

## **10 COMMON MISPERCEPTIONS RE: INSURANCE COVERAGE FOR EMPLOYMENT-RELATED CLAIMS**

### **I. NO EFFECTIVE COVERAGE FOR EMPLOYMENT PRACTICE CLAIMS IS AVAILABLE OUTSIDE OF EMPLOYMENT PRACTICE LIABILITY INSURANCE POLICIES**

Commercial General Liability, Employee Benefits Liability, Errors and Omissions, Directors & Officers, as well as Fiduciary Liability policy have all been found to have a duty to reimburse defense fees in employment related disputes.

### **II. EMPLOYMENT PRACTICES-RELATED EXCLUSIONS BAR ANY POTENTIAL COVERAGE UNDER COMMERCIAL LIABILITY POLICIES**

Employment practices-related exclusions in Form CG21470798 still widely disseminated as part of commercial general liability policy provides only that,

“a. This insurance does not apply to bodily injury/personal injury/advertising injury to a person arising out of any: (c) employment related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed to that person: this exclusion applies (1) whether the insured may be liable as an employer or in any other capacity . . . and (2) to any person to share damages with or repay someone else who must pay damages because of the injury . . . Sexual harassment means . . . verbal or physical conduct of a sexual nature that . . . (3) create a work environment that interferes with performance.

- *Peterborough Oil Co. v. Great American Ins. Co.*, 397 F. Supp. 2d 230, 238-39 (D. Mass. 2005) (“[I]t is intended to refer to matters that directly concern the employment relationship itself, such as the demotion, promotion, or discipline of employees by employers, and tortious acts that may accompany such personnel decisions, such as discrimination, harassment, or defamation. Conversely, it is not intended to refer to all matters that concern or relate to employees.”).
- *Cincinnati Ins. Co. v. Markel American Ins. Co.*, No. 3:07-cv-168-WHB-LRA, 2008 WL 2415248 (S.D. Miss. June 11, 2008) (“Because Woodward alleges a claim of unlawful detention, which may not constitute assault, battery, abuse, or molestation, and which may not have arisen because of the alleged rape, the Court finds that the exclusions in the Markel Policies excepting such actions from coverage are not applicable.”).

Some employment actions are not specifically delineated and the exclusions thus may not operate as a bar to all employee-related claims. The “fellow employee” exclusion is not commonly added to pertinent policies. It only excludes coverage for an employee’s “personal injury” that was caused by another of the insured’s employees within the course and scope of employment.

### **III. EMPLOYEE BENEFIT LIABILITY POLICIES ARE RARELY IMPLICATED BY EMPLOYER/EMPLOYEE DISPUTES**

Employee benefit liability policies may be implicated where the employee’s disgruntlement extends to the employee benefits he or she received.

## INSURING AGREEMENT

- (1) COVERAGE V-EMPLOYEE BENEFITS LIABILITY. **To pay** on behalf of the Insured **all sums** which the Insured shall become legally obligated to pay as a result of damages sustained by an employee, former employee, prospective employee or the beneficiaries or legal representatives thereof and caused by any **negligent act, error or omission of the Insured**, or any other person for whose acts the Insured is legally liable in the **administration of the insured's Employee Benefit Programs** as defined herein, and the Company shall have the right and duty to defend any suit against the Insured seeking such damages, **even if such suit is groundless, false or fraudulent** . . . . [Emphasis added.]

## CONDITIONS

- .....  
(2) DEFINITIONS APPLICABLE TO THIS INSURANCE

- .....  
(b) Employee Benefit Programs. The term "Employee Benefit Programs" shall mean group life insurance, group accident or health insurance, profit sharing plans, pension plans, employee stock subscription plans, workers' compensation, unemployment insurance, salary continuation plans, social security, disability benefits insurance, savings, vacation plans, or any other similar Employee Benefit Programs.
- (c) Administration. The unqualified word "administration," wherever used, shall mean:
- (1) giving counsel to employees with respect to the Employee Benefit Programs;
  - (2) interpreting the Employee Benefit Programs;
  - (3) handling of employee records in connection with the Employee Benefit Programs;
  - (4) effecting enrollment, termination or cancellation of employees under the Employee Benefit Programs; providing all such acts are authorized by the Named Insured.

