



# THE BETTERLEY REPORT

## PRIVATE COMPANY MANAGEMENT LIABILITY INSURANCE MARKET SURVEY – 2012:

### *Increasing Rates Attributable to EPL and D&O Entity Claims*

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President  
Betterley Risk Consultants, Inc.

#### Highlights of This Issue

- *Rates Climbing Somewhat, Especially for EPL*
- *Deductibles and Self-insured Retentions Increasing in Difficult States*
- *Carriers Continue to Offer New Coverage Lines to MLI Insureds*
- *Reports of Troubling Increase in Entity D&O Claims from Some Carriers, but Not Others – Why?*

#### Next Issue

October

*Side A D&O Liability Insurance Market Survey 2012*

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# The Betterley Report

**Editor's Note:** *In this issue of The Betterley Report, we present our annual review and evaluation of the growing Private Company Management Liability market. This product combines several lines of coverage for so-called business practices risks into a single policy.*

*We have focused this Market Survey on the Private Company market; similar products are available for Public companies, but premium pricing and coverage forms can be quite different. Also, the Private Company market is growing faster, has more carriers active in developing products, and shows more innovation, so we decided to limit the Survey to these carriers.*

*In this review, as always, we not only identify the carriers and the differences in their offerings, we also evaluate the state of the market – how healthy the line is, and how fast it is growing. Reports of moderate rate and retention increases are widespread, and some carriers are experiencing higher-than-expected levels of Entity D&O claims*

*arising out of the Great Recession.*

*Carriers are becoming more creative in offering additional coverage lines on the basic Management Liability insurance (MLI) forms. In particular, Cyber Risk and Privacy coverages are becoming more available on MLI policies, as have Errors and Omissions, Media Liability, and Crisis Response protections. Insureds and their advisors are seeking additional types of protection, and the MLI product is proving to be a good way to provide it.*

*Wage and Hour coverage continues to be a hot topic for any policy relating to EPL, so we have refined our Lines of Coverage tables to provide further information about this controversial coverage.*

*Please see our Lines of Coverage Available discussion and tables for further information.*

*We have selected twenty-four carriers for this year's Survey, up from twenty-three in 2011. XL is the new market added*

*As always, 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 the carriers' exact policy wording (which of course can be voluminous), we*

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# The Betterley Report

*in many cases 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 summary of their policies or survey responses.*

*In the use of this information, 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.*

*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](http://www.betterley.com/blog).*

## Introduction

The insurance coverage that we call Private Company Management Liability Combined Products is a combination of various lines, all of which are generally related to the insured's business practices. The core coverages are Liability forms, but some additional lines (such as Crime or Kidnap & Ransom) are available from some carriers.

Although combined policies have been around for some time, special forms for private companies began to become prominent when Executive Risk (now part of Chubb) brought out its first policy in 1995.

The Management Liability Combined Product is generally appropriate for privately-held companies. Publicly-traded companies are a very different risk, especially for D&O, and therefore (and

not surprisingly) typically not eligible for this product line.

Not all carriers offer the same lines of coverage. Most include the following core Liability coverages:

- Directors & Officers, both individual and entity
- Employment Practices
- Third-party Discrimination and Harassment
- Fiduciary

Some carriers also offer one or more of the following:

- Side A D&O
- Wage & Hour Defense
- Wage & Hour Indemnity (rarely)
- Kidnap & Ransom
- Crime
- Intellectual Property Liability (rarely)
- Cyber Risk Liability
- Identity Theft Post-breach Response
- Miscellaneous Professional Liability
- Employed Legal Counsel
- General Partner Liability
- Private Equity Liability

## Carriers in This Survey

Ace	Allied World
Arch	Argo
AXIS	Chartis
Chubb	Cincinnati
CNA	Fireman's Fund
Great American	The Hartford
HCC Global	Hiscox
Monitor	NAS
Philadelphia	RLI
RSUI	Starr
Travelers	U.S. Liability
XL	Zurich

- Media Liability
- Crisis Response
- Pollution Defense
- Workplace Violence

An insured is not required to buy each coverage. It can pick and choose according to its needs (and budget). However, carriers generally require that an insured purchase either the D&O or EPL coverage in order to qualify for the combined product.

By combining various exposures into one policy, the insured is less likely to encounter disputes between carriers, the administrative burden for both insured and carrier is lessened, and premium economies can be achieved.

This is particularly apparent for insureds comparing standalone EPLI policies with a Combined Product that includes EPL and D&O. Many have found that EPL can be added to the D&O policy (changing therefore to a combined policy) for an additional premium of 15 percent. In the past, adding EPL to a D&O policy resulted in less broad EPL coverage. However, the EPL portion of today's Management Liability product is greatly improved, making the combination far more attractive.

