



# For Professional Services Firms, Landmines Lurk in D&O Policies

Directors and Officers (D&O) policies are designed to respond to claims made against directors and officers for wrongful acts committed in their capacity as such. Unfortunately, a professional services firm expecting the protection of D&O coverage may instead find itself navigating a field of exclusionary landmines placed by its insurer. And in the case of “absolute” professional services exclusions, a D&O policy can be rendered effectively useless.

## CONTACT

To learn more about how Amwins can help you place coverage for your clients, reach out to your local Amwins broker.

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## Why it happens

D&O policies provide coverage for claims related to management liability, while professional liability claims are properly covered by E&O policies. However, lines between the two can blur for professional services firms.

Seeking to provide clarity, underwriters have over time crafted professional services exclusions on D&O policies to ensure they aren't covering claims alleging actual or alleged errors or omissions in the delivery of those services.



**The problem arises in how those exclusions are worded and their potential broad application when applied. In particular, absolute language that is often found can essentially invalidate D&O coverage, such as exclusions for:**

Any claims based upon, **arising from**, in consequence of, or in any way directly or indirectly **related to** or involving the rendering or failure to render professional services.

For a law firm, engineering company or other professional services business, virtually any claim against directors or officers may be construed as “arising from” or “related to” services the entity provides.





## Helping your clients avoid landmines

Courts have sometimes found that broad policy exclusions — particularly those that effectively invalidate coverage — cannot be applied. However, relying on courts to make that determination is a risk you and your clients cannot afford to take.

It is essential that you carefully review D&O policies and understand their exclusions, particularly given the wide variety in policies and lack of standardized forms that exist in other lines of coverage. Once those exclusions are analyzed, work with your underwriters to negotiate terms that carve back essential coverages and avoid gaps between the D&O and E&O policies your clients have in place.



**The best solution is to have the entire professional services exclusion removed from the policy. Most carriers are unwilling to do that; however, some success can be found by changing the absolute language “based upon, arising from, etc.” to a narrower preamble. The exclusion could be written something like:**

Any claims for the rendering or failure to render professional services.

Many D&O policies have a section of exclusions that only apply to the entity. If the exclusion cannot be removed entirely, it most certainly should only apply to the entity. If the exclusion applies to the whole policy, request that the underwriter move the exclusion to the entity exclusion section.



Lastly, it's important to attempt to negotiate language that will invalidate the exclusion under certain circumstances. Following the exclusion, there should be a statement like:

**However, this exclusion will not apply to...**

There are a handful of these “carve backs” to request:



**Failure to supervise** – claims by any third party alleging that they were financially harmed as a result of the company's “failure to supervise” one or more individuals in the performance of professional services,



**Securities claims** – claims brought by shareholders alleging they were financially harmed as a result of an employees, directors, or officers' errors or omissions in the performance of professional services,



**Derivative claims** – claims brought by shareholders against the board of directors alleging that the company has been financially harmed as a result of the board's actions related to the performance of professional services and demanding that the board make the company whole, and



**Side A claims** – claims brought against directors, officers or employees where the company cannot indemnify the individuals typically due to insolvency.



## Partner with Amwins

Ultimately, as with all matters in insurance there are compromises, negotiations and risk management decisions to be made. For retail agents, it is important that clients be made fully aware of potential gaps, limitations and other issues in their decision-making process around the D&O policy they put in place.

Retail agents should also take care to work with a wholesale broker that understands these issues well. Amwins delivers broad market access and has the proven ability to negotiate favorable D&O terms with underwriters to offer the best protection for your clients.

### Insight provided by:

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