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The Betterley Report

EMPLOYMENT PRACTICES LIABILITY INSURANCE MARKET SURVEY 2012:

Rates Continue to Firm, but Not for All Carriers

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Highlights of This Issue

- Mixed Signals from Carriers about Rates and Retentions
- Little or No Premium Growth in the U.S.
- Aon's Wage & Hour Coverage
- Several New Carriers, and One Withdrawal

Next Issue
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Technology E&O Market Survey

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Editor's Note: *In this issue of The Betterley Report, we present our annual review and evaluation of the changing Employment Practices Liability market. In this review, we identified the leading carriers and key differences in their offerings, as well as evaluated the state of the market – how healthy is the line, whether it is growing, and what is the claims experience. In particular, we focused on rate and retention trends.*

This issue reviews thirty-six carrier products that form the core of this market, having added Alterra, Business Risk Partners (Lloyds and Liberty International), and Protective. Professional Underwriters Agency (PUA), a Lloyd's program, has been removed from our Survey at their request, although they hope to return if they can secure a new Lloyds syndicate. Chartis entries have been updated and returned to the AIG name.

List of Tables

EPLI coverage can also be found in Management Liability insurance packages. Readers may wish to read our Private Company Management Liability Market Survey (August 2012), which reviews so-called "Management Liability" products that can, and usually do, include EPLI.

While each insurance carrier was contacted in order to obtain this information, we have tested their responses against our own experience and knowledge. Where they conflict, we have reviewed the inconsistencies with the carriers. However, the evaluation and conclusions are our own.

Rather than reproduce their exact policy wording (which can be voluminous), in many cases we have paraphrased their wording, in the interest of space and simplicity. Of course, the insurance policies govern the coverage provided, and the carriers are not responsible for our interpretation of their policies or survey responses.

In the use of this material, the reader should understand that the information applies to the standard products of the carriers, and that special arrangements of coverage, cost, and other variables may be available on a negotiated basis. Professional counsel should be sought before any action or decision is made in the use of this information.

For updated information on this and other Betterley Report coverage of specialty insurance products, please see our blog, The Betterley Report on Specialty Insurance Products, which can be found at: www.betterley.com/blog

Introduction

We have been closely following the EPLI market since 1991. In the beginning, there were 5 carriers; now, there are perhaps 50-55 carriers active in the market. While there are other carriers offering EPLI, they represent (we believe) a trivial portion of the market. In particular, add-on coverage to package products appears to be limited to smaller employers, as carriers recognize the importance of underwriting and claims expertise as vital to EPLI success.

For our survey, we focus on the most prominent carriers writing the most business, or those that offer some unique product or service. While this omits some carriers, we believe that it makes the information more useful to our readers.

To test whether we were covering the key carriers, we have reviewed the list with some of the most prominent observers of the EPLI market, who have confirmed we did not omit any significant carriers.

Some notes on the tables: in the Exclusions tables, the entry "no" means that the exclusion is not present in the policy. Of course, if coverage is not present (because it is not included in a definition or insuring agreement), then the absence of an exclusion does not necessarily mean coverage exists.

New and Interesting

Aon, the global insurance brokers, really shook the market up when it announced its Wage & Hour coverage for large employers. We interviewed Tom Hams of Aon in our blog (http://thebetterleyreport.wordpress.com/2012/07/23/wage-hour-the-cover-that-couldnt-be-done/) for further information on the product.

The following is excerpted from the interview.

In April, Aon brought out a new product designed for the larger employer that wanted indemnity and defense coverage for W&H claims. After 2 years of work developing and analyzing data, drafting policy forms, and educating potential carriers, the new product arrived to huge market interest. Before commenting on it, I wanted a bit of time to see the market's reaction.

Some product notes:

- *Capacity of $50 million+, with more being added as carriers become more comfortable with the concept*
- *A minimum retention of $5 million*
- *Probably makes the most sense for employers with 7,500 or more employees. This is not a restriction, more a result of the large retention.*
- *US-only employees*

Carriers in This Survey

The full report includes a list of 36 markets for this coverage, along with underwriter contact information, and gives you a detailed analysis of distinctive features of each carrier's offerings. Learn more about *The Betterley Report*, and subscribe on IRMI.com.

