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# INSURANCE COVERAGE FOR WRONGFUL EMPLOYMENT PRACTICES

DOUGLAS R. RICHMOND\*

## *I. Introduction*

Businesses are routinely subjected to a variety of claims by current and former employees. For example, employees may sue their employers under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (Title VII),<sup>1</sup> the Americans with Disabilities Act (ADA),<sup>2</sup> the Age Discrimination in Employment Act (ADEA),<sup>3</sup> the Equal Pay Act,<sup>4</sup> section 101 of the Civil Rights Act of 1991,<sup>5</sup> and under certain circumstances, the Rehabilitation Act of 1973 as amended by the Civil Rights Act of 1991.<sup>6</sup> Governmental employers may be the target of section 1983<sup>7</sup> claims by aggrieved employees. All fifty states<sup>8</sup> and many local governments have separate laws and ordinances prohibiting discrimination. Potential plaintiffs also have a number of common law theories at their disposal. Former employees may sue for blacklisting, wrongful discharge, constructive discharge, retaliatory discharge, breach of express or implied contract, breach of an implied covenant of good faith and fair dealing, defamation, and negligent or intentional infliction of emotional distress. Indeed, employer liability is expanding at "a bewildering pace."<sup>9</sup>

Traditionally, employers defended such suits with counsel of their choice, and paid any settlements or judgments themselves.<sup>10</sup> As litigation costs and actual and

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1. 42 U.S.C. §§ 2000e-2000e-17 (1988 & Supp. V 1993).

2. *Id.* §§ 12,101-12,213.

3. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993).

4. 29 U.S.C. § 206(d) (1988).

5. 42 U.S.C. § 1981 (1988).

6. 29 U.S.C. §§ 701-797b (1988 & Supp. V 1993). Section 504 of the Rehabilitation Act of 1973 (codified at 29 U.S.C. § 794(a) (1988)) applies to programs or activities receiving federal financial assistance. *See, e.g.*, *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995) (section 504 and ADA claims against county transportation agency).

7. 42 U.S.C. § 1983 (1988).

8. David B. Ritter & Marcia E. Goodman, *Insurance Coverage of Employee Claims Against Employers*, in *TORT & INSURANCE PRACTICE SECTION*, ABA, *LITIGATING THE SEXUAL HARASSMENT CASE* 49, 90 n.5 (1994).

9. Robert A. Machson & Joseph P. Monteleone, *Insurance Coverage for Wrongful Employment Practices Claims Under Various Liability Policies*, 49 *BUS. LAW.* 689, 689 (1994).

10. *See* Ritter & Goodman, *supra* note 8, at 51.

potential damage awards increase, however, employers increasingly look to their insurers for the defense and indemnity of wrongful employment practices claims. Employers may seek coverage under commercial general liability, directors' and officers' liability, and workers' compensation and employer's liability policies. A number of major insurers now write employment practices liability coverage, either as a separate policy or as an endorsement to another policy. In short, insurance coverage for wrongful employment practices is now a significant concern for employers and insurers alike.

## II. Wrongful Employment Practices

The generic term "wrongful employment practices" used here is intentionally broad. Breadth is essential, because current and former employees' claims are limited only by their attorneys' imaginations, and even similar (if not identical) claims may be differently labeled.<sup>11</sup>

"Discrimination" claims are typically brought under Title VII, which prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin."<sup>12</sup> Title VII applies to private employers with at least fifteen employees in an industry affecting interstate commerce.<sup>13</sup> The Equal Employment Opportunity Commission (EEOC) primarily implements and enforces Title VII.<sup>14</sup>

Discrimination actions generally fall into one of two categories: "disparate treatment" and "disparate impact" cases.

"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin . . . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . .<sup>15</sup>

Title VII proscribes both the disparate treatment of employees and the disparate impact of employers' policies.<sup>16</sup> "Disparate treatment is the most obvious form of discrimination."<sup>17</sup> Disparate impact discrimination, on the other hand, is the product

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11. This article does not purport to address all potential plaintiffs' claims, or all wrongful employment practices. The discussion of federal statutory claims or causes of action is not intended to be exhaustive.

12. 42 U.S.C. § 2000e-2(a)(1) (1988).

