



AVOIDING THE E&O CLAIMS MINEFIELD

Understanding your Errors & Omissions Insurance & Tips to Avoid Claims



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WHY PURCHASE ERRORS AND OMISSIONS INSURANCE?

- The days of caveat emptor or buyer beware are gone
- Three of ten real estate professionals will be sued during their career.



LITIGATION IS EXPENSIVE

- You can spend upwards of \$100,000 defending a simple failure to disclose lawsuit.
- We live in a litigious society and litigation pervades the real estate industry more than most fields.



THE REAL ESTATE MARKET'S IMPACT ON CLAIMS

Falling Market – Misrepresentation claims which may attribute to some element of buyer's remorse

Rising Market – Specific Performance Claims

- Seller and buyer agree to a contract but seller attempts to cancel sale due to a minor infraction. Seller may have a backup offer and will sell to another buyer at higher price. First buyer attempts to enforce the original contract since the property is rising in value.

- In either of these markets the representative is always brought in!



THE REAL ESTATE PROFESSIONAL

Real Estate Agents & Brokers are held to the highest ethical standards that the law provides.

Real Estate Agents & Brokers are at the center of a person's most likely emotional, and expensive, purchase.



ERRORS & OMISSIONS AS A RISK MANAGEMENT TOOL

An E&O Policy can act as a roadmap to better practice management

- Provisions of coverage define parameters for your practice



PROFESSIONAL SERVICES OFTEN COVERED IN ERRORS & OMISSIONS INSURANCE FOR REAL ESTATE AGENTS & BROKERS

- Real Estate Agents or Brokers
- Appraisers
- Consultants
- Property Managers
- Auctioneers
- Short Term Escrow Services
- Notary Public
- Not all policies cover these services!



WHAT IS COVERED?

The professional services performed on behalf of the client resulting in the payment of a fee, commission, or other compensation while acting as a Residential or Commercial:

Buyer's or Sellers Broker or Agent

Transactional Broker or Agent

Appraiser of Real Estate

Real Estate Consultant

Auctioneer

Counselor or Property Manager



TEN OF THE TOP REASONS AN AGENT OR BROKER MAY BE SUED

- 1 Failing to Disclose
- 2 Failing to Recommend Inspections
- 3 Failing to Identify Potential Issues
- 4 Failing to Properly Advise on the Terms of a Contract
- 5 Exaggerating Features of the Property



TEN OF THE TOP REASONS AN AGENT OR BROKER MAY BE SUED

- 6 Failing to Explain the Significance of a Disclosure Issue to Buyers
- 7 Making Promises You Cannot or Do Not Keep
- 8 Failing to Explain the Significance of a Disclosure Issue to a Seller
- 9 Failing to Comply with the Time Frames in the Contract
- 10 Representing Clients in Unfamiliar Geographical Areas

CLAIMS EXAMPLES

- 50-75% or more of all E&O Claims involve Failure to Disclose
- Of that, 90% of the time, the agent/broker did not have the information.
- Plaintiff's lawyer will argue, and most likely win, that the agent/broker *should have* known about the material defect, property condition, neighborhood/community matter, etc
- Similar to this is False Marketing – EX: “the best school system in the State”



CLAIMS EXAMPLES (cont'd)

- Misrepresentation – Zoning, Sq. Footage, Condition
- Fair Housing & Discrimination
- Escrow Services/Money Dispute
- Foreclosures
- Improper Evictions
- Leasing
- Failure to Maintain the Property/Property Management
- Breach of Contract
- Alleged Negligence



AVOIDING CLAIMS

DISCLOSE, DISCLOSE, DISCLOSE

85% of all claims arise out of allegations that parties failed to inspect property and/or disclose material defects.

Agents or parties should disclose all facts that may affect the value or desirability of the property.

WHEN IN DOUBT, DISCLOSE



AVOIDING CLAIMS

Communicate with your client. Although communicating with a client seems like elementary advice, it is amazing how many agents do not adhere to it.

Ask if your client has individual issues, such as financing problems.

Determine exactly the type of property the client is seeking and what the client expects from the transaction (*i.e. quick sale or purchase, 90-day escrow, etc.*).



AVOIDING CLAIMS

Determine if the seller has particular concerns. There may be issues beyond the price of the property, such as timing issues, delicate disclosure or privacy issues, which must be dealt with

- ❖ Answer all questions carefully.
- ❖ Do not exaggerate descriptions.
- ❖ Clarify what is fact and what is opinion.
- ❖ Indicate your sources for the facts you present.
- ❖ When appropriate, recommend professional seeking opinions.

Most of all, never predict the future.



AVOIDING CLAIMS

Conduct a careful visual inspection of each property

Ask questions of the owners if you suspect a problem

The problem you ignore or gloss over will be the one that comes back to haunt you.



AVOIDING CLAIMS

A completed Seller's Disclosure Statement is strongly recommended and most likely required by state law. Not all property conditions or representations are covered by the standard disclosure statement. If they aren't, disclose them anyway.



AVOIDING CLAIMS

Don't act outside your area of expertise.

Recognize when to ask for help from or use the services of another professional, such as an Attorney, CPA Mortgage Broker, Banker, Home Inspector, Appraiser or other professional

Disclose all conflicts and potential conflict of interest in writing.



RECOMMEND INSPECTIONS

You should always recommend that inspections be performed...

Keep a list of inspectors handy. Never recommend just one. These inspectors should be routinely checked for qualifications and experience.

You should put recommendations in writing and request the buyer sign an acknowledgment that you have made the inspection recommendations.

If the buyer chooses not to pursue an inspection note that fact on a supplemental disclosure form and have the buyer sign it.



AVOIDING CLAIMS - DOCUMENTATION

Generally the outcome of a lawsuit comes down to one person's word against another's.

If the agent has documentation written at the time of the event the agent will be able to support their defense.

Prepare and keep a transaction log where all occurrences affecting a transaction including meaningful telephone conversations are recorded. If you attend an inspection, you should note the attendance. Each time you provide an inspection report or any other document to your client or to other party, you should make a note in the transaction log.



THANK YOU

PLEASE CONTACT US WITH ANY QUESTIONS.

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