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FOREWORD

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WESTERN NEW ENGLAND LAW REVIEW

SYMPOSIUM: INSURANCE COVERAGE OF EMPLOYMENT DISPUTES

FOREWORD

Because we are a risk-averse society, insurance contracts play an important role in our personal and business lives. Acknowledging this important role, the law governing the interpretation and enforcement of insurance contracts has for some time now deviated from traditional applications of contract law, although courts have not always been willing to acknowledge this fact openly. For this reason alone, insurance law provides an interesting and challenging practice focus.

Litigation concerning the scope of coverage provided by insurance policies is not only a major area of legal practice in its own right, it also often highlights doctrinal expansion in other substantive areas. For example, the tremendous expansion of legal liability for environmental harms during the past generation spawned a tidal wave of complex litigation by insureds seeking coverage for their environmental liabilities under various insurance policies. Attorneys were faced with the daunting prospect of relating specialized insurance law doctrines and the developing field of environmental law to a variety of factual settings.

This Symposium addresses the most recent insurance coverage issue that requires mastery not only of insurance law concepts but also a rapidly developing area of substantive law. Employers increasingly are finding themselves subject to state and federal regulation of the terms, conditions, and duration of their relationship with employees. The liabilities associated with increased govern-

mental regulation represent a major financial exposure, leading many employers to demand coverage under their various insurance policies. This rapidly evolving area of insurance law achieved some measure of public notice with the recent disclosure that two insurance companies already have paid out nearly a million dollars to President Clinton's defense team in connection with the sexual harassment case brought by a former Arkansas state employee for behavior alleged to have occurred while Clinton was Governor of the state.¹ Insurers often refuse to concede coverage in these matters, though, resulting in litigation over coverage availability. These coverage cases raise significant interpretive problems because employment law continues to be in a state of tremendous flux and the insurance industry constantly is revising policy language. The contributions to this Symposium identify and analyze many of these complex problems.

In the first article, I describe the basic principles of insurance coverage law that employment lawyers need to understand in order to advise their clients, providing a general backdrop for the more specific analyses that follow. The next two articles survey the coverage issues that arise under particular liability policies when an employer seeks coverage for employment-related litigation. Joe Monteleone discusses potential coverage under Commercial General Liability Policies and Directors' and Officers' Liability Policies, and Jim Scheuermann and John Baillie discuss potential coverage under Errors and Omissions Policies and Employer's Liability Policies. These articles represent a balance of sorts, since Attorney Monteleone serves as Claims Counsel to an insurer while Attorneys Scheuermann and Baillie represent insureds in coverage litigation.

The next two articles in the Symposium introduce the numerous practical and strategic considerations that arise in connection with insurance coverage litigation. Larry Golub provides a checklist for the attorney seeking to secure coverage, beginning with an examination of all of the employer's insurance policies and following through to the trial of the coverage action. Steve Gilford and Robert Folger provide a more focused account of a crucial strategic decision: deciding "who, where, and when" to sue for coverage in light of the sometimes substantial differences in state law treatment of various relevant issues. As the authors explain, these considerations are important to both insured and insurer, with the result that

1. Glenn R. Simpson & Leslie Scism, *Clinton's Insurers Shell Out for Defense of Paula Jones Suit*, WALL ST. J., Feb. 8, 1996, at c3.

effective lawyering may require a "race to the courthouse." Together, these two articles provide an overview of general considerations and a focus on forum selection that provides a starting point for developing a litigation strategy.

One effect of the recent explosion of coverage litigation brought by employers has been an effort by insurers to include specific employment-related practices exclusions in general liability policies. Correspondingly, insurers in the specialty market have begun marketing products that are designed to provide coverage for employment-related practices liabilities. These products raise a host of new issues, two of which are addressed by contributors to the Symposium. Joe Monteleone analyzes the question of selection of defense counsel—always a complex issue in light of the potential for a conflict of interest—in light of the special circumstances surrounding employment-related litigation. Wayne Borgeest, Anthony Fowler, and Michael Santocki assess when coverage is triggered under a "claims made" policy, an issue that is of growing importance since virtually all Employment Practices Liability policies are written on a "claims made" basis.

The Symposium is rounded out by articles that assess (and, often, hypothesize) how these legal issues will be addressed under Connecticut and Massachusetts law, the two jurisdictions most closely associated with the Western New England Law School. Cal Anderson first provides an overview of the employment law liabilities facing employers and then applies the Connecticut approach to interpreting general liability policies to the particularities of these employment liabilities. Marylou Fabbo, Audrey Samit, and Richard Stubbs have more direct precedent to work with, and they provide an overview of how Massachusetts law has begun to deal with these matters.

An undertaking as large as this would not be possible but for the efforts of a number of people. This Symposium grew out of my participation on a panel at the A.B.A. Annual Meeting in August, 1995. I would like to thank Bob Fitzpatrick of the Tort and Insurance Practice Section of the A.B.A. for inviting me to be on the panel, Peter Prestley for suggesting my name to Bob, and Peter Bennett (Panel Moderator) for arranging A.B.A. permission to reproduce the papers presented by the panelists. The first six articles in the Symposium are revised and edited versions of papers originally prepared for the panel program.² Additionally, the entire

2. Editor's Note: Several of the articles in this Symposium originally contained

staff of the Western New England Law Review has worked tirelessly to turn this idea into reality in a few short months. It truly would be unfair to single out individual persons for praise, since the editorial staff exhibited complete teamwork in their efforts. Technical and administrative support was provided with cheerful accuracy and promptness by Carmen Alexander, Barbara Falvo, Donna Haskins, Nancy Hachigian, Joann Spinelli, and Pat Stoeber. Finally, Dean Joan Mahoney provided the institutional support that permitted the Law Review to publish a project of this length and to ensure its wide distribution.

Francis J. Mootz III

citations to state reporters. The board of editors has elected to retain these citations in order to preserve each article's utility for practitioners in the areas of employment and insurance law.