

# REAL ESTATE BROKERS: DO YOU HAVE AN E&O CLAIM, AND IF SO, WHEN SHOULD YOU REPORT IT?

All major insurance underwriters of errors and omissions insurance for real estate brokers provide policies written either on a "claims made" or a "claims made and reported" basis. A broker's failure to properly report a claim or potential claim can ultimately result in coverage being denied to the broker.

## What is a "claim"?

The policy may or may not define what constitutes a claim. However, if there is a definition it can vary among insurance companies so please read your policy carefully. Typically a claim is made when you have any knowledge of any incident which may give rise to a request for damages in the future.

## Does a lawsuit have to be filed and served upon you to constitute a "claim" that should be reported?

No, in general when a demand is made, whether written or verbal, against you for damages, you should report the matter to your E&O carrier in every instance. The demand may not even refer to any damages, but simply allege an act, error, omission or personal injury caused by the broker or one of its agents. The policy will define how and when to report a claim or potential claim. Typically a policy will have an "Awareness Provision": *If, during the Policy Period, the company shall be given written notice of any act, error, omission or Personal Injury which could reasonably be expected to give rise to a claim against the Insured under this policy, any claim which subsequently arises out of such act, error, omission, or Personal Injury shall be considered to be a claim made during the Policy Period in which the written notice was received.*



Once you become aware of a claim or a potential claim you should report the claim to your current errors and omissions carrier immediately. If you fail to report the claim and subsequently allow your policy to lapse, then later report the claim under a replacement policy, you may find yourself without coverage. Also, if you switch your coverage to a new E&O carrier, but fail to report a claim to your prior carrier before you switch and then report the claim to your new E&O carrier, you also may find yourself without coverage on the basis that the claim was made against you prior to the new carrier's policy inception date. Your prior carrier may also deny coverage for failure to report the claim during the policy period because no extended reporting period was applicable beyond the policy expiration date.

**Example:**

Broker Jim's firm is insured with E&O Carrier #1. During E&O carrier #1's policy term, Broker Jim receives a letter from an attorney representing former clients Broker Jim had represented in a sales transaction. The letter alleges that former clients are now being sued because of the transaction and suggests that Broker Jim notify his insurance carrier regarding claims the former clients have against broker Jim because of this lawsuit.

Broker Jim does not notify Carrier #1. Rather, Broker Jim hires an attorney who responds to the letter denying any responsibility on the part of Broker Jim. Nothing further is heard from the attorney for the former clients and Broker Jim assumes the matter is resolved.

Two months later Broker Jim switches his E&O coverage to Carrier #2. Three months later Broker Jim is finally served with a lawsuit by the former clients. Broker Jim tenders the

lawsuit to Carrier #2. Carrier #2 declines coverage on the basis that Broker Jim's first notice of claim was the letter sent by the attorney for former clients before Carrier #2's policy inception. Broker Jim then tenders the lawsuit to Carrier #1 on the basis the letter was received during Carrier #1's policy period. Carrier #1 declines coverage because Broker Jim did not report the claim during the policy period and coverage ended upon Broker Jim buying coverage with Carrier #2. Carrier #1's policy required that claims be made and reported during the policy period. Broker Jim is now faced with defending a lawsuit without any errors and omissions coverage.

This case example illustrates why it is important to read your errors and omissions policy thoroughly and to take steps to immediately report a claim or a potential claim. Brokers usually have the responsibility to negotiate with an insurer for an E&O policy for himself and his/her agents. Therefore, they also have the responsibility to inform and educate their agents on the merits of immediate disclosure to the broker in the event of a potential error.

It is not uncommon for an agent to try to "fix" a client grievance or they feel it is so obscure it will "just go away." Many times these situations can be fueled by the lack of proper and timely attention and turn a small E&O *fire* into a *twelve alarm blaze* of a claim. Thus, the agents need to be just as sensitive to E&O claim reporting procedures as the broker, who certainly does not want to prejudice his rights to coverage by not immediately reporting a claim or potential claim. If you are uncertain whether an incident is a claim, contact your errors and omissions carrier as soon as possible to get advice and instruction. Do this, even if the alleged damages appear to fall below your E&O policy deductible.

This brings out one more important point. The use of "risk management service" companies is popular among real estate brokers. These companies propose to defend up to a broker's E&O deductible. Sometimes these companies appear to be in conjunction with or related to an E&O carrier. These companies may serve a useful function by handling legal matters where liability or costs appear to be within a broker's E&O deductible.

However, when using such a firm, brokers should never assume the claim or potential claim has been reported to the E&O carrier by the "risk management service" company. To do so could jeopardize coverage! The E&O carrier not only needs to be notified by the covered broker but they may want to "bless" the course of action being taken by the "risk management service" company, particularly where the claim may eventually exceed the broker's deductible.

We leave you with this thought. As a real estate broker or agent, some of you will most assuredly be involved in a real or alleged E&O claim in the near future. If you cannot think of your E&O insurance carrier as a friendly paid consultant, then think of them as a stalwart defender of your reputation and assets.



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