

E&O Risk Management: Meeting The Challenge Of Change

Agency/Carrier Contracts – E&O Considerations



Big "I"
**PROFESSIONAL
LIABILITY**

Swiss Re



Corporate Solutions

Agent/Carrier Contracts – E&O Considerations

Objective:

- *Explore key provisions of agency agreements that could create potential E&O exposures*
- *Review some E&O considerations in working with carrier underwriting guidelines*

What's Covered:

Introduction	2
Provisions of Potential Exposure	2
Section 1: Licensing and Appointments.....	2
Section 2: Binding Authority and Processing Instructions.....	3
Section 3: Retention of Documents.....	3
Section 4: Accounting – Direct and Agency Bill	3
Section 5: Notification of Claims and Losses	4
Section 6: Sub-producers.....	4
Section 7: Marketing Materials.....	4
Section 8: Privacy Laws	4
Section 9: Indemnification	4
Section 10: E&O Coverage Requirement.....	5
E&O Considerations of Carrier Underwriting Guidelines	6
Section 1: Target Business	6
Section 2: Years in Business.....	6
Section 3: Loss Experience	6
Section 4: Continuous Coverage	6
Section 5: Mandatory Provisions	6

INTRODUCTION

At the heart of an agent's exposure to potential E&O claims from carriers are agency agreements. These agreements lay the foundation for the relationship as well as the responsibilities of the agency and the carrier. A breach of duties outlined in the agency agreement can open the agency up to an E&O claim. Agents should be familiar with the provisions of their agency agreements and make sure their operational procedures take them into account. Agency management should make sure staff is aware of the provisions that affect their job responsibilities, and build these requirements into agency procedures. It is also important that agency agreements are reviewed in tandem with underwriting guidelines and other rules that may be referenced in the agreement.

Risk Management Tip:

Keep the lines of communication open between the agency and your carriers. Ask for a clarification of the carriers underwriting guidelines if the information is ambiguous or unclear. If necessary, ask your carriers to provide a written guideline of their underwriting preferences.

PROVISIONS OF POTENTIAL EXPOSURE

This section will explore some the provisions of agency/carrier agreements that could create E&O exposure from claims brought by a carrier. It is important to realize that agency agreements are binding legal documents. It is highly recommended that agency principals thoroughly review their agency/carrier agreements, as well as have them reviewed by their attorney. If there are provisions with the agreement that are unacceptable to the agency's interest then consider negotiating terms with the carrier.

Section 1: Licensing and Appointments

Agency agreements outline the products that the agency is approved to sell along with where they can be sold. Agency staff is required to have proper licenses and company appointments in place. Obviously, the agency should only be selling products for which they are authorized and staff should be licensed and current on their CE requirements. If an agency is looking to expand into additional states beyond those authorized in the agreement, then a conversation with the carrier needs to precede this expansion.

Section 2: Binding Authority and Processing Instructions

Many agency agreements clearly outline the agent's responsibility for adhering to binding authority and other procedures by reference. These reference documents should be reviewed in tandem with the agency agreement and relevant information shared with employees. Generally the agreements state that the agency must comply with underwriting guidelines and written instructions. Some agreements have specific provisions that could result in exposure to an E&O and agents should have a heightened awareness of these, including:

- Requirements for issuance of policies (either online or in the traditional mode)
- Type of application to be used (ACORD or proprietary)
- Specific timeframe requirement for forwarding endorsement requests to the carrier and the method to be used
- Agents specifically prohibited from making coverage representations
- No backdating of coverage without the carrier's specific agreement
- No authority to make any changes to quotes, rates, or policies issued by the company
- No binding authority without authorization
- Specific timeframe for notification of policies issued or coverages bound with the carrier (i.e., 5 days)

Section 3: Retention of Documents

There may be provisions in the agency agreement that require the agency to retain certain documents and allow them to be reviewed by the carrier. This can be the case when carriers have proprietary underwriting systems or when documents are uploaded. Carriers may ask the agency to retain applications or policy documents. The agreement may specify how long to retain these documents but the agency should also be aware of any record retention requirements prescribed by the laws in the states in which they operate.

Section 4: Accounting – Direct and Agency Bill

Agency agreements can outline the handling of both direct and agency bill premiums. Agency responsibilities with either type of premium collection method may differ, especially in the event of cancellation. For example, on direct bill policies the agreement may indicate that the agency cannot issue policies and renewals, or issue notices of non-renewal or non-payment cancellations. The agreement may also specify requirements for forwarding cancellations to the carrier if received by the agency (i.e., 10 days). Some agreements may prohibit the agency from extending the amount of time for customers to pay premiums owed to the company.

Section 5: Notification of Claims and Losses

There are provisions that require the agent to report all losses and potential claims to the carrier promptly. Some contracts, specify a timeframe for forwarding claims or incidents that may give rise to a claims. The agency should make certain that these requirements are being followed by its employees. Failure to notify the carrier of claims, potential claims or incidents within the prescribed timeframe could result in the denial of claims for late notice and create an E&O exposure to the agency.

