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**10/21/2022**

**How to Fix a Broker (Broken) Relationship - Potential E&O Claims,  
Recent Trends, and How to Protect Your Business**

**8:15 AM - 11:15 AM**

**A. Bernard Guekguezian, Daniel Wu**

**CEUs: 3**

Massachusetts Association  
of Insurance Agents



# HOW TO FIX A BROKER (BROKEN) RELATIONSHIP – POTENTIAL E&O CLAIMS, RECENT TRENDS, AND HOW TO PROTECT YOUR BUSINESS

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# ANATOMY OF THE CLAIM



# WHAT DOES THE PROCESS LOOK LIKE?

## Complaint and Answer

- Complaint
- Notifying Carrier
- Initial Meeting
- Production of file to Attorneys
- Answer

## Discovery

- Interrogatories
- Requests for Production of Documents
- Depositions

## Trial

- ~2 weeks
- Constant Evaluation Based on Evidence
- Verdict

# SAMPLE DISCOVERY QUESTIONS

## INTERROGATORY NO. 7

Please detail Defendant's relationship with [REDACTED] and/or any related entities, including the duration of such relationship, the frequency of contact, all insurance policies procured on their behalf, all insurance policies offered but not procured on their behalf, and all marketing or solicitation materials sent to each individual or entity.

## INTERROGATORY NO. 15


Please state all relevant facts known to Defendant regarding Defendant's procurement of insurance, in or around October of 2015, on behalf of [REDACTED] as discussed in Plaintiff's Complaint.

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## DISCOVERY MISTAKES THAT CAN SINK A CASE




# E&O CLAIMS



**Errors and Omissions Insurance (E&O)**

*['er-ərz ən(d) ō-'mi-shənz  
in-'shur-ən(t)s]*

Insurance that protects companies, their workers, and other professionals against claims of inadequate work or negligent actions.

 Investopedia

- What are E&O claims
- Commons Claims
  - Negligence
  - Inaccurate advice
  - Misrepresentation
- Evaluation of Claim
- Limits of Liability

# DEFENSE'S EVALUATION AND PERSPECTIVE

## Defend?

- Review all materials
- Policy Exclusions
- Communications
- Expert Reviews

## Early Resolution?

- Admission of liability
- Maintaining Business Relationships
- Financial Cost of Litigation
- Reservation of Rights

## Wait and See?

- Stay of Case
- Mediation
- Assignment of Rights

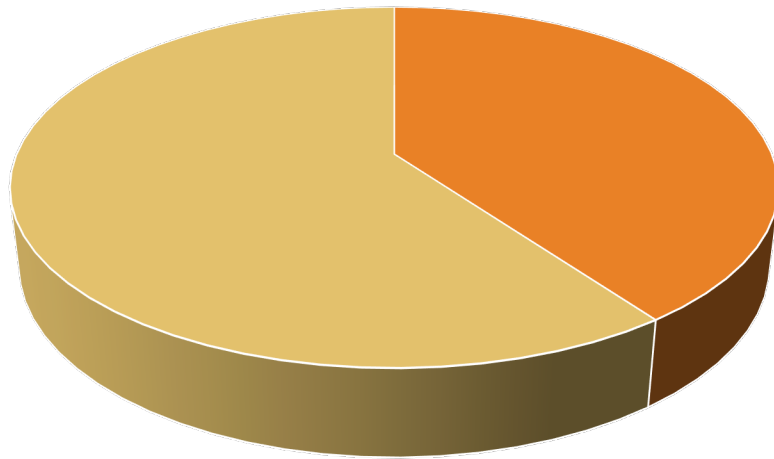


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## A BRIEF DETOUR INTO CHAPTERS 93A AND 176D



# E&O CLAIMS IN 2020 – BY THE NUMBERS



- 90% of claims made by agency customers. 8% made by non-customer third-parties
- COMMERCIAL LINES make up 60% of all E&O claims; PERSONAL LINES make up the other 40%.
  - Commercial Lines Top 5 – General liability, property, professional liability, auto and business owner policies
  - Personal Lines Top 5 – Homeowners, auto, dwelling, fire, crop and farm owners

# THE PERILS OF A “SPECIAL RELATIONSHIP”

## Generally

- Absent “special circumstances,” there is “no general duty of an insurance agent to ensure that the insurance policies . . . provide coverage that is adequate for the needs of the insured.”

## Exceptions

## Significance

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- Agents can be held liable for wrong/incomplete coverage

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- \$\$\$

# CASE STUDY NO. I – CATASTROPHIC INJURY TO A CONSTRUCTION WORKER



## FACTS

- 2015 – Client (GC) obtained insurance through Agency for large residential apartment construction project
- 2018 – Client hired several Sub-Contractors, who in turn hired others (including the Injured Party) to perform work
- 2018 – Injured Party fell off the roof of building, sustaining catastrophic injuries and became quadriplegic

## ALLEGATIONS

- GC had long-standing “special” relationship with Agency
  - Had other insurance through Agency
  - Several communications back-and-forth
- GC was not an experienced individual and relied on Agency to meet his coverage needs
- GC was never informed he did not have coverage for “Employees of Independent Contractors”

The following exclusions are added to the policy:

This insurance **does not** apply to:

### 3. Employees of Independent Contractors

“Bodily injury”, “property damage”, “personal and advertising injury”, or any injury, loss, or damage:

- a. Sustained by any employee of an independent contractor contracted by you or on your behalf; or
- b. Arising out of operations performed for you by independent contractors or your acts or omissions in connection with your general supervision of such operations.

