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COVERAGE ISSUES UNDER COMMERCIAL GENERAL LIABILITY AND DIRECTORS' AND OFFICERS' LIABILITY POLICIES

JOSEPH P. MONTELEONE*

INTRODUCTION

As many lawyers and business people are all too acutely aware, employment-related litigation has been burgeoning over the past few years as various pieces of federal and state legislation have been enacted. This legislation has significantly expanded the rights and remedies available to aggrieved employees. Not surprisingly, after appreciating the heightened liability and damages exposures in this area, one's thoughts may turn to whether or not there is insurance coverage available for these exposures. About four years ago, insurers introduced a liability insurance product which has come to be known generically as Employment Practices Liability Insurance ("EPLI"). Unlike the other insurance policies that will be discussed in this article, EPLI is in a sense the first insurance product specifically intended by insurers to provide coverage for employment-related perils such as discharge from employment, workplace discrimination, and sexual harassment. The notoriety that has attended these perils, exemplified by events such as the confirmation hearings for Supreme Court Justice Clarence Thomas in the fall of 1991, and the \$7.2 million jury verdict in California in the summer of 1994 against a major law firm arising from sexual harassment, has served only to exacerbate interest in the insurance issues in this area.

This Article will focus upon the extent that coverage may be

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available under certain liability insurance policies, other than EPLI, for employment-related claims. Specifically, the policies to be examined are commercial general liability ("CGL") and commercial umbrella covers and directors' and officers' liability ("D&O").

I. CGL AND UMBRELLA COVERAGE

Virtually all businesses carry a general liability insurance policy which, dependent upon the size of the business entity and its risk management needs, may be augmented by layers of excess and/or umbrella policies.¹ Except as otherwise may be provided pursuant to a "personal injury" coverage part to the policy, the CGL policy only provides coverage only for claims that: (i) allege bodily injury or damage to tangible property and (ii) arise from an "occurrence" as defined in the policy.

A. *The Bodily Injury Trigger*

CGL policies typically cover bodily injury, defined as "bodily injury, sickness or disease." Most wrongful employment claims do not involve physical bodily injury, although one can imagine such injury in connection with a claim of sexual harassment or a non-genteel employment discharge. Can such claims, which usually feature allegations solely of emotional distress and/or mental anguish, ever constitute "bodily injury" so as to invoke CGL coverage?

The courts are sharply split on this issue. One view is that, absent physical symptoms or manifestation of emotional distress, claims for emotional distress alone do not constitute bodily injury. As one court stated, "[b]odily injury . . . is a narrow term and encompasses only physical injuries to the body and the consequences thereof."² In many jurisdictions therefore, allegations of purely

1. The discussion in this paper with regard to the CGL policy applies to both *excess* and *umbrella* policies. Simply put, an *excess* policy typically "follows form" of the underlying primary CGL policy, i.e., it adopts the same terms, conditions, and other provisions of the primary policy but does not apply until or unless the underlying insurance is exhausted by claim exposures. An *umbrella* policy also operates in excess of a primary policy but provides broader protection in certain areas. To the extent coverage exists under an umbrella policy that does not exist under the primary policy, the umbrella will typically "drop down" and operate as primary insurance.

2. *Allstate Ins. Co. v. Diamant*, 401 Mass. 654, 656, 518 N.E.2d 1154, 1156 (1988). *See also Greenman v. Michigan Mut. Ins. Co.*, 173 Mich. App. 88, 91-92, 433 N.W.2d 346, 348-49 (1988) (bodily injury is interpreted "to require at least some physical manifestation of mental injuries"); *Artcraft, Inc. v. Lumberman's Mut. Casualty Co.*, 126 N.H. 844, 845, 497 A.2d 1195, 1196 (1985) (emotional pain of defective mobile home buyer, lacking any physical manifestations, was not bodily injury covered by liability policy).

emotional distress without a physical manifestation—which are typical of many wrongful employment claims—will not invoke coverage under a CGL policy.

Many courts, however, find coverage when claims for emotional distress are accompanied by allegations of a specific physical injury, such as ulcers or exacerbated hypertension.³ In other courts, vague or minimal allegations of physical symptoms may be sufficient to trigger bodily injury coverage.⁴ A few jurisdictions substantially abandoned the physical injury requirement and permit coverage for emotional distress without any proof of physical injury or symptoms.⁵ Surprisingly, New York—traditionally conservative on issues of insurance coverage—is now in the vanguard of this view.⁶

Still, other courts have not focused on the distinction between physical bodily injury and emotional distress. Rather, they have elected to examine the basic core of the allegations in an effort to determine whether bodily injury coverage per se is triggered regardless of any distinction between physical and mental injuries. A leading decision in this area is *Waller v. Truck Insurance Exchange*,⁷ which considered the issue of whether allegations of emotional and physical distress in a suit that was otherwise comprised of claims for economic loss and non-tangible property damage triggered a duty to defend under a general liability policy. The court had little trouble in following California precedent to the extent that the physical distress allegations would bring the claim into the realm of

3. See *Aim Ins. Co. v. Culcasi*, 280 Cal. Rptr. 766, 774-76 (Cal. Ct. App. 1991), *review denied*, 1991 Cal. LEXIS 2891 (Cal. June 20, 1991); *Presidential Hotel v. Canal Ins. Co.*, 188 Ga. App. 609, 610, 373 S.E.2d 671, 672 (1988); *Artcraft*, 126 N.H. at 845, 497 A.2d at 1196; *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wash. 901, 907, 726 P.2d 439, 443 (1986).

4. *EEOC v. Southern Publishing Co.*, 894 F.2d 785, 789 (5th Cir. 1990) (unspecific allegation of physical pain, in connection with allegations of sexual touching and assault and battery, held sufficient to constitute bodily injury claim under Mississippi law).

5. *State Farm Mut. Auto. Ins. Co. v. Ramsey*, 295 S.C. 349, 350, 368 S.E.2d 477, 478 (under South Carolina law, emotional trauma is bodily injury), *aff'd*, 297 S.C. 71, 374 S.E.2d 896 (1988).

