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Real Estate Institute, LLC  
New Mexico



## NEW MEXICO ERRORS AND OMISSIONS CLAIM REVIEW 2019 – 2024<sup>1</sup>

Rice Insurance Services Center (RISC), a division of Accretive Specialty Solutions, LLC, administers the New Mexico Real Estate Commission's current 2024 group real estate errors and omissions (E&O) insurance program, which is issued by Continental Casualty Company, a CNA company rated "A, Excellent" by A.M. Best. RISC and its predecessor companies have been the New Mexico state group program provider since 2004. Currently, RISC is the state group program provider and handles claims for all states with similar programs for real estate licensees. As of August 31, 2024, RISC's in-house adjusters have handled 3,100+ claims against New Mexico brokers and real estate firms.

The 2024 New Mexico group policy defines a claim as follows:

**Claim** means:

1. a written demand for money or services received by the **Insured**; or
2. service of a lawsuit or institution of arbitration or mediation proceedings against the **Insured** seeking **Damages** and alleging a negligent act, error, or omission in the performance or failure to perform **Professional Services**. Complaints to or disputes before a real estate regulatory board or commission are not **Claims**. Criminal proceedings are not covered under this Policy regardless of the allegations made against any **Insured**.

**Claim Overview** – Insureds report claims, potential claims, regulatory complaints, and subpoenas. The group policy provides limited coverage for regulatory complaints and subpoenas in some instances. The chart below shows the total number of matters reported to RISC under the 2019 to 2024 New Mexico group policies.

| 2019 – 2024 New Mexico Group Policies<br>Claims, Potential Claims, Regulatory Complaints, and Subpoenas Reported* |                  |
|-------------------------------------------------------------------------------------------------------------------|------------------|
| New Mexico Group Policy Year                                                                                      | # Files Reported |
| 2019                                                                                                              | 182              |
| 2020                                                                                                              | 172              |
| 2021                                                                                                              | 184              |
| 2022                                                                                                              | 243              |
| 2023                                                                                                              | 219              |
| 2024                                                                                                              | 118              |
| <b>TOTAL</b>                                                                                                      | <b>1,118</b>     |

\*Includes claims, potential claims, regulatory complaints, and subpoenas, regardless of coverage. As of 9/05/2024.

Of all matters reported, most were non-legal (written demands or potential claims), followed by litigation against the insured.

| 2019 – 2024 New Mexico Group Policies, Combined<br>Types of Files Reported* |           |                              |         |
|-----------------------------------------------------------------------------|-----------|------------------------------|---------|
| Nonlegal (written demand / potential claim)                                 | 487 (44%) | Regulatory Complaint & Legal | 20 (2%) |
| Legal                                                                       | 291 (26%) | Mediation**                  | 7 (1%)  |
| Regulatory Complaint                                                        | 237 (21%) | Not Available                | 3 (<1%) |
| Regulatory Complaint & Nonlegal                                             | 45 (4%)   | Subpoena & Nonlegal          | 2 (<1%) |
| Subpoena                                                                    | 26 (2%)   |                              |         |

\*Includes claims, potential claims, regulatory complaints, and subpoenas, regardless of coverage. As of 9/05/2024.  
 \*\*Reflects files that came in as mediation proceedings. Mediations may also occur in the course of litigated and non-legal files.

<sup>1</sup> As of September 5, 2024.

**Claim Details** – Looking further into the files reported, we can determine who makes claims, who they are made against, the type of properties involved, and the type of transactions that may lead to claims.

**Who's involved in real estate E&O claims?** Recent New Mexico claims are most often brought by property buyers and most often target listing brokers, which is consistent with data in other states we've recently reviewed. Anecdotally, our adjusters think many of the claims from buyers stem from buyer's remorse and target listing brokers because of the (often mistaken) impression that because listing brokers represent the sellers, they have more information than selling brokers about the property.

