

Avoiding Coverage Traps with Your Errors & Omissions Insurance

Most businesses want to highlight their attributes and benefits, and insurance companies are no different. As consumers, we all look for the best features and value as we choose our purchase selections, whether that be a new car, groceries or insurance. The adage the “one size doesn’t fit all” remains true. We wouldn’t buy a sports car to go off-roading, wouldn’t look for hamburger in the produce section and shouldn’t expect any insurance policy to fit every circumstance. Instead, we assess our needs, learn how a product works and buy accordingly.

Using this analogy in the context of an errors & omissions policy can be instructive. While most E&O policies offer broad coverage, let us look at some examples where coverage could be denied or may not exist. The first relates to the policy as a “Claims Made” policy. This basically means that a policy must be in force at the time the claim is made. All such policies further contain specific language about *when* a claim must be reported. A “Claims Made” policy might more specifically be a “Claims Made *and* Reported” policy. A claim made by an insured outside of the reporting period may be denied and here is an example. A “Claims Made and Reported” policy might require that a notice of claim be reported to the insurer in the same policy year that the insured received notice of the claim. Seems simple enough but suppose the insured received notice of a potential claim, let us say an alleged non-disclosure on a property defect. The broker/agent then tries to remedy the situation on his/her own by paying for repairs. After a period of time, the new homeowner remains unsatisfied and engages a lawyer to sue the broker. The insured broker reports it to the insurance carrier, but the claim is denied as the notice of *potential* claim was received by the broker in the 2015-2016 policy year, but was not reported until the 2016-2017 policy year, (after the period of time the broker tried to remedy on her own) in conflict with the required “Reporting” policy language. The takeaway is to learn what your insurer requires as to how and when to report a potential or actual claim. Brokers should help their agents understand that if the agent receives a threat of or actual legal notice, to report it to the managing broker immediately for a timely response to the insurer.

Coverage can also be called into question on the provision and definition of professional services. Each E&O policy specifically lists what professional services are covered or not. At times, an “Endorsement” can be added to the policy to add in coverage initially excluded. Common traps involve the brokerage providing professional services not covered, frequently property management and escrow services. While many policies cover these services, not all do. If a firm provides property management services (and it may be important to get the insurer’s definition of property management versus rental/leasing services) but property management is not listed as a covered professional service, then a claim would most likely be denied. The takeaway here is to review the E&O policy as to the definition of professional services and if your firm provides a service not listed, either see if coverage can be endorsed on, get a new policy that covers what service is being provided or stop providing the service.

A third example relates to the growing threat of cybercrime. Errors & Omissions policies were not developed to contemplate this threat. Insurers are scrambling to add (minimal) coverage to E&O policies, add restrictive language excluding most cybercrime from E&O coverage, and/or develop more appropriate and comprehensive policies specifically designed to insure against the many forms of cybercrime. Real estate firms should put into place the technology and training to minimize the risk of cybercrime, recognizing that it is between the “chair and the desk” (i.e. the person sitting there) that is

most responsible for opening the door to computer crime. The third takeaway of this article is to understand that computer crime receives little to no attention in an E&O policy, and brokerages should assess their risk and consider appropriate protective steps, including cybercrime insurance.

An E&O policy, like all insurance policies, is full of definitions and conditions. Becoming familiar with these and assessing how they match to your business operations can be critical when something goes wrong. You want to make sure the coverage is there when you need it the most.