A Risk Manager's Guide to Negotiating the Terms and Conditions of an EPL Insurance Program

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Past issues of *EPLiC* have focused on a variety of points to consider and coverage enhancements to seek when structuring an EPL insurance program, because many "off the shelf' EPL insurance products (like most insurance products) may be enhanced considerably to improve the scope of coverage they provide. Although contributors to *EPLiC* can continue to raise critical coverage issues, such suggestions will come to naught if risk managers are unable to negotiate these enhancements with EPL underwriters. This article provides risk managers with a guide on how to conduct an EPL insurance policy initial placement or renewal negotiation so that they can effectively address the important coverage issues that are examined in *EPLiC*.

This Guide Might Create New, Higher Standards

This guide presents one person's viewpoint, and perhaps a controversial one at that. Indeed, some insurance brokers and underwriters may resist this approach because the author is not an insurance broker, but rather a lawyer who provides legal counsel to policyholders large and small. Regardless, based upon the experience of my practice, it has become apparent to me and many of my clients that new standards governing the relationships among insureds, agents, and insurers are necessary.

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Interestingly, several insurance broker clients have hired me to work with both them *and* their policyholder-insureds in the manner discussed by this article. In addition, I have developed relationships with certain insurance underwriters who appreciate the value of "partnering" with their risk manager clients as set forth herein.

Accordingly, risk managers should evaluate for themselves the validity of the points made within this article. In truth, that is the essence of this piece: the view that risk managers should empower themselves and become personally involved in insurance policy negotiations, as opposed to blindly rubber-stamping the work of another. Only by partnering with a broker, rather than passively following a broker, can the risk manager be assured that the policy he or she ultimately buys actually contains the terms and conditions he or she originally sought.

A "Partnering" Relationship between Broker and Risk Manager Is Key

When it comes to negotiating the terms and conditions of an EPL insurance policy (or any insurance policy, for that matter), the key is for the risk manager (alone or with another professional), to "partner" with an insurance broker. However, certain insurance brokers conduct an insurance policy initial placement or renewal negotiation in a way that makes such a "partnering" relationship impossible. Such brokers preclude the risk manager (1) from seeing or hearing the underwriter's comments regarding the terms and conditions contained within the underwriter's quote *and* (2) from learning the underwriter's responses to the risk manager's requests for coverage enhancements. This approach makes the risk manager completely dependent on the information provided by the broker.

The results of such broker conduct can vary. In some instances, the risk manager

obtains only a few of the many coverage enhancements he or she requested. At other times, the results are more dangerous: The policy is written with terms or conditions that are contrary to what the risk manager expressly requested. One example of such a pitfall is when the risk manager requests a "non-duty to defend" program but the broker places a "duty to defend" program. (For a discussion of the differences between a "duty to defend" program and "non-duty to defend" program, see the Winter 1999 issue of *EPLiC.)*

Developing the Ground Rules with Your Insurance Broker

The first step in the process of negotiating the terms and conditions of an insurance policy for an initial placement or renewal is to lay the ground rules with the insurance broker with whom you are working. While there are numerous issues that a risk manager should discuss with any insurance broker, the following guidelines are the ones specifically related to the issues addressed in this article. At the outset, the risk manager should obtain from the broker an agreement that the following guidelines will be adhered to. These guidelines are noted in Figure 1 and discussed in further detail within the balance of this article.

Guideline 1 - The "Brainstorming" Session

There are certain fundamental issues relating to EPL insurance that should be discussed with the insurance broker before the broker goes to market. These issues are in part examined in the Winter 1999 issue of *EPLiC*. They pertain to the question of whether the insured wants a "duty to defend" or "non-duty to defend" program and whether the insured seeks a "working layer" program or "catastrophic" program.