6. New York's highest court adopted this view in *Lavanant v. General Accident Ins. Co.*, 79 N.Y.2d 623, 595 N.E.2d 819 (1992) (holding that term "bodily injury" in an all-risk liability policy was ambiguous under the circumstances, and allowed coverage of claims against insured landlord for purely mental or emotional distress and injury). See also *Omark Indus., Inc. v. Safeco Ins. Co.*, 590 F. Supp. 114 (D. Or. 1984).

7. 32 Cal. Rptr. 2d 692 (Cal. Ct. App. 1994), *aff'd*, 44 Cal. Rptr. 2d 370, 900 P.2d 619 (1995).

covered bodily injury.⁸

The court, however, then proceeded to hold that where the gravamen of the underlying suit is economic loss, the alleged emotional and physical distress is a mere "by-product" of the economic loss. The court stated that: "We 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."⁹ The court also rejected the insured's argument that earlier decisions¹⁰ read into the policy an interdependence between the bodily injury and property damage coverage in the CGL policy not required by the policy language itself. The court held that the coverages "are necessarily interdependent," but that there would still be bodily injury coverage in a case where a "plaintiff's physical injuries are not solely parasitic to the plaintiff's economic losses or other financial injuries."¹¹

Waller would seem to support the view that merely tangential allegations of emotional and/or physical injury should not be determinative of coverage.¹² The key, however, is whether or not the emotional or physical injury *derives solely* from the alleged economic loss. Taking employment practice claims as an example, this may not always be the case, particularly where the emotional distress and/or physical injury is allegedly inflicted *before* the claimant is terminated from employment. Nonetheless, *Waller* and its progeny would appear to present the better view in this area, in that they do not permit coverage to be determined by the fortuity of the plaintiff's pleading but rather attempt to objectively assess the gravamen of the claim.

Resolutions of bodily injury trigger issues are not always well defined, as illustrated by companion decisions rendered by the Supreme Court of New Jersey in 1992. In *Voorhees v. Preferred*

8. *Id.* at 700 n.6 (citing *Aim Ins. Co. v. Culcasi*, 280 Cal. Rptr. 766, 772, 776 (Cal. Ct. App. 1991)).

9. *Id.* at 701.

10. *See, e.g.*, *Keating v. National Union Fire Ins. Co.*, 995 F.2d 154 (9th Cir. 1993); *McLaughlin v. National Union Fire Ins. Co.*, 29 Cal. Rptr. 2d 559 (Cal. Ct. App. 1994).

11. *Waller*, 32 Cal. Rptr. 2d at 703.

12. Another recent California decision in a vein similar to *Waller* is also on appeal to the Supreme Court of California, *see Gossard v. Ohio Casualty Group of Ins. Cos.*, 35 Cal. Rptr. 2d 190 (Cal. Ct. App. 1994) (no duty to defend on the part of a general liability insurer where emotional or physical distress that might otherwise be covered is alleged to be induced by an uncovered economic loss), *review granted*, 37 Cal. Rptr. 2d 842, 888 P.2d 236 (1995).

Mutual Insurance Co.,¹³ the court held that plaintiffs claiming emotional distress plus vaguely alleged physical manifestations (i.e., nausea, headache, depression, and bodily pain) did allege adequate bodily injury for the purpose of triggering CGL coverage.¹⁴ But in *SL Industries, Inc. v. American Motorists Insurance Co.*,¹⁵ the court held that plaintiffs' claims of emotional anguish and alleged sleeplessness lacked any sufficient physical manifestations and could not be bodily injury within the coverage.¹⁶

While the CGL policy permits recovery for property damage in addition to bodily injury, property damage generally will not include much of the damages sought in a typical discharge claim. Those damages, such as loss of front and back pay, usually are viewed by courts as economic damages, which do not fall under the coverage definition of property damage in a policy.¹⁷

B. *The Occurrence Trigger*

The typical CGL policy essentially defines an occurrence as an accident and currently contains as an exclusion—a provision that the accident cannot be “expected or intended from the standpoint of the insured.” Many wrongful employment practices therefore may not constitute an occurrence because they do not meet the requirement of being unexpected or unintended. Most courts that have faced this issue have concluded that a wrongful discharge does not occur accidentally or negligently and therefore cannot be an occurrence.¹⁸ Similarly, an individual who sexually harasses or assaults another could not do so accidentally or negligently.¹⁹

*Society of Mt. Carmel v. National Ben Franklin Insurance Co.*²⁰ is a recent Illinois appellate decision that arose from an underlying wrongful termination suit brought by a California high school teacher. The employer-defendant in the underlying claim

13. 128 N.J. 165, 607 A.2d 1255 (1992).

14. *Id.* at 180, 607 A.2d at 1262.

15. 128 N.J. 188, 607 A.2d 1266 (1992).

16. *Id.* at 204-06, 607 A.2d at 1275-76.

17. *Mutual Serv. Casualty Ins. Co. v. Co-op Supply, Inc.*, 699 F. Supp. 1438, 1441-42 (D. Mont. 1988) (claim of lost salary and benefits was not covered as property damage).

18. *See, e.g., Commercial Union Ins. Co. v. Superior Court*, 242 Cal. Rptr. 454 (Cal. Ct. App. 1987); *Smithway Motor Xpress, Inc. v. Liberty Mut. Ins. Co.*, 484 N.W.2d 192, 194-95 (Iowa 1992); *John's Cocktail Lounge, Inc. v. North River Ins. Co.*, 235 N.J. Super. 536, 542, 563 A.2d 473, 476 (1989).

19. Chrys A. Martin, *Coverage for Claims Arising Out of Employment*, FOR THE DEFENSE, at Sept. 1989.

20. 268 Ill. App. 3d 655, 643 N.E.2d 1280 (1994).

sought coverage under CGL, workers' compensation, and umbrella policies issued by the insurer defendants in the coverage action.

The most important issue for the CGL insurers involved the court's holding as to whether there was a duty to defend under the CGL policy because of a single count in the underlying complaint alleging 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. 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."²¹

The court continued:

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 the [sic] 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.²²

This is an important decision for CGL insurers to consider because oftentimes even what may somewhat pejoratively be called a "throwaway" allegation of negligence is argued as a basis for the CGL insurer to have to defend. While an Illinois court's interpretation of California law would have little authority in California itself, the court appears to correctly interpret California precedent.

