Accountants’ Malpractice (E&O)

Duties that can give rise to accountant liability derive from three different sources:

* Contracts: agreements made between parties that are recognized in the law
* Common law: theories of liability recognized by the courts, such as negligence and other torts
* Statutes: theories of liability founded upon specific federal or state statutes
* Fiduciary Duties
* Under certain circumstances, accountants may owe their clients a fiduciary duty. When a fiduciary relationship exists, an accountant owes his client duties of good faith, candor, trust, and confidence, in addition to a duty of due care. The existence of a fiduciary duty depends on the length of the relationship between the accountant and the client, the type of advice the accountant has provided to the client, the degree of trust between the accountant and the client, and the relative level of knowledge of the accountant and client.
* Common Law Duties to Third Parties
* Accountants may also owe nonclients a duty of due care, depending on which state law applies. If they do, the nature and extent of that duty is usually identical, or virtually identical, to the duty they owe their clients. There are three principal approaches to determining whether accountants owe nonclients a duty: (1) the privity or near privity approach, (2) the Restatement (Second) of Torts approach, and (3) the foreseeability approach. A number of states have failed to embrace any specific approach, different jurisdictions may apply the same approach in different fashions, and courts within the same state may apply the same approach differently in different factual situations.

Coverage

For coverage to apply under an accountants professional liability policy, a claim must be first made (i.e., the claim has not previously been made during another policy period) against the insured during the policy period and arise from acts that took place on or after the policy's retroactive date (if the policy contains retro date). Every carrier that offers this coverage uses their own proprietary policy language. It is important for you and your client to work with individuals who know the markets.

As with many other areas of commerce in the United States and around the world, the landscape of the accounting profession is changing rapidly. It seems there are new proposals for regulatory change and for heightened scrutiny of the accounting industry nearly every week. Thus, the law governing accountants' liability will likely continue to change, perhaps even more rapidly than in the past. These changes in the law may sweep away some of the more conservative approaches to third-party liability described in this article, thereby making it easier for nonclients to assert successful claims against accountants. Indeed, these expected changes in the law will likely present ongoing challenges to those who seek to understand the principles of accountants' professional liability.