

## Expert Commentary

---

[Home](#) » [Expert Commentary](#)

# Avoiding Errors and Omissions in Excess and Surplus Lines

---



The excess and surplus (E&S) lines insurance market is like a sharp knife. It is a useful tool but will cut you if you aren't careful. Retail insurance agents who do not use it with skill and respect are likely to suffer the injury of an errors and omissions (E&O) claim.

What can agents do when working with E&S markets to reduce the chance of an E&O claim? Here are five recommendations.

## Read the Proposals and Policies—*Really*

Insurance agents who are not in the habit of reading proposals and policies deal with the E&S market at their own peril. Coverage is almost never as broad as in the standard market. The executive vice president of one of the country's largest E&S brokers told me, "We help agents place coverage they can't write with admitted insurers, but, in most cases when dealing with E&S markets, agents should expect that coverage will be more restrictive than they are used to."

A few common examples are the following.

- Very high minimum earned premiums
- In hurricane-prone areas, "short rate" cancellation provisions of 80 percent or more if the policy is in force for even 1 day during hurricane season
- Commercial general liability (CGL) policies that limit liability coverage to the "designated premises"
- Exclusions on products/completed operations and personal injury and advertising injury in CGL policies
- CGL policies that exclude the business's greatest risks, such as liquor liability and assault and battery claims on a policy for a bar

Agents should remember that, generally, E&S brokers and insurers have no duty to quote what the agent asked for or what the insured needs. As a result, agents must read the proposals and policies carefully to see what is being reduced, restricted, and excluded.

I was recently an expert witness in a suit against an agent who had delivered a general liability policy from an E&S insurer for a doggy daycare facility with an animal exclusion. The policy he was replacing had not contained that exclusion.

A large dog ripped its leash out of an employee's hand and attacked a little girl. Of course, coverage was denied because of the animal exclusion. In the suit against the agent, he was asked if he had read the policy before he delivered it. He testified, "Read a 150-page policy? I don't think so!" His agency's E&O insurer tendered its limits. The insured sued the E&S broker for issuing a policy with such a gaping hole in coverage, but the court found the E&S broker's proposal and policy clearly stated the exclusion and ruled in its favor.

Most proposals from E&S brokers contain boilerplate wording that more politely says something like this:

This proposal may not include the coverage you asked for or that your insured needs.

This proposal is for the coverage the insurance company wants to sell, **not** necessarily for what your policyholder wants to buy.

Read it carefully, and BUYER BEWARE.

Even when an agency does check the E&S proposals and policies, too often the job is delegated to someone who has little insurance education or experience. Agencies should have a competent agent or customer service representative review the E&S broker's proposal to compare the schedule of forms (including form numbers and edition dates) against prior coverage. They should read the forms that they are not familiar with and ask the E&S broker to answer questions that they have about the forms—in writing.

## Look for an E&S Broker Who Is a Specialist without "Red Flags"

Courts generally do not hold E&S brokers responsible to advise the agent or the insured about what coverages the insured should have. Agents should try to find a broker who goes beyond what is legally required and provides value-added expertise in the type of risk they are placing.

Gary Grindle, an executive vice president for AmWINS, who specializes in construction risks, told me:

Agents should try to deal with a professional wholesaler, not just a quote generator. It is common for an agent to bring me a quote from a competitor that is a few thousand dollars less expensive than what I have presented, but when I look at it, there are big coverage gaps. For example, the quotation is for a contractor, but it includes an endorsement which eliminates contractual liability or includes an exclusion for subcontracted work even though they use subcontractors. I talk to the agent about it, and he tells me, "We spoke to the other wholesaler and he assures us that the underwriter's intent is not to exclude these exposures." I tell them, "Good luck with that!"

Brokers who provide agents with sound advice will help them sell more coverage and avoid E&O claims. But agents know that is hard to find when they are placing insurance on small accounts. In the small business world, both agents and E&S brokers are often generalists.

In that case, agents should at least avoid E&S brokers who are likely to cause them problems. Sim Bridges is vice president of underwriting at Coastal Insurance Underwriters in Florida. Coastal is a regional E&S broker that specializes in several niche areas, including condominium associations and country clubs. Mr. Bridges gives the following advice to agents dealing with E&S brokers who are not specialists:

There are red flags for retail agents to pay attention to. Stay away from an E&S broker if they:

- Aren't organized or do sloppy work.
- Aren't paying attention to what you already told them.
- Don't issue binders and other paperwork promptly.
- Make you request what they should have provided to you to begin with.
- Haven't automated their policy assembly and other processes in order to reduce human error.
- Are just a quote generator and don't bring experience and expertise to the table.