Issues similar to those dealt with in *Society of Mt. Carmel* were also resolved in two other significant appellate decisions. In *State Farm Fire & Casualty Co. v. Compupay, Inc.*,²³ a Florida appellate court considered the availability of coverage under a "business liability insurance policy," which is similar to a standard commercial general liability form, for claims arising from sexual harassment and sex discrimination. The court determined that discrimination and

21. *Mt. Carmel*, 268 Ill. App. 3d at 667-68, 643 N.E.2d at 1289.

22. *Id.* at 668, 643 N.E.2d at 1289.

23. 654 So. 2d 944 (Fla. Dist. Ct. App. 1995).

harassment were akin to sexual abuse in that there is an inherent intent to harm the victim and that they are thus intentional acts as a matter of law without regard to the alleged, subjective intent of the abuser or harasser.²⁴ Finding that the employer-insured here was well aware of the conduct of the harasser, the court appeared not to give any weight to the fact that the underlying plaintiff pled at least one count of negligence based upon the employer's decision to continue to retain the harasser in its employ.

In a very succinct memorandum opinion, the Court of Appeals of New York has also found there to be no coverage under a general liability policy for an incident involving the shooting of an off-duty police officer by a night club security guard.²⁵ While not an employment-related case, the court's decision is instructive and relevant. Suit was brought against both the security guard and his employer, Val-Blue. The allegations against the employer were based upon *respondeat superior*, negligent hiring, negligent supervision, and negligent training. The policy contained the following exclusionary provision: "It is agreed that no coverage shall apply under this policy for any claim, demand or suit based on Assault and Battery and Assault and Battery shall not be deemed an accident, whether or not committed by or at the direction of the insured."²⁶ Disregarding the allegations of negligence, the court held that the policy provided no coverage finding that "[t]he injury being sued upon here is an assault and battery. The plethora of claims surrounding that injury, including those for 'negligent shooting' and 'negligent hiring and supervision' are all 'based on' that assault and battery without which [the plaintiff] would have no cause of action."²⁷

As in the cases exploring the bodily injury trigger noted above, decisions such as *Society of Mt. Carmel, Compupay*, and *Val-Blue* evidence a willingness of the courts to look beyond the allegations framed within the four corners of a complaint and not allow a "negligent tail" to wag the "intentional dog." The issue of whether or not an event happens to qualify as an occurrence under the policy is related to whether or not that same event, or at least a claim arising

24. *Id.* See also *Commercial Union Ins. Co. v. Sky, Inc.*, 810 F. Supp. 249 (W.D. Ark. 1992).

25. *U.S. Underwriters Ins. Co. v. Val-Blue Corp.*, 85 N.Y.2d 821, 647 N.E.2d 1342 (1995).

26. *Id.* at 822, 647 N.E.2d at 1343 (emphasis added).

27. *Id.* at 823, 647 N.E.2d at 1344.

from that event, may be uninsurable because it involves intentional wrongdoing.

In many respects, the first significant piece of federal employment-related civil rights legislation enacted since the Reconstruction Era following the Civil War was Title VII of the Civil Rights Act of 1964. Even before Title VII became law, the Insurance Department of the State of New York had issued a pronouncement in 1963 to the effect that insurance coverage for discrimination-based liability "may not lawfully be written under the New York Insurance Law."²⁸ New York's prohibition was broad and sweeping, extending not only to coverage for any judgment or settlement amounts but also to the costs of defending such claims while the allegations remained unsubstantiated in fact.

Over thirty years later, on May 31, 1994, this wall erected by the Insurance Department was substantially demolished when it issued its Circular Letter No. 6 (1994).²⁹ The department's two-page letter provided that insurance for disparate impact type discrimination, as well as discrimination for which one is only vicariously liable, is now permissible.

Many EPLI insurers have now begun to offer their policies to New York domiciled insureds. No other jurisdictions had absolute prohibitions similar to New York. As a result of this circular letter, EPLI is now available on a nationwide basis. Some insurers, however, have voluntarily elected not to write business in certain states where they perceive there to be unfavorable law and/or hostile jury biases regarding suits against employers.

In many respects, the new position of the insurance department in New York is similar to what has been established by statute in California by way of section 533 of the California Insurance Code ("section 533").³⁰ That statute was recently construed in a decision rendered by the United States District Court for the Northern District of California in *Save Mart Supermarkets v. Underwriters at Lloyd's London*.³¹

The *Save Mart* court held that discrimination as a result of disparate treatment, as opposed to disparate impact, was uninsurable under section 533. The court reasoned that "unintentional discrimi-

28. Opinion of the New York Superintendent of Insurance (September 26, 1963).

29. New York Insurance Department Circular Letter No. 6, Insurance Coverage for Discrimination Claims based upon Disparate Impact and Vicarious Liability (May 31, 1994).

30. CAL. INS. CODE § 533 (West 1982).

31. 843 F. Supp. 597 (N.D. Cal. 1994).

nation may be inherently harmful, but a plaintiff need not establish that the insured intended to commit a wrongful act in order to recover under such a theory."³² Stated another way, it is the intentional nature of the *result* which runs afoul of section 533 and not the mere intentional nature of the *act* itself. While the policy at issue in *Save Mart* was a general liability policy, and the underlying litigation involved allegations of retaliatory discharge, constructive discharge, and employment-related sex and age discrimination, the issues therein may arise in any number of policies and factual scenarios.