| 2019 – 2024 New Mexico Group Policies, Combined*                                                                                                                                                                                                                                              |           |                        |         |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|------------------------|---------|
| Claimant / Potential Claimant and Insured Roles in the Underlying Transaction in E&O Files                                                                                                                                                                                                    |           |                        |         |
| INSURED'S ROLE IN TRANSACTION                                                                                                                                                                                                                                                                 |           |                        |         |
| Listing Agent / Broker                                                                                                                                                                                                                                                                        | 464 (42%) | Leasing Agent / Broker | 6 (1%)  |
| Selling Agent / Broker                                                                                                                                                                                                                                                                        | 253 (23%) | Appraiser              | 2 (<1%) |
| Property Manager                                                                                                                                                                                                                                                                              | 169 (15%) | Consultant             | 2 (<1%) |
| Not Otherwise Classified                                                                                                                                                                                                                                                                      | 69 (6%)   | Auctioneer             | 1 (<1%) |
| Listing & Selling Broker                                                                                                                                                                                                                                                                      | 61 (5%)   | Facilitator            | 1 (<1%) |
| Not Available                                                                                                                                                                                                                                                                                 | 45 (4%)   | Mortgage Broker        | 1 (<1%) |
| Transaction Broker                                                                                                                                                                                                                                                                            | 44 (4%)   |                        |         |
| CLAIMANT'S / COMPLAINANT'S ROLE IN THE TRANSACTION                                                                                                                                                                                                                                            |           |                        |         |
| Buyer                                                                                                                                                                                                                                                                                         | 598 (53%) | Not Available          | 57 (5%) |
| Seller                                                                                                                                                                                                                                                                                        | 172 (15%) | Government             | 9 (1%)  |
| Not Otherwise Classified                                                                                                                                                                                                                                                                      | 117 (10%) | Unit Owner             | 9 (1%)  |
| Lessee                                                                                                                                                                                                                                                                                        | 97 (9%)   | Insurance              | 1 (<1%) |
| Lessor                                                                                                                                                                                                                                                                                        | 57 (5%)   | Lender                 | 1 (<1%) |
| *Includes claims, potential claims, regulatory complaints, and subpoenas, regardless of coverage. As of 9/05/2024.                                                                                                                                                                            |           |                        |         |
| **In some situations, the claimant / potential claimant may not have been directly related to the transaction, and therefore, may not fall into another classified or be unknown. Further, in potential claims and subpoenas, claimant / potential claimant information may not be available. |           |                        |         |

**What types of transactions / services lead to claims?** The sale of property led to the most claims against brokers. Property management also led to a significant number of claims.

**What type of properties are involved in real estate E&O claims?** The majority of claims involve residential property. In our adjusters' opinion, many residential buyers and sellers' lack of experience with real estate transactions may contribute to the number of residential claims.

| 2019 – 2024 New Mexico Group Policies, Combined* |           |                          |         |
|--------------------------------------------------|-----------|--------------------------|---------|
| TRANSACTION TYPE / SERVICES INVOLVED*            |           |                          |         |
| Sale                                             | 576 (52%) | Not Available            | 17 (2%) |
| Property Management                              | 137 (12%) | REO Sale                 | 3 (<1%) |
| Contract                                         | 108 (10%) | Appraisal                | 2 (<1%) |
| Listing Agreement                                | 105 (9%)  | Broker Price Opinion     | 2 (<1%) |
| Lease                                            | 50 (4%)   | Construction Contract    | 2 (<1%) |
| Other / Not Classified                           | 38 (3%)   | Development Contract     | 2 (<1%) |
| Buyer Agency                                     | 36 (3%)   | Auction                  | 1 (<1%) |
| Offer                                            | 21 (2%)   | Lease with Option to Buy | 1 (<1%) |
| Showing / Marketing Property                     | 17 (2%)   |                          |         |

| REAL ESTATE TYPE*                                                                                                                                                                                                                   |           |                            |         |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|----------------------------|---------|
| Residential                                                                                                                                                                                                                         | 844 (75%) | Multi-Family Residential   | 13 (1%) |
| Vacant Land                                                                                                                                                                                                                         | 60 (5%)   | Mobile / Manufactured Home | 11 (1%) |
| Commercial                                                                                                                                                                                                                          | 46 (4%)   | Farm / Ranch               | 7 (1%)  |
| Apartment                                                                                                                                                                                                                           | 31 (3%)   | Not Otherwise Classified   | 6 (1%)  |
| Condominium / Townhouse                                                                                                                                                                                                             | 27 (2%)   | Business                   | 4 (<1%) |
| Property Management**                                                                                                                                                                                                               | 26 (2%)   | REO Property               | 2 (<1%) |
| Not Applicable                                                                                                                                                                                                                      | 22 (2%)   | Mineral / Water Rights     | 2 (<1%) |
| Not Available                                                                                                                                                                                                                       | 16 (1%)   | Industrial                 | 1 (<1%) |
| *Includes claims, potential claims, regulatory complaints, and subpoenas, regardless of coverage. As of 9/05/2024.                                                                                                                  |           |                            |         |
| **Most claims involving property management are coded more specifically (residential, commercial, etc.) for most files. In some situations, such as subpoenas and potential claims, more specific information may not be available. |           |                            |         |