13. *Id.* § 2000e-2(b).

14. *Machson & Monteleone*, *supra* note 9, at 691.

15. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

16. Whether disparate impact theory applies to ADEA claims is an open question. See *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995).

17. *Edwards v. Wallace Community College*, 49 F.3d 1517, 1520-21 (11th Cir. 1995); *EEOC v.*

of subtle practices. Discriminatory treatment claims hinge on proof of discriminatory motive, while discriminatory impact claims do not.<sup>18</sup> The real difference between the two, then, is intent. Additionally, disparate treatment claims afford plaintiffs greater compensatory damages and the opportunity to recover punitive damages.<sup>19</sup>

Absent direct evidence of discrimination, a Title VII or ADEA plaintiff must make a *prima facie* showing of discrimination. Courts apply what is commonly known as the *McDonnell Douglas* test, named for the Supreme Court's decision announcing it, *McDonnell Douglas Corp. v. Green*.<sup>20</sup> Depending on the particular case,<sup>21</sup> a plaintiff must demonstrate that (1) she is a member of a protected class; (2) she was qualified for the subject job, or was performing to the employer's legitimate expectations; (3) she was terminated or rejected; and (4) she was replaced by a person outside the protected class, a person outside the protected class was treated more favorably, or the employer continued to seek applicants with her qualifications after her rejection.<sup>22</sup> An employer may rebut the presumption of discrimination by producing evidence that it preferred someone other than the plaintiff for legitimate, nondiscriminatory reasons.<sup>23</sup> If the defendant rebuts the plaintiff's allegations, the plaintiff's *prima facie* showing is no longer relevant.<sup>24</sup> Of course, the plaintiff can still prevail by demonstrating that the employer's stated reasons for its actions are pretextual.<sup>25</sup> The plaintiff bears the ultimate burden of persuasion to show that the challenged employment decision or practice was the result of illegal discrimination.<sup>26</sup>

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Francis W. Parker Sch., 41 F.3d 1073, 1076 (7th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3707 (U.S. June 19, 1995) (No. 94-1558).

18. *Edwards*, 49 F.3d at 1520-21; *Francis W. Parker*, 41 F.3d at 1076.

19. 42 U.S.C. §§ 1981a(a)(1) & (2) (1988).

20. 411 U.S. 792, 802 (1973).

21. The *McDonnell Douglas* framework is flexible and may be adapted to fit different situations. *Cherry v. American Tel. & Tel. Co.*, 47 F.3d 225, 228 (7th Cir. 1995); *LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 172 (2d Cir. 1995); *Waldron v. SL Indus.*, 56 F.3d 491, 494 n.3 (3d Cir. 1995).

22. *See Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1073 (11th Cir. 1995); *Krenik v. County of LeSueur*, 47 F.3d 953, 957 (8th Cir. 1995); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1512 (D.C. Cir. 1995); *Roper v. Peabody Coal Co.*, 47 F.3d 925, 926 (7th Cir. 1995).

23. *Coutu*, 47 F.3d at 1073; *Krenik*, 47 F.3d at 958.

24. *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995); *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1091 (1st Cir. 1995); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1379 (10th Cir. 1994); *Turner v. AmSouth Bank*, 36 F.3d 1057, 1061 (11th Cir. 1994).

25. *EEOC v. Louisiana Office of Community Servs.*, 47 F.3d 1438, 1443 (5th Cir. 1995); *Lidge-Myrtill v. Deere & Co.*, 49 F.3d 1308, 1311 (8th Cir. 1995); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 728 (3d Cir. 1995); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104 (1995); *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329-30 (6th Cir. 1994); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 119 (2d Cir. 1994).

26. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1993); *see also Murray v. City of Sapulpa*, 45 F.3d 1417, 1421 (10th Cir. 1995); *Cronin*, 46 F.3d at 203; *Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 971 (8th Cir. 1994); *Lam v. University of Haw.*, 40 F.3d 1551, 1564 (9th Cir. 1994).

