

Mind the Gap Between D&O and E&O Insurance Policies

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Today's Presentation

- **Primer on E&O and D&O coverage**
- **“Mind The Gap”**
- **Key cases**

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Gap Between D&O & E&O

- *Tagged, Inc. v. Scottsdale Insurance Co.*, 2011 U.S. Dist. LEXIS, at *14-22 (S.D.N.Y. May 27, 2011) (California law)
 - Social website for teenagers advertised that it would protect minor users from adult content.
 - New York State asserted that it had failed to do so.
 - Court denied coverage under D&O and E&O coverages in the same package policy

DENIED
D&O

DENIED
E&O



E&O and D&O Primer

- **Cover Claims for Loss**
- **Cover Defense Costs**
 - Often no duty to defend
 - Defense costs reduce limits
 - Timing of insurer payment
 - Duty to pay (best)
 - Duty to reimburse (better)
 - Duty to indemnify (better)
 - Duty to defend (least preferred)

Who Needs E&O Coverage?

- **Any company that provides a service for a fee**
 - Doctors, lawyers, accountants, architects, engineers
 - Insurance companies, banks and any other provider of financial services
 - But also – A to Z: Advertising agencies, commercial printers, consulting firms, public relations firms, software design firms web hosting companies , even wedding planners
- **Not limited to traditional professions**

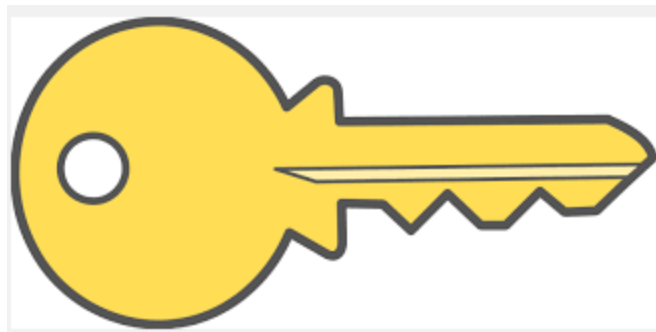


E&O Policies Insure:

- Alleged or actual negligence
- Personal injury
 - Libel and slander
 - Copyright infringement
- Claims and damages
- Defense costs

Professional Services Definition

- Key to coverage
- **Tagged:** Professional Services definition limited to Tagged's provision of "advertising services"
- Tagged's liability arose from other services not within scope of definition



E&O Policies May Not Insure:

- **Fraudulent acts (final adjudication)**
- **Employment matters**
- **False advertising**
- **Patents and trade secrets**
- **Cyber liability**
- **Personally identifiable information**



D&O Policies Insure:

- **Directors and officers**
 - Pay their non-indemnified defense costs
 - Pay their non-indemnified losses
- **Company for indemnified defense costs and losses incurred on behalf of directors and officers**
 - Tied to alleged wrongful acts in capacity as directors and officers
- **Company coverage**

D&O Insuring Clauses

Directors and Officers Liability Coverage Part

In consideration of payment of the premium and subject to the Declarations, General Terms and Conditions and the Endorsements, Exclusions and other terms of this Coverage

I. **I. Insuring Clauses**

(A) **Individual Non-Indemnified Liability Coverage**
The Company shall pay Loss on behalf of the Insured Persons resulting from any D&O Claim first made against such Insured Persons during the Policy Period, or any applicable Extended Reporting Period, for Wrongful Acts, but only to the extent the Insured Organization does not indemnify the Insured Persons for such Loss.

(B) **Individual Indemnified Liability Coverage**
The Company shall pay Loss on behalf of the Insured Organization resulting from any D&O Claim first made against Insured Persons during the Policy Period, or any applicable Extended Reporting Period, for Wrongful Acts to the extent the Insured Organization indemnifies the Insured Persons for such Loss.

II. For purp

(C) **Corporate Entity Liability Coverage (Optional)**
If the Corporate Liability Coverage is purchased as set forth in Item 3 of the Declarations of this Coverage Section, the Company shall pay Loss on behalf of the Insured Organization resulting from any Insured Organization Claim first made against such Insured Organization during the Policy Period, or any applicable Extended Reporting Period, for Wrongful Acts.