**What types of issues lead to claims?** Quite a variety, but the information below illustrates common issues. Note a single claim may involve multiple issues. Additionally, claims often include some covered allegations and damages and some uncovered allegations or damages. In that situation, the insurance carrier will defend the entire claim and reserve rights in regard to uncovered allegations and damages (provided coverage would otherwise apply under the group policy's terms, conditions, and exclusions).

| 2019 – 2024 New Mexico Group Policies, Combined*                                                                   |                                                        |
|--------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------|
| 10 Most Common Issues / Allegations                                                                                |                                                        |
| 1. Nondisclosure / Misrepresentation Roof                                                                          | 6. Nondisclosure / Misrepresentation Plumbing          |
| 2. Bodily Injury / Property Damage                                                                                 | 7. Breach of Property Management Contract              |
| 3. Breach of Duty                                                                                                  | 8. Nondisclosure / Misrepresentation Flooding or Leaks |
| 4. Nondisclosure / Misrepresentation Mold                                                                          | 9. Tenant Problem                                      |
| 5. Nondisclosure / Misrepresentation Heating Unit or A/C                                                           | 10. Nondisclosure / Misrepresentation Repairs Made     |
| *Includes claims, potential claims, regulatory complaints, and subpoenas, regardless of coverage. As of 9/05/2024. |                                                        |

**Cost of E&O Claims.** We hear from many brokers who think a claim will never be made against them. The most common reasoning is “I do everything by the book.” The information revealed by closed claims reveals the fallacy of thinking claims are only made against brokers who mishandle a transaction.

As of September 5, 2024, of the 1,118 files reported to RISC under the 2019 – 2024 group policies, 930 (83%) qualified for coverage. Only 188 (17%) did not.<sup>2</sup> The chart below shows payouts on closed files. Of the 930 covered files reported under the 2019 – 2024 group policies, 161 were open and 769 were closed (as of September 5, 2024).

| 2019 – 2024 New Mexico Group Policies, Combined* |                     |                     |                                                                      |
|--------------------------------------------------|---------------------|---------------------|----------------------------------------------------------------------|
| Closed Files (not including disclaimed)          |                     |                     |                                                                      |
| Damages Paid?                                    | Defense Costs Paid? | Number (Percentage) | Range of Total Payments per File (Damages & Defense Costs, Combined) |
| No                                               | No                  | 400 (52%)           | \$0                                                                  |
| No                                               | Yes                 | 244 (32%)           | \$2.56 - \$42,687.15                                                 |
| Yes                                              | Yes                 | 100 (13%)           | \$440.25 - \$168,841.02                                              |
| Yes                                              | No                  | 25 (3%)             | \$500 - \$62,666.67**                                                |

<sup>2</sup> Coverage issues are outside of the scope of this article. We encourage you to notify your insurance carrier immediately in writing of any claim or potential claim, regardless of whether or not you think coverage may apply. Failure to do so may jeopardize any coverage that may otherwise be available. We also encourage you to investigate other types of insurance coverage, such as general liability, employee theft, and cyber liability, which may apply to your business.

| Total Paid<br>(Damages & Defense Costs, Combined)                                               | Number<br>(Percentage) |
|-------------------------------------------------------------------------------------------------|------------------------|
| \$0                                                                                             | 400 (52%)              |
| \$1 - \$25,000                                                                                  | 303 (39%)              |
| \$25,001 - \$50,000                                                                             | 32 (4%)                |
| \$50,001 - \$75,000                                                                             | 26 (3%)                |
| \$75,001 - \$100,000                                                                            | 2 (<1%)                |
| \$100,001 - \$125,000                                                                           | 1 (<1%)                |
| \$125,001 - \$150,000                                                                           | 3 (<1%)                |
| \$150,001 - \$175,000                                                                           | 2 (<1%)                |
| *As of 9/05/2024.                                                                               |                        |
| **Regarding the claim that settled for \$62,666.67, defense costs were paid on a related claim. |                        |

In the vast majority of closed files that qualified for coverage, no damages were paid, meaning there was no settlement or judgment against the insured. RISC's experienced adjusters handle many non-litigated claims in-house, keeping program costs low.