The *McDonnell Douglas* test is inapplicable where a plaintiff presents direct evidence of discrimination.<sup>27</sup> In the Title VII context, direct evidence includes any document or statement showing a discriminatory motive on its face.<sup>28</sup> The ADEA evidentiary analysis, including the shifting burden of proof, parallels that used in Title VII cases.<sup>29</sup>

Under the ADA, an individual has a "disability" if he has a mental or physical impairment that substantially limits one or more of his major life activities, he has a record of such an impairment, or he is regarded as having such an impairment.<sup>30</sup> In order to incur liability under the ADA, an employer must know of an employee's claimed disability. An employer obviously cannot discriminate against an employee "because of" a disability unless it knows of the disability.<sup>31</sup>

A plaintiff makes a *prima facie* ADA case by establishing (1) that she is disabled within the meaning of the Act; (2) that she can perform essential job functions, with or without reasonable accommodations; and (3) that she was rejected or terminated because of her disability.<sup>32</sup> Like Title VII and ADEA cases, ADA cases involve shifting burdens. Once a plaintiff satisfies her initial three-part test, the burden then shifts to the employer to show its inability to reasonably accommodate the plaintiff without undue hardship. The plaintiff must then come forward with evidence concerning her individual capabilities and suggestions for possible accommodations.<sup>33</sup> The plaintiff bears the ultimate burden of persuasion at all times.<sup>34</sup>

Sexual harassment claims were energized by the Senate Judiciary Committee's confirmation hearings for Supreme Court Justice Clarence Thomas. In the year following Justice Thomas's confirmation, sexual harassment claims reported to the EEOC rose fifty percent.<sup>35</sup> Sexual harassment is a form of sex discrimination prohibited by Title VII.<sup>36</sup>

"Sexual harassment" generally refers to unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.<sup>37</sup> *Quid pro quo* harassment occurs when submission to such conduct is an express or implied condition for better workplace treatment, compensation, or promotion.<sup>38</sup> Sexual harassment need not include an economic *quid pro quo*. So-called "hostile

27. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1984); *see also Johnson v. New York*, 49 F.3d 75, 79 (2d Cir. 1995).

28. *Portis v. First Nat'l Bank*, 34 F.3d 325, 329 (5th Cir. 1994).

29. *Thomas v. IBM*, 48 F.3d 478, 484 (10th Cir. 1995).

30. 42 U.S.C. § 12102(2) (1988 & Supp. V 1993).

31. *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 932 (7th Cir. 1995).

32. *See White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995); *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 212-13 (4th Cir. 1994).

33. *White*, 45 F.3d at 361; *Mason v. Frank*, 32 F.3d 315, 319 (8th Cir. 1994).

34. *White*, 45 F.3d at 361; *DeLuca v. Winer Indus.*, 53 F.3d 793, 797-98 (7th Cir. 1995).

35. *Machson & Monteleone, supra* note 9, at 693.

36. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); *see also Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).

37. *Meritor Sav. Bank*, 477 U.S. at 65.

38. *See Cram v. Lamson & Sessions, Inc.*, 49 F.3d 466, 473 (8th Cir. 1995); *Ellert v. University of Tex.*, 52 F.3d 543, 545 (5th Cir. 1995); *Nichols v. Frank*, 42 F.3d 503, 509 (9th Cir. 1994).

environment" claims are also actionable. This latter form of harassment occurs where the challenged conduct has the purpose or effect of unreasonably interfering with the subject's work performance, or creating an intimidating, hostile, or offensive work environment.<sup>39</sup> Isolated, innocuous or sporadic incidents of offensive behavior generally will not support a finding of sexual harassment.<sup>40</sup>

The Supreme Court most recently examined sexual harassment in *Harris v. Forklift Systems*,<sup>41</sup> a hostile environment case. In *Harris*, the Court was asked to determine whether a plaintiff must suffer serious psychological injury in order for sexual harassment to be actionable.<sup>42</sup> The court concluded that Title VII imposed no such requirement. "So long as the environment would reasonably be perceived, and is perceived as hostile or abusive . . . there is no need for it also to be psychologically injurious."<sup>43</sup>

Race discrimination victims have remedies beyond Title VII. "An employee's right to employment free from racial discrimination is one of the most widely recognized and protected civil rights."<sup>44</sup> Under 42 U.S.C. § 1981, employees are protected against "nongovernmental discrimination," as well as discrimination under color of state law.<sup>45</sup> Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.<sup>46</sup>

Section 1981 is broader than Title VII in some respects because it includes no threshold number of employees for purposes of employer liability.<sup>47</sup> Additionally, section 1981 does not limit plaintiffs' potential recovery of compensatory and

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39. *Meritor Sav. Bank*, 477 U.S. at 65.

