



AXIS INSURANCE SERVICES, LLC

Understanding a Real Estate E&O Policy



<i>Issues</i>	<i>What to Look for in Your E&O Policy</i>	<i>Gaps Which May Exist in Your Policy</i>
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. This definition may be included by in the body of the policy, on the Declarations Page or it may be included in an Endorsement .	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 you without coverage for a Claim involving things like property management, real estate auctions, business opportunities brokerage, oversight of tenant buildout or receivership services.
Defense Expenses	Defense Expenses are those reasonable and necessary expenses incurred by your insurance company in the defense of a covered claim. These typically includes attorney’s fees, filing and other court costs, the cost of appeal bonds and pre- and post-judgment interest. Defense Expenses are nearly always paid by the insurance company, and can either be included within the limit of liability (DWL) or are paid in addition to the limit of liability (DOL).	In many E&O policies, Defense Expenses are included Within the Limit of liability (DWL). This means that the total cost of defending a covered claim will be a part of, and not in addition to, the total limit of liability provided for a single claim. For example, if you have a \$1M policy and \$250,000 is spent in defending a claim, then just \$750,000 would be available to settle with the claimant, or satisfy a court ordered judgment. In a policy with Defense Expenses Outside the Limit (DOL), the \$250,000 in Defense Expenses would not erode the per claim limit, leaving the full \$1M available to settle with the claimant or satisfy a court ordered judgment.
Independent Contractors	Most real estate firms utilize the services of Independent Contractors in their sales force. Unless your sales force carries 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. Of concern also, where your Independent Contractors maintain has their own E&O insurance, it is possible that the defense undertaken by their insurance carrier might tend to implicate the real estate brokerage, (your company), directly or indirectly.



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Pollution	<p>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, <i>the failure to advise of the existence of known pollutants or contaminants</i>, in connection with your Professional Services, is intended to be covered.</p>	<p>When your E&O policy does not specifically provide coverage for your Professional Services in the <i>failure to advise of the existence of known pollutants or contaminants</i>, 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 Pollution.</p>
Discrimination	<p>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 suggest residential property, it can be interpreted to apply to commercial real estate as well. 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.</p>	<p>While most Real Estate E&O policies exclude Damages for Claims involving Discrimination, many also do not provide coverage for Defense Expenses when a claim alleges Discrimination. This will leave an Insured in a position of having to bear the full costs of defending a law suit which contains allegations of Discrimination. This gap could cost your firm tens of thousands of dollars in attorney’s fees and other Defense Expenses.</p>
Bodily Injury & Property Damage	<p>Bodily Injury & Property Damage are common exclusions in Real Estate E&O policies. The reason for this is that most bodily injury and property damage claims are intended to be covered under your General Liability policy. Your real estate E&O policy should contain language which makes it clear that while claims <i>for Bodily Injury & Property Damage</i> 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.</p>	<p>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.</p>
Bodily Injury & Property Damage – Lockbox	<p>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 should provide a sub-limit for Bodily Injury & Property Damage claims involving the use and operation of a Lockbox.</p>	<p>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. As an example, an E&O claim could arise from the failure to properly reengage a security system which could lead to vandalism or theft at the property.</p>



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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 Final Adjudication is a determination by a court that can no longer be appealed.)	Many claims allege fraud or dishonesty, even if there really isn’t any. If your policy does not provide coverage for Defense Expenses until Final Adjudication , your insurance company may deny all coverage for a claim which contains allegations of Fraudulent, Criminal or Dishonest Acts . Naturally, this could be well before the bad acts are established as a matter of law, thus, leaving your firm to bear the full weight of defending a claim such as this.
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 for both Defense Expenses and Damages , for those Innocent Insureds who had no knowledge of and did not participate in the alleged 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 and settling 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 of Personal Injury , such as libel, slander, publications or utterances which are defamatory or disparaging of a person’s character, or are violations to 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 does not provide 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 lawsuit which 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 a plaintiff in a law suit.



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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.	Not all E&O policies impose a Duty to Defend on the insurer. 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 undertake your own defense. In these policies, the insured has to advance all or most of the Defense Expenses , and then seek reimbursement for covered expenses, months after the claim is resolved.
Consent to Settle	Your insurance company should not settle a claim without the Consent 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 Damages 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	Many E&O policies will exclude claims arising from or relating to properties in which the insured, collectively, has a financial interest greater than an established percentage. Often, that percentage is 50% or less. If your company has owned property exposures, coverage should be added to address claims from third parties which might be related to a Wrongful Act in the conduct of your Professional Services . Insurance carriers typically will not provide coverage for Claims relating solely to your owned property, but a properly structured policy can address Claims arising from a third party exposure.	E&O policies vary widely in how they treat Owned Property . Some policies exclude Owned Property entirely; others limit coverage for Owned Property to specific Professional Services , such as Property Management . Still others will cover Damages and Defense Expenses , but only for the percentage of the property not owned by the Insured . For example, if the insured, collectively, owns 40% of a property, the maximum coverage provided will be 60% of Defense Expenses and Damages , associated with a claim relating to this (partially) Owned Property . If your policy is not structured to address the Owned Property exposure you have, you could have no coverage, or severely limited coverage, for claim by a third party.