- *Pricing is generally $20-30,000 per million, but this can vary substantially depending upon the risk*
- *There are 5 core carriers: XL, Alterra, Allied World, Chubb, and Beazley. Additional excess capacity is available from other carriers*
- *Coverage is on a claims made basis with broad prior acts*
- *Coverage choices between Defense, Classification Claims, and Pay Practices Claims can be made*
- *Choice of counsel is permitted, but consent is required for actions that may reasonably exceed 25% of the tion. Jackson Lewis, Seyfarth Shaw, and Morgan Lewis are pre-approved. Each played a key role in developing the product and will be critical to its success*
- *50% hammer clause*

Reports to date are that the potential insureds are very interested in the product, and have been willing (eager?) to provide the information required by the application.

This new coverage represents a significant step forward in EPL coverage for larger employers. We would not be surprised to see other carriers offering comparable products, and perhaps even extending into smaller employers. That last comment, though, illustrates a significant risk, as Aon and its insurance and legal partners believe that large employers are more likely to have controls that minimize the chance of a claim, and have the ability to sustain a large self-insured retention. Middle market and smaller employers have neither.

We think that Wage and Hour is quite insurable for smaller employers, but recognize that it presents a tough underwriting challenge for carriers. Hopefully someone will figure out that there is a great market opportunity and will find a way to offer coverage - prudently. The Aon initiative might be the triggering event that makes this coverage available to all size employers.

There has been a lot of chatter about social networking and bullying and their relationship to EPL coverage. While both represent relatively new exposures, we don't think that there is much that needs to be changed in the way of coverage wording, and have not seen much in the way of carriers making such changes. We do note the Wrongful Internet coverage was introduced in 2012 by the ABA/Greenwich EPLI program.

Online quoting engines for smaller employers, sometimes restricted to certain agencies, continue to become more widely offered and used. EPLI is a line that can make use of online quotes more easily than many, at least for small insureds. Head count, location, claims experience, a few questions about employment practices, and you've got your quote. That should speed up the process and lower cost.

Finally, carriers with new or updated forms include ABA/Greenwich, AIG (Executive Liability larger employer product), Arch, and Travelers (Community Bank and Credit Union product).

State of the Market

Rates and Retentions

There is a distinct trend to higher rates and some increase in retentions (deductibles and SIRs) both continuing from 2011. Insureds, their agents or brokers, and carriers generally expect the renewal premium charged will be somewhat higher than on the expiring policy. This higher premium might be a result of increasing headcount, but is also a result of generally-higher rates for EPLI. But, this trend is less pervasive than we expected when we wrote Market Survey 2011 last December.

At that time, the forecast was for across-the-board rate increases on almost all insureds and by all carriers. Higher increases might be expected in certain states and for certain business classes, and for individual carriers restoring profitability to their books. There was little expectation of flat rates and even less of reductions.

Our survey of carriers revealed a much more diverse situation – the majority indicated further rate increases, but there were several that plan level and even decreasing rates. Very surprising, contrary to what agents and brokers are seeing, and not a good sign for the health of this line.

Is this an indication that some carriers are already falling off the 'higher rates are necessary' wagon? Typically, and speaking broadly, the pricing cycle in the commercial lines insurance industry shows a slow changeover to higher rates, with price leaders edging rates up, other carriers resisting in hopes of gaining market share, then 'all aboard.' For a period, all carriers will continue to raise rates, until some begin sensing an opportunity to gain market share at the expense of the pricing leaders. Then, a soft market ensues, pricing discipline falls apart, and we are back where we started.

Is this happening already in EPLI? We don't think so, but here are some of the (not for attribution) carrier comments. It is an indication of some very different attitudes toward pricing.

