A Tale of Two Towers:  
When Professional Liability And D&O Coverage Both Are Implicated

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I. **INTRODUCTION**

Many companies obtain multiple types of insurance policies to protect against various risks of loss. These include directors and officers (“D&O”) policies and professional liability policies, commonly known as errors and omissions (“E&O”) policies. Frequently, the coverage provided by these policies is complementary and mutually exclusive. In other instances, however, it may overlap for a variety of reasons. This article examines the situation where both D&O and E&O policies are implicated by a single claim and the issues that arise when coverage overlaps or potentially overlaps.

In Section II, Adam Doherty discusses the interplay of the coverages granted and excluded in D&O and E&O policies. In Section III, Charles Yuen analyzes professional liability exclusions in D&O policies and the case law addressing them. In Section IV, Steven McNutt provides an overview of American law involving “other insurance” provisions and Stephanie Manson does the same with English law regarding “double insurance.” In Section V, Ms. Manson offers practical advice on structuring insurance programs to avoid overlapping coverage.

II. **INTERPLAY OF COVERAGES GRANTED AND EXCLUDED IN D&O AND E&O POLICIES**

A. **D&O Coverage**

Traditionally, D&O insurance has afforded coverage for a corporation’s directors and officers for liabilities incurred as a part of the corporation’s business operations.\(^2\) Those traditional policies, typically written prior to the mid-1990s, provided two types of insuring agreements. The first provided coverage to the directors and officers themselves when the corporation would not or could not indemnify them for their loss – what is now colloquially coined Side A or Part A coverage. The second provided coverage to the corporation itself for the satisfaction of its obligations to indemnify its directors and officers.\(^3\) In the mid-1990s, insurers began to write entity coverage that was primarily limited to securities claims, which typically encompassed claims being brought under the Securities Act of 1933 and the Securities Exchange Act of 1934. That limitation on entity coverage, though still prevalent in policies issued to publicly traded insureds, is now an anachronism in the private company D&O marketplace.

By way of an example, a traditional D&O policy issued to a publicly traded entity might have insuring agreements similar to the following:

PART A:

The Company shall pay, on behalf of the Insured Persons, Loss for which the Insured Person is not indemnified by the Organization and which the Insured Person becomes legally obligated to pay on account of any Claim first made against the Insured Person during the Policy Period for a Wrongful Act.

PART B:


\(^3\) *Id.* at 139.
The Company shall pay, on behalf of the Organization, Loss for which the Organization grants indemnification to an Insured Person, as permitted or required by law, and which the Insured Person becomes legally obligated to pay on account of any Claim first made against the Insured Person during the Policy Period for a Wrongful Act.

PART C:

The Company shall pay, on behalf of the Organization, Loss which the Organization becomes legally obligated to pay on account of any Securities Claim first made against the Organization during the Policy Period for a Wrongful Act.

However, if the insured is a privately or closely held company, insuring agreement C would be drastically different. It might read something like this:

PART C (for private companies)

The Company shall pay, on behalf of the organization, Loss which the Organization becomes legally obligated to pay on account of any Claim first made against the Organization during the Policy Period for a Wrongful Act.

The expansion of coverage for claims made against private insureds is significant. No longer are those claims limited to those brought under the Securities Act of 1933 and the Securities Exchange Act of 1934. Rather they encompass all Wrongful Acts not otherwise excluded. A typical definition of Wrongful Act in a D&O policy includes any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by an Insured Person in his or her Insured Capacity, or for purposes of coverage under Part C, by the Organization.

B. E&O Coverage

Professional liability or E&O insurance is the general appellation used to describe many types of insurance that protect persons or entities that render “professional services” for liabilities arising from errors or omissions committed while rendering such services, usually for a fee or commission. Policy terms vary widely by industry and often are narrowly tailored to “professional services” of particular industry.

A typical E&O policy’s insuring agreement might read something like this:

“To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as Damages resulting from any Claims first made against the Insured and reported to the Insurer during the Policy Period … for any Wrongful Act of the Insured or any other person for whose actions the Insured is legally responsible, but only if such Wrongful Act … occurs solely in the rendering or failure to render Professional Services.”
Thus, E&O policies generally afford coverage for claims made by third parties alleging acts, errors, or omissions in the rendering of or failure to render, professional services. Courts have generally defined professional services as a business activity that specialized knowledge, labor, or skill and is predominately mental or intellectual as opposed to physical or manual in nature.4

C. Interplay Between the Coverages:

Typically, E&O insurance does not include the activities of an officer or director, as what they are providing to the insured organization is not considered a professional service and excludes from coverage claims arising out of any other services the directors and officers might render to third parties.5 Public D&O policies likewise have a typical exclusion that excludes claims arising out any actual or alleged act, error, omission, misstatement, misleading statement or breach of duty in connection with the rendering or, or failure to render, professional services to a third party. However, that exclusion is no longer standard on private D&O policies, though it is often endorsed on depending on the insured’s industry. However, where there is no such endorsement and the claim is effectively related to the rendering or failure to render services to third parties, coverage may be available under both the D&O and the E&O policies.

Even if the D&O policy contains a professional services exclusion, there be may some issues where the director or officer of the insured has performed professional services for the insured in his capacity as such. This often occurs when the individual in question is a lawyer-director, as was the case in Federal Savings & Loan Ins. Corp. v. Mmahat.6

In Mmahat, the receiver of an insolvent savings and loan brought an action against John Mmahat, an attorney, and his law firm Mmahat & Duffy. Mmahat had been general counsel and Chairman of the Board of the savings and loan. At trial there was evidence indicating that Mmahat had encouraged loans in violation of certain regulations so that his law firm could earn closing fees. A jury found Mmahat and his firm liable for legal malpractice. On appeal, the U.S. Court of Appeals for the Fifth Circuit rejected the argument that Mmahat had acted not as a lawyer but as Chairman of the Board and, therefore, could not have committed legal malpractice as a matter of law. Accordingly, Mmahat provides a classic example of where a director or officer may be sued in multiple capacities.