Employee dissatisfaction with the determination of benefits due them either of alleged wrongful termination, retirement or any period when calculation of such benefits is pertinent complicates employer-employee disputes. The particular problem areas include 401k's, profit sharing plans, changes in employee status from a union plan to management, failures to consider as compensation bonuses over time and commissions, formulas that look to the five last years worked instead of the five highest earning years in calculation of pension, consideration of part-time work in calculation of benefits.

Note there are three prime areas of contention:

- (1) a retirement plan payout is inexplicably less than colleagues received;
- (2) the money is lower than what would appear appropriate given the number of years worked;

- (3) there has been a merger by the company or a new pension plan administrator has been retained.

It is a rare employee who faces termination that does not also wonder about the scope of the benefits due him or her upon termination as they relate to employee benefits plans. Given the likelihood of disagreements between employee and employer in this context regarding the appropriate amount paid, it is not unlikely that upon further review many wrongful termination suits will include claims that employee benefits were improperly cap determined.

#### **IV. WAGE AND HOUR CLAIMS CAN NEVER BE RECOVERED UNDER EPLI POLICIES**

Although there is some contention that damages may not arise because a successful wage and hour claimant is simply receiving disgorgement of ill-gotten gain and thus not a “damage” remedy.

Express sub limits for wage and hour claims or separate wage and hour coverage is permitted that would at a minimum cover defense fees. Note: sub limits are a two-edged sword. If there is coverage for discrimination asserted in connection with a wage and hour claim or other covered personal injury offenses under CGL policies, such as invasion of privacy, defamation, disparagement, malicious prosecution or the like, the sub limit may actually reduce coverage since you could bar any defense fees beyond the sub limit, say \$250,000, which would otherwise be available.

#### **V. IF THE ALLEGATIONS OF THE COMPLAINT DO NOT CLARIFY WHETHER A DEFENSE IS DUE, THERE IS NO NEED TO FURTHER MONITOR THE LITIGATION TO EVALUATE WHETHER FACTS COULD ARISE THAT MAY TRIGGER COVERAGE**

**First**, amendments of pleadings may change the character of the suit to make what was uninsurable potentially fall within coverage.

**Second**, during a mediation, clarification of what coverage arises may help the claimant realize that other claims that have not yet been asserted would be helpful to enlist the insurer’s involvement.

**Third**, skillfully crafted discovery prepared with the assistance of coverage counsel to elicit facts responsive of the questions raised by the policy, may clarify a duty to defend. Such fact allegations must be provided to the carrier so that they are facts known to it in many jurisdictions even those like California which purport to look to only facts available to the insurer are often narrowly construed by judges to require facts known to the insurer as the applicable standard.

**Fourth**, clarifying facts regarding coverage can be deemed collusive and thus bar any potential coverage which might otherwise arise. The insurer bears a heavy burden of proof to establish collusion. The presence or absence of coverage is an obligation which the defense counsel owes to the claimant under existing discovery rules, especially those applicable in federal court proceedings.

**Fifth**, the availability of coverage is deemed material as it may enhance prospects for settlement where the defendant merely clarifies which parts of the claims often inchoate have yet to be clarified through discovery responses or otherwise. It is not precipitating a dispute that did

not previously exist but facilitating analysis of the distinctions raised by the policies in light of the actual full panoply of claims that have not yet been fully asserted and proven.

**VI. ABSENT A SUIT, THERE IS NO NEED TO PROVIDE NOTICE TO AN EPLI CARRIER**

Nothing can be more dangerous than delay in notifying an EPLI insurer of a claim. It must be promptly reported so as to not bar coverage for any eventual lawsuit that arises out of it. Especially where a claims made policy is being renewed at the time any demand letter or other indication of a claim is made, careful review of applicable EPLI policy language is necessary to determine whether notice of a circumstance should be provided, just as in true with lawyers' errors and omissions policies.

**VII. EPLI POLICIES TYPICALLY INCLUDE EITHER NO RETROACTIVE DATE OR AN EARLY ENOUGH RETROACTIVE DATE; WHEN THE WRONGFUL EMPLOYER CONDUCT FIRST BEGAN IS NOT PROBLEMATIC**

To the contrary, many EPLI policies may seek to use a date of policy inception where the policy issued is the first of that character. This will bar coverage where any prior circumstance known to the insured became the genesis of a claim or was not reported in the application. The application is deemed a part of a policy and all facts and all the statements therein deemed material.

