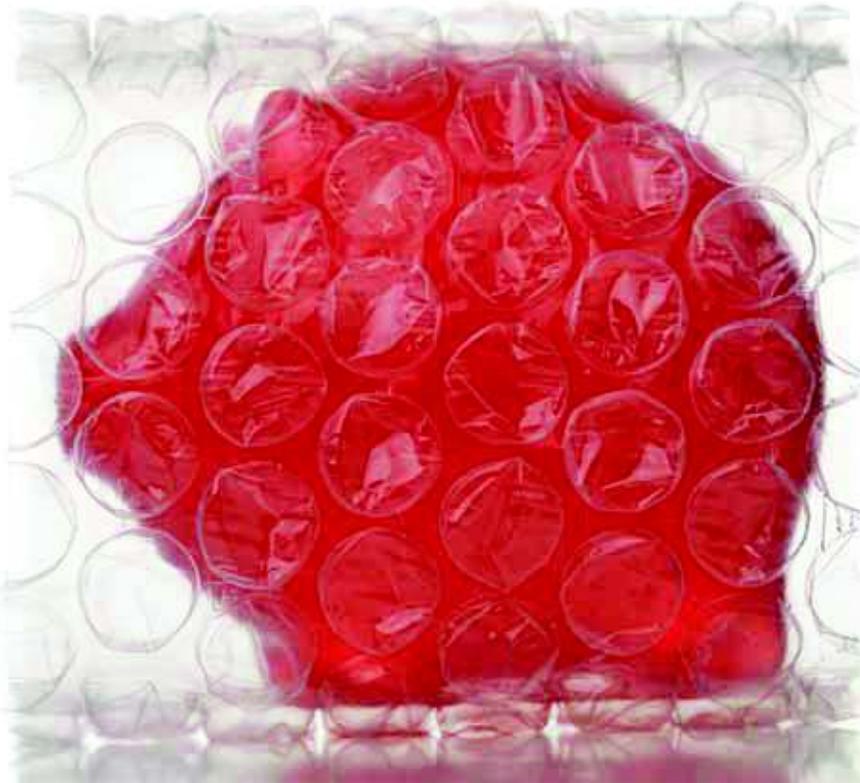


Support Your Errors and Omissions Policy with a Proactive Plan

Submitted Anonymously



This is the third E&O article presented over the past year in *Exclusivefocus* magazine. As the Allstate agent progresses into new and uncharted waters regarding the company's evolving stance on E&O claims, I suggest agents take a more proactive approach in order to remain informed on this subject.

To begin with, every agent should set up either a hardcopy or electronic E&O file. Next, review and save each E&O article that has appeared in this publication as well as any other articles or court case documentation you come across. Be-

cause your financial future may depend upon your active awareness of this issue, it is important to stay current and review your file from time to time. As we will see, there may be no excuse for "I didn't know that."

If you are new to Allstate or new to the Allstate E&O "game," in that you haven't had one yet, then it is very important that you understand how things have worked for others. Forewarned is forearmed, after all.

Why do we buy E&O coverage?

Outside of the fact that Allstate man-

dates we purchase the coverage, why should we even care? After all, as professionals, most of us run a clean shop.

In a nutshell, the E&O policy is purchased by the agent primarily as a defense from suits brought by clients for something the customer alleges the agent did or didn't do, such as deleting the wrong vehicle or failing to add a requested coverage. It is also there in case an agent or staff person provides incorrect or inadequate advice to the client that is deemed harmful, such as advising the client he only needs \$100,000 in life insurance instead of \$250,000.

More than one E&O claim was filed after Hurricane Katrina, primarily because many clients were under the impression their homeowners insurance included coverage for flood. Even though every competent agent knows flood coverage is separate from homeowners insurance, it could be the client's "understanding" that counts in a court of law. But, perhaps more frequent than a misunderstood explanation of coverage is when an agent does not know the insurance policy's limitations, and states there is coverage for a peril, when there is none.

Once a claim has occurred, an expedited process of coverage verification will determine if the claim meets the parameters of the policy form. If the loss occurs from a covered peril, then the claim is paid. If the loss is deemed to originate from a peril that is not covered under the policy form purchased, the claim is denied.