However, both types of policies afford coverage only for wrongful acts committed by the insured solely in an insured capacity. Because of the difficulty in identifying in which capacity a particular wrongful act was committed, lawyer-directors and other types of insureds acting in dual capacities may have little certainty as to the existence and extent of insurance coverage for claims arising out their dual capacities.

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4 See, e.g, Aetna Cas. & Sur. Co. v. Dannenfeldt, 778 F. Supp. 484, 495 (D. AZ. 1991); see also Am. Motorist Ins. Co. v. Southern Security Life Ins. Co., 80 F. Supp 2d 1285, 1289 (M.D. Ala. 2000) (professional service “is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominately mental or intellectual, rather than physical or manual.”); Abrams v. State Farm Fire & Cas. Co., 714 N.E.2d 92, 98 (Ill. App. 2002) (“the term professional service ‘refers to any business activity conducted by the insured which involves specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual in nature.’”).


At the very least, if coverage is afforded, there will be fight to determine how the loss may be allocated among the insurers.

III. Professional Services Exclusions

In this section, we identify and discuss, briefly, the types of professional liability exclusions as this is a key area of litigation involving whether D&O and E&O policies may provide coverage for the same claim. Typically, but perhaps counter-intuitively, the professional liability exclusions have excluded “professional services” using language differing from “professional services” coverage found in a policyholder’s E&O policies. The lack of a precise “fit” between the coverages often generates interesting coverage questions. They include whether a gap exists for coverage a policyholder may reasonably have expected and whether coverage may be provided under both the D&O and E&O policies.

A. Decisions Regarding Professional Liability Exclusions In D&O Policies

The following decisions illustrate the language of professional liability exclusions found in policies containing D&O coverage.

1. Medical Services

In 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), an endorsement “operate[d] to exclude 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.”

The court found this professional services exclusion failed to exclude coverage for underlying claims by the policyholder hospital’s patients. They asserted that a nursing assistant employee sexually molested them. The court reasoned that while this nursing assistant “undoubtedly provided” medical treatment to the claimants, the claims were “based on the employee’s intentional and offensive acts, independent of any treatment or medical service that he may have been providing.”

2. Social Website Services

In Tagged, Inc. v. Scottsdale Insurance Co., No. JFM-11-127, 2011 U.S. Dist. LEXIS, at *14-22 (S.D.N.Y. May 27, 2011) (California law), the court denied coverage under a D&O section of a policy as well as E&O coverage provided by a professional services section of the same policy. The professional services exclusion in the D&O policy excluded claims involving “rendering or failure to render professional services,” but did not define “professional services.”

The insured, operator of a social website oriented to teenagers, advertised “efforts to protect minor users from [inappropriate] content” posted by users. A claim, asserted by New York State, asserted that it had failed to do so. The court determined that the insured’s identification of the inappropriate content was a “professional service.” Notably, the court relied upon California case law interpreting professional services exclusions in general liability policies, rejecting the policyholder’s argument that to follow these decisions would render coverage illusory.
The court held that the claim was not covered under the professional services coverage section, as well. The court reasoned that the policyholder’s activities did not constitute advertising, “for others, for a fee” as required under the coverage section.

3. Banking Services

In Associated Community Bancorp, Inc. v. Travelers Cos., No. 3:09-CV-1357(JCH), 2010 U.S. Dist. LEXIS 34799 at *28-34 (D. Conn. April 7, 2010) (Connecticut law), aff’d, 2011 U.S. App. LEXIS 9653 (2d Cir. May 11, 2011), the court interpreted a professional services exclusion in a D&O section of a policy issued to a bank. The exclusion stated that the insurer “shall not be liable for any Loss on account of any Claim made against any Insured based upon, arising out of, or attributable to the rendering of, or failure to render, any service to a customer of a Company.”

The bank and its investment-oriented division were sued by investors who lost money as a result of a Ponzi scheme. The court denied coverage, rejecting the argument that the professional services exclusion “eviscerates” the coverage. The court reasoned that coverage could be invoked for actions not related to customers, as in the bank’s business “[a]ctions are taken with regard to shareholders (or members) and regulators, for example.”

4. Mare-Lease Services

In Great American Insurance Co. v. Geostar Corp., No. 09-12488-BC, 2010 U.S. Dist. LEXIS 20258, at *27-41 (E.D. Mich. Mar. 5, 2010) (Michigan law), an exclusion provided that a D&O liability section “shall not apply to, and the Company shall have no duty to defend or pay, advance or reimburse Defense Expenses 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.”

The carriers denied coverage, arguing that the underlying claims were based on tax advice rendered in connection with a mare-lease program. The underlying claims, however, also alleged fraud in the conduct of the mare-lease program. The court denied an early motion to dismiss filed by the carriers, but observed that any claim asserting misrepresentations in opinion letters would be excluded.

5. Mortgage Loan Services

In Neighborhood Housing Services of America, Inc. v. Turner-Ridley, 742 F. Supp. 2d 964, 970-74 (N.D. Ind. 2010) (Indiana law), an endorsement stated:

[T]he Underwriter shall not be liable to make any payment for Loss in connection with any Claim made against the Insured based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving the Insured’s performance of or failure to perform professional services for others.

