
ERRORS & OMISSIONS

RISK MANAGEMENT ALERT

Risk Management Considerations During COVID-19 Pandemic

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As has been addressed in past articles regarding the COVID-19 pandemic, the task of making coverage determinations must be left to the carrier, as it is the carrier's responsibility to determine whether the facts of a given claim trigger coverage under the policy it issued. Put another way, the insurance policy is a contract between the insurance carrier and the policyholder; the agent is not a party to the contract and does not have a duty to interpret coverage under the contract.

If you have been reading the trade journals and national news periodicals, you would note that there has been much reporting on carrier denials of COVID-19-related claims, specifically centering around business interruption claims. Litigation has also started in several states regarding the economic impact to businesses, alleging that Business Income coverage should respond to claims arising out of government shutdown.

From this, it appears that there is a new trend forming where agency customers will call their agent requesting that the agent speak with the agency customer's legal counsel to discuss various coverages. While it may be a natural instinct to want to assist your customer and show your customer's legal counsel your knowledge on the topic of insurance products and how they respond, *you should avoid this at all costs*. At best, you will be providing a road map for your customer's legal counsel to attack the carrier that you have a contracted with to sell insurance; at worst, you will be helping the customer's legal counsel build a case against your agency. It is a no-win proposition.

If your customer contacts your agency requesting an agent or producer speak with the agency customer's legal counsel to discuss insurance coverage, you should kindly decline and refer them to the carrier in question, since, as indicated above, it is the carrier who makes the determination on how they will interpret the insurance contract in relation to the customer's claim.

Further, if you receive inquiries from your customers regarding general questions on how coverages work, it is acceptable to respond in general terms. However, you should always encourage your customer to tender a claim, if they feel they have one, and allow the carrier to determine whether there is, or is not, coverage. Do not answer hypothetical questions about coverage, because there are many variables that could alter a coverage determination. Always document these communications to avoid "he said, she said" scenarios where the message you provided is misinterpreted. Documenting back the question along with your response will provide a record of that communication, should one be required at a later date.

Some other issues to consider as your clients' exposures change, states begin to reopen, and workforces return to the workplace include:

- **Watch for backlogs at the individual staff level.** Make sure your agency is properly staffed to handle an increase in claim activity or shift in agency workflow.

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- **“Lay-up” vehicles need to be reinstated when put back on the road.** If you had customers take vehicles off of a policy due to the stay-at-home order in their state, follow up with those customers to remind them that the vehicles need to be put back on the policy before those customers start driving them again.
- **Check on carrier timelines for reversion of extended coverages.** For carriers that offered extensions of coverage for changes in customers’ usage, such as personal vehicles used for food delivery, determine when those extensions are set to expire and advise your customers accordingly.
- **Check all policies on renewal (Mirror Test).** Watch for removal of business income coverage, additional exclusions, such as a Viral Pandemic Exclusion, or limitations to coverage that were not on the expiring policy. Be sure to document to your customer, either through a coverage checklist or a coverage letter/email, policies that contain virus, bacteria, communicable disease, and/or civil authority shutdown exclusions or other restrictive language.
- **Pay close attention to the terms and conditions in Excess & Surplus Lines placements.** E&S carriers are not subject to the same notice requirements as admitted carriers, and can make changes the day before a renewal; reach out to your E&S brokers early to start the renewal process and review those proposals carefully.
- **Have a list of agency-billed customers who are in a “cancellation hold.”** Be on top of who owes premium and provide timely non-payment cancellation requests to your carriers.
- **Workers Compensation – “Other states” coverage:** With many companies having staff working remotely, it is advisable to send a notice to your commercial account customers suggesting that they verify the states that their employees are working from, and confirm that they are listed properly on the WC policy declaration page or not excluded on the declaration page. If a change in coverage is required on their policy, your customer should advise you as soon as possible. Additionally, we have noted a trend in E&O claims arising out of the categorizing of employees on the workers compensation application, particularly *3c. Other States*. This is applicable to contractors who travel to out-of-state job sites, sales representatives in multiple states, and employees working remotely during COVID-19 shutdowns, among others. Do not overlook this exposure.

As always, ensure that you are documenting all communications from customers and use your agency management system to track progress on all new policies, binds, renewals, change requests, etc. If you are approached by legal counsel who wants to have a discussion or make a recorded statement, kindly decline, direct them to the carrier in question, and notify your E&O carrier. Accurately and in a timely manner report all claims to carriers that are submitted by your customers, especially claims-made basis and claims-made and reported coverages. Stay on top of guidance from your state’s insurance commissioner, as well as the state governor, and state and local health departments. By staying informed, communicating with customers and carriers, documenting all communications and transactions, avoiding making comments about the coverage of claims and maintaining adequate staffing levels, you should be well positioned to manage most, if not all, of the challenges presented by this pandemic.

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