(a) a written demand for monetary damages or non-monetary relief;

(b) a civil proceeding commenced by the service of a complaint or similar pleading;

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Side A Non-Indemnified Coverage

DIRECTORS & OFFICERS AND COMPANY LIABILITY COVERAGE

I. INSURING AGREEMENTS

A. Directors and Officers Individual Coverage

If Insuring Agreement A coverage is granted pursuant to Item 2 of the Declarations, the Insurer shall pay on behalf of the Insured Persons Loss for which the Insured Persons are not indemnified by the Company and which the Insured Persons become legally obligated to pay on account of any Claim first made against them, individually or otherwise, during the Policy Period or, if exercised, during the Discovery Period, for a Wrongful Act taking place before or during the Policy Period.

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Side B Indemnified Coverage

- Reimburses company for defense and indemnity of directors and officers

DIRECTORS & OFFICERS AND COMPANY LIABILITY COVERAGE

B. Company Indemnification Coverage

If Insuring Agreement B coverage is granted pursuant to Item 2 of the Declarations, the Insurer shall pay on behalf of the Company Loss for which the Company grants indemnification to the Insured Persons, as permitted or required by law, and which the Insured Persons have become legally obligated to pay on account of any Claim first made against them, individually or otherwise, during the Policy Period or, if exercised, during the Discovery Period, for a Wrongful Act taking place before or during the Policy Period.


Side C Securities Coverage for Public Companies

DIRECTORS & OFFICERS AND COMPANY LIABILITY COVERAGE

C. Company Securities Claim Liability Coverage

If Insuring Agreement C coverage is granted pursuant to Item 2 of the Declarations, the Insurer shall pay on behalf of the Company Loss for which the Company becomes legally obligated to pay on account of any Securities Claim first made against the Company during the Policy Period or, if exercised, during the Discovery Period, for a Wrongful Act taking place before or during the Policy Period.

Side C Broader Coverage for Private Companies




ACE American Insurance Company

This Policy is issued by the

THIS POLICY IS A CLAIMS MADE AND REPORTING POLICY. THIS POLICY COVERS ONLY CLAIMS FIRST REPORTED TO THE INSURER DURING THE POLICY PERIOD. PLEASE READ THIS POLICY CAREFULLY.

THE LIMITS OF LIABILITY AVAILABLE TO THE INSURED PERSONS FOR DEFENSE COSTS, FURTHER AND LOSS SHALL ALSO BE APPLIED AGAINST THE LIMITS OF LIABILITY AVAILABLE TO THE INSURED PERSONS.

TERMS THAT APPEAR IN BOLD FACE TYPE IN THIS POLICY ARE DEFINITIONS.



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**ACE AdvantageSM
Private Company
Management Liability Policy**

In consideration of the payment of the premium, in reliance upon the Application, and subject to the Declarations and the terms and conditions of this Policy, the Named Insured, the Insureds, and the Insurer agree as follows:

I. INSURING AGREEMENTS

A. Management Liability

If Management Liability coverage is purchased as indicated in Item 3 of the Declarations:

1. Management Liability

The Insurer shall pay the Loss of the Insured Persons for which the Insured Persons are not indemnified by the Company and which the Insured Persons have become legally obligated to pay by reason of a Claim first made against the Insured Persons and reported to the Insurer during the Policy Period or, if elected, the Extended Reporting Period, for any Wrongful Acts taking place prior to the end of the Policy Period.

3. Company Liability

The Insurer shall pay the Loss of the Company which the Company becomes legally obligated to pay by reason of a Claim first made against it and reported to the Insurer during the Policy Period or, if elected, the Extended Reporting Period, for any Wrongful Acts taking place prior to the end of the Policy Period.

B. Separate Limits of Liability and Retention

Insuring Agreements Purchased:

Management Liability

Employment Practices Liability

Fiduciary Liability

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Management Liability

Employment Practices Liability

Fiduciary Liability

B. Employment Practices Liability

If Employment Practices Liability coverage is purchased as indicated in Item 3 of the Declarations:

The Insurer shall pay the Loss of the Insureds which the Insureds have become legally obligated to pay by reason of a Claim first made against them and reported to the Insurer during the Policy Period or, if elected, the Extended Reporting Period, for any Wrongful Acts taking place prior to the end of the Policy Period, if such Claim is brought and maintained by or on behalf of:

1. any past, present or prospective full-time, part-time, temporary or leased employee(s) of the Company, or

