

E&O Insurance

Covering Real Estate Agents in Professional Matters

By Ken Reko

✓ Lunch with accountant

✓ Write commission checks

✓ Review my errors and omissions insurance

If you're like most real estate brokers and agents, reviewing your errors and omissions insurance isn't first on your list of things to do today. It may not be on your list at all. However, your E&O insurance is something you carry with you every day. It's almost like a silent business partner. This partner, instead of being an investor in your business, can be there to defend you if someone files a professional liability claim against you. Professional liability claims could include allegations of misrepresentation concerning the zoning of the property or failure to properly market the property.

When you stop to think about it, your E&O insurance can be essential to the success of your real estate business. Yet many agents and brokers sometimes consider the pur-

chase of a new car, a new computer system or mobile phone service more important than their E&O insurance.

Real estate E&O insurance coverage is as different as the number of insurance carriers that provide the coverage. There is no standard policy in the marketplace or any minimum level of coverage that every company must offer. Each company devises its own coverage form and decides what options will be made available. With the help of your insurance agent, you should review your current E&O coverage, paying particular attention to key coverage features, such as the following.

Is the policy written in plain English, or is it written in a traditional insurance contract style?

Plain English is generally easier to read and understand, which allows you to better comprehend what is and is not covered.

Is coverage provided on a defense within limits or defense outside limits basis? The payment of defense expenses erodes the limits of coverage in defense within limits policies, which means less of the policy limit is available to pay damage amounts.

Does the deductible apply to defense expenses? If the deductible applies to defense expenses, you'll be responsible for the deductible amount whenever the insurer incurs any defense expenses, even if no damages are ever paid. Deductibles that apply to damages only are often referred to as "first-dollar defense" deductibles, meaning you incur no deductible for claims that result in defense expenses only.

Does your policy automatically protect your employees, former employees and independent contractors? If not, make sure these persons are named in the policy in order for coverage to apply.

Does your policy allow you to purchase an extended reporting period, sometimes called tail coverage? Most policies allow for some form of extended reporting period coverage to be purchased. However, the length of time available varies. Because the extended reporting period allows you to report claims after your policy ends, policies that allow you the option to purchase a reporting period

for an unlimited time period are the most favorable.

Does your policy contain any sub-limits? Sub-limits are reduced limits of coverage that apply to specific claims. Make sure you are aware of any such limits and how they affect your coverage.

What exclusions are contained in your policy?

Exclusions take coverage away, and understanding what is not covered is just as important as understanding what is covered.

Also, you should carefully consider the insurance company that stands behind your E&O insurance policy. It's important to differentiate between the insurance agent who represents the company and the insurance company itself. Your insurance agent plays an important role in helping to advise you about product features, helping you determine your insurance needs and helping you purchase proper coverage. However, it's the people and financial assets of the insurance company standing behind your E&O insurance policy that you need to be able to count on to be there to defend you when and if a need arises.

There are several things you should take into consideration when determining from which insurance company you should purchase your E&O coverage.

Is the company financially sound? While financial stability isn't always easy to determine, there is a good reason for you to ask the question. Weiss Ratings reported that during 2002, 25 property and casualty insurance companies failed. That's an average failure rate of nearly one company every other week.

If the insurance company isn't financially viable, other carriers may not be willing to provide you with prior-acts coverage (coverage for wrongful acts committed before your new policy is effective) at the time you change carriers. That can be a problem. You may be left with buying replacement coverage that doesn't cover your prior acts or buying a reporting endorsement from a carrier that's insolvent.

Moreover, an insurer whose primary role is to defend and pay covered claims won't be of much help if they don't have the financial ability to back up their promise to pay.

Does the insurance carrier have experience handling E&O claims for real estate agents and brokers? During the past few years, a number of insurance companies have quickly jumped into, and out of, the real estate E&O business. Look for a carrier that has demonstrated a commitment to the market for the long term.

After all, E&O claims are handled differently from property claims or bodily injury claims. If you are sued, or if someone makes a demand that you pay damages, such

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claims generally include allegations of professional negligence, and that can often be viewed as an assault on your professional reputation—a valuable business asset.

In the event of a claim, you need an insurer that has the expertise and experience to step in and guide the claim negotiation and settlement process to the most successful conclusion.

Yet another consideration is whether your E&O policy is underwritten by an “admitted” or a “surplus lines” insurance company. Simply stated, an admitted insurance company is one that is licensed to do business in your state, and the E&O product sold by such a company is subject to the regulatory requirements of your state insurance department. For example, the rates, policy forms and all provisions of the policy must comply with your state's insurance regulations, and you may be eligible for a specified limit of coverage in the state guarantee fund should the company become insolvent.

On the other hand, a surplus lines insurance company issues products that are typically not subject to a review by the state's insurance department and may contain limitations that are not permitted in admitted insurance. Also, surplus lines insurance is generally not included for protection in state guarantee funds, so in the event your insurer becomes insolvent, your state guarantee fund won't be able to help you out.

Errors and omissions coverage is an important coverage for real estate agents to have as part of their insurance portfolio. Brokers and agents should carefully consider the features of their E&O coverage and the financial stability and claims-paying ability of the insurance carrier providing the coverage. Perhaps it's time to make this item a priority on your “to do” list. ■



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