One additional benefit of a combined product is that insureds can choose to combine several lines into a single aggregate limit of liability, or even a multiyear aggregate. We do not see many insureds combining multiyear aggregates, since the premium for this coverage has been relatively attractive. As we see rates increase, we expect to see more insureds accepting multiyear aggregates in an effort to control premiums, but the reverse seems to be happening – fewer carriers even offer multiyear aggregate limits, perhaps based on the market's chilly reception to the concept.

A reminder: our surveys 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 for our readers.

To be certain that we are covering the key carriers, we have reviewed the list with some of the most prominent observers of the Management Liability market, who have confirmed we did not omit any significant markets.

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.

### State of the Market

In 2009 we saw the Great Recession as being an effective block to higher rates, which proved to be right (and in fact resulted in a decline in premiums collected from individual commercial insureds as exposure bases shrank). Carryover into 2010 led to yet another year of deferred rate increases, as carriers were willing to sharpen the pencil to acquire or retain insureds. During 2011, though, the tide began to (slowly) turn.

Private Company MLI rates are heavily influenced by the EPL portion of the premium, and thus loss experience in EPL is affecting the cost of MLI. Lately, they have become increasingly affected by D&O Entity loss experience. Entity claims, considered rare for private companies, have become a concern for some carriers (and curiously, not for others), who are seeing an uptick in severity claims emanating from business activity during the Great Recession. Troubled businesses may have taken some steps during those troubled times that they wouldn't take during more



normal times, and these may be responsible for the increasing levels of litigation.

As we talk with people knowledgeable about actual quoting and renewal activity, we are hearing more about rate increases and far less about competition. Although carriers poaching market share from their competitors is still common, the incumbent is less likely to defend its share at any cost. Rates are edging up, although not dramatically or painfully for the insureds.

Along with an edging up of rates is a small increase in deductibles (sometimes as a way to hold premiums level for the insured). Deductibles are the preferred route, as insureds will typically be more willing to accept a possible increase in potential cost (if there aren't any claims for an insured, their cost doesn't increase). An exception is larger increases in EPL deductibles, especially in California.

We surveyed our participating carriers about their rate expectations, both for themselves and for the market in general. Responses varied, but for the most part carriers with large books of business are edging their rates up 5-10%, sometimes more, even at the cost of losing some insureds. This seems particularly true for the carriers that write a lot of smaller employers.

The volume of premium being written is remarkably difficult to come by, as many carriers seem to track premiums by each line of coverage they offer in the MLI product. We are sure they know what these total up to (recall that each coverage would be sold separately as well as part of an MLI product), but aren't sharing it with us.

We have seen estimates of U.S. MLI premiums as low as \$1.3 billion to as high as \$3 billion, with another \$1 billion written for insureds based outside the United States.

### *Claims*

We did not solicit information about claims experience, because of the large number of coverages in the Management Liability product line. Anecdotally, we understand the product is reasonably profitable. EPL portions are not so profitable, but the line in general seems to be. The amount of competition still evident with these products certainly indicates that the carriers find them attractive.

Again, much of the claims pressure is on the EPL line, which is not surprising when one considers the claims experience for monoline EPLI products. As the uneven economic prosperity continues to be a factor, increasing claims frequency is still expected.

We expect to see that this claims pressure will, over the long-term, push rates and deductibles higher. We do not foresee a restriction in coverage breadth or availability, except perhaps for Wage and Hour claims.

### **Lines of Coverage Available**

As we noted in the Introduction, there is a core group of coverages offered by almost all carriers (D&O, EPL, Third Party, and Fiduciary). An insured must buy D&O or EPL, at minimum, to qualify for the product.

Where carriers differ is in the other coverages they offer. In the table *Lines of Coverage Available*, the coverages that an insured can choose are shown by carrier. We no longer allow carriers to list coverages that they offer outside of an MLI product; we are solely interested (for this Report) in coverages that are offered as a part of their MLI program.

There is a significant difference between carriers in the coverages an insured can choose. De-

pending on their comfort, perceived expertise, and perception of market interest, carriers offer an array of coverages. Carriers continue to add Cyber Risk/Privacy, Media Liability, and/or Professional Liability options to their Management Liability products.

Although carriers continue to broaden the types of coverages they offer the middle market, we believe they are missing a golden opportunity by not offering more coverage options.