Provided, however, that the foregoing shall not be applicable to any derivative action Claim alleging failure to supervise those who performed or failed to perform such professional services.

The policyholder provided mortgage loans to low income families. It sold certain loans but retained obligations to service them for a fee. A negligence claim (among various claims) alleged that an
officer of the policyholder failed to supervise its employees and asserted damages from improper application of received mortgage payments. The court reasoned that “supervision of individuals performing professional services” was itself a “professional service.” It then denied coverage because the action was not a derivative action subject to the exclusion’s derivative action exception. Notably, the court rejected the argument that application of the exclusion rendered policy coverage illusory.

6. Investment Services

MDL Capital Management, Inc. v. Federal Insurance Co., 274 Fed. Appx. 169, 173 (3d Cir. 2008) (Pennsylvania law) involved a professional liability exclusion in a D&O policy for litigation which “arises from . . . the rendering of or failure to render professional services.” The court denied coverage for underlying claims alleging “derelictions as investment adviser and investment manager.”

In Piper Jaffray Cos. v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania, 38 F. Supp. 2d 771, 781 (D. Minn. 1999) (Minnesota), the court evaluated two professional services exclusions in D&O policies. According to the court, an endorsement excluded “losses sustained in connection with any claim against officers and directors ‘alleging, arising out of, based upon or attributable to’ the performance of professional services.” Another endorsement excluded “losses in connection with any claim against directors and officers based on the ‘company’s performance of professional services for others in the capacity of Investments Counselor, Mutual Fund Advisor and/or Underwriter/Broker Dealer.’” Both exclusions contained “failure to supervise” exceptions, which allowed coverage for “any derivative or shareholder class action claims against directors or officers alleging a failure to supervise those who performed or failed to perform such professional services.”

The underlying claims, however, did not specifically allege failure to supervise. The court denied coverage under the “failure to supervise” exception, reasoning that the exception “requires that the underlying class action complaints contain allegations of failure to supervise or allegations comprised of elements legally equivalent to those required to establish a claim of failure to supervise.” Id. at 782.

7. Trust Services

In Reinhardt v. Certain Underwriters at Lloyd’s, London, No. A06-949, 2007 Minn. App. Unpub. LEXIS 275, at *6, *13-14 (Minn. Ct. App. 2007) (affirming denial of coverage for claims asserted against trust manager and equity-investment manager), a professional services exclusion in a D&O policy excluded liability:

based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way relating to any act, error or omission in connection with performance of any professional services by or on behalf of any of the Assureds for the benefit of any other entity or person; provided, however, this exclusion shall not apply to any such Claim brought directly, derivatively or otherwise by one or more securities holders of the Assured Organization.

8. Advertising Services

professional services exclusion in a “nonprofit management and organization liability” policy precluded coverage for claims of fraudulent misrepresentations, unfair competition, and trademark infringement. The court viewed the claims as arising out of advertising and marketing services provided to the underlying claimant and held that these were professional services.

9. Medical Board Services

In Town of Massena v. Healthcare Underwriters Mutual Insurance Co., 98 N.Y.2d 435, 446 (2002) (denying coverage for claims of civil rights deprivation, disparagement, and tortious interference), a provision excluded “any loss resulting from performance of ‘professional services,’ including services on ‘a formal medical accreditation or similar medical professional board or committee of an Insured.’”

10. Insurance Services

In Federal Insurance Co. v. Hawaiian Electric Industries, Inc., No. 94-00125HG, 1997 U.S. Dist. LEXIS 24129, at *36-37 (D. Hawaii Dec. 23, 1997) (Hawaii law), the court interpreted two professional services exclusions in a D&O policy. The policyholder had an insurance company subsidiary. Underlying claimants alleged that the policyholder improperly failed to provide funds to the subsidiary so that the subsidiary could pay hurricane-related claims.

An endorsement excluded claims, relating to the insured’s “business as an insurer”:

based upon, arising from or in consequence of the rendering or failure to render professional services in connection with the INSURED’s business as an insurer. Said professional services shall include, but are not limited to, the refusal to renew or the cancellation of any policy of insurance, reinsurance, bond or indemnity including but not limited to annuities, Pension contracts, risk management self-insurance program pools or similar programs (hereinafter “Insurance Contracts”); refusal to pay or delay in the payment of benefits or indemnity due or alleged to have been due under any insurance contract; handling any claim or obligation arising out of or under any Insurance Contract conducting any engineering survey; conducting any loss control service; or any advice by the INSUREDS in connection with any of the above.

Id. at *36. The court referred to the list of activities described in the endorsement and observed that they “all involve the interaction between [the subsidiary] and the recipients (or potential recipients) of its insurance services. Applying the doctrine of ejusdem generis, the court interpreted the exclusion restrictively and found that it did not apply to management services provided to the subsidiary.

Another endorsement excluded claims, relating to services relating to the insured’s “business as insurance agents or insurance brokers”:

based upon, arising from or in consequence of the rendering or failure to render professional services in connection with the INSURED’s business as insurance agents or insurance brokers. Said professional services excluded shall include, but are not limited to, the negotiation of insurance contracts; collection or remittance of premiums; rendering of advice concerning limits of liability, deductible, terms, conditions, application of exclusions, scope of coverage, types of coverages or forms
to be carried; the rendering of loss control services; or any advice by the
INSUREDS in connection with any of the above.