Additional items to address include which, if any, of the myriad coverage enhancements that are "hotly" being debated are particularly important to the policyholder. For example, for some insureds, having express language in the EPL insurance program relating to coverage for stock options is important, whereas for others, it is not. Similarly, for some policyholders it is vital to have coverage for amounts owing under an express written employment contract, while for others, it is not a significant item. These and any other issues important to the risk manager should be discussed, and the specific goals to be achieved with respect to such issues should be decided up front.

At this point, the risk manager should ask the broker for a list of the markets the broker intends to approach and the reasons those markets are well suited to achieve the goals established. If the risk manager is very knowledgeable about the insurers who provide EPL insurance, he or she should make sure that the list suggested by the broker includes all the insurers the risk manager would approach.

However, if the risk manager lacks knowledge concerning the EPL insurance market, he or she should obtain a second opinion from another source. Many risk managers work with two (and sometimes more) brokerage firms in putting together their insurance program. Therefore, the risk manager should not be reticent to confer with the EPLI resource person at the

Figure 1
Risk Manager-Broker Partnering Guidelines

Guideline 1 - We are going to "brainstorm" about issues before you go to market.

Guideline 2 - You will show me the actual indications, quotes, and other written responses from the underwriters.

Guideline 3 - We will negotiate with the underwriters together if need be, whether in writing, over the telephone, or by meeting.

Guideline 4 - We will not bind coverage until coverage enhancements are confirmed in writing.

Guideline 5 - The policy will be issued in draft within 1 month of binding and will not be issued in final until I sign off on it.

Guideline 6 - You will review the issued draft policy for accuracy and advise of any needed corrections.

"other" insurance broker's office. The risk manager should explain the goals that have been developed for the placement or renewal and request that the resource person compile a list of markets that are particularly appropriate for achieving those goals. If the resource person identifies any markets that were not included in the list provided by the broker who will be placing the policy, the risk manager should require that the broker add such markets to the list. Of course, the "second opinion" can come from any source. Lawyers, risk management consultants, or risk managers at other companies who have experience with EPL insurance can also serve as effective sounding boards.

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The important point is that the risk manager should not blindly follow a broker. That is not a "partnering" relationship. Rather, it is a "dependency" that is unhealthy for the professional development of the risk manager and for enhancing the efficacy of the risk manager's insurance program. What must be established, at all levels of the process, is a "partnering" relationship, in which the broker and risk manager work together by sharing information, ideas, views, and opinions.

Guideline 2-Reviewing Indications, Quotes, and Other Communications from Underwriters

When the broker returns from the market, the broker should furnish the risk manager with copies of the actual communications from underwriters. Regrettably, some brokers have a habit of providing the risk manager with a summary of the underwriters' indications/quotes on the letterhead of the broker, rather than the underwriter's direct, first-hand comments. In my experience, this is a recipe for disaster. Time and again, I have reviewed such "proposals" only to find that the broker (unintentionally, of course) has inaccurately represented the quotes. This approach is plainly wrong. Some of the more frequent errors include, but are not limited to, stating the incorrect policy form numbers, providing the wrong limits and retentions, and inaccurately describing coverage terms and conditions on key issues (such as whether the policy is a "duty to defend" or "non-duty to defend" program).

The broker can provide such "proposals" if he or she chooses, but the risk manager should insist on reviewing the backup documentation that came directly from the underwriters. Only by reviewing such documentation can the risk manager, or his or her adviser, be assured that the broker is describing the situation accurately. Some brokers are offended when asked to provide such documentation, but they should not be. Only by providing this information can they "partner" with their client-the insured. And if such material contains information the broker does not want the risk manager to see (such as the commission that the broker is earning), then all the broker needs to do is "white out" that part of the documentation and advise the risk manager of what is being "whited out."

The same goes for reviewing an underwriter's response to the risk manager's requests for coverage enhancements, which is discussed below.

