

E&O Claims Advisor

An exclusive risk management service of the
Big "I" Professional Liability Program



New E&O Claims Data Reveal Same Patterns

Summer 2010

By David Hulcher

AVP of Agency Professional Liability Risk Management

When reviewing agents E&O claims data from Swiss Re 2003 through 2009, I can't help but think of the lyrics of rocker Jon Bon Jovi, "It's all the same, only the names will change."

In general, the data reveals that the same people are making the same types of errors, on the same types of coverages, and during the same process step. The good news is that we continue to see those agencies that attend an E&O seminar put on by Big "I" state association performing better with fewer claims. Here are some facts that the agents E&O claims data reveals:

Producers and CSR's Drive Claims

Producers continue to be most frequently involved in E&O claims at 38%, following by CSR's at 22%. Following agency procedures, maintaining comprehensive documentation in the client file especially when it comes to coverage offers and rejections, using risk analysis exposure questionnaires and checklist, and offering increased limits will lower agency staff's exposure to E&O claims.

Who's Suing Who?

73% of claims involve the customers suing agents, however, claims being brought against the agent by their carriers have greatly increased from 2003 to 2009. Carriers are no longer reluctant to pursue agents when they pay a policyholders underlying claims where coverage was questionable. With investment income at historically low levels over recent years, carriers can't afford to take higher underwriting losses and the agent is another way to recoup revenue. The allegations used against agents are often that they misrepresented policy terms or exceeded their binding authority.

New Business, New Exposure

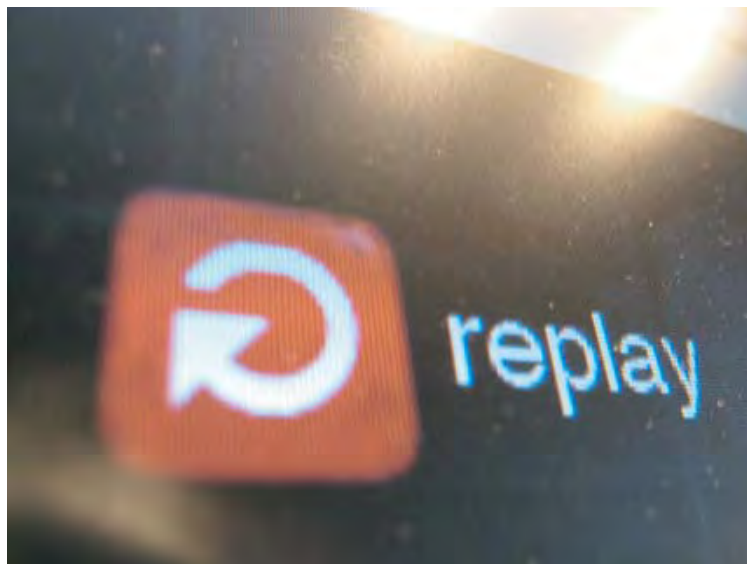
Claims involving the placement of new business continue to drive claims representing nearly 42%.

CGL Dominates

22% of claims involve the placement or serving of Commercial General Liability policies. Automobile coverage is second at 14%, followed by Homeowners and Commercial Property at 12%.

We Recommend You Offer...

Failure to offer the correct coverage or increased limits was where agents erred most frequently at 13%. Claims handling and applications follow at 11% and 9% respectively. Many of these errors are preventable by offering increased limits or



excess and umbrella coverage where available and documenting the insured's rejection, forward claims to the carrier in a timely manner and having follow-up procedures in place, and having the insured complete, sign and date applications which are forwarded to the carrier in a timely basis.

Failing to Procure Coverage

One in four claims come from failing to procure coverage requested. Solid procedures that are followed invariably by agency staff can prevent the agency from failing to procure the coverage requested for any number of reasons.

The good news there are more risk management tools available today than there were in 2003. These include the Big "I" Risk Management website, the Agency Shield Program™, and the Big "I" Virtual Risk Consultant powered by Rough Notes. You can learn more about all of these at www.iiaba.net/EO.

Increasing agency staff's awareness of exposure to E&O claims and implementing strong procedures, paired with consistent encouragement and oversight of managers, can help the agency decrease exposure to E&O claims while improving profitability.

Office Routing	

2010 Hurricane Season is underway and expected to be very active.

When the wind blows the water rises, here are the top ten tips to mitigate agency E&O claims from flood.

By Sabrena Sally, CPCU, Head of US Agents E&O Program, Swiss Re

With a couple months of the 2010 Hurricane season behind us, we want to share latest information from the Swiss Re Natural Catastrophe team as we head into the peak hurricane season.

Various weather institutes, including the National Hurricane Center, have issued seasonal hurricane forecasts. These forecasts unanimously point toward a very active season, with 14 to 23 storms being predicted for the North Atlantic region. Very high sea surface temperatures in the North Atlantic and the strong likelihood that late summer will see the onset of La Niña conditions, support the generation of intensive hurricanes.

