Analyzing Hold Harmless Clauses and E&O Claims

Agency agreements are commonly executed between insurance carriers and agencies in order to define the carrier-agency relationship in contractual terms. The contract typically specifies the degree of authority given to the agency, the types of insurance the agency may write for the insurer, the commission structure and the payment terms. These agreements usually also contain some form of a "hold harmless" or indemnity clause.

Hold harmless agreements generally require that the agency hold the carrier harmless for any costs the carrier may incur as a result of the agency's negligent acts, errors or omissions, as well as any violation of the terms and conditions of the agency agreement. Hold harmless in this context means pay or reimburse. Most agreements require that the agency carry sufficient errors and omissions coverage to make sure the agency has the funds available to fulfill its hold harmless obligation. This is a contractual arrangement, and as long as the terms are clear and unequivocal, these clauses are valid and enforceable. Almost all agency agreements require the agency to hold the carrier harmless; some hold harmless clauses similarly impose a hold harmless obligation that runs from the carrier to the agency.

If you are sued for an error or omission and believe that there is a reasonable basis to support the carrier providing you a defense and indemnity, what should you do?

1. **First and foremost—do not delay in reporting the claim to your E & O carrier prior to requesting the carrier provide a defense and indemnity.** The claims handler or attorney assigned to defend your agency can protect your interests while waiting for a carrier response. While you may have a great relationship with the carrier, the carrier is now represented by counsel and you may find that your own defense counsel will have better luck in getting the carrier to consider the request. Seemingly innocuous statements can later be used against you; have only limited conversations with co-defendants and when possible those conversations should be done through counsel.
2. **Don't get discouraged if the initial response is "no."** The carrier is going to have to be convinced it actually owes you a defense and indemnity. This almost always is going to require some document that shows that the agency did not "contribute to, or cause" the error or omission. This is where your documentation can be critical. If the answer continues to be "no," then a cross claim against the carrier may be supported and if it furthers the defense of the case, may be covered by your E & O policy. Even if the carrier rejects a request to provide you a defense and indemnity, you still have not lost your valid defenses to the plaintiff's claim.
3. **Don't be fooled by an offer to provide a defense but not indemnity.** While it may sound good to have the carrier pay your legal bills, you are giving up the power to direct the defense. If you are still open to liability on a claim, you are much better served by having your own counsel look after your interests. If your interests are truly aligned with the carrier's, then fee-sharing arrangements can always be made, thus reducing litigation expenses. For example, it may be possible to share the costs of an expert. Even if you believe that you have erred, do not forget that despite your apparent error, other parties may also be culpable and further your error may not have caused the damages that are alleged. You are better off having some control of the defense of the case.

Take a careful look at the hold harmless provisions of agency agreements you are asked to sign. If possible, consult with your agency's attorney prior to entering any such agreement to make sure that the terms are reasonable. When a claim situation arises, be sure to look at any agreements between your agency and the other involved parties—the rights and duties of the parties may be determined in part or in whole by those agreements.

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Not on Even Ground

While it would be great if the parties were on equal footing when negotiating the agency agreement hold harmless clause, in reality, it rarely happens. These clauses can be very one-sided. Carriers do not often agree to change the wording of the hold harmless clause. An agency can certainly try to discuss more even-handed wording, and if you are faced with a very one-sided agreement, consult an attorney before signing the agreement. Spending a little money up front may help you down the road.

In the context of errors and omissions claims, the hold harmless clause may result in a carrier requesting that the agency defend and indemnify it, or conversely, the agency may be entitled to indemnity from the carrier—it all depends on the contractual terms, and, of course, the nature of the complaint.

—A.P.