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Advanced Issues in Insurance Coverage

#Me Too! Coverage for Workplace Claims

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Ohio Supreme Court Coverage For Molestation And Derivative Negligence Claims

Gearing v. Nationwide Insurance Company (1996), 76 Ohio St.3d 34

- Incidents of intentional acts of sexual molestation of a minor do not constitute policy "occurrences" as intent to harm, inconsistent with an insurable incident, is properly inferred from deliberate acts of sexual molestation of a minor. *Id* in P. 1 of the syllabus.

- Ohio public policy precludes liability coverage for injuries from sexual molestation of a minor. *Id.* in P. 2 of the syllabus.

Gearing (continued)

- Thus, the insurer had no duty to defend a suit arising from molestation of three girls.

- The Court ruled that "in those cases where an intentional act is substantially certain to cause injury, determination of an insured's subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage." *Id.* at P. 39.

- Thus, "an insured's protestations that he 'didn't mean to hurt anyone' are only relevant where the intentional act *** was not substantially certain to result in injury." *Id.*

Cuervo v. Cincinnati Insurance Company (1996), 76 Ohio St.3d 41

- Decided the same day as *Gearing*, the Ohio Supreme Court decided whether a father could be indemnified, under his homeowner's policy, for negligence claims brought because his minor son molested a child.

- Following *Gearing*, the Ohio Supreme Court ruled that neither the son nor the father could be indemnified by the insurance policy.

Doe v. Shaffer (2000), 90 Ohio St.3d 388

"Ohio public policy permits a party to obtain liability insurance coverage for negligence related to sexual molestation when that party has not committed the act of sexual molestation." *Id.* in the syllabus.

- "John Doe" was a mentally challenged man who had resided, for over 20 years, in a residential care facility run by a religious order;
- He was diagnosed with HIV.
- His parents sued the religious order, the Catholic Diocese of Columbus, the Bishop and others, alleging that he had been molested and infected with HIV by employees of the residential care facility under the control of the Diocese and the Bishop.

Doe (continued)

- The Does alleged negligent hiring, transmission of a sexually transmitted disease, fraud and sexual molestation.
- During the lawsuit, Doe died of AIDS.
- Diocese's insurer intervened, seeking a declaration that it had no duty to defend or indemnify.

Doe (continued)

- "A contrary interpretation that refuses to distinguish between the abuser's intentional conduct and the insured's alleged negligence, would impermissibly ignore the plain language of an insurance policy that excludes from coverage bodily injury that was expected or intended from the standpoint of the insured." *Id.* at P. 13.

- Ohio Supreme Court declined to follow, its *Cuervo* decision that precluded coverage for a non-molester's negligence related to molestation.

Safeco Ins. Co. of Am. v. White (2009), 122 Ohio St.3d 562

- 17 year old Benjamin White attacked and stabbed Casey Hilmer, a 13 year old girl, as she was jogging.

- Pleaded guilty to attempted murder and felonious assault.

- Casey and her parents sued White and his parents alleging negligent: supervision, entrustment and infliction of emotional distress.

Safeco Ins. Co. of Am. (continued)

- The jury awarded the Hilmers $6.5 million, finding Benjamin 30% responsible and his parents 70% responsible.

- Safeco filed a dec action, arguing that it had no duty to defend or indemnify the Whites for their son's intentional act.

Safeco Ins. Co. of Am. (continued)

- "When a liability insurance policy defines an "occurrence" as an "accident", a negligent act committed by an insured that is predicated on the commission of an intentional tort by another person, *e.g.* negligent hiring or negligent supervision, qualifies as an "occurrence." *Id.* at P. 1 of the syllabus.

- "Insurance policy exclusions that preclude coverage for injuries expected or intended by an insured, or injuries arising out of or caused by an insured's intentional or illegal acts, do not preclude coverage for the negligent acts of others insured under the same policy that are predicated on the commission of those intentional or illegal acts, *e.g.* negligent hiring or negligent supervision." *Id.* at P. 2 of the syllabus.