While we can't predict with certainty what will happen, 'tis the season for a timely reminder that natural catastrophes typically result in an increase in claims made against insurance agents, especially in the way of flooding. While agents have been frustrated over the lapses of the National Flood Insurance Program (NFIP) over past couple months flood insurance is an important coverage to offer to customers to help protect your agency against these type of claims, here are the top ten risk management tips regarding flood insurance:

1. Remember, mortgage holders require flood insurance only on those properties falling into the identified areas, however, flood exposures exist in areas outside the federally identified special flood hazard areas.
2. Let customers know that coverage for flood is excluded from most policies and offer flood coverage to all customers.
3. Communicate to your customer in writing, any waiting period that is required before coverage can incept.
4. Be aware of limitations on values in primary flood policies, and offer Excess Flood insurance where needed.
5. For customers in Coastal Barriers Resource System (CBRS) or Otherwise Protected Areas (OPA) recognize that coverage for these areas is typically only available through Lloyds or the surplus lines market.
6. If your customer rejects a recommendation of flood coverage, including excess flood, request a signed coverage rejection form. Send a letter to the customer reminding them of the rejection, the importance of flood coverage, and the fact that they can purchase coverage at any time, subject to any applicable waiting period.
7. Check all policies and endorsements for accuracy prior to delivery to the customer.
8. Advise customer in writing of any unusual coverage exclusions, terms, or conditions. This is particularly relevant when placing coverage with Lloyds or with surplus lines carriers.
9. Never renew "as is". Always update values and exposures with the customer. If the customer rejected flood coverage at inception, send a letter to the customer prior to renewal reminding them that they do not have this important coverage and can purchase it at any time subject to any applicable waiting period.
10. If flood exposures exist but no coverage is available through your agency, advise your customer in writing

Here are links to several articles relating to flood insurance to share with your staff:

Don't Flood Your Agency with Potential E&O Claims
Debunking Flood Insurance Misconceptions
Examine Excess Flood Insurance to Keep the Tide of E&O Claims Low

Have you checked out IIABA's
Flood Program, Big "I" Flood?
www.iiaba.net/Flood

Should you have any questions or wish to obtain further information, please feel free to contact your State Administrator. Your state association and Swiss Re are committed to helping you identify and reduce your E&O exposure.

This article is intended only for educational or illustrative purposes and should not be construed to communicate legal or professional advice. You should consult legal or other professionals with respect to any specific questions you may have. Further, the statements and/or opinions contained are those only of the author and do not constitute and should not be construed to constitute any statement, opinion or position of Swiss Re or IIABA.

Hurricanes and Oil Don't Mix: Insurance Implications of the Gulf Oil Spill

This article is a collaborative effort of the VU faculty, led by Mike Edwards, CPCU, AAI, and assisted by Bill Wilson, CPCU, ARM, John Eubank, CPCU, ARM, and David Thompson, CPCU, AAI.

Most times "Oil and water don't mix"...until now. With hurricane season just underway and oil still gushing into the Gulf of Mexico, it might only be a matter of time before oil and water do mix to create a potential insurance claim. So, if oil ends up in/on your insureds' property, is it covered?

First, it is important to note that insurance policies differ. Therefore, the discussions herein are restricted to standard ISO coverage forms. Insurance practitioners and policyholders must consult the specific policy which insures the damaged property in order to make a final determination as to whether or not there is coverage. Also, in many instances, coverage will be fact dependent and the necessary generalizations in a coverage discussion such as this may or may not apply to your insured's specific circumstances and policy forms.

Fundamental to any direct property damage claim is the requirement for damage to covered property by a covered cause of loss. (Note: Some indirect coverages such as business income may only require damage to property - not necessarily covered property - to trigger coverage.)

Numerous coverage provisions of the current ISO HO 00 03 Homeowners policy and the ISO CP 00 10 Commercial Property coverage form could come into play in a hurricane, such as direct property damage, loss arising from orders of civil authority, additional living expenses, business income and extra expenses, debris removal, and so forth.

However, all these coverage provisions require that there first be damage by a covered cause of loss. Therefore, the key to determining whether or not any of these various coverage provisions would apply to a hurricane-and-oil loss would hinge on what role the hurricane played in putting oil into or onto an insured's covered property.

Since damage by a hurricane has a water component and a windstorm component, each requires examination.

Coverage for direct damage caused by waterborne oil

This would be the result of the classic "storm surge" that every coastal resident is all too familiar with. During a press conference on the eve of the 2010 hurricane season, NOAA Administrator Jane Lubchenco commented that "if there is a hurricane in the Gulf of Mexico, and it makes landfall someplace on the Gulf Coast, it is possible that some of the oil that's on the surface might be transported through the storm surge on the coastal area as high as the storm surge goes."

In addition, while a meteorologist would have to gauge its feasibility, it's conceivable that a hurricane could deposit oil farther inland in the form of heavy rains.

Coverage Under ISO HO and CP Forms

In the wake of litigation following Hurricane Katrina, ISO revised the water damage (so-called "flood") exclusions in the Homeowners, Dwelling, Commercial Property, and BOP coverage forms. The revised language is presently added to existing coverage forms by way of mandatory endorsements for each type of policy. In the future, the new language will be incorporated into the body of each policy at the next revision.

Below is the new water damage/flood exclusion (emphasis added for later discussion). This exhibit is from the HO 16 10 01 09 which is mandatory for the HO 00 03 and HO 00 05. There are different versions of this same Water Exclusion Endorsement promulgated for use with the other HO forms, as well as for Dwelling, CP, and BOP forms. The other versions differ only in the reference to specific provisions in the existing forms to which the exclusion applies. The essential scope of the new water damage exclusion is the same for all coverage forms.

WATER EXCLUSION ENDORSEMENT SECTION I - EXCLUSIONS

A.3. Water Damage is replaced by the following:

3. Water

This means:

- a. Flood, surface water, waves, including tidal wave and tsunami, tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind, including storm surge;
- b. Water which:
 - (1) Backs up through sewers or drains; or
 - (2) Overflows or is otherwise discharged from a sump, sump pump or related equipment;
- c. Water below the surface of the ground, including water which exerts pressure on, or seeps, leaks or flows through a building, sidewalk, driveway, patio, foundation, swimming pool or other structure; or
- d. Waterborne material carried or otherwise moved by any of the water referred to in A.3.a. through A.3.c. of this Exclusion.

