

Insurance Agents & Brokers - What to do if you are sued -

Unfortunately, lawsuits against insurance agents and brokers remain relatively common, which means that you or your agency is likely to be part of the litigation process at some point. This will answer some of the questions agents and brokers frequently ask, and help you understand the various stages of the litigation process.

A. Why have I been sued?

The litigation process begins with the plaintiff filing a lawsuit. Most often they are called Complaints, Petitions, or Statements of Claim, depending on the jurisdiction. Reading the suit papers will typically give you a good idea of why you've been sued. It might be that the client feels he was underpaid on a claim. The client might assert that he had requested certain coverage that his policy didn't contain. The underlying carrier may have denied a claim outright, and the lawsuit is challenging that decision. There are numerous reasons why insurance customers sue their carriers, agents and brokers.

The important thing is not to panic. After you report the lawsuit to the Swiss Re errors and omissions claims department, the Swiss Re claims professional will appoint a lawyer to represent you. Your claims professional and outside defense attorney deal with similar situations on a daily basis and will help guide you through the process. Most lawsuits initially ask for a very large amount of damages, which can seem menacing; however, even if the plaintiff wins his case, courts typically make much more modest awards. Some lawsuits may ask for punitive damages that seek to "punish" one or more defendants for their alleged wrongdoing. Again, this can seem overly

threatening. Bear in mind that punitive damages are rarely awarded and even so, carriers are usually the primary target; there are very few cases in which punitive damages have been imposed on an insurance agent or broker. Even though you may feel that the claims against you are frivolous the lawsuit must and will be taken very seriously, and you will need to work with your defense lawyer and claims professional to make sure that everything is being done to assure the best possible outcome.

B. What do I need to do?

The first and most important thing you need to do is to report the matter as soon as possible to Swiss Re as your errors and omissions carrier. Fax the lawsuit papers to 1-877-880-1590, clearly labeling your fax cover page with your policy number and contact information, i.e. name, address and phone number where you can best be reached. If you have any questions before you fax in the suit papers, contact your state or provincial association E&O Administrator or the Swiss Re claims department at 866-866-8907. Do not discuss the matter with anyone other than your claims professional, your defense attorney, and your internal compliance and management personnel.

Once Swiss Re receives the suit papers, we will determine that your policy is in place and covers the allegations made against you. You will receive communications identifying the claims professional assigned to your claim, her contact information, the claim number, and the defense attorney assigned to protect your interests, as well as his contact information.

At this point, your defense attorney will contact you and begin working on your defense. The courts impose short deadlines on a defendant's response, so your cooperation is critical. You will have an attorney-client relationship with your lawyer and members of the firm, so everything you discuss with the lawyers is strictly confidential and protected. You should tell them everything that you know that relates to the case, even if you think it may hurt your position.

C. How will the lawsuit get resolved?

The lawsuit will go through several stages, and may take several months or years to resolve. Generally, the course of the suit involves the initial pleadings, discovery, pre-trial motions, trial, verdict, post-trial motions, and appeal. While settlement may be an option in the future, proper defense of the lawsuit is of utmost importance. Your claims professional and defense attorney will keep you advised throughout the process.

1. Initial Pleadings

As discussed above, the plaintiff starts the lawsuit process by filing his lawsuit with the court and serving a copy on you. Keep a record of the time and method by which you are served with the lawsuit, as each jurisdiction has its own strict rules as to how proper service must be effectuated. Once properly served, there is a relatively short time to respond and file an Answer or Statement of Defense.

In rare cases, your defense attorney may recommend filing a motion to dismiss the lawsuit rather than filing an

Answer. However, courts typically do not dismiss cases summarily unless there has been uncontroverted evidence established that demonstrates there is no legal avenue of recovery against you. Such evidence generally must be developed through the “discovery” process.

2. Discovery Process

There are many forms of discovery, which is the legal term for the parties determining the facts of the case. In essence discovery entails written or oral questions and responses. Your lawyer will send written questions (“interrogatories”) to the other parties for their response, and those parties will send written questions to you for you and your attorney to answer together. Responses to interrogatories are sworn testimony that can be used in court. The parties will also take “depositions,” or “examinations for discovery,” in order to find out how parties and other witnesses will testify at trial. Court reporters transcribe the deposition questions and answers and generate a transcript. Like interrogatories, depositions are given under oath. The goal of discovery is to make sure you understand what all the evidence is going to be before trial.

3. Pre-trial Motions

Once discovery has progressed sufficiently, the parties may file various pre-trial motions. In some cases, these motions will seek to eliminate or limit particular pieces of evidence under the applicable rules. In other cases, these motions will argue that certain allegations or elements of damages should be eliminated from the case. Some motions will seek to have a party dismissed from the case altogether (“motion for summary judgment”). Sometimes, plaintiffs will file a motion to have the court declare that one or more parties is liable as a matter of law to the plaintiff. Courts frequently hold hearings at which the attorneys will present oral argument to supplement the briefs filed with the court. Your presence is not always required at these hearings, but you may attend if you wish. If the court has not disposed of the case after ruling on the pre-trial motions, it’s time for the trial.

4. Trial

The trial will be scheduled on the court’s calendar at some point in the future. In some jurisdictions this can be relatively far into the future. Most trials last several days or sometimes even weeks, depending on the number of witnesses and the complexity of the case. In the United States, most professional liability trials are conducted before a jury. In Canada, most professional liability trials are tried before a judge only. In all cases, you will be expected to attend every day of the trial, and any staff members who are witnesses will also have to participate. At the end of the trial, the judge or jury will render a verdict, either for the plaintiff or the defendants. If the case is tried before a judge, she may choose to take the matter under advisement and issue a verdict at a later date.

5. Appeal

Any party may file an appeal after the verdict as to various aspects of the trial. In general, it is more difficult to succeed on an appeal based on a judge or jury’s interpretation of the evidence, as the factfinders at trial are able to assess each witness’s credibility, and the appellate courts will not set aside such a ruling unless it is clearly erroneous. Appeals filed based on procedural or legal errors are more likely to succeed, but only if the appellate court finds that the procedural or legal error materially affected the outcome. The appellate process can take months or even years.

6. Settlement Negotiations

The reality of litigation is that the overwhelming majority of professional liability cases settle before trial. Your Swiss Re claims professional and defense attorney will keep you fully advised of any settlement negotiations. Most jurisdictions require that the parties participate in a formal settlement discussion or mediation at some point in the process (Alternative Dispute Resolution, or ADR). You will usually need to attend mediations. Most professional liability policies contain a “consent clause” that requires you to agree to settle the case before money can be paid on your behalf, such payments typically including both your

deductible and Swiss Re’s funds. In many instances, since litigation is filled with uncertainty of outcomes but certainty of time and cost, it may make sense for the parties to settle rather than going to trial. But remember, Swiss Re’s primary duty is proper defense of our insureds.

Conclusion

The litigation process is long and expensive and can be emotionally charged. However you feel about the situation, you are not alone. First, bear in mind that many insurance professionals have been sued over the years with similar allegations made against them. Second, you have a team of professionals behind you. Swiss Re is the leading provider of professional liability solutions for insurance professionals in North America and has provided insurance agents and brokers errors and omissions coverage for more than 30 years. The Swiss Re claims professional assigned to your case has many years of experience in handling similar claims, and the defense attorney engaged on your behalf will have significant experience in defending professional liability cases against insurance agents and brokers. The three parts of the team, you, the claims professional, and the defense attorney, will work together to achieve the best possible result.

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