Western New England Law Review

Volume 21 *21 (1999)*
Issue 2 *Symposium: Employment Practices Liability Insurance and the Changing American Workplace*

Article 2

1-1-1999

COVERAGE FOR EMPLOYMENT PRACTICES LIABILITY UNDER VARIOUS POLICIES: COMMERCIAL GENERAL LIABILITY, HOMEOWNERS', UMBRELLA, WORKERS' COMPENSATION, AND DIRECTORS' AND OFFICERS' LIABILITY POLICIES

Joseph P. Monteleone

Emy P. Grotell

COVERAGE FOR EMPLOYMENT PRACTICES LIABILITY UNDER VARIOUS POLICIES: COMMERCIAL GENERAL LIABILITY, HOMEOWNERS', UMBRELLA, WORKERS' COMPENSATION, AND DIRECTORS' AND OFFICERS' LIABILITY POLICIES*

JOSEPH P. MONTELEONE**
EMY POULAD GROTELL***

INTRODUCTION

Insurance policies that are written specifically to provide coverage for employment practices liability claims such as wrongful discharge, discrimination, and harassment are a relatively recent phenomenon. These employment practices liability ("EPL") insurance policies were first introduced in the early 1990's. Prior to the widespread availability of EPL policies, coverage for employment-related claims was typically sought under one or more of the following policy types:

- Commercial General Liability ("CGL")
- Umbrella and Excess Liability
- Homeowners' Liability
- Workers' Compensation ("WC") and Employers' Liability ("EL")
- Directors' and Officers' Liability ("D&O")

Employers continue to seek coverage under these policies for employment practices liability claims, leading to a substantial amount of litigation and case law development. In contrast, there has yet to be any case law in the form of officially published judicial decisions

---

* The opinions expressed in this Article are those of the authors, individually and collectively, and do not necessarily reflect those of Reliance National, Blackmoor Group, Inc., or any affiliated insurer in the Reliance group of insurance companies with respect to any insurance policy. The authors do not purport to restate, explain, or interpret any insurance policy issued by a member company in the Reliance group.

** Joseph P. Monteleone is Senior Vice President and Underwriting Counsel at Kemper Insurance.

*** Emy Poulad Grotell is Vice President and Claims Counsel at Blackmoor Group, Inc. in New York.

under any of the EPL policy forms introduced over the past several years. Thus, this Article will examine the coverage issues that arise under each of these policies in the context of various employment practices liability claims. With the advent of EPL insurance, certain changes have been made to the forms of these policies, particularly in the case of commercial general liability forms,[1] to ensure that they do not overlap with EPL insurance. Nonetheless, these changes are not universal and it behooves the policyholder and the EPL insurer to examine these other sources of insurance for employment claims. It is probably fair to state that insurers under these policies never intended to provide coverage for employment practices claims and will resist attempts to secure the coverage for a given claim, quite often successfully in light of the cases discussed in this Article. Consequently, it would not be wise to rely upon any of these policies as a substitute for EPL insurance despite the occasional case law finding coverage under some variations of these policies for particular employment claims.

I. COMMERCIAL GENERAL LIABILITY POLICIES

The commercial general liability policy ("CGL"), previously known as the comprehensive general liability policy, is a policy held by virtually every business in the United States to protect it from a variety of negligence-based civil liability claims. The CGL policy has two primary coverage parts. The first part, referred to as "Coverage A: Bodily Injury and Property Damage Liability," generally provides coverage for "bodily injury" or "property damage"[2] caused by an accident resulting from an insured's negligent conduct. It is usually under this part of the CGL policy that coverage is provided for premises liability and products liability claims. The second coverage part, "Coverage B: Personal and Advertising Injury Liability," provides coverage for specifically enumerated torts which are committed by an insured in the course of its business or in the course of advertising its goods, products, or services. In the context of employment-related claims, coverage is typically sought under the Coverage A section of the CGL. Additionally and alternatively, and especially where an employment-related claim includes elements of a personal injury tort, such as defamation, coverage may be sought under Coverage B. Attempts to secure

1. *See infra* notes 62-68 and accompanying text.

2. See *infra* Part I.A for discussion of what constitutes "bodily injury" and "property damage" under a CGL policy.

CGL coverage for employment practices liability claims have been met with mixed results for a number of reasons.

A. *Coverage A: Bodily Injury and Property Damage Liability*

1. Defining Property Damage

Coverage A provides coverage for "bodily injury" or "property damage" which is caused by an "occurrence." The term "property damage" will not, generally, trigger coverage for employment practices claims since it requires that the claimant seek damages for physical injury to, or the loss or use of, tangible property. Courts have uniformly held that economic loss alone will not trigger coverage for "property damage."[3] As such, claims by an employee or former employee seeking back pay or loss of benefits will not trigger coverage under "property damage."[4]

2. Defining Bodily Injury

The term "bodily injury" is generally defined as "bodily injury, sickness or disease sustained by any person."[5] Most wrongful employment claims allege emotional distress and/or mental anguish, but a majority of jurisdictions hold that allegations of purely emotional distress or mental anguish do not satisfy a claim for "bodily injury."[6] As one court stated: "'[b]odily injury' . . . is a narrow term and encompasses only physical injuries to the body and the consequences thereof."[7] A majority of courts, however, have found coverage when the allegations for emotional distress or mental anguish

---

3. *See, e.g.*, Lassen Canyon Nursery, Inc. v. Royal Ins. Co. of Am., 720 F.2d 1016, 1018 (9th Cir. 1983); Hommel v. George, 802 P.2d 1156, 1158 (Colo. Ct. App. 1990); L. Ray Packing Co. v. Commercial Union Ins. Co., 469 A.2d 832, 834 (Me. 1983).

4. *See* Aetna Cas. & Sur. Co. v. First Sec. Bank, 662 F. Supp. 1126, 1130 (D. Mont. 1987) (finding that lost wages and diminished earning capacity do not constitute "property damage"); Lamar-Truck Plaza, Inc. v. Sentry Ins., 757 P.2d 1143, 1144 (Colo. Ct. App. 1988) (finding damages claimed by employee for alleged sexual discrimination and harassment were purely economic and, therefore, not within definition of "property damage"); Southeastern Color Lithographers, Inc. v. Graphic Arts Mut. Ins. Co., 296 S.E.2d 378, 380 (Ga. Ct. App. 1982) (finding that economic losses sustained because job offer was rescinded do not fall within definition of "property damage").

5. Throughout the discussion of CGL we quote from the standard CGL forms issued by the Insurance Organization Services, Inc. ("ISO"). ISO is an organization which drafts various forms for many types of insurance. Many insurance companies will either use ISO forms in issuing their CGL policies or model their own CGL policies from ISO forms.

6. *See, e.g.,* AIM Ins. Co. v. Culcasi, 280 Cal. Rptr. 766 (1991) (citing to the decisions of a majority of courts finding that emotional distress alone does not trigger coverage for "bodily injury").

7. Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154, 1156 (Mass. 1988).

are accompanied by physical manifestations.[8] Only a minority of jurisdictions have found coverage under "bodily injury" where the plaintiff alleges emotional distress or mental anguish absent physical manifestations.[9]

What constitutes a physical manifestation to invoke coverage under "bodily injury" is not well-defined.[10] The ambiguity is best exemplified by two cases decided by the New Jersey Supreme Court which addressed the types of injuries that satisfy the definition of "bodily injury." In *Voorhees v. Preferred Mutual Insurance Co.*,[11] the court held that the plaintiffs, who claimed emotional distress, and who only alleged remote physical manifestations (e.g., nausea, headache, depression, and bodily pain), did in fact trigger coverage under the CGL policy.[12] But, on the same day, in *SL Industries, Inc. v. American Motorists Insurance Co.*,[13] the same court held that a claim of emotional anguish, which caused sleeplessness, lacked sufficient physical manifestations to trigger "bodily injury" coverage.[14]

Other courts have not focused on the distinction between physical bodily injury and emotional distress, but have instead elected to examine the basic core of the allegations in an effort to determine whether bodily injury coverage is triggered. A leading decision in

---

8. *See, e.g.,* Citizens Ins. Co. of Am. v. Leiendecker, 962 S.W.2d 446, 454 (Mo. Ct. App. 1998) (stating that the common meaning of "bodily injury" refers only to "physical conditions of the body"); Garvis v. Employers Mut. Cas. Co., 497 N.W.2d 254 (Minn. 1993) (stating that emotional distress is not an injury to the body but to the psyche and does not trigger coverage for "bodily injury"); *AIM Ins. Co.*, 280 Cal. Rptr. at 774-75 (finding that emotional distress accompanied by physical manifestation is covered under "bodily injury"); E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 726 P.2d 439, 443 (Wash. 1986) ("[CGL] coverage contemplated actual bodily injury, sickness or disease resulting in physical impairment, as contrasted to mental impairment.").

9. *See, e.g.,* General Accident Ins. Co. of Am. v. Gastineau, 990 F. Supp. 631 (S.D. Ind. 1998) (stating that allegations of emotional distress in context of hostile work place and sexual harassment triggered coverage for "bodily injury" because of physical contact); Lavanant v. General Accident Ins. Co. of Am., 595 N.E.2d 819, 822-23 (N.Y. 1992) (finding definition of "bodily injury" encompasses mental anguish under CGL policy); Loewenthal v. Security Ins. Co., 436 A.2d 493, 499 (Md. Ct. Spec. App. 1981) (stating that "bodily injury" encompasses a claim of pain, suffering, and mental anguish under CGL policy).

