ERRORS & OMISSIONS

RISK MANAGEMENT ALERT

Clearing up Six Misconceptions About E&O Coverage

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If you have never had an errors and omissions (E&O) claim – and hopefully you never will – you might have some misconceptions about E&O coverage and E&O claims. We'd like to clear up six that we come across frequently:

Misconception #1: My E&O policy is another resource I have available to offer my clients in the event they have an uncovered loss.

Reality: Your E&O policy is a "liability" policy. If you have an incident or a legal action against you that could be a claim, you need to report it to your E&O carrier. After inquiry/investigation of the facts, your E&O carrier may determine that you were not liable, and deny the claim. In fact, you need to keep in mind that some claims against agents may generate defense payments – remember, your E&O policy is there to indemnify your agency, not the third party. But most claims are closed without a loss payment. Why? Well, in some cases the underlying carrier may have wrongfully denied coverage. In addition, consumers play a bigger role than you may think in making sure they have adequate protection for themselves.

Other reasons include good documentation on your part as well as a number of defenses that support the agents' role in the insurance transaction. (Did I mention good documentation?!) Bottom line is that if you have a claim or incident that could become a claim, you need to report it to, and work with, your E&O carrier so they can investigate and determine liability. Don't assume that your agency is liable for every uncovered loss a client may have.

Misconception # 2: If my client has an uncovered loss, I can pay for it and then turn it into my E&O carrier for reimbursement.

Reality: Most E&O policies spell out your duties in the event of a claim. This includes reporting it as soon as possible, cooperating in the defense, and not assuming any obligation, making a voluntary payment or incurring any expense – except at your own cost. If you admit liability or make any voluntary payments, you may prejudice the E&O carrier's ability to provide an adequate defense. Don't put your agency or your E&O coverage at risk. You want your E&O carrier on your side, so work with them from the start.

Misconception# 3: If the extent of client damages that are uncovered are within my E&O deductible, I can just settle it on my own and not involve the E&O carrier.

Reality: Sadly, this happens all too often. But as the adage goes, "he who represents himself has a fool for a client." This would be the case even if the claim is not in suit. One can't deny that some situations are just flat out errors and omissions, and that the facts suggest there are just no defenses. Still, you want to bring your E&O carrier in from the start. They have the experience to assist you in what to say and not say, making sure the claim is not over paid and getting proper releases of further liability. You may innocently pay for uncovered damage to a motor vehicle only to find out later that a passenger was hurt and is making a claim for bodily injury for hundreds of thousands of dollars. By then you may have prejudiced the E&O carrier and their ability to defend, violated the conditions of your policy and put your agency at great risk. Some courts have thrown out an agent's attempts to self-settle when subsequent facts give rise to greater liability issues. What's more, the way in which you self-negotiate a claim can expose the agency to business law/good faith law violations.

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Misconception# 4: If I bring my E&O carrier into a matter that is within my deductible or in which I am not liable or believe will just go away, they will non-renew me or increase my premium.

Reality: Consider the consequences if you don't involve your E&O carrier in a matter. In the big picture, each factual circumstance has to be evaluated on its own merit. Every E&O carrier has their own way of dealing with claim activity and frequency. Just because you "heard" this or that happened to another agent because they reported a claim or incident doesn't mean the same will happen to you. You need to feel comfortable working with your E&O carrier, so consider your relationship with them. Having an E&O policy should be more than just the ability to prove to your markets you have E&O coverage so you can do business with them or, as need be, to turn in a worst-case claim. Your E&O carrier should be viewed as a resource. Your relationship and ability to communicate with the persons who make the decisions about your claim, your policy and your premium should be a big part of what you are paying for when you buy E&O.

Misconception# 5: I can hire and work through my own attorney to handle an E&O claim without bringing my E&O carrier in to it.

Reality: It would be a shame to pay for an E&O policy and not use it when you need it. Hopefully, by now this article has convinced you to involve your E&O carrier from the start. If not, and you hire your own attorney without involving the E&O carrier, you do so at your own risk. If your E&O carrier is worth their salt, they have experienced people handing your claim, so there is a good chance they and their attorneys have seen it all, and know the defenses that are available to agents that you and your own counsel may not be aware of. Make sure you know where to report a claim if you have one. Know and feel comfortable with the expertise of the E&O carrier in handling claims – that's what you're paying for.

Misconception# 6: The uncovered client's claim is with an insurance company with whom the agency has a contract and this contract includes defense and indemnification language. I can report it to them and they will defend and protect the agency.

Reality: You lose nothing by notifying your E&O carrier first and you have everything to gain. After your contracted carrier has done their investigation into the facts and finds out that your agency made an error, or violated your binding authority, their first comment to you may likely be "If you haven't notified your E&O carrier as of yet you need to do so." Reporting an incident or claim to your E&O carrier after another party (especially one who may be an adverse party) has had a head start on the investigation is a dangerous game. You may not realize it, but at that point you may already have stacked the cards against yourself and significantly impeded your E&O carrier's ability to foster a defense for your agency. Again, notify your E&O carrier first. If appropriate, the E&O carrier can work with other parties, including your contracted insurance companies, to consider the best course of action.

Works as Partners

Here's another important reason to call your E&O carrier first: Some E&O policies have a reporting feature that provides for the reporting of detailed facts regarding an incident or circumstance, but does not constitute an actual or immediate claim. The E&O carrier will still consider the date you originally advised them of these same facts or circumstances to be the date the claim was made, should an actual claim develop. If you have a claims-made policy, this would be important should anything happen to your E&O policy in the meantime, such as a lapse or gap in coverage.

It is always the right choice to report a claim, or potential claim, to your E&O carrier. If someone has suffered a loss that is not covered, you cannot count on them to seek redress from another party. When big money is at stake, your long-standing client relationships can deteriorate quickly. The safer course is to report the matter to your E&O carrier where you can work as partners in bringing about proper resolution.

[1]Utica National Insurance Group and Utica National are trade names for Utica Mutual Insurance Company, its affiliates and subsidiaries. Home Office: New Hartford, NY 13413.

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