

## **Disclaiming Disclaimers: Be Careful Using Narrow Disclaimers**

Because of the questions surrounding insurance protection for COVID-related claims, agents from around the country are considering including COVID-related disclaimers in proposals, renewals and any other document intended for prospects and clients.

While this may seem a timely and effective method for avoiding errors and omissions (E&O) problems from COVID claims, in fact, using such a narrow disclaimer could worsen the agency's E&O exposure. Focusing on one potential exposure while not addressing or effectively ignoring all other exposures places the agent in a dangerous position.

When considering the E&O implications of any decision, agents must imagine the plaintiff attorney and the witness stand. What is going to be asked and what decision must the agent defend?

### **Why Disclaimers**

A disclaimer is defined as a formal statement saying that the disclaiming party is not legally responsible for something, such as the information given in a book or on the internet, or that the disclaiming party has no direct involvement in it. \* (\*Cambridge Dictionary)

Disclaimers notify the reader that the information provided may not be all the information relevant to the reader and should not be relied upon as the final or primary source of information. In effect, a disclaimer notifies the reader that he or she is responsible for seeking out all relevant information. Effectively, the disclaimer places the risk of researching all relevant information on the reader.

Disclaimers focused solely on COVID, or any other "hazard of the day," open up major opportunities for the plaintiff attorney if an uncovered loss occurs or an improperly managed exposure results in a loss. Neither the deposition nor the witness stand is the desired time to explain a seemingly good, yet knee jerk decision.

Agents generally do not list every possible exclusion or limitation in a proposal or renewal, but a few are highlighted – generally those added by endorsement. But as every agent knows, or should know, the unendorsed policy language already contains exclusions and limitations.

Short of listing every exclusion, gap or limitation (which would require pages and pages of explanation), the only way the agent can adequately warn the insured about exclusions and limitations is by use of a well-worded disclaimer. Disclaimers are necessary but should **not** be narrowly focused.

### **Disclaimers, Depositions and the Witness Stand**

Imagine sitting on the witness stand, being sued because the policy contained a specific exclusion not addressed in the proposal or renewal documents. Assume further that the loss is not covered because of an exclusion not addressed in the proposal or not properly referenced by the disclaimer. Following is what this might look like in court (forgive the buildup, but this is how it works).

Plaintiff Attorney: *Mr. Agent, does the commercial property policy you wrote for my client provide coverage on the building and the business personal property within the building?*

Agent: *Yes, it does.*

Plaintiff Attorney: *Does this policy provide “all risk” coverage?*

Agent: *No, it provides “special” coverage, or “risk of direct physical loss” coverage.*

Plaintiff Attorney: *Oh. So, what does that mean?*

Agent: *That means the policy provides coverage for damage caused by any loss not specifically excluded or limited by the policy or any endorsement.*

Plaintiff Attorney: *Oh? So you mean there are things that could happen that are not covered by the policy?*

Agent: *Yes. Not every type of loss is covered by the policy.*

Plaintiff Attorney: *I’m looking now at your proposal detailing this policy. Is this the proposal you provided the client?*

Agent: *Yes, this looks like the proposal.*

Plaintiff Attorney: *It looks like you did list a few exclusions in this proposal. You listed eight exclusions and/or limitations to be exact. Why did you list these?*

Agent: *Those were exclusions endorsed onto the policy and a few we, as an agency, make sure we list such as flood and earthquake.*

Plaintiff Attorney: *Are those the only exclusions or limitations applicable to the coverage?*

Agent: *Well, no. There are several others.*

Let’s skip ahead a bit. The set-up is somewhat obvious.

Plaintiff Attorney: *It appears you included disclaimer language in the proposal to address exclusions or limitations not specifically listed in the proposal, is that correct?*

Agent: *Yes, we did add a disclaimer to address potential exclusions not specifically addressed.*

Plaintiff Attorney: *In reading the disclaimer, it appears to address COVID losses only. Am I reading this correctly?*

Agent: *Yes, given the current situation, we felt we needed to address COVID-related situations.*

Plaintiff Attorney: *Beyond the list of exclusions in the proposal and the disclaimer for COVID-related losses, are there any other exclusions or limitations affecting my client’s coverage?*

Agent: *Yes, there are.*

## How Does this End?

Result: Agent loses. The plaintiff attorney will go on to highlight that the agent chose, on behalf of the insured, which exclusions and limitations were important and which were not – without asking the insured what might be important. Basically saying, what else did you decide wasn't important to the insured?

Moral: Unless every possible exclusion or limitation is listed in the proposal, use very broad disclaimers. Narrow disclaimers focused on one or a few exposures can make the situation worse, not better.

Attempting to list every exclusion and limitation is just as dangerous from an E&O perspective as narrow disclaimers. There is no effective way to address all exclusions and limitations in less than 30 pages. Consider the commercial property policy as just one example. Beyond the specifically-listed exclusions, the commercial property policy contains:

- Exceptions to exclusions;
- A list of property not covered;
- Sub-limits;
- Additional coverages, with conditions; and
- Conditions in general.

When a package of coverages is written (CGL, BAP, Umbrella/Excess, Crime, etc.), the exclusion and limitation explanation pages would fill an encyclopedia.

Disclaimers are necessary to remove the need to be this precise in every proposal. And from a sales and marketing perspective, presenting the client with a 60-plus-page proposal, most of which is explanations of the lack of coverage, lowers the chances of closing most clients.

How to write a disclaimer:

- Disclaimers should not address one or a few specific exposures.
- Disclaimers should be broad enough to warn the prospect and client that there are exclusions and limitations that may not be addressed in the proposal.
- Disclaimers should point the insured to the specific policy language, warning the insured to not depend on the proposal for any interpretation of coverage.
- Disclaimers should clearly state that coverage determinations are often fact-based and are determined by the carrier.
- Disclaimers should address the agent's market access. This means that the agent makes known to the insured that they have not researched the entire marketplace to see if a specific coverage is available; but they have researched their available markets.

Following is sample disclaimer language: *"All insurance policies contain exclusions and limitations either within the policy language or added to the policy by attachment of an endorsement. Not all exclusions or limitations are addressed in this proposal. Exclusions and limitations can be absolute or conditional based on the specific circumstances and allegations of a loss or claim. Policy language dictates coverage. [Name of Agency] offers the coverage options available from the insurance carriers it is licensed to represent or from those with which it has a relationship; the agency makes no representations regarding coverages, exclusions or limitations in policies from any carriers not represented by the agency nor does*

*the agency make representations regarding the availability of coverage to cover any specific risk of loss in the broader insurance marketplace.”*

Disclaimers are necessary in every proposal and communication regarding coverage. Attempting to address all possible coverage issues in the absence of a proposal creates a major problem when the agent is on the witness stand. Make use of proper disclaimers.