It is an altogether different process that revolves around a complaint from an insured who believes they were incorrectly insured or "underinsured." If the insurer feels that the agent did some-

thing it deems was wrong (prejudices the insurer), it can, and usually does, deny the loss. Since the agent did something – allegedly at this point – unacceptable to the insurer, then the insurer must deny the loss because it believes the agent was wrong in doing (Error) or not doing (Omission) whatever it was. Thus, since the insurer has taken the stand that there was no coverage at the time of loss, the denial of coverage is appropriate. It may or may not prove to be a legally valid stance, but the initial denial of coverage substantiates the insurer's position.

Typically, when an E&O claim is presented, the insurance customer will sue both the agent and the insurance company, thereby covering “both bases.” Most E&O policies include language that stipulates that the agent should not admit liability. Often, there are further restrictions about coercing the customer into making an E&O claim; perhaps, for instance, suggesting to the customer that the E&O policy will cover the agent's alleged mistake. These restrictions are typical and ensure that the agent is acting in the best interests of the E&O company.

Although not a party to the agent's E&O policy, the insurance company that sold the policy to the customer via the agent will also refrain from any form of contact with the agent's customer. This is to ensure that they do not prejudice their own position should the customer decide to bring suit against them as well. They simply deny the claim and then typically remain silent unless or until a suit surfaces.

Insurance companies can choose to settle claims to mitigate future payouts

Typically, if an insurer pays a claim, they are saying there was coverage under the contract at the time of loss. On occasion, there may be reasons for an insurance company to pay a claim when there was no apparent coverage for the loss. More than one high-profile wrongful death claim has been settled by an insurance company before a criminal trial is allowed to exonerate their insured client, the defendant.

When such payouts occur, I believe it muddies the water, and greatly weakens

the insurer's position that the agent committed an error that was detrimental to the insurer. The insurer has the ability to mitigate its losses – or even eliminate them – by denying the insured's claim. Alternately, because the company has the ability to choose a payout process based on factors other than whether or not coverage was afforded under the policy, it is my belief that the assumption of error shifts to the company should they decide to pay the claim. In other words, once the company decides to pay, they are confirming coverage under the policy, and in doing so, they are placing the agent on their side.

In the case of a denied claim for coverage, the agent and insurer must wait to see if the insured is going to sue after the denial. The insured, of course, may choose not to sue. Perhaps the alleged wrongdoing wasn't a wrongdoing after all, and the insured, when faced with the daunting prospect of a trial, decides not to pursue the matter.

Allstate pays... then makes a claim against your E&O

It seems Allstate, on the other hand, has changed the dynamics for traditional E&O losses. With increasing frequency, they take it upon themselves to pay the insured's claim and then seek redress from the agent's E&O policy. In cases like this, it seems to me Allstate is saying that there is coverage by the fact that they paid the claim. Then, acting as the injured party, Allstate files a claim directly with the E&O carrier, sometimes without adequately informing the agent. This leads me to wonder if an agent, or an Allstate shareholder, can simply call up the insurer(s) of Allstate Director's and Officer's Policy and file a claim because they thought one of the corporate officers had caused them financial injury.

So, in my opinion, there is a highly unusual dynamic at work in these Allstate E&O situations.

Then there is the additional fact that in the course of its claim investigation, Allstate has perhaps asked questions of agency staff, sometimes without the agency principal's prior knowledge. Staff who respond to the questioning may not be experienced enough to answer de-

tailed and leading questions asked by experienced adjusters. In trying to be helpful, they may answer questions based on assumptions that are not factually correct, or they may misunderstand exactly what, in fact, occurred.

In spite of the fact that the claims conversation was recorded, it is possible that you or your staff person were not advised that there was a potential for an E&O claim to be advanced by Allstate. Since the E&O policy has a clause/condition that instructs the insured (agent) not to admit liability, it becomes a slippery slope when Allstate has a recorded statement with one of your staff admitting to a mistake. Thus, Allstate can put you, the agent, in a precarious position with respect to coverage under your E&O policy.

Please carefully review your E&O policy. Save it or print a copy. It may change from year to year, so you will want to stay abreast of any changes to the policy wording. You should also understand the extent of the coverage, the type of operations covered, and, of course, the conditions, exclusions, duties, definitions and everything else about the policy.