From a large carrier focused on all sizes of insureds:

- Market in general - rates up in the low double digits

From a mid-sized carrier focused on small-midsized insureds:

- Market in general - rates up 10-12%
- Own rates – rates up 6-8% (admitted), 10-25% (non-admitted)

From a small carrier focused on small insureds:

- Market in general - rates up 25%
- Own rates – rates up 25%

From a large carrier focused on all sizes of insureds:

- Market in general - rates up 25%
- Own rates – rates up 10%

From a mid-sized carrier focused on smaller insureds:

- Market in general - rates up 10%
- Own rates – rates up 10%

From another mid-sized carrier focused on smaller insureds:

- Market in general - rates **down** 10%
- Own rates – rates **down** 10%

From a large carrier focused on larger insureds:

- Market in general - rates up 0-5%
- Own rates – rates up 10%

From a large carrier focused on all sizes of insureds:

- Market in general - rates down 5%
- Own rates – rates flat

From a midsized carrier focused on small-midsized insureds:

- Market in general - rates up 5%
- Own rates – rates up 10%

Retentions (meaning deductibles or self-insured retentions) show somewhat more consistency amongst the commenting carriers. We saw no evidence of declining retentions.

Note that carriers tend to answer this in terms of percentage increase or decrease, which is a bit hard to interpret. We take the responses as an indication of the general trend.

From a mid-sized carrier focused on small-midsized insureds:

- Market in general - retentions up 15%

From a small carrier focused on small insureds:

- Market in general - retentions up
- Own retentions – retentions flat

From a large carrier focused on all sizes of insureds:

- Market in general - retentions up 10%
- Own retentions – retentions up 50%

From a large carrier focused on larger insureds:

- Market in general - retentions flat
- Own retentions – retentions flat

From a large carrier focused on all sizes of insureds:

- Market in general - retentions flat
- Own retentions – retentions flat

The Great Recession's impact on claims has been significant, not only in terms of numbers, but also as a nudge to insurers that need to better match their premium revenue with their costs. The general insurance press reports that rates are tightening; we concur but are troubled by what seems to be weakening price discipline.

Volume

The volume of business (gross written premium) continues to be stuck at about $1.6 billion in the United States, and perhaps another $500-550 million outside the U.S. A combination of soft rates and declining exposure bases during 2009-12 made premium growth difficult, but a recovering economy and higher rates ought to be moving the total premium amount higher. If it is not, that may be an indication of insureds accepting higher retentions (whether by choice, to hold down premiums, or because they are being forced to by market conditions). Will new insureds help this product line resume its growth? Hard to picture that happening, as we would think that most potential insureds are already buying coverage, and the uninsureds have made a conscious decision to self-assume the risk.

Betterley Comment We are a bit surprised about some of the estimates of non-U.S. premium in the $500 million range. Few carriers even offered an opinion on this question. Premium growth in this area is accelerating.

Claims

EPLI Market Survey continues to focus on products, not claims, but we keep our ear to the ground on claims as they affect coverage, pricing, and availability.

The frequency of claims continues to be costly for underwriters. Insureds have had more covered claims than expected combined with increasing defense costs. This has increasingly been met by some carriers with mandatory higher deductibles.

There are two problem areas of claims: mass claims and Wage and Hour claims.

Mass (also called multiple plaintiff) claims, where brand name companies are targeted by multiple plaintiffs that threaten coercive action unless the defendant settles quickly, are a big problem for carriers writing large companies. Carriers have seen some very large settlements for claims that employers would not fight, fearing reputational costs more than the costs to settle. These claims have made it difficult for brand-name companies to buy EPLI coverage at the costs they would like.

Carriers that have a lot of experience with these types of claims use a variety of tools.

Some report mandatory deductibles of $1 million+, and coinsurance of 10-25%, for such insureds. Other carriers include policy language that applies the deductible to each claim, rather than a single deductible for the group of claims. The leading carriers are very firm in requiring large retentions for mass claims.

Carriers focusing on smaller- to mid-sized employers have not seen mass claims as a problem (since most of their insureds are not as vulnerable to the pressure of such claims), and generally have not applied any special restrictions. However they are encountering more Wage and Hour claims than expected. These are brought by employees alleging that they were not paid for all of the hours they worked, or that they were not paid the correct wage. This can add up to a very expensive claim, when multiplied by all of the affected employees.

Target Markets

Carriers continue to be interested in most types of insureds, with the significant exceptions of employee leasing and temporary staffing, educational, religious, and public entities (which have specialty markets available). Law firms, investment banks, and entertainment industries are often cited as not desirable.