Section 533 is, in a sense, a statutory exclusion that must be read into every insurance policy to the effect that "[a]n insurer is not liable for a loss caused by the wilful act of the insured."³³ The *Save Mart* court examined the earlier California Supreme Court decision in *J.C. Penney Casualty Insurance Co. v. M.K.*,³⁴ which held that if an act is *inherently* harmful, section 533 requires only a showing of intent to engage in the harmful conduct to preclude coverage. *J.C. Penney* involved child molestation, and California courts since have found several other types of conduct to be inherently harmful, and hence uninsurable, under section 533. Examples include: (1) knowing *inducement* of patent infringement;³⁵ (2) sexual harassment;³⁶ (3) malicious prosecution;³⁷ (4) intentional exposure of sexual partner to HIV;³⁸ (5) knowing conspiracy to unlawfully restrain trade;³⁹ (6) racially motivated hate crime;⁴⁰ (7) sexual assault;⁴¹ and (8) wrongful termination based on racial discrimination and union

32. *Id.* at 606.

33. CAL. INS. CODE § 533.

34. 278 Cal. Rptr. 64, 804 P.2d 689 (Cal. 1991).

35. *Aetna Casualty & Sur. Co. v. Superior Court*, 23 Cal. Rptr. 2d 442 (Cal. Ct. App. 1993) (commonly known as the "Watercloud" decision).

36. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 18 Cal. Rptr. 2d 692 (Cal. Ct. App. 1993). This decision cannot necessarily be read as holding that sexual harassment is universally inherently harmful conduct that falls within the proscription of section 533. It should be noted that in *Coit* the primary harasser and defendant was the CEO and sole shareholder in the corporate entity. Thus, there was not pled, and arguably could not have been pled, any theory of recovery against the corporation or individual manager in the nature of negligent supervision or negligent hiring.

37. *California Casualty Mgt. Co. v. Martocchio*, 15 Cal. Rptr. 2d 277 (Cal. Ct. App. 1993).

38. *Aetna Casualty & Sur. Co. v. Sheft*, 989 F.2d 1105 (9th Cir. 1993).

39. *Trailer Marine Transp. Corp. v. Chicago Ins. Co.*, 791 F. Supp. 809 (N.D. Cal. 1992).

40. *Allstate Ins. Co. v. Tankovich*, 776 F. Supp. 1394 (N.D. Cal. 1991).

41. *State Farm Fire & Casualty Co. v. Ezrin*, 764 F. Supp. 153 (N.D. Cal. 1991).

activities.⁴² In finding the discrimination at issue in *Save Mart* to be in the nature of disparate impact, the court concluded that the policy of discouraging willful torts would not be furthered by applying section 533 to exclude coverage.

While both California (by way of *Save Mart*) and New York (by way of the Insurance Department's circular letter) now clearly hold disparate impact discrimination to be insurable, this may be of little practical consequence in that most experienced observers in this area would agree that disparate treatment claims occur with proportionately much greater frequency than disparate impact claims. Of greater practical significance is the New York Insurance Department's position, discussed above, regarding vicarious liability of an employer for discriminatory acts of its employees. This would appear to greatly expand the number of situations in which the employer may be afforded insurance coverage despite the intentional and likely uninsurable misconduct of its employees.

The section 533 analysis of *Save Mart* should have applicability to *any* liability insurance policy. Many other jurisdictions would likewise apply a similar analysis where there may be a similar statute or insurance department regulation in place, as well as applicable case law.

Perhaps the most significant recent development in the area of insurability of intentional misconduct is a decision of the United States Court of Appeals for Ninth Circuit applying Alaska law.⁴³ Although there was some unusual policy language at issue that arguably supported the result, the decision is particularly noteworthy because it is a rare instance of a court finding insurance coverage in a situation involving sexual abuse of a minor.

The Ninth Circuit noted Alaska public policy against insuring a person against liability for his or her intentional acts.⁴⁴ Nonetheless, the court was willing to make an exception in situations where the purpose of the insurance is to compensate innocent third parties for injuries caused by intentional misconduct.⁴⁵ It further held that making such an exception is particularly appropriate when the

42. *B&E Convalescent Ctr. v. State Compensation Ins. Fund*, 9 Cal. Rptr. 2d 894 (Cal. Ct. App. 1992). While not expressed by the court in such terms, *B&E* would be a situation more in the nature of a disparate treatment case than the disparate impact scenario in *Save Mart*.

43. *St. Paul Fire & Marine Ins. Co. v. F.H.*, 55 F.3d 1420 (9th Cir. 1995).

44. *Id.* at 1423 (citing *Dairy Queen v. Travelers Indem. Co.*, 748 P.2d 1169 (Alaska 1988)).

45. *Id.*

existence of the insurance is unlikely to have been an inducement to the insured to engage in the intentional misconduct.⁴⁶ The court thus held that “[p]ublic policy concerns against allowing [the insured who engaged in intentional misconduct] to avoid civil liability by reason of insurance coverage are outweighed by the advantages of assuring that his victim[s] . . . will be compensated for the injuries [he] caused.”⁴⁷

C. *The Personal Injury Trigger*

The CGL policy also may be enhanced by the payment of an additional premium to provide coverage for certain kinds of personal injury—usually defined as injury arising from specified offenses such as libel, slander, or disparagement—that violate an individual’s right of privacy.⁴⁸ Although possibly not intended, personal injury coverage may be applicable to wrongful employment practice claims, such as allegations of defamation in connection with an employee’s termination or violation of the employee’s right of privacy.⁴⁹ Similar broad coverage for “personal injury” may also be found in the employer’s umbrella and excess coverage policy. In many excess coverage policies, personal injury is defined specifically to include discrimination.⁵⁰

Courts have generally viewed personal injury coverage as insuring against a broader type of injury than bodily injury policies. The result was that courts construed the language of such umbrella or excess policies as affording both coverage and defense for claims

46. *Id.* Although the Ninth Circuit recognized that Alaska had yet specifically to address this exception in the context of a sexual abuse or assault claim, it did note that other jurisdictions have recognized such an exception. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Shernow*, 222 Conn. 823, 610 A.2d 1281 (1992) (sexual assault by a dentist); *Vigilant Ins. Co. v. Kambly*, 114 Mich. App. 683, 319 N.W.2d 382 (1982) (sexual abuse by psychiatrist).

47. *St. Paul*, 55 F.3d at 1424.

48. A typical broad form comprehensive liability endorsement covering “Personal Injury,” used with a CGL policy, is described in *Federal Ins. Co. v. Cablevision Sys. Dev. Co.*, 637 F. Supp. 1568, 1573 (E.D.N.Y. 1986). *See also* H.W. RUBIN, *DICTIONARY OF INSURANCE TERMS* 308 (2d ed. 1991).

