E&O Risk Management: Reducing E&O Exposures

Presented by:
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Today’s Agenda

- Agent/Carrier Relationship – Law of Agency
- Agency/Carrier Contracts: E&O Considerations
- Understanding Agent Duties
- E&O Claims
- Reducing E&O Exposure
E&O RISK MANAGEMENT

Agent/Carrier Relationships – Law of Agency
INTRODUCTION

• Independent insurance agents are uniquely positioned to meet their customers’ insurance needs with access to multiple carriers

• The relationships with carriers and customers and the duties agents owe to each can become blurred

• Understanding these relationships is critical to protect against potential claims arising out of a failure to meet the minimum standards of care owed each of these parties
THE LAW OF AGENCY

• “Agency” is a term that denotes a legal relationship established when one party represents another.

• Both parties must voluntarily agree to enter into the relationship which can be done in writing or orally.

• When an “agency” relationship is created, the agent steps into the shoes of the principal and acts on the principal’s behalf.

• In the insurance agency relationship, the agent acts on behalf of the carrier in an insurance transaction.
ESTABLISHING AN AGENCY RELATIONSHIP

Three Types of Authority

- An agent has **three types of authority to bind a principal** to any agreement made with a third party.

- They include:
  - Express Authority
  - Implied Authority
  - Apparent Authority
ESTABLISHING AN AGENCY RELATIONSHIP

*Express Authority*

- Express authority may be oral or written

- The principal expressly indicates the extent of authority they are granting

- This generally comes in the form of a unique carrier-agency agreement

- Agency agreements outline the duties the agent owes to the carrier in exchange for the right to market the carrier’s products
ESTABLISHING AN AGENCY RELATIONSHIP

**Implied Authority**

- **Not everything** that an agent is required to do in an insurance transaction **is found in the agency agreement**

- There are **certain duties** that an agency must perform that are **implied**

- The **courts may also extend the agent’s authority** to that which is implied in the relationship – i.e. that **authority which is proper, usual and necessary** to the exercise of the authority expressly granted
ESTABLISHING AN AGENCY RELATIONSHIP

Apparent Authority

- Apparent authority occurs when a third party believes, by all appearances, that the agent has authority to transact business on behalf of the principal, even when no authority actually exists.

- If the carrier has created or allowed a situation to occur the principal may have to honor the contractual promise made by its agent.
GENERAL AGENT DUTIES TO CARRIER

• Fiduciary Duty

• Loyalty

• Accounting – Collection of Premium

• Disclosure of Information
GENERAL AGENT DUTIES TO CARRIER

Fiduciary Duty

• The word fiduciary comes from the Latin fides which means faith and fiducia, meaning trust

• Often fiduciary relationships involve the handling of money

• The carrier must have a high degree of trust that any money received by the producer, that belongs to the carrier, will be promptly sent to the carrier at the appropriate time
GENERAL AGENT DUTIES TO CARRIER

Loyalty

The agent has the duty of loyalty to its principal:

Challenge of Perceived Dual Agency:

• In some states, where a customer procures insurance through an agent, a dual “agency” relationship may be found to exist

• Customers may not be clear about whom an independent agent represents and may assume that the agent is only representing the customer’s interest

• In a single insurance transaction, an independent insurance agent’s representation may vary between the customer’s interest and that of the carrier
GENERAL AGENT DUTIES TO CARRIER

Accounting-Collection of Premium

• The majority of states require that the agency must be able to distinguish the money owed to carriers from operating funds belonging to the agency.

• Individual state insurance laws dictate whether the producer may or may not co-mingle the premiums owed to a carrier with their own funds.

• There are Federal fraud statutes governing the use of other peoples’ money.