Know the rules or else

I also suggest you save and/or print an “example copy” of every policy jacket that you currently sell, or have sold at Allstate. You should also print and/or save a copy of all underwriting manuals, rules (known as RMPs in at least some states), underwriting directives, and any revisions to them. If you find yourself facing an E&O, these documents could prove invaluable, especially since you do not know if prior versions will be available on the Allstate Gateway when needed. And remember, if you leave Allstate, you will likely no longer have access to Gateway.

Another important point is that Allstate may not always advise you directly of changes to the “rules.” Frequently reviewing the rules is important, because if the rule appears on Gateway, you are expected to know it. The copious information available on Gateway – no matter how cumbersome or difficult for you to monitor – is apparently not a defense when it comes to an E&O loss.

In addition, when rules are revised, the

old rule or rules that are affected may no longer be available to you. Not being able to determine what the rule was at the time the event occurred may impair your ability to defend your agency's actions.

Studying the rules ahead of time may also reveal issues that you should clarify with the underwriting department. I suggest sending an e-mail asking for clarification and keeping a hard copy in the appropriate file. In case you do not receive a timely response, be sure to follow up and document your efforts. At some point, if responses are not forthcoming, you may want to send an e-mail stating your interpretation of the rule, adding that if you do not receive a response to the contrary within 10 days, this will be your understanding.

From various discussions, it is my understanding Allstate will use everything in its quiver to establish that you did not follow a rule in order to try to show you are liable.

Here are a couple of examples of words in the rules that may require clarification by Allstate:

- You may see the word “must,” the meaning of which is pretty clear. But if the rule says “should” does it mean that the agent “must” or does it mean it is optional? In one state's Auto RMP it says, “Applicants **should** be asked to supply their social security number.” So then, are we to believe social security numbers are optional?

- Another says “credit reports must be ordered on no more than one named insured, whether licensed or not, and that named insured's spouse, if any, if licensed.” So what if the named insured as listed in the policy declarations is husband and wife?

- “Complete Address.” Actually to be clear in this RMP, it should say “Complete and current residence address.”

In an E&O claim situation, Allstate will likely insist that you should have understood these poorly written, imprecise instructions **exactly as they intended**. Also, make sure you know if the rules apply to just “New Business” or to endorsements as well. Make sure your staff is aware of potential E&O situations, and that they

have the same access as you to this information. You may want to prepare a form letter to send to your clients from time to time regarding some of the more common rules violations, such as ineligible vehicles or the need to inform you about changes to the occupancy of their home.

Last spring, *Exclusivefocus* published an E&O article which suggested that Allstate does not have the technology to ensure the rules are followed on endorsements. When processing an endorsement, you might think, “Oh well, if Allstate doesn't want it, it'll get rejected, but if it goes through the system, then it's their problem.” This is wrong-headed thinking because you cannot count on receiving a “rejection,” and it will not likely stop Allstate from holding you accountable.

What is frightening is that some of the RMPs and other rules, may fly in the face of state law. Some may even fly in the face of the insurance contract. Thus, by following the rule, you are violating the policy contract and by following the policy contract, you are violating the rule. When writing rules/manuals and other supporting documents relating to transacting insurance, it is my opinion that they should conform to the law, as well as conform to the contract of insurance, which is not always the case.

I understand that information contained on Gateway is fair game in trying to prove the agent is negligent. I have it on fairly good authority that while Gateway is too cumbersome and time-consuming to be able to find needed information in a timely manner, it is not a defense in an E&O situation. Not having time to attend “that training webinar” is also not an excuse. So, not only are you apparently expected to know it all, you must also keep up with the copious revisions as well, regardless whether you were specifically advised that a revision had been made or not.

Know your customers, or else

In one or more states last year, a rule was changed with respect to pizza and postal delivery vehicles. Whereas using a vehicle part-time for delivery previously had been allowed, it is now “an ineligible vehicle” for new business and endorse-

ments. It is highly likely that even if most agents remembered to ask about pizza delivery at the time of an application, virtually none will remember to ask again once a policy has been issued. So, some young person's decision to deliver pizza after school to help pay for the car, gas, and insurance, may suddenly be a potential E&O if you somehow failed to determine this change in usage.