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<p>Receivership Services</p>	<p>Receivership Services include a myriad of services that are not typically included in a definition of Property Management. Many of these services are fiduciary in nature. For example, it is often the Receivers responsibility to oversee the property and to recommend expenditures, including expenditures for property improvements. A court appointed Receiver may also recommend when to sell a property. Some Receivers may even recommend or determine, a property's selling price. If your firm provides Professional Services as a court appointed Receiver, your policy should cover these services.</p>	<p>Not all E&O policies adequately address the exposures facing a court appointed Receiver. For example, some E&O policies will cover Receivership Services, only when performed by the Named Insured. Where the court appoints only an individual (a natural person) as Receiver, a gap may exist for services performed by that individual. Not all claims related to Receivership Services are covered by an E&O policy. For example, a Receiver may engage their own property managers and hire related party companies to provide ancillary services, which can create a conflict of interest. Claims arising from this sort of conflict of interest are generally excluded from coverage in an E&O policy. Additionally, many Receivers are given sole discretion to sell a property without seeking the prior approval of the court. Sometimes, this can give rise to self-dealing or self-interest claims, which are also commonly excluded from an E&O policy. Certain other services which are not closely related to Property Management services, such as the placement of insurance, the handling employees and other services which may be required by a court order, are often also excluded in many E&O policies.</p>
<p>Incident Reporting</p>	<p>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 notice of an actual Claim or other demand for payment. A properly structured E&O policy will allow an Insured to report Incidents during the policy period. If that incident later develops into an actual Claim, (including after the policy expires) that Claim will be treated as if it was reported during the Policy Period.</p>	<p>Some policies do not permit Incident Reporting. Under these policies, only matters that meet that policy's definition of a Claim may be reported to the insurance carrier during the policy term. Since E&O policies are nearly always Claims Made policies, this could lead to the denial of coverage for a Claim in a subsequent policy period, where the Incident which gave rise to the Claim was known to the Insured during a previous policy period.</p>



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<p>Extended Reporting Period Endorsement</p>	<p>If you elect not to renew your E&O policy, or if you sell your company or retire, claims can be made against your firm after the expiration or cancellation of your policy. Without an in-force E&O policy, you may have to bear the full financial burden of these claims. An Extended Reporting Period (sometimes referred to as a “Tail”), can address these exposures. An Extended Reporting Period does not extend the coverage provided by the policy, but does provide additional time to report claims arising from the Professional Services that were provided prior to the expiration of the policy. What you should have in your E&O policy is the option to purchase an Extended Reporting Period, for a specified period of time, and at a specified additional premium. That option should be available whether the policy is cancelled either by the insurer or the Named Insured. This is usually referred to as a “Bilateral” Tail. Because an Extended Reporting Period typically cannot be renewed, your policy should provide options for at least three and perhaps even five years. Some policies may even offer the option of an unlimited Extended Reporting Period.</p>	<p>Some E&O policies don’t offer the option of purchasing an Extended Reporting Period. Others may offer the option with significant limitations. For example, in some E&O policies, the option to purchase an Extended Reporting Period may exist only if the insurance company cancels or refuses to renew your policy. This is usually referred to as a “Unilateral,” or “One Way” Tail. Still, others may permit the purchase of an Extended Reporting Period, but limit the term to one year. This can present a problem if you sell your company. With only a twelve month Extended Reporting Period, you could be forced to bear the full weight of claims which are made after the twelve month Extended Reporting Period expires. Further, many asset and stock purchase agreements require evidence of an Extended Reporting Period of no less than three years. Without the option to purchase a thirty-six month Extended Reporting Period, the ability to sell your firm could be jeopardized.</p>

***Disclaimer:** This Real Estate Coverage checklist is intended for informational purposes to help you better understand real estate E&O policies. Not all Real Estate E&O policies can or will have all of these coverage features. Further, other features may or may not be available based on individual underwriting guidelines specific to each insurance carrier and to each insured. You should always read your policy and endorsements carefully and consult only a qualified broker.