Safeco Ins. Co. of Am. (continued)

- Ohio Supreme Court: "* * *liability coverage hinges on whether the act is intentional from the perspective of the person seeking coverage." *Id.* at P. 24.

- Since Benjamin White's parents did not intend the attack, the incident was an "occurrence" under their Safeco policy.

- Ohio Supreme Court: Exclusions that preclude coverage for injuries intended by an insured, or injuries arising out of an insured's intentional or illegal act, do not preclude coverage for the negligent acts of others under the same policy, *i.e.*, negligent hiring or negligent supervision.

Allstate Insurance Company v. Campbell (2010), 128 Ohio St.3d 186

- As applied to a policy's intentional act exclusion, the doctrine of inferred intent is not limited to case of sexual molestation or homicide. *Id.* at P. 62.

- The doctrine of inferred intent applies only in cases in which the insured's intentional act and the harm caused by that act are intrinsically tied so that the harm necessarily results from the act. *Id.* at P. 62.

Typical CGL Exclusions Related To EPLI Claims

Employment Related Practices Exclusion

Excludes claims for “bodily injury” and/or “personal and advertising 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, discrimination or malicious prosecution directed at that person; or

Employment Related Practices Exclusion

Exclusion applies:

1. Whether the injury-causing event occurs before, during or after employment;

2. Whether the insured may be liable as an employer or in any other capacity; and

3. To any obligation to share damages with or repay someone else who must pay damages because of the injury."

Other Coverage Defenses:

- Employment Discrimination typically produces neither “bodily injury”, “property damage” nor “personal and advertising injury”.

- Discrimination damages usually include past or future wages – economic losses not covered by CGL.

- When employment claims do produce bodily injury (physical manifestation of emotional distress) they fall within the workers’ compensation system and, thus, within workers’ compensation exclusion.

Other Coverage Defenses:

- Emotional distress, including stress from sexual harassment, does not constitute "bodily injury" for insurance coverage.

- *Dunn v. N. Star Rest.,* 8th Dist. Cuyahoga No. 79455, 2002-Ohio-4570, PP. 35 to 38; *David V. Nationwide Mutual Insurance Company*, 106 Ohio App.3d 298, 301, 302 (1st Dist. 1995).

Other Coverage Defenses:

- Those cases rely on *Tomlinson v. Skolnik*: "the words 'bodily injury are commonly and ordinarily used to designate any injury caused by external violence. * * *" 44 Ohio St.3d 11, 14 (1989) overruled on other grounds.

- Other considerations:

  - Companies That Give Bad References Can Find Themselves Facing Libel And Slander Claims That Could Be Covered Under The "Personal And Advertising Injury" Liability Coverage.

Employment Practices Liability Insurance ("EPLI")

"If you have employees, you need EPLI insurance" – The Hartford

Protects employers against claims such as:

- Discrimination
- Harassment
- Retaliation
- Violations of the FMLA

EPLI

- Wrongful discipline
- Wrongful failure to promote
- Wrongful termination
- Wage and hour violations, including wage and overtime calculation and job classifications

EPLI

- Per the EEOC, over 90,000 charges of employment discrimination were made in 2016
- More than 40% of all EPLI claims are filed against private employers with 15 to 100 employees
- Plaintiff attorneys are allowed, by statute, to recover attorney fees in successful discrimination claims

EPLI

- Most EPLI policies are written on a claims-made basis
- Many EPLI policies are “burning limits” policies
- EPLI provides coverage for judgments, settlements, back-pay, front pay, interest, attorney fees, costs and defense expenses
- Most EPLI policies exclude coverage for earned wages, benefits or the insured’s expenses, fines, penalties or taxes, amounts due under an employment contract, stock options and deferred compensation and injunctive relief

EPLI

- EPLI policies exclude coverage for claims involving workers' compensation, ERISA, unemployment compensation, COBRA, wage and hour claims, NLRB decisions and breach of contract

- Although most EPLI policies exclude claims for bodily injury and property damage, EPLI often covers claims for mental or emotional distress associated with covered losses