40. *Koelsch v. Beltone Elec. Corp.*, 46 F.3d 705, 708 (7th Cir. 1995); *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3d Cir. 1995); *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994). The Seventh Circuit attempted to explain the fine line between potentially actionable harassment and inactionable vulgarity in *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995):

On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures . . . . On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers . . . . It is not a bright line, obviously, this line between merely unpleasant working environment . . . and a hostile or deeply repugnant one . . . .

*Id.* at 430-31 (citations omitted).

41. 114 S. Ct. 367 (1993).

42. *Id.* at 370.

43. *Id.* at 371 (citation omitted).

44. *Barbour v. Merrill*, 48 F.3d 1270, 1278 (D.C. Cir. 1995).

45. 42 U.S.C. § 1981(c) (1988).

46. *Id.* § 1981(a).

47. *See Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1515 n.3 (1994).

punitive damages, and there is no requirement of administrative exhaustion. However, employers can violate section 1981 only by intentional discrimination.<sup>48</sup>

Plaintiffs who can establish that their employer deprived them of a constitutional right while acting under color of state law may sue under 42 U.S.C. § 1983.<sup>49</sup> For example, public employees might allege that they were discharged or retaliated against for exercising their First Amendment right to free speech.<sup>50</sup> Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or amenities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .<sup>51</sup>

In sum, section 1983 does not create substantive rights, but provides a remedy for the violation of rights created by federal law.<sup>52</sup> Mere negligence will not support a section 1983 claim;<sup>53</sup> rather, the defendant must act deliberately or recklessly.<sup>54</sup> Additionally, the doctrine of *respondeat superior* is not a viable basis for section 1983 liability.<sup>55</sup>

Wrongful discharge claims are based on an at-will employee's termination or layoff for improper purposes. Wrongful discharge plaintiffs may allege they were fired because of their age, sex, or race, or because they suffer some disability. Plaintiffs also routinely allege they were fired for reasons contrary to public policy, such as refusing to commit a crime directed by their employers, reporting violations of the law, or asserting legal rights.<sup>56</sup> In order to succeed on a wrongful discharge

48. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982); *see also National Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 714 (5th Cir. 1994); *Grooms v. Wiregrass Elec. Coop.*, 877 F. Supp. 602, 607 (M.D. Ala. 1995).

49. *See Broman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995); *Tatro v. Kervin*, 41 F.3d 9, 14 (1st Cir. 1994).

50. *See, e.g., Barnard v. Jackson County, Mo.*, 43 F.3d 1218 (8th Cir. 1995); *Blackburn v. Marshall City*, 42 F.3d 925 (5th Cir. 1995); *Feldman v. Philadelphia Hous. Auth.*, 43 F.3d 823 (3d Cir. 1994).

51. 42 U.S.C. § 1983 (1988).

52. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

53. *See Daniels v. Williams*, 474 U.S. 327, 333 (1985).

54. *Romero v. Fay*, 45 F.3d 1472, 1478 (10th Cir. 1995); *Walton v. Alexander*, 44 F.3d 1297, 1301-02 (5th Cir. 1995).

55. *Green v. Bauvi*, 46 F.3d 189, 194 (2d Cir. 1995); *Randle v. Parker*, 48 F.3d 301, 303 (8th Cir. 1995).