Also seen in the list of undesirable employers are extended care (nursing home) facilities, real estate/property management companies, auto dealers, and technology companies. Technology companies can be shunned purely on the basis of the failure rate of many employers in that industry, but there are still many carriers that welcome these as insureds.

Few carriers avoid specific states, unless they have not yet been approved to write business in a particular state. California is often cited as a challenge (carriers requiring larger deductibles, for example), but it is such a large market, it can't easily be ignored.

Carriers also identify states in which their product may not be available due to regulatory restrictions, but since these can change, it is better to inquire of the carrier before rejecting it as a possible market.

Limits, Deductibles and Coinsurance

Total capacity in the market, using U.S., Bermuda, and London sources, looks to be about $500 million, although there are reports of as much as $800 million. This is achieved by buying excess layers, of course. These layers may not be coming from other EPL insurers, but rather be bundled into super layers that include other coverages (such as Excess Umbrella, E&O, and others).

Deductibles seem steady, except for the retentions required of the largest employers, who are probably better off self-assuming all but the catastrophe claims anyway. Smaller and mid-sized employers continue to be able to obtain reasonable retentions (or deductibles) at reasonable premiums.

Coinsurance? Insureds can reduce premiums by assuming a percentage of each loss, but we haven't seen that happen in years, and don't expect to in the near future. For very large employers coinsurance might be a good way to share in the loss for appropriate savings (as they sometimes do for mass claims).

Betterley Comment In past Reports we have commented that most small- to mid-sized insureds select deductibles that are too small, which can lead to pressure to increase premiums upon renewal. The market is pushing those deductibles higher, which in the long run will be helpful to holding premium rises in check. Still, it is tough on the insureds and their brokers when a market that used to offer a $2,500 deductible pushes the minimum to $10,000, then the next year to $25,000 (which one California reader told us).

Sample Pricing

We asked carriers to price out several sample applicants, using the following assumptions:

- 5,000 employees, $10 million limit, $100,000 deductible
- 500 employees, $5 million limit, $25,000 deductible
- 250 employees, $1 million limit, $25,000 deductible
- 100 employees, $1 million limit, $10,000 deductible
- 50 employees, $1 million limit, $2,500 deductible

We asked them to assume a "typical" insured, "typical" state, and no particular underwriting issues (problems). Prior Acts coverage was to be included.

The results are shown in the Typical Premiums table attached.

Eight carriers provided this information; others expressed reservations about their ability to sample price, since too many factors enter into the pricing equation. While that is a good point, we find that employers and their risk management advisors are hungry for information about price ranges, and offer it here.

Betterley Comment Please be cautious in using this information. Although it is a guide to the price competitiveness of a carrier, it is easy to be competitive when quoting a theoretical applicant. Also, individual carriers may be more or less competitive in a particular state or industry. Use the table as a guide to typical pricing, not as a reason to reject a carrier as too expensive.

Typical Limits

As an indication of the maturity of this market, we are more often asked about the typical limits purchased by insureds, and less often about which types of employers buy coverage. Most carriers provided useful information about the typical, high, and lower limits purchased by the insureds.

Since limits often equate to the size of the insured, we specified employers ranging from 50 to 25,000 employees. The results are summarized in the attached table "Typical Limits." The answers are merely an indication of the limits insureds select, and should not be used as a guide to sufficient limits.

Betterley Comment To us, this table provides continuing evidence that many employers do not buy enough limits, and seem content to have insurance, even if it is inadequate.

Special Coverages

Several special coverages are becoming more necessary, so we asked for specific information, and included the responses in the table "Special Coverages and Cost."

Punitive Damages Coverage

We asked carriers for information about coverage for punitive-type damages and/or intentional acts in states where there may be a restriction of coverage imposed on the insurer. Our intent was to elicit information about Most Favorable Venue-type wording (also called choice of law) and Offshore Wrap policies.

Coverage for either Punitive Damages or Intentional Acts can be prohibited by states, either by regulation or on a theory that such coverage is contrary to public policy (or both!). Almost every carrier offers separate coverage to fill in such potential gaps in coverage, either via most favorable venue wording, or with an off-shore wraparound in a jurisdiction such as Bermuda that does not frown upon such coverage.