10. Some carriers will endorse their policies to redefine "bodily injury" to clearly indicate that emotional distress and mental anguish are covered only when they result from a physical harm, sickness, or disease.

11. 607 A.2d 1255 (N.J. 1992).

12. *See id.* at 1262.

13. 607 A.2d 1266 (N.J. 1992).

14. *See id.* at 1274. The court distinguished *Voorhees* by explaining that in that case emotional distress resulted in physical manifestations, whereas in *SL Industries*, sleeplessness was an emotional condition, not a physical one. *See id.* at 1273.

this area is *Waller v. Truck Insurance Exchange, Inc.*,[15] which considered whether allegations of emotional and physical distress triggered a duty to defend under a CGL policy. The court had little trouble in following the majority of courts by holding that only allegations of physical distress bring the claim into the realm of covered bodily injury.[16]

However, the court then proceeded to hold that where the gravamen of the underlying suit was economic loss, the alleged emotional and physical distress was a mere "by-product" of the economic loss.[17] The court stated, "[w]e cannot torture the duty to defend by allowing pleadings of emotional and physical distress resulting from financial injury to convert uncovered claims for economic losses into potentially covered claims for bodily injury."[18] *Waller* seems to support the view that merely tangential allegations of emotional and/or physical injury should not be determinative of coverage. The key, however, is whether or not the emotional or physical injury *derives solely* from the alleged economic loss. Taking employment practices claims as an example, the plaintiff's alleged "bodily injury" may not always derive solely from the alleged economic loss, particularly where the emotional distress and/or physical injury is allegedly inflicted *before* the claimant is terminated from employment.

While most courts will look to see if a plaintiff's complaint alleges elements of physical injuries, *Waller* and its progeny appear to present the better view because they do not permit coverage to be determined by the fortuity of a plaintiff's pleadings, but rather, they attempt to objectively assess the gravamen of the claim.

3. The Occurrence Requirement

Even where the wrongful employment claim triggers coverage for "bodily injury," typically the CGL policy also requires that such "bodily injury" be caused by an "occurrence." "Occurrence" is defined as "an accident, including continuous or repeated exposure to

---

15. 900 P.2d 619 (Cal. 1995), *aff'g*, 32 Cal. Rptr. 2d 692 (Cal. Ct. App. 1994); *see also* Keating v. National Union Fire Ins. Co., 995 F.2d 154, 156 (9th Cir. 1993) (finding emotional and physical distress suffered by investors, which arose from economic loss, was not covered under CGL policy since "[i]t would expand coverage of these policies far beyond any reasonable expectation of the parties"); Chatton v. National Union Fire Ins. Co., 13 Cal. Rptr. 2d 318, 328 (Cal. Ct. App. 1992).

16. *See Waller*, 900 P.2d at 630.

17. *See id.*

18. *Waller*, 32 Cal. Rptr. 2d at 697.

substantially the same general harmful conditions."[19] Generally, the use of the word "accident" in the definition of "occurrence" has been a basis upon which courts have held that coverage under Coverage A should be limited to fortuitous acts, and should exclude intentional acts, such as termination of employment and disparate treatment discrimination.[20] Thus, some courts have held that the wrongful termination of employment is not an "occurrence" since it does not occur accidentally, but rather, intentionally. For example, in *Sage Co. v. Insurance Co. of North America*,[21] the Minnesota Appellate Court held that firing an employee was "the antithesis of an accident," and therefore, any alleged bodily injury was not caused by an "occurrence."[22] As to other types of employment practices claims, to determine if there is an "occurrence," courts will often look to the factual allegations, as opposed to the nomenclature of the cause of action. For example, when all the factual allegations in the complaint are premised on intentional discrimination and harassment, an allegation of negligence may not trigger coverage.

In *Society of Mount Carmel v. National Ben Franklin Insurance Co.*,[23] a California high school teacher brought a wrongful termination suit. The employer in the underlying claim sought coverage

---

19. Prior to the November 1985 ISO Form, "occurrence" was defined as an "accident . . . neither expected nor intended from the standpoint of the insured." In 1985, ISO changed its definition and the latter part of the definition was made into an exclusion.

20. Courts will look at the allegations of the complaint to determine whether the alleged discrimination is considered "disparate treatment" or "disparate impact." Disparate treatment may include actions such as the firing of an employee because of his or her race, gender, national origin, or ethnicity. In order to establish a claim for disparate treatment, the plaintiff must prove that the defendant intended the wrongful act. On the other hand, disparate impact discrimination occurs when the employer has a policy which is neutral on its face but nonetheless has a discriminatory effect. Under disparate impact discrimination the claimant does not need to prove intent, only the discriminatory effect of the policy. *See, e.g.*, Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178 (7th Cir. 1980).

21. 480 N.W.2d 695 (Minn. Ct. App. 1992); *see also* Smithway Motor Xpress, Inc. v. Liberty Mut. Ins. Co., 484 N.W.2d 192, 194-95 (Iowa 1992); Loyola Marymount Univ. v. Hartford Accident and Indem. Co., 271 Cal. Rptr. 528, 532 (Cal. Ct. App. 1990) ("Intentional discharge does not become an accidental occurrence even if it causes unintended damages . . . ."); Kilgore v. Resumix, Inc., Mealey's Emerging Disputes, Vol. 3, Issue #5, at A-1 (Mass. Super. Ct. Apr. 16, 1998) (finding that negligence count did not allege acts separate from termination and, therefore, there was no covered accident). *But see* Maine Bonding & Cas. Co. v. Douglas Dynamics, Inc., 594 A.2d 1079 (Me. 1991) (finding that wrongful discharge may be a covered "occurrence" where there is no finding of subjective intent to cause harm).

22. *See Sage Co.*, 480 N.W.2d at 698.

23. 643 N.E.2d 1280 (Ill. App. Ct. 1994).

under CGL, workers' compensation, and umbrella policies issued by the insurer defendants in the coverage action. The most important issue for the CGL insurers was the court's holding as to whether there was a duty to defend under the CGL policy when a single count in the underlying complaint alleged negligent infliction of emotional distress.

Citing California precedent, the court held that a CGL policy offered no coverage for a wrongful termination claim because the *intentional* act of termination did not constitute an occurrence under the policy.[24] In addressing the allegation of negligence, the court held that it was necessary to "look beyond the pleadings to determine if the allegations of negligence contained therein are based on separate negligent acts, or are just merely intentional acts which have been labeled as negligent."[25] The court further stated:

> Here, Gabriel's [the underlying plaintiff] complaint seeks recovery for negligent infliction of emotional distress. However, the complaint sets forth no negligent acts or any facts from which such negligence can be inferred. Rather, the acts upon which that count is based are the very same acts which underlie every other count of Gabriel's complaint, the intentional discharge. Thus, the count alleging negligent infliction of emotional distress does not constitute an occurrence or accident under the terms of the comprehensive general liability policy, and the trial court was incorrect in so finding.[26]

This decision is important to consider because it suggests that even what may otherwise be pejoratively called a "throwaway" allegation of negligence can nevertheless provide a basis for the CGL insurer to defend. While the Illinois court's interpretation of California law has little authority in California itself, the court appeared to correctly interpret California precedent.[27]

Issues similar to those addressed in *Society of Mount Carmel* were also resolved in other significant decisions. In *State Farm Fire*

---

24. *See id.* at 1289.

25. *Id.*

26. *Id.*

27. *See generally* State Farm Fire & Cas. Co. v. Panko, No. C-94-2040, 1996 WL 162977, at *1 (N.D. Cal. Apr. 2, 1996) (refusing to consider a potential claim for negligence as triggering coverage under the policy for claim of wrongful termination, sexual harassment, and gender discrimination since the alleged facts would not support it); Quan v. Truck Ins. Exch., 79 Cal. Rptr. 2d 134 (Cal. Ct. App. 1998) (finding that allegation of negligence alone does not trigger coverage; rather, it is the alleged acts or conduct that determines whether there is an accident).

& Casualty Co. v. Compupay, Inc.,[28] a Florida appellate court considered the availability of coverage for claims arising from sexual harassment and sex discrimination, under a "business liability insurance policy," which is similar to a standard CGL form. The court determined that discrimination and harassment were akin to sexual abuse in that there is an inherent intent to harm the victim, and therefore, they are intentional acts as a matter of law.[29] Finding that the employer-insured was well aware of the conduct of the harasser, the court appeared not to give any weight to the fact that the plaintiff pled at least one count of negligence based upon the employer's decision to continue to retain the harasser in its employ. As in the cases exploring the bodily injury trigger noted above, decisions such as *Society of Mount Carmel* evidence a willingness by some courts to look beyond the allegations framed within the four corners of the complaint, and do not allow a "negligent tail" to wag the "intentional dog."[30]

In some instances, courts have also denied coverage because the allegations are so offensive that coverage would be barred by public policy. For example, California Insurance Code section 533 provides: "An insurer is not liable for a loss caused by the willful act of the insured; but [the insurer] is not exonerated by the negligence of the insured, or the insured's agents or others." In *Coit Drapery Cleaners, Inc. v. Sequoia Insurance Co.*,[31] the sole owner and CEO of the employer/defendant perpetuated an offensive sex-

28. 654 So. 2d 944 (Fla. Dist. Ct. App. 1995).