- The intended acts exclusion is generally limited to situations where the conduct has been established by a final adjudication

Title VII Prohibits Employment Discrimination Based On Sex, Race, Color, National Origin, Or Religion

- Sexual harassment violates Title VII

- Sexual harassment includes unwelcome sexual advances, requests for sexual favors and visual, verbal or physical contact of a sexual nature

- Two types of work place sexual harassment:

    1. Quid Pro Quo; and
    2. Hostile work environment

Title VII

- Quid pro quo harassment when - sexual advances or contact are made as a condition of employment, *i.e.* to receive, keep or advance in a job to receive certain benefits, promotions or privileges

- Hostile work environment - sexual behavior that is pervasive and creates an intimidating environment that affects the employee's ability to perform his/her job. (sexually explicit pictures/materials, offensive language, personal questions of a sexual nature, obscene jokes, or sexual contact).

Typical EPLI Grant of Coverage

"The Company will pay on behalf of the **Insured**, **Loss** for any **Employment Claim** first made during the **Policy Period** * * * for a **Wrongful Employment Practice**."

Definitions

- **Claim** means an Employment Claim or if ITEM 5 of the Declarations indicates that Third Party Claim Coverage is applicable, a **Third Party Claim**. * * *

- **Discrimination** mean any actual or alleged:

    1. Violation of any employment discrimination law; or

    2. Disparate treatment of, or the failure or refusal to hire a **Claimant** * * * because he or she is or claims to be a member of a class which is or is alleged to be legally protected.

Employment Claim means:

1. Written demand for monetary damages or non-monetary relief;

2. Civil proceeding commenced by service of a complaint or similar pleading;

3. Criminal proceeding commenced by filing of charges;

Employment Claim means:

4. Formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order, service of summons or similar documents, including a proceeding before the EEOC or any similar governmental agency; * * *.

5. An arbitration, mediation or similar ADR proceeding * * *.

Employment Claim means:

6. A written request to toll or waive a statute of limitations relating to a potential civil or administrative proceeding, * * *.

Loss means

Loss means **Defense Expenses** and money in which an **Insured** is legally obligated to pay as a result of a **Claim**, including settlement; judgment; back and front pay; compensatory damages; punitive or exemplary damages or the multiple portion of any multiplied damage award if insurable under the applicable law most favorable to the insurability of punitive, exemplary or multiplied damages * * * and legal fees * * *.

“Loss” does not include:

1. Civil or criminal fines; sanctions; liquidated damages other than liquidated damages awarded under the Age Discrimination and Employment Act or the Equal Pay Act; payroll or other taxes; or damages, penalties or relief deemed uninsurable under applicable law;

"**Loss**" does not include:

2. Future compensation, including salary or benefits, for a **Claimant** who will be hired, promoted to, or reinstated to employment pursuant to a settlement, court order, judgment, award or other resolution of a **Claim**; or that part of any judgment or settlement which constitutes front pay, future monetary losses including pension and other benefits, or other future economic relief * * *.

"Loss" does not include:

3. Medical, pension, disability, life insurance, **Stock Benefits** or other similar employee benefits, except to the extent that a judgment or settlement of a **Claim** includes a monetary component measured by the value of:

    a. Medical, pension, disability, life insurance, or other similar employee benefits; or

    b. **Stock Benefits** of an **Insured Organization** whose equity or debt securities are not publically traded, including on the stock exchange or other organized securities market;

As consequential damages for a **Wrongful Act**; * * *.

Sexual Harassment means

Sexual Harassment means any actual or alleged unwelcome sexual advances, request for sexual favors or any other conduct of a sexual nature:

1. Which is made a term or condition of a **claimant's** employment or advancement;

2. Which submission to or rejection of is used as a basis for decisions affecting the **Claimant**; or

3. Which has the purpose or effect of creating an intimidating or hostile or offensive work environment.

Workplace Harassment and Wrongful Act

Workplace Harassment means any actual or alleged harassment, other than **Sexual Harassment**, which creates a work environment that interferes with job performance, or creates an intimidating, hostile or offensive work environment.