Several carriers are reluctant to disclose that they offer such coverage, fearing that regulators might attack their offshore solutions. We understand that there are 16 states that prohibit or restrict coverage for either Punitive Damages and/or Intentional Acts, including New York, Ohio, Florida, and California. Such additional coverage is vital in those states.

Betterley Comment Most carriers have Most Favorable Venue wording, at least as an option, but be cautious about carriers that simply answer "Where Insurable," as the whole point of this coverage feature is to remove the uncertainty.

Wage and Hour Coverage

The biggest news continues to be coverage for Wage and Hour claims, including Aon's new product for larger insureds, which we commented on earlier in this Report. Lawsuits alleging improper payment of overtime wages have been very much in the news the past several years. Employees classified as exempt and therefore not owed overtime have been able to bring (sometimes) successful claims that they are in fact owed overtime. Prominent class action lawsuits have created huge legal bills for the targeted employers.

Are Wage and Hour claims covered in a typical EPLI policy? It is not always clear whether or not Wage and Hour claims are covered in a typical EPLI policy, and our participating carriers are reluctant, in many cases, to provide definitive information. Generally, it seems that a Wage and Hour claim that involves other covered allegations will at least get the insured a defense.

Because of this uncertainty, we now ask carriers for definitive information about this coverage (or lack thereof); their responses are in our Special Coverages and Cost table.

Betterley Comment Wage and Hour should be insurable for small- to mid-sized employers. We think there are many instances where the violation was unintentional, not caused by an employer trying to deny its employees a just compensation. While we do not believe that insurance should step in to pay for compensation found to be owed to the employees, nor to pay for related governmental fines, multiplied damages and attorney's fees could be covered.

Third-Party Liability

Coverage for suits brought by third parties, such as customers, continues to draw attention. Although early coverage forms applied to discrimination only, more now apply to both discrimination and harassment. All carriers can include third-party coverage in 2012, including Cincinnati, within their umbrella products.

Betterley Comment Not all coverages are alike; some carriers restrict the coverage to business relationships, which is not unreasonable, and may limit harassment coverage to sexual harassment, which may not be as reasonable.

Workplace Violence

Few carriers offer it, and we don't see much demand for the cover.

Who Is An Insured And Definition Of Claim

As with definitions of coverage, this area has also shown a real convergence of approach, with less coverage distinction between carriers. For example, all carriers cover employees, although some specifically include seasonal or temporary employees in their definition. This raises a question: if a carrier covers employees, without limitation, does it need to specifically include seasonal or temporary employees? We think specific language is preferable.

Leased and contract employees may need coverage; a number of carriers extend coverage to these individuals if they are indemnifiable like employees.

Betterley Comment Providing coverage for part-time, seasonal, or temporary employees would seem to be wise. Including the employee defendant in the defense of the claim might help reduce the risk that he or she will attempt to blame the employer in order to get released from the claim.

Newly acquired organizations is one area in which carriers differ, and subsidiaries is another. Generally, we find less distinction between carriers than before.

What is a claim, for the purposes of triggering coverage, is important. Carriers are generally similar in approach, including written demands, administrative processes, and arbitration. Oral demands are covered by some.

Definition of Coverage

The definition of coverage remains vitally important to the quality of the policy, but it is getting increasingly difficult to distinguish between carriers. The key sources of claims are covered well, and it is only by subjecting the policy wording to microscope-level analysis that we can distinguish differences.

Most policies now contain all-inclusive wording that eliminates the need to enumerate perils. Carriers now frequently broaden their coverage by including language such as "and other protected classes." This is a benefit for the insured, and makes the need to compare lists of perils less important.

Betterley Comment In general, we would encourage carriers to reduce the number of words and definitions they use, and use more all-inclusive (all risk) wording. In the definitions of coverage, we are seeing more "all risk" wording, and view this as better for both the carrier and the insured.

In analyzing coverage for this article, we struggle with how best to present our findings. On the one hand, we would like to list the covered items, and then identify whether all-inclusive wording is included (this is the approach used this year). Both carriers and readers seem to like a list of covered items.

On the other hand, if all-inclusive wording is becoming prevalent, then listing items just takes up space.