56. *See, e.g., Sunshine Inv. v. Brooks*, 642 So. 2d 408, 410-11 (Ala. 1994); *Leggett v. Centro, Inc.*, 887 S.W.2d 523, 524-25 (Ark. 1994); *Leibert v. Transworld Sys.*, 39 Cal. Rptr. 2d 65, 70-72 (Ct. App. 1995); *Herman v. Western Fin. Corp.*, 869 P.2d 696, 703-05 (Kan. 1994); *Mountain Clay, Inc. v. Commission on Human Rights*, 830 S.W.2d 395 (Ky. Ct. App. 1992); *McAm v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 604-07 (Miss. 1993); *Lay v. St. Louis Helicopter Airways*, 869 S.W.2d 173, 176-77 (Mo. Ct. App. 1993); *Taylor v. Cache Creek Nursing Ctrs.*, 891 P.2d 607 (Okla. Ct. App. 1994); *Anderson v. Evergreen Int'l Airlines*, 886 P.2d 1068 (Or. Ct. App. 1994); *Reynolds v. Ozark Motor Lines*, 887 S.W.2d 822, 825 (Tenn. 1994); *Gallipo v. City of Rutland*, 656 A.2d 635 (Vt. 1994); *Roberts*

claim under the "public policy" exception to the at-will employment doctrine, the action must vindicate a broad public interest, and not merely advance the plaintiff's personal or proprietary interests.<sup>57</sup> A constructive discharge occurs where the employer makes the employee's working conditions intolerable, essentially forcing him to quit.<sup>58</sup> The constructive discharge standard is an objective one, with the proper focus being on the working conditions imposed.<sup>59</sup>

### III. Insurance Fundamentals

Employers sued for their alleged wrongful employment practices may look for coverage under general liability, directors' and officers' liability, errors and omissions, or workers' compensation and employer's liability insurance policies.

#### A. Commercial General Liability Insurance

Commercial general liability (CGL) insurance is the primary form of liability coverage for most businesses. A standard CGL policy covers claims alleging bodily injury or property damage caused by an occurrence. Standard policies define "bodily injury" to include "bodily injury, sickness or disease."<sup>60</sup> As a rule, emotional distress alone does not constitute bodily injury.<sup>61</sup> "Bodily injury is a

v. Adkins, 444 S.E.2d 725 (W. Va. 1994).

57. See *City of Green Forest v. Morse*, 873 S.W.2d 155, 158 (Ark. 1994); *Hunter v. Up-Right, Inc.*, 864 P.2d 88, 94-95 (Cal. 1993).

58. *Beard v. Baum*, 796 P.2d 1344, 1349-50 (Alaska 1990); *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1030-32 (Cal. 1994); *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 362 (D.C. 1993); *Vagts v. Perry Drug Stores*, 516 N.W.2d 102, 105 (Mich. Ct. App. 1994); *Manning v. City of Hazel Park*, 509 N.W.2d 874, 880 (Minn. Ct. App. 1993), *appeal dismissed*, 521 N.W.2d 610 (Minn. 1994); *Missouri Div. of Employment Sec. v. Labor & Indus. Relations Comm'n of Mo.*, 739 S.W.2d 747, 749 (Mo. Ct. App. 1987); *Sullivan v. Sisters of Charity of Providence of Mont.*, 885 P.2d 488, 494-95 (Mont. 1994); *Martin v. Sears, Roebuck & Co.*, 899 P.2d 551, 553 (Nev. 1995); *Fischer v. KPMG Peat Marwick*, 607 N.Y.S.2d 309, 311 (App. Div. 1994); *Kroen v. Bedway Sec. Agency*, 633 A.2d 628, 633 (Pa. Super. Ct. 1993); *Slack v. Kanawha County Hous. & Redevelopment Auth.*, 423 S.E.2d 547, 558 (W. Va. 1992).

59. See *Towle v. Flexel Corp.*, 867 F. Supp. 954, 958-59 (D. Kan. 1994); *Cameron v. Beard*, 864 P.2d 538, 547 (Alaska 1993); *Gibson v. Aro Corp.*, 38 Cal. Rptr. 2d 882, 888 (Ct. App. 1995); *Seery v. Yale-New Haven Hosp.*, 554 A.2d 757, 761 (Conn. App. Ct. 1989); *Motley v. Illinois Human Rights Comm'n*, 636 N.E.2d 100, 104-05 (Ill. App. Ct. 1994); *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161, 168-69 (Mass. 1995); *Soentgen v. Quain & Ramstad Clinic*, 467 N.W.2d 73, 83 (N.D. 1991); *Schwartz v. Comcorp, Inc.*, 633 N.E.2d 551, 554 (Ohio Ct. App. 1993), *appeal dismissed*, 631 N.E.2d 159 (Ohio 1994); *Hammond v. Katy Indep. Sch. Dist.*, 821 S.W.2d 174, 177 (Tex. Ct. App. 1991).