29. *See id.* at 947; U.S. Underwriters Ins. Co. v. Val-Blue Corp., 647 N.E.2d 1342 (N.Y. 1995) (holding that there is no coverage under CGL policy for allegations of negligent hiring, supervision, and retention against employer where underlying claim involved shooting by employee; the assault exclusion encompassed the plethora of claims asserted in underlying complaint); *see also* Cornhill Ins. PLC v. Valsamis, Inc., 106 F.3d 80 (5th Cir. 1997) (applying Texas law and concluding that where a claim for negligent infliction of emotional distress, negligent hiring, and supervision is interrelated to sexual harassment, there can be no "occurrence" for purposes of coverage); Public Serv. Mut. Ins. Co. v. Camp Raleigh, Inc., 650 N.Y.S.2d 136 (N.Y. App. Div. 1996) (holding that allegations of negligent hiring, retention, and supervision are not covered "occurrences" where underlying claim is for sexual abuse).

30. *See* Society of Mount Carmel v. National Ben Franklin Ins. Co., 643 N.E.2d 1280 (Ill. App. Ct. 1994). On the other hand, there are some courts that find coverage even when there are no allegations of negligence. *See* General Accident Ins. Co. of Am. v. Gastineau, 990 F. Supp. 631 (S.D. Ind. 1998) (recognizing the standard for employer liability for hostile work environment under Title VII is negligence and, therefore, a covered occurrence); Duff Supply Co. v. Crum & Forster Ins. Co., No. CIV.A. 96-8481, 1997 WL 255483 (E.D. Pa. May 8, 1997) (finding allegations of recklessness in context of violation of Title VII is a covered "occurrence").

31. 18 Cal. Rptr. 2d 692 (Cal. Ct. App. 1993).

ually hostile workplace. The court not only found the individual's conduct uninsurable, but also declined to find the corporate employer/defendant within the possible scope of insurance because: (i) it was the *alter ego* of the harasser, and (ii) no cause of action for negligent supervision or other non-intentional corporate conduct was pled or indeed could successfully have been pled given the degree of control the harasser had over the corporation. The court also held that coverage would be barred by section 533:

> [W]e seriously question whether section 533 would ever permit insurance coverage for any intentional course of conduct, as evidenced by this record, consisting of a long pattern of behavior of sexual discrimination and sexual harassment by a corporation's high managerial agents which have been known, ratified, and condoned by the corporation.[32]

While the court acknowledged Coit's argument that section 533 did not forbid the insurer from providing a defense, given the egregious facts in *Coit*, the court stated: "[W]here . . . both statute and public policy bar any possibility of indemnity for conduct which is inseparably intentional, there is also no duty to defend."[33]

Courts are more likely to provide coverage where the allegations of discrimination are not premised on intentional wrongdoing. In *Save Mart Supermarkets v. Underwriters at Lloyd's London*,[34] the United States District Court for the Northern District of California distinguished between "intentional" wrongful conduct, which is clearly uninsurable under section 533, and "accidental" wrongful conduct. The court held that coverage for unintentional disparate impact discrimination was permitted under section 533[35] and noted that "the policy of discouraging wilful torts would not be furthered, if coverage for unintentional discrimination was barred by § 533."[36]

Similarly, in *Melugin v. Zurich Canada*,[37] the California Court of Appeals held that coverage under a CGL policy for alleged gender and pregnancy discrimination was not precluded by section 533 where the employee-claimant contended that inept and unfair personnel management policies caused the alleged discriminatory result. In upholding coverage, the court emphasized that the CGL policy at issue expressly expanded the available coverage to include

32. *Id.* at 704.
33. *Id.* at 705 n.3.
34. 843 F. Supp. 597 (N.D. Cal. 1994).
35. *See id.* at 606.
36. *Id.*
37. 57 Cal. Rptr. 2d 781 (Cal. Ct. App. 1996).

claims for "discrimination . . . violation of civil rights, [and] sexual discrimination," to the extent "insurance against [the] same is not prohibited by law."[38] Thus, where the underlying claim for discrimination is not premised on intentional wrongdoing, California courts may provide at least a duty to defend.[39]

The United States Supreme Court recently rendered two decisions which held that employers could be liable for the illegal harassing behavior of supervisors even when management had no idea that it was occurring and were not negligent in any way.[40] An employer who was not aware of the harassing behavior, but is nonetheless liable because it failed to provide a reasonable complaint procedure to aggrieved employees, will probably be likened to the employer who had a policy which was neutral on its face but was discriminatory in its effect. Like the "disparate impact" discrimination cases, where an employer is not aware of the harassing behavior, courts may find a covered occurrence and, therefore, a duty to defend. However, a court following the reasoning of *Society of Mount Carmel* and similar decisions may hold that there is still neither a covered occurrence nor a duty to defend, since despite the lack of apparent culpability on the part of the employer or, at best, mere negligence, there is still an underlying intentional wrongful act on the part of a supervisory employee within the organization.

4. Employers' Liability Exclusion

Even in those situations where a claim for an employment practice is found to constitute an occurrence resulting in bodily injury, such a claim may be barred because of the employer's liability exclusion found under Coverage A. Specifically, the exclusion states, in relevant part, that the policy does not apply to:

> "Bodily injury" to
> (1) an "employee" of the insured arising out of and in the course of:

38. *Id.* at 782.

39. *See id.*

40. *See* Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998); Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998). In both cases, the employees were subjected to sexual harassment by their supervisors and the employers were not aware of the sexually offensive behavior. In *Ellerth*, the company had a policy against sexual harassment, which the employee chose not to use. *See Ellerth*, 118 S. Ct. at 2262. In *Faragher*, there was a written procedure which was never distributed to the employees or supervisors. *See Faragher*, 118 S. Ct. at 2280-81. In both cases, the Court noted that the employer could defend itself by showing that it had exercised reasonable care by implementing a policy of which the employee had failed to take advantage.

(a) Employment by the insured; or
(b) Performing duties related to the conduct of the insured's business . . . .

The term "arising out of" has been given broad interpretation.[41] Courts have applied the exclusion even in situations where some of the offending acts occurred outside the employment. For example, in *Meadowbrook, Inc. v. Tower Insurance Co.*,[42] the Supreme Court of Minnesota applied the employer's liability exclusion to bar coverage for an employee's injuries resulting from a hostile work environment, even though some of the hostile acts arguably occurred outside the workplace. The three alleged instances which supported the claim for hostile work environment were (1) a remark made during a pre-employment interview; (2) a pinch made at a company volleyball game; and (3) telephone calls made by a supervisor to the employee at home. The appellate court did not apply the exclusion to bar coverage because some of the acts allegedly occurred outside of the employment relationship. The state supreme court reversed, finding:

> Assuming for the sake of argument that these instances in fact occurred outside the scope of the plaintiffs' employment . . . the *injuries* allegedly caused by these instances were directly related to the creation of a hostile work environment. . . . In assessing whether an insurer has a duty to defend, the court must focus on the *claim* and whether its elements fit within the exclusion. . . . In this case, the court of appeals mistakenly focused on some of the *conduct* being asserted to prove the *claim*. The *claim* asserted that the environment in which the plaintiffs *worked* had become hostile. It is incongruous to hold that such a claim can arise anywhere but in the course and scope of a plaintiff's employment.[43]

In *St. Paul Fire & Marine Insurance Co. v. Seagate Technology,*

---

41. *See, e.g.,* New England Mut. Life Ins. Co. v. Liberty Mut. Ins. Co., 667 N.E.2d 295, 298 (Mass. App. Ct. 1996) (finding that exclusion which bars coverage for personal injury arising out of discrimination also bars coverage for discrimination and common law torts of negligent misrepresentation, negligence, and loss of consortium; term "arising out of" is synonymous with "originate" or "come into being"); *see also* American Motorists Ins. Co. v. L-C-A Sales Co., 713 A.2d 1007, 1010 (N.J. 1998) (construing the term "arising out of" broadly to mean "originating from" or "growing out of"). *But see* Kimmins Indus. Serv. Corp. v. Reliance Ins. Co., 19 F.3d 78, 82 (2d Cir. 1993) (noting that although the term "arising out of" is broadly construed, in the context of an exclusion, the "injury does not arise out of a specified set of conditions unless it is proximately caused by those conditions").

42. 559 N.W.2d 411 (Minn. 1997).

43. *Id.* at 420 (citations omitted).

Inc.,[44] the Minnesota Appellate Court applied the exclusion to bar coverage for claims against Seagate for failure to provide its employee with a safe workplace. In this case two employees, Christian and Lipscomb, began a personal relationship in December 1992. In May 1993, Christian was assaulted by Lipscomb at their home and, thereafter, obtained an order for protection against him. Christian forwarded the order to Lipscomb, to her employer's human resources department, and to her supervisor, and further requested their assistance in enforcing the order. Lipscomb, however, continued to harass and intimidate Christian. When she complained to her supervisor she was told to look for another job, because Lipscomb had more job seniority. On May 20, 1993, Lipscomb assaulted Christian at her work station.[45]

The court, in concluding that the employer liability exclusion in the CGL policy barred coverage for Christian's claim against her employer, held:

> It is undisputed the conditions of Christian's employment provided the time and place for the assault. Moreover, Lipscomb's access to Christian at her workstation and Seagate's failure to investigate or take steps to stop Lipscomb's harassment of Christian increased the risk of Christian being assaulted by Lipscomb. Under these circumstances, Christian's claims fit within the employer's liability exclusion.[46]

These cases provide examples of how courts will look to the nature of the claim to determine whether the employers' liability exclusion will be applied to bar coverage. If it is an employment-related claim, the exclusion will likely be applied even when the alleged wrongdoing may have occurred outside the employment premises.[47]

---

44. 570 N.W.2d 503 (Minn. Ct. App. 1997).