Id. at *26, *40. The court interpreted this exclusion as inapplicable as well. It reasoned that “[a]ll of the
activities listed involve professional services rendered to clients or potential clients of [the subsidiary] in
connection with its business as an agent or broker of insurance,” and not to “management services
provided to [the subsidiary] itself by the officers and directors of [the subsidiary] and [the parent].” Id. at
*41.

B. Decisions Regarding Professional Liability Exclusions In Other Policies

Professional liability exclusions in policies other than D&O policies, such as general liability policies, are
common. Many prior decisions involving such professional liability exclusions may impact litigation of
issues under D&O policies. The following recent -- and interesting -- decisions merely illustrate the
flavor of litigation involving professional services exclusions contained in such other policies.

In Wimberly Allison Tong & Goo, Inc. v. Travelers Property Casualty Co. of America, No. 08-2976, 2009
U.S. App. LEXIS 25294 (3d Cir. Nov. 18, 2009) (New Jersey law), a professional services exclusion in
commercial liability and excess liability policies barred a duty to defend. The architectural firm insured
provided architectural services for the construction of an allegedly defective parking garage. Despite
additional allegations in the claims of general negligence, the court construed “all of the allegations” in
the underlying claims to have arisen out of the firm’s professional services as an architect.

In Food Pro International, Inc. v. Farmers Insurance Exchange, 89 Cal. Rptr. 3d 1 (Cal. App. 6th Dist.
2008), a professional services exclusion failed to bar a defense of a claim under an engineering firm’s
general liability policy. The firm had a duty under contract to inspect ongoing work and the underlying
claimant fell through a hole in floor at the work site. An issue of fact existed as to whether the firm’s
employee was providing safety-related engineering services in relation to the accident.

In Western World Insurance Co. v. Empire Fire & Marine Insurance Co., No. 7:06-217-RBH, 2006 U.S.
Dist. LEXIS 83800 (D.S.C. Nov. 16, 2006) (South Carolina law), the court found that a professional
liability exclusion in a general liability policy excluded liability from the transport of patients by
ambulance.

Super. Ct. App. Div. 2006), a professional services exclusion in general liability and umbrella liability
policies did not preclude coverage for a claim against an engineering company alleging failure to warn of
a likely pier collapse, despite the company’s inspection which apparently showed an imminent danger.
The court held that the exclusion did not apply to a negligent failure to provide information.

law), the policy “exclude[d] coverage for liability for ‘damages due to (e) any service of a professional
nature, including but not limited to: (1) the preparation or approval of maps, plans, opinions, reports,
surveys, designs, or specifications and (2) supervisory, inspection or engineering services.’” The insured
was hired to inspect and investigate the source and responsibility for asbestos materials at a school, and it
found that an asbestos removal firm failed to remove all of the asbestos. Based upon the professional
services exclusion, the court denied coverage for the asbestos removal firm’s defamation and tortious interference claims.

C. Decisions Regarding Coverage Provided By Policies Covering Professional Services

Generally, in defending a denial of coverage under a professional liability exclusion, carriers will try to characterize the claim as based upon a professional service. Decisions regarding the scope of a professional service exclusion in a D&O policy are therefore often affected by reported case law interpreting the phrase “professional services,” and similar phrases, used in E&O policies which provide coverage for professional services.

Carriers denying coverage under professional services exclusions have an incentive to cite victories by policyholders against E&O carriers, such as Miller v. Westport Insurance Corp., 200 P.3d 419 (Kan. 2009) and Woo v. Fireman’s Fund Insurance Co., 164 P.3d 454 (Wash. 2007). In Miller, the court held that referrals to a debt adjustment company constituted the “business” of insured insurance agents in “rendering services for others as a licensed life, accident, and health insurance agent.” The court held that the professional liability carriers therefore had a duty to defend a claim relating to the referrals.

In Woo, the court held that an oral surgeon’s professional liability insurer had a duty to defend a claim alleging that surgeon implanted dental flippers, modified to look like boar tusks, temporarily in an employee/patient while under anesthesia. The surgeon photographed the employee/patient while the flippers were being used. The court considered relevant the fact that the employee/patient was undergoing an agreed dental procedure, and flippers were a necessary part of the procedure. The court construed the insertion of the boar tusk flippers as “conceivably” within the practice of dentistry.

Policyholders seeking such coverage, on the other hand, have an incentive to cite E&O coverage denials where a link to a professional service has been found absent. In Davis & Meyer Law, Ltd. v. ProNational Insurance Co., 2007 Ohio 3552 (App. 2007), for example, the court held that a professional liability carrier had no duty to defend a claim against an insured title agency alleging the agency billed its clients excessive courier and recording fees.

In Massamont Insurance Agency, Inc. v. Utica Mutual Insurance Co., 489 F.3d 71 (1st Cir. 2007) (Massachusetts law), the First Circuit rejected an insured broker’s argument that a dispute about an exclusivity promise in an agency agreement related to a “professional service” covered under the broker’s E&O policy. The policyholder argued that other allegations in the underlying claim could be covered, but the court held that the “gravamen” of the claim was for the breach of the exclusivity promise.

Notably, in interpreting the scope of professional liability coverage, courts often consider an interpretation of “professional service” stemming from Marx v. Hartford Accident & Indemnity Co., 157 N.W.2d 870 (Neb. 1968). In Marx, the Nebraska Supreme Court interpreted “professional service” to mean “one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.” E&O policies -- and professional services exclusions -- may use a definition of the services covered which appears influenced by the formulation in Marx. Accordingly, any practitioner in this area should become reasonably familiar with Marx and its progeny.
IV. **“OTHER INSURANCE” PROVISIONS**

D&O and E&O policies typically include “other insurance” clauses. These clauses are contractual provisions that seek to control the priority of payment when a loss is covered by two or more policies. The “other insurance” provisions in D&O policies generally seek to make them excess of all other insurance unless the other insurance is expressly written as excess over the D&O policy. E&O policies also invariably contain “other insurance” provisions, many of which also seek to make them excess over other policies. Regardless of the reason that D&O and E&O policies may be implicated by a single claim, where both types of policies are implicated, at the forefront will be issues involving “other insurance” provisions and how both policies may share in any loss.

