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Mind the Gap: D&O Runoff in M&A Transactions

Most D&O policies in the U.S. contain some version of a batch or deemer clause, also known as a related claims or interrelated claims provision. These clauses are essential to claims-made policies and without them, timing technicalities and renewals may create gaps in coverage.

In many modern D&O forms, batch/deemer clauses have become so broad that they may eliminate coverage for claims insureds often reasonably expect to be covered. As a result, what was initially designed to preserve coverage has become a reason coverage is denied.



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Where the gaps begin

Runoff, tail or ERP coverage becomes necessary whenever a transaction materially changes ownership or prevents renewal of the existing D&O policy. This most commonly occurs in mergers, acquisitions and sales where the original entity ceases to exist. It can also arise in going-public transactions, bankruptcies, dissolutions, reverse mergers and other control-shifting restructurings. In each of these scenarios, the legal structure may change, but the exposure tied to prior board and management decisions remains. That lingering risk is what runoff is designed to address.

Despite its importance, runoff coverage is often overlooked during deal execution. Transaction teams are typically focused on valuation, financing and integration planning. D&O insurance may not be prioritized unless specifically raised by legal or risk management.

Compounding the issue is a misunderstanding of how claims-made policies function. Coverage is triggered when a claim is filed, not by when the alleged wrongful act occurred. Without a properly structured tail, claims arising from pre-closing conduct may not be covered.

Some deal teams also assume that the absence of known claims eliminates exposure. In reality, shareholder litigation, regulatory inquiries and creditor disputes tied to pre-closing decisions may not surface for years. Others mistakenly believe the buyer's D&O policy will respond to past acts or that resignation eliminates liability. In many transactions, runoff coverage is the only protection available to former directors and officers.



It's a matter of timing

Timing is critical. Address runoff during due diligence, well before transaction documents are finalized. Early discussion allows the parties to clearly determine who will purchase the coverage, how long the tail should last and what limits and terms are appropriate given the risk profile.

This planning is crucial because once a change in control happens, the seller's D&O policy usually switches to runoff automatically and the terms are no longer negotiable. Delaying the decision can lead to tight timelines, fewer market options or confusion about who is responsible for binding coverage.

The need for advance planning becomes even clearer when considering the types of claims that commonly arise after closing. Shareholder or investor lawsuits alleging breaches of fiduciary duty, challenges to disclosures, regulatory investigations tied to governance decisions and claims brought by creditors or bankruptcy trustees often emerge only after ownership changes. These cases frequently examine decisions made before the transaction but litigated afterward.

Structuring effective runoff terms

Selecting appropriate runoff terms requires a long-term view of exposure. Align tail length with applicable statutes of limitations — six years is often viewed as standard in public company transactions. Private deals may opt for shorter periods depending on the circumstances.

Limits deserve equal attention. Because runoff limits do not replenish, it is typically advisable to match the expiring program's limits or consider higher limits if the transaction presents elevated risk. The breadth of coverage should also be preserved. Definitions, prior acts language and Side A protection should remain consistent and free from material narrowing.

Finally, carrier financial strength and claims experience matter. Runoff claims can be long-tail in nature, making insurer stability a key consideration in protecting individuals years after the deal closes.





Straddle exposure requires deliberate coordination

Beyond traditional runoff considerations, transactions can create what is commonly referred to as “straddle” exposure. This occurs when alleged wrongful acts span both pre- and post-closing periods.

Because D&O policies are claims-made and time-sensitive, the seller’s policy typically moves into runoff at closing and covers only prior acts, while the buyer’s policy responds to future acts from that point forward. When conduct begins before closing but continues or evolves afterward, uncertainty can arise over which policy should respond.

Without coordination, this transition may create unintended gaps, overlap or allocation disputes between insurers. For example, a claim could allege that misstatements began prior to closing but continued under new ownership. Determining how defense costs and settlements are allocated may require negotiation between carriers.
Managing straddle exposure necessitates deliberate coordination between the runoff policy and the go-forward D&O program. Tail coverage should clearly define wrongful acts as occurring before or on the transaction date to ensure pre-closing conduct is captured. At the same time, consider structuring the buyer’s policy with carefully defined retroactive dates and past acts exclusions so that it responds appropriately to post-closing management decisions without unintentionally barring legitimate claims.

Some organizations negotiate specific endorsements or retroactive provisions to create clearer continuity between policies. Just as importantly, it’s advisable that both sides’ insurance advisors communicate early to align policy inception dates with the transaction closing date and confirm how potential straddle allegations will be addressed.

Best practices for deal teams

To minimize exposure gaps, treat runoff and go-forward D&O coverage as coordinated components of the transaction, not separate insurance exercises. Align policy effective dates precisely with the closing date and be sure to review retroactive dates and exclusions in the buyer’s policy. Clearly document who is responsible for purchasing and funding runoff coverage in the purchase agreement, along with expectations regarding how defense costs will be handled if a straddle claim arises.

We help you win

The batch/deemer clause does not change allegations or reduce liability. It controls how insurance responds. When written properly, the clause can help protect insureds from technical traps. When written poorly, it can create them.

The risk is real, supported by claims experience and case law and it deserves far more attention than it typically gets at placement. Working with the professional lines specialists at Amwins helps ensure that coverages are properly aligned, minimizing your clients' exposure and safeguarding their projects from financial and legal setbacks.

Whether your clients operate in the private, public or nonprofit sector, partnering with a wholesale broker that understands these issues well is key. 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.

No matter what segment your clients operate in, we've got your back.

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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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