Bernie Neff, CIC, CPCU
neffbj@aol.com

Technically Speaking...

Twenty Years Ago – Employment Practices Liability

I was looking at my calendar the other day and I noticed that it has been twenty years since 1) I retired from the St. Paul (now part of the Travelers Companies) and 2) we became aware that we had better be offering Employment Practices Liability insurance to our clients. Whether they bought the coverage or not, the offer was something that had to be made.

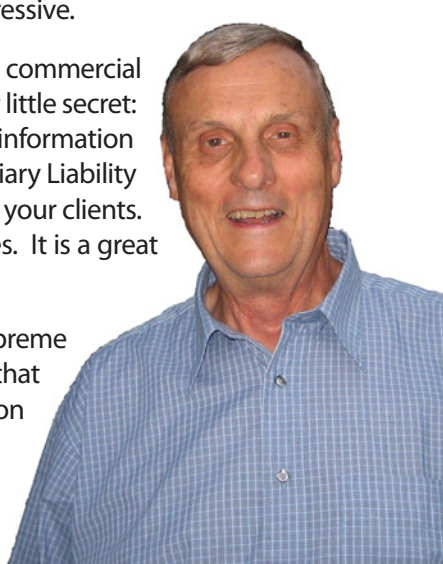
I have never seen a need for an insurance product explode onto the insurance scene as fast and dramatic as EPL coverage did. Think back, how often did you even think of this coverage twenty years ago? The reason for its dramatic arrival, of course, was the full force and urgency of the federal and state legislation that was being passed in the early 1990"s, especially the Civil Rights Act of 1991 and the American Disabilities Act that was finalized in 1994. I don't mean to ignore the many other laws that also impact this coverage, but time only permits a brief look. Also, don't forget the various state agencies that can be involved, like the Human Rights Commission and the Equal Employment Opportunity Commission (EEOC) that may require our policies to provide some needed legal assistance at hearings as well as defense coverage.

So what has happened in the last twenty years? Remember the long, drawn out applications twenty years ago that took hours to fill out? All the larger companies began to come out with their stand-alone EPL policies (prior to that, the coverage was usually provided as an endorsement to the Directors and Officers policies, or some other policy). Just like the D & O policies in their early development, one size fit everyone. We had one policy for the for-profit companies and the non-profit companies as well. The market was also fairly limited, prices were considered "high" and the minimum premiums were substantial.

A lot has changed in these following years. We now have EPL policies for all kinds of different specialty risks, the applications have slimmed down, prices are getting much better as well as the minimum premiums, and the market is much more open to your submissions.

The methods of providing coverage have changed considerably. The non-profit D & O policies now often offer EPL coverage automatically, or as an option, often with separate limits and retentions. Stand alone policies still have their place, especially for the larger or more adventuresome risks, but now we are seeing easy-to-use endorsements being used in the Bussinessowners and smaller commercial market. Even ISO got on the band wagon and now has a sample EPL endorsement for use with the GL policies.

This accomplishes two nice effects: no "heavy" minimum premium and the pricing is really getting more attractive. Several companies have begun to provide EPL coverage this way and are getting very aggressive.



As a quick aside, several coverages can be added to the BOP policies and even the larger commercial packages: EPL, D&O and Fiduciary Liability. You can write any or all of them. Here's another little secret: if the insurance carrier is providing the GL coverage, they will already have almost all the information they need to write the D & O exposures, and with a few more questions, the EPL and Fiduciary Liability coverages. So it can be done with a minimum of your time and with a minimum of cost to your clients. The moral here: start thinking about adding these coverages to your commercial packages. It is a great cross-sell approach. Just start asking your underwriters.

As to the EPL exposures and how they have changed over the past twenty years, the Supreme Court of the United States has been somewhat busy. One of the biggest areas of change is that of sexual preference with reference to both discrimination (including wrongful termination

Technically Speaking...continued on page 17

Technically Speaking...continued from page 15

cases) and sexual harassment cases now being covered by the ADA (actually the Court said that they "could" be covered by the ADA, depending on the circumstances, but I don't think we - or our clients - want to be taking chances). Overall, the courts have broadened what the various federal and state laws demand, and put more burdens on our clients to comply in their human resources endeavors.

One area to be aware of is the policy limits and the question of "how much should I buy"? EPL cases are very expensive to defend because the defense attorney has to question most, if not all, the employees. Courts are always looking for a pattern, especially in cases of discrimination and sexual harassment. While there is no easy answer to the above question, I would suggest that a policy or endorsement with limits of $300,000 or less is a defense policy only, because that is about all that will be left if the case is litigated. There won't be much (if any) limits left to pay for the judgment. Be especially careful of the "throw in" coverages that can be provided, especially in the various BOP policies. Many companies have their customized endorsements that will bring in several coverages under some kind of "blanket" endorsement. While these can be wonderful additions to a BOP policy, the limits are often woefully inadequate. A throw in coverage of $25,000 or $50,000 for EPL exposures is fine, but is just a start in what might be needed if your client is involved in a claim. Be sure to offer higher limits.

Finally, there are the "desperate cases", that is, those trying to find coverage under our standard policies the past twenty years. The GL, Umbrella, Employers Liability and even the Homeowners have been taken to trial as desperate people looked for help, where almost always, the court found there was none. So, our final thought, is this. If providing EPL coverage today is so relatively easy, don't forget to mention it to every client. The one policy I didn't list above, but one that has also frequently been in litigation is the E & O policy. Emphasis on the (O) omission here.