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Affirmative Duty to Defend: How the Four Corners Approach Is Modified

By **Christopher Tellner and Benjamin Messing, published in** *The Legal Intelligencer on August 29, 2017.*

In the field of insurance law, most liability policies are designed to cover two primary and qualified contractual obligations assumed by the insurer—a defense expense obligation and an indemnification expense obligation. How the defense expense obligation is actually implemented through policy language can vary greatly between types of liability policies. The most frequently encountered liability policies—home, auto, commercial—implement the defense expense component through what is known as a duty to defend provision, in which the insurer assumes control of the defense of a claim and appoints defense counsel to represent the policyholder. However, there is another category of liability policies that do not contain a duty to defend provision but instead contain a duty to advance defense costs provision. These are typically found in higher exposure liability policies such as directors and officers (D&O), employment practices liability (EPL), or individual and organization (I&O) policies, where the policyholder, not the insurer, controls selection of counsel and exercises primary control over litigation, albeit with some limitations. Often, policies containing a duty to advance defense costs explicitly state at the outset that the insurer disclaims any duty to defend. This disclaimer, however, does not end the inquiry. Since policies containing a duty to advance defense costs are less frequently encountered by courts there is limited legal authority interpreting duty to advance provisions. We examine the differences between these two types of polices and how courts applying Pennsylvania law have addressed the topic. As discussed below, despite a duty to defend disclaimer, policies that contain a duty to advance defense costs provision most often are examined under the traditional duty to defend analysis.