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Are Brokers in for a Tsunami of Pandemic- Related E&O Claims in 2021?

SPECIAL
REPORT



In November 2020, attendees of the [Professional Liability Underwriting Society's](#) first-ever virtual conference warned insurance brokers they should expect agency errors and omissions (E&O) claims to substantially increase in size and frequency in 2021. In this special market report, we'll look at how COVID-19 has been the catalyst for propelling the uptick in E&O claims activity and severity, what it means in an already hard insurance market, the impact on brokers, and what they can expect over the next few months.

PAST CATASTROPHIC TRENDS: E&O CLAIMS A LAGGING INDICATOR OF WHAT IS TO COME

When we look at claim trends, there is generally a 12-24 month lag time from when the exposure occurred to when E&O claims are filed. In fact, as history has demonstrated, it's not uncommon for the industry to experience a surge in E&O allegations against brokers several months or even a year or more after a catastrophic event. The reason? Once a major crisis has passed and people's lives begin to normalize, high volumes of claims typically enter the final stages of processing. At that time, insureds are more likely to contact their broker with tough questions, such as what their policies will and won't cover and addressing specifics regarding claim settlements and denials – all of which can trigger E&O allegations.

COVID-19 RELATED E&O CLAIMS

We recently passed the first-year anniversary of the onset of COVID-19 in the U.S. As recovery efforts slowly get underway, and based on lagging indicators from past crisis events, experts predict the bulk of initial first-party claims will begin to funnel through the claims process over the next several months. As final settlement determinations

are made, carriers are anticipating a swarm of new E&O claims – perhaps even more than have occurred in the past. Why? Mainly because unlike notable crisis events such as hurricanes Katrina or Sandy, the pandemic wasn't limited to a single geographical location. This, coupled with emerging pandemic-related coverage and claims scenarios that the industry doesn't typically experience, has prompted multiple allegations from policyholders against their brokers and, in some cases, from brokers against their agents.

According to [MyNewMarkets](#), allegations against agents for E&O claims commonly include a failure to procure (or a misrepresentation of) coverage, not processing claims in a timely manner, and a failure to properly identify exposures and recommend appropriate coverages. For carriers that underwrite high volumes of E&O insurance, COVID-19-related E&O claims are likely to be attributed to brokers allegedly failing to advise insureds as to what their current policy won't cover as well as not recommending coverage that policyholders should have been advised to purchase. Currently, the main COVID-19 E&O issue is primarily property-driven, with a focus on business interruption-related litigation claims against brokers, along with other operational coverage concerns.

As of March, businesses in the U.S. have filed nearly 1,500 COVID-19-related lawsuits challenging insurers that denied business interruption and other property damage claims, according to the [UPenn Litigation Tracker](#).



AN EVEN HARDER HARD MARKET

For the insurance industry, hard market conditions have been a catalyst for carriers to raise premiums, avoid certain risks, reduce coverage limits and increase exclusions. Historically, these conditions have also increased claims litigation and denials, leading to a higher number of E&O claims against brokers. Today's combination of hard market conditions and COVID-19 is creating even more challenges as pandemic-related exclusions, limits and supplemental applications are being added to nearly every line of business – including E&O insurance. These factors have put brokers in a situation where they'll need to communicate new policy changes to clients who are already frustrated by COVID-19 restrictions, and this also can increase the likelihood of a professional liability claim.

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WHAT TO EXPECT OVER THE COMING MONTHS

- ✔ Insurers will begin to adjust and define policy language in most product lines, making it crystal clear that pandemics are not considered a covered loss, i.e., adding restrictive exclusions for claims related to communicable diseases such as COVID-19.
- ✔ Supplemental applications on products that were not required before the pandemic will likely accompany most policies as insurers determine COVID-19-related exposures.
- ✔ Business interruption claims involving exclusions for loss of business due to virus or bacteria will continue to create legal challenges.
- ✔ Brokers who assume the duty of reporting claims and potential claims on behalf of clients versus the client directly reporting a claim to the carrier will continue to expose themselves to additional liabilities.
- ✔ Clients will continue to look to their broker for answers as to whether they have a potentially covered COVID-19-related loss.
- ✔ Claims that are denied by carriers will continue to give rise to E&O claims alleging that the broker failed to procure the appropriate coverage.
- ✔ States will require brokerage firms to file all claims and potential claims – regardless of whether a broker feels there is or isn't coverage for a loss.
- ✔ Hard market conditions will likely exacerbate challenges for businesses already facing financial issues and may lead to policy lapses or cancellations.

- ✔ Soft market enhancements will be removed, such as:
 - » Aggregate Deductible Caps
 - » Defense Outside the Limits
 - » First Dollar Defense
- ✔ Insolvency exclusions will be added, related to placements specific to each agency (i.e. non-rated carriers, state backed funds, and carriers below A.M. Best B+ ratings). Soft market conditions for the last 10 years have relaxed the implementation of these exclusions, and in some cases, these exclusions have been completely removed.
- ✔ Carriers will be cutting limit capacity, further increasing premiums and making it difficult to maintain existing coverage limits.
- ✔ Premiums will increase drastically, while coverage terms & conditions are further restricted.

CONCLUSION

The Agents & Brokers E&O snowball is rolling downhill and may get even bigger over the next several months as limits, terms and conditions of Agency E&O policies are put to the test. While it can't be stopped, brokers who understand what may lie ahead will be in a better position to address some of the tougher concerns of their clients, including whether no coverage exists or coverage is insufficient. The bottom line is that it's impossible to avoid all E&O issues. However, a risk management plan that includes a comprehensive E&O insurance coverage program that is placed by a Broker specializing in the space helps minimize the financial impact of a lawsuit alleging an Error and/or Omission by Agents & Brokers.

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