However, many files do require local counsel to defend the insured. As you can see, in 32% of covered closed files, the insurer paid defense costs on the insured's behalf but no damages to the claimant. This is an important aspect of E&O insurance, as defense costs regularly reach tens of thousands of dollars (and up to \$42,687.15 in one file), even if the insured did nothing wrong. Without E&O insurance, these insureds would have faced the dilemma of incurring their own defense costs or going without representation.

Damages were paid to the claimant in only 16% of closed files. Honest mistakes can open brokers up to legal liability, and the group policy's damage coverage for covered claims is a benefit to insureds when that happens.

### Risk Reduction Tips

There's no way to prevent claims entirely, but the following tips may help brokers reduce the chance of a claim or increase the likelihood of a successful defense in the event a claim is made.

- **Maintain a Paper Trail** – Whatever the broker's role, it's wise to keep documentation of communications with the buyer or seller, other broker, contractors, and others. For example, if a buyer says they don't want a structural inspection due to the cost, it can be helpful for the selling broker to send a quick email confirmation, something as simple as, "In our conversation, you said you did not want to get a structural inspection because of the cost. Please let me know right away if this is not correct. Thanks!"
- **Don't Try to be an Expert in Everything** – Real estate transactions involve lots of moving parts. It's often helpful to encourage buyers and sellers (in writing) to consult with an accountant, lawyer, zoning expert, surveyor, or other professionals to assist in their due diligence, so they can focus on their expertise and the broker can focus on theirs.

3,100+ claims, potential claims, regulatory complaints and subpoenas have been reported under the New Mexico group program since 2004 when RISC and its predecessor companies have administered the program. Continental has paid \$23+ Million for damages and defense costs on behalf of New Mexico real estate brokers and firms under the group program as of August 31, 2024. While brokers don't have to do anything wrong to be involved in a claim, sound risk management techniques and good documentation can help avoid claims and reduce payments when claims are made.

*Information current as of September 5, 2024. This information is for illustrative purposes only and is not a contract. Nothing herein should be construed as legal advice or advice regarding any applicable standard of care. Rather, this information is intended to provide a general overview of certain products, services, and situations encountered in the course of our business. This information does not amend any E&O policy in any way. Only the policy can provide actual terms, coverages, amounts, conditions, and exclusions. The program referenced herein is underwritten by Continental Casualty Company, a CNA insurance company. The E&O program described herein is only available in Colorado. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2024 CNA. All rights reserved. Prepared by Rice Insurance Services Center, a division of Accretive Specialty Solutions, LLC © 2024*



## REAL ESTATE ERRORS AND OMISSIONS INSURANCE INFORMATION & CLAIM STUDIES

Rice Insurance Services Center (RISC), a division of Accretive Specialty Insurance Solutions, LLC, administers the New Mexico Real Estate Commission's real estate errors and omissions (E&O) insurance program. Continental Casualty Company (Continental), a CNA insurance company rated "A, Excellent" by A.M. Best, is the insurance carrier. RISC also administers the group real estate E&O program for all other states that currently require real estate licensees to maintain such insurance and have a group program. RISC's in-house claims adjusters have handled **27,780+ real estate E&O claims**, and the carrier has incurred **\$197.5+ Million** in defense costs and damages on behalf of licensees insured under RISC's programs. This gives RISC unique insight into issues faced by real estate brokers.\*

### TIPS & HIGHLIGHTS

**Recognizing an E&O Claim** – Some brokers incorrectly think an E&O claim only arises once a lawsuit is filed; however, that is not the case. Other communications, even emails, may arise to a claim. The current New Mexico group policy defines claim as follows:

**Claim** means:

1. a written demand for money or services received by the **Insured**; or
2. service of a lawsuit or institution of arbitration or mediation proceedings against the **Insured** seeking **Damages** and alleging a negligent act, error, or omission in the performance or failure to perform **Professional Services**. Complaints to or disputes before a real estate regulatory board or commission are not **Claims**. Criminal proceedings are not covered under this Policy regardless of the allegations made against any **Insured**.

**Immediately Report All Claims to Your Provider in Writing** – E&O claims are often made even when the broker did everything by the book. Other claims result from honest mistakes. It can be frustrating that anyone can make a frivolous claim, but it's critical to immediately notify your E&O provider in writing of any claim you or your firm receives, regardless of whether you believe the claim has merit. Failure to do so may jeopardize any coverage that may otherwise have been available.

