense?

Response: Yes, Aspen would have that right to subrogate back against the practice policy insurer. However, in the meantime, Aspen is covering 80% of the costs of the duty to defend, so that helps the DP's cash flow tremendously. Any amounts recovered by Aspen pursuant to subrogation would be applied as set forth in the DTD policy, which potentially includes getting the DP's 20% coinsurance back as well.

3. **Question:** How does Aspen determine the defense attorney when in fact the policy is written for the DP but the DP's client is being defended?

Response: Aspen does not determine the defense attorney. Aspen merely suggests defense attorneys that can be used if the DP wants help in that process. The duty to defend remains the DP's through the entire process. Aspen cannot force an attorney on the DP or the client. Note that Aspen pays the "reasonable" cost of the defense. If the DP or the client chooses a very expensive attorney, then Aspen would only pay for the reasonable costs as determined for that location of the country. The DP would have to pay the difference over reasonable costs. That is why we recommend that the duty to defend

should be negotiated with a reasonableness standard included.

4. **Question:** Would Aspen have a panel of attorneys similar to what a practice policy insurer may have?

Response: Aspen would use their current panel counsel (probably larger firms that would have a broader practice) as a starting point.

5. **Question:** Are there guidelines as far as rates charged by defense attorneys?

Response: Aspen would pay such panel counsel in the ballpark of where they pay them now in those states for regular A&E claims.

6. **Question:** Could the exclusion barring coverage for worker's comp claims be interpreted to deny a DTD claim when the owner is being sued by an injured construction worker?

7. **Question:** If the injured worker made a negligence claim against the client not based on work comp laws, and then the Practice Policy Insurer declines because of the contractual liability exclusion or the fact that the client is not an insured under the Practice Policy, then that could bring the DTD policy into play. It would likely be very fact specific.

This is a unique product that may solve the challenges presented by the contractual obligation to defend a DP's client. On the other hand, there are other factors mentioned above that should be considered when evaluating this coverage. Ultimately it will be up to the individual design firm. If you would like to discuss this further, please give us a call or if you are interested in applying for coverage, please [CLICK HERE](#) to complete the application. ■

Live Well, Work Well

September 2019

Health and Wellness Tips for Your Work and Life
Provided by Cavignac & Associates



Getting Outside May Be the Key to Boosting Your Physical and Psychological Well-being

A recent study published in Scientific Reports revealed that spending 120 minutes a week outdoors can improve your health and psychological well-being. Remember, well-being refers to feeling good and living both safely and healthily. And, the concept of well-being can have implications on your overall quality of life, health and happiness.

What are the benefits of spending time outside?

Exercising in nature has been proven to improve one's mental and physical health. Being outside also helps to promote higher vitamin D levels, a vitamin the body makes when skin is directly exposed to the sun. Many people are deficient in vitamin D, so exercising outside can be a great way to correct that.

In addition, outdoor activity can help you maintain a healthy weight, boost immunity and lower stress. Exercising outside can feel less routine than working out in a gym.

What counts as spending time outdoors?

Visiting town parks, greenspaces, woodlands and beaches all count as spending time outdoors. Here are two simple activities that you can do outside:

1. Walking or hiking—Hiking and walking have been proven to improve heart health and can help you maintain a healthy waistline.
2. Riding your bike—Riding a bike helps improve balance and endurance, and it's an exercise that's easy on your joints.

Be Prepared

Before you head outside and start improving your health today, you need to make sure that you're properly prepared. This means that you should pack water, first-aid supplies, sun protection and, if you're spending a significant amount of time outside, a healthy snack to help you refuel.

Potato and Ham Skillet With Eggs

2 potatoes (peeled and diced)
2 Tbsp. vegetable oil
2 onions (small, chopped)
1 green pepper (chopped)
6 eggs (beaten)
¼ tsp. black pepper
6 ounces frozen ham (thawed and chopped, about 1 cup)
1 cup reduced-fat cheddar cheese (shredded)

Preparations

1. In a medium-size skillet, cook potatoes in oil over medium heat until just soft, about 5 to 10 minutes.
2. Stir in onion, green peppers and ham, and cook 5 minutes.
3. Pour eggs and black pepper over potato mixture in pan, and sprinkle with cheese.
4. Cook for 5 minutes, stirring occasionally, or until eggs are firm and cheese is melted.

Makes: 6 servings

Nutritional Information (per serving)

Total Calories	290
Total Fat	15 g
Protein	19 g
Carbohydrates	19 g
Dietary Fiber	3 g
Saturated Fat	5 g
Sodium	540 mg
Total Sugars	4 g

Source: USDA

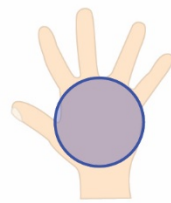
Making Smart Food Choices at a Restaurant

Eating healthy doesn't always mean sacrificing your favorite meals. Although it may not seem like it, you can still stay on track with your diet when enjoying a meal out with friends and family.

Since restaurants—especially fast food chains—tend to use more fat, salt and sugar than home-cooked meals, you just need to be smart about what you order from the menu. To make it simple, here are some things to keep in mind next time you're eating out:

- Avoid fried and carb-heavy options, like fried chicken or macaroni and cheese.
- Watch your portion size, as many restaurants give you more than one serving.
- Be mindful of your beverage choice, since there are many hidden calories in sugary sodas and alcoholic drinks.

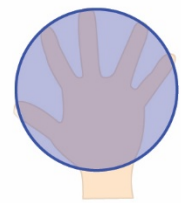
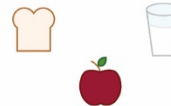
A Handy Guide to Portion Control



A serving of protein should be the size of the palm of your hand.



A serving of carbs should be the size of your fist.



A serving of vegetables should be an open handful.



An Increasing Number of Americans Are Making the Switch to Veganism

While veganism isn't a new concept, it has grown in popularity over the past few years. In fact, according to GlobalData, the number of vegans in the United States grew from 1% to 6% between 2014 and 2017.

Those who are vegan do not eat anything containing animal products (such as dairy and eggs), and prefer not to use products made of fur, leather, wool or down feathers. People who choose to follow a vegan diet do so for various reasons, including environmental, ethical or health reasons.

Making the switch from animal-based products is something you can do on your own. Making the switch in your diet, though, is a more involved process. Every person is different. That's why it's important to discuss your desire to become a vegan with your doctor before you change your diet.



Cavignac & Community



Cavignac & Associates is proud to support local and non-profit civic organizations, including the Challenged Athletes Foundation:



It is the mission of the Challenged Athletes Foundation (CAF) to provide opportunities and support to people with physical challenges, so they can pursue active lifestyles through physical fitness and competitive athletics. The Challenged Athletes Foundation believes that involvement in sports at any level increases self-esteem, encourages independence and enhances quality of life.

For more information, go to www.challengedathletes.org