

P&C Brokers – Canada

Why brokers should not make claims decisions on behalf of carriers or clients

One recurring theme seen by insurance brokers E&O claim handlers is the problem created by a broker's recommendation that a particular claim not be submitted to all potentially responsible carriers. An agent or broker who does an excellent job in location and placement of policies, later undoes all his or her good work by making assumptions about coverage for an occurrence or potential occurrence when one finally happens.

This is understandable. Insurance brokers, like everyone else, want to save themselves and their clients unnecessary work that seems unlikely to produce tangible results. A good broker wants to get to a productive solution rather than wasting valuable time when he or she perceives that there is no coverage.

In the simplest example of where good intentions can go wrong, consider a claim where, for whatever reason, a homeowner's policy does not carry sewer backup coverage. When the client calls to report the mess in his basement, the broker has two choices. First, the broker can advise the client that, unfortunately, his policy does not cover sewer backup, and ask if he'd like to add the coverage for the future. Second, the broker can advise about the availability of the coverage but go ahead and submit the claim to the carrier anyway. In truth, there are many reasons why the coverage may not have been on the policy, some of which may lead the carrier to reform the policy to include the coverage. Further, there are some causes of sewer backup that some carriers may consider to be covered occurrences even absent the specific coverage. Imagine the client's reaction when his neighbor's claim is covered, and his is not. That reaction could lead to an E&O claim that could have been avoided merely by reporting the claim to the carrier.

More typically, the failure to report claims scenario is a bit more complex. One example is a claim against an employer by its recently fired employee, which the employer's insurance broker submits only to the employment practices liability carrier, and not to the GL carrier. In fact, the GL carrier might have obligations regarding defamation allegations against the employer and failing to submit the claim to the GL carrier could lead to an E&O claim. Another example is part of a load falling from a truck and causing property damage. Would the allegations that the trucking company failed to properly train and supervise the employees who loaded the truck be excluded by the GL policy's auto exclusion? This is a determination that should be made by the GL carrier, and not by the insurance broker. The better practice is to submit the claim both to the business auto and to the GL carrier.

One group of carriers that should always be included among those to which claims are submitted is excess and umbrella carriers. Even if it appears, at first blush, that the underlying policy limits are more than adequate, it is good practice to notify these carriers along with the primary carriers. Later, should the claim develop such that upper layers might be involved, any successful late notice defense available to excess/umbrella

carriers could result in a successful E&O claim against the broker who didn't report the claims to all the carriers involved.

In many cases the broker's initial reaction is correct: There is no coverage available to the client. Nevertheless, this is not the broker's determination to make. While a policy may have lapsed or been cancelled, if a broker reports a loss under that policy, the carrier in question typically has a statutory or regulatory obligation to review the matter and make a coverage determination. While rules may differ, all carriers are obligated to make a timely coverage determination and to provide timely notice of that determination to the entity making the claim for coverage. Failure to make the timely determination or provide timely notice of the determination may affect a carrier's ability to deny coverage, even on a policy that is no longer in effect. This is, admittedly, not a strong position, as it relies on the remote possibility that a carrier may make an unlikely mistake or favorable determination in handling the claim. Still, from an E&O perspective, getting the claim covered lessens the possibility of facing an E&O claim down the road. In fact, the mere effort of submitting the claim for the carrier's consideration could provide an important avenue of defense should an E&O claim arise.

There are obvious situations where it makes no sense to report a claim. If your client has driven his only car away on vacation, and his house burns down while he is away, presenting a claim to his auto carrier would be frivolous in most cases. However, this author suggests that brokers should err on the side of reporting to too many carriers rather than too few.

Finally, there is the true E&O situation, where the lack of coverage seemingly arises from brokerage error, such as misplacing and then failing to submit an application for coverage. In such cases, you should immediately report the situation to your E&O carrier and seek your carrier's advice for handling the situation. You should not undertake to explain the situation to the "would be" carrier hoping for ex gratia consideration of your client's claim, as such a request might be considered an admission that breaches your E&O policy's cooperation clause. Remember that your E&O carrier deals with similar situations daily and will work with you to resolve the situation in the best way possible.

In sum, undertaking to assist your clients in reporting claims is not a duty to be taken lightly. In fact, while representing good customer service, it is typically not a duty the law requires an insurance broker to perform. However, if you choose to provide this service to your clients, you must report any claim to all reasonably relevant carriers, and especially to all excess and umbrella carriers. Err on the side of reporting. The best practice is to follow up by sending your client a letter setting forth the list of carriers and policy numbers under which the claim has been reported. If the client believes the claim should additionally be reported to any other carriers, he should advise the broker immediately. Advise the client that he should be hearing from each of the carriers shortly, and he should feel free to follow up with the brokerage if he does not hear from one or more carriers. Finally, you should advise your client that the brokerage is not involved in the claim process of any carrier, and any questions about any carrier's process must be addressed to that carrier.