

COVID Happened, Now What? A New E&O Landscape

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February 2020 seems like a lifetime ago. The then new Coronavirus was only a brief mention on the nightly news, few paid much attention to it. We had heard about pandemics before.

Move forward one month to March 2020 and our whole world changed. Cities, counties and even entire states introduced various measures in immoderate attempts to curtail the spread of the virus. The now infamous if not misquoted phrase or promise, "15 days to flatten the curve," has dragged into its 11th month.

American business owners and the insurance industry saw something that neither EVER anticipated, the wholesale closure of businesses considered "non-essential." No one in the business world or insurance business would have ever considered the idea that any government in the US would prevent a legal business from operating, especially for several months at a time.

Prior to COVID, few **if any** "main street" agents would have anticipated the need to ask about much less search out coverage for governmental actions such as these experienced in the last year. One problem is that few markets existed for such coverage; another issue is that very few agents or brokers even knew these markets existed; and lastly, the cost for such coverage was high (maybe prohibitively high).

From the perspective of the "reasonable man" (or "reasonable agent") test, it would be unreasonable to hold the agent responsible for something that had never happened on such a large scale in anyone's lifetime. This was not a risk that could or should have reasonably been anticipated.

Although agents may likely see an uptick in errors and omissions (E&O) claims in the coming months, the anticipation is that few cases will be lost because of the "reasonable man" test. But now COVID has happened, and what may have been an "unreasonable" expectation before is no longer "unreasonable."

COVID has happened, now what?

Agents are practicing in a new world of probabilities if not possibilities. Previously there was little or no need to address the question of mass government closures of business in the absence of property damage or natural catastrophe because nothing like it had occurred before. Now it has and agents must address the exposure.

A few recommendations for this timid new agency world are:

- Undertake a reasonable search of the agency's available markets and those with which the agency has a relationship to ascertain whether the necessary coverage is available or not. This is not an exhaustive search of the entire marketplace as theoretically coverage is available for any risk of loss. Rather this is a survey of the agency's standard markets and the brokers with which the agency has an on-going relationship and maybe two or three additional brokers. If a market is found, learn about the market, coverages offered and the pricing scheme. If no market is found, state so on all proposals and program deliverables.
- During the prospecting and renewal process, specifically address the exposure with the insured. If the agency has an available market, ask the insured if a quote is desired. If the agency does not have a market, state that the agency was not able to locate a market. (Never state that no market exists, only that the agency was not able to find a market.)
- Like with any other exposure, make sure that the prospect/client signs or initials that the exposure has been discussed and what options are available from the agency.
- In the proposal, the exposure should be addressed again along with the agency's available options (i.e., "The agency does not have an available market;" "The agency has a market, but could not get a quote because of 'X,' 'Y' or 'Z'" (whatever the reason); "The agency was able to obtain a quote," then provide the coverage specifics)).
- Resist the temptation to create a narrow disclaimer focused solely on COVID or a COVID-type exposure. Disclaimers should be general in nature. For more information on disclaimers, see [Disclaiming Disclaimers](#).

Now that COVID has occurred, anticipating such losses is no longer unreasonable. Agents must now address this loss possibility with prospects and clients. The "one bite" allowance previously available from the "reasonable man" test may no longer be available. Businesses have been bit, now agents must address the exposure.

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