

Professional Liability (E&O) Insurance

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Who is a professional?

A “professional” is someone who possesses distinctive qualifications such as education or training that is perceived to be an expert in their field. In many cases, professionals such as architects or engineers are required to be registered or licensed in order to practice their profession and are required to conform to certain technical or ethical standards. Yet, this is not necessarily required in order for an individual or organization to be recognized as a professional and perceived to be providing a professional service.

What is the standard of care?

As a result of professionals’ superior expertise, they are subject to higher expectations with respect to the work, advice and counsel that they provide. Professionals are expected to uphold a legal “standard of care” which requires them to perform their services in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances. In the event that a professional doesn’t meet the standard of care, then the professional is said to have committed professional negligence.

Nature of an errors and omissions insurance policy

Professional liability insurance, commonly referred to as errors and omissions “E&O” insurance, is regularly used by professionals as a risk transfer tool with respect to the liability that could arise from the provision of professional services.

E&O insurance affords coverage to an insured for errors, omissions or negligent actions that are committed when providing professional services. The policy generally requires the policyholder to be a professional with proper licensing or qualifications, as applicable, but the language can be adapted to ensure consistency with the nature of the work performed by the insured individual or organization. The policy can extend to provide coverage to the professional’s company or employer, in most cases limited to the entity’s vicarious liability, or to temporary staff and subcontractors. However, every E&O policy is different and the extent of the coverage will vary.

The policy provides third party liability coverage. As such, it is triggered when a client alleges they have suffered loss as a result of the insured’s professional services. In contrast to claims covered by a general liability insurance policy, claims alleging professional liability often involve loss that is not the result of an accident or occurrence that causes injury or physical damage. Professional liability policies are generally designed to provide coverage to the insured for both the cost of defending against a claim as well as any alleged damages.

Most E&O insurance policies are written on a “claims made and reported” basis which means that the policy in place at the time that a claim is made against an insured is the policy that will respond, so long as the claim arises from wrongful acts committed after the retroactive date on the policy and is reported during the same policy period. This is beneficial to the policyholder because, so long as E&O insurance is maintained and the retroactive date on the E&O insurance policy does not change, the insured will have coverage for a claim, even if it arises many years after the professional service was provided.

Key features of an E&O policy

- Insuring agreements – what’s covered
- Definitions – who’s covered
- Exclusions – what’s not covered
- Terms and conditions – how the policy works
- Endorsements – changes to the wording which are specific to the risk

Insuring agreements

This section sets out the scope of the coverage provided by an E&O policy.

- Professional services – Loss that an insured individual is legally obligated to pay on account of a claim as a result of any act, error or omission in the performance of professional services
- Vicarious liability – Loss that a policyholder becomes legally obligated to pay as a result of a claim alleging a policyholder’s vicarious liability incurred in performance of professional services by an insured individual
- Failure to supervise – Loss that a policyholder becomes legally obligated to pay as a result of a claim alleging a failure to supervise an insured individual in the performance of professional services
- Regulatory investigation – Defence costs that an insured individual or organization incurs when required to appear before a governing regulatory body

Key definitions

The definitions section of the policy will set out who the policy will defend, and for what type of allegations

- Claim – can include all types of proceedings, civil criminal, administrative or regulatory investigation and coverage for non-monetary relief
- Insured persons could include:
 - Insured individuals and an insured organization
 - The individuals must have a contractual relationship with the policyholder or be employees of the policyholder acting in that capacity
- Professional services – The definition must be consistent with the services that are being offered
- Loss – Not restricted just to damages but to “amounts” owing to ensure remittances covered. Generally taxes, fines or penalties, investigative costs (other than defence costs), matters that are uninsurable under the law, or amounts covered under another insurance policy, are not included in this definition
- Wrongful act – The coverage under the policy is triggered by allegations of an error, omission or negligence in the provision of professional services

Exclusions

Generally there are four types of events or categories that are not covered by a professional liability policy:

- Matters covered under other policies (bodily injury resulting from an accident, bodily injury to employees, pollution, pension liability)
 - Bodily injury and property damage exclusions can be carved back or deleted such that coverage exists for third party bodily injury or property damage that results from the provision of professional services
- Matters uninsurable under the law (fraud, dishonest acts, fines and penalties)
 - Coverage extensions are available on some policies to provide coverage for professional negligence claims arising out of dishonest or fraudulent acts of employees of the insured
- Uninsurable risks (war, nuclear liability) and consequences of deliberate and intentional wrongdoings
- Matters too precarious to underwrite (insured vs. insured, prior and pending litigation)

- Coverage is excluded for loss arising from a legal action initiated by an associated company or individual
- Claims that are ongoing at the time insurance is purchased, or matters that the insured is aware might give rise to a claim at the time insurance is purchased, will not be covered

Terms and conditions

The terms and conditions portion of a policy governs how a policy works. It includes:

- Provisions addressing when and how to give notice of a claim
- Circumstances that could give rise to a claim
- The territory in which the policy will respond
- What to do in the event of a dispute between the insurer and the insured
- How to address a claim which contains covered and uncovered matters or insureds
- How to cancel the policy

Endorsements

There are occasions when the policy needs to be customized to better fit the insured's risk profile, ensure compliance with regulatory requirements or amend the scope of coverage provided. This is typically done by way of an additional policy endorsement. The contents of a policy endorsement can vary from insurer to insurer and will largely depend on the needs of the insured.

In the event of an E&O claim:

- Don't admit fault
- Don't be afraid to report to the insurer

- Report as soon as possible
- A proactive approach is almost always better than a passive approach
- Work closely with the insurer to develop a defence or settlement strategy
- If legal help is required, push for a budget
- Delayed payment of fees and fee disputes often turn into claims, so treat them as if they are a claim

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