

He Said, She Said

How to avoid a “swearing match” in E&O claims

By Caryn Mahoney

Author Foster Meharry Russell said, “Every story has three sides to it—yours, mine, and the facts.”

An errors & omissions claim against an agent can often devolve into the agent’s word against the client’s. When a lawsuit involves this type of “swearing match,” getting the case dismissed on a motion is usually not an option—and if it goes to trial, it’s up to a jury to decide who’s telling the “truth.”

Unfortunately, many jurors don’t like insurance companies—or, by extension, insurance agents—and are more likely to side with the claimant, who is just another person like them from their hometown.

Your best weapon against this type of case: documentation of the facts. Better still, if your agency has a Swiss Re Corporate Solutions policy, proper documentation may serve as the basis for up to a 100% reduction in the deductible under the new policy.

The current Swiss Re policy includes a “deductible reduction provision” that gives the agency a 50% reduction of their deductible up to a maximum of \$12,500, in the event that the agency “generates and maintains contemporaneous written documentation in the agency file of the refusal of any customer to accept any type of coverage or limits recommendation made” by the agency, and a subsequent claim alleges failure to secure the recommended type of coverage or limit.

Under the new Swiss Re policies that will phase in this year, the deductible reduction provision now gives agencies in most states a 100% reduction in the deductible, up to a maximum of \$25,000. The same requirements apply.

As a Swiss Re policyholder, how can you secure this benefit? The first best practice is to always send your client something in writing that outlines the quote and/or policy and clearly states your recommendation that they consider “the following optional coverages



and limits,” along with the cost of those coverages. Require your client to initial and sign any coverages they reject.

Logistically, it is not always possible to get a signed rejection of the coverages back from your client. For the purposes of the deductible reduction provision, it is enough to have documentation that you sent your client something in writing that included your offer, and documentation that they rejected the coverage. Note that this documentation must be “contemporaneous,” meaning it either existed or occurred during the same time period as the claim involving the coverage or limit.

It’s much easier to defend an E&O claim when you’re armed with undeniable facts, not just a memory of what took place.

Caryn Mahoney is an assistant vice president, claims specialist with Swiss Re Corporate Solutions and works out of the Chicago office. Insurance products underwritten by Westport Insurance Corporation, a member of Swiss Re Corporate Solutions, Overland Park, Kansas.

This article is intended to be used for general informational purposes only and is not to be relied upon or used for any particular purpose. Swiss Re shall not be held responsible in any way for, and specifically disclaims any liability arising out of or in any way connected to, reliance on or use of any of the information contained or referenced in this article. The information contained or referenced in this article is not intended to constitute and should not be considered legal, accounting or professional advice, nor shall it serve as a substitute for the recipient obtaining such advice. The views expressed in this article do not necessarily represent the views of the Swiss Re Group (“Swiss Re”) and/or its subsidiaries and/or management and/or shareholders.

Copyright © 2017, Big “I” Advantage, Inc. and Westport Insurance Corporation. All rights reserved. No part of this material may be used or reproduced in any manner without the prior written permission from Big “I” Advantage. For permission or further information, contact Agency E&O Risk Manager, 127 South Peyton Street, Alexandria, VA 22314 or email at info@iiaba.net.