• At a minimum, agencies must be able to provide an accounting of these funds.
GENERAL AGENT DUTIES TO CARRIER

Disclosure of Information

• It is reasonable for the principal to expect that their agent will provide them with any material information of which the agent is aware

• Material information would affect the carriers’ decisions regarding:
  – acceptance or denial of the account
  – the extent of coverage offered based on the understanding of the exposures being transferred, and
  – the premium charged for this transfer of risk.
E&O RISK MANAGEMENT

Agent/Carrier Contracts – E&O Considerations

Photo by rawpixel on Unsplash
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
INTRODUCTION

**Agents should:**

- be familiar with the provisions of their agency agreements
- 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
- build these requirements into agency procedures
PROVISIONS OF POTENTIAL EXPOSURE

**Licensing and Appointments**

- Agency staff should be **properly licensed & current on their CE requirements**
- Company **appointments** should be in place
- Agencies should only be **selling products for which they are authorized**
- If an agency is **looking to expand into additional states** then a **conversation with the carrier needs to precede this expansion**
PROVISIONS OF POTENTIAL EXPOSURE

Binding Authority and Processing Instructions

• Agency agreements may outline the agent’s binding authority and other procedures

• Relevant information should be shared with employees

• Some agreements have specific provisions that could result in exposure to an E&O claim
PROVISIONS OF POTENTIAL EXPOSURE

*Binding Authority and Processing Instructions*

- Agency agreements may outline the agent’s **binding authority** and other procedures

- Relevant information should be shared with employees

- Some agreements have **specific provisions that could result in exposure to an E&O claim**
PROVISIONS OF POTENTIAL EXPOSURE

Retention of Documents

In addition to any state law regarding record retention requirements:

• Agency agreement may require the retention of certain documents and allow them to be reviewed by the carrier

• Carriers may ask the agency to retain applications or policy documents

• The length of retention may be specified in these documents
PROVISIONS OF POTENTIAL EXPOSURE

Producer Recordkeeping

South Dakota Codified Law (SDCL) 58-30-91. Records to be maintained by insurance producer - Violation as misdemeanor. The insurance producer shall keep at the insurance producer's place of business records pertaining to transactions under the insurance producer's license and the licenses of the insurance producer's soliciting insurance producers, for a period of at least five years after completion of such transactions. Such records shall show, as to each policy, the name and address of the insured, the form, number, and term of the policy, the general subject of the insurance, and the general nature of the coverage. Nothing in this section precludes a home, zone, or regional office of the insurer from maintaining such business records in lieu of an insurance producer maintaining the records so long as the insurance producer receives compensation substantially in the form of a salary or produces seventy-five percent or more of his or her insurance business, based on gross premiums written, with one insurer or group of insurers subject to common management or ownership.

Any violation of this section is a Class 2 misdemeanor.

PROVISIONS OF POTENTIAL EXPOSURE

Accounting – Direct and Agency Bill

- Agency **agreements can outline** the handling of both **direct and agency bill** premiums
- Agency **responsibilities may differ**, especially in the event of cancellation
- 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 extending the amount of time for customers to pay premiums** owed to the company
PROVISIONS OF POTENTIAL EXPOSURE

**Notification of Claims and Losses**

• Some provisions require the agent to report all losses and potential claims to the carrier promptly.

• Other 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.
PROVISIONS OF POTENTIAL EXPOSURE

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
PROVISIONS OF POTENTIAL EXPOSURE

Marketing Materials

• The agreements may specify that agents cannot use certain items without prior written consent

• Keep this in mind when creating marketing materials and websites

• Some agreements may even require the agent to get approval before using agency-developed marketing materials
PROVISIONS OF POTENTIAL EXPOSURE

Privacy Laws

• Carrier agreements often address this topic as it relates to their own proprietary information and that of its customers.
• Usually require agents to maintain the privacy of information and to be compliant with state and federal privacy laws.
• Following a security breach resulting in damages the carrier could bring an action against the agency.
• Some carrier agreements may even require the agency to maintain the “security and integrity” of the carrier’s electronic system.
PROVISIONS OF POTENTIAL EXPOSURE

**Indemnification**

- This is one of the most important provisions of the agreement when a carrier brings a suit against the 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.
PROVISIONS OF POTENTIAL EXPOSURE

E&O Coverage Requirement

• Carriers require agents to maintain E&O policies with certain limits and deductibles as part of their agency agreements

• These limits are 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 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
E&O CONSIDERATIONS OF CARRIER UNDERWRITING GUIDELINES

• Not being thoroughly familiar with agency binding authority and underwriting guidelines (and not following those guidelines) can be a recipe for potential E&O claims.