49. *See* Raoul D. Kennedy & James A. Roberts, *Insurance Coverage For Wrongful Termination Claims*, 10 *EMPLOYEE REL. L.J.* 654, 661 (1995).

50. *Id.* at 662-63. *See, e.g., Union Camp Corp. v. Continental Casualty Co.*, 452 F. Supp. 565, 567 (S.D. Ga. 1978) (policy covered personal injury; defined as including injury from discrimination); *Clark-Peterson Co. v. Independent Ins. Assocs.*, 492 N.W.2d 675, 676 n.3, 668-79 (Iowa 1992) (contractors’ umbrella policy defined personal injury to include discrimination and humiliation; the court held that an act of discrimination although intentional, was required to be covered under Iowa’s doctrine of reasonable expectations).

of purely emotional distress that may come within the broader definition of personal injury.⁵¹ However, because personal injury coverage is defined by the type of acts causing the claimed injury (i.e., defamation), such coverage will probably not cover most claims of wrongful discharge, discrimination, or sexual harassment unless such acts and terms are specifically included in the policy. Moreover, even in the absence of an occurrence requirement, the insurer still can question the insurability of any alleged wrongful employment practice that was arguably intentional or criminal. Thus, personal injury coverage is no panacea to the employer.

D. *Implication of the Insurer's Duty to Defend*

The insurer's obligation under the typical CGL policy is two-fold: (i) to defend the insured in any lawsuit or proceeding alleging a covered claim; and (ii) to indemnify the insured for any insurable damages arising from a covered claim. The insured needs to know whether it can rely on this duty to defend, and to what extent.

It often is said that the duty to defend is broader than the duty to indemnify. Thus, "an insurer must defend a suit whenever it ascertains facts within or without the complaint that give rise to the potential of liability under the policy."⁵² In most states (California is one exception),⁵³ an insurer need not defend if "the complaint unambiguously alleges noncovered conduct on the part of the insured, even if the facts alleged would permit amendment or construction under a different theory which would be covered."⁵⁴ If the insurer can "exclude the possibility of a recovery" for which the policy provides coverage, there may be no duty to defend.⁵⁵

51. See, e.g., *Westfield Ins. Co. v. TWT, Inc.*, 723 F. Supp. 492, 494 (N.D. Cal. 1989) (applying California law, insurer under CGL and excess policy was liable for coverage and defense on cross-claim for emotional distress caused by negligence); *Morrison Assurance Co. v. North Am. Reinsurance Corp.*, 588 F. Supp. 1324, 1327 (N.D. Ala. 1984) (mental anguish resulting from strip mining damage to farm property is personal injury), *aff'd without op.*, 760 F.2d 279 (11th Cir. 1985); *American States Ins. Co. v. Cooper*, 518 So. 2d 708, 710 (Ala. 1987) (under Alabama law, an insurer under CGL policy was liable for coverage and defense of claims by purchasers against insured vendors of apartment complexes for alleged misrepresentation, alleging mental anguish); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 115, 314 S.E.2d 775, 779-80 (1984).

52. *Westfield*, 723 F. Supp. at 495.

53. *Montrose Chem. Corp. v. Superior Court (Canadian Universal)*, 24 Cal. Rptr. 2d 467, 861 P.2d 1153 (Cal. 1993) (duty to defend even if the only facts upon which duty arises are extrinsic to the complaint).

54. *Federal Ins. Co. v. Cablevision Sys. Dev. Co.*, 637 F. Supp. 1568, 1578 (E.D.N.Y. 1986).

55. *Boston Hous. Auth. v. Atlanta Int'l Ins. Co.*, 781 F. Supp. 80, 83 (D. Mass.

Circumstances may arise, depending on the policy terms, in which the CGL insurer does have a duty to defend or pay for defense against third-party claims that are potentially within its coverage, though no indemnity could be obtained for any award (i.e., where indemnity would be prohibited by statute or public policy).⁵⁶ However, as suggested in a recent California decision⁵⁷ that denied defense costs where the claim was uninsurable under a California statute prohibiting indemnification for willful conduct, the policy must expressly provide or contemplate the payment of defense costs under those circumstances:

[I]f an insured either expressly purchases a defense without regard to indemnification (e.g., a litigation policy) or is led by the terms of the insurance agreement, whether those terms be clear or ambiguous, to reasonably expect a defense to the type of claim asserted, then a defense may be required even though there can legally be no duty to indemnify⁵⁸

E. CGL Coverage for EEOC and Similar Agency Proceedings

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 possessing special familiarity with the various laws,

1992) (duty to defend insured against claims of blatant and intentional racial discrimination was barred as matter of public policy); *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1499 (S.D.N.Y. 1983), *aff'd on reh'g*, 748 F.2d 760 (2d Cir. 1984); *B&E Convalescent Ctr. v. State Compensation Ins. Fund*, 9 Cal. Rptr. 2d 894 (Cal. Ct. App. 1992) (under workers' compensation policy requiring the insurer to defend claims for "injuries insured against under this policy," the court could conceive of "no rational construction" by which the insured reasonably could expect to be defended against claims of wrongful discharge committed in retaliation for an employee's refusal to implement an illegal plan to replace American workers with Filipinos to defeat union in violation of labor and civil rights laws).

56. See, e.g., *Horace Mann Ins. Co. v. Barbara B.*, 17 Cal. Rptr. 2d 210, 215-16, 846 P.2d 792, 797-98 (Cal. 1993) (insurer has duty to defend "if any claim encompassed within (underlying action) potentially may be covered" and permitting defense coverage for parasexual conduct leading to molestation).

57. *B&E Convalescent Ctr.*, 9 Cal. Rptr. 2d at 909.

58. *Id.* See also *Gray v. Zurich Ins. Co.*, 54 Cal. Rptr. 104, 113, 419 P.2d 168, 177 (Cal. 1966) (en banc) (upholding coverage and duty to defend under homeowner's policy against assault claim; construing California statute as forbidding contract to indemnify for loss from willful wrongdoing but not contract to defend against accusation).