This Exclusion (A.3.) applies regardless of whether any of the above, in A.3.a. through A.3.d., is caused by an act of nature or is otherwise caused.

This Exclusion (A.3.) applies to, but is not limited to, escape, overflow or discharge, for any reason, of water or waterborne material from a dam, levee, seawall or any other boundary or containment system.

However, direct loss by fire, explosion or theft resulting from any of the above, in A.3.a. through A.3.d., is covered.

All other provisions of this policy apply.

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Regarding the issue of oil which has been deposited by the storm surge, section A.3.d. now clearly excludes damage by "waterborne material carried or otherwise moved by any of the water...." For insurers who have not adopted the revised water damage exclusionary wording related to "waterborne material," damage done to covered property by the oil might be covered under the exception to the pollution exclusion - discussed in the next section below.

Otherwise, this would appear to exclude claims arising from waterborne oil. In addition, note that the exclusion applies whether caused by an act of nature "or is otherwise caused" (e.g., by an oil rig mishap). The exclusion goes on to say that it applies to discharge of waterborne material from any other boundary "or containment system" (e.g., an underwater well?). Finally, any resulting "direct loss by fire, explosion" is covered; however, in this case, the waterborne material, at best, resulted from fire or explosion, not vice versa.

It is important to note that the Water Damage exclusion is found in the so-called "anti-concurrent causation" (ACC) section of the policy exclusions. Therefore, where water has been pushed ashore by the force of the windstorm (as a "storm surge"), the damage done by the water is still excluded, as stated in the introduction to the ACC exclusions [emphasis added]: "We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area."

Coverage Under NFIP Flood Forms

Since the standard ISO policies exclude damage from both "water" ("flood") and "waterborne material," it is important to examine how the NFIP flood policies (Dwelling Form and General Property Form) address the issue of pollutants such as oil which are often present in a flood. In fact, flood waters are frequently a witch's brew of all sorts of pollutants, including sewage, household, lawn care and industrial chemicals, automotive fuels and lubricants, medical waste, garbage, and myriad other kinds of gunk.

In the Dwelling Form, the only exclusion in Section V - Exclusions that references pollution is the following:

Exclusions. F. We do not pay for the testing for or monitoring of pollutants unless required by law or ordinance.

In Section III - Coverage D Increased Cost of Compliance, the following pollution-related exclusion is included, related to testing and monitoring, etc. of pollution:

Exclusions. 5.b. The cost associated with enforcement of any ordinance or law that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

In the General Property Form, there is no pollution exclusion in Section V - Exclusions. However, in Section III - Other Coverages, there is a sublimit of \$10,000 for pollution damage, as follows:

3. Pollution Damage

We will pay for damage caused by **pollutants** to covered property if the discharge, seepage, migration, release, or escape of the **pollutants** is caused by or results from **flood**. The most we will pay under this coverage is \$10,000. This coverage does not increase the Coverage **A** or Coverage **B** limits of liability. Any payment under this provision when combined with all other payments for the same loss cannot exceed the **replacement cost or actual cash value**, as appropriate, of the covered property. This coverage does not include the testing for or the monitoring of **pollutants** unless required by law or ordinance.

As in the Dwelling Form, the General Property Form also has a pollution exclusion in Section III - Coverage D Increased Cost of Compliance, related to testing and monitoring, etc. of pollution that is identical to Exclusion 5.b. above.

In the Dwelling Form, damage to covered property from a flood that is otherwise covered by the flood policy is not impaired by the presence of pollutants such as oil from the oil spill in the Gulf. In addition, testing or monitoring of pollutants which is required by a law or ordinance is also covered. For claims covered under Coverage D Increased Cost of Compliance (ICC), the testing, monitoring, clean up, etc. that is required by ordinance or law is not covered. Note that ICC only has a limit of \$30,000.

Under the General Property Form, there is no pollution exclusion for damage to covered property, but there is a sublimit of \$10,000 for damage by a pollutant where a flood caused the discharge, seepage, migration, release, or escape of the pollutant - in this case, oil from the Gulf. It is unclear exactly how a claims-adjustment expense specifically related solely to damage by the pollutant (oil) can be determined in situations like a storm surge. However, to the degree that such costs can be isolated and assigned to the presence of a pollutant such as oil, the sublimit of \$10,000 would apply.

Coverage for direct damage caused by windborne oil

It is plausible that a strong hurricane or a waterspout could pick up a quantity of oil and deposit it miles inland, onto or into a home or business. The coverage analysis now revolves around the pollution exclusion since windstorm itself is a covered peril in the ISO Homeowners, Dwelling, Commercial Property/Causes of Loss, and BOP forms. However, damage by pollution is excluded unless the release, escape, migration, etc. of the pollutant is caused by a specific named peril.

The Special Causes of Loss pollution exclusion in these coverage forms (e.g., HO 00 03 and CP 10 30) is essentially the same, with minor variations. The following policy excerpt incorporates the primary language of the Homeowners and Commercial Property pollution exclusions to illustrate the similarities and minor differences:

Exclusions

"Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against named under Coverage C." [HO 00 03]...or "by any of the 'specified causes of loss' ." [CP 10 30].

