

If I'd only sent them the policy...

Richard F. Lund, J.D.

If I'd only sent them the policy, then I wouldn't be in this mess." And if I had a nickel for every time I heard that from an agent when there was a claim and a carrier was denying coverage for an uncovered underlying claim, I'd be a rich man.

Policy delivery is a key element to ensuring that your customers understand the coverage they have and what is and is not covered. In many states, including Missouri, the defense to a claim when there is an uncovered underlying loss is that the insured had a duty to read the policy. However, if you failed to deliver the policy prior to their loss, not only do you lose that defense, but they will use that against you.

Prior to the digital age, the time frame for policy delivery could sometimes be very lengthy. From the time the agent bound the policy for the customer and provided a binder, sent the binder to the carrier, the carrier received it and put the policy together, mailed it to the agent, and the agent either mailed or hand-delivered the policy to the customer, weeks or even months could have elapsed.

As Tim Wahl points out in his article in this issue, "Electronic Document Delivery, You Ready?," with the advent of the electronic age and adoption of the Uniform Electronic Transactions Act (UETA) in Missouri and virtually all other states, there is almost no reason now why the policy can't be delivered in only a few days, if not hours.

So, what are the types of claims that can happen if a policy is not delivered promptly? The first and unfortunately easiest error to prevent is when the agency has received the policy from the carrier, but it sits on the agent's desk because he/she wants to make a personal delivery to the customer. Due to difficulties in contacting the customer to arrange a time, or the agent's own delay in not making a concerted effort to deliver the policy as soon as it is received, the common claim that happens is that in the intervening time, an underlying loss occurs that is somehow not covered or is excluded by the policy.

Due to the agent's failure to promptly deliver the policy to the customer and allow time for the customer to read and review the policy to be aware that there could be an uncovered loss, the duty to read defense is completely lost. In that situation, the agent is more likely than not going to be responsible for payment of the underlying loss. And that usually means that the E&O carrier for the agent will pay that loss.

Another key element to policy delivery is many courts have determined that not only does the customer have a duty to read the policy, but the statute of limitations "clock" starts to run as soon as the policy is delivered. This is particularly important when a customer has received the policy, the policy has been renewed with no changes for several years, there is a circumstance that they make a claim on the policy several years after the initial policy delivery, and the carrier denies the claim citing the policy language.

In those cases, the defense is not only that they had a duty to read the policy, but due to the length of time between when they should have known of the policy language and when the claim is made, the statute of limitations bars the claim due to their failure to take action to read the policy and have it corrected or have coverage placed elsewhere.

So, what steps can you take to prevent this type of situation from happening to you?

1. Always deliver the policies you obtain for your customers as soon as you possibly can after you receive them.
2. Use electronic policy delivery (i.e., email) whenever possible. Once you have established a course of dealing with your customers where they have agreed to electronic delivery, as described by the Missouri statute in Tim Wahl's article, you will greatly decrease your risk of a "failure to deliver the policy" claim.
3. If you can't deliver the policy electronically, establish a procedure in your office about how policies will be delivered, either in person or by mail, and FOLLOW THE PROCEDURE! Having a procedure in place and making sure you follow it in each and every case will ensure that you are getting the policies delivered in a timely fashion.
4. Document, document, document. I know you've heard that many times, but documentation of your activities with your customers is still the one key element in your defense when an E&O claim happens.

For more information about the importance of policy delivery, go to the E&O Happens website (www.iiaba.net/eohappens) and in the search bar type "policy delivery." You'll find several articles that expand on the subject, including "Two Blind Mice" and "The Obligations of Policy Delivery." There are also sample cover letters for policy delivery that you can adapt and utilize for your office.

This article is intended to be used for general informational purposes only and is not to be relied upon or used for any particular purpose. Swiss Re shall not be held responsible in any way for, and specifically disclaims any liability arising out of or in any way connected to, reliance on or use of any of the information contained or referenced in this article. The information contained or referenced in this article is not intended to constitute and should not be considered legal, accounting or professional advice, nor shall it serve as a substitute for the recipient obtaining such advice. The views expressed in this article do not necessarily represent the views of the Swiss Re Group ("Swiss Re") and/or its subsidiaries and/or management and/or shareholders.

**Richard F. Lund, JD, is a Vice President and Senior Underwriter of Swiss Re Corporate Solutions, underwriting insurance agents errors and omissions coverage. He has also been an insurance agents E&O claims counsel and has written and presented numerous E&O risk management/ loss control seminars, mock trials and articles nationwide since 1992.*

Copyright 2021 Swiss Re