

**ERRORS & OMISSIONS****Questions  
and Answers**

The following questions & answers can help you understand the basics of Errors & Omissions (E&O) coverage as well as some common issues that can contribute to E&O claims.

We KNOW  
for Insurance Agents

E&O**1. What is an Errors and Omissions (E&O) policy?**

Insurance agents are considered professionals and, as a result, are held to a professional standard. The most common means of protecting themselves is for insurance agents to secure an Agents' E&O policy, often called malpractice insurance for an insurance agent. There are tremendous differences in the policy forms offered by the various carriers, so it is suggested that you request a specimen policy with your proposal.

**2. What does an E&O policy cover?**

Most E&O policies provide coverage for your role as a P&C agent/Life & Health agent/broker, consultant, notary, etc. Covered activities most often include identifying, analyzing, and evaluating your clients' needs (including work for prospective clients and public service), the selling and placing of coverage, appraising real estate in connection with a policy you're writing or placing, adjusting claims on policies written or serviced by your agency, notarizing documents, and more. It is recommended that an agent review the policy form when securing coverage to ensure it covers the majority of your activities.

**3. What is excluded?**

There can be significant differences in the exclusions among various carriers and it is recommended that an agent review this section carefully. Review any added endorsements to the basic policy form. Typically, acts deemed to be deliberate, dishonest, criminal, fraudulent, or malicious are not covered. Many carriers exclude the insolvency of an insurance carrier/trust, etc., while others may provide coverage for carriers with a minimum AM Best rating.

**4. If I am selling Life, Accident & Health coverages, are these activities covered by my policy?**

Most, but not all, of the carriers writing Agents' E&O coverage include coverage for the selling and servicing of Life, Accident & Health products. Securing a specimen policy is highly recommended to determine the coverage provided for this activity.

**5. What are some of the common differences among policies?**

Among the more common differences is the "trigger" of coverage. This is often determined by whether the policy is a "claims-made form" or on a "claims-made-and-reported form." A "claims-made form" is generally considered more favorable.

Other differences include the definition of "who is an insured," the offering of "full prior acts" as compared to a form with a "retro date," the applicability of the consent-to-settle provision should your agency be faced with a claim and found liable, and the various Extended Reporting Period options should you decide to retire from the business or sell your agency.

Since it is not possible to identify all the differences, discuss with the Underwriter the benefits of their company's policy as compared to the competition.

## 6. What is the claims trigger under a policy with a Utica National company?

The policy with a Utica National company is written on a claims-made basis. The trigger of coverage is when your agency is aware a claim is being made against it. The trigger of some carriers is when the claim is received by the carrier.

## 7. What does “claims-made” mean?

A “claims-made” policy essentially is defined as a policy that provides coverage for claims made during the policy period, regardless of when the error occurred. For example, the agency has a policy that runs from 1/1 – 1/1. If the agency made an error on 7/1 when they did not place a coverage requested by the client and the client then suffers an uninsured loss the following year, the policy in effect when the claim is made against the agency will determine the protection, not the policy in effect when the error occurred.

## 8. What is the difference between “claims-made” and “claims-made-and-reported”?

The main difference is that with a “claims-made-and-reported” form, the claim is not officially considered a claim until it has been reported to the company.

## 9. Other than the policy form, are there other differences between E&O carriers?

There are a number of carriers that write this class of business. When considering a carrier, review their history/commitment of providing this coverage and the level of expertise of their Underwriting and Claims staff. Be aware of the caliber of the legal counsel they would assign should a claim be made against your agency.

Another common area of difference involves premium payment options as some carriers have attractive payment options allowing an agency to spread out the premium over the year.

## 10. What does a “retro date” mean and how does it work?

A policy containing a “retroactive date” (or “retro date”) means that errors committed prior to the retro date are not covered. Because certain aspects of this coverage are somewhat limited, a premium credit is typically provided. If a policy does not contain a retroactive date, it would be considered as providing “full prior acts” coverage.

## 11. What is the “Loss and Litigation” deductible and how does it work?

In the event of a suit against your agency, with a “Loss and Litigation” deductible you are responsible for the defense costs/judgment up to the amount of the deductible. Contrasting this is a “Loss Only” deductible, where your agency will only pay the deductible if a claim settles or a judgment was reached against you. (A policy with a Utica National company would pay full defense costs.)