Claims Reporting and Extended Reporting Period

How soon a claim has to be reported is an important distinction between policy forms. Most carriers require the Named Insured to report "as soon as practicable," which seems reasonable. In practice, unless the insured has delayed reporting so long (and irresponsibly) as to compromise the defense of the claim, there is little practical difference between carriers.

Betterley Comment Not all policies are as generous when it comes to claims reported after the expiration of the policy. Some, for example, require the claim to be reported before the expiration, while others have an automatic extended reporting period of up to ninety days.

An important distinction between carriers involves the interpretation of when an event is actually a claim under the policy. Is a comment by an employee that he or she is dissatisfied with their treatment a claim under the policy? Many carriers treat the notice of an event that is likely to become a claim as an actual claim under the policy, which can be important for insureds that are changing carriers or dropping coverage.

Extended Reporting Period protection is an under-appreciated feature of EPLI policies, one that will take on a growing importance if carriers lose interest in the market. We note that many carriers have shortened up the length of ERP they are offering.

All carriers offer an ERP, but length and cost differ. The shortest minimum period in our survey was six months. A variety of carriers offered at least one year, with three or more years available. Several carriers report that the ERP is negotiable in term and cost, which is dangerous for the insured. Make sure that this negotiation takes place <u>before</u> the carrier loses interest in your EPLI business.

Betterley Comment A long ERP could be enormously valuable should the EPLI carrier decide it did not want to continue offering this line of coverage (though we don't expect such a development).

Selection of Counsel

In previous years, we have been vocal in our criticism of carriers that do not allow the insured a voice in the selection of counsel. We believe that the relationship between counsel and client is a precious one, as trusting as the bond between patient and doctor.

At the same time, we agree with the concern of carriers that unqualified legal representation cannot be allowed, and that control over fees is necessary in a line like EPLI. Indeed, one carrier has told us that the primary reason they are reluctant to enter the smaller employer market is their belief that such employers often use improper counsel, and take employment actions without legal advice.

Therefore, we are pleased to report that, while most carriers continue to control the selection of counsel, almost all are very flexible in allowing the insured to select or approve counsel. If the insured requests specific counsel approval at the right time (during proposal negotiations), the carrier is likely to approve the insured's choice.

A few carriers offer the insured a choice of an indemnity policy, which allows the insured full control over selection of counsel. While some dispute our attraction to indemnity policies (since an uncovered allegation may not be defended by an indemnity policy), we still think control over counsel is of enough value to make indemnity policies worth consideration.

Note that the carriers that are primarily interested in larger employers are more likely to give selection of counsel to the insured; carriers that specialize in smaller insureds are less likely to be able to invest the time necessary to approve special counsel requests, since they are charging correspondingly less premium. However, in our experience, carriers are generally willing to allow the use of the insured's choice of counsel, as long as they are clearly qualified. For the insured that asks, even the smaller carriers are willing to allow selection by the insured.

Betterley Comment We regularly get phone calls from EPL defense law firms that are finding carriers are no longer willing to retain them, as they restrict more and more of their work to existing panel members. These may be qualified attorneys with a good record of successfully guiding clients to a resolution. As the EPLI business matured, carriers needed to reduce the number of law firms that they worked with and ideally reduce cost. This has unfortunately left many competent attorneys on the outside looking in, wondering whether they will continue to be able to represent their clients.

We find that many carriers are willing to approve use of the insured's preferred counsel especially if that agreement is reached while the insurance policy is being purchased (or renewed). Insured's should not wait until they have a claim in hand before requesting approval of their preferred counsel.

Consent to Settle

Carriers are still reluctant to allow insureds much control over settlement, understandably, since EPL suits often involve a good deal of emotion. Both employer and employee are often willing to continue their fight in court long after it makes economic sense to settle. Carriers are reluctant to fund such battles, of course.

The so-called "Hammer Clause" allows a carrier to limit its claim payment to no more than the amount it could have settled for plus defense costs. This protects the carrier against a "litigate at any cost" insured, while protecting the employer against a "settle it, who cares about the precedent" carrier.

The Hammer Clause causes both insured and insurer some unhappiness; so-called "soft" hammer clauses exist, which share the cost above the claim between the carrier and the insured. Originally offered by Royal, many carriers now make it a feature of their products. Please see our table Claims Reporting for specifics.