Therefore, it could be argued that fire, explosion or windstorm caused the pollutant (oil) to be released, escape, migrate, etc., and therefore any damage done by windstorm-deposited oil would be covered. Note, however, that this exception to the pollution exclusion would not apply to damage done by water (i.e., the storm surge), due to the "anti-concurrent causation" language in the water damage exclusion previously discussed. Also, keep in mind that, aside from the dispersal by windstorm, this presumes that the originating cause of the spill was explosion or fire.

And, while there is no pollution exclusion in any of the Named Peril coverage forms (HO 00 02, HO 00 04, etc., and CP 10 10 and CP 10 20), since these forms cover fire, explosion or windstorm, damage done by the oil which was deposited on the covered property as a result of fire, explosion or windstorm could be covered due to the doctrine of proximate cause. Since the pollution exclusion is not contained in the "anti-concurrent causation" section of the exclusions, the doctrine of proximate cause can be applied to loss situations.

Coverage for indirect or consequential losses

In the standard ISO property coverage provisions in personal lines and commercial lines, indirect or consequential losses such as business income and extra expense, additional living expenses, civil authority, debris removal, pollution cleanup, etc. are triggered if there is first direct damage by a covered cause of loss.

For example, there have already been reports of condo rental cancellations by vacationers and hotel cancellations by conventioners. These cancellations arise from the uncertainty of future conditions, so the resulting loss of income is not due to direct damage on premises by a covered peril.

As discussed earlier, where the direct damage coverage form excludes such damage by oil related to the action of a hurricane, then there would also be no coverage for any indirect or consequential losses that might otherwise be afforded by a particular policy.

But, where a particular coverage form provides direct damage coverage for oil damage related to a hurricane, then the precondition of damage by a covered cause of loss has been met. At that point, the other conditions precedent to coverage can be analyzed as they normally would. For example, even if the cause of loss is covered, if a dwelling is still "fit to live in" or a hotel building is still "tenantable," there may still be no coverage.

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For the most up-to-date information on insurance coverage and the Gulf oil spill on the Big "I" Virtual University, click [here](#). Also, be sure to check out FEMA's "Oil in Flood Water Memorandum."

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Don't Get Caught in the Web!

Be aware of and mitigate E&O exposures from your website.

by Sabrena Sally, CPCU

Over 40% of agencies insured through the IIABA-Swiss Re E&O program now have their own website, having grown from 19% in 2006. Having a good website, with robust functionality, has become a core tool for agencies with a modern marketing strategy. Agencies are moving to more complex websites to respond to consumers and clients who increasingly want to shop online and be able to handle basic service needs when convenient for them.

Virtually all agency websites provide basic advertising for the agency, showing the agency name, logo, phone number, address and email link. Over the past eighteen months, however, applications for E&O show a clear trend toward agency websites expanding beyond standard advertising information, as might be expected from expanding consumer online behavior and the services being offered by competitors and other industries.

Advertising Exposure

Let's first examine what errors and omissions exposures an agency can face from the more traditional type of website. Many of the exposures on these sites are the same that exist in the 'paper' world. Advertising liability can arise out of the use or misuse of a trademark, or from the copyrighted material of others, and statements regarding the services available through the agency may be subject to regulatory requirements. At least one state, New York, makes this clear in Circular Letter No. 5 (2001), "Advertisements, Referrals and Solicitations on the Internet," where it states that "Advertisements that appear on the Internet are subject to all applicable existing statutory and regulatory guidelines and restrictions

About this article: *Agency websites have become a core component of the marketing strategy for many independent agencies, but they also may present errors & omissions exposures that must be managed. This article explores some of the major E&O exposures that may arise and provides several E&O tips for mitigating those risks, as well as sample website disclaimers.*

applicable to advertisements in any other medium."

E&O Tip: The same level of care in creating 'paper' advertising is appropriate for the agency advertising contained on the website. If in doubt, a quick consultation with your qualified legal counsel is well worth the cost.

Websites commonly provide a button allowing a site visitor to contact the agency via email. One could certainly expect questions about what services the agency provides, hours open for business or even driving directions. Keep in mind, however, that there is no way to control what a visitor might choose to include in the content of their email. The visitor might decide to include confidential personal information (such as a name coupled with a social security, drivers license or credit card number) in the unprotected email, creating an exposure to breach of data privacy.

E&O Tip: To help mitigate the liability exposure from this common website feature, posting an appropriate disclaimer is a best practice. A sample disclaimer is provided within this article for agents to use as a starting point and to customize to their agency's situation.

Posting Website Content

As a simplified case study, let's view the stages a hypothetical agency might follow in expanding its website over time, and how these changes can affect the agency's E&O exposure. After constructing a basic website, the next step an agency often takes is to add articles that will be of interest to site

visitors. Articles of interest can range widely in subject matter and may be available for viewing only or also as a download. "What is an umbrella policy," "How to implement an employee wellness plan," and "Where to find information on OSHA requirements" are examples of topics seen on agency websites. Content can be general in nature or become more technical and specific to certain types of exposures. The options are practically endless.

Posting informative articles on the agency website can draw visitors, generate stickiness with existing customers, and lead people to contact the agency for additional information. In addition to these positive benefits, there are risks that accompany posting information.

E&O Tip: If the content is original material created by the agency, practicing due diligence to ensure accuracy of the information is a key preventative measure. The more specific the information provided, the higher the risk of generating allegations against the agency for misrepresentation or providing inaccurate advice.

