# Your Professional Liability Policy

By Debra Smith, *Associate General Counsel*, Madison Commercial Real Estate Services

Your errors and omissions ("e&o") coverage lets you sleep at night. But do you really know what it covers?

While each policy is different, the purpose of this article is to give you a heightened awareness of key provisions and issues that may affect you when and if you have a claim under your policy.

## The Basics of an "E&O" Policy

First, what is covered? Generally e&o policies are "claims made" policies. This means that you have coverage for claims made during the policy period. . The claims quite often will relate to events that occurred before the policy period. The policy will contain a retroactive date. The acts on which the claim is based must have occurred after the retroactive date. Be sure when you purchase an e&o policy to have the retroactive date be the date you started business, if possible. While, depending on when a claim is made, many claims may be time barred by the applicable statue of limitations, it is desirable to have coverage for as long a period as possible.

The most basic and most important coverage is for wrongful acts in rendering or failing to render professional services. There may also be certain personal injury coverage (for example, for claims for defamation, libel, slander and the like). Policies today also typically include technology professional coverage. Generally speaking, this relates to claims resulting from unauthorized use of computers.

## What's Not Covered

Before you can understand what is covered, it is important to review what is excluded in your policy. For example, most policies have an exclusion for claims arising from intentional, dishonest or fraudulent acts. While we all understand the meaning of dishonest and fraudulent, the term "intentional" may be subject to a wide range of definitions. Another common exclusion is for claims made by related or affiliated entities. Carefully review the affiliated entity exclusion in the context of your business. For example, if you are an officer of another company and you also perform services for that company, a claim by that company may be excluded under the policy.

## Notice of Claim

When you receive a claim, give notice to the carrier as soon as practicable. Some policies require prompt notice .Others specify that notice must be given within a certain number of days. Most policies also include a provision that obligates you to give notice to the carrier when you become aware of facts that lead you to believe that a claim may be asserted. A corollary of this provision is a requirement that, at the time you obtain a new policy, you notify the carrier of any knowledge you may have of facts that could reasonably cause you to foresee a claim. Carefully review the language of such provisions so that you can assess whether you should report a particular state of facts that could result in a claim. If you do not comply with the notice provisions, you risk loss of coverage. While one can make an argument that the carrier should not be permitted to deny coverage in a situation in which it has not been prejudiced by late notice, this is certainly a battle you want to avoid.

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## The Tri-Partite Relationship

After a claim is submitted and a preliminary coverage determination is made by the carrier, the carrier may appoint counsel to represent you in a lawsuit. Typically, the carrier pays the fees of counsel. Usually, fees expended reduce the amount of insurance. Almost invariably the carrier has the unilateral right to select counsel. When you are negotiating a policy, you might want to try to have the carrier agree that counsel selection is subject to your consent, not to be unreasonably withheld.

When counsel is appointed by a carrier to represent the insured, a unique tri-partite relationship is formed. The carrier is paying the bill, selects the attorney and controls the litigation. (Although the carrier controls the litigation, many policies provide that no settlement may be made without the insured's consent.)

Who is the client in this situation? In New Jersey, the law is clear that both the insured and the carrier are clients. This relationship can give rise to many ethical issues for a lawyer.

If you believe the case is being mismanaged by counsel appointed by the insurer, you may have the right to request the appointment of independent counsel. Bear in mind that simply because you disagree with strategy being employed does not mean that the case is being mismanaged.

Generally the attorney is required by the carrier to submit periodic status reports to the carrier. To be sure you are fully informed, you should ask the attorney to provide you with copies of these reports.

## Some Ethical Issues in the Tri-partite Relationship

Under the New Jersey Rules of Professional Conduct, a lawyer may not represent a client if the representation involves a concurrent conflict of interest (New Jersey RPC 1.7). A conflict of interest exists if the representation of one client will be directly adverse to another client (New Jersey RPC 1.7(a) (1)).

At the outset of the representation, there is generally no such conflict. But what if counsel comes upon information in the course of its representation of you that could affect coverage? For example, what if you tell counsel something that, if known to the carrier, might give the carrier the right to invoke a policy exclusion? Under applicable ethics rules, the attorney cannot disclose this information to the carrier without the informed consent of the insured. Not only does RPC 1.7 apply, but the attorney is also required to keep the information confidential because of the attorney client privilege: RPC 1.6(a) states that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation…". Unless you authorize the attorney to disclose this information to the carrier or the carrier consents to counsel withholding information that may affect coverage, counsel cannot continue to represent both clients. In such a situation, you may be entitled to independent counsel selected by you and paid by the carrier pursuant to the policy. Alternatively, the attorney could continue to represent you, but no longer represent the carrier: In such a situation the carrier would no longer enjoy client status, but would have its function limited to the role of third party payor.

Another example of a potential conflict that may arise is when there are covered and non-covered counts. What if the plaintiff alleges in the complaint that his damages were the result of your intentional or negligent acts? Whether there will be coverage for a loss in that situation hinges on which count the case is decided on. If the court finds that you were negligent, there will be coverage. However, as noted above, intentional acts are often excluded from coverage. This could give rise to a concern that counsel, who has an ongoing relationship with the carrier, may be motivated to steer the case towards resolution on non-covered counts. If such a situation arises, under certain circumstances you may have the right to demand that the carrier appoint independent counsel selected by you, but nonetheless paid for by the insurer. What your rights are in this situation is very dependent on the specific facts: if you find yourself in this situation and are uncomfortable with the representation provided by the carrier, I suggest you consult an attorney to assess you rights.

