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| **Professional Services** | Your E&O policy should provide coverage for the **Professional Services** that your firm provides. The definition of **“Professional Services”** in your policy should specifically list these services. They may be listed by endorsement and some services may not be covered at all. | Some policies do not list the specific **Professional Services** the policy intends to cover. These policies typically rely on the words “Real Estate Agent or Broker” to describe the coverage provided. This may work out fine for property listing and sales, but could leave the insured without coverage for a claim involving things like property management, real estate auctions, business opportunities brokerage, and oversight of tenant buildout or receivership services. |
| **Claims or Defense Costs** | **Claims or Defense Costs** refer to those reasonable and necessary approved amounts incurred in the defense of a covered claim by your insurance carrier. This may include among other things attorney’s fees, court costs, costs of appeal and pre/post judgement interest. These **Claims or Defense Costs** can either be included within the limit of liability (DIL) or in addition to the limit of liability (DOL). | In many E&O policies **Claims or Defense Costs** are included within the limit of liability (DIL). This means if you have a $1M policy and spend $250,000 in defending the claim then only $750,000 would be available to ultimately pay any indemnity payment required by the claim. In a policy with **DOL (defense outside the limit),** the policy would pay the $250,000 in defense and you would still have the full $1M available to pay for an indemnity payment, assuming it was a covered claim. |
| **Independent Contractors** | Most real estate firms utilize the services of **Independent Contractors** in their sales force. Unless your sales force carry their own E&O, the definition of **“Insured”** in your policy should include coverage for **Independent Contractors** while providing **Professional Services** on your behalf. | Not all Real Estate E&O policies include coverage for **Independent Contractors.** Those which do not will likely provide coverage for the **Named Insured** (your firm) but will leave your **Independent Contractor** agents without coverage. This means your agent will have to hire their own attorney to defend them in the event of a claim or law suit, and pay any damages which might result. Also, it is possible if your independent contractor has their own policy that their carrier might seek to defend their independent contractor while implicating the real estate broker. |
| **Pollution** | Nearly all Real Estate E&O policies exclude coverage for the dispersal, release or escape of, and the costs of testing, monitoring or removal of, Pollutants. What your E&O policy should contain is language which makes it clear that while **Pollution** itself is not covered, *the failure to advise of the existence of known pollutants or contaminants* in connection with your **Professional Services** is intended to be covered. | When your E&O policy does not specifically provide coverage for your **Professional Services** in the *failure to advise of the existence of known pollutants or contaminants,* the insured could be left without coverage for a claim related to, or arising from pollution related claims**.** This could lead to your firm bearing the full weight, including attorney’s fees and any settlement or judgment for a claim relating to this matter. |
| **Discrimination** | Most Real Estate E&O policies contain an exclusion for claims alleging **Discrimination** under Title VIII of the Civil Rights Act of 1968 and the Fair Housing Amendment of 1998. Even though the term Fair Housing seems to imply residential housing, it can be expanded to include commercial real estate services. What your policy should provide is coverage for **Defense Expenses**, including attorney’s fees, for defending a claim alleging **Discrimination** in the performance of your Professional Services. | Many Real Estate E&O policies exclude **Damages** for **Claims** alleging **Discrimination**, but also do not provide coverage for **Defense Expenses** when the claim alleges **Discrimination.** This will leave the Insured in a position of having to bear the full costs of defending such a law suit, which could run in the tens of thousands of dollars. |
| **Bodily Injury & Property Damage** | **Bodily Injury & Property Damage** are common exclusions in Real Estate E&O policies. The reason being that most bodily injury and property damage claims are intended to be covered under your GL policy. Your real estate E&O policy should contain language which makes it clear that while claims *for* **Bodily Injury & Property Damage** are not covered, that **Claims** based on, or arising out of **Bodily Injury & Property Damage** caused by the performance of or your failure to perform your **Professional Services** are covered. | Not all Real Estate E&O policies close the “gap” typically created by the common **Bodily Injury & Property Damage** exclusion. Where no language is provided clearly providing coverage for your **Professional Services,** a claim alleging **Bodily Injury & Property Damage,** even a claim for your **Professional Services,** could be denied if the underlying claim is for **Bodily Injury or Property Damage.** An example of this might be a claim related to an injury caused by a slip or fall or property damage caused by improperly maintained facilities. |