There is one significant difference between content posted on a website and content published in more traditional forms. Posting content online makes the information available to anyone regardless of their physical location. This instantaneous world-wide availability raises the issue of jurisdiction. It is not

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Agency Toolbox

KEY ACTIVITIES FOR MITIGATING E&O EXPOSURES GENERATED BY A WEB PRESENCE

It's an exciting time as agencies become more creative in using the opportunities that websites can provide. Be creative, but not naive. Keep in mind that with every opportunity, there is risk. Consider the following quick tips to help mitigate your agency's exposure to errors and omissions that may arise from your agency's website:

1. Review website advertising with the same level of legal scrutiny toward copyright and trademark issues as the agency's more traditional advertising
2. Post an appropriate Privacy Statement prominently on the website
3. Review original content posted on the website for accuracy and post appropriate disclaimers
4. Obtain written permission for content obtained from other parties, be confident they are a knowledgeable source, credit their authorship, obtain the author's indemnification (if feasible) and post appropriate disclaimers
5. If you decide to refer to other service providers, provide more than one provider name, obtain written permission to link to them and post appropriate disclaimers regarding the services provided by the vendors
6. If the website has interactive features that collect personally identifiable information, comply with all state and federal privacy and data breach notification laws and regulations and create a Secure Socket Layer connection with the visitor's browser before the visitor is asked to enter an id or password or any personal information.



Agency Toolbox

SAMPLE WEBSITE DISCLAIMERS **Please review carefully!**

Agents should consult with their local counsel to customize these sample disclaimers so that they fit their website, are positioned at the appropriate places on the site and comply with all of the federal and state laws and regulations that apply to them. These disclaimers are in addition to the Privacy Statement that the agency should include at the bottom of its website setting out its privacy policies.

For more sample disclaimers or various sample client letters visit the Big "I" Risk Management Website - E&O Happens at www.iiaba.net/EOhappens.

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>> Please contact our office at 555.555.5555 to discuss specific coverage details and your insurance needs. In order to protect your privacy, please do not send us your confidential personal information by unprotected email. Instead, discuss that personal information with us by phone or send by fax.

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Agency Toolbox

TOP TEN RISK MANAGEMENT TIPS FOR INSURANCE AGENCY E-SECURITY

As the way agencies, carriers, and customers do business continues to change and more is done over email and over the internet agencies need to be thinking about their electronic security procedures. Below are ten risk management tips for managing your agencies electronic security.

1. Encrypt non-public personal customer information whenever transmitted or wherever stored, including: internal network, backup, hand-held devices, and removable storage media
2. Use TLS (Transport Layer Security) or equivalent when transmitting non-public personal customer information electronically (email, website, etc)
3. Post an appropriate Privacy Statement on the agency website
4. Maintain a firewall barrier for internal networks
5. Comply with state and federal regulations for protecting customers' non-public personal information
6. Have basic physical security of the office for employees, visitors, and vendors to protect against unauthorized entry
7. Maintain password protection on desktops, laptops, hand-held devices, and removable storage media
8. Establish a written agency security policy addressing, at minimum:
 - The installation and use of software applications
 - Information access and protection
 - Identity and password management
 - Internet usage, including email, social networking, blogging, and/or discussion forums
 - Network security
 - Desktop and server management
 - Remote access to the corporate network
9. Communicate the agency security policies to all employees in writing, and make resources available to answer employee questions to ensure full understanding.
10. Audit the agency security policy to ensure it is being followed and is effective.

ACT Now! Info from the Agents Council for Technology

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yet clear how legal jurisdiction might be applied to content published on a website. Including an appropriate legal disclaimer as part of posted information is for now one's most effective tool in mitigating the jurisdictional risk.

E&O Tips: If the content is obtained from another source, the first step in risk management is to verify the expertise of the information's source. This step helps minimize the exposure to allegations of misrepresentation or inaccurate advice. The information is also most likely copyrighted, creating exposure to allegations of copyright infringement. Obtaining written permission from the owner or licensor of the material prior to posting and giving appropriate credit of authorship can help mitigate the copyright exposure. If the content is obtained under a licensing agreement, explore what options may exist to protect the agency via contractual indemnification. As with information authored by the agency, it is recommended that appropriate legal disclaimers be clearly posted with information obtained from other sources.

Website Referrals

As agencies often receive requests from customers for referrals to other service vendors, it is a natural next step for the agency website to include links to these types of service vendors. Windshield repair services, CPAs for tax preparation, and disaster recovery solutions firms, are just a few examples of service vendor links seen on agency websites. Linking to vendors on the agency website can create the same exposure to negligent referral that exists when the referral takes place verbally, through email or snail mail. Regardless of how a referral is provided, the best practice recommendation is to provide at least two referrals, leaving it to your customer to choose which vendor to use. If the agency site links directly to a vendor, there also may be exposure to allegations of trademark infringement or unfair use of cyber marks from the vendor.

E&O Tips: The best practices to follow to mitigate allegations of negligent referral for vendor referrals, including linking, are to:

1. obtain written permission from the vendor or site to which the link leads
2. provide always more than one selection for each type of service
3. ensure there are appropriate disclaimers regarding the services being provided by these vendors.

Interactive and Web-based Transactions Agencies are increasingly adding interactive website features to increase the effectiveness and efficiency of the agency. When interactive features are included on an agency website, more unique E&O exposures can quickly develop. The most rapidly growing exposure we have seen is the number of agency websites that are accepting application information.