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Misconduct Exclusions

- Exclude fraudulent, criminal or intentional non-compliant acts
- Excludes coverage where directors obtained illegal remuneration or acted for personal profit
- Always seek final adjudication requirement



Misconduct Exclusions

- Severability
- Nonrescindability
- Innocent directors remain fully covered even if the acts of their colleagues were intentional or fraudulent



DENIED



Interplay Between E&O and D&O

- Lack of fit between D&O and E&O can create a coverage gap
- Often arises in connection with professional services





Professional Services Exclusion

- **Excludes Claims arising out of any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty in connection with the rendering of, or failure to render, professional services to a third party**

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Professional Services Exclusion

(12) based upon, arising from, or in consequence of such Insured having gained in fact any profit, remuneration or financial advantage to which such Insured was not legally entitled.

(B) No coverage will be available under this Liability Coverage Section for Loss, other than Defense Costs, which constitutes costs of compliance with any order for, grant of or agreement to provide nonmonetary relief.

(C) No coverage will be available under Insuring Clause (C) for any Insured Organization Claim.

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an Insured Organization under any written or oral contract or agreement.

(6) based upon, arising from, or in consequence of any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted or allegedly committed or attempted in connection with the rendering of, or actual or alleged failure to render, any professional services for others by any person or entity otherwise entitled to coverage under this Liability Coverage Section; provided that this Exclusion (C)(6) shall not apply to any securities Claim; Securityholder Derivative Demand or Securityholder Derivative Action.

mark or misappropriation of ideas or trade secrets; or

(8) based upon, arising from, or in consequence of allegations of price fixing, restraint of trade, monopolization, unfair trade practices or any actual or alleged violation of the Federal Trade Commission Act, the Sherman Anti-Trust Act, the Clayton Act, or any other federal statutory provision involving anti-trust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities, and any amendments thereto or any rules or regulations promulgated thereunder or in connection with such statutes; or any similar provision of any federal, state, or local statutory law or common law anywhere in the world.

Case Law Summary: Health Care

- ***Charleston Area Medical Center, Inc. v. National Union Fire Insurance*, No. 2:09-cv-00573, 2011 U.S. Dist. LEXIS 58520, at *27-30 (S.D.W.Va. June 1, 2011) (West Virginia law)**



Case Law Summary: Health Care

- Policy excluded coverage for claims ‘alleging, arising out of, based upon or attributable to the Insureds performance or rendering of or failure to perform or render medical or other professional services or treatments for others.’



Case Law Summary: Equine Leasing

- ***Great American Insurance Co. v. Geostar Corp.*, 2010 U.S. Dist. LEXIS 20258 (E.D. Mich. Mar. 5, 2010)**





Case Law Summary: Equine Leasing

- Policy excluded coverage for “any Claim: . . . based upon, alleging, arising out of, or in any way relating to, directly or indirectly, any actual or alleged act, error or omission by any insured with respect to the rendering of, or failure to render professional service for any party.”

Case Law Summary: Investments

- ***MDL Capital Management, Inc. v. Federal Insurance Co.*, 274 Fed. Appx. 169, 173 (3d Cir. 2008) (Pennsylvania law)**



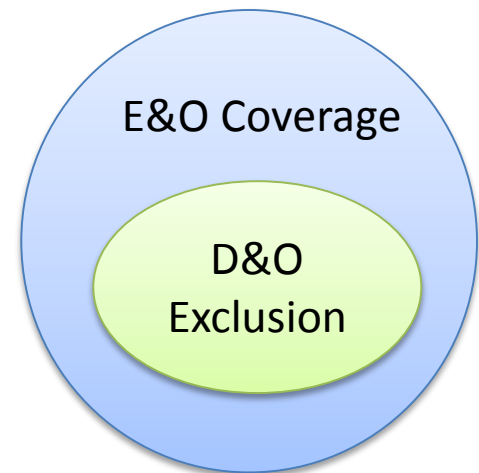
Case Law Summary: Investments

- D&O policy professional liability exclusion for claim that “arises from . . . the rendering of or failure to render professional services.”



Fill the Gap Between D&O & E&O

- Coordinate policy language so E&O coverage equal to or broader than D&O professional liability exclusion
- Use same primary insurer for both E&O and D&O
- Consider package policy





Questions?

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