| **Bodily Injury & Property Damage – Lockbox** | **Lockboxes** are not commonly used by commercial real estate agents. However, some agents may list or sell residential property occasionally, which may involve the use of a **Lockbox**. While claims for **Bodily Injury & Property Damage** are excluded**,** your policy shouldprovide a sub-limit for **Bodily Injury & Property Damage** claims involving the use and operation of a **Lockbox.** | **Bodily Injury & Property Damage** claims, arising from the use of a **Lockbox,** will likely be denied by your insurance company, unless your policy has a specific sub-limit for the use and operation of a **Lockbox.** An example might be a property damage claim relating to failure to reengage a security system and subsequent vandalism or theft. |
| **Fraudulent, Criminal or Dishonest Acts – Final Adjudication** | Intentionally **Fraudulent, Criminal or Dishonest Acts** are not covered by a Real Estate E&O policy. However, your policy should provide coverage for **Defense Expenses**, including attorney’s fees, until the **Fraudulent, Criminal or Dishonest Acts** are established by a **Final Adjudication** in a court of law (a determination by a court that can no longer be appealed.) | Many claims allege fraud, even if there really isn’t any. If your policy does not provide coverage for at least **Defense Expenses** until **Final Adjudication,** your insurance company may deny all coverage whena claim alleges **Fraudulent, Criminal or Dishonest Acts.** This could bewell before the bad acts are established, leaving the insured to bear the full weight of defending allegations such as these. |
| **Fraudulent, Criminal or Dishonest Acts – Innocent Insureds** | Beyond providing coverage for **Defense Expenses** related to claims involving allegations of **Fraudulent, Criminal or Dishonest Acts,** your policy should also provide coverage forboth **Defense Expenses** and **Damages,** forthose **Innocent Insureds** who had no knowledge of and did not participate in the bad acts. | If your policy does not provide coverage for **Defense Expenses** and **Damages** for **Innocent Insureds,** these insureds – including your firm - may be left bearing the full expense of defending a law suit alleging **Fraudulent, Criminal or Dishonest Acts,** despite the fact that these parties had no knowledge of, and did not participate in, the bad acts. |
| **Personal Injury** | Your policy should include coverage for claims related to allegations **Personal Injury,** such as libel, slander, publications or utterances which are defamatory or disparaging of a person’s character, or are violations an individual’s right to privacy that occurred within the scope of your Professional Services. | Some Real Estate E&O policies do not provide coverage for claims related to **Personal Injury.** If your policy doesprovide coverage for **Personal Injury,** your insurance company may “allocate” **Defense Expenses** based on “covered” and “uncovered” allegations. This could leave the insured to bear significant expense in defending and settling a lawsuitwhich includes these allegations. |
| **Punitive Damages** | **Punitive Damages** can often far exceed the amounts awarded for “Compensatory Damages” in a lawsuit. Your policy should provide coverage for both “Compensatory Damages” and **Punitive Damages,** in jurisdictions where coverage for **Punitive Damages** is permitted by law. | If your jurisdiction permits coverage for **Punitive Damages,** but your insurance policy does not include coverage for these damages, your firm may have to pay any **Punitive Damages** awarded to the plaintiff in a law suit. |
| **Duty to Defend** | Your insurance company should have a **Duty to Defend** any **Claim** against your firm alleging **Wrongful Acts,** in the performance of, or failure to perform, your **Professional Services,** even if the allegations are groundless, fraudulent or false. | In a **Duty to Defend** policy, it is the carrier’s obligation to defend you within the terms and conditions of the policy. If your insurance company does not have a **Duty to Defend** your firm, you may have to secure defense counsel, including paying a retainer to the law firm, and seek reimbursement from your insurance company months or years, later. In some policies that are not a **Duty to Defend** policy, the insured must defend themselves and then seek reimbursement for covered expenses. |