45. *See id.* at 505.

46. *Id.* at 507.

47. *See* American Motorists Ins. Co. v. L-C-A Sales Co., 713 A.2d 1007 (N.J. 1998) (upholding the exclusion to bar coverage for wrongful termination claims based on claimant's age, and rejecting the employer's argument that the exclusion did not apply because, if anything, the "bodily injury" occurred after the termination); Board of Educ. v. Continental Ins. Co., 198 A.D.2d 816 (N.Y. App. Div. 1993) (finding that employer liability exclusion applied to bar coverage for teacher's claim of sexual harassment and hostile work environment even though principal committed some of the alleged acts of sexual harassment away from school); Ottumwa Hous. Auth. v. State Farm Fire & Cas. Co., 495 N.W.2d 723, 727 (Iowa 1993) (noting that the exclusion applies regardless of whether the employer has any liability under workers' compensation; all that is required is that the injury arise out of and in the course of employment).

B. *Coverage B: Personal and Advertising Injury Liability*

The CGL policy also provides coverage for employment-related claims due to a violation of an enumerated offense found under the definition of "personal injury." Coverage B insures claims for "personal injury," which includes injury, other than "bodily injury," arising out of one or more of the following enumerated offenses:

> a. False arrest, detention, or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies by or on behalf of its owner, landlord, or lessor;
>
> d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services; or
>
> e. Oral or written publication of material that violates a person's right of privacy.

Unlike Coverage A, Coverage B has no "occurrence" requirement. As such, there is coverage for employment-related claims when the complaint asserts a claim for one of the enumerated offenses.[48] In most instances, where the claim does not specifically assert an enumerated offense, courts will not find coverage under Coverage B.[49] In some instances, courts have found coverage

---

48. *See, e.g.*, Zurich Ins. Co. v. Smart & Final Inc., 996 F. Supp. 979 (C.D. Cal. 1998) (concluding that false imprisonment is covered); Melugin v. Zurich Canada, 57 Cal. Rptr. 2d 781, 783-84 (Cal. Ct. App. 1996) (pointing out that the policy's definition of personal injury was extended to include "discrimination . . . where insurance against same was not prohibited by law." The court found coverage under the policy for a claim of disparate impact discrimination since coverage for such discrimination was not prohibited by law).

49. *See, e.g.*, Hamlin v. Western Mut. Ins. Co., 461 N.W.2d 395 (Ct. App. Minn. 1990) (finding that a claim for sexual harassment did not fall within "personal injury" definition); *Ottumwa Hous. Auth.*, 495 N.W.2d at 728 (concluding that allegations that plaintiffs were subjected to verbal abuse, sexually suggestive conversation, insults, and unwanted sexual innuendoes did not trigger coverage under personal injury, since complaint did not seek damages for plaintiffs' reputation); Kilgore v. Resumix, Inc., Mealey's Emerging Disputes, Vol. 3, Issue #5, at A-1 (Mass. Super. Ct. Apr. 16, 1998) (finding that deposition testimony by Kilgore, that he suspected that Resumix had defamed him and damaged his reputation because people no longer will to do business with him, was insufficient to trigger coverage for libel under definition of personal injury; "Kilgore failed, in the deposition, to allude to specific instances of possible defamation, and he was not able to recount any statements, whether defamatory or not, that were related to him or to his work").

under "personal injury" when there is no cause of action for an enumerated offense but the facts alleged in the underlying complaint could potentially support a claim for one of the enumerated offenses.

In *Duff Supply Co. v. Crum & Forster Insurance Co.*,[50] the court found coverage and a duty to defend because the facts alleged a potential claim for defamation. The complaint asserted claims for gender-based discrimination and sexual harassment, but did not assert a cause of action for defamation. However, in the context of the claim for sexually hostile work environment, the complaint alleged that the plaintiff endured comments about her clothing, e.g., "when plaintiff wore high heels they were referred to as 'f—k me pumps.'"[51] The court found that these allegations constituted a "publication" for purposes of supporting a defamation claim:

> Although this paragraph does not explicitly state that these comments were made to other employees in the office, this paragraph implicitly alleges that the statements were made by and in the presence of various employees at McLean's [complainant] place of work. Thus, McLean asserted the requisite 'publication' in her Complaint.[52]

Since the allegations could be read to include a claim for defamation, the court held that there was coverage and a duty to defend under the policy.[53]

C. *The Co-Employee Exclusion to Coverage A and Coverage B*

The "Who Is An Insured" section of the CGL policy generally provides that employees are insured under the employers' CGL policy for acts performed within the course and scope of employment. Oftentimes this same provision will go on to include what is referred to as the "fellow employee exclusion," which bars coverage to employees for "bodily injury" or "personal injury" to a co-employee. If an employee is sued, the question becomes whether his or her alleged wrongful conduct was in the course and scope of the employment and, if so, whether the covered "bodily injury" or "personal injury" was to a co-employee.

---

50. No. CIV.A. 96-8481, 1997 WL 255483, at *1 (E.D. Pa. May 8, 1997).
51. *Id.* at *6.
52. *Id.*
53. *See id.* at *6-7; *see also* Commercial Union Assurance Co. v. Merrill, 6 F. Supp. 2d 439 (D.V.I. 1998) (finding that plaintiffs' claim that breach of employment claim damaged their reputation was covered under "personal injury").

The CGL policy does not define "course and scope of employment." Therefore, courts often turn to the common law definition to determine whether the employee seeking coverage was acting in the course and scope of employment. *Newyear v. Church Insurance Co.*[54] is a good example of how courts do not provide coverage to an employee when the alleged offending conduct was not in the furtherance of employment. In *Newyear*, the plaintiff was an Episcopal Priest of the Episcopal Diocese of Missouri, who was sued by two women who alleged that over the course of several years he engaged in sexual misconduct with them during pastoral counseling.[55] Newyear filed a declaratory judgment seeking coverage under the CGL policy issued by Church Insurance.[56] The policy defined insured to include any clergyman and employee acting within the course and scope of his duties as such.[57] Newyear argued that he was entitled to a defense under the policy because the allegations in the underlying complaint against him arose out of his duties as a pastoral counselor.[58] He further argued that as "counseling relationships tend to give rise to a wide range of intense emotions, allegations of sexual contact or innuendo that arise from such counseling are not unforeseeable and are therefore covered under the [policy]."[59]

The court found that "to determine whether Newyear is an insured under the Policy, we must find not only that the allegations arise out of pastoral counseling but that Newyear was also acting within his duties as an employee of the Diocese when he engaged in the sexual misconduct," otherwise the language in the policy "acting within the scope of their duties as employees . . . would be rendered meaningless."[60] The court went on to hold that since the policy did not define "acting within the scope of his duties," the district court was correct to look to Missouri law which requires that under agency principles, an act is within the course and scope of employment if it is in furtherance of the business or interests of the employer.[61] The court also noted that under Missouri law "a priest does not act in furtherance of the business or interests of his

54. 155 F.3d 1041 (8th Cir. 1998).
55. *See id.* at 1042.
56. *See id.*
57. *See id.* at 1042-43.
58. *See id.* at 1043.
59. *Id.* at 1041.
60. *Id.* at 1044.
61. *See id.*

employer when he engages in sexual misconduct with parishioners."[62] Applying this reasoning, the court determined that Newyear was not entitled to a defense under the policy.[63]

Two cases decided by the Supreme Court of California, although not insurance coverage decisions, may be instructive in defining what is meant by the course and scope of employment in the context of a sexual harassment claim, and hence, whether the alleged individual wrongdoer can enjoy coverage under the CGL policy. In the first case, *Farmers Insurance Group v. County of Santa Clara*,[64] the court held that sexual harassment of a subordinate correctional institution employee by a deputy sheriff was not within his scope of employment, and thus the employer entity would not have any vicarious liability for his actions. The second case, *Lisa M. v. Henry Mayo Newhall Memorial Hospital*,[65] did not involve an employment situation. This was a case regarding the sexual molestation of a pregnant patient by a hospital ultrasound technician. As in *Santa Clara*, the court found the technician's actions to be outside the course and scope of employment because they were not motivated by a desire to serve the employer's interests.

However, even if the employee's act is found to be within the scope of employment, the same act may also apply to bar coverage. For example, in *Miller v. McClure*,[66] Miller sued her supervisor, McClure, and her employer for sexual harassment and discrimination. The complaint alleged sexually hostile and offensive conduct by McClure over the course of her employment. McClure sought coverage under three policies: the employer's workers' compensation/employer liability policy, the employer's CGL policy, and his homeowners' policy. In determining whether McClure was insured under the CGL policy the court found that:

> [P]laintiff's core allegations that she was the victim of sexual harassment constituting sex discrimination . . . is dependent on her employment by Artex and McClure's position as her supervisor. Consequently, McClure is an insured under the policy regarding those alleged acts. The same facts, however, remove McClure as an insured under that part of the definition of insured providing that "no employee is an insured for bodily injury or personal in-

62. *Id.* at 1044-45.
63. *See id.* at 1045.
64. 906 P.2d 440 (Cal. 1995).
65. 907 P.2d 358 (Cal. 1995).
66. A-0315-97T5F and A-1183-97T5f (N.J. App. Div. May 27, 1998) (unpublished opinion).

jury . . . to a co-employee while in the course of his or her employment."[67]

Therefore, even when the CGL policy is triggered to provide coverage for the employer, there is a substantial question as to whether the individual employee is also insured under the policy. Regardless of whether the employee is the supervisor who committed the alleged wrongful acts, or the supervisor who failed to act in preventing or correcting the ongoing sexual harassment, coverage may be denied either because the supervisor is not an insured, i.e., his or her acts were not in the scope of employment, or the acts fall under the fellow employee exclusion.