**Allegations v. Facts** – Under the current group policy, a claim must allege a negligent act, error, or omission in the insured licensee's performance or failure to perform professional services, regardless of whether or not the allegations are true. When defending an E&O claim, being able to show you complied with your duties can be as important as complying with them in the first place. Proactive brokers consider how their business practices can support their defense in the event a claim is made.

**Stay in Your Lane** – RISC's adjusters have found brokers to be well-intentioned professionals. Occasionally, a broker's desire to assist a buyer or seller through a real estate transaction leads them to stretch their services outside their expertise. We've seen brokers who have had experience with a particular issue in one transaction assume it is always handled the same way when an expert in the area would appreciate nuances. For example, due diligence contract language drafted by a buyer's attorney for a specific commercial transaction will not necessarily address the buyer's concerns in a different commercial transaction. Or finding it is relatively inexpensive to connect to electricity for one vacant lot does not mean that will be the case for others, even in the same subdivision or on the same street.

**Be Familiar with Your State's Broker Duties\*\*** – Nearly every real estate E&O claim alleges breach of broker duties, which in New Mexico include the duties of honesty, reasonable care, and ethical and professional conduct. Even the most experienced brokers can benefit from occasionally reviewing the broker duties and considering whether they have standard practices in place to assist with compliance, consistency, and documentation.

- **Duty of Honesty** – Breach of the duty of honesty is often asserted in tandem with failure to disclose and misrepresentation. These claims often involve issues that the sellers are adamant have been resolved. A few brief examples of issues that have led to allegations of breach of the duty of honesty:
  - Failure to disclose previous roof leaks and drainage issues (especially in New Mexico, where these issues may be dormant for months and then arise after a heavy rain).
  - Misrepresenting accessibility to well / water rights.
  - Misrepresenting sewer / septic access. Be wary of assuming a property is on sewer because nearby homes are. RISC has seen several claim involving homes on septic surrounded by homes on sewer.
- **Duty of Reasonable Care** – Breach of the duty of reasonable care is one of the most common allegations RISC sees and can arise from numerous issues, which may not be apparent until after closing. A few brief examples of issues that have led to allegations of breach of the duty of reasonable care:
  - Failure to ensure repairs were fully completed prior to closing.
  - Recommended listing price was allegedly lower than market value.
  - Failure to advise of legal options when other party did not meet contingency deadlines.
  - Recommending a contractor who did not have a current license.

Duty of Ethical and Professional Conduct – Breach of the duty of ethical and professional conduct is often alleged in E&O claims and regulatory complaints against brokers. If you receive a regulatory complaint, immediately notify your E&O provider in writing, because there may be limited coverage to retain an attorney to represent you. Be sure to review any conditions that must be met for regulatory complaint coverage to apply, including any time limits to report the regulatory complaint to your E&O provider. A few examples of issues that have led to allegations of breach of the duty of ethical and professional conduct:

- o Selling broker allowed potential buyers to enter home unaccompanied by the broker.
- o Failure to attend meeting with out-of-state buyer with no contact for several days due to family emergency.
- o Potential buyer alleged broker “must have” disclosed confidential information when seller did not accept his offer.
- o An emerging issue is the use of AI (artificial intelligence) assistants by real estate and other professionals. We do not yet have data on this issue but expect to see it trending in the future.

#### CLAIM STUDIES

The following are examples of actual claims made against real estate brokers insured under RISC’s programs. The names and identifying details have been changed to protect the privacy of the individuals. Like most claims reported to RISC, these involved alleged breach of the duties of honesty, reasonable care, and/or ethical and professional conduct. Of course, an allegation does not necessarily mean the broker did anything wrong, the duty’s scope is as broad as alleged, or the broker even had knowledge of the issue complained of.

### Claim Study Eye Spy 1

Broker Betty was very excited when her childhood best friend asked her to list her mom's house for sale after her dad passed away. Betty has always thought it was a beautiful home when she and her friend got together to play when they were little.

Betty enjoyed reminiscing about the old days with the seller at the listing appointment when the seller informed her that the house had experienced some minor settling shortly after it was built. When Betty asked for more information concerning the settlement, the seller explained that she and her husband had installed a retaining wall and that no further shifting had occurred in over 10 years. Betty explained the seller would need to disclose this on the Adverse Material Facts Disclosure Statement.