Sometimes both D&O and E&O coverages are afforded in a single policy that provides a clear answer how both coverages will apply if they are implicated by a single claim. It is also common for these coverages to be provided by different insurers, with different limits, different retentions, and varying “other insurance” clauses, raising the likelihood that the parties may dispute who pays first and how any loss may be allocated among the insurers.

Case law specifically addressing the interaction between “other insurance” clauses contained in D&O and E&O policies is virtually non-existent. Nevertheless, there are numerous cases addressing the interaction between “other insurance” clauses in policies providing varying forms of coverage, such as D&O and general liability, that provide guidance.

A. **The Concurrent Coverage Issue**

Courts typically begin their analysis of how to treat multiple insurance policies that provide coverage for a single claim in one of two places. Some courts look first to the “other insurance” provisions in the policies themselves. Others first analyze whether the policies cover the “same risk” at the same “layer” (i.e., primary or excess insurance). The courts using this second approach typically will not allow an excess clause in an otherwise primary policy, referred to as “coincidental” excess coverage, to morph the policy into a “true” excess policy. In this way they avoid concurrent or overlapping coverage.

In analyzing whether a policy is a “true” excess policy, courts may examine a variety of factors including: (1) whether the insured obtained underlying coverage for the same risk; (2) whether the policy was marketed or sold as a “true” primary policy or “true” excess policy; (3) whether the policy specifies specific policies that provide underlying insurance; and (4) whether a reduced premium was paid for the policy on understanding that underlying insurance would pay first.

Some courts analyzing whether policies cover the “same risk” also may refuse to examine “other insurance” clauses in policies providing different types of coverage, such as general liability policies and D&O policies. See, e.g., *Pacific Indemnity Co. v. Linn*, 766 F.2d 754 (3d. Cir. 1985) (holding that a professional liability policy and a general liability policy insured different risks and therefore were not “other insurance” as to each other); but see *Cincinnati Ins. Co. v. Am. Hardware Mfrs. Ass’n*, 898 N.E.2d 216, 242 (Ill. App. Dist. 2008) (“It is not necessary that policies provide identical coverage in all respects in order for the two policies to be considered concurrent, and each insurer is entitled to contribution from the other, as long as the particular risk actually involved in the case is covered by both policies, the coverage is duplicate, and contribution will be allowed.”).
Two recent decisions exemplify the different approaches and the resulting differences in coverage. See *Fieldston Property Owners Association, Inc. v. Hermitage Insurance Co., Inc.*, 945 N.E.2d 1013 (N.Y. Ct. App. 2011); *Federal Insurance Co. v. Firemen’s Insurance Co.*, 769 F. Supp. 2d 865 (D. Md. Feb. 11, 2011). In *Fieldston*, a lawsuit against a policyholder alleged a number of counts, including an injurious falsehood count, which implicated a commercial general liability policy. The general liability policy contained a duty to defend and also provided that it was primary. The complaint, however, was largely based on events taking place after the expiration of the general liability policy, but during the policy period of a D&O policy. Further, it alleged a number of counts that would be covered by the D&O policy, but were not covered by the general liability policy for indemnity purposes.

The D&O policy had an “other insurance” clause that provided it was excess to other insurance. On this basis, the D&O insurer argued that, because the general liability was primary and had a duty to defend, the general liability insurer had a duty to defend all claims without contribution from the D&O insurer. The intermediate court of appeals disagreed. It found that with the possible exception of a single count, the policies did not provide coverage for concurrent risks. On that basis it reasoned that “the ‘other insurance’ clause is inapplicable to the risks of all other such losses, and the D&O policy thus provides primary coverage with respect to some of those risks.” *Fieldston Property Owners Association, Inc. v. Hermitage Insurance Co., Inc.*, 873 N.Y.S.2d 607, 611 (2009).

On appeal, New York’s highest court reversed. It began its analysis by looking to the “other insurance” provisions in the policies. Applying the language of the “other insurance” provision in the D&O policy, it determined that the general liability policy was “‘other insurance’ which would cover the ‘loss’ arising from the defense of the [] underlying action. . . .” 945 N.E.2d 1013, at 1018. Accordingly, it held that the D&O policy was excess and the general liability insurer had the obligation to defend the underlying litigation without contribution from the D&O insurer.

During roughly the same period of time, a different result occurred in a lawsuit in Maryland. See *Federal*, 769 F. Supp. 2d 865 at 875. In *Federal*, a Maryland federal court, relying in part on the intermediate appellate decision in *Fieldston*, held that a general liability policy and a D&O policy do not provide coverage for the same risks. On that basis, it concluded that the policies’ “other insurance” provisions were inapplicable to determining the priority of coverage. *Id.* Shortly after this court made its ruling, the intermediate appellate court in *Fieldston* was reversed by the New York Court of Appeals. The D&O insurer moved for reconsideration of the court’s ruling that the policies did not cover the same risk, citing the reversal of *Fieldston*. The Maryland federal court, however, refused to follow the New York Court of Appeals’ approach and denied the D&O insurer’s motion for reconsideration, reasoning that it saw no reason to depart from other established precedent.