60. SUSAN J. MILLER & PHILIP LEFEBVRE, 1 MILLER'S STANDARD INSURANCE POLICIES ANNOTATED 409 (1991).

61. *Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272, 1284-85 (7th Cir. 1995) (interpreting Wisconsin law); *Travelers Indem. Co. v. Holloway*, 17 F.3d 113, 115 (5th Cir. 1994) (interpreting Texas law); *McLaughlin v. National Union Fire Ins. Co.*, 29 Cal. Rptr. 2d 559, 569 (Ct. App. 1994); *National Casualty Co. v. Great S.W. Fire Ins. Co.*, 833 P.2d 741, 746-47 (Colo. 1992); *University of Ill. v. Continental Casualty Co.*, 599 N.E.2d 1338, 1353 (Ill. App. Ct.), *appeal denied*, 606 N.E.2d 1235 (Ill. 1992); *Wayne Township Bd. of Sch. Comm'rs v. Indiana Ins. Co.*, 650 N.E.2d 1205, 1210-11 (Ind. Ct. App. 1995); *McNeill v. Metropolitan Property & Liab. Ins. Co.*, 650 N.E.2d 793, 795 (Mass. 1995); *State Farm Fire & Casualty Co. v. Basham*, 520 N.W.2d 713, 715 (Mich. Ct. App. 1994); *Mellow v. Medical*

narrow term and encompasses only physical injuries to the body and the consequences thereof.<sup>62</sup> A few states have abandoned the physical injury requirement, affording coverage for emotional distress in the absence of physical injuries or symptoms.<sup>63</sup> Even in those states strictly adhering to the physical injury requirement for coverage, physical manifestations of emotional distress trigger coverage for bodily injury.<sup>64</sup> "Property damage" means "physical injury to or destruction of tangible property," or "loss of use of tangible property which has not been physically injured or destroyed" occurring during the policy period.<sup>65</sup>

The alleged bodily injury or property damage at issue must be caused by an "occurrence." An occurrence is generally defined as "an accident, or event including continuous or repeated exposure to conditions, which results in bodily injury . . . neither expected nor intended from the standpoint of the insured."<sup>66</sup> By virtue of this definition, CGL policies do not insure against insureds' intentional acts. An intentional act is not an accident and it therefore cannot be an "occurrence."<sup>67</sup> Moreover, standard CGL policies expressly and specifically provide that they do not apply to bodily injury or property damage "expected or intended" from the insured's standpoint.<sup>68</sup> This latter provision is simply an intentional acts exclusion.

Some CGL policies, and those CGL policies with a standard broad form endorsement, protect insureds against "personal injury" claims. Standard CGL policies define personal injury as follows:

"Personal Injury" means injury arising out of one or more of the following offenses committed during the policy period:

- (1) false arrest, detention, imprisonment, or malicious prosecution;
- (2) wrongful entry or eviction or other invasion of the right of private occupancy;
- (3) a publication or utterance
  - (a) of a libel or slander or other defamatory or disparaging material, or

Malpractice Joint Underwriting Ass'n, 567 A.2d 367, 368 (R.I. 1989); Northwest Farm Bureau Ins. Co. v. Roberts, 765 P.2d 328, 330 (Wash. Ct. App. 1988).

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

63. See, e.g., First Ins. Co. of Haw. v. Lawrence, 881 P.2d 489, 492-94 (Haw. 1994); Lavanant v. General Accident Ins. Co. of Am., 595 N.E.2d 819, 822-23 (N.Y. 1992); State Farm Mut. Auto. Ins. Co. v. Ramsey, 374 S.E.2d 896, 896 (S.C. 1988).

64. See, e.g., Garvis v. Employers Mut. Casualty Co., 497 N.W.2d 254, 257 (Minn. 1993); Voorhees v. Preferred Mut. Ins. Co., 607 A.2d 1255, 1262 (N.J. 1992).