Another situation in which the interests of the carrier and the insured may diverge can arise when you are sued for an amount in excess of policy limits. This situation was addressed in a well known New Jersey Case, Rova Farms Resort, Inc. v. Investors Insurance Company of America, 65 N.J. 474 (1974). In this case, the insured had a $50,000 policy. A patron of Rova Farms

Resort was seriously injured as a result of a diving accident and sued Rova Farms Resort. The carrier refused to make a settlement offer of more than $12,500. There was eventually a jury verdict for $225,000. This left the insured with significant personal liability, which would have been avoided had there been a settlement within policy limits. The insured brought a bad faith action against the carrier. The court held for the insured. Even though there had been no formal settlement offer by the plaintiff, the court held that the carrier had "a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage". Since this was a bad faith action, the carrier's liability was not limited by the policy amount.

As is evident from the forgoing, the tri-partite relationship in insurance representation can give rise to many issues and concerns. The best way for you to protect yourself if you find yourself in this situation is to communicate regularly with the counsel appointed by the carrier and to be aware of the ethical quandaries that may arise.

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Debra Smith, Esq.
*Associate General Counsel,* Madison Commercial Real Estate Services

With substantial experience in all facets of commercial real estate, Ms. Smith specializes in handling complex commercial real estate transactions in New York. Before joining Madison, Ms. Smith served as Senior Vice President of Fidelity National Financial (FNF), one of the nation's major title insurance underwriters, where she managed a division of attorneys and related support staff responsible for administering title insurance claims in 16 states and Canada for all FNF brands. She has extensive experience in managing litigation related to title insurance and coverage law.

Ms. Smith earned a bachelor's degree from The New School. She earned her Juris Doctor degree from New York University School of Law. She is an active member of the NY State Bar Association.



## Six Key Legislative Priorities Focus on Creating Jobs, Growing Economy and Saving Energy

AIA

Washington, D.C. – January 13, 2014 – The American Institute of Architects (AIA) today announced its "punch list" for Congress that, if completed, will ignite the construction economy by spurring much needed improvements in energy efficiency, infrastructure and resiliency and create jobs for small business

"America needs to create more jobs, to strengthen communities, and find help for millions of young people to succeed in the new economy," said Robert Ivy, CEO of the American Institute of Architects, "so we've created a punch list–a term that enumerates unfinished items in a construction contract."

"The AIA's Congressional punch list will help Congress satisfy its implicit contract with the American people to spur growth and create jobs," Ivy said. "Our legislative agenda reflects the interests of our members, which not so coincidentally reflects the priorities of the American people."

The AIA's Punch List for Congress:

### 1. Re-enact Expired Energy Efficiency Tax Incentives

Congress left town in December without extending several important tax incentives that expired on New Year's Day. Of most significance to the design and construction industry is the expiration of a tax break enacted in 2005 for energy efficient commercial buildings. The 179D deduction allowed building owners to claim a tax deduction of $1.80 per sq. ft. of building area to install systems that reduce the total energy and power costs by 50 percent or more when compared with a reference building. As Congress continues to debate long-term tax reform, it can boost the economy and create jobs today by reinstating this deduction.

### 2. Help Businesses by Reforming Government Procurement Rules

More than 97 percent of architecture firms employ 50 or fewer people; every project they design leads to job opportunities for millions of construction workers. But too many laws and regulations block innovative solutions that maximize the government's return on its investment. Congress must reform procurement rules so that architects and designers can deliver projects that are safe, productive and sustainable. In 2014, the AIA is aggressively pushing for passage of The Design-Build Efficiency and Jobs Act of 2013 (H.R. 2750), introduced by Rep. Sam Graves (R-MO) in July, which would reform of the design-build contracting process so that more design and architectural firms can bid on federal contracts without fear of losing money in the process.

### 3. Invest in the Next Generation of Design Leaders

Millions of young people aspire to help their communities build a better future – but a lack of opportunity and the crushing cost of education hold them back. As a result, the design and construction industry faces a severe shortage of talent, at exactly the moment we need to start rebuilding for the future. The AIA urges Congress to pass the proposed National Design Services Act (NDSA), which will give architecture students the relief from crushing student loan debt as that granted young lawyers, doctors and others – in return for pro bono community service.

### 4. Invest in Infrastructure

Just as the Capitol dome, the symbol of American democracy is undergoing a multi-year renovation, so too must our nation's infrastructure. Congress should pass a multi-year transportation reauthorization, which would allow for long-term planning that not only repairs roads and bridges but helps communities prosper; and enact a National Infrastructure Bank to finance the design, construction and repair of buildings and other vital infrastructure. Such moves would help free up capital for private sector building projects, and new ways to invest in public sector buildings, providing jobs in the short term and a more competitive economy in the long run.

### 5. Pass a Common-Sense Energy Efficiency Bill

Last session, the Senate Energy and Natural Resources Committee approved a bipartisan bill, the Energy Savings and Industrial Competitiveness Act of 2013 that would encourage families, businesses and the government to save energy. The Senate should take up the legislation, sponsored by Ohio Republican Rob Portman and New Hampshire Democrat Jeanne Shaheen, in 2014, and oppose efforts by the fossil fuel industry to repeal existing policies that save energy.

### 6. Help Communities Weather Natural Disasters

Each year, natural disasters kill tens of thousands of people worldwide and inflict billions of dollars in damage. Many parts of the United States are still recovering from tornadoes and hurricanes like Superstorm Sandy. Congress can help communities fortify themselves from such disasters by passing the Safe Building Code Incentive Act, introduced by New Jersey Democratic Senator Robert Menendez and Florida Republican Congressmen Mario Diaz-Balart, which encourages states to voluntarily adopt and enforce nationally recognized model building codes.