D. *The Employment-Related Practices Exclusion to Coverage A and Coverage B*

As employment practice claims became more prevalent during the 1980's, insurers became concerned about the possibility that coverage for employment practices would eventually be found under a CGL form. As a result, ISO developed a new endorsement (CG 21 47) to eliminate all coverage under a CGL policy for employment-related injuries, including wrongful employment practices involving defamation and invasion of privacy that might otherwise be insured under CGL Coverage B.[68]

There are a number of decisions that have addressed the applicability of this or similar exclusions. For example, in *Frank & Freedus v. Allstate Insurance Co.*,[69] the firm was sued for, inter alia, defamation, based on statements made by a partner about a former employee, Martin Caprow. Allegedly, the partner stated that Caprow was "likely gay and probably has AIDS."[70] The court held that the employment-related practices exclusion applied to bar coverage.[71] The court reasoned that the defamatory statement was clearly employment-related since "[t]he statement was made in the context of Caprow's employment and its content is directly related

---

67. *Id.*

68. The ISO "Employment-Related Practices Exclusion" excludes coverage for "bodily injury" or "personal injury" "to: (1) A person arising out of any: (a) Refusal to employ that person; (b) Termination of that person's employment; or (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination directed at that person . . . ."

69. 52 Cal. Rptr. 2d 678 (Cal. Ct. App. 1996).

70. *See id.* at 680.

71. *See id.* at 685.

to Caprow's performance as an employee."[72] In contrast, in *HS Services, Inc. v. Nationwide Mutual Insurance Co.*,[73] the court held that the employment-related practices exclusion did not bar coverage for a defamation claim when the defamatory statements were made three months after the wrongful termination and the statements were made in an attempt to prevent the terminated employee from competing with the former employer.

While defamation is specifically referenced under paragraph (c) of the exclusion as an employment-related practice, policy, or act which is not covered, false arrest, detention, imprisonment and invasion of privacy, all covered offenses under the definition of "personal injury," were not itemized by the drafters under subparagraph (c) of the Employment-Related Practices Exclusion. Whether false imprisonment was excluded under paragraph (c), also referred to as the "catch all" clause, was addressed in *Zurich Insurance Co. v. Smart & Final, Inc.*[74]

In *Zurich Insurance Co.*, Richard Michener, an employee of Smart & Final, was driven by co-employees, without his consent, to a motel room where they interrogated him about inventory shortages and mistakes he may have committed during his employment.[75] During the interrogation, Michener felt coerced and intimidated.[76] He was told that Smart & Final would not retaliate if he told the truth.[77] Nevertheless, his employment was terminated.[78] Michener then filed an action against Smart & Final for, inter alia, false imprisonment. Zurich denied coverage to Smart & Final based on the employment-related practices exclusion.[79] The court held that the exclusion did not bar coverage, and that Zurich had an obligation to defend Smart & Final for the entire action.[80] The court explained that the exclusion did not specifically exclude false imprisonment, and that the catch-all phrase "other employment-re-

72. *Id.*; *see also* Alexandra House, Inc. v. St. Paul Fire & Marine Ins. Co., 419 N.W.2d 506, 510 (Minn. Ct. App. 1988) (finding that employee's claim regarding defamatory statements made about her sexual preference was barred by employment-related exclusion: "Statements concerning an employee are employment-related where they cause an employer to conduct an employment review and result in the employer requiring the employee to take part in counseling").

73. 109 F.3d 642 (9th Cir. 1997).

74. 996 F. Supp. 979 (C.D. Cal. 1998).

75. *See id.* at 981.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.* at 988-89.

lated practices, policies, acts or omissions" found in the employment-related exclusion did not bar coverage for the false imprisonment claim.[81] The court reasoned that "one cannot assume causation between the false imprisonment and Michener's ultimate suspension and termination; rather, the false imprisonment arose solely in the context of loss prevention."[82]

Based on the decisions discussed above, whether the employment-related practices exclusion bars coverage will turn on the specific factual allegations within the complaint and causes of action asserted. For example, the courts look to such facts as whether the wrongdoing against the plaintiff occurred before the termination of employment or after, and whether it was committed in the course of employment or arose in the employment context.

E. *The Duty to Defend*

Employers also need to be concerned with the issue of whether the CGL defense obligation extends to enforcement actions or proceedings that do not necessarily seek an award of actual money damages, such as charges of discrimination brought before the Equal Employment Opportunity Commission ("EEOC"). These proceedings can be arduous, if not costly to handle, and may require lawyers with special familiarity with various laws, statutes, regulations, and procedures. For example, an adverse EEOC probable cause determination may have an impact on the employer's future liability. Although not preclusive in any subsequent federal action brought by the EEOC or by the aggrieved employee, a probable cause determination may still be admissible evidence against the employer.[83]

The CGL policy generally provides that the insurer has a duty to defend a "suit," which is defined as "a civil proceeding in which damages because of 'bodily injury,' 'property damage,' 'personal injury,' or 'advertising injury' to which this insurance applies are alleged."[84] An EEOC proceeding is not a "suit seeking those

---

81. *See id.* at 988.

82. *Id.*; *see also* Lawson v. Strauss, 673 So. 2d 223, 227 (La. Ct. App. 1996) (holding that a policy exclusion arising out of "personnel practices, policies, acts or omissions" did not exclude claim by ex-employee for assault and battery).

83. *See* Whately v. Skaggs Cos., 707 F.2d 1129, 1136-37 (10th Cir. 1983) (finding that admission of EEOC investigator's determination was not reversible error because it was not given preclusive effect); Smith v. Universal Servs. Inc., 454 F.2d 154, 158 (5th Cir. 1972) (finding of probable cause and EEOC report held admissible under federal law).

84. The definition of "suit" also includes: "a. An arbitration proceeding in which

damages" (or any damages) and therefore, the insurer arguably has no duty to defend. Oftentimes the Charge of Discrimination will not specifically allege a "bodily injury" or "personal injury" offense. Rather, it provides a short description of the offending conduct of sexual harassment and/or discrimination, without providing the type of detail that would be required (claims of physical manifestations) to trigger coverage for "bodily injury." Even more rare are allegations of defamation, invasion of privacy, or false imprisonment, which are covered offenses under the definition of "personal injury." Moreover, the EEOC proceeding cannot impose damages against the employer as contemplated under the CGL policy. The EEOC proceeding is a conciliation proceeding. As one court pointed out:

> [T]he duty to defend is triggered when the insured is involved in an adversarial proceeding, a consequence of which is the factual determination that legal liability may or may not be imposed upon the insured. It matters not whether the factual determination is made by a judicial body after the filing of a complaint and a plenary hearing, or whether the determination is made by an administrative body which has the authority to impose liability upon the insured. It is not the forum in which the proceeding is held that is critical, but whether, as a result of the hearing, liability may be imposed.[85]

Since the EEOC proceeding cannot impose liability upon the employer, arguably there should be no duty to defend an insured in such a proceeding.[86]

II. HOMEOWNERS' POLICIES

Particularly in sexual harassment cases, the aggrieved employee will often sue both the employer and the employee who

---

such damages are claimed and to which the insured must submit or does submit with our consent; or b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent."

85. Campbell Soup Co. v. Liberty Mut. Ins. Co., 571 A.2d 1013, 1017-18 (N.J. Super. Ct. Ch. Div. 1988), *aff'd*, 571 A.2d 969 (N.J. Super. Ct. App. Div. 1990).

86. *See* Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178 (7th Cir. 1980) (finding that insurer did not breach its duty to defend a General Services Administration proceeding because these proceedings are conciliatory in nature and cannot impose liability upon the insured). *But see* School Dist. No. 1, Multnomah County v. Mission Ins. Co., 650 P.2d 936 (Or. Ct. App. 1982) (holding that insurer had an obligation to defend its insured in a proceeding before the EEOC and the state Bureau of Labor because the term suit was ambiguous and the state statute gave the BOL commissioner power to order the District to compensate its victims).

committed the harassment, as well as the employees who failed to prevent or correct the hostile environment. The defendant employees will often seek coverage under their personal homeowners' policy. Each homeowners' policy must be reviewed to determine whether it provides coverage for EPL claims. Generally, homeowners' policies provide coverage for "bodily injury" and "property damage" caused by an accident or occurrence; sometimes they provide coverage for "personal injury" offenses such as defamation or invasion of privacy. Therefore, like the CGL policy discussed above, the homeowners' policy would require that the complainant assert a claim for "bodily injury," i.e., in most jurisdictions a claim for physical injury resulting from an accident.[87]

Assuming the complainant asserts a claim for "bodily injury" caused by an accident, homeowners' policies often provide pertinent exclusions such as the "intentional acts" and "business pursuits" exclusions which may bar coverage to the individual employee.[88] The "business pursuit" exclusion is intended to apply to activities that are involved in the furtherance of one's business, employment, trade, occupation, or profession. It has been held that in order to constitute a business, two elements must be present: (i) continuity and (ii) profit motive.[89] As such, where the alleged conduct can be construed as personal in nature, the business pursuit exclusion may not apply to bar coverage.[90] Where the individual employee seeking coverage under the homeowners' policy is the harasser who created the alleged hostile environment, courts will probably apply the intentional acts exclusion to bar coverage. However, where the individual employee is being sued because he or she failed as a supervisor to stop or correct the harassing envi-

87. *See supra* pages 3-6.

