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Seven Things About Professional Liability Coverage, Part 6: Restitutory Relief

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This is the sixth in a series of posts from the [Federation of Defense & Corporate Counsel's \(FDCC\) Blog](#) on issues arising under professional liability policies. The aim of this series is to provide sufficient background information to allow the defense attorney to identify relevant issues frequently raised by professional liability policies and to formulate a plan for addressing them. This is not a treatise on how different jurisdictions view professional liability issues. For that, the reader should review the DRI's 2012 publication *Professional Liability Insurance: A Compendium of State Law*. There are, of course, other issues of importance not discussed here.

Restitutory Relief

When a professional is accused of wrongdoing, one of the accusations often made is the professional did not earn his or her fee, or charged an exorbitant and unconscionable fee for his or her services. The plaintiff's prayer for relief then includes a demand for disgorgement or restitution of funds received by the insured. Rarely is this the only demand made, so the presence of a claim for disgorgement or restitution may not eliminate coverage for the loss, but rather just limit the scope of any duty to indemnify.

In some industries, professional liability policies commonly exclude restitutory relief from coverage. One such exclusion applies to:

Restitution, reduction, disgorgement, set off, return, or payment of any form of any consulting fees or payments, or any other costs, expenses or charges;

National Ground Water Association, Professional Liability Form

In these circumstances, the insured facing a professional liability claim including a prayer for restitution or disgorgement of funds received may face a significant uninsured exposure. For the defense attorney, this means regular and frank communication with the insured is absolutely necessary to prevent unpleasant surprises at the end of the claim and litigation process. For coverage counsel and the insurer, prompt and open communication is equally important. If the insurer and its counsel foresee that the insured may be called upon to make a personal contribution towards resolution in excess of the deductible or self-insured retention, that possibility should be brought to the insured's attention at an early point.

Next Up: A discussion of some common exclusions.