| **Consent to Settle** | Your insurance company should not settle a claim without the C**onsent** of the **Named Insured.** If the **Named Insured** withholds consent to a proposed settlement, your insurance company should provide some coverage for both **Defense Expenses** incurred after a settlement is offered, and **Damages** above the proposed settlement amount. Often Real Estate E&O policies will provide coverage for 50% of these **Defense Expenses** and **Damages** which are in excess of the original proposed settlement. | Some E&O policies include a **Consent to Settle** provision, but fail to provide any coverage for **Defense Expenses** and **Damage**s after a proposed settlement is rejected by the **Named Insured**. This may cause the insured to feel compelled to **Consent** to a settlement they disagree with, to avoid the potential costs of the **Defense Expenses** and **Damages** above what was proposed by their insurance company. |
| **Owned Property** | Most E&O policies will exclude claims arising from relating to properties in which any insured has a financial interest or an interest greater than a certain percentage. Typically, that percentage is 10% ownership collectively by all insureds. You should address if your company has owned property exposure and see if you can get coverage added to include claims from outside third parties that might that might be related to a **Wrongful Act** in the conduct of your **Professional Services.** Insurance carriers don’t want to pay you (the **Insured** for claims from yourself, but a properly structured policy can address the third party exposure. | Some E&O policies will include coverage for some services such as **Property Management Services** if there is an ownership interest. Others will provide coverage but only to the extent the **Insureds** collectively own less than 50% and yet others will only cover you for the percentage of the property you don’t own. For example, if you own 40% of a property, they will only pay for 60% of the defense or indemnity payout associated with the claim relating to this property. |
| **Receivership Services** | **Professional Services** as a court appointed receiver can be covered but not automatically.  **Receivership Services** include a myriad of services other than standard property management which are fiduciary in nature. It is the Receivers responsibility to oversee the property and to recommend expenditures, improvements and even when to sell, including for how much. | Often Court Appointed Receivers are appointed as individuals not corporations and thus may be excluded from coverage under a standard E&O policy. Many times Receivers appoint their own property managers to manage the property and hire related party companies to provide services. This can create a conflict of interest and thus an exclusion in the E&O policy. Additionally, many receivers may have sole discretion to sell a property without seeking approval of the court. Self-Dealing and Self Interest claims will most likely be excluded from the policy. Additional non property management services such as placement of insurance, handling employees and other services as often may be required by the Court Order may also be excluded. |
| **Incident Reporting** | **Incident Reporting** allows an **Insured** to report matters they believe may give rise to a claim during the policy period even if they have not yet received an actual claim or a demand for payment. A properly structured E&O policy will allow an insured to report **Incidents** during the policy period and if a **Claim** develops in the future such **Claim** will be treated as if it was reported during the **Policy Period**. | Some policies do not allow for **Incident Reporting** and thus a matter has to be a **Claim** before it can be reported to the insurance carrier. Since E&O policies are primarily **Claims Made** policies, this could lead to the inability to have a **Claim** covered in subsequent periods. |
| **Extended Reporting** | **Extended Reporting** refers to the period of time after the expiration of a policy in which an **Insured** can continue to report a claim that occurred during the policy period. This is sometimes referred to as a **Tail Policy.** Under a claims made and reported policy you must report all claims made against you during the policy period or a very short window after the policy expiration date (typically 30-60 days). In the event you terminate your coverage either by electing not to renew or if you have sold the company or retired, claims can continue to come in for a period of time. Most of the better E&O policies will allow you the ability to purchase additional time to report a claim that occurred during the policy period. The fee is typically 100%, 150% and 200% for a 12, 24 or 36 month extended reporting period, respectively. | Some E&O policies don’t afford the company the right to purchase an Extended Reporting Endorsement unless the insurance company cancels the policy (One Way Tail). Other companies will only allow for an additional 12 months of coverage. This can present a problem if you sell the company without any way to insure the new owner (or yourself) that there is coverage for your prior acts. An **Insured** should be able to obtain both a **Bilateral Tail** and for a period of up to 36 months. |