As part of the underwriting process on a recent renewal, we reviewed an agency website. The site opened to a very professionally designed home page. The site had clearly written text, eye-pleasing graphics, was well-organized, and quick-loading. At the bottom of the first page, a link to the agency privacy statement was prominently posted. Following the various tabs, one could easily find informative articles which clearly showed authorship and contained appropriate disclaimer language. So far, so good.

We then clicked on a button titled Personal Lines, on through the Auto Insurance button, to "Submit Application." The Submit Application button led to a page where a full spectrum of personally identifiable information can be submitted, including: name, address, date of birth, social security number, drivers license number - basically all the information one needs to carry out identity theft. There was no indication of security being enabled by an 'https' displayed before the URL (evidence of creation of an SSL connection), and nothing contained within the web page itself referred to secure transmission of this data.

An agency has the duty to protect personally identifiable information and a

myriad of both state and federal laws apply. Violations of these laws carry significant financial penalties, not to mention the extreme damage that can be done to the agency's reputation. One state, for example, specifically requires "encryption of all transmitted records and files containing personal information that will travel across public networks, and encryption of all data containing personal information transmitted wirelessly." At the most recent count, forty-six states have some type of law or regulation addressing the protection of personal information.

E&O Tips: Agencies that collect personally identifiable information (whether on their websites or not) should take the necessary steps to be knowledgeable about state and federal laws and regulations that protect such personal information and provide the level of data security required by them.

A best practice is that the agency website create an SSL connection with the visitor's browser before the visitor is asked to enter an id or password or any personal information, such as that included on insurance applications, so that this information cannot be read by unintended parties over the Internet.

Many agencies are now expanding their online presence to include social media as a part of their advertising and customer interaction. ACT has an article and webinar on the E&O exposures arising from the use of social media which can be found at www.iiaba.net/act at the "Website & Social Media" link.

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For more information about ACT, visit www.independentagent.com/act or contact Jeff Yates, ACT Executive Director at jeff.yates@iiaba.net. This article reflects the views of the author and should not be construed as an official statement by ACT or IIABA.

Electronic Data Exposures: Are they covered by your E&O Policy?

by Shirley Zelenski, Underwriter for US Agents E&O Program, Swiss Re

A commonly asked question in today's electronic business age is whether the theft, misuse, or mistaken release of electronic data is covered by Swiss Re's Agency E&O policy. While the circumstances of any given claim are unique and are evaluated on their own merits, the general answer is that this exposure is sometimes covered.

The evaluation of coverage or defense for electronic data-related claims is heavily based upon one question: Is the claim the result of a wrongful act arising out of professional services rendered to others? The Swiss Re policy definition* of "professional services" is considered broad; however, when applied to a scenario in which electronic data is involved, the misuse or loss of electronic data must occur during an insured's performance of professional services for an insurance client. The handling of electronic data in and of itself is not a professional service but is many times part of it and the resulting theft, unintentional sharing, or loss of data is what constitutes a potentially covered event.

Some exposures are clearly not covered by our policy such as if an agency-owned laptop was lost and the electronic data stolen. Or, if a hacker gained access to the personal data collected on an agency's website; this would not be covered. An agency employee who purposefully steals sensitive customer information for personal financial gain is not covered. These incidents are not uniquely related to the performance of professional services and usually fall under excluded acts within our policy as well.

The fact that specific policies, known as cyber-liability or data theft E&O, are available in the marketplace is evidence of the distinction made between standard errors & omissions of a professional insurance agency and the unique exposures involving electronic data. Your Swiss Re underwriter or state association administrator can further guide you in this matter.

*Policy form W1004C Copyright 2010 Swiss Re

68 Cents Brings Agencies Increased Sales and Reduced E&O Exposure

Member Purchases of Big "I" Virtual Risk Consultant Continue to Climb

When asked if you'd be willing to invest 68 cents a day to provide a tool that would aid agency staff in increasing sales, elevate customer service and reduce exposure to E&O claims the answer is always a resounding - "Heck yeah!" Well, Big "I" members from across the country are investing in their future by purchasing the Big "I" Virtual Risk Consultant Powered by Rough Notes ("VRC") for as little as 68 cents a day. Exclusively available to members the VRC is an easy-to-use agency resource website offering:

- ◆ Commercial and Personal risk exposure assessment tools including questionnaires and checklists for hundreds of businesses (including the popular Coverages Applicable guide information)
- ◆ Reference and proposal tools to help you better understand and present the coverages you are selling (including PF&M, ACORD forms)



- ◆ Marketing and prospecting tools such as sample articles, building business letters, and where to find markets.

As sales of this product grow so do the agents' opinions of the product. **A recent survey revealed that 92% were satisfied with their purchase of the VRC and further 92% would recommend it to other agencies.** The greatest testimony of all!

To learn more about the VRC or to purchase it visit www.iiaba.net/VRC. Or, click here to view a comprehensive webinar providing an overview of the product.



Insurance Agency Errors & Omissions

Potential Impact of the ARRA on Insurance Agencies

By Annette Hollingsworth JD, CPCU, CLU, ARC. Product Underwriting for Agency E&O, Swiss Re

Entities involved in the health care industry must comply with federal regulation to protect individually identifiable health information and this began with the now famous Health Insurance Portability and Accountability Act of 1996 (HIPAA) legislation. The legislation was expanded under the American Recovery and Reinvestment Act of 2009 (ARRA) which was the stimulus package that came into effect in February, 2009. Parts of the legislation that was passed in February 2009 are now being implemented in 2010 causing a resurrection of interest in the impact of the legislation by those being affected.