Shortly after closing the buyers allegedly discovered ongoing settlement issues and complained that the retaining wall was not strong enough. The buyers sued Betty and the seller, alleging that the statement was incomplete and that the ongoing settling issues should have been disclosed.

During the litigation, the buyers and the brokers learned that the seller and her deceased husband had previously sued the developer over similar issues, settled that lawsuit for a significant amount, and spent only a fraction of the settlement amount to install the retaining wall. This could leave the impression that the retaining wall was insufficient to address the problem.

At the trial, the seller testified that she had given Betty a copy of the prior lawsuit and told her the extent of the previous problems but that Betty had told her they did not need to be disclosed since there hadn't been any more signs of trouble in over ten years.

Betty insisted that was not true. She testified that the seller had told her that minor settlement issues common with new construction had been completely remediated with the retaining wall. Betty acknowledged that the seller gave her the contact information for the company that installed the retaining wall, which she shared with the buyer's broker.

The buyers also pointed to Betty's longtime friendship with the seller's daughter and many childhood visits to the home, suggesting she had more knowledge about the property than a typical listing broker.

The buyers had estimates of over \$200,000 to replace the retaining wall with a longer, higher wall, install a new drainage system, and add fill dirt. Betty and the seller had contractors who said such work was unnecessary, and the current retaining wall remained sufficient.

## Claim Study 2

**Facts** – Silas Selling represented first time homebuyers who fell in love with a home near their child's school. Prior to closing, the buyers signed the seller disclosure form, which checked the boxes for Kitec, copper, and PEX in response to type of plumbing. The buyer's inspection noted the main line plumbing was not visible and noted various types of plumbing (other than Kitec) in some areas. The inspection report contained a warning that polybutylene and Kitec plumbing systems have experienced problems and may be used along with copper but not visible in a typical inspection. Prior to closing, Silas provided the buyers with a Kitec Aluminum Piping/Polybutylene Resin Piping Information Sheet containing information and warnings about potential problems with Kitec, which the buyers signed and dated. The buyers did not ask any questions about Kitec or request any repairs or remediation relating to Kitec before closing.

After closing, the buyers discovered Kitec in the property during a bathroom remodel. They sued the sellers, Silas (the selling broker), and the listing broker, alleging nondisclosure of Kitec plumbing, failure to disclose potential problems with Kitec, and failure to disclose a previous national class action lawsuit involving Kitec (but not this property). The buyers sought the amount it would allegedly cost to replumb the entire home. Silas and the buyers' broker happened to have the same E&O insurer, which they notified immediately in writing of the claim.

**Result** – The E&O insurer retained separate defense counsel for Silas and the listing broker. Defense counsel representing Silas filed a motion for summary judgment, arguing that the buyers could not their claim in light of the seller disclosure form, inspection report, and Kitec Aluminum Piping/Polybutylene Resin Piping Information Sheet. The buyers attempted to distinguish alleged failure to disclose Kitec and failure to disclose the extent of problems that could be created by Kitec, along with a prior national class action lawsuit. The court found there was no material issue of fact relating the buyers' case against Silas and dismissed him from the suit. Once the case against Silas was dismissed, the buyers voluntarily dismissed their claim against the listing broker.

The E&O carrier paid more than \$70,000, combined, in defense costs on behalf of Silas and the listing broker. In light of the dismissals, no damages were paid to the buyers.

**Takeaways** – In RISC's claims-handling experience, few E&O cases against New Mexico brokers are dismissed voluntarily or on summary judgment. The unusual resolution in this case illustrates how strong written evidence can support the broker's defense.

## CONCLUSION

Even the most diligent and experienced brokers may be faced with a claim. Even if you think a claim is meritless or is likely to go away, you should always immediately report any potential claim or claim to your E&O provider in writing, because failure to do so might jeopardize any other coverage that may have been available. If you are insured under the policy administered by RISC, report any claims by email at [claims@risceo.com](mailto:claims@risceo.com), fax at (502) 896-6343, or mail at RISC, Claims Department, 4211 Norbourne Blvd., Louisville, KY 40207-4048.

\* Information current as of April 30, 2024.

\*\* Of course, even if breach of duty is alleged, that does not necessarily mean the broker breached a duty or even had knowledge or the duty to disclose the specific issue complained of.

