

## **CHAPTER EIGHT**

# **ERRORS AND OMISSIONS INSURANCE**

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Comedian Rodney Dangerfield's trademark line was "I don't get no respect." The same can sometimes be said for errors and omission (E&O) insurance. It is something all producers and publishers need, but it is not usually uppermost on their minds. Cajoling talent, appeasing directors and other issues may seem more important, but waiting too long to take care of the nuts and bolts of insurance can add to the complexity and expense of obtaining a policy.

This chapter is intended to provide the reader with a general understanding of the types of E&O policies, what is covered and what is not, the procedure for obtaining them and the parties' obligations. It does not address all situations that may arise.

### **[8.0] I. WHAT IS IT? TYPES OF E&O POLICIES**

E&O insurance is essentially a narrow form of malpractice insurance for producers or publishers to protect against specific intellectual property and personal property or personal rights claims that could be made against a film or publication. The concept is similar to professional or corporate liability insurance—that is, malpractice insurance for doctors, lawyers, and accountants, or coverage for corporate directors and officers. As the title implies, it is intended to address "errors" and "omissions" by the party insured.

There are several types of policies. One is designed for entertainment properties, such as film and television productions, sometimes referred to as producers E&O. Another type of policy is designed for traditional media, such as newspapers, magazines, and broadcasters, which are typically referred to as "media peril" policies. The main difference between the two is that the policies for the latter cover additional claims that can arise out of news-gathering activities. For example, when a camera crew follows someone onto private property, it may be trespassing. This type of activity would be covered under the media perils policy as long as it is done in the process of reporting a story. As reality television and expansive use of the Internet increase the scope of risk, most carriers now provide media peril types of policies, and many have switched to a third type of policy, the broader "all-risk" policy, which is discussed in the next section.

**[8.1] II. SCOPE OF COVERAGE****[8.2] A. Generally**

A typical policy covers claims for invasion of privacy, unauthorized use of an individual's name or likeness (rights of publicity), defamation, copyright infringement, unauthorized use of titles or trademarks and breach of implied contract for submission of ideas. Media peril policies also cover news-gathering claims related to covering a story.

**[8.3] B. Named Perils**

Historically, an E&O policy was called a "named perils" policy because coverage was limited to the named perils as discussed above. It would not cover anything other than what was specifically listed in the policy. It would not cover a director's auto accident or an expensive movie set destroyed by a hurricane. Other types of specialty entertainment insurance can cover these risks, which are described later. In addition to the named perils limitation, policies also contain specific exclusions that limit the coverage further. Normal exclusions, for example, are claims such as breach of contract, intentional acts and criminal acts.

**[8.4] C. All-Risk Policy**

More recently, carriers have begun gravitating to a more expansive policy form known as the "all-risk" policy. The constant pushing of the envelope by creators has increased the scope of risk. Responding to this change, as well as increased competition, carriers have broadened coverage. This has been accomplished by increasing the list of perils named in the policy and by prefacing the list of covered claims with the phrase "including but not limited to." This phrase provides a bit of legal wiggle room for claims that may not fall precisely within the described categories. These policies are not limitless. They contain the same exclusions as their predecessors and are often limited to a single production. The director's auto accident or the set destroyed by hurricane not covered in the named perils policy are not covered under an all-risk policy either.

**[8.5] D. Policy Limits**

These policies, just like auto and homeowner policies, all contain financial ceilings, which in the business are called "limits"—the uppermost amounts of funds that will be expended on a policyholder's behalf by the carrier. Limits include all costs expended by the carrier, including

such things as attorney's fees and court costs in defending a claim as well as any judgment or settlement of a claim.

There are usually two limits in each policy. One is for each claim and the other is for all claims combined. A typical policy contains limits of \$1,000,000/\$3,000,000. The first number is the limit per claim. In other words, the carrier will not pay any more than \$1 million on any single claim. The second number is the limit for the entire policy period. If it is a three-year policy, and the policy holder has three claims that total \$1 million each within the first two years of coverage, the policy limits are exhausted, and there no longer is coverage.

Another financial variable in a policy, aside from the premium, is the deductible, sometimes called "self-insured retention." This is the amount the insured will be required to pay in the event of a claim. A typical auto policy has a \$500 or \$1,000 deductible; the deductibles for E&O policies are typically \$10,000 or \$25,000. If the project is higher risk, the deductible could rise to \$50,000 or \$100,000. Large entities such as studios, distributors and broadcasters have deductibles in the seven-figure range, as high as \$5 million.

