

# THE INSTITUTE FOR INSURANCE TRANSPARENCY

## NAVIGATING D&O EXCLUSIONS FOR CERTAINTY

In the world of Directors & Officers (D&O) coverage, assumptions can be your Achilles' heel. Many top executives entrust their insurance brokers with managing their D&O policies, presuming their best interests are always at the forefront. But recent revelations suggest a different narrative. In a recent survey, over 80% of these policies harbor exclusions that, in the event of a claim, could cause problems and, on some occasions, even result in non-coverage of claims that should be covered. It's time to shatter these illusions and embark on a journey to uncover the true essence of your D&O coverage.

### A GLIMPSE INTO REAL-LIFE CHALLENGES: HARVARD'S BATTLE

Amidst the complexities of policy terms and conditions, real-life stories often offer valuable lessons. Take, for instance, Harvard University's recent legal battle, which shed light on the importance of timely notification.



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**HARVARD'S LAWSUIT AGAINST MARSH** followed losses in federal court in the insurance coverage lawsuit that Harvard had previously filed against Zurich American Insurance Co. Harvard is alleging that Marsh failed to promptly notify Zurich, which lay excess to a primary policy, inside the policy's 90-day notification window, which had resulted in a finding in the prior insurance coverage lawsuit that coverage under the Zurich policy was precluded. Harvard placed the blame squarely on Marsh, alleging that the broker failed in its contractual and professional duty to provide notice to the college's excess errors and omissions insurers.

*This case is a stark reminder that even renowned institutions can find themselves entangled in the web of D&O complexities. It underscores the necessity of proactive and expert guidance to navigate these treacherous waters successfully.*

**See page 2 for Kevin M. LaCroix's introduction.**

## INTRODUCING KEVIN M. LACROIX

Before we delve into the intricate world of D&O exclusions, it's essential to introduce Kevin LaCroix, an attorney and Executive Vice President at RT ProExec, a division of RT Specialty. With over 35 years of experience in directors' and officers' liability insurance, Kevin brings a wealth of knowledge and insight to the table. LaCroix is a recognized authority in the field writing the industry's go to publication, The D&O Diary, where he has consistently emphasized the importance of understanding the nuances of D&O policies.

### The "Claims Notification Provision": Certainty Through Swift Action

A cornerstone of D&O policies is the "claims notification provision." Beyond mere notification, its provisions make swift action imperative for certainty in coverage, as LaCroix has frequently pointed out in his writings and discussions.

### Why It Matters: Timely Assurance

According to LaCroix, notifying your insurer promptly when a claims surface isn't mere protocol; it often comes with strict deadlines. Missing these timelines can pose formidable barriers to securing coverage when you need it most.

### The Challenge: Late Notification Denials

LaCroix has highlighted the challenges that can arise when not all states mandate insurers to prove prejudice from late notice. In some jurisdictions, insurers can simply rely on untimely notice as a defense to coverage, irrespective of actual harm to the insurer.

### Mitigating Denials: Modifying Policy Language

To mitigate this challenge, LaCroix recommends considering policy language modifications. Specify that insurers cannot reject coverage due to late notice unless they can demonstrate tangible prejudice as a result of the late notice, a strategy he often advises.

### Unmasking the "Conduct Exclusion": A Closer Look

Every D&O policy clauses known as the "conduct exclusions." These provisions' purpose is to preclude coverage for losses stemming from fraudulent or criminal misconduct.

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### Why It Matters: Precision Counts

LaCroix emphasizes the pivotal role of precision in D&O policy language. It's not enough to assume that your broker has secured comprehensive protection. The availability of coverage hinges on the important details negotiated during the policy's placement; a viewpoint consistently championed by LaCroix.

### Language Choices: Judgment vs. Adjudication

Intriguingly, the specific wording within the conduct exclusion can tip the scales of your coverage. While most exclusions require a "judgment" for preclusion, others mention "adjudication." The choice between these terms isn't arbitrary; it holds strategic significance, as LaCroix has noted in his analyses.

### Going Beyond: The Crucial Details

However, the story doesn't end there. Simply opting for "adjudication" doesn't guarantee coverage throughout all potential appeals. The policy language must go further, specifying a "final" adjudication that is "non-appealable" to safeguard against coverage denial before exhausting all legal avenues, a point elaborated by LaCroix.

### In Conclusion: A Paradigm Shift in D&O Assumptions for Certainty

These two provisions wield immense power and can significantly influence your D&O coverage in the event of a claim. They are just two of many aspects negotiable during policy placement. The inclusion of preferred wordings can be a game-changer for coverage availability, underscoring the need for expert guidance in the policy placement process, as LaCroix advises.

As a parting thought, it's clear that the landscape of D&O coverage is evolving, and assumptions can no longer be your guiding light. Challenge the status quo, scrutinize policy language, and rely on seasoned professionals and then verify claim scenarios to ensure your D&O coverage remains robust and certain. Your peace of mind hinges on it.

# MEET THE EDITORS



## EDITOR

*Mitchell Andrews*

*Partner – The Plexus Groupe*

Mitchell Andrews is a fearless disruptor in the insurance industry with over 35 years of experience. He never hesitates to challenge the status quo or question authority when it comes to achieving the best possible outcome for his clients. Mitchell is known for his unrivaled expertise in Employee Benefits and Business Insurance as one of the founding partners of The Plexus Groupe. He is an uber-inquisitive and outspoken professional, always searching for what is new and different to drive client success including serving on numerous insurance advisory boards and participating in state and federal lobbying efforts to improve the efficiencies within the entire insurance ecosystem.



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Kevin M. LaCroix is the Executive Vice President at RT ProExec, a division of RT Specialty. He is also the author of The D&O Diary, an industry-leading online publication that provides news and analysis of directors' and officers' liability insurance and corporate governance-related issues. Throughout his illustrious career, he has been a recognized expert and international speaker on D&O insurance and risk management topics. You can learn more about his insights and expertise at <https://www.dandodiary.com/>.