88. There are many variations of the intentional acts exclusion found in homeowners' policies. For example, the exclusion could read: "this insurance does not apply to 'bodily injury' or 'property damage' expected or intended from the standpoint of the insured" or "bodily injury, property damage, or personal injury arising out of the intentional acts of any insured." Similarly, the business pursuit exclusion will vary from policy to policy. In essence, the exclusion will bar coverage for bodily injury, property damage, personal injury or loss which arises out of, results from, or is caused by the insured's business pursuits. The policy will often define "business" to include trade, profession or employment.

89. *See* United Food Serv., Inc. v. Fidelity & Cas. Co., 189 A.D.2d 74 (N.Y. App. Div. 1993); Shapiro v. Glens Falls Ins. Co., 47 A.D.2d 856 (N.Y. App. Div. 1975).

90. *See, e.g.,* Scheer v. State Farm Fire & Cas. Co., 708 So. 2d 312 (Fla. Dist. Ct. App. 1998) (finding that allegations that insured touched co-employee's breast and buttocks and made sexually offensive remarks are not in furtherance of business interest and, therefore, business pursuit exclusion did not apply).

ronment, the business pursuit exclusion most likely bars coverage.[91]

For example, in *Miller v. McClure*,[92] Suzanne Miller sued both her employer, Artex Knitting Mills, Inc., and John McClure, in his individual capacity and as a supervising employee at Artex. The complaint alleged egregious behavior by McClure for acts in the course of his employment as a supervisor and for acts done in his personal capacity. The court concluded that there was no coverage for McClure under his homeowners' policy because the business pursuit exclusion barred coverage for his alleged acts as a supervisor. As for the acts in his personal capacity, specifically the offensive touching, the intentional acts exclusion barred coverage.

III. Umbrella Liability Policies

As there is no standard umbrella policy, each umbrella policy must be reviewed individually to determine whether it may cover EPL claims. Umbrella policies generally provide broader coverage than the underlying primary policies on top of which they sit. In fact, it is not unusual for an umbrella policy to cover a claim for which there is no coverage under the underlying primary policy. For example, in *Interco Inc. v. Mission Insurance Co.*,[93] the primary CGL policy did not provide coverage for an employment termination claim because of an employer liability exclusion. The umbrella policy, however, defined an "occurrence" as an "accident or a happening or event . . . which unexpectedly and unintentionally results in personal injury."[94] The court concluded that the definition of occurrence excluded coverage only for intentional acts, and the injury or damage is intentional only if there is specific intent to cause the harm or the insured's intent to harm is inferred as a matter of law.[95] The court concluded that the firing of an employee could potentially be covered if there is no showing of specific intent to cause the physical and emotional damages sustained by the employee, and therefore the carrier should have assumed the defense.[96] Although umbrella policies are by their nature quite broad, there is nevertheless a growing trend for umbrella insurers to incorporate employment practices exclusions into their policies.

---

91. *See United Food Serv., Inc.*, 189 A.D.2d at 74; *Shapiro*, 47 A.D.2d at 856.

92. A-0315-97T5F and A-1183-97T5F (N.J. App. Div. May 27, 1998) (unpublished opinion). *See supra* note 60 and accompanying text.

93. 808 F.2d 682 (8th Cir. 1987).

94. *Id.* at 685.

95. *See id.* at 685-86.

96. *See id.* at 686.

IV. WORKERS' COMPENSATION LIABILITY POLICIES

Like the CGL policy, the Workers' Compensation ("WC") policy provides two coverage parts: "Part One—Workers' Compensation" and "Part Two—Employers' Liability." Both parts require the employee to sustain a bodily injury by accident or disease within the course and scope of his or her employment with the insured. Part One, however, provides coverage to the employer for its obligation to pay the *benefits* it is required to pay an employee under the state's specified workers' compensation law.[97] Part Two, in contrast, provides coverage for the employer's obligation to pay *damages* for the bodily injury caused by accident or disease.

Courts have generally agreed that there is no coverage under Part One for civil damages sought by an employee for employment liability claims such as harassment, discrimination, and wrongful termination. For example, in *HDH Corp. v. Atlantic Charter Insurance Co.*,[98] the court held that "[t]he terms of Part One of the policy clearly limit defense and indemnity of the employer to claims for benefits required by the workers' compensation statute."[99] Similarly, in *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.*,[100] the court held that "the civil and workers' compensation . . . insurer which promises to pay claims for benefits does not have a duty to defend civil actions seeking damages."[101]

Courts have recognized that Part Two of the WC policy is intended to provide protection for those situations where the insured employer is not subject to workers' compensation law or where the employee has a right to bring a common law tort action despite the provision of workers' compensation law.[102] As such, coverage for certain types of employment practice claims may be available under Part Two of the standard WC policy. However, as with the CGL, workers' compensation insurers have been incorporating exclusions for employment practice claims into the body of their policies or adding the same by endorsement. An example of such an exclusion

---

97. Generally, the declaration page of the WC policy will indicate for which state workers' compensation law coverage is being provided.

98. 681 N.E.2d 847 (Mass. 1997).

99. *Id.* at 850.

100. 884 P.2d 1048 (Cal. 1994).

101. *Id.* at 1059.

102. *See, e.g.*, Schmidt v. Smith, 713 A.2d 1014, 1016 (N.J. 1998); Michaelian v. State Compensation Ins. Fund, 58 Cal. Rptr. 2d 133, 137 (Cal. Ct. App. 1996); Conrad v. Mike Anderson Seafood, Inc., CIV.A.NO. 89-1481, 1991 WL 22925, at *6 (E.D. La. Feb. 15, 1991).

can be found in the Employer's Liability ("EL") part of the standard WC policy distributed by the National Council on Compensation Insurance ("NCCI"), which provides, "[t]his insurance does not cover . . . damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against or termination of any employee, or any personnel practices, policies, acts or omissions."

Based upon the previously stated standard exclusion, coverage is likely prohibited under Part Two of the WC policy for a wrongful employment practice claim. For example, in *Michaelian v. State Compensation Insurance Fund*,[103] the insured sought coverage under Part Two of its WC policy for a suit brought by a former employee alleging sexual harassment, constructive discharge resulting from the harassment, assault and battery, and negligent infliction of emotional distress.[104] The court found that the provision in Part Two of the policy which excluded "damages arising out of the *discharge* of, coercion of or *discrimination* against any employee in violation of law" applied, and barred coverage for the claims of harassment and constructive discharge.[105] As for the claims of assault and battery, coverage was excluded by Part Two's exclusion for "bodily injury intentionally caused or aggravated by you . . . ."[106] Finally, the court denied coverage for the cause of action for negligent infliction of emotional distress because none of the facts alleged in the underlying complaint gave rise to any conceivable theory bringing the claim within the policy's coverage.[107]

However, in *Schmidt v. Smith*,[108] the New Jersey Supreme Court held that a similar exclusion found in Part Two of a WC policy was in violation of New Jersey law.[109] In *Schmidt*, Lisa Schmidt filed suit against her employer, Personalized Audio Visual, Inc. ("PAV") and the president of PAV, Dennis Smith.[110] The complaint asserted hostile work environment, sexual harassment in violation of New Jersey's Law Against Discrimination, assault, battery, invasion of privacy, and intentional infliction of emotional distress.[111] PAV sought coverage under both its CGL and WC policies

103. 58 Cal. Rptr. 2d 133 (Cal. Ct. App. 1996).
104. *See id.* at 137-38.
105. *See id.* at 141.
106. *Id.*
107. *See id.* at 142.
108. 713 A.2d 1014 (N.J. 1998).
109. *See id.* at 1015.
110. *See id.*
111. *See id.* at 1016.

issued by its insurer, United States Fidelity & Guaranty ("USF&G").[112] USF&G denied coverage under both policies, relying on two exclusions found in the EL part of the policy.[113] First, it asserted the application of the employer related practices exclusion similar to the one quoted above.[114] Second, it relied upon an exclusion which bars coverage for "bodily injury intentionally caused or aggravated by you."[115]

Before addressing the application of coverage under the EL part of the WC policy, the court noted that the New Jersey Legislature requires that every employer carry workers' compensation insurance, stating that "[t]hose policies must cover not only claims for compensation prosecuted in the Workers' Compensation court, but also claims for work-related injuries asserted in a common law court."[116] The court also noted that EL coverage "is traditionally written in conjunction with workers' compensation and is intended to serve as a 'gap-filler' providing protection to the employer in those situations where the employee has a right to bring a tort action despite provisions of the workers' compensation statute."[117]

The court held that the intentional acts exclusion did not bar coverage because there was no evidence that PAV intentionally caused any injury to Ms. Schmidt.[118] With respect to the employment-related exclusion, the court stated:

> The employers' liability section of the contract was to provide compensation for bodily injuries to workers falling outside the workers' compensation system--injuries intentionally caused by fellow employees, for example, or injuries befalling a worker under the age of eighteen "by reason of the negligence of his or her master." Exclusion C7 [the employment-related exclusion] in the employers' liability section disclaims coverage for a class of discomforts that one typically would not associate with bodily injury-- criticism, demotion, evaluation, and defamation, for example--and that one typically would not expect to be covered by a

112. *See id.*
113. *See id.*
114. *See id.* at 1017.
115. *Id.*
116. *Id.*
117. *Id.*
118. *See id.* at 1018. Interestingly, PAV was a closely held corporation; the offender, Dennis Smith, was the president of PAV; and his father was the CEO and a part-time employee. Although the court did not expressly impute Dennis Smith's acts upon the company, it held that the company was vicariously liable for Dennis Smith's acts.