## 12. The policy references “Legal Liability.” What does this mean?

For the E&O carrier to pay an amount on your behalf, the allegations against your agency must be covered and your agency must be found legally liable. These standards are determined by legal precedent and prior court decisions. In most, but not all, states, an insurance agent is not required to:

- provide an insurance policy that would cover all possible contingencies;
- advise an insured with respect to coverage options;
- advise the insured as to every exclusion contained in the policy; or
- continue to advise, guide, or direct a client to obtain additional coverage.

Absent an agreement to the contrary, an agent has no duty beyond what they have specifically undertaken to perform on behalf of the client. They do have a duty to:

- obtain the requested coverage for their clients within a reasonable time; or
- inform their client of their inability to do so.

## 13. What is an Extended Reporting Period?

This is an additional period of time provided after the expiration of a claims-made policy, during which valid claims will continue to be accepted by insurers. When an agency is sold or the owner decides to retire from the business, the agency would purchase an Extended Reporting Period – commonly referred to as “tail” – for a period ranging from 1-10 years. Once the “tail” is purchased, it cannot be cancelled.

## 14. How long do I have to decide the length of the Extended Reporting Period?

Typically, an agency has a finite time period after the agency has been sold or the policy has expired to purchase the Extended Reporting Period (commonly referred to as “tail”). In many policies, 60 days is the most common. It is important that the agency consider all of the options as they are only allowed one time to make this buying decision.

### **15. How do my E&O limits work?**

Most E&O policies contain two sets of limits. In the example of \$1,000,000/\$3,000,000, the \$1 million limit is the amount available for any one claim against the agency. The \$3 million limit is called the aggregate and is the limit available to pay for all claims against the agency in the policy year. The limits start fresh each year. Agencies must realize that they typically have one time of the year to make the decision on what limit to buy – either at the onset of the coverage or at the annual anniversary. Most carriers will not allow mid-term increases of policy limits.

### **16. How do I determine what limit I should buy?**

This is an important decision you need to make at the onset of coverage or at the anniversary of your policy. There is no specific formula to follow, but there are areas to consider. When evaluating your potential for a big claim, look at the type of accounts you write and your mix of business. While heavy Personal Lines typically have smaller claims, there is certainly the possibility of a big claim in this area. Commercial Lines presents a wide variety of exposures and large E&O claims can result. Most agencies are increasing their limits in light of some significant claims awards. Don't hesitate to ask your Underwriter for pricing at various limit options.

### **17. Are the defense costs “in addition” to the limit of liability?**

In most, but not all, E&O policies, the defense costs are unlimited and are in addition to the limit of liability. As a result, the limit available for any judgment against the agency is not impaired by the defense costs.

### **18. Who in the agency causes claims?**

Virtually any person in the agency has the potential to cause an E&O claim.

### **19. What could a Claims staff member do that could generate an E&O claim?**

There are a number of areas where a Claims staff member could commit an error or omission. There are a number of E&O claims where the agency Claims staff exercised judgment on whether the insured's claim was covered and, in some cases, they made the decision not to send the claim into the insurance company. If it was later determined that there might be coverage, there is the strong possibility that the insurance company could deny the claim due to the late reporting. Another potential scenario that could result in an E&O claim is poor handling of that claim and a delay in securing the necessary documentation.

### **20. What could a receptionist do that could generate an E&O claim?**

Based on the responsibilities of the receptionist in various agencies, there is potential for an E&O claim to result. The agency should have a procedure that does not allow the receptionist to accept funds without getting the CSR/Account Executive involved. If the receptionist were to accept funds on a policy that was previously cancelled, the client could be led to believe that they have coverage. In addition, the detail and timeliness of providing solid telephone messages is important. If the receptionist handles certificates of insurance (COIs), they must follow the necessary procedures, including ensuring that the proper party executes the certificate.

