

## How a Claim is Made

By Shirley Zelenski, Swiss Re

Fans of the TV show “How It’s Made” enjoy watching how some of the most seemingly mundane objects in the industrialized world today are created. The show’s presentation of the steps and materials it takes to create objects as simple as a mirror or silk glove make us more appreciative of how easily these things are available to us. And yet the life cycle of any object is more than the sum of its parts; each step in the process of making those parts is a story of its own.

Luckily for most, the life cycle of a professional liability claim is a mystery. For those who have had the experience, some perhaps didn’t really know what stage their E&O claim was in until it affected their deductible or until their E&O carrier paid to defend and settle. If you are one of the curious, stay tuned and enjoy; here’s the story of how an E&O claim is created - with no commercial interruptions.

### **How a claim is defined**

First, the claim is created by policy definition. The Westport Insurance Agents Professional Liability policy defines a claim as:

- 1.) an insured has received a summons, a subpoena, or any other notice of legal process;
- 2.) an insured has received notice of any “suit”;
- 3.) an insured has received notice of a written demand, or a written demand for money or services; or
- 4.) an insured has received a request to provide a recorded statement.

In any or all of these instances, the claim must be immediately reported by the agency to the E&O carrier.

### **Reporting the claim to the E&O carrier: behind the scenes**

Once the claims department receives notice, a claims specialist contacts the insured agency to notify them that a claim has been received. A claim file is opened and the claims specialist reviews the applicable deductible, policy limits, retro date, and confirms that the policy is in force. A determination is then made as to whether the alleged error or omission of the “claim” is covered by the policy. If the allegations fall within the coverage terms, the claims specialist then attempts to determine the insured’s potential liability. The claims specialist will speak with individuals from the agency who were involved in the matter, including the agency principal to determine what happened. He or she will ask them about standard agency procedures and practices, and will check to see whether the underlying carrier (or others) have made payments yet. They will also ask for any and all documentation from the agency file so they can review it to support the agency’s defenses to the claim.

Many times the allegations of the claim do not indicate that the agent has made any error. In those cases, the claims specialist will advise the claimant that their claim has no valid basis and will deny the claim. However, if the allegations may give rise to a valid claim, and if a lawsuit has not yet been filed, the claims specialist will ask for documentation that supports the claimant’s allegations. If the claimant has retained an attorney, the claims specialist will work directly with the attorney. The claims specialist will then review the information they provide and determine what further action to take to resolve the claim.

### **Bringing in Defense Counsel**

If a lawsuit results from the allegations of a claim, the claims specialist will choose appropriate Defense Counsel for the agency, sometimes referred to as the “DC”. The DC selected usually comes from a panel of defense attorneys that have a proven history of excellence in defending insurance agents errors and omissions claims. The DC represents and has an ethical and professional obligation to the insured first and is the insured’s representative in a court of law. In

some cases, Swiss Re has enhanced the E&O policy with an endorsement that allows insureds to choose their own defense counsel, subject to some limitations.

The DC will meet with the insured and begin the discovery process. This begins by requesting written discovery and may include subpoenas of various records including tax returns, receipts, or payroll records. Depositions are another part of discovery. Depositions are sworn testimony of the parties, witnesses and experts in order to determine what their testimony will be at trial. Individuals involved in the alleged error from the agency are deposed in most cases to document their side of the story. All of this is used to help build the agency's defense and may also factor into the ongoing updates of the reserves. The agency's potential liability is the logical conclusion that develops in the mind of the claims specialist as the discovery process unravels the facts. The claims specialist will then analyze, with the help of the defense counsel, how a judge or jury will view the agency's liability and establish the expense, defense, and loss reserves. Defense counsel will continue to have regular contact with the insured, following the case to the end and keeping the insured informed about progress, delays, and the eventual outcome.

### **Mediation, summary judgment, or trial**

In many cases, it is appropriate for a case to be mediated. This is a non-binding process involving an independent third party whereby an attempt is made to negotiate a settlement. The process is non-binding because it is voluntary and the parties are not required to reach a settlement. If a settlement is not reached, the case continues in the litigation process..

In some instances, where there is no dispute as to the facts of the case and the evidence clearly supports the agency and law supports the agency, the DC will file a motion summary judgment. This is a request where the attorney will ask a judge to determine as a matter of law that the claimant's case should be dismissed. It can only happen if the material facts are not in dispute such as whether a faxed document was received by the intended recipient or whether an injured worker is an employee of the plaintiff. The goal is to save time and money that would be spent further representing the insured by going to a jury trial when it is clear that there is no basis for the claim. If the motion is unsuccessful, the case goes continues in the litigation process.

A trial can last from one day to several weeks. On average, most E&O trials last two or three days. After the jury or the judge has reached its verdict and the trial has ended, either side may seek to appeal the verdict if they believe that the verdict was against the weight of the evidence or that there was an error as a matter of law. This can add several months to the process.

At some point, just like a mirror or a silk glove, the claim will finally come to an end. The entire process, from the first demand letter to the agency to the final closing letter from defense counsel or the claims specialist, can last from just a couple of months to a couple of years. Either way, the goal is to successfully defend the agency and resolve the claim. Being accused of making an error is never pleasant. But hopefully now you will have a better understanding of the life cycle of a claim and will be prepared if it should ever happen to you.

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