Guarding for Carrier Claims Against Agents

There is an old saying that tells us to love our neighbors and also to love our enemies—probably because they are generally the same people. This is good advice in all areas of life, especially in business relationships. Historically, carriers and agents had close and longstanding relationships. Carriers were loyal to their agents and were reluctant to pursue them in situations where the carrier paid a claim even if there was a question about whether coverage was owed. In fact, carriers could typically be counted on to side with an agent in the face of a claim dispute and would pay questionable claims, especially to valuable producers. This was due to the fact that higher investment income allowed carriers to better withstand underwriting losses, as well as the fact that insurance was more relationship-driven than it is today. While accommodations still happen, they are becoming more and more rare.

Today, the trend seems to be toward carriers taking harder line coverage positions. Carriers are now more regularly pursuing the agents in situations where the carrier was found to owe coverage that it did not believe it owed. As carriers keep a close eye on profitability, they have taken the approach that pursuing agents is another avenue to recover losses. This results in carriers denying coverage and holding the agent responsible for actions like misrepresentations, exceeding authority or paying the underlying claim and then pursuing the agent for reimbursement. Some carriers have even designated a dedicated professional liability subrogation specialist whose job is to review paid claims and determine whether to pursue claims against the agent. These aren't just large claims either; they are typically lower-value claims that may fall within the agency's deductible on its E&O policy. It's a headache nonetheless and frequency could become more of an issue. Here are a few examples of real E&O claims scenarios:

Case study #1. An agent requested a carrier add a new project to an existing open builders risk policy. A request was made for a higher limit than contained in the master policy and for expanded (flood) coverage for this project. The carrier added the project with the higher limits only. A flood loss occurred and the carrier took the position that there was no flood coverage. The documentation was not clear on either side. Ultimately, the carrier paid the claim in the amount of $4 million and then pursued the agent. Interestingly, the carrier structured the underlying claims settlement with the policyholder as plaintiff in the lawsuit so it appeared that the policyholder was bringing the claim against the agent. The defense of the case went on for four years before it was settled with a payment of nearly $2 million.

Case study #2. A plaintiff wanted auto coverage with no UM/UIM coverage. The agent did not obtain a UM/UIM waiver. The plaintiff's wife was then killed in a car accident. The carrier paid the $1 million in UM/UIM benefits and then sued the agent even though the agent was the carrier's largest producer in the state (writing in excess of $100 million in annual premium). In addition to asserting strong liability and damages defenses, the agent's defense included attempting to leverage the relationship to reach a favorable resolution. The carrier, however, was unyielding and pursued the claim for 10 years before the case was settled.

Case study #3. An agent erred in placing BI coverage for a manufacturing company on a per location basis with a coinsurance provision as opposed to blanket as requested. Following a hurricane loss, the carrier adjusted claim on a blanket basis, contrary to the policy, and paid the claim. Upon discovering its error, the carrier demanded repayment from the plaintiff. Poor claims handling by the carrier created a bad faith exposure for the carrier, but even in the face of a bad faith claim and a strong waiver argument, the carrier refused to recognize its exposure and centered its defense on the agent's negligence.

Case study #4. An agency's customer signed an application for auto insurance on Dec. 5, but the application was dated Dec. 4. An auto accident occurred on December 5, prior to the client signing the application. The carrier initially denied coverage for the claim. However, since the policy was issued with an effective date of December 4, the carrier paid the claim. The carrier then pursued the agent.

The willingness of carriers to pursue claims against agents creates an additional category of E&O claims for agents to consider and guard against. While in the past it was reasonable to assume that carriers wouldn't come after their own agents, but that isn't the case today.

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Learning from Experience

The same best practices used to prevent claims from customers should be used to prevent claims by carriers. Here are a few risk management suggestions to help you avoid E&O claims from carriers:

- Practice clear communications with carriers and incorporate discussions with customers' files.
- Thoroughly review quotes and policy documents upon receipt.
- Verify accuracy of information gathered from customers and transmitted to carriers.
- Understand carrier requirements and authority limits.
- Document, document, document.

—K.T.