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Technical Advisory

TA 229 **Date: October 8, 2003**

SUBJECT: Reading Contracts For Insureds – Guidelines And Sample Disclaimer

BACKGROUND: As every E&O attorney knows, there are a sizeable number of E&O claims against agents that arise out of the agent trying to do a favor for an insured.

Especially for agents that insure contractors, that "favor" often involves reading or reviewing contracts signed by the contractor. Of course, other insureds sign contracts, such as lessors and lessees, and others.

Agents are caught in a Catch-22 when it comes to reviewing contracts signed by their insureds. To run from the task would call into question the agent's professional service. On the other hand, to tackle the project with no written guidelines or disclaimers could be disastrous for the agent and agency.

MAIN POINTS: The most common sense approach, and one that is recommended by E&O attorneys, is the middle ground: review the contracts, but with ample caveats.

Of primary importance is to state in writing that the agent is only reviewing the **insurance requirements** of the contract, and is not providing any sort of legal advice.

In addition, such a disclaimer should be provided at least annually to insureds for which the agent frequently and routinely reviews contracts. For situations where a contract review is done only infrequently, it is recommended that the disclaimer be provided to the insured each time. Those who favor a conservative approach recommend using the written disclaimer each time a contract is reviewed, no matter how many contracts are reviewed for an insured each year.

Below is a proposed disclaimer letter that could be used when reviewing contracts for insureds. This proposed disclaimer should be reviewed with the agency's legal counsel prior to actual use with an insured.

Our agency has, upon your request, reviewed the contract indicated above. Specifically, we reviewed only the insurance requirements as contained in Section __, Page ___.

The scope of our review was to determine if the current insurance program which you have placed through our Agency addresses the types and amounts of insurance coverage referenced by the contract. We have identified the significant insurance obligations, and have attached a summary of the changes required in your current insurance program to meet the requirements of the contract. Upon your authorization, we will make the necessary changes in your insurance program.

We will also be available to discuss any insurance requirements of the contract with your attorney, if desired.

In performing this review, our Agency is not providing legal advice or a legal opinion concerning any portion of the contract. In addition, our Agency is not undertaking to identify all potential liabilities that may arise under this contract. This review is provided for your information, and should not be relied upon by third parties.

Any descriptions of the insurance coverages are subject to the terms, conditions, exclusions and other provisions of the policies and any applicable regulations, rating rules or plans.

As an example of how simply doing a favor for an insured by reading or reviewing a contract can quickly bring an agent to the verge of litigation, a recent case is illustrative.

The agent insures several large contractors, and reviews contracts for these insureds on a very regular basis. In an unfortunate oversight, the agent failed to notice that one construction contract his insured had signed required limits of $20 million. The insured carried $10 million limits. Two weeks after the job had begun, the risk manager for the building owner called the contractor to notify him that the Certificate of Insurance the agent had sent reflected inadequate limits, and that work must stop immediately until sufficient limits could be obtained and verified.

The contractor immediately called the agent, who was totally embarrassed by the oversight. Later that same day, the agent was able to obtain the additional $10 million excess quote for approximately $8,000 premium.

The contractor was then angry that the additional premium was essentially going to have to come out of his profit on the job, since he hadn't figured that additional cost into his bid. He told his agent that he should pay the additional premium, since it was the agent's error.

While this case has not yet gone to trial, the agent was advised by an E&O attorney **not** to pay the additional premium, no matter how embarrassed he was by the oversight. If the agent paid the $8,000 additional premium, it could easily be construed as admitting

fault, which violates one of the key provisions of all E&O policies. Below is an excerpt from a typical E&O policy:

General Terms & Conditions.

I. Reporting and Notice. Insured's duties in the event of a claim or any potential claim:

A. The insured shall not, without our written consent, do any of the following:

1. Admit liability;

2. Participate in any settlement discussions nor enter into any settlement; or

3. Incur any costs or expense.

Since the job has been underway for two weeks, with a $10 million gap in limits, the agent could theoretically be liable for the "missing" $10 million, should an injury already have occurred. And by paying the additional premium and thus probably admitting fault, the agent would be "bare" with no E&O coverage at all.

Moral of the story: Doing "favors" for insureds can lead to bad results for the agency, if not handled just as carefully as any other "regular" task.

Moral #2: When reviewing contracts for insureds, use an appropriate written disclaimer letter.

NECESSARY ACTION: Circulate this Technical Advisory to all appropriate agency staff. Establish procedures for the use of a disclaimer letter similar to the one included in this Technical Advisory.