



**NATIONAL
TORNADO
SUMMIT
& DISASTER SYMPOSIUM**

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After the “Storm”

Post Disaster Claims Against
Insurance Agents & Brokers

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Disclaimer

This presentation provides general information and recommendations that may apply to many different situations or operations. Any recommendations described in this presentation are not intended to be specific to your unique situation or operation. Consult with your staff and specialists to determine how and whether the information in this presentation might guide you in developing specific plans or procedures for your situation or operations. This presentation is not intended as, and does not substitute for, legal advice, which should come from your own counsel. Any statements made or opinions expressed are strictly those of the presenter, and not necessarily those of Allianz Insurance Company or its subsidiaries or affiliates.



What We Will Talk About

- The “problem”
- Some stats
- Review of general E & O claim issues (not specific to post-disaster claims)
- “The War Stories” (claims we see by disaster type)
- E & O Loss Mitigation Tips
- Q’s and A’s



The “Problem”

Dear Mr. Jones,

“We regret to inform you that under the circumstances, there is no coverage for this loss, and we must respectfully decline to make payment for.....”



And Mr. Jones says,
“That’s OK, I’m fine with that. Thank you very much for your fabulous service.”
And everyone closes their files and lives happily ever after.....



Ummm.....

That is not typically what happens.



The Problem, continued

The reality is that typically when someone finds themselves without coverage, they will look for alternatives.



And the insurance “agent” is usually the primary target



The Problem

This tendency tends to be magnified after a large disaster, as a wave of E & O claims follows. We call this the “echo CAT” phenomenon.



Some Thoughts on Why This Is

- The law of large numbers—the larger the number of people and risks involved, the higher potential for issues caused by errors or otherwise
- In areas prone to disasters, many carriers have responded by restricting coverage, adding exclusions, lowering limits, increasing deductibles, changing policy terms and conditions, or withdrawing from the market completely
- Surplus Lines carriers, NFIP, Fair Plans, Wind Pools and carriers of last resort have become increasingly the only available market, and they have very strict application, timing, placement, payment and other processes in place that can generate exposure to the insurance producer
- Agents and Brokers tend to be dragged into coverage and claim disputes between the insured and the carrier (such as wind vs. flood issues)
- The Plaintiffs’ bar can be very active following a large event



So Lets Look at Some Numbers

- Since 2004, when we starting coding post-disaster E & O claims, we have tracked over 1500 claims. (We only track certain events—not all events with an ISO CAT code). Totals for the Agents E & O marketplace are undoubtedly much higher.
- I don’t have the figures, but who wants to guess what the total \$\$ incurred for those claims is?
- Which event do you think generated the most E & O claims?
- Which event do you think was most costly for the industry?



Numbers...

- Average Loss Paid (claims closed with payment) could be between \$30,000 and \$60,000 carrier wide for these kinds of E & O claims
- Average Total Incurred for those claims could be as high as \$40,000 to \$60,000+
- That does not include the other, sometimes intangible, costs to the insurance agent or broker.



“Intangible” Costs

- Loss of time and distraction from day to day business
- Impaired customer relationships
- Impaired carrier relationships
- Exposure above E & O policy limits
- Possible license actions
- Damage to professional reputation



General Claim Allegations

- Failure to Procure
- Failure to Advise
- Claim handling issues



Failure to Procure

- Failure to secure specific coverage requested
- Failure to replace coverage with equal or better coverage
- Failure to “advise” that specific coverage needed



Two Areas

- Coverage Type
- Amount of Coverage
- Statistically, failure to procure coverage in some fashion accounts for over 50% of all E & O losses (although failure to advise claims are on the rise).



“Repeat Offenders”

- Failure to actually place coverage at all
- Non-standard exclusions/limitations contained in coverage forms for clients placed in surplus lines or other non “mainstream” markets
- Inadequate property limits (which can be a procurement or an advice issue, potentially)



Failure to Advise

- Former “rule” that no duty to advise is being undermined by the courts via exceptions, such as the addition of the “special relationship” test
- Duty undertaken creates a duty to discharge the duty with reasonable care
- Need to explore the relationship between the parties:
 - “order taker” vs. “adviser”
 - Other hallmarks that may indicate broader duties, and that includes when the agent has undertaken to advise

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Claim Handling Issues

- Failure to timely report to all potentially applicable carriers
- Referral to specific contractors without carrier authority, or before a coverage determination has been made by the carrier
- The potential danger of getting too involved in coverage or damage disputes between the client and the carrier

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Flood



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Flood

True or False?
 “Most people/entities procure flood insurance only when it is required by their mortgage holder or other source....”
 “Most people equate “needing” flood insurance with a requirement by their lender”