Betterley Comment Most carriers will not force an insured to settle, but are free from any additional cost (settlement or defense) obligations. A few policies continue to allow the carrier to settle without the insured's consent, which is very dangerous to the employer. In practice, if the insured has a good reason to continue the defense, carriers will not enforce their hammer clause.

Prior Acts Coverage

Prior Acts coverage is a very valuable protection that used to be difficult to obtain. Underwriters were reluctant to insure the prior activities of an employer, anticipating that only those organizations that needed coverage would buy Prior Acts protection.

This ignored the reality that the EPLI exposure is one that confronted all employers, and that even the best managed risks still needed coverage. Just because an insured wanted Prior Acts coverage doesn't mean it was a higher-than-average risk.

As carriers competed to take business away from other carriers, though, they were forced to offer Prior Acts protection, because of course EPLI is written on a claims made basis. As they became more comfortable with the risk of a prior act, it became easier to offer the coverage even to new insureds. In fact, for many carriers, there is no additional cost for Prior Acts coverage.

So, we now see carriers reporting that they include Prior Acts in their standard coverage, with the option of limiting the exposure *via* Retroactive

Dates. Even those that do not include it in their standard form can include it by endorsement.

Territory

Coverage for events that take place outside of the U.S., Canada, or related territories is more important for insureds than ever. All policies reviewed offer worldwide coverage for suits brought in the U.S. or Canada and territories. Most carriers also offer the option of true worldwide coverage (suits brought anywhere).

Risk Management Services

Finally, our table Risk Management Services identifies the types of value-added services offered by EPLI carriers. These services are particularly appropriate for EPLI, offering the same type of benefit to the insured that, for example, loss control engineering does for property insurance.

Value-added services is a primary source of product innovation in the EPLI business, and one in which numerous vendors, including law firms, are competing for business. Several carriers have reported enhanced services, and/or are offering them to more categories of insureds.

Like loss control engineering, it presents the opportunity for carriers and insureds to jointly benefit. We hope that value added services do not take a back seat as product innovation slows and an emphasis on expense control continues.

Betterley Comment Valued-added Risk Management services are an appealing extra benefit to insureds. In talking with them (and the service providers), we are puzzled why so many seem to not know that these services are offered.

We would like to see more use of these services by insureds, and encourage their advisors to more effectively communicate their value.

Summary

EPL is a strong but mature business in the United States, with little in the way of growth opportunities for the line in general. Opportunities exist in expanding the purchase of coverage by smaller employers, whether through a monoline policy, as a part of a Management Liability package (with D&O), or added to a BOP-type package. For carriers with capabilities beyond the U.S., foreign expansion of coverage is likely to be a good opportunity for growth in premium and diversification.

Other opportunities exist for more capable value-add Risk Management Services, and perhaps further claims cost reductions.

We noted in our research that, while the general market trend is for rates to continue to rise, some carriers are reconsidering. A few carriers are indicating substantial rate increases, while others are considering flat rates or even reductions. Of course, California remains a troubled state with rate and availability trends substantially worse than much of the rest of the U.S.

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About The Author

Richard S. Betterley, CMC, is the President of Betterley Risk Consultants, an independent insurance and alternative risk management consulting firm. BRC, founded in 1932, provides independent advice and counsel on insurable risk, coverage, alternatives to traditional insurance, and related services to corporations, educational institutions, and other organizations throughout the U.S. It does not sell insurance or related services.

Rick is a frequent speaker, author, and expert witness on specialty insurance products and related services. He is a member of the Professional Liability Underwriting Society and the Institute of Management Consultants. He joined the firm in 1975.

Rick created The Betterley Report in 1994 to be the objective source of information about specialty insurance products. Now published 6 times annually, The Betterley Report is known for its in-depth coverage of Management Liability, Cyber Risk, Privacy, and Intellectual Property and Media insurance products.

More recently, Rick created The Betterley Report Blog on Specialty Insurance Products, which offers readers updates on and insight into insurance products such as those covered in The Betterley Report. It provides him with a platform to more frequently and informally comment on product updates and newly announced products, as well as trends in the specialty insurance industry. www.betterley.com/blog

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