The deductible and policy limits needed in a particular situation will often depend upon the licensor's requirements. Distributors and broadcasters typically require policies that have limits of \$1,000,000/\$3,000,000, with a minimum deductible of \$10,000. With inflation, many networks now require \$5,000,000/\$5,000,000 limits and a \$25,000 deductible so that the producer's policy covers costs up to the amount of the broadcaster's, studio's or distributor's deductible. Thereafter, its policy will kick in.

#### **[8.6] E. Defense Costs**

Some of these policies have a provision that defense costs are outside the limits of the policy. This means that the carrier will continue to pay to defend the claim regardless of the cost and in amounts greater than the policy limits. Some years ago a famous Las Vegas celebrity filed a libel claim against a news organization. He won a large judgment at trial, but after several years and a number of appeals, his judgment was overturned. He received nothing. In the meantime, the carrier had paid out approximately \$10 million in legal fees. Had the defense costs been inside the limits of his policy, once the \$1 million-per-claim amount was reached, the insured would have been on his own, and the additional \$9 million would have had to come out of his own pocket. For obvious reasons, this

policy provision is now extremely difficult to find; it's not impossible, but it will not be inexpensive.

### **[8.7] F. Policy Period**

Another nuisance of E&O insurance is the method by which coverage is limited to the policy period. If a car insurance policy expires on March 31 and there is an accident on April 1, it will not be covered. The same principle holds true with E&O, but it is modified by the type of policy. Policies are written in two different forms.

#### **[8.8] 1. Claims Made Policy**

The “claims made” policy covers only claims made during the policy period. If a film distributor who has this type of coverage ending on March 31 receives a letter asserting a libel claim against one of its documentary films on April 1, with no prior notice of this claim, it will not be covered by the policy. If the letter is received on March 31, coverage will be afforded. The difference between this and a typical auto policy is that the libel could have actually taken place six months prior. Coverage would not be affected by the fact that the error or action took place while the policy was in place.

#### **[8.9] 2. Occurrence Policy**

Just like an auto policy, the “occurrence” policy is triggered not when the claim is asserted but when the event that gave rise to the claim actually occurred. For example, suppose the documentary discussed above is broadcast on March 31 and the claim is asserted on April 30, a month after the policy term expired. Under an occurrence policy, there would still be coverage. Even though the event—the libel—occurred on March 31 when the film was broadcast, and the claim was asserted a month after the policy expired, the coverage did not expire because it was based upon when the event occurred.

An important limitation with these types of policies is that they are often issued for an individual work, such as a particular film or television production. This means that coverage is limited to claims related only to that work itself. If Production Company A produces a film called *Friday the 31st* and a claim asserts that the film infringes the copyright of a book, that film is covered. If a libel claim is then asserted against the production company for a film it made six months earlier, *Thursday the 12th*, the pro-

duction company would not be covered unless the company had a policy that included all of its films, or the second film had its own policy.

### **[8.10] III. WHO NEEDS E&O INSURANCE, AND WHO IS COVERED?**

Anyone involved in the creation and dissemination of a creative property needs E&O insurance: writers, distributors, Internet service providers, Web site owners, music publishers, record companies, book publishers, advertising agencies and game developers, among others. As a practical matter, the person or entity receiving the economic benefit from the exploitation of the work has the most exposure to a claim, and the one with the most to lose is the one who will need to secure coverage. With a film or television production, for example, it will be the production company that is responsible for the insurance.

There is typically no negotiation with regard to the responsibility for coverage. When producing a television project for a cable network, a production company would be required by contract to obtain the policy. The network will rarely negotiate on this issue. One explanation for this position is that some networks rely on independent producers rather than producing their own programming; therefore a network's insurance policy is structured to cover only the broadcasting of the program, not its production.

The large networks carry policies that have deductibles or a self-insured retention of \$1 million or greater. They will require E&O insurance for two reasons: (1) so that the production activities are covered, and (2) if there are claims they will not be charged against their policies. In the case of a distributor, its policy typically provides "secondary" coverage, meaning that it will apply only if the primary coverage is invalid, or the limits are exhausted. The carrier will require the distributor to distribute only films that have separate coverage, which is considered the primary coverage.

Policies also cover the employees of the company, which can be a problem in a business that utilizes many independent contractors who are not technically employees. Most of these policies do cover "loan-out" companies.

Another way coverage may be expanded is with the "additional insured"—an individual or entity "added" to the policy coverage. Coverage is limited to actions or errors of the "named insured"—the person or

entity that took out the policy, such as a film production company. The important distinction here is that if one is an “additional insured,” the policy will not cover any of that entity’s errors. For example, suppose a distributor is added to the policy and, on its own, decides to change the title of the film for marketing purposes. If a claim were asserted for the use of that title, the policy would not cover it, even if the distributor were an additional insured. If the distributor consulted with the producer, and the producer actually changed the title, in that instance the additional insured coverage would protect the distributor against that claim.