65. MILLER & LEFEBVRE, *supra* note 60, at 409.

66. See, e.g., Great Lakes Chem. Corp. v. International Surplus Lines Ins. Co., 638 N.E.2d 847, 853 (Ind. Ct. App. 1994); Smartfoods, Inc. v. Northbrook Property & Casualty Co., 618 N.E.2d 1365, 1367 (Mass. App. Ct. 1993); SCSC Corp. v. Allied Mut. Ins. Co., 533 N.W.2d 603, 609 (Minn. 1995); Sanborn Plastics Corp. v. St. Paul Fire & Marine Ins. Co., 616 N.E.2d 988, 993 (Ohio Ct. App. 1993); Union Pac. Resources Co. v. Aetna Casualty & Sur. Co., 894 S.W.2d 401, 403 (Tex. Ct. App. 1994); see also MILLER & LEFEBVRE, *supra* note 60, at 409.

67. Farmers Union Mut. Ins. v. Kienenger, 847 P.2d 1360, 1361 (Mont. 1993).

68. MILLER & LEFEBVRE, *supra* note 60, at 434.2.

(b) in violation of an individual's right of privacy; except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.<sup>69</sup>

Employees' allegations of defamation or the invasion of their privacy rights may constitute covered personal injury. However, the standard broad form personal injury endorsement excludes coverage for personal injury "arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the insured."<sup>70</sup> Defamatory statements made with knowledge of their falsity are also excluded.<sup>71</sup>

The general liability policy at issue in *City of Boise v. Planet Insurance Co.*<sup>72</sup> defined "personal injury" to include "[b]odily injury, sickness, disease, disability, shock, fright, mental anguish, and mental injury, including death at any time [as a result]."<sup>73</sup> An assistant fire chief, Patrick Dunn, sued the city, alleging that he was wrongfully demoted. He was awarded a judgment of more than \$288,000, including \$46,608 for emotional distress. The city's insurer denied coverage.<sup>74</sup>

The Supreme Court of Idaho observed that Dunn's emotional distress attributable to his demotion constituted "personal injury" as defined in the city's policy. Specifically, emotional distress fell within "mental anguish, and mental injury."<sup>75</sup> After holding that an employee personal injury exclusion did not exclude coverage,<sup>76</sup> the *City of Boise* court next addressed whether Dunn's demotion was an "occurrence." Because the fire chief who demoted Dunn did not intend to cause his emotional distress, the demotion was an "occurrence." The insurer was therefore obligated to pay the judgment.<sup>77</sup>

Liability insurers owe their insureds two express contractual duties: a duty to defend and a duty to indemnify.<sup>78</sup> The insurer's duty to defend arises upon the insured's tender,<sup>79</sup> and it is much broader than the duty to indemnify.<sup>80</sup> Any

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69. *Id.* at 436.

70. *Id.*

71. *Id.*

72. 878 P.2d 750 (Idaho 1994).

73. *Id.* at 752.

74. *Id.* at 753.

75. *Id.*

76. *Id.* at 753-55.

77. *Id.* at 756-57.

78. See ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 561-62 (1987).

79. *Oscar W. Larson Co. v. United Capitol Ins. Co.*, 845 F. Supp. 458, 460 (W.D. Mich. 1993); *Purvis v. Hartford Accident & Indem. Co.*, 877 P.2d 827, 830 (Ariz. Ct. App. 1994); *Montrose Chem. Corp. v. Superior Court*, 861 P.2d 1153, 1157 (Cal. 1993); *Empire Fire & Marine Ins. Co. v. Clarendon Ins. Co.*, 642 N.E.2d 790, 793 (Ill. App. Ct. 1994); *Pedro Cos. v. Sentry Ins.*, 518 N.W.2d 49, 51 (Minn. Ct. App. 1994).