In a similar vein, some courts may look past “other insurance” provisions and instead focus on the “intent of the parties” and which policy is “closest to the risk” to determine the priority of payment between policies that provide overlapping coverage. See, e.g., *Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co.*, 567 N.W.2d 71 (Minn. Ct. App. 1997). For example, in *Redeemer*, the court held that a professional liability policy provided primary coverage for a sexual misconduct claim despite the existence of a primary general liability policy that also provided coverage. It reasoned that the general liability policy only incidentally provided coverage for the risk and therefore the intent of the parties was that the professional liability policy would provide coverage first.
Accordingly, these cases demonstrate that in evaluating overlapping or potentially overlapping D&O and E&O coverage it is critical to determine the particular jurisdiction’s rules in analyzing how different types of policies will be treated for “other insurance” purposes and whether different types of insurance are considered to cover the “same risk.”

B. Application of “Other Insurance” Clauses

Courts analyzing “other insurance” clauses generally first determine whether both clauses can be applied as written. If they can, most courts will apply the policy language. See, e.g., Colony Ins. Co. v. Georgia-Pacific, LLC 27 So. 3d 1210, 1215 (Ala. 2009) (reconciling other insurance provisions). Where “other insurance” clauses cannot be reconciled, there are typically two types of conflicts. The first is a situation where the clauses contain identical or nearly identical language. Here, to the extent that enforcing both provisions is not possible, the general rule is that courts will prorate coverage, typically by policy limits, however, some jurisdictions prorate by equal shares. See Home Ins. Co. v. St. Paul Fire & Marine Ins. Co., 229 F.3d 56, 64 (1st Cir. 2000).

For clauses that conflict with each other but contain different language, courts vary their approaches and the issue should be examined on a jurisdiction by jurisdiction basis. Some jurisdictions automatically prorate. Others have rules classifying types of “other insurance” clauses and addressing which types of clauses “trump” each other. In this regard, there is a broad diversity of other insurance clauses. The most widespread are known as pro-rata, excess, and escape clauses. Pro-rata clauses typically provide that if other insurance exists, the insurer will pay its pro-rata share in relation to the insurers’ respective liability limits. Excess clauses provide that the policy will not pay until the limits of other insurance have been exhausted. Escape clauses generally provide that the insurer is relieved from any obligation to the insured if other coverage is available. Other common variations are super escape, super excess, and excess with no contribution.

The most common conflicts are among the following types of provisions:

- **Pro-rata vs. Excess** – The majority view is that the policy with a pro-rata provision is primary to a policy containing an excess provision. See State Farm Fire & Cas. Co. v. Liberty Ins. Underwriters, Inc., 613 F. Supp. 2d 945, 963 (W.D. Mich. 2009). The minority view is that the clauses are mutually repugnant and accordingly loss should be prorated, usually by policy limits. See, e.g., Rockwood Ins. Co. v. Ill. State Medical Interinsurance Exch., 646 F. Supp. 1185, 1191 (N.D. Ind. 1986).


Given the varying approaches different jurisdictions apply to “other insurance” provisions, it is extremely important to research the particular law that will apply.

C. “Other Insurance” and the Duty to Defend

A key issue that arises when multiple policies provide coverage for the same claim is how defense expenses and the duty to defend are addressed. Most D&O policies do not obligate the insurer to defend, but place that responsibility on the policyholder. They typically provide for indemnification of defense costs incurred by the policyholder in defending a covered claim. Professional liability policies, on the other hand, may contain a “duty to defend” insureds from covered claims. Accordingly, how policies with dissimilar obligations regarding the duty to defend interact may come to the forefront when both a D&O policy and an E&O policy are implicated by a claim.

Some jurisdictions hold that the “other insurance” clauses apply to “duty to defend” obligations. See e.g., Fieldston, 945 N.E.2d 1013, at 1018; Home Indem. Co. v. Gen. Accident Ins. Co., 572 N.E.2d 962 (Ill. App. Ct. 1991); Frankenmuth Mut. Ins. Co. v. Cont’l Ins. Co., 537 N.W.2d 879 (Mich. 1995). As discussed above, in Fieldston, the New York Court of Appeals recently held that an “other insurance” provision in a D&O policy, which made that policy excess to a general liability policy, prevented the general liability insurer from obtaining contribution for costs it incurred in defending their mutual insured from a claim. See Fieldston, 945 N.E.2d at 1013, at 1018.

A number of other courts, however, have held that “other insurance” provisions do not apply to the duty to defend in certain circumstances. See, e.g., Trinity Universal Ins. Co. v. Emplrs Mut. Cas. Co., 592 F.3d 687, 695 (5th Cir. Tex. 2010) (“[t]he ‘other insurance’ clause applies only to the duty to indemnify, not the duty to defend”); Utica Mut. Ins. Co. v. Miller, 130 Md. App. 373, 394 (Md. Ct. Spec. App. 2000) (“‘Excess’ or ‘other’ insurance clauses have been recognized as not applying to the duty to defend”). Accordingly, policyholders and insurers should carefully evaluate the law of the jurisdiction regarding the interaction between “other insurance” provisions and the “duty to defend” when one of multiple policies applying to a single claim contains a “duty to defend.”

D. Double Insurance Under English Law

Where an insurance policy is placed through the Lloyd’s insurance market in London it would not be uncommon for the jurisdiction clause to incorporate the law of England and Wales. In this context it is important to understand how an English court would deal with situations where insurance policies potentially overlap in coverage.