*This information is for illustrative purposes only and is not a contract. Nothing herein should be construed as legal advice or advice regarding any applicable standard of care. Rather, this information is intended to provide a general overview of certain products, services, and situations encountered in the course of our business. This information does not amend any E&O policy in any way. Only the applicable policy can provide the actual terms, coverages, amounts, conditions, and exclusions, which may be subject to change without notice. In the event of a claim, the nature and extent of coverage is determined based upon the claim's facts, circumstances, and allegations and application of the relevant policy's terms, conditions, and exclusions. The E&O program described herein is only available in certain states. The program referenced herein is underwritten by Continental Casualty Company, a CNA insurance company. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2024 CNA. All rights reserved. Prepared by Rice Insurance Services Center, a division of Accretive Specialty Insurance Solutions, LLC © 2024*



## NEW MEXICO ASSOCIATION OF REALTORS® — 2023 INFORMATION SHEET - POLYBUTYLENE, KITEC AND ENTRAN II

*This form is NOT a disclosure and does NOT provide property-specific information. The general information contained herein is not an exhaustive analysis of the subject matter. Brokers are not experts in the subject matter. If you have additional questions or concerns, you are encouraged to conduct further research and to contact a subject-matter expert.*

### POLYBUTYLENE PIPING/PLUMBING

Polybutylene is a form of plastic resin that was used extensively in the manufacture of water supply piping from 1978 until 1995 as a substitute for traditional copper piping. It is most commonly found in the "Sun Belt" where residential construction was heavy through the 1980's and early-to-mid 1990's. The piping systems were used for underground water mains and as interior water distribution piping. Industry experts believe it was installed in as many as ten (10) million homes.

#### Problems Associated with Polybutylene Piping/Plumbing

It is believed that oxidants in the public water supplies, such as chlorine, react with the polybutylene piping and acetal fittings causing them to scale and flake and become brittle. Micro-fractures result, and the basic structural integrity of the system is reduced. Thus, the system becomes weak and may fail without warning causing damage to the building structure and personal property. It is believed that other factors may also contribute to the failure of polybutylene systems, such as improper installation.



**PLEASE VISIT THE FOLLOWING WEBSITE FOR MORE INFORMATION ON  
POLYBUTYLENE PLUMBING.**

<https://www.nachi.org/pb.htm>

### KITEC PIPING/PLUMBING

Kitec plumbing was sold between 1995 and 2007 and used as plumbing for drinking water systems, radiant heating systems, and hot water baseboard heaters. Kitec is made of polyethylene with a thin layer of aluminum and can usually be identified by its bright orange (hot water) and bright blue (cold water), which were the most common colors; however, it was also sold in red, blue, gray and black.



Normally, metal piping is used as an electrical ground. Kitec cannot be used as a ground. Consequently, Kitec plumbing may be identified by a yellow sticker on the inside of the electrical panel door that says "Caution: This building has non-metallic interior water piping."

#### Problems Associated with KITEC Piping/Plumbing

The most common plumbing issues are associated with the fact that Kitec does not perform well under high pressure and/or under high temperature. Under high pressure and high temperature, it starts to deteriorate fast, leading to pipe breaking and bursting. In addition, its brass fittings tend to corrode when exposed to moisture and oxygen. This problem also leads to leaks, as the zinc oxidation in the pipes causes limited water flow. Due to the problems with its tendency to corrode, Kitec plumbing is no longer being manufactured and was recalled in 2005.

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## NEW MEXICO ASSOCIATION OF REALTORS® — 2023 INFORMATION SHEET - POLYBUTYLENE, KITEC AND ENTRAN II

### ENTRAN II PLUMBING

Entran II, a type of rubber hose used in radiant heating and snowmelt systems that was manufactured from 1989-1994 by Goodyear Tire and Rubber Company. Radiant heat, also called radiant hydronic heat, is used to heat residential and commercial buildings in many parts of the United States and Canada. Hot water is carried throughout the structure using pipes, tubes or baseboard heaters. Approximately 25 million feet of Entran II was sold, distributed and installed as part of radiant heat systems in nearly every state and province in the US and Canada.

### Problems Associated with Entran II

Scientists and juries have concluded that Entran II is defective. The hose can harden, leak and fail in some cases after just a few years of use. Tubing failure may fail causing personal property damage and leaving the property without heat.