Adding more coverage options can be a successful product strategy because MLI policies are an easy sell to insureds and their brokers - most insureds need at least a couple of the core coverages (EPL and Fiduciary). Adding additional coverages to an existing policy is an easier buy (or sell?) for many insureds, who find it easier to add an option than to buy an entirely new policy.

Many insureds and brokers have told us over the years that they can get internal support for an added coverage option that would have encountered resistance as a new policy purchase. This was especially true during the recent soft market, when premium reductions freed up budget for additional insurance purchases.

Intellectual Property coverage had been an option for a few carriers, but as we found in our April report on monoline IP policies, few carriers are interested in offering this type of coverage. We had hoped that IP protection would become a standard offering in Management Liability policies, but it does not appear that this is going to happen. We would note that the D&O coverage section for individual Directors and Officers may well include protection against suits alleging Intellectual Property misuse, but that Entity coverage for IP is unlikely at best.

## Target Markets

Carriers focus this product on smaller and midsized companies, as shown in our *Market Information* table. Many carriers specify their target market as companies with up to a certain number of employees or amount of assets. We find both of these to be guidelines, not absolutes. Certainly, larger private companies can buy Management Liability policies if they are an attractive risk.

The real barrier for many carriers is companies that expect to go public. The D&O risk for pre-IPO companies is far greater than for companies that expect to stay private, so many carriers will not write, or restrict coverage for, these insureds.

With carriers that are willing to write companies that are pre-IPO, coverage restrictions, such as SEC exclusions, should be watched for.

## Limits and Deductibles

Different coverages offer different limits and deductibles, so we refer you to the *Limits and Deductibles* table. Insureds are generally looking for higher limits (above \$5 million) for D&O and/or EPL only. They do not typically buy limits above \$2 to \$3 million for lines such as Fiduciary.

Our table *Limits Options Available and Cost* shows the three that are typically offered:

- **Carrier Offers Separate Annual Aggregate For Each Coverage** – this means the carrier will offer a separate annual aggregate for each line of coverage, so that a blowout loss in, for example, EPL, does not erode the coverage for D&O.
- **Carrier Offers Combined Annual Aggregate For All Coverages** – this means the carrier will offer a single annual aggregate for the entire policy, so that a blowout loss in, for example, EPL, will erode the coverage for D&O. This is dangerous, since risk managers and/or

insurance brokers do not find it much fun when informing the directors that their coverage has evaporated because there was a big EPL claim!

- **Carrier Offers Combined Multiyear Aggregate For All Coverages** – this means the carrier will offer a single aggregate for the entire policy, both coverages and term, so that a blowout loss or an accumulation of losses will erode the coverage for, say, D&O. This can also be dangerous, for the same reasons, and the chances of it happening are greater, because claims can accumulate over the multiple-year term of the policy.

There is a premium discount offered for insureds that opt for other than annual per-coverage aggregates. Typical discounts are shown in the table.

To counter the risk of inadequate aggregate limits, most carriers offer reinstatement of limits options (generally subject to negotiation and of course underwriting). Reinstatement options can be a valuable enhancement to a policy and should be considered carefully.

### 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. All but six of the participating carriers provided useful information.

Since limits often equate to the size of the insured, we specified employers ranging from \$10 million to \$500 million in annual sales. The results are summarized in the attached table *D&O Limit Usually Purchased by Carrier's Insureds*. The answers are merely an indication of the limits insureds select, and should not be used as an indication of sufficient limits.

To us, it is evidence that many smaller employers still do not buy enough limits, content to have insurance, even if it is inadequate. We hope that cost cutting by insureds won't result in coverage that is even less adequate.

### Policy Type and Definition of Insured

When considering the issue of Duty-to-Defend versus Indemnify forms, there is a lot of flexibility in how these policies respond to a claim. A number of the carriers offer the insured the flexibility to decide at the time of the loss whether the claim will be defended by the carrier or by the insured. All policies reviewed can be written on a Duty-to-Defend form, but a number of carriers offer the insured the option of an Indemnity form as well. In earlier years, all carriers except Chartis offered this option at the time the policy was purchased; Chartis allowed the choice for each claim at the time of the claim, giving the insured the most flexibility. We now see more carriers offering the same flexibility as Chartis, to the benefit of the insureds.

The Definition of Insured varies from policy-to-policy, and from coverage-to-coverage. The most significant difference is in the EPL line, where coverage for Independent Contractors, Leased Employees, and part-time employees is not automatically included in most policies.

Other coverage observations:

- Leased and contract employees may need coverage; a number of carriers extend coverage to these individuals if they are indemnifiable like employees.
- Newly acquired organizations is one area in which carriers differ, and subsidiaries is another. Generally, we find less distinction between carriers than before.