• 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.
E&O CONSIDERATIONS OF CARRIER UNDERWRITING GUIDELINES

• Loss Experience
• Continuous coverage
• Mandatory Provisions
• Target business
  o What the carrier wants to write – Eligible business
  o What the carrier does NOT want to write – Ineligible business
• Years in Business
E&O CONSIDERATIONS OF CARRIER UNDERWRITING GUIDELINES

*Target Business*

To keep it simple there are **two types of business** that **underwriting guidelines are designed to communicate** to agents:

1. the **business carriers** **want to write**
2. the **business** they do **NOT want to write**

From an E&O perspective, **knowing the ineligible business classes may be as equally as important as knowing the eligible ones**
E&O CONSIDERATIONS OF CARRIER UNDERWRITING GUIDELINES

Years In Business

- Carriers often require a certain number of years in business
- Sometimes they will consider new ventures where management has past experience
- Be clear with your customers that you’ll need carrier review and approval
E&O CONSIDERATIONS OF CARRIER UNDERWRITING GUIDELINES

**Loss Experience**

- Be sure 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.
E&O CONSIDERATIONS OF CARRIER UNDERWRITING GUIDELINES

Continuous Coverage

• Carriers often require potential customers to have continuous coverage for a specified timeframe with no cancellations or non-renewals

Mandatory Provisions

• When writing certain types of businesses, carrier underwriting guidelines may dictate certain coverage provisions or exclusions be used based on individual risk characteristics
E&O RISK MANAGEMENT

Understanding Agents Duties
INTRODUCTION

• Understanding duties owed to customers are critically important
• These duties can lay the foundation for how your agency operates
• Can assist in the decision of the level of service provided to customers
• Puts procedures in place to minimize E&O exposures for going beyond the legal duty
DUTIES TO CUSTOMERS

• In all states, *agents/brokers can be held liable for their negligence in providing services* to their customers

• *Each state's laws differ* regarding the duties an agency owes to customers

• *Awareness of the standard of care is a baseline for establishing how an agency operates* including:
  – whether the agency simply takes customer orders
  – specializes in certain coverages, or
  – performs more thorough risk analyses
DUTIES TO CUSTOMERS

Negligence – Prove It!

• Negligence is the *standard of care established by law* that would be *expected of a reasonably prudent agent* acting under similar circumstances.

• There are *four (4) requirements that must be met* for a customer to prove that the agency was negligent.

• Agents are, at a minimum, held to this standard of care.
DUTIES TO CUSTOMERS

Negligence – Prove It!

Negligence requires that all four of the following are met:

1. A duty existed
2. The duty was breached
3. **Proximate cause** - A connection between the breach and duty showing that the particular error or omission was a cause of the loss
4. **Actual damages occurred** as a result of the breach
DUTIES TO CUSTOMERS

To Whom is a Duty Owed?

The duty owed can vary by state, which can include:

• Customer
• Carrier
• Tort claimant
• Party of interest
DUTIES TO CUSTOMERS

Standard of Care

The standard of care is the degree of prudence and caution required when rendering services to customers.

- The level of standard of care is closely dependent on the circumstances.
- Based on how a reasonable agent would react under similar circumstances.
- Failure to meet one’s standard of care can result in a claim of negligence.
DUTIES TO CUSTOMERS

Standard of Care

The determination of the legal standard of care varies in each state

• Know your state’s standard
• Be cognizant of “special relationships” that could increase the chances of negligent claims
• Agencies need to be aware of their exposures and implement procedures to minimize risk.
DUTIES TO CUSTOMERS

Differing Levels of Standard of Care

• The **standard of care** for agents is determined by state courts and can be **divided into two categories:**
  1) **Non-professional** or order-taker status; and
  2) **Professional** standard of care.