Wrongful Act means:

1. A **Wrongful Employment Practice** occurring in the course of or arising out of a **Claimant**'s employment, application for employment or performance of services * * *.

Wrongful Employment Practice
means any actual or alleged:

1. Discrimination;
2. Retaliation;
3. Sexual Harassment;
4. Workplace Harassment;
5. Wrongful Termination;

Wrongful Employment Practice means any actual or alleged:

6. Breach of non-Employment Agreement;

7. Violation Of FMLA;

8. Employment-Related Misrepresentation;

9. Employment-Related Defamation, Including Libel Or Slander Or Invasion Of Privacy;

Wrongful Employment Practice means any actual or alleged:

10. Failure Or Refusal To Create or Enforce Adequate Workplace Or Employment Policies And Procedures The Employer Promotes, Including Wrongful Failure To Grant Bonuses, * * *.

11. Wrongful Discipline, Wrongful Demotion, Denial of Training, Deprivation Of Career Opportunity, Denial Of Seniority Or Evaluation;

Wrongful Employment Practice means any actual or alleged:

12. Employment-Related Wrongful Infliction Of Emotional Distress; or

13. Negligent Hiring, Supervision Of Others, Training Or Retention Committed Or Allegedly Committed By Any Insured But Only If Such Act Is Alleged In Connection With A **Wrongful Employment Practice** Set Forth In 1 Through 12 Above Provided That The Claim Alleging The Negligent Hiring, Supervision Of Others, Training Or Retention Is Brought By Or On Behalf Of Any **Claimant**.

Wrongful Termination means

Wrongful Termination means the actual, alleged or constructive termination of an employment relationship between a **Claimant** and the **Insured Organization** in a manner or for a reason that is contrary to applicable law or public policy, or in violation of an **Employment Agreement**.

Common EPLI Exclusions

- No coverage for bodily injury, sickness, disease, death or loss of consortium, except to that portion of a claim seeking loss or emotional distress, mental anguish, humiliation or loss of reputation;

- No coverage for any violation of responsibilities, duties or obligations under any law concerning Social Security, unemployment insurance, workers' compensation, disability insurance, or any similar related federal, state or local law or regulation;

Common EPLI Exclusions

- No coverage for any actual or alleged violation of the Worker Adjustment and Retraining Notification Act, OSHA, COBRA, the National Labor Relations Act or any similar or related federal, state or local law regulation, but this exclusion will not apply to claims for retaliation.

Common EPLI Exclusions

- No coverage arising out of ERISA violation;
- No third party coverage arising from alleged price discrimination or other violation of any anti-trust or unfair trade practices law.
- No coverage for any liability governing the terms of an independent contractor, temporary worker or leased employee agreement.

Common EPLI Exclusions

- No coverage for claims arising from obligations imposed by any Wage and Hour Law except for any alleged violation of the Equal Pay Act.

- No coverage for claims seeking payment associated with complying with the ADA.

Common EPLI Exclusions

- No coverage for severance pay, damages or penalties under a written employment agreement or under any policy providing for payment in the event of a separation from employment or sums sought for unpaid services.

Nat'l Waste Assocs., LLC v. Travelers Cas. & Sur. Co. of Am., 51 Conn. Supp. 369, 988 A.2d 402 (Judicial Dist. Hartford 2008)

- The insured purchased EPLI policy covering February 15, 2007 through February 15, 2009.

- In response to a May 12, 2007 wrongful termination lawsuit, insurer said it had no coverage because insured failed to disclose, on EPLI application, that the former employee had been a party to an action before the employment security appeals division in 2005 involving the insured.

Nat'l Waste Assocs. (continued)

- Exclusion stated: "This [l]iability [c]overage shall not apply to, * * * any [c]laim . . . based upon * * * or in any way relating to any * * * [w]rongful [a]ct * * * alleged in any prior or pending civil, criminal, administrative, or regulatory proceeding, * * *."

- The court granted insurer summary judgment since the prior employment security appeals division claim was an "administrative proceeding" within the EPLI exclusion.