E&O policies often include automatic additional insureds, such as distributors, financiers and others who may be named in a lawsuit against the film company. Carriers will also allow the insured to add others to the policy, but this would need to be done by an endorsement—a rider or written amendment to the policy. Sometimes this will necessitate additional cost, and there may be a limit to the number of individuals one can add to the policy coverage.

#### **[8.11] IV. WHY IS E&O INSURANCE NECESSARY?**

The initial reason why E&O insurance is necessary is that no one is likely to distribute or air any production without it. Most distributors and broadcasters will not even release funds without it. More important, it protects an individual or company from financial loss. The major value of an E&O policy is that it will pay for certain types of claims and the costs to defend those claims. The attorney’s fees and court costs are often the most significant expense for any claim. Even a frivolous lawsuit can cost \$100,000 in expenses to have it dismissed. The defense cost coverage is by far the most important aspect of the policy. Weigh the price of one simple claim that can cost \$100,000 against a premium cost of perhaps \$15,000, and the benefit is obvious.

#### **[8.12] V. WHEN SHOULD A POLICY BE OBTAINED?**

The policy date is arbitrary, depending only upon the amount of risk one is willing to take. What is important to understand is that if a claim is asserted before a policy is acquired, there will be no coverage. Any expenses will come out of pocket.

A conservative approach would be to get insured at the start of principal photography, or even at the beginning of significant pre-production activities. Some do not believe in paying a premium during the production process, when the risk of a claim is limited. The absolute latest date to

bind coverage is just prior to distribution or broadcast of a project to the public. In some instances the coverage inception date is a contractual obligation, often at the start of principal photography. The logic behind this is that once a film or television show goes into production, publicity is generated, and those who might have a claim against the production may be made aware of it and be inspired to assert their rights or interests.

Regardless of when one intends or is required to bind the policy, it is important to understand that the process of getting approved for a policy can take weeks or longer, as securing E&O insurance is much more complex than getting car insurance, which often can be done in a day or even a few hours. If one waits until the last minute, a premium not expected or budgeted for may be attached. Another reason to apply early is that the policy may not be in force exactly when it is needed. Sometimes a few days or weeks is unimportant, but not if it creates a breach of the distributor's contract or is the legal reason for the delay in receiving needed production funds.

Once an application is submitted to the carrier, it is reviewed by an underwriter and an attorney, each of whom may ask questions or request additional information. This back-and-forth can take days, weeks, or in the case of complex productions, months. In addition, the broker will want to have the time to shop it to several carriers to get the best price. This means that the question-and-answer process will take place with several different companies. If a project is based in fact, the carrier may require a detailed review, adding additional time to the process.

## **[8.13] VI. WHAT DOES AN E&O POLICY COST?**

Policy premiums can vary from company to company. They also vary depending upon the risk. The cost for a docudrama, a story based in fact or a reality television show will be higher than scripted fiction. It can also depend upon the applicant. A person or company with a history of claims will pay higher premiums, and the experience level of the parties involved will also be a determinant. As with auto insurance, inexperience or a "bad" record requires more coverage. Thus, it is important to start the process early as pricing can vary from company to company and project to project.

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**[8.14] VII. WHAT IS THE PROCESS OF OBTAINING A POLICY?**

To obtain a policy, one must complete a detailed application and provide the carrier with all relevant information. The questions start with basic information about the company, including the company's activities and the names of the owners, their experience levels and biographical information. Similar information will be requested about the company's attorney, including his or her experience levels. The applicant will also explain whether it or the production or the producer to be insured has or had previous claims brought against them as well as whether they are aware of any circumstances that could possibly give rise to a claim.

The questions then become specific as to the work and how the rights have been obtained to produce and distribute the work. They will vary depending upon whether the applicant is a filmmaker, composer or commercial producer, for example, but the general nature of the questions is the same.

In addition, there will be a required list of general clearance procedures. These include obtaining copyright and title reports, and securing licenses for any underlying works and third-party materials such as music, photographs or film clips. The applicant will need to check and/or clear identifying items in the production, such as character names, business names and locations, and have written agreements for all of the above.

There will also be a set of warranties that are presented and, in some cases, require the applicant's initials or signature. These range from confirming that answers on the application are accurate to agreeing to follow certain clearance procedures. Another warranty confirms that one understands certain terms of the policy, such as limits of liability and deductibles.

While some companies do not require an attorney to sign an application, unless one is a very experienced producer, it is likely that legal assistance will be necessary to properly answer the questions. Most, if not all, carriers require that an attorney be involved in the process. With most companies, the application and the statements made on it become part of the policy. This is important. An intentional misstatement or failure to respond completely to a question could be grounds for the company to deny coverage of a claim that was not anticipated by the carrier because of a misstatement. If an attorney's signature is required, he or she will need

to affirm that he or she understands the statements made on the application by the client to be true.

