

ERRORS AND OMISSION CLAIM

What you need to know if and when a claim is brought against you

What are your chances of having an error and omissions claim brought against you? Possibly more likely than you think. Each year approximately one in 15 real estate professionals will have a claim brought against them. What exactly is a claim? It is a demand for money, the filing of a lawsuit, or instituting an arbitration procedure against you for giving, or failing to give, professional services. In other words, someone feels they have been damaged because of something you did or failed to do and they want a remedy for that damage. In most situations, money is the remedy.

What should you do if and when someone brings a claim against you? If you carry insurance, you have certain conditions and obligations in your policy. One condition states that once you become aware of any negligent act, error or omission which could reasonably be expected to be the basis of a claim, you must notify the insurance company in writing. Many times, we are aware of a "problem" even before a claim is made. By addressing it early, the problem can often be remedied with limited or no damages. The longer a problem exists the more money it will likely take to remedy the problem.

Other conditions of the insurance policy are: you must cooperate with the insurance company by providing any and all information requested; you may be required to appear at any hearings, meetings, or trials; assist in making any settlements; and supply all pertinent documentation relative to the claim.

Finally, an insurance policy states you should not voluntarily make any payment without the written consent of the insurance company. The reason for this is when a claim is settled, an insurance company will secure a written release against future claims in exchange for a settlement. Without such release, the person making the claim could make another demand at a later date. In fact, if you voluntarily make a payment to resolve a claim, you could possibly be voiding your policy. For example, let's say a home you sold has a leaky roof. The buyers contact you and claim you should have known about the leaky roof. You get an estimate of \$500 to fix the leak and then pay for the work to be done. A year later, the home owner discovers that because of the leak, structural damage occurred and the cost to fix the damage is \$10,000. You now turn the claim in to your insurance company. The insurance company could deny coverage because you failed to perform two duties required in your policy: 1) report the claim when first known and 2) you voluntarily made payment without written consent of the company.

There are times an insured will contact their own attorney when they are presented with a claim. Again, if insurance is carried, and legal counsel is required, the insurance company will assign legal representation. The insurance company has no obligation to reimburse any unapproved counsel regardless of the outcome. The reason for this is that insurance companies negotiate favorable rates

with lawyers whose expertise is in defense of professional liability claims. If every insured who has a claim hired their own lawyer at the "going" rate, insurance premiums would go up because claims costs would increase. In addition, in each profession, we specialize in certain areas. Your specialization may be residential, commercial, or property management. Insurance defense is a specialty unto itself. Defense of a claims-made or professional liability policy is even more specialized.

When you become aware of either a claim or a possible claim there are certain things you should do, in addition to contacting your insurance company. First, write a narrative chronologically of everything which occurred. Be as detailed as possible. This will serve you well in the future as none of our memories are perfect. Claims can take years before they are settled. Documenting minor details, can often times be the difference in a positive outcome.

Secondly, gather all pertinent information into a chronological file and make a copy of everything. The insurance company will ask for both a narrative and the documentation. The more information you can provide, the better your position.

Obviously, being in the insurance business, we feel your needs are best served through the purchase of insurance. However, we do recognize that some professionals prefer not to purchase E & O insurance. In either case, the same basic principles still apply with the exception that you will have to hire your own legal representation. Your first impulse will be to contact your personal attorney. While that person may be qualified to handle your claim, we suggest you ask what experience they have in insurance defense. If their experience is limited, ask for a referral of an experienced insurance defense attorney. Again, do not agree to settle or pay any damages without legal counsel. It is imperative that a proper release be executed upon any settlement.

NEVER, NEVER, agree to anything or sign anything without consulting your insurance company or lawyer. Period!

The Minnesota Association of REALTORS' approved purchase agreement contains a section for binding arbitration to resolve any claims which result from the sale of the property. It is imperative that all parties; buyers, sellers, listing agent, and selling agent initial and understand this section. The arbitration brochure should be given to both the buyer and seller. It is wise to explain arbitration before an offer is made or a listing taken. Arbitration does not relieve your duties in an insurance policy. You must still report any claim immediately and fulfill the duties described earlier. Arbitration is an excellent vehicle to settling disputes quickly, fairly, and at a lower overall cost, keeping insurance premiums lower. It is truly a win-win situation for all concerned.

Claims against real estate professional are an increasing part of your business. Avoidance is unquestionably the best defense. However, if you are ever presented with a claim, do not panic. Contact the appropriate people and let them work with you in resolving the matter. With good documentation, cooperation, and proper claim and legal assistance you will be in a good position for a satisfactory resolution.

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