• The court will assess whether a “special relationship” exists which can potentially increase the standard.

• All agency personnel must be aware of the circumstances in determining how a special relationship is created.
DUTIES TO CUSTOMERS

Differing Levels of Standard of Care

Non-Professional Standard of Care

In states where agents are not subjected to a professional standard of care the agents obligations are:

- to procure the coverage requested by the customer, and
- to let customer know if that cannot be done

Where possible:
- obtain written confirmation from insureds regarding any specific coverage requests, and
- document all steps, including the final outcome of any such requests.
DUTIES TO CUSTOMERS
Differing Levels of Standard of Care

Professional Standard Of Care

In states where agents are subjected to a professional standard of care the agent’s basic standard of care recognizes the insurance professional’s skills and knowledge required to perform his/her duties

• agents may be expected to uncover and inform customers of the possible loss exposures they face, and
• offer insurance solutions
DUTIES TO CUSTOMERS
The “Special Relationship”

• Courts often look to the nature of the relationship the agent maintains to determine the standard of care to be applied.

• Some factors the court might consider that could increase the standard of care or create a “special relationship” include:
  – Claims of expertise
  – Agreement or Additional Compensation
  – Length of Customer Relationships
  – Rendering of Advice
AGENCY PRACTICES VS. LEGAL DUTY

• Know your states prescribed legal requirements

• Generally, it takes an uncovered customer loss to create an E&O claim

• Ensuring that customers have adequate coverage and limits can reduce an agency’s exposure to loss
AGENCY PRACTICES VS. LEGAL DUTY

• Uncovering customer exposures and offering coverages and increased limits
  – better serves your customer and
  – provides the agency with more opportunity to increase revenue.

• Consistently strive to fully communicate and follow-up to meet these standard practices - “say what you do, and do what you say.”
AGENCY PRACTICES VS. LEGAL DUTY

Creating a Duty Where None Previously Existed

Agents should always be mindful of creating additional duties when creating office procedures:

• Avoid the practice of contacting chronically late-payers

• Saying it’s taken care of before it really is
E&O RISK MANAGEMENT

An E&O Claim - 360° View

Photo by Joshua Sorenson on Unsplash
INTRODUCTION

- Often uncovered loss to create an E&O claim
- Generally speaking, *an uncovered loss would be caused by:*
  1. A lack of appropriate type of coverage, or
  2. Inadequate values or limits to cover the full loss
INTRODUCTION

It can happen to you!

• E&O claims don’t discriminate by the size or location of agencies.
• All agencies, regardless of staff size, must proactively address E&O risk management!
INTRODUCTION

Statistics Don’t Lie:

• Annually *one (1) in seven (7) insurance agencies and brokerages* will report a potential E&O claim

• Approximately **50%** of those reported claims are *closed with no defense reserves or indemnity payment* made
INTRODUCTION

Statistics Fluctuation Influences:

• Market cycles which drive changing behavior of insurance buyers, carriers, and agents
• Catastrophic events which can be the catalyst for the discovery of uncovered losses
INTRODUCTION

Documentation & Procedures are Critical:

• Where the claim goes forward, the agency may or may not have actually made a mistake

• The agency may be unable to prove that they are not responsible

• Unfortunately, E&O claims allegations are “he said, she said” and this is where documentation, combined with good E&O risk management procedures that are invariably followed, is a key defense mechanism.
E&O DEFINED

“I made a mistake” (error) or “gosh I missed that” (omissions)

• Wrongful acts can be described as human failings
• An agency that has good E&O risk management procedures in place, that are enforced and monitored, can reduce their E&O exposure.
Agency E&O Culture
Staff Awareness

A Culture of E&O Awareness facilitates:

– Better claims reporting
– Ensures coverage by meeting the agency’s E&O policy’s reporting requirements

Fear of discipline or reprisal may delay bringing a situation to management’s attention until it is too late to resolve the problem.
Procedural vs. Knowledge Based Errors

• E&O claims can generally be broken down into two categories: procedural errors and knowledge-based errors.

