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THE E&O CORNER The Importance of Documentin

We are all aware of the phrase *caveat emptor*. In common parlance, this Latin phrase translates into its most basic and popularly understood form, "Buyer Beware!" Simply put, it means the onus is on the purchaser to be informed of the details of his or her own transaction and is ultimately responsible if certain facts are undisclosed that were knowable. As we have written in the past, the natural evolution of that idea in relation to errors and omissions claims against insurance agents and brokers is the application of the Duty to Read. It holds that an insured is bound by the terms, conditions and limitations contained in the insurance policies they receive. Unfortunately, the courts sometimes need more than just the Duty to Read to hold insureds accountable for the insurance they ultimately decide to purchase or reject after it was offered.

Flood Insurance Coverage to Customers

One might naturally think an insurance agent or broker has no E&O exposure for coverages offered that the customer chooses not to purchase. It makes sense, given the law. But, not so fast as it is not as clear-cut as common sense or the law might suggest. In this case, it is not just *Non-Buyer Beware* but *Agent & Broker Beware* even when coverage is offered then rejected. In such a situation, a best practice for an insurance agent or broker to follow is to make certain there is documentation providing evidence the customer rejected coverage that had been offered. This is especially important when it comes to flood insurance.

We are all aware of a considerable uptick in flood claims in recent years, particularly in areas not usually subject to those kinds of claims. However, they're being filed with greater regularity and severity than in the past. You see them as typical flood claims related to property damage. We see them as possible E&O claims and lawsuits coming from customers not located in higher risk zones and who either do not have FEMA flood insurance coverage or are only insured by limited non-FEMA coverage.

We know the current National Flood Insurance Program expires in 2017, and various rumblings in Washington D.C. and articles in trade journals suggest the property and casualty Industry might be interested in writing private flood coverage outside of FEMA and the WYO or Write Your Own programs. Flood insurance is a hot topic. Since Hurricane Irene in 2011 and Superstorm Sandy in 2012 hit the East Coast, our clients have told us more of their insureds have inquired about flood coverage. However, we also understand from you flood coverage is often rejected by customers for a variety of reasons.

Insurance agents and brokers often tell us they regularly offer customers the option of purchasing flood insurance coverage as a corollary to explaining the possibility of property damaged by wind-driven rain, broken pipes or sprinkler heads, sewer line backups, clogged drains or flood waters. When flood insurance is offered and then rejected, agents and brokers typically document the rejection in their agency management systems. Although documenting the rejection of flood insurance in an agency management system is a good practice, use of the ACORD 60 flood rejection form is a practice and procedure every agency and brokerage should consider adopting as a regular part of conducting business. The ACORD 60 is a simple, one-page form titled "Flood Insurance Notice/Rejection." This form, which should be signed by the insured and dated, contains the following declaration:

I understand that flood insurance coverage is available for the property located at the address below, but I hereby elect not to purchase such coverage. I also understand that my rejection of this coverage will apply to all future renewals, continuations and changes unless I notify you otherwise in writing.

The ACORD 60 form is a great help in addressing potential E&O claims and lawsuits based on the lack of flood insurance covering a claim. After Hurricane Irene and Superstorm Sandy, we saw numerous flood based E&O claims and lawsuits against insurance agents and brokers dismissed because ACORD 60 forms signed by customers were in the agency or brokerage's files. All you need to do is to have this form signed once, and then place it in your files. It will be your "get out of jail free" card in the event a claim or lawsuit is filed alleging a failure to procure flood insurance. Note: the ACORD 60 flood rejection form applies to both commercial and personal lines insurance coverage.

A best practice for insurance agents and brokers to follow when discussing coverage options with customers is always offer flood insurance. If, however, the customer or potential customer rejects the option of purchasing flood insurance coverage, the prudent insurance agent or broker should be certain to have their customers complete and sign an ACORD 60 form, indicating they reject the coverage offered.

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Keidel, Weldon & Cunningham, LLP concentrates its practice in the defense of insurance agents and broker's errors and omissions claims and litigation, errors and omissions loss control counsel and education, insurance coverage analysis and litigation and insurance regulatory matters. Please direct any comments or questions to James C. Keidel, Esq. by mail to the main office of Keidel, Weldon & Cunningham, LLP, at 925 Westchester Avenue, Suite 400, White Plains, NY 10604, telephone at (914) 948-7000 or e-mail at jkeidel@kwcllp.com. The law firm also maintains offices in Syracuse, New York; New York City, New York; Wilton, Connecticut; Fair Lawn, New Jersey; Warwick, Rhode Island, Philadelphia, Pennsylvania, Williston, Vermont and Naples, Florida.