**VIII. COVERAGE LITIGATION OVER THE SCOPE AND MEANING OF EPLI POLICIES CAN BE AS EXPENSIVE AS THE UNDERLYING SUIT**

**First**, this is rarely the case. Following a carrier denial, discovery is unlikely since no discovery is permitted based on an inquiry into the facts the carrier should have known at the time it denied a defense. Indeed it would be bad faith now for the carrier to seek facts which it deems material to deny a defense which it did not have at the time of its earlier decision to preclude coverage.

**Second**, as pure disputes of law, cases susceptible to resolution by summary judgment on typically undisputed facts in California should not await litigation until after the underlying case is resolved. Five primary benefits:

- The applicable standard is reasonable fees, not those limited by Civil Code §2860;
- The rates paid commonly by carriers to their appointed counsel;
- No allocation is permitted pursuant to *Buss v. Superior Court* between potentially covered and uncovered claims;
- Reasonableness is the standard for recovery of both fees and rates, and
- The insurer bearing the burden to prove that the fees incurred were unreasonable and were paid by the insured, those payments are their market value.

**IX. NO NOTICE OF AN EEOC CLAIM MUST BE PROVIDED TO THE CARRIER UNDER TYPICAL EPLI CLAIMS MADE POLICIES**

- *Munsch, Hardt, Kopf & Harr P.C. v. Executive Risk Specialty Ins. Co.*, No. 06-1099, 2007 WL 708851 (N.D. Tex. March 8, 2007) (The policy requiring notice to the insurer within 60 days of the claim was deemed

unsatisfied where notice followed filing of the suit but was not timely because it was not forwarded within 60 days of an EEOC charge of discrimination, but delayed under the employee received the right to sue letter. A mere letter demand complaining of sexual harassment received before the issuance of an EPLA policy need not be provided to the insurer.).

- *Sigue Corp. v. Farmers Ins. Co.*, No. B189959, 2007 WL 586689 (Cal. Ct. App. Feb. 2007) (An employee terminated on 5/16/2000 which post-dated an application where the insured stated it was not aware of any pending employment practice claim or set of facts which would give rise to such a claim and that employee turnover was due to voluntary and not involuntary termination but to the denial of the claim under an EPLI policy with a retroactive date of 4/4/2000. A suit arising two weeks before submission of the policy application, which was settled during the policy period, did not fall within the coverage of the policy because rescission was permitted, as it is both a remedy to misstatement in a policy application and a defense to a claim. Court of Appeal affirmed the trial court summary judgment in favor of the insurer.).

## **X. CALIFORNIA COVERAGE LAW IS ALWAYS BROADER AND WILL BE APPLICABLE TO A LABOR DISPUTE IN CALIFORNIA BETWEEN AN EMPLOYER AND EMPLOYEE**

**First**, the majority of insurers are not headquartered in California and issue policies out of their regional offices or in some instances, their principal place of business. Key insurer states include Illinois, New Jersey, Connecticut and New York, and to a lesser extent, Massachusetts, Minnesota and Wisconsin.

**Second**, a recent court of appeal decision from Judge Croskey, on choice of law found that under California law, the applicable law – the place of performance, i.e., where the attorneys appear of record to render legal services determinative in choice of law analysis as the test for what law applies.

- Pursuit of insurance coverage claims in a forum other than California may yield better results in some cases where California law is less advantageous to the insured than California law.

**Third**, corporate clients may have their headquarters outside of California and policies may be issued out of state and the applicable law there may be preferable to that in California.

**Fourth**, coverage law outside of California will find 20 jurisdictions which permit recovery of coverage fees to the prevailing party.

- A number have stronger rules on the right to independent counsel in California.
- Few limit rates of attorney fee reimbursement to those governed by Civil Code section 2860.
- Many do not permit allocation under any circumstances between covered and uncovered claims.

- Some permit settlement recovery where there is even a potential of coverage of any claim at the time of settlement, rather than inquiring as to whether the liability would have been covered had the case proceeded to trial as California law suggests is the standard.