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WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

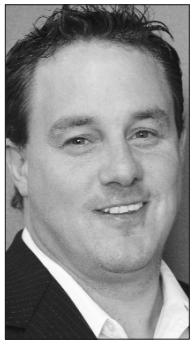
TitleTRACK

# Are you protected from 'mayhem?'

## *Some basic concerns about E&O insurance*

Errors & omissions (E&O) insurance is insurance against claims against your company, or you individually, holding you liable for a service you provided (or failed to provide) that did not have the promised or expected results. For doctors or dentists, it is often called malpractice insurance.

It is no masonic secret that the cost of doing business, especially in New York, is extraordinarily high. Factored into the cost for a title agent, or independent abstractor (if they elect to carry it), is the cost of maintaining E&O insurance. You are not mandated in New York state to carry E&O insurance, but you would be taking a substantial risk not to.



**By KEVIN MASTERS**
Daily Record Columnist

WebTitle Agency is covered as a title agent, escrow/closer and searcher/abstractor. With the amount of exposure/risk involved and the amount we wish to be covered for, our premium is several tens of thousands of dollars per year. That is the cost of a salaried employee. This cost is independent from the other forms of insurance and bonds that the company needs or feels obligated to carry to protect itself. For an independent abstractor, who is covered for searching/abstracting, the average cost to provide $500,000 to $1 million coverage with a $5,000 to $10,000 deductible is a couple thousand dollars per year.

Unfortunately, some experienced searchers that we have a long-standing relationship with have elected to no longer carry E&O insurance. As gas prices and insurance premiums increase, they point out that their base search prices haven't commensurately increased due to the introduction of cheap, inexperienced searchers into the market.

Ironically, it is claims made due to products of inexperienced searchers that are partly responsible for the premium increase that they are seeing. It is a serious risk they are taking. At the time of this article, we have never had to put in a claim against our policy, nor have we had a vendor make a claim on theirs. However, there is precedent, of course, where searchers or abstract companies have been sued due to missed liens.

Take, for example, a Pennsylvania case in 2004, *Fidelity National Title Insurance Company v. Suburban West Abstractors*. In this case, the abstractor was held liable by a jury for a $176,000 loss incurred by Fidelity after it settled with a creditor who held a $380,000 judgment missed by the abstractor. The abstractor charged only $25 for the last owner search that failed to turn out this judgment, with a disclaimer on the search stating that its liability was limited to the $25 paid for the search.

It also contended that its fee schedule provided to Fidelity that it limited their E&O insurance liability to $10,000. The court dismissed these disclaimers, supporting that the parties had always intended the abstractor to bear the risk of loss, and that Suburban had agreed to carry errors and omissions insurance of $250,000. Fidelity was allowed to introduce a vendor information sheet in support of this argument.

The moral of the story is this — as a searcher, if you provide a service that does not produce the expected results (in this case, reporting a $380,000 lien) and it results in a loss for a client, you cannot assume that you will not be held liable. If we underwrite a policy and there is a claim on it, you know that we will be expected to compensate for any loss.

How we choose to pay it is up to us. A claim on our E&O would undoubtedly raise the premium, if not preclude us from future coverage, so we may elect to first seek compensation from our vendor, pending the claim is a result of negligence on their part.

It is in my best interest as a vendor manager to have some sort of agreement in place with my respective vendors indicating that there is an understanding of the amount liability and risk that vendor bears. Whether we reach this understanding through the form of a contract, written agreement, or copy of an E&O policy that is in force, is up to the parties involved.

Some companies will not allow you to work for them as independent abstractors if you do not carry E&O insurance. In fact, in some cases, I have learned that this was the more compelling reason for somebody to obtain E&O insurance than for the cov-

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erage it provided. It simply afforded the searchers more business opportunities.

At the very least, as most E&O policies cover judgments, settlements and defense costs, it would be wise to carry it just for the possible chance you find yourself having to defend yourself groundless allegations. You would be spending thousands of dollars anyway, and if things don't fall your way in court you can be in real trouble. It is important to consider that if you are an independent abstractor, that everybody makes mistakes, but don't let yours cause your financial ruin or unceremonious exit from the industry, especially if this is your livelihood. Again the likelihood is rare that it will happen, but why chance it?

All this being said, understand that E&O insurance is complicated and it is imperative to use an experienced and knowledgeable agent to help you understand your policy and how claims would be handled. There are companies that specialize in professional liability insurance; Accord, Hiscox and Illinois Union Insurance are a few that come to mind. You don't want some fly-by-night insurance company that says that it offers professional liability insurance, but when you purchase it, it turns out that it only affords protection in connection with nuclear accidents or volcanic eruption.

What is also frequently misunderstood is that E&O insurance is a "claims-made" type of policy — in order to be covered against a claim, the claim has to be made during the policy period. This is not to be confused with an "occurrence policy," which means that a claim would be covered when the negligence or omission leading to the loss occurred. It is highly recommended that you never let your coverage lapse, and when possible, try to obtain a policy that will cover you back to a retroactive date that would defend you against claims that have not been disclosed to you that may have happened before you actually purchased or renewed the policy.

Each time you renew your policy, the retroactive date remains the earliest point of time at which you have maintained continuous coverage. If you let it lapse, the retroactive date will reset to the current date you purchased the new policy, and you won't be covered for prior work.

There is also another important facet to consider. Say the trials and tribulations of being an independent abstractor have become too much, or you decided to write the great American novel and holed yourself up in a cottage on the lake, it would be in your best interest to purchase what is called "tail-coverage." This will extend your coverage for up to five years, which is very important, as it is common knowledge that claims surface a considerable amount of time after the actual work was completed.

Unfortunately, as vendor manager, now it is required to ask for more than just the declaration page of an E&O policy. There have been instances in the industry where an abstractor will purchase E&O insurance, fax over a copy to their client as proof of coverage, and then elect not to further pay their monthly installment due to the premium, and let the policy lapse. I suppose that is one way to avoid the high annual premiums while maintaining "good standing" with your unsuspecting client.

That is why some companies are now requesting to be a "Certificate Holder" on E&O policies. This is where the abstractor's policy has to list the name of the company holding certificate; meaning that if I wanted WebTitle to be named on one of my vendor's policy as a certificate holder, the E&O insurance provider is required to try to make an effort to let WebTitle know when the abstractor's policy has lapsed.

By putting our company on the policy as certificate holder, it does not mean that we are covered under the abstractor's policy. However, as I learned, abstractors are able to write that information in then scan and forward it to whoever requests it. The problem is that if it is never actually sent to the insurance company itself, how would it know to notify the certificate holder of the lapse?

One of the best ways of finding out the status of a policy, short of contacting the insurance company itself, is simply looking at the retroactive date. If it is a considerable amount of time back, and it good through some point in the future, the chances are it is in force. But you never know.

I would recommend that the title agency and the independent abstractor do serious homework about E&O as well as get to know one another. You both want to be covered by any type of "mayhem" this industry may throw at you.

*Kevin Masters is vendor manager at WebTitle Agency. Offices are located at 500 A Canal View Blvd., Rochester, N.Y. 14623; and the Executive Office Building, 36 W. Main St., Suite 51, Rochester, N.Y. 14614; phone (585) 454-4770; www.webtitle.us.*