• The spread of claims between these two categories is about 50/50 and in some cases there is overlap between the two
An E&O Claim--360 View

- Lack of timely response
- Incomplete information to carrier
- Failure to comply with underwriting guidelines
- Failure to submit claims
- Failure to add Additional Insured
- Failure to deliver policy in timely manner
An E&O Claim--360 View

Knowledge-based Errors

- Inadequately explaining coverage provisions
- Inadequate values/limits
- Failure to properly assess exposure
- Failure to offer additional coverage
- Misrepresent coverage
- Failure to duplicate prior coverage
E&O CLAIM STATISTICS

Who is Suing Agents?

- Customers
- Carriers
- Third Parties
- Regulatory/government agencies
The Role of Agency Procedures

E&O RISK MANAGEMENT

Photo by Beatriz Pérez Moya on Unsplash
Photo by Darwin Vegher on Unsplash
INTRODUCTION

• Proper policies and procedures insure that your E&O carrier could mount a compelling defense
• Good Procedures:
  – Are critical from an E&O protection standpoint
  – Improve customer service
  – Increase the efficiency of the agency operation
What are “Invariable Practices”?

When procedures are in place that requires certain steps for each customer/carrier touch point, and all agency personnel execute the steps as prescribed, the agency operations are in unison.
What are “Invariable Practices” Important?

Invariable practice provides the agency with a defense in times where follow-through on procedures comes into question.

Photo by rawpixel on Unsplash
PROCEDURE MANUAL

- An invaluable employee training tool
- Assist in reducing operating costs
- Can be used by management to evaluate employee performance
- Provides guidance for agency operations audits, and
- **Supports** an agency’s invariable practices
- Provides guidance to new employees on agency operations
- Assures quality control and customer service performance

The key is they must reflect the actual operations of the agency.
PROCEDURE MANUAL

Reduction of Operating Costs

• Written procedures should represent the best and most efficient way to complete tasks

• Without a procedure, staff members are burdened with finding their own way of doing a task

• This is both time consuming, costly to an agency, and has a negative effect on employee morale
PROCEDURE MANUAL
Employee Evaluation

• Compliance with current procedures should be part of any employee evaluation

• This requires constant monitoring and periodic customer file reviews
Audits accomplish two goals of E&O loss control:

- It reinforces the commitment to agency-wide compliance with operating procedures
- At the time of an E&O claim, indicates assure that procedures are continually followed
A strong defense using invariable practice requires:

• The ability to demonstrate that a procedure is followed by all staff members - without exception

• Auditing:
  o Compares operations with procedures so corrections are made for any variances
  o supports an agency’s assurance of invariable practice
  o improves procedures to reflect current workflow
  o fosters employee input on amendments
E&O RISK MANAGEMENT

Reducing E&O Exposures
E&O: Incomplete or Inaccurate List of Insureds

• Insureds should be listed in declarations
  o Or covered because of some relationship

• Named insureds versus other insureds

• Must have insurable interest

• Problem areas
  o Unnamed subsidiaries
  o Newly acquired or formed entities
Named Insured E&O Tips

• To avoid errors and omissions losses from uninsured persons or entities:
  o Understand the distinction between named insureds and other insureds.
  o Periodically (e.g., annually) review the list of insured parties.
  o Make sure the list of named insureds in each policy includes all entities that ought to be covered as such.
  o Use a broad form named insured endorsement.
E&O: Improper First Named Insured

• The first named insured often has more rights and duties than other insureds.
  o Make policy changes.
  o Initiate cancellation.
  o Receive notice of cancellation.
  o Pay initial and audit premiums.
  o Receive return premiums.