Pinncale Anesthesia Consultants, P.A. v. St. Paul Mercury Ins. Co., 359 S.W.3d 389, 2012 Tex. App. LEXIS 1077 (5th Dist. Tex. 2012)

- Employee sued for breach of employment contract based on termination without cause.

- Jury found that the insured lacked cause to terminate.

- Exclusion stated: "Insurer shall not be liable for that part of Loss that constitutes . . . amounts owed under a written contract or agreement. . . ."

Pinncale Anesthesia Consultants (continued)

- Court affirmed insurer's summary judgment because the lost earnings were amounts due under a written employment contract. The damages were for past and future lost earnings.

- Exclusion precluded coverage for insured's liability to the employee for his lost earnings from the breach of the employment contract.

Kittansett Club v. Phila. Indem. Ins. Co., 2012 U.S. Dist. LEXIS 127939 (D.Mass. Sept. 10, 2012)

- EPLI policy.
- Employees filed a complaint against employer alleging "failure to distribute the full proceeds of gratuities to [the insured's] employees as required by law," raising allegations of breach of implied contract, interference with contractual relations, and unjust enrichment.
- Insurer notified the insured that it would not provide coverage.

Kittansett Club (continued)

- Parties disputed coverage.

- Earned wages exclusion: "[H]owever, there is no coverage * * * for any Claim related to, arising out of, based upon, or attributable to the refusal, failure or inability of any Insured(s) to pay Earned Wages."

- Exclusion applied for any claims arising out of an insured's failure to pay earned wages, as "wages" included tips.

Manganella v. Evanston Ins. Co., 700 F.3d 585, 2012 U.S. App. LEXIS 24360 (1st Cir. Nov. 27, 2012)

- Former employee's sexual harassment claim against a company's former president fell within an intentional acts EPLI exclusion.

- Arbitrators found that the president willfully failed to comply with a sexual harassment policy, inappropriately touched and propositioned an employee, and his denials were unworthy of belief.

Manganella (continued)

- Trial court: insurer was not required to defend or indemnify the president.

- Appellate court affirmed, finding that the former president's conduct fell within the intentional act exclusion as his conduct was committed with wanton, willful, reckless, or intentional disregard of the sexual harassment law.

W. Bend Mut. Ins. Co. v. Rosemont Exposition Servs., 378 Ill. App.3d 478, 880 N.E.2d 640, 2007 Ill. App. LEXIS 1275 (1st Dist. Ill.)

- Insurer issued an EPLI policy, a CGL policy, and a commercial umbrella policy. CGL contained an employment-related practices exclusion.

- Two married, former, employees sued, alleging defamation and retaliatory discharge, based on the insured's refusal to re-hire the employees after wife was injured, and employees were allegedly taking part in a fraudulent workers' compensation claim.

W. Bend Mut. Ins. Co. (continued)

- Insurer defended the insured until the EPLI limit was exhausted. Court found insurer had no duty to defend the insureds once the EPLI limit was exhausted due to CGL employment-related practices exclusion.

- Appellate court affirmed summary judgment for insurer.

Certain Underwriters at Lloyds of London v. Jeff Wyler Dealer Group, Inc., 2007 U.S. LEXIS 49399 (S.D. Ohio July 9, 2007)

- EPLI policy contained a notice provision that insured allegedly violated by providing late notice of a discrimination charge.

- EPLI policy: "You must see to it that we * * * are notified as soon as practicable, but in no event more than thirty (30) days from the time that a management or supervisory Employee becomes aware of the making of a Claim."

Certain Underwriters at Lloyds of London (continued)

- The employee filed a discrimination charge with the EEOC on August 28, 2001. The insured first received the charge November 7, 2001. The insured's insurance agent failed to forward the discrimination charge to any insurance company.

- EEOC found a violation of Title VII, and filed a class action lawsuit against the insured on September 25, 2003.

Certain Underwriters at Lloyds of London (continued)

- Insurer received notice on October 7, 2003. The insurer denied coverage for the lawsuit on May 20, 2004. The insurer agreed to defend the lawsuit, but denied coverage again on August 24 2005.