Don't deal with that broker. Find someone else with that market.

Neil Kessler, chief operating officer for CRC Insurance Services, Inc., told me:

All wholesale brokers are not created the same. Agents want an E&S broker who truly is focused on coverage forms because, in the wholesale market, every form may be different. It is "mission critical" that they find one who is knowledgeable about the type of risk they are placing. Beyond that, they want to partner with a broker who has the size and credibility to help solve a problem if one does occur.

## Avoid Placing Coverage with a Financially Weak E&S Insurer

I recently reviewed the policy forms of seven of the country's E&O insurers who, among them, cover a majority of US independent agents. All seven had an exclusion on claims against the agent arising from the insolvency of an insurance company. But all seven had an exception to that exclusion if, at the time the agent placed the coverage, the insurer had an A.M. Best rating of B+ or higher (B or higher in one case). Four of the insurers also had an exception to that exclusion if the insolvent insurer was covered by a state guaranty fund, even if it did not meet their A.M. Best requirements. Of course, E&S insurers are not covered by state guaranty funds.

The takeaway: None of the standard policies of the E&O insurers would cover an agency if it places coverage with an E&S market that has an A.M. Best rating below B+ (B in the one case) that later becomes insolvent. So, agents need to use extreme caution when placing coverage with financially weak E&S insurers. (Note: In some instances, E&O insurers may be willing to endorse their policy to cover this risk. Agents should try to negotiate this coverage with their E&O insurer if they need it.)

## Review and Negotiate the E&S Broker's Contract

An agent shared with me that he had reported an insured's liability claim to the E&S broker who had placed the coverage. Unfortunately, the E&S broker did not forward the claim notice to the insurer. When the insurer finally received notice of the claim, the insurer denied it for late reporting, and that denial was upheld by the court. The agent expected the E&S broker to step up and pay the claim, but the E&S broker pointed to their agreement. "You indemnified us in the contract you signed. This claim is yours to handle."

Edgar Lion, president of Alpine Risk Management Corporation, which assists agents in E&O loss prevention, told me:

We find that the overwhelming majority of agencies have never reviewed the written contracts they have with surplus lines brokers. As a result, they are unaware of one-sided hold harmless clauses and other restrictive wording.

A prominent agent E&O defense attorney told me:

The key point in contracts between agents and E&S brokers is that the indemnification and hold harmless agreement should be 100 percent reciprocal. The agent should indemnify the E&S broker for the agent's errors, and the E&S broker should indemnify the agent for the E&S broker's errors. If you are a good agency, the E&S broker should agree to this very fair provision.

Every agency should have a standardized procedure for doing business with E&S brokers, and part of it should be to review and negotiate the E&S broker's contract. Do not accept one-sided provisions favoring the E&S broker unless you have absolutely no other choice.

## Do Not Go Beyond Your *Written* Authority

Even though it makes life difficult for agents, the fact is that, with rare exceptions, retail agents do not have authority to bind coverage or issue certificates for E&S insurers.

It was Friday afternoon on the last day coverage was in force, and the agent and insured did not meet until just before closing time. The insured selected building coverage that was written by an E&S market. The agent got a check and assured the client he was covered. The agent emailed a request to bind the coverage to the E&S broker at 6:00 p.m., but the E&S broker did not respond because the brokerage was already closed for the weekend. The building burned to the ground Sunday morning, and the E&S market denied the claim since the agent had no authority to bind coverage.

To avoid an E&O claim like this, agencies should make sure all of their licensed staff are aware that they do not have binding authority with E&S markets. All must understand that, until the agency receives written confirmation from the E&S broker, they cannot lead an insured to believe that coverage is bound.

E&S markets are a powerful tool, but they are dangerous to those who do not treat them with skill and respect. Following the recommendations in this article may save your agency from a costly E&O claim.

This article is intended as advice to agents about best practices to avoid E&O suits. It is not legal advice and does not purport to make representations about the standard of care that an agent may be responsible to meet in a particular state or in a particular situation.

---

Opinions expressed in Expert Commentary articles are those of the author and are not necessarily held by the author's employer or IRMI. Expert Commentary articles and other IRMI Online content do not purport to provide legal, accounting, or other professional advice or opinion. If such advice is needed, consult with your attorney, accountant, or other qualified adviser.

---

Like This Article?



## IRMI Update

Dive into thought-provoking industry commentary every other week, including links to free articles from industry experts. Discover practical risk management tips, insight on important case law and be the first to receive important news regarding IRMI products and events.

[Learn More](#)