

Insurance Agent and Broker Errors and Omissions (E&O)

SCOPE OF COVERAGE PROVIDED

Insurance agent and broker E&O policies cover actual or alleged acts, errors, misstatements, misleading statements, omissions, neglect, or breach of duty committed by an agent or broker while providing insurance services for pay. The insuring language generally provides limited coverage for breaches of privacy and breaches of network security in the provision of insurance services. Some policies also provide coverage for government claims and the costs of responding to a subpoena.

SUMMARY OF ANTICIPATED CLAIMS

In general, COVID-19-related claims are likely to arise under many of the same E&O policy provisions that are commonly at issue in other claims. The economic climate occasioned by the societal response to coronavirus increases the likelihood of several scenarios that lead to E&O claims.

In particular, we anticipate an uptick in claims against agents and brokers for:

- Failing to procure sufficient business interruption* or business income coverage
- Failure to provide timely notice of claim under policies where agents/brokers assumed wrongly that there would be no coverage

**For more on this issue, see our tip sheet on Business Interruption coverage.*

Agents and brokers should be especially cognizant of the following concerns:

- Agents and brokers may guarantee coverage for a coronavirus-related claim where no coverage exists under their client's policy, resulting in a claim against the agent's E&O policy.
 - Some agents may unwittingly, in effect, substitute their E&O coverage for the client's business interruption or CGL coverage in an attempt to preserve the client relationship.
- Agents and brokers may tell clients their policies do not cover a COVID-19-related claim, when in reality the clients' policies may or would provide coverage.
 - The agents' actions in attempting to interpret coverage unilaterally may lead to loss of coverage due to late reporting, which in turn leads to the clients making E&O claims against the agents. Alternatively, the clients' insurers may provide coverage despite receiving late notice, then make E&O claims against the agents under contractual indemnification provisions in the agency agreement.

- Agents and brokers may file claims on behalf of clients for COVID-19-related losses that do not qualify for coverage or are excluded under their clients' policies, without having their clients review the loss forms (such as Acord®) prior to submission.
 - Faced with a coverage denial, the clients may then present a different account of the loss, blaming the agent for misreporting the cause of loss, leading to an E&O claim against the agents from either the clients or the clients' insurers.
- Agents may heed a client's request to "wait and see" what happens with coronavirus-related losses where coverage is questionable, hoping for a resolution between the parties to the losses or for further facts to develop that place the losses within coverage.
 - The delay may lead to loss of coverage due to late notice, resulting in an E&O claim.
 - Additionally, certain policies may require that suit against an insurer be commenced within a specified time period. In such cases, as well, delay may lead to loss of the right to challenge a coverage denial.
- Agents and brokers may engage in "self-help," writing advocacy letters to clients' insurers for coverage of COVID-19-related losses or attempting to reform clients' coverage in an effort to preserve or enhance client relationships.
 - These efforts have often been unsuccessful in the past, and we expect that the types of arguments agents and brokers often use to advocate on behalf of their clients are even less likely to be unsuccessful in the current economic climate.
 - Moreover, when they are unsuccessful, such efforts may be used as evidence in later E&O claims against the agents and brokers by either clients or clients' insurers.
- Additionally, for E&O policies that include coverage for network security breaches, there may be a rise in related claims due to the increased prevalence of "work from home" arrangements, including for insurance agents and brokers and staff across the country.

As sure as night follows day, the aftermath of disasters leads to an increase in agent/broker E&O claims. The simple fact is that the vast majority of insureds don't insure for utter disaster, and it is unlikely much of the insurance-buying public purchased insurance with a global pandemic in mind. So it is a virtual certainty that there will be significant portions of the insurance-buying public who are underinsured for the types of losses they are now sustaining. Understanding this, it is important to be conscious of the types of behaviors to avoid that could increase and potentially exacerbate E&O exposures.

For more information on these issues, we invite you to review the following articles from Goldberg Segalla's *Professional Liability Magazine*:

"A Word to the Wise for Insurance Agents and Brokers Who Are Asked to Hold Off on Reporting Claims: There's Danger in Delay" (on the danger of delay in reporting claims)

"Exhibit A' Against Themselves" (on the danger of writing to insurers to cover disputed claims)

POTENTIAL COVERAGE ISSUES

- Where the agent or broker has made admissions related to coverage under the client's policies, such admissions may vitiate coverage under the agent's or broker's E&O policies.
- Where agencies or brokerages provide insurance services using multiple entities, services provided by one entity may not be covered under another entity's policy.
- Some claims-made policies provide for submission of a Notice of Circumstance in order to extend reporting deadlines, but they may require that the Notice be followed by a formal report of the claim within a certain time period.
- Many policies include exclusions relating to commingling, inability or failure to collect, safeguard, or return, or intentional failure to pay money. As economic stress on clients' business increases, agents and brokers may more frequently engage in such practices, which may fall within the exclusions.
- Agencies or brokerages may undergo changes in control or acquisitions as a result of stressful economic conditions. Coverage under their E&O policies may be limited following such changes or acquisitions.

CLAIMS-HANDLING TIPS

E&O insurers should communicate with their insureds to advise them of practices and procedures they should implement to avoid E&O claims and ensure coverage for such claims when they arise. Such communications should include the following:

- Larger agencies/brokerages should adequately staff their claim input processes to record descriptions of claims accurately.
- Review claim reporting forms with clients before submitting them to the clients' insurers.
- Claims submitted by agencies and brokerages—both claims submitted on behalf of clients as well as E&O claims on their own behalf—should be reported promptly. Clear, consistent communication will prevent a large number of potential disputes.
- Do not make claims decisions. Leave those decisions to the insurance carriers.
- Do not advise clients as to whether coronavirus-related claims are covered. Such advice should be left to the insurance carriers.
- Do not engage in "self help" or advocacy for coverage on behalf of clients, which is likely to create evidence against agents and brokers in E&O claims. Instead, promptly report such matters to E&O carriers, who can retain E&O attorneys to engage in such efforts on behalf of agents' and brokers' clients as appropriate.
- Report claims to all carriers/all layers that may potentially provide coverage. When in doubt, notify every insurer that could conceivably provide coverage for a coronavirus-related loss or claim.
- Avoid giving written or recorded statements without first contacting the E&O carrier. This applies equally to statements given to clients and statements given to property and casualty insurers or their attorneys.
- Document in writing each communication on a COVID-19-related claim, regardless of whether the communication is with a client, a client's insurer, or an E&O carrier.

FOR MORE INFORMATION OR TO LEARN HOW OUR TEAMS CAN WORK TOGETHER, CONTACT:

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