- Insurer sought a declaration that EPLI policy provided no coverage due to late notice.

- Court found a factual dispute as to whether the insured gave timely notice, by faxing the EEOC charge to the insurance agent.

Gauntlett v. Ill. Union Ins. Co., 2012 U.S. Dist. LEXIS 131086 (N.D. Cal. Sept. 13, 2012)

- EPLI policy excluded any loss under the Fair Labor Standards Act and rules or regulations under any similar provisions of federal, state or local statutory law or common law.

- EPLI policy excluded any loss arising out of an insured gaining any profit, remuneration, or financial advantage to which such insured was not legally entitled.

- An employee filed a complaint, based primarily on alleged wage and hour violations.

Gauntlett (continued)

- Insured notified insurer, which declined coverage, claiming that the allegations were not an EPLI covered "loss" or were otherwise not covered by the gain or profit, compensation earned and due, and employment contracts exclusions.

- In a dec action, ruled that the underlying lawsuit was based solely on wage and hour claims, the EPLI terms precluded coverage for wage and hour claims.

Gauntlett (continued)

- An appellate court found that the wage and hour claims were excluded from coverage and affirmed insurer's summary judgment.

Tucker v. Am. Int'l Group, Inc., 2015 U.S. Dist. LEXIS 9874 (D.Conn. Jan. 28, 2015)

- Plaintiff was discharged on October 16, 2003.

- A November 3, 2003 letter, from plaintiff's attorney, made claims of wrongful discharge and retaliation, demanded a severance package to avoid administrative action.

Tucker (continued)

- Plaintiff then sought damages from her former employer's EPLI insurer, arising from her unlawful discharge.

- Court found that the November 3, 2003 letter constituted a "claim", first made on that date, under the EPLI policy because it was delivered to a subdivision of the insured.

Tucker (continued)

- Plaintiff sought recovery under the 2004 policy but since the plaintiff's claim was first made in November 2003, before the effective policy period, the insurer was not obligated to indemnify the plaintiff with respect to the underlying judgment.

- The EPLI coverage did not apply to claims outside the policy period.

- Insurer's failure to pay the $4 million judgment, from the underlying trial, did not breach the 2004 policy.

Admiral Ins. Co. v. Debber, 442 F.Supp.2d 958, 2006 U.S. Dist. LEXIS 50498 (E.D.Cal. 2006)

- Insurer issued an EPLI policy based on the insureds' representations that no employment discrimination, harassment, or wrongful discharge claims had been filed within the past five years.

- Two such actions had been filed, though they had both been dismissed. A third action was filed for sexual harassment.

Admiral Ins. Co. (continued)

- Insurer defended the insureds in the third action, paid the arbitration award, and then filed its own action against the insureds, seeking to rescind the policies for material misrepresentation and to obtain reimbursement of defense fees and the arbitration award it paid.

- Trial court rescinded the policies, finding that the information requested by the insurer had been material to the contract, and warranted rescission of the policy ab initio.

Payless Shoesource, Inc. v. Travelers Cos., Inc., 569 F.Supp.2d 1189, 2008 U.S. Dist. 59746 (D.Kan. 2008)

- EPLI policy had liability limit of $10,000,000 for each policy period for all loss combined and $500,000 SIR for each claim.

- Underlying class action lawsuit alleged that over 300 individuals, who were insured's current or former employees, were improperly required and/or allowed to work off the clock, without compensation, in violation of California Statutes.

Payless Shoesource (continued)

- EPLI excluded coverage for actual or alleged violations of: the Fair Labor Standards Act, the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, COBRA, OSHA, ERISA, any workers' compensation, unemployment insurance, social security or disability benefits law, other similar provisions of any federal, state, or local statutory or common law.

Payless Shoesource (continued)

- Insurer denied coverage because the claims did not constitute wrongful employment practices under EPLI policy and claims were excluded.

- Court found the claims asserted in the underlying litigation were excluded by the EPLI policy's exclusion and granted insurer summary judgment.

Questions?