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Flood Issues

- Complete lack of flood coverage
 - Failure to understand/follow NFIP rules and procedures (waiting periods, premium payments, when coverage is effective, elevation certificates)
 - Claimed failure to advise “needed” or claimed advice that the coverage is not “needed”
 - Lack of understanding of “standard market” policy and appetite restrictions
 - Errors in determining flood zones (when undertaken)

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Other flood issues

- Lack of contents coverage or coverage for other structures
- Inadequate limits
- Alleged lack of/failure to offer excess flood coverage
- Commercial Risks/Condos
- Failure to explore alternative markets
- Miscellaneous issues (Sump Pump cvg., sub limits, deductibles)

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Storms/Wind/Hail





Storms/Wind/Hail

- Market and policy restrictions
- Wind pool and “carrier of last resort” requirements/processes/restrictions
- Damage causation-wind vs. flood
- Age of roof; ACV vs. RCV coverage
- Storm deductibles (flat deductible, percentage of loss, percentage of insured value, per occurrence or per building)



Wildfires



Wildfires

- FAIR Plan and other non-standard carrier processes/restrictions
- Inadequate Limits
 - Advice Issues
 - Calculation Issues
 - Appraisal/Market Value vs. Cost to Rebuild
 - Disaster impact on rebuild costs
 - Coinsurance penalties
 - “Guaranteed” replacement cost coverage



Commercial Risks



Commercial Risks

- Off Premises Power failure
- Business Interruption coverage issues
- Code Upgrade coverage (this can be an issue for personal risks as well)
- DIC coverages
- Blanket limits vs. Specified Location Limits
- Coinsurance issues



“Mitigation”

Noun

1. the act of [mitigating](#), or lessening the force or intensity of something unpleasant, as wrath, pain, grief, or extreme circumstances;
2. the act of making a condition or consequence less severe: the mitigation of a punishment;
3. the process of becoming milder, gentler, or less severe;
4. a mitigating circumstance, event, or consequence.

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E & O Loss Mitigation

- Clear documentation of undertaking
- Clear documentation of coverage offers/rejections
- In fact, clear documentation of everything
- Offer of alternatives
- Signed applications
- Look at your website
- Always ask the client to let you know if changes are needed
- Know what duties accompany what you undertake
- Stay informed
- Have and follow your own disaster recovery plan!
- Involve your e & o carrier early when potential problems arise—they can help!

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Mitigation Tips

From Defense Counsel (East Coast):

- Document the file and send confirming communication to the client.
- Avoid relegating tasks to parties without the requisite expertise or training to handle them.
- Improve the level/quality of communication between the parties with direct client contact (especially in terms of agreements made) and those acting to place coverage and handle the account on a day to day going-forward basis.

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Mitigation Tips

From Defense Counsel (West Coast):

- Don't get in over your head -- don't procure specialized coverage unless you have experience with that particular line.
- When claims get reported by the insured, tender far and wide (to all possible carriers; don't make the coverage decision yourself).
- Involve your own liability insurer and defense counsel early if you suspect a claim will be coming -- in many instances a lawsuit can be avoided.
- Documentation cannot be overemphasized -- on all sides: with the insured, with the insurer, and where applicable with the surplus lines broker.

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Mitigation Tips

From Quality Manager at large regional broker:

- As an agent/broker, understand the risk and exposures of your client to determine the types of insurance and other risk transfer methods that meet their needs. This requires more than obtaining a copy of their current insurance policies. There is no guarantee the prior agent understood the clients risk and exposure to loss OR that they have any technical insurance knowledge of coverage, etc.
- All staff should understand they have a responsibility for the quality of the product being produced by the agency...it takes many eyes at times to catch a problem just waiting to surface.
- If the E&O ramifications aren't enough to entice an organization to take documentation seriously, then increasing productivity and efficiency of the work being conducted by staff across your organization should. Many hours are lost trying to figure out what someone did in their absence or where in the blazes they filed it.

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Mitigation Tips

From independent consultant focusing on Independent Agency operations:

- Exposure analysis – using a consistent approach not only helps producers identify exposures, but it provides a consistent means to document files, and consistency enhances credibility.
- Standard proposal templates – there is nothing that makes more permanent representations of coverage than an agency's proposal. It has to be right. Following a template makes a huge difference in accurate representations and consistency.
- Timely and thorough policy checking and delivery to clients – the most under-appreciated and expensive processes yet most important in the agency. It is more than a clerical check, so the people involved need to be technically competent. Two sets of eyes are better than one.

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Questions?