### **21. A speaker at an E&O conference referenced the term “special relationship.” What does this mean?**

If a special circumstance is present in the agency relationship, the insurance agent may possibly be under a heightened duty to take some sort of action rather than just follow the instructions of the client. Although there is not a significant degree of court precedent in this area, it is generally acknowledged that a “special relationship” could be created:

- via intimate knowledge of a client's personal and business endeavors.
- where a client has multiple businesses, and the agency writes all of the exposures.
- where a social relationship exists – frequent interaction.
- where the agent receives compensation for consultation beyond the premium payments.
- if the insured relies on the expertise of the agent regarding a raised question of coverage or there is an extended course of dealing sufficient to put objectively reasonable agents on notice that their advice was being specially relied upon.

### **22. On what basis will the Utica National companies defend me if I am faced with a claim?**

Each claim is very fact-sensitive. Some of the areas that the Utica National companies might use are:

- Plaintiff failed to read their policy.
- Plaintiff failed to give accurate information to the agent.
- Plaintiff misrepresented certain facts.
- Plaintiff signed policy application containing incorrect information.

**23. Our agency just got hit with a claim. What should I do with the file?**

Your E&O carrier will provide advice and guidance on what to do with the file. Typically, it is acceptable for an agency to organize the file, but be certain not to add, delete, or alter any items in it.

**24. When should I report a potential problem to my E&O carrier?**

Your agency should contact the E&O carrier when there is a possibility a problem could develop into an E&O claim. Most E&O policies have a provision allowing coverage to apply if the reported "incident" turns into a claim. Contact the carrier to be safe in protecting your agency. A good E&O carrier will guide you further.

**25. We just reported a claim to Utica National. What happens now?**

Within a short time period (typically the same day), a Utica National Claims professional – or possibly legal counsel they have retained – will contact you to advise you further and let you know what happens next.

**26. Do I have to get my own attorney?**

In the vast majority of the claims, the carrier will provide you with legal counsel to act on your behalf. This counsel will primarily be the entity the agency interacts with on the claim. If the demand from the plaintiff is more than the E&O policy limits, the carrier may advise the agency to get its own legal counsel to represent them in this area.

**27. Is carrier insolvency covered by my E&O? If so, are all of my insurance companies covered?**

This is not as easy question to answer and may depend upon the carrier you are with and the form they have provided. Read the policy carefully. Contact your Underwriter if you have questions.

Some E&O carriers provide insolvency coverage for insurance companies with a minimum AM Best rating of "B" or higher; some go with "B+" or higher. In addition, insolvency for RRGs, RPGs, HMOs, PPOs, and trusts are typically not covered. If you are placing business with any of these insurance entities, contact the Underwriter to see if the exclusion can be bought back.

**28. Am I responsible if one of my insurance companies is declared insolvent?**

There is the possibility that you could be held responsible for placing your client with a company that is not able to fully handle its obligations. Best practices state that an agent should periodically monitor the financial condition of the insurance companies with which they place business.

**29. I am thinking of buying an agency. What should I do to make sure that my E&O is in order?**

To begin, contact your E&O carrier to be certain how they handle this issue. As the buyer (of the assets, not the liabilities), look to endorse your policy effective on the date of the sale for any errors committed from that date forward. There may be an additional premium for the exposure – the Utica National companies, which rate based on staff, do not charge any additional premium until the account renews. While some carriers offer some automatic short-term coverage, make sure your E&O reflects this new exposure.

**30. I am thinking of selling my agency. What should I do?**

Contact your E&O carrier to better understand the best way to handle this. When you sell your agency, you will probably still be responsible for liabilities moving forward. In addition, since there is the possibility of claims being made against your agency for errors committed prior to the sale, protect your agency through the purchase of an Extended Reporting Period, also called a "tail." This "tail," with options ranging from 1-10 years, extends the time you have protection for claims made against the agency. Act promptly as there is a limited timeframe to purchase this coverage. There is a premium associated with this – see your policy for more details – so be sure to budget for this premium.

**31. Can I simply give my E&O policy to the agency that is buying my agency?**

With few exceptions, the E&O policy is not assignable and, as a result, cannot be transferred to the buyer. If the owner of the agency is selling to a long-time employee or to a sibling, the carrier may agree to the assignment, but this assignment is not official unless it is approved by the carrier.

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