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THE E&O CORNER

Why do E&O Claims Occur Against Insurance Agents, Brokers?

Insurance agents and brokers often ask us this simple question: Why do errors and omissions claims occur against them? Simply stated, one of the reasons why E&O claims against insurance agents and brokers frequently occur is because an insurer (or insurers) takes the position after a loss that its policyholder is not entitled to coverage and/or is entitled to less coverage than the policyholder (and/or its attorney and/or its public adjuster) concludes that it is entitled to under the insurance policy(ies) in question. Whether such denial of coverage is or is not based upon a good faith effort on the part of the insurance company, the reality is that denials of coverage frequently trigger claims not only against the insurer but also against the policyholder's agent or broker. In this situation, customers often put the blame on their insurance agent or broker for the fact that their claim is not being paid as they expected it would.

In a perfect world, if all claims were paid in full all of the time, there would be no E&O claims against insurance agents and brokers. There would, of course, soon be no insurance companies left in business if all claims were paid in full all of the time. As opposed to this unrealistic scenario for responding to claims, the highest expectation that we can have is that insurance company claims personnel will have the capacity and the ability to understand the meaning of the terms, conditions and exclusions of their policies and that they will timely investigate and promptly pay legitimate claims that are covered under the policy. In the event that this lofty ideal is not realized in all cases, you may rest assured that the partners and associates of Keidel, Weldon & Cunningham, as their primary *modus operandi* in the defense of E&O litigation, will, when appropriate, continue to educate your insurance company partners with respect to their duties and obligations under the policies written by your agencies and brokerages. Often we win E&O lawsuits by compelling insurers to provide coverage that their policies should have provided to their customers. When this is accomplished, the E&O claim against the agency or broker is then resolved.

As observers of the E&O landscape for many years, my partners and I have also isolated several other broad factors, developments and trends that often influence the frequency of E&O claims against insurance agents and brokers. A prolonged hard market period frequently creates in its wake a disproportionate number of E&O claims against insurance agents and brokers. The unavailability of coverages and/or procurement of less coverage than an insured would have desired, often encourages, after a loss, a form of 20/20 hindsight-induced amnesia on the part of an insured. After a loss, the insured is often able to remember only that it requested their agent or broker obtain for them before the loss "full coverage, comprehensive coverage or all the coverage money will buy."

An increased frequency of E&O claims against insurers often correlates with financially difficult periods for insurance companies. Whether by reason of a conscious or subconscious desire to hold on to as much money as possible for as long as possible and/or the loss of some of its most competent claims people, hard times for insurers often make for hard times for insurance agents and brokers. For these reasons, we at KWC have seen the potential consequences that can arise when an insurer is reputedly flirting with receivership or insolvency. History has taught us that claims administration on behalf of insolvent or near-insolvent insurers often results in too many legitimate claims not being paid, thereby unnecessarily exposing agents and brokers to E&O-related litigation.

Catastrophic or traumatic events that cause extraordinary and nonrecurring losses can also potentially impact the frequency of E&O claims in a dramatic way. For example, after Superstorm Sandy, a large number of E&O claims were made against New York insurance agents and brokers for claims customers sustained that were not covered by their insurance policies. While, it would seem, on the basis of well-settled law, that the overwhelming majority of damage claims related to hurricane Sandy were properly excluded under the terms of standard insurance policies, insureds still wanted to blame someone for their uncovered loss. Accordingly, the E&O claims were made by the insureds with the uncovered claims against their insurance agents and brokers.

Finally, one of the simplest reasons why E&O claims occur is because insurance agents and brokers occasionally commit negligent acts, errors and omissions. In recognition of this fact, an absolute necessity for the prudent insurance agency or brokerage is to make certain that they have a professional liability insurance policy issued by a financially responsible insurer with dedicated underwriting and claims dimension in the specialty of agent and broker errors and omissions. This, however, is only the second line of defense. The first line of defense must be that the agency or brokerage is committed to practicing good E&O loss control procedures and makes certain that all employees know and follow those procedures routinely and consistently.

If a true commitment to E&O loss control hasn't made it to the top of the business plan at your agency or brokerage, I encourage you to make this a priority. As we have said many times, we have observed over the years that the insurance agencies and brokerages that are truly committed to E&O loss control not only have less E&O claims and lawsuits made against them but they also provide better customer service and also sell more insurance as a result of the loss control procedures that are practiced. In the simplest explanation that I can offer, E&O claims occur against insurance agents and brokers when they do not prioritize loss control, and adopt the best, time-tested office practices and procedures, before a loss occurs.

Submitted by:

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Keidel, Weldon & Cunningham, LLP concentrates its practice in handling legal matters for insurance agencies and brokerages, including E&O litigation, loss control and education; insurance coverage analysis and litigation; regulatory matters; agency sales and purchases; and, non-compete and non-solicitation issues. Please direct any comments or questions to James C. Keidel, Esq. at the main office of the law firm at 925 Westchester Avenue, Suite 400, White Plains, NY 10604, telephone 914-948-7000 or email at jkeidel@kwcllp.com. The law firm also maintains offices in New York, NY; Syracuse, NY; Fair Lawn, NJ; Wilton, CT; Warwick, RI; Philadelphia, PA; Williston, VT; and, Naples, FL.