Section 6: Sub-producers

Many agreements address the issue of working with sub-producers or independent contractors. These provisions can discuss acceptability, sharing of company marketing materials, and reiterate binding and processing requirements. The independent sub-producer may need to be appointed by the carrier.

Section 7: Marketing Materials

How agencies can use carrier trademarks, service marks, logos, and use of carrier marketing materials are often addressed. The agreements may specify that agents cannot use the certain items without prior written consent. Keep this in mind when creating marketing materials and websites. Some agreements may even require the agent to obtain approval before using agency-developed marketing materials.

Section 8: Privacy Laws

Privacy of customer information is a huge topic for agents today and carrier agreements often address this topic as it relates to their own proprietary information and that of its customers. The agreements generally require agents to maintain the privacy of information and to be compliant with state and federal privacy laws regarding the safekeeping of information. This is important because if the agency has a security breach resulting in damages the carrier could bring an action against the agency. Interestingly, some carrier agreements may even require the agency to maintain the “security and integrity” of the carrier’s electronic system. Be sure the agency is fully aware of their duties under the agreement.

Section 9: Indemnification

This is one of the most important provisions of the agreement when it comes to the topic of a carrier bringing suit against the agent. The important language to note in indemnification provisions are limitations such as: “unless caused by you” or “except when you are responsible for the error”. With that wording, it is likely that a carrier who feels the agent caused the loss would pursue an E&O claim against that agent. It is beneficial for the agency that any indemnification provision contained in the agency agreement contains mutual, and not a one-sided, indemnification language. If the agency is not certain if the agreement contains the appropriate language, have any attorney review the agreement.

Section 10: E&O Coverage Requirement

Carriers require agents to maintain E&O policies with certain limits and deductibles as part of their agency agreements. Realize that these limits are what the carrier requires and not necessarily what the agency should purchase. The agency's limits should be based (among other considerations) on its specific exposures including the amount, size, and type of the customers they write. Some carrier agreements have language that would require the agent to notify them of "any claim or suit against you" and allow the carrier to make relevant investigation, settlement, or defense necessary. This is potentially in conflict with the provision of the agency's E&O carrier. In these situations always refer any claim, potential claim, incident or suit to your E&O carrier first and let them determine the appropriate course of action.

Risk Management Steps:

Inform agency personnel regarding:

- **Individual carrier's target market for each line of insurance;**
- **Carrier proprietary programs, with unique forms or underwriting guidelines, require special attention;**
- **Binding authority details should be communicated on a regular basis with all affected agency personnel. Keep in mind that just because the agency has binding authority doesn't mean that all employees should have maximum authority. However, this can be difficult to administer. Unless program/MGA situation is involved, it is best to have all agency personnel operating on a level of full authority as regards underwriting authority. Consistent and proper management of varying levels of authority would be very difficult for all but the very best-managed agencies to monitor consistently. Also, at one time, agency binding authority was clearly outlined in agency agreements; this is often no longer the case. Best to assume no authority, and clarify/double-check when binding coverage.**

Good: Carrier communications are forwarded to agency personnel. A chart of binding authority is created, circulated and when required, updated

Better: In addition to the above, regular office meetings include discussions on carrier specific issues including binding authority. Management personnel monitor for compliance and immediately correct any deviation

Best: Electronic information is readily available to appropriate personnel and is updated as required. Office procedure manual requires that personnel access the information before binding coverage, submitting application or making/requesting endorsement changes.

E&O CONSIDERATIONS OF CARRIER UNDERWRITING GUIDELINES

Not being thoroughly familiar with agency binding authority and underwriting guidelines (and not following those guidelines), which are often referenced in carrier agreements, can be a recipe for potential E&O claims from the carrier. Underwriting guidelines outline the targeted appetite for carriers and they include limitations on what risks are acceptable. It is important to be thorough and honest in evaluating potential customers and writing new accounts. Producers with incentives to write new business may be inclined to stretch the underwriting box or withhold information to get the business on the books. Below are some general considerations addressed by company underwriting guidelines:

Section 1: Target Business

To keep it simple there are two types of business that underwriting guidelines are designed to communicate to agents: the business carriers want to write and the business they do NOT want to write. Make sure agency staff understands the characteristics of accounts that the carrier is not interested in writing which could be based on the type of business, the size, number of locations, sales, employees, insured value, etc. From an E&O perspective, knowing the ineligible business classes may be as equally as important as knowing the eligible ones.

Section 2: Years in Business

Carriers often require a certain number of years in business. Sometimes they will consider new ventures where management has past experience. When the question of experience comes up, be clear with your customers that you'll need carrier review and approval.

Section 3: Loss Experience

Be sure that that you are acquiring the loss experience on the risk for each carrier's specifically required timeframe. Carriers may vary on the number of years of prior loss runs needed so be sure that you meet their specific requirements.

Section 4: Continuous Coverage

Carriers often require potential customers to have continuous coverage for a specified timeframe with no cancellations or non-renewals. Make sure you make the carrier aware of any past gaps in coverage.

Section 5: Mandatory Provisions

When writing certain types of businesses, carrier underwriting guidelines may dictate certain coverage provisions or exclusions are used based on individual risk characteristics. The agency should adhere to these requirements and share with the customer the effect of these on coverage.