**PLEASE VISIT THE FOLLOWING WEBSITE FOR MORE INFORMATION  
ON ENTRAN II PLUMBING.**

[http://npiweb.com/Portals/0/GPI\\_Reference\\_Disk/Technical  
Bulletins/HVAC/Entran II Oct. 2006.pdf](http://npiweb.com/Portals/0/GPI_Reference_Disk/Technical_Bulletins/HVAC/Entran II Oct. 2006.pdf)

 **DISCLAIMER:** This Information Sheet does not address all possible piping/plumbing problems that they may exist in the building and the absence of any of the above type piping/plumbing does not guarantee the adequacy of or the present or future functionality of the piping/plumbing in the building. Buyers and Sellers should consult with a licensed contractor and/or plumber to learn more about the building's piping/plumbing and any problems that may exist therewith.

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 **TRANSACTIONS**  
TransactionDesk Edition



## CLAIMPREVENT® BLOG

# Real Estate E&O Tail Coverage – Everything You Need to Know

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Tail E&O Coverage for real estate professionals ensures you're covered for past transactions, even after your E&O insurance coverage has lapsed. It's especially useful if you're retiring or moving into a role that provides you with insurance coverage, meaning you no longer need your individual E&O policy.

Here's what you need to know about Tail Coverage . . .

## What is Real Estate E&O Tail Coverage?

Optional tail coverage is also known as "Extended Reporting Period." It extends your E&O insurance after your policy has lapsed, to cover any claims that arise from transactions you were involved in while you were insured.

Example:

A real estate professional with 10 years of experience decides to make a major career change. She stops her real estate E&O insurance because she's getting out of the industry and plans to retrain in a different area. But, six months into her new career, previous buyers lodge a claim against her for misrepresentation. The former clients allege she failed to disclose defects in a property they purchased. The defects have only just been discovered during renovations. Without Tail Coverage, the real estate agent must defend the claim independently (and be responsible for legal fees and any judgment) without the backing of her insurer. This is because the claim was filed *after* her E&O Insurance lapsed.

With Tail Coverage, the former real estate agent is in a much better position. If the agent had an individual real estate E&O policy in her name, and she had talked to her E&O insurer within 30 days of her renewal date, she could have purchased Tail coverage. With Tail coverage, she would have been covered by her previous insurer who will help her to defend the lawsuit. This means less out-of-pocket costs and less stress.

## When is Tail Coverage Needed?

Tail coverage is useful in times of transition and any circumstances where the lapse of a real estate professional's E&O insurance policy is planned. This includes:

### **Change of career**

As in the above example, Tail Coverage is useful if you plan to move out of the real estate industry and no longer require your E&O Insurance to be maintained.

### **Retirement**

Real estate professionals who are planning retirement should consider Tail Coverage to ensure they're covered after they let their license lapse. This protects retirees from costly lawsuits that can greatly affect their retirement plans.

### **Planned career breaks**

Tail Coverage is useful if you're planning extended periods away from work — maybe you're planning to travel for a year or spend a few years at home raising your children. It can cover the transactions you were involved in when you were

insured. And with Tail E&O, you can save paying for individual E&O coverage that you don't need because you're not actively working.

## Things to Consider

**You won't need Tail Coverage if you're simply changing E&O insurance companies without a gap in insurance coverage.** Check the fine print in your insurance documents, but almost all E&O insurance policies, including CRES, cover transactions as far back as the previous policy covered.

**Your Tail Coverage will only cover transactions that were completed before the start of the Tail Coverage.** Any transactions after the Tail Coverage effective date will not be covered.

## CRES Tail Coverage

CRES offers Tail Coverage to our E&O Insurance clients. If you're planning a career change, retirement, or other planned absence from real estate, you can choose to extend your coverage with up to four years of Tail Coverage.

CRES Tail Coverage gives you peace of mind, so you won't have to face costly lawsuits alone in times of transition. You'll be covered for all transactions completed while you were insured, even after your E&O insurance policy has lapsed.

Having the right insurance coverage is so important for real estate professionals — even if you're moving away from the industry. It's a way to minimize your liability and to protect yourself financially in case a claim occurs.

See our [Ultimate Guide to Understanding Real Estate Errors and Omissions Insurance](#)

**CRES can help find you the best insurance options for the best price**, because we have access to more product options and carriers than just about anyone else (we're part of Arthur J Gallagher, one of the largest insurance brokers in the world). From [real estate E&O for individuals and firms](#), to [Business Owner's Policies](#), [Cyber](#)