

## Insurance Agent and Broker Loss Control: Keys to Avoiding and Mitigating E&O Claims in the COVID-19 Environment



By Jonathan S. Ziss, Colleen M. Murphy, Peter J. Biging, and Mathew S. Marrone  
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### The Importance of E&O Loss Control in a COVID-19 Environment

Insurance agents and brokers are wise to implement regularly followed agency-wide errors and omissions (E&O) loss-control techniques, which have been proven to decrease the likelihood that an E&O claim or lawsuit will be brought or will succeed against the agency or brokerage. The cost of being involved in an E&O lawsuit is high when factoring in the application of the deductible under the E&O policy, a portion of which often will apply to legal costs and expenses, and certainly to any judgment or settlement. But there are other costs to consider, including the time required to report the claim, meet with E&O defense counsel, gather all documents, and prepare for depositions and trial.

We are certain, as discussed here, that the COVID-19 environment will trigger a rise in E&O claims and lawsuits brought against insurance agencies and brokerages in the near (and for the foreseeable) future. In addition to the specific COVID-19 tips discussed below, the main takeaway is that everyone at the insurance agency or brokerage (from agency owner/producer to account executive to customer service representative) needs to get serious about E&O loss control, and implement and regularly follow practices and procedures designed to avoid and/or mitigate future E&O claims.

Two of the most important tips that would significantly reduce the E&O risk agents and brokers are going to be confronted with in the current environment are as follows:

#### 1. CONSISTENTLY DOCUMENT YOUR ACTIONS AND COMMUNICATIONS

This means that insurance agents and brokers must fully and consistently document the agency management system in place with regard to actions taken on each file, and must take the time to save all records of communications with insureds to the relevant account files, prospective insureds, retail and wholesale brokers, MGAs, and insurance carriers—including marketing representatives, underwriters, claims representatives, etc., regarding each account.

#### 2. DETECT AND AVOID PROBLEM BUSINESS

After documentation, the second most important practice is learning how to detect and avoid—and yes, let go of—“problem business,” whether it be from a prospective insured or another broker. Beware of the client that:

- Is always late with payment of premiums and has to have its policies reinstated
- Fails to disclose prior losses
- Excessively “bad-mouths” former brokers
- Is excessively premium conscious and/or spreads its insurance business to multiple brokers all around town
- Is abusive to staff or consistently refuses to take advice
- Takes huge chances insuring one building or vehicle or piece of equipment and not another
- Habitually fails to update schedules
- Has sued you in the past

These clients are typically uncovered claims/underinsured claims waiting to happen, and, in our experience, they can be an E&O claim waiting to happen as well. These indicators are not hard and fast rules; learn to listen to, and heed, what your gut is telling you. Problem clients are not worth it. Consider having a heart-to-heart with them, and doing what you can to address the problem behaviors. If this doesn't have an impact, move on (and be sure to follow all carrier and regulatory requirements which may apply). Do not become desperate in this COVID-19 environment and take just any “bad business” that comes along.

## 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 the coronavirus increases the likelihood of several COVID-19-related scenarios. But just as importantly, we expect to see a jump in garden-variety E&O claims any time an insured suffers an uninsured or arguably underinsured claim. As individuals and companies continue to suffer from the economic blows delivered by the pandemic, they will be less willing to accept anything short of a near 100-percent payout on an insurance claim/loss.

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

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

- Advising clients that their policies do not cover a COVID-19-related claim when, in reality, the clients' policies may or would provide coverage:
  - 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, if the insurers have been prejudiced by the delay.
  - In addition, agents of insurers take heed: Agency agreements often require that the agents timely report claims and tender pleadings, such as a Summons and Complaint.
- Filing 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.
- Heeding 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.
- Engaging 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 successful 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.

## Summary

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*:

On the danger of delay in reporting claims: "[A Word to the Wise for Insurance Agents and Brokers Who Are Asked to Hold Off On Reporting Claims: There's Danger in Delay](#)"—*Professional Liability Magazine*, Summer 2019

On the danger of writing to insurers to cover disputed claims: "['Exhibit A' Against Themselves](#)"—*Professional Liability Magazine*, Winter 2020

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## CLAIMS-HANDLING TIPS

- Agencies/brokerages should **ADEQUATELY STAFF** their claims reporting processes to record descriptions of claims accurately, and to **TIMELY REPORT** same.
- **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 advocate 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** and all layers that may potentially provide coverage. When in doubt, notify every insurer that could conceivably provide coverage.
- **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 claims communication, regardless of whether the communication is with a client, a client's insurer, or an E&O carrier.

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For more information, contact the experienced E&O attorneys at Goldberg Segalla.

**Jonathan S. Ziss**

*Chair, Management and Professional Liability*  
(267) 519-6820 | [jziss@goldbergsegalla.com](mailto:jziss@goldbergsegalla.com)

**Colleen M. Murphy**

*Leader, Insurance Agents and Brokers*  
(716) 844-3412 | [cmurphy@goldbergsegalla.com](mailto:cmurphy@goldbergsegalla.com)

**Peter J. Biging**

*Vice Chair, Management and Professional Liability*  
(646) 292-8711 | [pbiging@goldbergsegalla.com](mailto:pbiging@goldbergsegalla.com)

**Mathew S. Marrone**

(267) 519-6851 | [mmarrone@goldbergsegalla.com](mailto:mmarrone@goldbergsegalla.com)



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