There is no common law restriction on how many times an insured is able to insure a subject matter. A main policy reason for this principle is that an insured should be able to protect itself against the risk of an insurer not being able to pay a covered loss due to insolvency. The insured does not have any common law obligation to disclose that a risk is being covered by another indemnity insurance policy, unless there
is an increased risk of fraud. A definition of double insurance was codified through section 32(1) of the Marine Insurance Act 1906:

"Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance."

So where the insured has more than one insurance policy which covers the same peril at the same period of time, the common law allows the insured to claim full recovery from any one of the insurers. The restriction which does limit the freedom of double insurance is the principle of indemnity which sets out that the insured cannot recover more than that which has been lost.

An insurer who pays out a full covered loss to an insured will then have the right to claim a share from any other insurer covering the same peril at the same period of time, through the equitable principle of contribution. There is conflicting case law on how the contribution should be calculated and it very much depends on the type of insurance policy. Where a claim falls within the limits of two liability policies, it would appear that the loss will be shared equally between the two insurers. However where a claim falls within a policy with a higher limit, the lower limit policy will cover half the loss up until its limit and then the higher limit policy will cover the rest.

Although the principle of double insurance provides the insured with the right to insure the same risk with several insurers and a free choice as to who to recover from, this right is often amended through various contractual agreements. Insurers will for instance often require the insured to disclose any other insurance held which covers the same risk. The insurance contract will also often include specific other insurance clauses which deals with concurrent insurance. Through these provisions insurers will look to amend and restrict the common law position by contractually setting out that the policy will not automatically cover the whole of the covered loss where there is other insurance policies covering the same risk. The three common contractual amendments often seen in the London Market are:

- Rateable proportion clauses – where the insurer will only be liable to the insured for its proportion on any loss so that the insured would have to separately recover from the various insurance contracts in place.
- Excess of other insurance clauses – where the insurance contract will be triggered as an excess policy once any other concurrent insurance has been exhausted.
- Escape clauses – which is the most extreme clause meaning that the insurer is not liable under the contract where other insurance covers the same risk.

Individually all three of the above contractual provisions will generally be valid and enforceable where the insured has more than one policy in place which covers the same risk. However the question arises as to what will happen where two or more concurrent policies contain similar clauses where the effect may be that none of the policies can fully operate.

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7 Mathie v Argonaut Marine (1923) 21 L1. L.R. 145  
8 Newby v Reed (1763) 1 Wm.Bl. 416  
9 Commercial Union Ass Co. v Hayden [1977] Q.B. 804
Where two concurrent policies include a rateable proportion clause the effect is to restrict the insured’s ability to claim the full recovery from any one preferred insurer and in any order. It does not however affect the insured’s right to a full recovery and it simply means that insurer will not have to seek contribution from other insurers at a later stage. The consequence of rateable proportion clauses is that the insured does not have protection against one insurer’s insolvency as the other insurers would ordinarily remain liable for their share only.

More complex difficulties arise where two policies covering the same risk both include an escape clause or excess clause. Where two policies both include an escape clause English courts have held that the only sensible result is that the two clauses cancel each other out. The same position appears to apply where two concurrent policies include excess clauses. In these scenarios the common law position would take affect and the insured would be able to claim the full loss from any one insurer. It is not clear what would happen where one policy has an escape clause and the other concurrent policy has an excess clause. One argument would be that the escape clause could be enforced and that the excess clause would therefore not be applicable since there would be no other cover available.

Whilst the common law position is fairly straightforward under English law, reality is that most insurers will make contractual amendments and thereby effectively transfer the burden of contribution and risk of insolvency to the insured. The implications of this may mean significant delay and confusion in the handling of a claim and as such it is crucial to ensure that any contractual amendment to the principles of double insurance and contribution are carefully considered where both a D&O policy and an E&O policy are purchased concurrently.

V. **CAN THE TALE OF TWO TOWERS BE AVOIDED?**

Where an insured purchases both E&O and D&O insurance can a dispute be avoided when a claim occurs which could potentially trigger both insurance programs? Although there is no silver bullet for avoiding policy disputes, there are a number of specific considerations which should be addressed at the placing and underwriting stage which could help avoid disputes and uncertainty in the event of a claim which has the potential to trigger multiple policies.

A. **Review The Policy Language**

Of course the wording of each policy affects how each policy will respond and accordingly will also shed light on how the two polices will relate and interact. Therefore it is important that the wordings of each policy should be reviewed not in isolation, but together. Certainly insureds and their brokers and other insurance advisors should be reviewing all coverages purchased to ensure that there are no gaps in coverage but also to be certain that the polices relate appropriately.

As reviewed in detail above, the starting place for thinking about the interaction of the two policies should be the other insurance clauses. If there is a specific intent that one policy should have priority, the other insurance clauses should be reviewed to ensure they would operate as intended if challenged in court. The above review of the case law on how courts interpret such clauses can be instructive on how such clauses should be drafted to give priority to one policy over another and the consequences of failing to review such clauses. Similarly, where there are other insurance clauses in both policies which have not

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10 Eagle Star Insurance Co Ltd v Provincial Insurance plc [1994] 1 A.C. 130
been drafted to interrelate, the insured should consult their insurance and legal advisors to ensure that the consequences of agreeing to the provisions are understood. Although insureds may question their ability to alter such clauses, this is addressed in the two further practical considerations discussed below.