> scheme designed to insure that employees' bodily injuries be compensated.[119]

The court held that the exclusion is valid as long as the liability arising from those discomforts is not related to bodily injury.[120] However, to the extent that the exclusion would otherwise operate to deny coverage for bodily injuries, it violates public policy under the New Jersey workers' compensation scheme, and is thus void.[121]

The *Schmidt* decision raises a number of questions. First, the court held that "bodily injury" within the WC policies were "emotional injuries accompanied by physical manifestations" pursuant to its prior decision in *Voorhees v. Preferred Mutual Insurance Co.*[122] However, in *Voorhees*, the court interpreted "bodily injury" as specifically defined in a CGL policy, *not* "bodily injury" within the context of a WC policy, which does not usually define the term.[123] Second, the court held that the exclusion should be applied only in the context where there are no allegations of "bodily injury." Yet, if the complaint does not allege bodily injury, the insurer arguably has no obligation to defend. The *Voorhees* court stated that the "duty to defend . . . is determined by *whether* a covered claim is made . . . ."[124] If the complaint does not allege a "bodily injury" in the course of employment, there is no allegation of a covered claim under the policy, and therefore, no duty to defend.

The *Schmidt* court failed to address two additional arguments. First, WC policies generally require that the bodily injury be by accident or disease. Yet, the insurer seemingly did not raise the argument that Ms. Schmidt's injuries resulting from sexual harassment and/or assault and battery could not be caused by accident or disease. Secondly, WC policies generally provide coverage only for the employer. However, in *Schmidt*, the court arguably held that there was coverage for both PAV and Smith. While one could conclude that the requirement that the bodily injury occur by accident violates New Jersey's workers' compensation scheme, in the absence of any guidance, one could also argue that employees are not covered under the WC policies.[125]

---

119. *Id.* (citations omitted).
120. *See id.*
121. *See id.*
122. 607 A.2d 1255 (N.J. 1992).
123. *See id.* at 1261-62.
124. *Id.* at 1259.
125. *See, e.g.*, Miller v. McClure, A-0315-97T5F and A-1183-97T5F (N.J. App. Div. May 27, 1998) (unpublished opinion). McClure was denied coverage under the

V. DIRECTORS' AND OFFICERS' LIABILITY POLICIES

Unlike the CGL and WC policy, there is no standard Directors' and Officers' Liability ("D&O") policy form.[126] Under a typical D&O policy, a corporation's directors and officers are covered for wrongful acts committed in their capacities as such, and the corporation is reimbursed for indemnifying them. It should be noted that D&O policies "vary from insurer to insurer and in many instances these variations are significant and material. . . ."[127] Most claims against directors and officers are brought by the corporation's shareholders and commonly involve securities disputes. An increasing number of claims, however, are being made by employees of the corporation. Since most D&O policies exclude claims for personal injury or bodily injury, there is no coverage for wrongful employment practices to the extent those claims are premised on bodily or personal injury allegations.

Many wrongful employment practices claims rarely provide a legitimate basis for claims against directors, since directors do not have the type of day-to-day responsibility over the operations of the company's business that would subject them to personal liability. Likewise, many of these claims are not likely to involve officers, particularly in a large corporate organization. However, officers may be targets of these claims in smaller organizations where they have more direct involvement in hiring and firing decisions, or where claims are premised upon negligence, because the employer permitted a pattern of discrimination or sexual harassment to exist within the company.

Of course, particularly egregious and expensive underlying sexual harassment and discrimination problems may well give rise to shareholder derivative litigation, such as the situation involving Del

---

employer's WC policy issued by New Jersey Re-Insurance Company because he was not an insured thereunder. As in most WC policies, the policy defined an insured as "an employer named in item one of the information page. If that employer is a partnership and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees." The court concluded that McClure was not an insured under the policy since there was nothing in the record to indicate that the employer was anything but a corporation and, even if it were a partnership, that McClure was a partner.

126. *See* JOSEPH P. MONTELEONE, *Directors' and Officers' Liability Insurance: Timing of Payment of Defense Expenses, and Allocation of Defense Expenses, Settlement, and Judgment Amounts*, 535 DIRECTORS' AND OFFICERS' LIAB. INS. 263 (Practicing Law Institute Course Handbook 1990).

127. *Id.* at 263-64.

Laboratories and its CEO, Dan. K. Wassong.[128] As a recent example, an award of $1 million in attorney fees and costs was approved in derivative litigation against Texaco directors arising from that company's $176 million racial discrimination class action settlement with Texaco employees. As a Delaware corporation, the $1 million award was not indemnifiable by Texaco and was borne by the directors with reimbursement from Texaco's D&O insurance.[129]

Even if the claim is asserted against an officer, the question as to whether that individual is sued in his or her capacity as an officer often arises. Most D&O policies limit their coverage solely to suits against directors and officers in their official capacities. Although a duty to defend and not an insurance coverage case, *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans*[130] highlighted the insured capacity issue. While most of the opinion dealt with the issue of personal jurisdiction over an archdiocese and parish which employed a priest accused both civilly and criminally of homosexual relations with a minor, the court's analysis was also applied to deny any defense obligation on the part of the archdiocese's insurer.[131]

The Fifth Circuit held that the lower court could not exercise personal jurisdiction over a Louisiana archdiocese and parish in an action brought in Mississippi arising from acts which took place at one of their "employed" priest's home in Mississippi.[132] Although this case is arguably *sui generis* because of the nature of a priest's employment relationship with his diocese and parish, it raises some interesting issues that must be considered in any employment-related claim vis-à-vis both liability and insurance.

First, the fact that the illicit acts occurred in the priest's private residence while not "on duty" was dispositive as to the issues involving personal jurisdiction over the diocese and parish, as well as

---

128. *See Del Laboratories, Inc.: Holder's Suit Says Officials Liable in Harassment Case*, WALL ST. J., Aug. 16, 1995, at A5 (reporting that such a derivative action had been filed subsequent to a $1.2 million settlement of sexual harassment claims brought by the EEOC on behalf of fifteen female employees of Del Laboratories).

129. *See In Re* Texaco, Inc. Shareholder Litigation, 20 F. Supp. 2d 577, 582-83, 596 (S.D.N.Y. 1998). This decision was subsequently reversed by the Second Circuit, which found that substantial benefits were not conferred upon Texaco through the efforts of plaintiff's counsel, and therefore attorney's fees were not justified. *See* Kaplan v. Rand, No. 98-9377, 1999 WL 710382, at *14 (2d Cir. Sept. 14, 1999).

130. 32 F.3d 953 (5th Cir. 1994).

131. *See id.* at 963-64.

132. *See id.* at 960.

the diocese's insurer's obligation to defend the priest.[133] Second, the abhorrent nature of the priest's conduct took his conduct outside the scope of his employment.[134] While it may be argued that the religious and moral missions of the diocese and parish were of particular pertinence to this finding, the court's rationale could also be applied, as an example, to allegations of sexual harassment and/or discrimination in the workplace. To wit, one can argue whether it is ever within the scope of one's employment to sexually harass employees or discriminate against minority employees.

In *State v Schallock*,[135] the Arizona court explored this proposition. The principal issue decided was whether a state agency, the Arizona Prosecuting Attorney's Advisory Council ("APAAC"), had an indemnification obligation to its subordinate director, Heinze, for damages resulting from his sexual harassment of subordinate female state employees.[136] APAAC's own liability for creating or tolerating a hostile work environment was not at issue.[137] Under an applicable state self-insured statute, Heinze would only be indemnified for conduct in the course and scope of his employment. The court found that the conduct at issue, which ranged from offensive and obscene language and sexually offensive touching, and in one instance, rape, was certainly sufficient to take such conduct outside the course and scope of employment.[138] Accordingly, the court held that Heinze was not entitled to indemnification.[139]

In the court's analysis of applicable Arizona law, it determined that an employee's acts occur within the course and scope of employment only if: (i) it is of the kind he or she is employed to perform, (ii) it occurs substantially within authorized time and space limits; and (iii) it is actuated, at least in part, by a purpose to serve the master/employer.[140] Given this tripartite test, it is arguable that one employee's sexual harassment of another can never be within the scope of employment.