• First insured named should be the same in all policies.
Named Insured E&O Tips

• To avoid errors and omissions losses resulting from improperly listing the named insureds:
  o Make sure the named insured whose name appears first in a client’s policy is the person or entity authorized to handle all insurance-related transactions.
  o Make sure the list of named insureds is the same in all of a client’s policies.
Reducing E&O Exposures: Crop Insurance

• Keep up to date on changes and additional coverage options

• Applications and acreage reports
  - Accuracy
  - Meeting deadlines
  - Do not alter dates
  - Insured signature on completed forms

• Using checklists

• Document, Document, Document!
Reducing E&O Exposures: Commercial Lines

- Additional Insured*
- Newly Acquired organizations (M&A)
- Commercial Liability
  - Employee Benefits Liability
  - Employment Practices Liability
  - Herbicide & Pesticide
  - Pollution
  - Contractual Liability RR

An E&O Claim--360 View
Reducing E&O Exposures: Commercial Lines

• Commercial Liability (cont’d)
  o Professional Liability

• Commercial Property
  o Valuation
  o CoInsurance
  o Business Income
Reducing E&O Exposures: Commercial Lines

- Commercial Automobile
  - Hired and NonOwned
  - Drive Other Car Coverage
  - Personal Auto vs Commercial Auto
  - Proper symbols
  - Mobile Equipment
  - Uninsured/Underinsured Motorist
Reducing E&O Exposures: Commercial Lines

• Umbrella/Excess
  o Recommend Coverage
  o Properly schedule underlying policies
  o Provide the required primary/underlying limits
  o Concurrency between primary and umbrella
  o Broader exclusions
  o Coverage over Foreign GL and Auto Policies
Reducing E&O Exposures: Personal Lines

- Uninsured and Underinsured Motorist
- Valuation
- Underwriting Guidelines
- Vacancy
- Ordinance & Law
- Personal Umbrella
Reducing E&O Exposures: Certificates of Insurance

• While there are a number of issues that can create E&O claims, one of the most common errors made involves agencies using the certificate of insurance as a way to add additional insureds without formally contacting the carrier to add them by endorsement.
CERTIFICATE

What is a certificate of insurance?

• Informational **snapshot only**
• It is for general informational purposes only and confers no rights
• It is subject to all of the terms and conditions of the various policies shown
CERTIFICATE

What isn’t a certificate of insurance?

It does not:

• extend any contractual rights to the holder not provided by the policy
• represent compliance with any contracts entered into by the insured with others
• amend, extend or alter coverages or terms afforded by the policy
Bulletin 10-01

DATE: January 13, 2010

TO: All Property Casualty Insurers & Agents

FROM: Merle Scheiber, Director

RE: Certificates of Insurance/Evidence of Insurance

The Division has worked diligently with agency management system vendors to implement the changes to Acord certificates of insurance required by bulletins, 09-05 & 09-06. However, the vendors have been unable to implement the changes in the software in a manner that is available and usable for all licensees by January 15, 2010.

The prior versions of certificates of insurance contained cancellation language that stated the insurer would endeavor to provide notice to the certificateholder upon cancellation. Any certificate of insurance containing this language or language that requires notice to the certificateholder is not permissible unless the notice is specifically provided for in the policy.
Why the increase in E&O Exposure

- **Increased demand** from third parties for certificates and Additional Insured
- **Increased complexity** of certificate and related documentation (agent affidavits, compliance checklists, etc.) requests
- **Increased frequency** leads to routine which leads to complacency in vigilantly reviewing requests

- **Lack of agency staff qualifications** for more complex requests, particularly requests for specific verbiage on certificates
- **Increased pressure** from insureds and third parties to issue **misrepresentative certificates**
- **Improved litigation success** focused on claims of fraud and detrimental reliance
Certificates of Insurance
Always Use ACORD Forms

