

Agency E&O: To Win a Lawsuit or Prevent One?



By Frederick J. Fisher

Insurance agents and brokers have long been targets of error and omission lawsuits. It's also true that most of them have sought advice of counsel as to how to win a lawsuit. They will often be told that the duty of an insurance agent or broker is to simply be an order taker: they should utilize their best due diligence to obtain the coverage requested. To avoid enhanced standards of care, they probably will also be told not to offer advice, nor provide risk management advisory services or analysis, nor make representations or promises they can't keep. The standard of care in most states is that agents and brokers are not obliged to make recommendations or provide advice.

While this is true, is this really the best course of action? Will it allow you to win or prevent a lawsuit? Is this advice from counsel even practical?

The fact is, if all you did was obtain the coverage requested, and offered no advice or counsel, chances are that a claim

against your client that might otherwise have been covered is going to be denied. Thus, there is a high probability of being sued anyway.

Most insurance agents or brokers know more about insurance than the average consumer. So how can the consumer ask you to obtain the appropriate coverage? How could they even understand or read an insurance policy to determine whether that which has been provided or been quoted will meet their expectations? Many attorneys can't understand insurance policies!

Insurance is far more complex than it was when I started my career in 1975. Most policies were written on an occurrence basis and, more often than not, they were written using ISO standardized forms, which everybody knew and had studied in order to even obtain a license.

Those days are long gone! Many "new" coverages are now necessities that previously didn't exist. In addition, today, many policies are written on a "claims made" basis, as opposed to an occurrence basis, adding to the complexity.

Such complex coverage triggers include claims made forms, or claims made and reported forms, some with prior act limitations, prior pending and continuity limitations and reporting requirements.



So how do you avoid litigation and still provide your clients with what they need? That's the dilemma facing the insurance agent or broker who could win a lawsuit by giving no advice but can avoid a lawsuit by doing so.

How many times have we heard from an aggrieved policyholder that his agent "promised him the best coverage" or the most "complete coverage" available? How often have we heard customers say that they wanted to be covered for "everything" and weren't?

Then how should you deal with such situations especially when a client says, "I want to be covered for all my exposures and I want the best policy possible?" That needs to be addressed and answered.

Most lawsuits against insurance agents and brokers arise from inadequate training, lack of uniform policies and procedures, lack of consistency, time constraints, and a failure to communicate. It boils down to providing reasonable finan-

cial security and explaining the coverages and exclusions to your customer. Providing financial security is key. You can only do that by really delving into the insured's needs and explaining how you can or can't satisfy them.

If you do everything possible to avoid what can go wrong, you won't be sued. This includes delinquency on premium payments, making sure all contingencies are obtained prior to binding, or even asking the pertinent questions when you hear the usual, "It's simply a name change nothing else has changed." Businesses don't change names; they change structure. Failure to delve into that could give rise to insuring an entity that no longer exists while not insuring the one that does.

When we don't give advice, we may win a lawsuit. But what's better, fighting it out, or not having a lawsuit at all? **■**

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