Guideline 3-Setting Forth Coverage Enhancement Requests and Negotiating Those Requests

There are at least two ways to make coverage enhancement requests, and other options include combinations of the two methods. The first is to go to market with a detailed list of "specifications" or to provide a draft policy form and ask insurers to sign on to the risk. In other words, if the risk manager and broker are familiar enough with the coverage forms offered by the markets that will be approached, they can put together a detailed list of coverages, terms, and conditions that they want to be contained within a quotation. Or, they can provide the draft of an

actual manuscript policy form they want to use. When the quotes come back, they will need to be compared with the original specifications to spot any omitted issues. These omitted issues should be noted in a letter to the underwriter, requesting such coverage, along the lines of the "wish list" letter discussed below.

Alternatively, the risk manager can wait for the broker to bring back quotes from market. The quotes can be reviewed and narrowed to the best two or three. At that point, for each of the best quotes, a "wish list" of changes to the quote can be drafted and sent to the underwriter. A "wish list" will contain a list of all changes to the policy form and any quoted endorsements that are being requested. Examples of such changes include changing language in a particular insuring agreement, exclusion, or condition; adding insuring agreements; deleting exclusions; and deleting or adding conditions. "Wish lists" are most effective if, for each request, the letter states the basis and support for the request (e.g., showing how the other quotes competing for the placement provide the language requested, or the manner in which other forms available in the market provide the language requested, or why decisions by certain courts of law serve as the basis for the request).

Along the way, it might be necessary to negotiate certain coverage enhancements orally with the underwriter. Often, the underwriter refuses to grant a request because he or she does not understand the purpose of the request, is laboring under a misunderstanding of the law applicable to the request, or actually has a legitimate concern with respect to the request (one that the risk manager or adviser did not intend to create). Such issues usually can be resolved simply by getting on the telephone with the underwriter and talking him or her through the issue. These are instances in which "partnering" between the risk manager and broker proves invaluable. If a broker does not understand the rationale underlying the request for a particular coverage enhancement, but the risk manager is not given access to the underwriter to discuss it, the issue will never be resolved. However, if the risk manager and broker work as a team and talk to the underwriter together, the issue typically can be resolved. And if the underwriter is of like mind, this "partnering" approach becomes a highly effective, three-way relationship among the risk manager, broker, and underwriter. For example, if the underwriter is not willing to grant the request made, he or she can offer an alternative that tries to address the risk manager's concern. This process will substantively achieve the risk manager's goal as respects the issue, even though the underwriter has not provided the exact modification that was originally requested. I have witnessed such "partnering" and will attest to the superior coverage enhancements that can be built into a program when working with an underwriter who has such a "partnering" mentality.

It is not clear which of the two methods discussed above is best, but one thing is certain the issues must be documented, documented, documented. The requests for coverage enhancements must be put in writing, as should the underwriter's response to each request. Documentation can be invaluable at the time a policy is issued. Written records will help when reviewing for accuracy and correcting the policy, if necessary (which is almost always the case). Documentation also can be useful in a claim situation in which the insurer's adjuster or outside counsel attempts to interpret a provision in the policy in a manner that is directly contrary to what the parties originally agreed when the policy was written. I have personal experience on several claims where the documentation compiled during policy negotiations was used to overcome claim denials. The proper way to create such documentation is discussed below.

Guideline 4 - Documenting the Terms and Conditions of the Coverage

This step would appear self-evident, but it often is one of the most overlooked tasks in the process. The agreements made with respect to requests for coverage enhancements must be documented. Ideally, they should be memorialized every step of the way while the quote is being negotiated. At a minimum, however, they should be documented prior to binding coverage.

That said, there are numerous ways to create such documentation. The following provides examples. Perhaps the

preferred method of documentation is to negotiate the language of the actual policy form to be issued. This method treats the insurance contracting process just like most standard contracts and is easy to apply if the policy form being used is in electronic form. Increasing numbers of insurers are adopting this technique. As discussions take place, the changes agreed upon and/or suggested language can be made in real time and the policy form can be shared via email for review and further discussion. When discussions conclude and all parties have agreed to the wording of the policy form, it can be attached to the binder as the document that embodies the parties' agreement. This method also has the benefit of minimizing the number of responses to requests for coverage enhancements that must be made.