ARRA expands the definition and legal obligations for compliance to HIPAA

Prior to ARRA, the federal legislation focused on “covered entities”. Covered entities are defined as health care providers, healthcare plans, and health care businesses that either process or facilitate the processing of individually identifiable health information. Under HIPAA, Federal regulations did not directly reach “business associates”, defined as professional service providers and others performing functions or activities involving individually identifiable health information on behalf of covered entities. The HIPAA rules only required that the covered entities, when they contracted with business associates, employed measures to protect personally identifiable health information through appropriate contractual protection. Prior to ARRA, business associates were not directly subject to governmental enforcement action and the only remedy available against a business associate was for a covered entity to sue for breach of contract. Under ARRA, business associates must comply with HIPAA privacy legislation regardless of whether or not those provisions are in their contracts with covered entities. Business Associates can now be held directly accountable to federal or state authorities for failure to comply with HIPAA as amended by ARRA or

applicable regulations. Additionally, ARRA changed the scope of those deemed business associates. The term business associate has been expanded not just to encompass professional service providers and other performing functions or activities involving individually identifiable health information but now includes the following:

- ♦ organizations involved in moving and tracking health information, such as regional health information organizations transmitting personal health records from one place to another, and
- ♦ vendors that “contract with a covered entity to allow that covered entity to offer a personal health record to patients as a part of its electronic health record”.

An important side note is that most insurance agents who are involved with TPA’s were probably deemed business associate by the less expansive definition if they were handling individually identifiable health information so this expansion of the definition may not have a substantial impact on them.

Potential new requirements for Insurance Agents under ARRA

Of significance is ARRA’s expansion of the obligations of business associates to protect the individually identifiable health information. As of February 17, 2010, ARRA requires business associates, in addition to their contractual obligations to protect health information, to directly undertake many of the protections previously imposed only on covered entities or risk facing civil or criminal fines and penalties. ARRA directs business associates to implement by February 17, 2010, the data security measures of HIPAA Security Rules. ARRA mandates that every business associate must have policies and procedures to satisfy certain standards including the following:

Insurance Agency Errors & Omissions

Potential Impact of the ARRA on Insurance Agencies (Con't)

- ◆ Appointment of a security official
- ◆ Workplace protection, including safeguarding access to electronic protected health information (EPHI) stored in the computer, safeguarding information stored on portable devices, safeguarding the storage and disposal of information.
- ◆ Risk management measures, including data recovery plans, security incident management and workforce training.
- ◆ Technology protection measures, including access and authentication security measures, transmission security (encryption), and data integrity.

ARRA increases obligations for reporting data breaches

If the business associate learns that a covered entity it serves engages in a pattern of practices that materially breach the covered entities obligations under their business associate's agreement, the business entity must require the covered entity to cure the breach. If the covered entity does not cure the breach, the business associate must quit dealing with the covered entity and report the breach to the Department of Health and Human Services. This ability to terminate the contract for violation should be written into the business associates contract.

In the past, HIPAA did not require covered entities to notify individuals of breaches of their protected health information. ARRA now requires covered entities to notify individuals if their health information has been breached. Business associates are required to notify the covered entities of any breaches and then the covered entity must notify the affected individuals of the breach. In determining whether or not notice is required, two questions need to be asked:

- ◆ Was there a "breach" under the breach definition, and
- ◆ Was the information protected by an encryption technology approved by the HIPAA legislation?

Breach means unauthorized acquisition, access, use, or disclosure of protected

health information which comprises the security or privacy of the protected health information, except where an unauthorized person to whom such information is disclosed would not reasonably have been able to retain such information.

If the information was encrypted in compliance with the HIPAA Security Rule, individuals are not required to be notified because there is a presumption that the information is safe and secure. The legislation says that a covered entity or business associate may use whatever measures allow them to reasonably and appropriately implement all safeguard requirements and the entity doesn't have to use encryption recommended by the HIPAA Security Rule. However, choosing not to use this method of encryption means that if a breach of information occurs, notification will need to be provided to affected individuals. So not complying is a business choice that the business associate and the covered entity make, knowing the consequence of that choice ahead of time.

Notice of a breach must be provided no later than 60 calendar days after the discovery of the breach. A breach is deemed discovered once the breach is known or should reasonably have been known by the entity. However, knowledge of the breach by the person committing the breach is not counted as knowledge by the entity. If the breach involves more than 500 individuals the media needs to be notified, otherwise written notification can go out just to the affected individuals through the mail. Notice of all breaches also must be provided to the Secretary of the Department of Health and Human Services.

Sections 13401 and 13404 of ARRA state that business associates can directly face civil and criminal penalties for violations of any applicable provision the Act. The amount of the penalty is \$1,000 per violation if a violation is due to a "reasonable cause" capped at \$100,000. However, if the violation is found to be willful neglect the penalty is \$10,000 with a maximum penalty of \$250,000, and if the violation is not corrected

properly the penalty for each violation grows to \$50,000 subject to a maximum penalty of \$1,500,000 per calendar year. These increased penalties are effective immediately. Moreover, within the next few years, the regulation is going to be altered to allow individuals affected by a HIPAA violation to receive a percentage of any monetary settlement collected with respect to such office. This change may cause an increased interest in enforcement activity giving individuals incentive to bring HIPAA complaints. The ARRA legislation while it has been passed into law, will continue to have addendums and clarifications added to it. Affected individuals should pay close attention to the development of the laws, regulations and guidance which will be forthcoming as this area of legislation by the federal government evolves.