There are a number of other policy provisions which could create confusion where both towers are potentially triggered and should be reviewed at the underwriting stage to ensure a complete liability program that responds as both the insured and insurer intend. Where natural person insureds are implicated in a professional services claim, the D&O insurer will likely focus its inquiry on whether the insured person was acting in an insured capacity under the D&O policy. This question can be tricky enough when the insured involved is an executive of the company where questions of coverage focus on whether the claim is focused on the insured’s duties as a director or their actions in providing professional services – and whether the two functions exist concurrently. The overlap between policies can become murkier still as the definition of insured person under many D&O policies expands to include employees of a company – even without the requirement that they be acting in a managerial capacity. This may result in what most directors would find to be an unexpected and unsatisfactory result. A D&O insurer may attempt to deny a claim on the basis that a director is being sued not in her capacity as a director, but for the provision of professional services, which is an act outside the scope of their insured capacity as a “director” under the D&O policy. On the other hand, if the definition of insured person also includes any “employee,” the insured capacity of that employee would seemingly include actions or omissions in the provision of services as presumably this is within his capacity as an employee. This produces the dissatisfactory result that the employee can erode the D&O policy for a professional services claim where the director arguably has no cover.\footnote{The expansion of the term insured person in the D&O policy may also provide an example of how a PI loss which the company may not want to cover can actually be unintentionally covered by the D&O. Importantly, a professional indemnity policy may provide coverage for the liability of natural person insureds only where the insured company is identifying the individual, which is quite different from a D&O policy where one of the main purposes of the coverage is to protect directors and officers where the entity cannot or will not provide an indemnity. Accordingly, if a natural person defendant falls within the definition of insured person under the D&O policy and the cover is otherwise wide enough to cover a PI claim, the insured company may find that an individual for which they would prefer not to receive the benefit of an indemnity could be covered under the side A coverage of the D&O policy.} Accordingly, it is important to consider how the D&O policy might respond to a professional services claim as to each group of persons insured under the D&O policy and ensure the policy operation is as all parties intend.

For similar reasons both the insured and insurer should review the definition of wrongful act or similar term in each policy with the interaction of the two policies in mind to ensure that there are no gaps or unexpected double coverage.

Where a professional services exclusion is included in the D&O policy, it should be closely coordinated with the coverage granted in the professional liability policy if the intent is to fully separate the two risks. Where the definition of professional services in the D&O is more narrow than in the E&O policy, there is unintended double coverage. Where the exclusion is written with a broader definition of professional
services than is covered by the E&O policy, a natural person insured may find themselves facing a gap in coverage.

In both policies, the known loss and/or prior and pending exclusions should not work against each other so that if the nature of the claim or targets of the claim change cover under one policy is not precluded simply because a prior notification was made to the other policy.

Of course, there are numerous other policy provisions which can affect the interaction between a D&O and an E&O policy, but a review of these provisions will go a long way to clarifying the intent between the insured and insurer which should help to minimise disputes in the event of a claim.

B. Choosing A Primary

An extremely practical way to minimise disputes over which policy is triggered is for an insured to have the same lead primary market on each policy. Where the same insurer is writing both policies, it is more likely that the insured and insurer can agree on language which makes the intended interaction of both policies clear and can work together in a claim. Moreover, any practical considerations about whether there may be another company which can contribute to the claim is minimised so the insured and insurer can focus on the defence of the claim rather than on coordinating the defence between multiple insurers or allocation of costs between the insurers. Although a claim would still need to be attributed to one policy or the other, and any excess markets involved may still dispute the allocation to one policy or the other, the practical reality is frequently that disputes are less likely to become contentious where the same insurer act as primary on both policies.

Of course, there are many considerations which may make this impractical such as the consolidation of counterparty risk, pricing, insurer appetite and capacity, and long-standing relationships between the insured and insurers on each program.

C. Consider Whether A Combined Policy Is Appropriate

In some instances, there may be no need for two separate towers at all. A blended tower that includes both D&O and E&O coverages can operate to avoid the disagreements and ambiguity that may arise where there are two separate towers. This can take numerous forms including simply having what are essentially two separate policies as parts 1 and 2 of the policy, which effectively provides for the one insurer option described above combined in what is sold as a single policy, but still provides separate cover which can have separate limits and retentions where necessary. The advantage of this over simply choosing the same primary on both policies is that there is a single tower so that the excess insurers are also the same and sit over the combined policy rather than having different excess insurers on the D&O and E&O. Where there are combined limits and concerns over the erosion of the D&O by entity E&O cover, insureds may purchase additional D&O on top of the blended policy, frequently only on a Side A & B or Side A basis. Where the two coverage parts make up one policy it is easier to coordinate the language used in each coverage part so that the language of each part of the policy operates as a consistent whole.
So a two tower program that looks like this:

Could be re-structured to look like this:
In addition to blended policies which are essentially the E&O wording and D&O wording sitting as two parts of a single policy, there are some fully integrated products available in certain industries. An example of this is in the private equity or venture capital space where completely integrated policies, sometimes called GPL or general partner liability policies are common. Such policies specifically account for the fact that where a private equity firm places a director on the board of a portfolio company, claims against that individual are likely to be for their action as a director, which of course is undertaken as a part of the professional services being provided by the private equity firm. As the proliferation of D&O expands to the private company market and non-traditional professional services are being offered by companies, this kind of insurance product presents an area for innovation as new claims expose new chapters in this tale of two towers.

VI. CONCLUSION

In many instances D&O and E&O policies provide complementary coverage that is mutually exclusive. In other situations, the coverages may overlap. While most of the disputes in this area are resolved by negotiation, litigation in this area is likely to increase with the private company D&O market providing coverage for non-securities claims. Accordingly, policyholders, brokers, and underwriters should be cautious of issues regarding dual capacity, the scope of coverage, and exclusions for professional services in structuring programs to avoid the unintended consequences of overlapping coverage and coverage gaps.