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.⁵⁹

The CGL policy, after stating that the insurer will pay those sums "that the insured becomes legally obligated to pay as damages," defines the insurer's duty to defend with the caveat: "We will have the right and duty to defend any suit seeking those damages."⁶⁰ An EEOC proceeding obviously is not a "suit seeking those damages" or any damages, and the insurer may have no duty to defend.⁶¹

One New Jersey appellate decision specifically held that an insurer under a CGL policy had no duty to defend a discrimination proceeding before the EEOC because the EEOC conciliation process is not "a coercive, adversarial proceeding."⁶² This reflects a more general rule that mere investigations and inquiries, which do not impose liability directly, will not trigger CGL coverage.⁶³

F. *Employment-Related Exclusions*

The CGL policy typically contains an exclusion for injury arising in the scope of the employment relationship, primarily to avoid any overlap with workers' compensation and similar coverage. This exclusion also may restrict or prevent its coverage of employment practices claims.⁶⁴

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

60. Commercial General Liability Coverage Form § I, Coverage A.1 (a).

61. *Cf. Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988) (general liability policies generally cover legal damages but do not extend coverage to claims for equitable relief—insurer had no duty to defend environmental clean-up suit by U.S. government).

62. *Campbell Soup Co. v. Liberty Mut. Ins. Co.*, 571 A.2d 969 (N.J. Super. Ct. App. Div.), *cert. denied*, 584 A.2d 230 (N.J. 1990).

63. *See Winkler v. Nat'l Union Fire Ins. Co.*, 930 F.2d 1364, 1366-67 (9th Cir. 1991) (merely threatened suit did not constitute a claim under a D&O liability policy).

64. Employee exclusions and other similar manuscripted exclusions have become more popular in recent years as employment practices claims proliferate. Two examples of such exclusions recently were upheld in *Old Republic Ins. Co. v. Comprehensive Health Care Assocs., Inc.*, 2 F.3d 105 (5th Cir. 1993). The first exclusion, which the court referred to as a sexual abuse exclusion, stated:

In consideration of the premium charged, it is agreed that such coverage as is

Unfortunately, it is not always clear when employment-practices claims arise in the scope of the employment relationship. Case law is split as to whether injuries suffered from an alleged wrongful discharge arise from employment-related injury or after the employment relationship was terminated. For example, and taking the sublime to the ridiculous, perhaps coverage could depend on whether the employer said, "you're a stupid and incompetent jerk and you're fired" (arguably not covered because the insult occurred during employment), or "you're fired, you stupid and incompetent jerk" (possibly covered because the insult occurred post-employment)!

Within the last few years, general liability insurers have begun to use a generic and very broad employment-related claims exclusion. A sample of this exclusionary language which is added to the policy by endorsement is attached as an appendix to this Article. Although the exclusion has yet to be interpreted by the courts, it would appear to be broad enough to exclude coverage in virtually any wrongful termination, discrimination, or sexual harassment claim. As such, many of the decisions discussed above that suggest the possibility of CGL insurance coverage for these claims may be of little practical comfort when one is faced with a CGL policy endorsed with the new exclusionary wording.

II. D&O LIABILITY COVERAGE

Under a typical D&O policy, a corporation's directors and officers are covered for wrongful acts committed in their capacities as

provided by this policy *shall not apply to any claim, demand and causes of action arising out of, or resulting from, either physical abuse, sexual abuse or licentiousness, immoral or sexual behavior intended to lead to, or culminating in any sexual act, whether caused by, or at the instigation of, or at the direction of, or omission by, the Insured, his employees, patrons or any causes whatsoever.*

Id. at 108 (emphasis added).

The second exclusion, an employment-related claim exclusion, stated:

It is understood and agreed that:

1. The policy does not provide any insurance coverage with respect to any claim, demand or causes of action arising out of or resulting from wrongful discharge, retaliatory discharge or any claim arising from the employment relationship between the insured and any of its employees, and allegations of such, whether caused by, or at the instigation of, or at the direction of, or omission by, the Insured, his employees, or any causes whatsoever.
2. The Company has no duty under the policy to defend the insured with respect to any claim, demand or cause of action of the sort described under paragraph 1

Id. (alteration in the original).

such, and the corporation is reimbursed for indemnifying them. There is no single standard D&O policy form, unlike as is the case with the standard CGL policy form. It is noted that D&O policies "vary from insurer to insurer and in many instances these variations are significant and material."⁶⁵

Most claims against directors and officers are brought by the corporation's shareholders and commonly involve securities disputes. An increasing number of claims, however, now are made by employees of the corporation.⁶⁶ Because most D&O policies exclude claims for personal injury or bodily injury,⁶⁷ there would be no coverage under those policies for wrongful employment practices claims to the extent those claims are premised on bodily or personal injury allegations.

Many wrongful employment practices claims rarely would provide a legitimate basis for a claim against a director because a director would not have the type of day-to-day responsibility for the operation of the company's business that could subject him or her to personal liability for those claims. Moreover, many of these claims are not likely to involve officers, particularly in a large corporate organization.⁶⁸ Nevertheless, officers may be frequent targets of these claims in smaller organizations where they have more direct involvement in hiring and firing decisions over all employees, or where claims may be premised upon negligence in allowing a pattern of discrimination or sexual harassment to exist within the company.

Of course, a particularly egregious and expensive underlying

65. Joseph P. Monteleone, *D&O Insurance: Timing of Payments of Defense Expenses*, in *DIRECTORS AND OFFICERS LIABILITY INSURANCE* 265-64 (PLI Comm. Course Handbook Series No. A 535, 1990). Other observers likewise noted "considerable differences in important exclusionary and coverage endorsements" among D&O policies available in the market. David B. Parker & Lance A. Selfridge, *Current Coverage Issues in Director and Officers Insurance*, in *INSURANCE EXCESS AND REINSURANCE COVERAGE DISPUTES* 743 (PLI Litig. Course Handbook Series No. H405, 1991).