• ACORD’s licensing agreement requires new form editions to be used no later than one year following publication
• This may require upgrading agency management systems
• Never issue “blank” certificates that do not show certificate holders
Certificates of Insurance
Requests for Specific Language

• Contractual insurance requirements
• Description of Operations verbiage
  o Review ACORD FIG explanation
  o Do not “quote wording from a contract”
• Agent affidavits or opinion letters
• Compliance checklists
• Do not paraphrase or summarize policy terms
Certificates of Insurance
Online Certificate Systems

- Often marketed to third parties based on funding by insurance agents who pay entry and access fees
- Agent may be forced to use system or lose customer
- Agency has no control over entered information
- No permanent copy for agency management system
- May result in policy misrepresentation in violation of the law
- May violate agency/company agreement
  - DOO field could be entered by the insured on one system
  - AI information could be added by certificate holder on another system
Certificates of Insurance

Reviewing Contracts

• Pros and cons
• E&O claim example
• Onerous request
• Sample disclaimer...
• Where did you go to law school?
Certificates of Insurance
Contract Review
Contract vs. Policy Limits

• Insured has a $5M policy limit and the contract only requires $1M, so he only wants the certificate to show $1M so he doesn’t reveal his full limit
  ○ ACORD FIG: “Enter limits corresponding to those found on the policy declarations page.”
  ○ It is likely illegal to misrepresent policy provisions

• Some AI endorsements only pay the lesser of the two, so it would be OK to show that on the COI
Certificates of Insurance
Sending COIs to Insurers

• Send them. Next question?
  o Marlin v. Wetzel (WV Sup. Ct., 2002)
  o Erie v. NGM (NY trial court, 2009)

• “Our internal procedures and our legal counsel require that a copy of all certificates be sent to our carriers.”

• Some AI endorsements are triggered by the receipt of the certificate by the carrier.
Certificates of Insurance
Additional Insured Issues

• MANY proprietary AI endorsements are significantly inferior to ISO forms (ongoing only, vicarious only, excess coverage, etc.)

• “Primary and noncontributory” (new CG 20 01 04 13)

• CA 20 48 is not a true AI endorsement
Reducing E&O Exposures: Current Issues

• Cyber/Data Breach
• Employment Practices Liability
• Flood – NFIP and Private Flood
• The Sharing Economy
  o Uber and Lyft
  o AirBnB and VRBO
  o Employee sharing
Rent better cars
Choose from thousands of unique cars for rent by local hosts

How it works

YOU’RE COVERED
You’re protected with $1 million in liability insurance, and your car is covered against theft and physical damage, unless you have commercial rental insurance and choose to waive protection provided via Turo for yourself and your customers.*

YOU’RE IN CONTROL
Set your minimum daily price for trips. Choose a mileage limit and get your car back re-fueled.
Reducing E&O Exposures: Current Issues

• Drones
• Autonomous Vehicles (auto, farm, etc)
• 3D Printers
• Cannabis
• Urban-rural interface
  o Wildfire exposures
  o Other geographic issues
• New challenges on the horizon
Reducing E&O Exposures – Key Takeaways

- Do what you say you’re going to do.
- Have & use an Agency Procedure Manual and update it regularly.
- Know your carriers including binding authority & underwriting guidelines.

- Read coverage forms.
- Ask Questions.
- Don’t Dabble.
- Professional Development Planning.
- Succession Planning.
E&O Resources

• IIABA.net/eohappens website
• Virtual University & “Ask an Expert”
• Your E&O Administrator at IIA South Dakota
• Your E&O Insurance Claims Representative
• VRC – Virtual Risk Consultant
• IRMI – Insurance Risk Management Institute
• InsuranceCommentary.com - Bill Wilson
• E&O Auditors & Consultants (list on file with IIABA)
THANK YOU!

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Photo by sydney Rae on Unsplash