Another documentation approach relies on the "wish list" and "response letter" techniques. Once the parties have finished negotiations and the underwriter has provided the final "response" to the "wish list" letter, the "wish list" letter and all responses to it can be attached to the binder. This documentation can then be used to draft the policy (either by manuscripting it or by creating endorsements to address the issues agreed upon) after the policy has been bound.

Another method is to draft a mutually agreed list of changes to the policy form. The off-the-shelf policy form and this list of changes can then be attached to the binder. These documents are then used after binding to draft final policy language.

Guideline 5 - Setting Parameters for Policy Issuance

As many risk managers know, sometimes it seems to take forever to physically receive a policy after binding. However, risk managers should not believe that they are powerless to alter such timing. Rather, they must specify as a guideline with the broker, and have it agreed upon by the insurer, that the policy will be issued, at least in draft form, within a certain time period after binding. I view 30 days as reasonable and typically request that time frame. Although some insurers have problems with such timing, others can and should agree to 60 days. In any event, it is important to agree upon the timing, in writing, with the underwriter. Finally, the broker must recognize this as one of the key issues to be negotiated.

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Moreover, it should be understood that the policy is not issued in "final" until the risk manager signs off on it. This avoids the necessity of issuing "correction" endorsements that are serial in number. We've all seen them: "end. No.9... this endorsement replaces end. No. 2." There is no need for such clutter if the policy is not issued in final until all necessary parties have reviewed the draft policy for accuracy and "signed off' on it when the draft is correct. As with issuance timing, this point should be agreed upon in writing with the underwriter, and the broker needs to recognize this as one of the crucial issues to be negotiated.

Guideline 6 - Reviewing the Policy for Accuracy

As with some of the other steps discussed above, reviewing the policy for accuracy would seem self-evident. Unfortunately, it is not. Interestingly, a particular large broker would, for years, send issued policies to its clients with a cover letter that read something like: "Here is the policy. ... We have not reviewed it for accuracy. ... Please review it to make sure that what was agreed to is in the policy." Other brokers actually do review the policy for accuracy but miss a lot of issues. Even more regrettable is the fact that some brokers claim to have reviewed the policy for accuracy when they actually did not. (Although time pressures sometimes cause people to take shortcuts when they should not, this practice is unacceptable.) Finally, a handful of brokers both actually review the policy for accuracy and do a great job of it. Of course, the standard should be that exemplified by the handful of brokers who actually, and competently, review a policy for accuracy.

A risk manager should obtain an agreement up front with his or her broker that the policy will be reviewed for accuracy. In addition, the agreement should identify the person(s) to conduct

the review, ideally the person(s) who brokered the policy. Finally, either the risk manager or another professional should at least spot-check the issued policy to make sure that the broker reviewed it for accuracy.

Concluding Remarks

The failure to complete any one of the steps outlined above can lead to problems. For example, one could follow all of the steps except the last and still get into trouble. I have witnessed many instances in which policyholders have spent much time and money negotiating extensive coverage enhancements to a policy but failed to verify that the broker reviewed the policy for accuracy. Only when a claim was reported did they learn that half of what was agreed to never found its way it into the policy. Likewise, what good is it to review the policy for accuracy if the changes agreed upon were not properly documented? And how valuable are the last several steps if you blindly followed your broker at the outset of the process?

However, if these guidelines are closely adhered to, a risk manager can be assured that the issues he or she wants to address in the initial placement or renewal of an EPL insurance program are receiving attention. Not every coverage enhancement requested will be obtained. However, it is certain that the risk manager will know exactly which coverage enhancements were agreed to prior to binding and that the issued policy actually contains all such enhancements. Following these guidelines will also maximize the number of coverage enhancements actually obtained. *EPLiC*

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