66. Thomas W. Hyland & Wayne E. Borgeest, *Directors' and Officers' Liability Insurance: An Introduction to the Coverage, Claims and Current Issues*, in *INSURANCE EXCESS AND REINSURANCE COVERAGE DISPUTES* 707, 708 (PLI Litig. Practice Course Handbook Series No. H405, 1991).

67. See Parker & Selfridge, *supra* note 63, at 770.

68. Indeed, the Ninth Circuit recently held that corporate officers and directors cannot be liable for claims alleging age and sexual discrimination arising under the ADEA and Title VII. See *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied sub nom.*, *Miller v. La Rosa*, 114 S. Ct. 1049 (1994); cf. *Lamirande v. RTC*, 834 F. Supp. 526, 529 (D.N.H. 1993) (officer may be deemed to be agent of the corporate employer if he or she exercises significant control over the alleged discrimination victim's hiring, firing, or conditions of employment).

sexual harassment or discrimination problem may well give rise to shareholder derivative litigation, as was the case in the recent situation involving Del Laboratories and its chief executive, Dan K. Wassong.⁶⁹

Even if a claim is asserted against an officer, the question may arise as to whether that individual is sued in his or her capacity as an officer. Most D&O policies limit their coverage solely to suits against insured individuals in insured capacities. Though not a case involving D&O insurance, a recent decision of the United States Court of Appeals for Fifth Circuit highlights the insured capacity issue.⁷⁰ Although most of the opinion deals with the issue of personal jurisdiction over the archdiocese and parish that employed a priest accused both civilly and criminally of homosexual relations with a minor, the analysis there was also applied to deny any defense obligations on the part of the archdiocese's insurer to the priest.

In short summary, the Fifth Circuit held that the plaintiff, a minor, could not get personal jurisdiction over a Louisiana archdiocese and parish in an action brought in Mississippi arising from acts that took place at one of their "employed" priest's home in Mississippi. 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-a-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 both the issues involving personal jurisdiction over the diocese and parish, as well as the diocese's insurer's obligation to defend the priest. Second, the abhorrent nature of the priest's conduct was found to take his conduct outside the scope of his employment. While it may be argued that the religious and moral missions of the diocese and parish were of particular significance to this finding, the court's rationale could also be applied, for example, to allegations of sexual harassment and/or discrimination in the work place. To wit, is it ever within the scope of one's employment to sexually harass female em-

69. See *Del Laboratories Inc.: Holder's Suit Says Officials Liable in Harassment Case*, WALL ST. J., Aug. 16, 1995, at A5, wherein it was reported that such a derivative action has been filed subsequent to a \$1.2M settlement of sexual harassment claims brought by the EEOC on behalf of 15 female employees of Del Laboratories.

70. *Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans*, 32 F.3d 953, 963-64 (5th Cir. 1994).

ployees or discriminate against racial minority employees?⁷¹

Even if there is D&O coverage for the claim against a director or officer, that coverage does not extend to the corporate entity. The corporation is not insured directly for its own liability or defense but is only insured to the extent it indemnifies its directors or officers.⁷²

Although the issues of rescission of the policy or denial of coverage based upon misrepresentations in the application for the policy are not particular to D&O policies, D&O insurers will no doubt scrutinize the application for possible misrepresentations whenever a claim is presented during the policy period with indications that the circumstances which gave rise to the claim were known to the insured(s) at the time of the application and should have been disclosed in response to one or more pertinent questions on the application.

Illustrative of this problem is a recent decision of the United States Court of Appeals for the Sixth Circuit which arose from an underlying sexual harassment and employment discrimination claim.⁷³ Coverage was sought under both a CGL and Public Officials and Employees Liability Insurance ("PO&E") Policy issued to

71. A recent Arizona case explores this interesting issue. In *State v. Schallock*, 196 Ariz. Adv. Rptr. 35 (Ariz. Ct. App. 1995), the principle 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. APAAC's own liability for arguably being negligent, or worse in creating or tolerating a hostile work environment, was *not* at issue.

Under an applicable state self-insured statute, Heinze would only be entitled to indemnity 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 to, in one instance, rape, was certainly sufficient to take such conduct outside the course and scope of employment. Accordingly, the court held that Heinze was not entitled to indemnification.

In the court's analysis of applicable Arizona law, it determined that an employee's acts occurs 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]." *Id.* (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1957); *Pose v. Liberty Mut. Ins. Co.*, 158 Ariz. 36, 38, 760 P.2d 1085, 1087 (Ariz. Ct. App. 1988)).

Given this tripartite test, it is relatively easy to appreciate why one employee's sexual harassment of another can never be within the course and scope of employment.

72. *Pepsico, Inc. v. Continental Casualty Co.*, 640 F. Supp. 656, 661 (S.D.N.Y. 1986) (D & O policies do not cover liability or defense costs of the corporation itself). A D & O policy occasionally may be endorsed to provide coverage for the corporate entity, but this usually is limited to certain not-for-profit businesses.

73. *Board of County Comm'rs v. International Surplus Lines Ins. Co.*, No. 93-3417, 1994 U.S. App. LEXIS 27870 (6th Cir. Oct. 3, 1994).

the plaintiff county government. The PO&E policy is substantively similar to a D&O policy.

Many of the coverage issues were resolved in favor of the defendant CGL and PO&E insurers based upon the nature of the relationship between the county sheriff's department, where the underlying plaintiff was employed, and the board of county commissioners.

What is most significant is the court's disposition of the issue of misrepresentation on the PO&E application. While denial of coverage and especially rescission is always difficult to establish based upon application misrepresentations and/or breaches of warranty, the court's holding, essentially set forth verbatim below, illustrates the *relative* ease of denying coverage and/or rescinding where there is no severability and no intentionality requirement under applicable law.