Aside from issues of course and scope of employment, a number of federal appellate courts have held that there can be no

133. *See id.* at 958-61.
134. *See id.* at 959.
135. 914 P.2d 1306 (Ariz. Ct. App. 1995), *vacated*, 941 P.2d 1275 (Ariz. 1997).
136. *See id.* at 1307.
137. *See id.*
138. *See id.*
139. *See id.* at 1311.
140. *See id.* at 1310.

liability on the part of an individual manager, supervisor, or employer for discrimination under Title VII.[141] The liability imposed would attach solely to the "employer" itself and not any of its agents. Recently, the Supreme Court of California held that there could be no individual liability for a discrimination claim under the California Fair Employment and Housing Act ("FEHA").[142]

The D&O policy, as a "claims made" policy, also presents issues as to when a claim is first deemed to have been made in various employment-related situations.[143] The issue is particularly troublesome if the policy at issue does not precisely define the term "claim" or does not provide a definition as to when a claim is deemed to have been first made. Some policies are very specific in this regard.[144] When policies are silent or less precise, however, problems arise. For example, in *National Union Fire Insurance Co. v. Cary Community Consolidated School District No. 26*,[145] the issue arose as to whether an EEOC charge of age discrimination was covered under any of two successive claims-made "school leaders" D&O policies.[146]

The first policy was a National Union policy scheduled to run from July 1, 1988 to July 1, 1991, but which was canceled effective

---

141. *See e.g.*, Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993). Similar results have occurred in the context of other federal employment discrimination statutes; *see* EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279 (7th Cir. 1995) (finding no individual liability in an employment-related Americans with Disabilities Act claim); Smith v. Lomax, 45 F.3d 402, 407-08 (11th Cir. 1995) (finding that individual supervisors are not personally liable under the Age Discrimination in Employment Act).

142. *See* Reno v. Baird, 957 P. 2d 1333 (Cal. 1998). In *Reno*, the underlying case involved discrimination based upon a medical condition. The court limited its holding to *discrimination* claims and declined to extend it to claims of *harassment*. *See id.* at 1347 (emphasis added). See *supra* note 123 for the proposition that none of the federal decisions draw a distinction between harassment and other forms of protected discrimination.

143. CGL and WC policies, discussed above, are generally issued on an "occurrence" basis, although, one can purchase on a "claims-made" basis. The ISO CGL "claim made" form does not define the term "claim."

144. For example, some Reliance Insurance Co. D&O policies define "claim" as:

> (a) a judicial or other proceeding that is filed against a Director and/or Officer and in which such Director and/or Officer could be subject to a binding adjudication of liability for compensatory money damages or other civil relief, or (b) a written demand from one or more parties alleging that such Director and/or Officer should have liability to such parties for compensatory money damages or other civil relief.

145. No. 93-C-6526, 1995 WL 66303, at *1 (N.D. Ill. Feb. 14, 1995).

146. *See id.* at *1.

July 1, 1990.[147] It was replaced by a Scottsdale Insurance Company policy effective July 1, 1990.[148] The underlying factual chronology is as follows:

June 22, 1990:	Underlying claimant teacher makes complaint of age discrimination to EEOC.
June 25, 1990:	EEOC mails Notice of Charge of Discrimination to insured school district, but the charge is non-specific as to which employee is filing the charge and specifically advises that "[n]o action is required on your part at this time."
June 27, 1990:	Insured receives the June 25 Notice.
June 28, 1990:	Insured sends Notice and cover letter to its broker.
July 9, 1990:	Insured receives a second Notice from the EEOC. This notice contains a copy of the charge dated and signed by the claimant teacher as of July 2, 1990.[149]

Notice of the matter (which ultimately proceeded into suit on October 1, 1990) was initially given to National Union sometime after July 1, 1990, but the court's opinion is not specific as to when this occurred.[150] National Union began to provide a defense because its personnel were unaware that the policy was canceled effective July 1, 1990.[151] Realizing their error, National Union, and perhaps the insured as well, appears to have tendered the defense of the suit to Scottsdale.[152] Upon Scottsdale's refusal to defend on the basis that this was a claim made before the inception of its policy, coverage litigation ensued.[153] The court noted that the Scottsdale policy did not contain its own definition of "claim," and essentially adopted the common definition of claim, "a demand for money or property as of right."[154]

In particular, the court relied upon *Bensalem Township v. Western World Insurance Co.*,[155] which held that an EEOC charge of discrimination did not constitute a claim in the context of a

147. *See id.* at *2.
148. *See id.*
149. *See id.*
150. *See id.*
151. *See id.* at *1.
152. *See id.* at *3.
153. *See id.*
154. *Id.*
155. 609 F. Supp. 1343 (E.D. Pa. 1985).

claims-made policy.[156] Holding that the claim here was first made after July 1, 1990, the court noted that the June 25, 1990, EEOC Notice contained no specific charge document and also contained the above-quoted 'no action' language.[157] It was further noted that the underlying claimant continued to be employed until December 1990, and thus had no claim for money damages, which the EEOC did not have the power to award.[158] Scottsdale also argued that even if the claim was first made during its policy period, it was excluded from coverage by virtue of a policy exclusion. The exclusion provided that the insurer had no obligation to make payment on or defend any claim "arising from any circumstance(s) or incident(s) which might give rise to a claim hereunder, which is known to the Insured prior to the inception of the policy *and* not disclosed to the Company prior to inception . . . ."[159] The court noted that the application for the Scottsdale policy was dated May 8, 1990, and the so-called warranty question as to "knowledge of any act, error, omission, or breach of duty which may reasonably give rise to a claim" was answered in the negative.[160] The application did not provide for any continuing obligation to disclose information, such as an EEOC Notice, up to the time of the policy's inception.[161] The court stated "[i]t would be unreasonable to impose such an obligation on an insured without [giving] advance notice of specific contract language so requiring."[162] Accordingly, the court held that the exclusion was inapplicable to the EEOC Notice received by the insured after the date of the application but prior to the policy inception date.[163]

One of the earliest and still common alternatives to an independent EPL policy is an extension to a D&O policy. Such extensions are available for relatively little, if any, additional premium for an otherwise desirable D&O risk. However, these D&O extensions have some rather serious shortcomings. While there are some broad EPL extensions to the D&O policy in the marketplace, EPL

156. *See id.* at 1348-49.

157. *See* National Union Fire Ins. Co. v. Cary Community Consol. Sch. Dist. No. 26, NO. 93-C-6526, 1995 WL 66303, at *4 (N.D. Ill. Feb. 14, 1995).

158. *See id.* Money damages were not recoverable in civil suits prior to the implementation of the Civil Rights Act of 1991. *See id.*

159. *Id.* (emphasis added).

160. *See id.* at *5.

161. *See id.*

162. *Id.* at *6.

163. *See id.*

extensions often contain one or more of the following policy restrictions:

- no coverage for the insured entity;
- no coverage for non-officer employees;
- exclusion of coverage pursuant to the insured versus insured exclusion, for employment practices claims brought by officers against other officers and directors;[164] and
- exclusion of coverage for emotional distress and mental anguish, typically pursuant to the bodily injury exclusion of most D&O policies.

It should be noted that D&O retention amounts tend to be relatively large compared with retention amounts available under stand-alone EPL policies. Many small or moderately sized EPL claims that would be covered by stand-alone EPL policies will fall within the retention of a D&O policy. Although endorsements to D&O policies are available to overcome some of the above restrictions by making the entity as well as non-officer employees insureds under the policy, or extending coverage to non-officer employees, such endorsements typically do not change the retention amount under such policies.

Another factor to consider is the potential depletion of policy limits for EPL claims, which could lessen the protection available for directors and officers. Particularly in the case of public corporations, the primary purpose of D&O insurance is to provide the directors and officers, and indirectly the corporation, protection in the event of a major shareholder class or derivative action. Indeed, individual officers or directors have little or no exposure to employment claims either because they do not have sufficient day-to-day involvement with the claimant to warrant liability or, in the case of Title VII and other federal anti-discrimination statutes, the prevailing case law has limited liability to the employer alone. Thus, it is important that brokers and employers consider all of the implica-

164. At least one court has upheld this exclusion to deny coverage for an employment-related claim by an officer. *See* Foster v. Kentucky Hous. Corp., 850 F. Supp. 558, 561 (E.D. Ky. 1994). *But see* Conklin Co. v. Nat'l Union Fire Ins. Co., CIV. No. 4-86-860, 1987 WL 108957, at *2 (D. Minn. Jan. 28, 1987) (finding that plaintiff sued in his capacity as a former employee, and not as a former officer). As more D&O EPL extensions expand the definition of insureds to include managers, supervisory employees, and even all employees, care needs to be taken that the exclusion is modified to "carve out" employment-related claims by such individuals. Otherwise, for all practical purposes, the extension of coverage becomes meaningless.

tions of utilizing a D&O employment extension as a substitute for an independent EPL policy.

CONCLUSION

Although EPL policy forms have been on the market for most of this decade, coverage litigation involving employment claims under the policies discussed in this Article continue. While no insurance policy offers a financial guarantee, the EPL policy offers a certain level of comfort in that it is specifically written to provide insurance for most employment claims. Absent the EPL policy, the policyholder is left with the alternative of a wide variety of judicial interpretations of policy language under different claim scenarios. While the trend appears to be against finding coverage under these policies, contrary holdings, such as in the *Schmidt* case,[165] still occur.

Much can be said for the approach of purchasing EPL insurance, while at the same time pursuing coverage under other policies in different claim situations. If more than one policy applies, the policyholder may enjoy the benefit of having additional policy limits of liability with which to fund loss. In some cases, these other policies may also provide coverage for defense costs without eroding coverage for any settlement or judgment amount and without being subject to a deductible. This thus "saves" the EPL policy limits, in their entirety, to pay settlements and judgments.

165. See *supra* notes 93-110 and accompanying text for a discussion of *Schmidt*.