[...]

CG 00 01 12 07

### EXCLUSION – SUB-CONTRACTED OPERATIONS

This endorsement modifies insurance provided under the following:  
**COMMERICAL GENERAL LIABILITY COVERAGE PART**

This insurance does not apply to “bodily injury”, “property damage”, “personal injury” or “advertising injury” arising out of operations performed for you or on your behalf, by any independent contractor or sub-contractor of yours, unless such contractor has in force general liability coverage including “products-completed operations hazard” and contractual liability coverage, with limits equal to the limits on this policy and on which you are named as an additional insured.

[...]

# CASE STUDY NO. 2 – FIRE IN BUILDING LEADING TO SEVERAL DEATHS



## FACTS

- Agency had worked with Client for approximately 20 years for fire and liability insurance
- Agency assisted Client in producing a single commercial policy that covered eight (8) rental properties, with limits of \$1M/\$2M.
- 2015 – Fire on property caused the death of three (3) individuals

# INSURANCE QUOTATION

## INSURANCE QUOTATION

We are pleased to offer the following summary of the quotation requested, which expires in thirty days:

Insurance Company: [REDACTED]  
Premium: \$3,779.36  
Coverage: Excess General Liability  
Excess Liability Limit: \$5,000,000 each occurrence/aggregate  
Excess Liability Deductible per Claim: None

This insurance quotation is subject to the following terms and conditions:

Signed Certified Acts of Terrorism coverage decision is needed at the time of binding coverage

Copies of underlying policies and loss runs for WC and Auto (if applicable)

Application completed in full and signed by the insured

Surplus Lines affidavit completed and signed by the insured

Premium is 25% minimum earned

Minimum and deposit premium clause applies

The quotation is based on the information provided, and is subject to change, and underwriting approval

( ) Please let us know if this quotation is acceptable. This coverage will not be placed and provided unless we are advised to do so and a deposit is paid.

( ) Please place coverage in the insurance company provided as per the conditions and terms above. Enclosed is a check for the deposit premium due of 100% as a requirement of the insurance company.

( ) Please call me to discuss this coverage further.

(X) Thank you for the quotation.  
I do not want to place coverage at this time, and will advise you when I want to consider this quotation in the future.

[REDACTED]  
Authorized Representative

Title 11/25/09

Date

(X) Thank you for the quotation.  
I do not want to place coverage at this time, and will advise you when I want to consider this quotation in the future.

[REDACTED]

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## NO SPECIAL RELATIONSHIP

- ✓ Long Business Relationship
- ☐ Complex Policy
- ☐ Frequent Contacts
- ☐ Advice of Agent to Client
- ☐ Agent as Specialist





# CASE STUDY NO.3 – OBTAIN IMPROPER E&O COVERAGE FOR PRODUCTS RECALL



## FACTS

- Client (products manufacturer) and Agency had a long-standing relationship
- Client requested that Agency procure coverage for damages related to third-party claims for recall due to defective products
- Claim against Agency that they did not obtain the proper policy and that they misrepresented coverage



# DO NOT FALL ON THE SWORD!!!!

Do not admit liability in light of any  
potential claims!



© marketooni

## WHAT DID THE AGENCY ADMIT?

- “I should have done a better job managing expectations for the Client”
- “Describing all of the exclusions in detail would have been helpful and could have possibly prevented the Client from bringing this claim”
- ““I had an improper understanding of the manufacturing defect exclusion. I misunderstood the application of the manufacturing defect exclusion. I never explained that exclusion to the Client between 2011 and 2017.”
- “This is the only E&O insurance policy I’ve ever sold to a manufacturing distributor. Most of my E&O policies are to finance firms, banks, and other providers of services, not manufactured goods.”

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- THE REALITY: Agency did excellent work for the client. The Agency too quickly fell on its sword...there SHOULD HAVE BEEN coverage afforded under the policy the Agency procured. Wrongful denial of coverage by the Carrier.

**OUTCOME** – Convinced plaintiff to amend complaint to add carrier as a defendant.

**Case settled:** approximately a 50/50 split. If Agency didn’t not send “fall on the sword” communications, the outcome would have been more favorable.

## HELPFUL HINTS

There are several factors to consider to protect yourself and your Agency against any potential claims.

- Whether the policy would provide the coverage requested?
- Does the Client know the limits of coverage?
  - Has this been documented or acknowledged in writing?
- Is the Client aware of the limits of the Agent's relationship?
- Has the Agent done and/or communicated anything to suggest he/she is giving advice?
  - "You should consider ..."
  - "I would recommend ..."
  - "This policy fits your needs ..."

# LAWSUIT

If a lawsuit is filed, there are several things you can do to help your insurance carrier and attorneys defend your interests.

- Provide the complete Agency file for the matter
  - Include all emails, quotes, policies, and signed documents
  - Not piecemeal!
- Do not discuss the matter with anyone but the insurance carrier and attorneys
- Cooperate— your participation will be required in responding to discovery requests (e.g. interrogatories) and at deposition



QUESTIONS OR COMMENTS?