- Whether or not the entity is covered, and whether or not the policy includes a Spousal Extension, is important for any comparison of D&O.

So-called Side A issues have become critical for publicly-traded companies in the U.S., following the well-publicized coverage problems of Enron, WorldCom, and Adelphia directors. Private company directors and officers are probably not as concerned as their publicly-traded company counterparts about the risk of corporate bankruptcy limiting their coverage, or rescission of the policy completely eliminating coverage. A few carriers have, or are creating, individual D&O policies in response, but most of the carriers report that they have seen little or no demand for specific individual (Side A) products. Several report they are willing to provide their policy with Side A coverage only for D&O, but that there has been very little demand.

All carriers offer coverage for the entity; most include it automatically, while a few carriers make it an option. We find few insureds choosing D&O coverage without including the entity, and most (if not all) proposals include the option.

Spousal Extensions include the insured's spouse for coverage, and are available from each carrier.

### Claims Reporting and Extended

#### Reporting Period

When 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.

Having said that, we note that, as with all claims-made policies, the insured needs to be cautious about notice provisions. If they have an indication that they might have a claim, are they required to report it to the carrier? Would it be covered if it became a claim? What if they change carriers and the new carrier denies the claim as having been reported to a previous carrier?

For an insured that is not changing carriers, this may not be important, but many smaller insureds frequently do change, and need to be careful about situations where notice of a potential claim ends up precluding coverage.

Extended Reporting Period (ERP) protection is an under-appreciated feature of claims made policies, one that will take on a growing importance if carriers lose interest in the market.

All carriers offer an ERP, but length and cost differ. A variety of carriers offered at least one year, with three or more years available. Many carriers now report that the length is negotiable; make sure that this negotiation is completed before the carrier loses interest in your business!

Whether the ERP is one-way or two-way (bilateral) is important to know. One-way means the ERP is available only if the carrier cancels or refuses to renew. Two-way means the ERP can be purchased even if the insured cancels or does not renew, and is available from almost all carriers.

#### Selection of Counsel

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 doctor and patient. While it is very important in EPL, it is even more important to the comfort and security of directors faced with a D&O suit.

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 D&O or 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.

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.

### Consent to Settle

Carriers are still reluctant to allow insureds much control over settlement, understandably, since D&O and 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. Of course, carriers are reluctant to fund such battles.

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 "soft" hammer clauses exist, which share the cost above the claim between the carrier and the insured. Originally offered by Royal, it is now a feature of many carriers' products, primarily for EPL.

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.

### Preset Allocation of Costs

Few carriers are willing to agree in advance that defense costs will be allocated on a fixed, preset basis, which is an agreement that the defense costs of an uncovered allegation (if any) will be  $x$  percent of the total defense costs of the claim.

Carriers offer various options, including no preset allocation, allocation for defense costs only,

defense costs and indemnity (securities claims only), and defense costs and indemnity (all claims).

We feel lukewarm about the benefits of preset allocation, but some find it attractive. For some, it is considered a possible solution to the Side A dilemma, but we do not find the argument convincing.

### Exclusions

Policy exclusions vary widely, but we recommend insureds and their advisors pay particular attention to professional liability and securities exclusions, as well as those relating to punitive damages and intentional acts.

### Risk Management Services

Our table *Risk Management Services* identifies the types of value-added services offered by carriers.

These services are primarily focused on EPLI and Kidnap/Ransom, with increased services to help mitigate D&O and Cyber risk, offering the same type of benefit to the insured that, for example, loss control engineering does for Property insurance. We have not seen much in the way of new services in the non-EPLI coverage area, and in this market environment, do not expect to see much change.

Innovation in value-added services has slowed, but it is still a primary source of product innovation in the EPLI business, and one in which numerous vendors, including law firms, are competing for business. As with loss control engineering, it presents the opportunity for carriers and insureds to mutually benefit.

### Summary

We like the MLI product – a lot. It offers insureds a relatively cost effective way to acquire multiple coverages in a single purchase, and a simplified sales opportunity for the brokerage community. The influx of new carriers into this product line may be nearing its end, and rate recovery seems to be happening.

We are glad to see that carriers are resisting the urge to rapidly increase rates, preferring a more moderate approach. It is doubtful that the market would allow rapid rate increases anyway, as there are too many carriers chasing a large but not infinite number of potential insureds.

Carriers that continue to offer a wide array of coverage options to the core lines of D&O, EPL, and Fiduciary will, we expect, be more likely to prosper in terms of sales, customer stickiness, and, hopefully, profitability.

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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](http://www.betterley.com/blog)

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