

## Risk Transfer

### *E&O issues when buying or selling an insurance agency*

By David Holt

**Buying or selling** an insurance agency or its book of business is, to say the least, a major decision. There are a host of factors for both the buyer and the seller to consider: the value of the business, a price point, personnel questions, property-related aspects, time commitments, and many other issues to investigate, assess, negotiate and eventually agree on.

While an attorney retained to assist with a sales agreement may have limited knowledge of insurance and an accountant consulted regarding the sale may well focus just on the financial and tax implications, it can be easy for even a highly experienced insurance agent, distracted by those important matters, to give short shrift to the potential for errors & omissions issues that arise from the sale or purchase of an agency.

However, giving E&O when buying or selling will help avoid road. To start, consider agency is buying just selling agency or is and liabilities, including the sales agreement have the parties agreed on the purchase of E&O insurance to address any pre-existing liability risk?



issues some thought an insurance agency difficulties down the whether the new the assets of the buying both the assets E&O liabilities. Does make that clear? And

Moreover, does state law provide successor liability coverage and has the sales agreement considered it? Does the sales agreement address possible indemnity between the buying and the selling agencies under various scenarios if one of them is sued by a client?

An obvious option is to purchase extended reporting period (ERP) coverage, sometimes referred to as tail coverage, which is added to the selling agency's existing E&O policy. An ERP generally affords E&O coverage for alleged errors or omissions by the insured agency committed before the existing insurance policy was canceled and the ERP went into effect, as long as the alleged acts are reported during the time period set out in the ERP.

Although the ERP does not provide coverage to the buyer, having insurance coverage in place to indemnify the selling agency's alleged errors provides some indirect benefit to the buying agency. The parties should also consider how long of an ERP to buy. Specifically addressing those matters in the sales agreement can help avoid

recriminations and finger-pointing between the buyer and the seller later on.

Documentation retention is another issue that can arise. Sometimes, a buying agency is served with a lawsuit by a client who had been with the selling agency for many years, but when the buying agency gathers the file to prepare its defense, it discovers the selling agency had not retained the documents or has not kept them in good condition. Conversely, if the selling agency is later sued and the buying agency has retained the documentation, an agreement addressing the selling agency's right to access necessary documents can make its defense much easier.

Remember, when considering such a provision, keep in mind that if an agency takes on a contractual obligation to indemnify the other agency in the agreement due to an action by a client, that might not be covered under an E&O policy. Some policies specifically exclude contractual liability claims; others might exclude a contractual liability claim except to the extent that the insured would have liability based on negligence in any event.

None of these issues should prevent an agency from deciding to proceed with a sale. However, thinking about potential E&O issues and taking reasonable steps to address them during the sales process can help both parties avoid trouble down the road.

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