According to Allstate's latest position, even if the change in usage occurred a couple of months after the policy was issued, and assuming the insured never thought to advise you, Allstate may pay the claim and then submit a claim to your E&O carrier. It is highly likely that after a review of the policy jacket in effect at the time of the sale, you will determine that the wording does not exclude “pizza, postal, retail or wholesale delivery.” The policy might also say that should the policy be in force for more than 60 days or some other stated period of time, there are only certain conditions for which the insurer can cancel it. One of those is a “material or substantial change of risk.” Does part-time pizza delivery constitute a “material or substantial change of risk”? I have my opinion, what is yours?

Oh, and by the way, in at least one state, the ineligible vehicle list includes: “Self-employed using a utility vehicle in business – includes: trucks, pick-ups, vans ...” What's a utility vehicle? The RMP also lists “Gray market vehicles” as ineligible. What are they?

When rules and customer actions collide

And what if you suspend coverage on a vehicle per the instructions outlined by Allstate, and that suspension violates the state motor vehicle law? Further, what if the client drives the vehicle, despite having suspended the coverage, and is in a very serious accident? If the uninsured client is at fault and there are lots of serious injuries, a smart lawyer will not take the insurance company's position that “coverage was suspended” as reason for declination of coverage without a hard look. So, when the lawyer finds the circumstances under which you suspended coverage are not permissible by state law, it will quickly become appar-

ent that you have violated the law, and have no defense. Once an E&O claim is in progress, you can bring Allstate into the action, but they may not appreciate it. If you succeed in putting the blame on Allstate because you were following their rules, you may not be an Allstate agent for very long.

Now, what if the RMP says that a house insured by a homeowner's policy has to be occupied within 30 days of the policy effective date and it is not? Let me ask the following questions:

- How would an agent know it hasn't been occupied?
- Since agents present the homeowner's policy to the bank in advance of closing, how does the agent know at closing, or just prior to closing, that the new purchaser hasn't agreed to allow the seller to stay in the premises for 90 days post-closing?
- Would a bank accept a Landlord's policy until the seller moved out?
- The homeowner's policy doesn't seem to exclude this directly; however, the basic underwriting premise of a homeowner policy is that it is a single-family, owner-occupied dwelling.

In my opinion, it is imperative for the people writing the rules and manuals also know the applicable state laws. Unfortunately, this may not always be the case. When writing the manuals and the rules, I believe they should take great pains to be as clear as possible so that there is no contradiction between the policy contract and the law. Allstate may not be alone in this conundrum, as other companies likely face similar disparities between the intent of the policy language and state regulations.

Know the laws in your state, know the policy jackets for the policies you are selling, and know the up-to-date RMPs and manual rules. If you think something is unclear, get your underwriting department to clarify it in writing and keep copies in your clients' files and in your general underwriting file.

I have seen serious issues raised in *Exclusivefocus* magazine. I have seen very serious topics raised for discussion on ABB. But to date, I have not seen a lot

of agents get too incensed about some of these issues. You should. Your livelihood is at stake. You must also realize that our society, including the laws that affect us, will evolve. And as technology advances, it will be increasingly easier for clients and their lawyers to document their claims against you. Before too long, you will no longer be able to count on that decades-old excuse that the client "should have read their policy" in order to escape reporting a potential E&O claim. Start now to explain the limits and benefits of the coverage being sold in your agency. Document your actions via computerized client records as well as hardcopy signatures from clients on coverage summaries or endorsements.

You have a fiduciary duty and an ethical duty to make your clients aware of "material matters" contained in their policies and to make sure they are properly covered. Equally important is the obligation you have to yourself to protect your livelihood from unwarranted E&O claims.

If Allstate changes a rule to exclude postal or pizza delivery, you must find a way to advise your clients that it is no longer permissible. Email blasts, Tweets, Facebook, or regular mail may all be useful ways to communicate to your clients. Decide which methods work best for you.

Most of all, do not sit back and let a claim go through without carefully checking the matter out. The old "go along to get along" just cannot apply to E&O claims. The premiums for our E&O coverage are jumping in leaps and bounds. It will continue. As insurers realize that the training at Allstate is not nearly thorough enough, that the Alliance and Connexus systems may actually create E&O problems, and that the rules, manuals and quantity of information provided by Allstate is way too cumbersome, then finding an affordable E&O carrier may soon become impossible, unless we accept even larger deductibles and more draconian terms. Do you really want this to happen? **Ef**

DID YOU KNOW?

Since NAPAA/OPEIU began offering partial E&O deductible reimbursements, we have paid 15 claims.