One is also obligated to follow standard industry practices, as the procedures are not intended to be exhaustive. Depending upon the type of work, the requirements may be more extensive than the standard list. For example, if producing a docudrama, documentary, or reality program, where the risk of a problem is greater, the carrier and its attorney will be more involved in the process. In the case of a docudrama on a current controversial topic, the producer will be required to provide a script, and its underlying factual research will be reviewed by the insurance company's attorney, who may request changes to alleviate perceived risks of a claim. As this process may take some time, one needs to involve the insurance company long before the start of principal photography. No producer wants to have completed filming scenes that the insurance company insists on changing.

What is often done in these high-risk productions is the producer's attorney provides advice on the production or the producer engages an attorney experienced in working with insurance carriers to provide such advice. This can be a few phone calls or may involve review of a script or underlying research materials. Another option is for the producer to apply for insurance at the very early stages of production so that the insurance company and its attorney are involved in the process. This can provide the carrier with more comfort that the risks are reduced to the extent possible, and it can head off differences of opinion as to whether something needs to be changed, or how those changes are to be made, at a time when it is much less expensive to accomplish.

The process can also involve negotiations with the insurance company over things such as release agreement language, underlying rights acquisition, character names and dialogue changes, to name a few. It can also lead to special deductibles or exclusions. For example, if a producer wants to portray a real individual in a docudrama as ruthless, but the research materials do not support this depiction, the carrier will require the portrayal to be changed. If this is crucial to the drama of the story, the producer may want to keep the script intact. As a compromise, the carrier may offer a special deductible, which will place the production company at risk for the initial amount of any claim filed by this individual. Depending upon the perceived risk, this deductible could range from \$50,000 to \$500,000 or greater.

Another issue that arises frequently is “fair use,” especially in connection with documentaries. Fair use is a defense to a claim of copyright infringement set out in § 107 of the U.S. Copyright Act<sup>1</sup> that allows one the use of a copyrighted work for the purpose of “criticism, comment, news reporting, teaching . . . , [or] scholarship.” Making a determination of whether something falls within the scope of the fair use exception is often a very subjective analysis and conclusion. Attorneys for producers are often rightfully concerned that a carrier could, in the face of a claim, dispute this conclusion and deny coverage. Recently many carriers have established procedures to avoid this confusion by setting up panels of attorneys whose opinion regarding whether a use is “fair” is acceptable to them. A letter is submitted with the application, and if the carrier raises no objection and issues a policy, it will not dispute this in the event of a claim. Some carriers go a step further and add a special fair use endorsement to the policy.

### **[8.15] VIII. FINDING AN INSURANCE BROKER**

As a producer or attorney, it is important to find an experienced insurance broker who specializes in entertainment and media insurance to provide the applications and guidance needed throughout the process. The types of insurance needed are unique and require special expertise. There is also a limited number of carriers that write this type of coverage, and they change frequently, so it is crucial to find a broker who knows where to get the coverage that will suit specific needs.

There is no single source to find a competent broker. Although one can run a Google search, as there are directories with listings, the best source is probably word of mouth. Speak to others who have had experience with entertainment insurance; obtain a few names and talk with them all. An entity seeking E&O insurance should decide which broker understands its needs and will work the hardest and smartest to achieve adequate coverage.

### **[8.16] IX. OTHER INSURANCE**

In addition to E&O insurance, there will likely be a need for other more standard types of insurance for coverage, including general liability, production, workers’ compensation and auto.

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<sup>1</sup> 17 U.S.C. §§ 101–1332.

General liability covers claims of bodily injury and property damage. This would include, for example, a moving camera colliding with a visitor. If coverage is needed for rented equipment, locations, props and other production-related liability, one will need a production package. An example of this is a crew member who is shooting on location breaking the property owner's antique vase.

Just as in any business, a production company is required by most states to have workers' compensation insurance, which covers medical benefits to its employees and independent contractors. Auto coverage is also a necessity. When a production assistant is sent to pick up the latest script drafts from the writer, and she sideswipes a parked car on the way, her personal auto insurance will not cover the accident, as it occurred on the job and for the benefit of the production.

In addition, there are other more exotic forms of production insurance. If sunny weather is important to the script, weather insurance can be purchased that will pay to re-shoot scenes if it rains or snows. Car chases and other special stunts also require special coverage.

## **[8.17] X. CONCLUSION**

The specific circumstances determine the type of insurance needed. It is important to find an experienced entertainment insurance broker and savvy entertainment lawyer who can provide guidance through the process and ask the right questions of both the applicant and the carrier to obtain the best policy at the best price.