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VRC Facts

Active ingredients:

- Commercial and personal risk assessment tools (Exposure identification surveys and coverage checklists)
- Coverage reference resources and proposal tools (PF&M, ACORD forms, insurance glossary)
- Marketing and prospecting tools (Client letter templates and web site content)

Use:

Use liberally for relief of lethargic agency sales and lack of producer confidence.

Dosage:

Subscribe annually (or get four years for the price of three). Available online 24/7.

Side effects:

- Dizzying improvement in knowledge and professionalism of agency staff.
- Innoculation against E&O claims from failing to offer proper coverage or identify customer exposure.
- Rejuvenated content to market your agency's services.

Warning: Prolonged exposure to VRC will result in agency success.

*Available for purchase exclusively to Big "I" members
over the counter at www.iiaba.net/VRC.*



VRC provides the resources you need to understand your customer's operation and exposures while identifying applicable coverages. And it gives you resources your agency needs such as E&O checklists, sales and marketing tools, proposal language, plus training and development support. It's just what the doctor ordered!



WHAT'S IN VRC?

RISK EXPOSURE ASSESSMENT TOOLS

Commercial Lines Risk Exposure Evaluation System

- This section includes narrative overviews of operations and exposures for more than 650 businesses.
- Coverage checklists help ensure you have reviewed all pertinent exposures.
- Helps you ask the underwriting and coverage questions needed to build a better product for your clients.
- Explains underwriting criteria and suggests SIC, NAICS, GL and WC classification codes.
- Provides printed E&O checklists and coverage recommendations in an organized fashion.
- Provides a coverage explanation template to accompany your proposal.

Personal Lines Risk Exposure Evaluation System

- This section contains narrative overviews for coastal properties, condos, rental properties, single family dwellings, and tenants' exposures.
- Recognizes that not all personal lines risks are the same by outlining a risk specific approach to evaluating diverse exposures, giving you confidence to pursue new and different accounts.
- Every risk changes over the course of the year. Use the pre-renewal questionnaire as a guide to disclose changes that could impact a client's insurance program.

Coverages Applicable

- This section identifies the coverages your client needs while supplying a simple and concise explanation of the insuring agreements and the reasons they should be considered.
- Continual updates alert you to new coverage availabilities.
- Risk specific explanations make this resource more valuable than relying on your carrier entirely for direction.

PROPOSAL AND TECHNICAL RESEARCH TOOLS

Policy Forms & Manual Analysis (PF&M)

- Over 7,200 pages of comprehensive yet, easy-to-use ISO and AAIS coverage form analysis and explanation with Commercial Lines Manual interpretations.
- Over 1,000 pages of court cases and decisions.
- Hyperlinks throughout this section make it easy to navigate the abundance of material and allows you to toggle multiple sections.

ACORD™Forms Library

Find all ACORD forms with instructions for proper completion in one central depository.

Insurance Words and Their Meanings

Being able to explain industry terms in a manner understandable to someone without an insurance background is the hallmark of a successful insurance professional. Insurance Words and Their Meanings provides glossaries for 11 business categories, enabling producers to comprehend unique terms frequently used in a variety of industries.

MARKETING AND PROSPECTING

Business Building Letters

Template language for sales, surveys, cancellations, and claims letters can be the basis for your marketing and client service efforts. Over 300 samples are provided based on a variety of topics.

e-Marketing for Agencies

Access to articles and content on topics important to clients that the agency can use to keep their website and newsletters current.

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A directory of 800 providers of E&S and specialty coverages for more than 660 hard-to-place exposures. Easy access to IIABA's online market access program featuring no fees, no volume commitments and competitive commissions.

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Up to 15 users per agency	\$250	\$750
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Are you on target?

Professional Liability

They say the best defense is a good offense. So the best protection from E&O claims must be good, solid prevention. That's why we developed the **Agency Shield Program™**, an on-line insurance agency E&O claims prevention and consulting program.

Features include:

- Detailed and systematic review of agency operations
- Focuses on reduction of E&O exposures
- Helps agencies avoid the direct and indirect costs associated with having an E&O claim, such as deductibles, loss of credits, loss of productivity and stress of being involved in a claim
- Assists you in establishing standards across all agency activities
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- Template for training your staff in the important area of customer service and potential agent liability
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Expertise you can build on.

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Big “I” Professional Liability Wallet Card

Print and fold this handy card for each member of your agency staff so they know what to do when an E&O incident occurs.

Keep one in your wallet and one near the phone, and refer to it FIRST when a customer contacts you to report or discuss a potential claim against your agency!

What to Do When an E&O Incident Occurs

All agency staff should consider the following when responding to customers when faced with an E&O situation:

1. Never admit liability. You can be empathetic, but never admit you've done anything wrong.
2. Don't participate in any settlement discussions or enter into a settlement without written consent from your E&O carrier.
3. Ask them to explain what they think it is you've done wrong and write it all down including names, dates, and telephone numbers.
4. Don't tell them you have E&O liability insurance unless they ask you specifically if you do. Then, only advise them that you do and that you will provide all the information to your insurance carrier and they will be in touch with them.
5. Report the incident immediately to management so they can submit it to your E&O carrier.



Swiss Re


Visit www.iiaba.net/EOHappens today to review exclusive agency risk management information that can help the agency avoid the hassle and expense of E&O claims.

And remember, a customer's uncovered claim is the catalyst for an E&O claim against the agency. The Big I Advantage[®] Virtual Risk Consultant Powered by Rough Notes can help agency staff better identify and cover customer exposures, while increasing sales. Annual subscriptions start for only \$250. Visit iiaba.net/VRC to learn more.