In *Board of County Commissioners*, the Board applied for a one year policy renewal and agreed under section 10(c) of its PO&E policy in August 1990. The Board agreed that:

[n]o fact, circumstance or situation indicating the probability of a claim or action is now known to any Public Official or Employee; and it is agreed by all concerned that if there be knowledge of any such fact, circumstance, or situation, any claim or action subsequently emanating therefrom shall be excluded from coverage under the insurance here being applied for. . . . Despite its agreement to this exclusion, the Board failed to notify [the insurer] at the time that the policy was being renewed that "troubles were brewing" in the Sheriff's Department, where a public employee had already filed two complaints with federal and state civil rights agencies over sexual harassment and sex discrimination. There is no suggestion that the Board consciously withheld information from [the insurer]. Rather, it is mutually agreed that the failure to disclose resulted from Commissioner Bell's innocent ignorance of the emerging problem. Nevertheless, the sheriff is a "public official" in Holmes County, and that public official knew very well, at the time that the Board applied for renewal of the PO&E policy, that a claim or action was probable. Consequently, the district court correctly found that section 10(c) of the policy excluded from coverage all claims for indemnification that "emanate" from the [underlying plaintiff's] action.⁷⁴

The D&O policy, as a "claims made" policy, also presents is-

74. *Id.* at *18-19.

sues as to when a claim is first deemed to have been made in various employment-related claim situations. The issue is particularly troublesome if the policy at issue does not precisely define the term "claim" or provide a determination as to when a claim is deemed to have been first made. Some policies are very specific in this regard, utilizing language similar to the following:

"Claim" shall mean: (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.

A Claim shall be deemed to have been first made on the date that a summons or similar document is first served upon any Director and/or Officer, or on the date that any Director and/or Officer first receives a written demand as defined herein, whichever date first occurs.⁷⁵

When policies are silent or less precise, however, problems similar to those visited in a recent Illinois decision arise.⁷⁶ In that case there was an issue as to whether an EEOC charge of age discrimination was covered under any of two successive claims made "school leaders" D&O policies. The first policy was a National Union policy scheduled to run from July 1, 1988-91, but which was canceled effective July 1, 1990. It was replaced by a Scottsdale Insurance Company policy effective July 1, 1990.

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— the insured receives the June 25 Notice.
- June 28, 1990— insured sends Notice and cover letter to its broker.

75. Language used by endorsement to Reliance Insurance Company D & O policy form.

76. *National Union Fire Ins. Co. v. Cary Community Sch. Dist. No. 26*, No. 93 C 6526, 1995 U.S. Dist. LEXIS 1846, (N.D. Ill., Feb. 14, 1995).

July 9, 1990— insured receives a second Notice from the EEOC. This Notice contains a copy of charge dated and signed by the claimant teacher as of July 2, 1990.

Notice of the matter (which ultimately proceeded into suit on October 1, 1990) was initially given to National Union some time after July 1, 1990, but the court's opinion is not specific as to when this occurred. National Union began to provide a defense because its personnel were unaware that the policy had been canceled effective July 1, 1990. Realizing their error, National Union, and perhaps the insured as well, appear to have tendered the defense of the suit to Scottsdale. Upon Scottsdale's refusal to defend on the basis that this was a claim made before inception of their policy, the coverage litigation ensued.

The court noted that the Scottsdale policy did not contain a definition of "claim" and essentially adopted the common definition that has been developed through case law, i.e., "a demand for money or property as of right." The court in particular relied upon *Bensalem Township v. Western World Insurance Co.*,⁷⁷ which held that an EEOC charge of discrimination did not constitute a claim in the context of a claims made insurance policy.

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. It was further noted that the underlying claimant continued to be employed until December 1990 and thus had no claim for money damages, which in any case, the EEOC would not have the power to award. Also, money damages could not be recovered in a civil suit at that time (1990), which was prior to the implementation of the Civil Rights Act of 1991.

Scottsdale also argued that even if the claim was first made in its policy period, it was excluded from coverage by virtue of a policy exclusion which provided it 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"⁷⁸

The court noted that the application for the Scottsdale policy had been dated May 8, 1990, and the so-called warranty question as to "knowledge of any act, error, omission, or breach of duty which

77. 609 F. Supp. 1343 (E.D. Pa. 1985).

78. *National*, 1995 U.S. Dist. LEXIS 1846, *9.

may reasonably give rise to a claim” had been answered in the negative.⁷⁹ The application did not provide for any continuing obligation to disclose information, such as an EEOC notice, up to the time the policy incepts. The court held that “[i]t would be unreasonable to impose such an obligation on an insured without giving advance notice of specific contract language so requiring.”⁸⁰ Accordingly, it was 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.

CONCLUSION

Employment-related litigation has substantially increased over the past few years. This rise in litigation has created questions about whether insurance policies cover claims such as wrongful discharge, discrimination, and harassment. Although EPLI is intended to cover such claims, many employers have not purchased EPLI because it is relatively new. For this reason, many employers must rely on other forms of insurance coverage.

CGL, umbrella coverage, and D&O policies may provide employers with insurance coverage for the types of claims that EPLI is intended to cover. However, whether CGL and D&O policies cover claims such as wrongful discharge, discrimination, and harassment depends upon a number of issues involving policy interpretation. Under any given factual circumstance, an employer may find itself without coverage for an employment-related claim. Therefore, employers should examine their insurance policies and consider whether they are adequately protected or whether they would be better served by securing an alternative form of coverage such as EPLI.

79. *Id.* at *15-16.

80. *Id.* at *16.

APPENDIX
CL 701
(10-93)

THIS ENDORSEMENT CHANGES THE POLICY.
PLEASE READ IT CAREFULLY.

CG 21 47 10 93

EMPLOYMENT-RELATED
PRACTICES EXCLUSION

This endorsement modifies Insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to paragraph 2., Exclusions of COVERAGE A- BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section 1-Coverages):

This Insurance does not apply to:

“Bodily 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; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of “bodily injury” to that person at whom any of the employment-related practices described in paragraphs (a), (b) or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

B. The following exclusion is added to paragraph 2., Exclusions of COVERAGE B-PERSONAL AND ADVERTISING INJURY LIABILITY (Section 1-Coverages):

This Insurance does not apply to:

“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; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "personal injury" to that person at whom any of the employment-related practices described in paragraphs (a), (b) or (c) above is directed.

This exclusion applies:

- (1) Whether the insured may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

CL701 (10-93)

CG 21 47 10 93

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