80. *Audubon Ins. Co. v. Terry Rd. Wine & Liquor, Inc.*, 875 F. Supp. 1243, 1247 (S.D. Miss. 1995); *Fireman's Fund Ins. Co. v. National Bank for Coops.*, 849 F. Supp. 1347, 1363 (N.D. Cal. 1994); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089 (Colo. 1991); *Irvine v. Prudential Property & Casualty Ins. Co.*, 630 So. 2d 579, 580 (Fla. Dist. Ct. App. 1993); *Waitzman v. Classic Syn-*

doubts as to whether a defense is owed are always resolved in the insured's favor.<sup>81</sup> Even so, an insurer has no duty to defend when there is no potential for coverage under any theory.<sup>82</sup>

Generally, whether a defense is owed is determined by comparing the petition or complaint with the policy.<sup>83</sup> Some jurisdictions have strayed from the "eight corners" rule, requiring the insurer to look beyond the pleadings to determine

dicate, 648 N.E.2d 104, 108 (Ill. App. Ct. 1995); *Essex Ins. Co. v. Fieldhouse, Inc.*, 506 N.W.2d 772, 775 (Iowa 1993); *Dennis v. Finish Line, Inc.*, 636 So. 2d 944, 946 (La. Ct. App.), *writ denied*, 644 So. 2d 636 (La. 1994); *State Mut. Ins. Co. v. Bragg*, 589 A.2d 35, 36 (Me. 1991); 26 *Adar N.B. Corp. v. Stewart Title Ins. Co.*, 610 N.Y.S.2d 7, 8 (App. Div. 1994); *Gebrayel v. Transamerica Title Ins. Co.*, 888 P.2d 83, 86 (Or. Ct. App.), *review denied*, 892 P.2d 1024 (Or. 1995); *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 666 (Va. 1994); *Elliott v. Donahue*, 485 N.W.2d 403, 407 (Wis. 1992).

81. *Legarra v. Federated Mut. Ins. Co.*, 42 Cal. Rptr. 2d 101, 105 (Ct. App. 1995); *Washington v. State Farm Fire & Casualty Co.*, 629 A.2d 24, 26 (D.C. 1993); *Chantel Assocs. v. Mount Vernon Fire Ins. Co.*, 656 A.2d 779, 786 (Md. 1995); *SCA Servs. v. Transportation Ins. Co.*, 646 N.E.2d 394, 396-97 (Mass. 1995); *American Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 523 N.W.2d 841, 844 (Mich. Ct. App. 1994); *Atlantic Employers Ins. Co. v. Chartwell Manor Sch.*, 655 A.2d 954, 958 (N.J. Super. Ct. App. Div. 1995); *Hart Constr. Co. v. American Family Mut. Ins. Co.*, 514 N.W.2d 384, 389 (N.D. 1994); *Allstate Ins. Co. v. Russo*, 641 A.2d 1304, 1306 (R.I. 1994); *North Star Mut. Ins. Co. v. Kneen*, 484 N.W.2d 908, 912 (S.D. 1992); *Clemons v. State Farm Fire & Casualty Co.*, 879 S.W.2d 385, 392 (Tex. Ct. App. 1994); *School Dist. of Shorewood v. Wausau Ins. Cos.*, 488 N.W.2d 82, 87 (Wis. 1992).

82. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*, 884 P.2d 1048, 1057-59 (Cal. 1994); *MGM, Inc. v. Liberty Mut. Ins. Co.*, 855 P.2d 77, 79-80 (Kan. 1993); *Allstate Ins. Co. v. Roy*, 653 So. 2d 1327, 1333 (La. Ct. App. 1995); *Columbia Nat'l Ins. v. Pacesetter Homes, Inc.*, 532 N.W.2d 1, 10 (Neb. 1995); *see, e.g., Thompson v. West Am. Ins. Co.*, 839 S.W.2d 579 (Ky. Ct. App. 1992); *American Casualty Co. v. Corum*, 885 P.2d 726 (Or. Ct. App. 1994).

83. *Bernstein v. North E. Ins. Co.*, 19 F.3d 1456, 1457 (D.C. Cir. 1994) (applying District of Columbia law); *Cincinnati Ins. Co. v. Lee Anesthesia*, 641 So. 2d 247, 249 (Ala. 1994); *Sauer v. Home Indem. Co.*, 841 P.2d 176, 180-81 (Alaska 1992); *Tri-State Ins. Co. v. Sing*, 850 S.W.2d 6, 7 (Ark. Ct. App. 1993); *Gerrity Co. v. CIGNA Property & Casualty Ins. Co.*, 860 P.2d 606, 607 (Colo. Ct. App. 1993); *Schwartz v. Stevenson*, 657 A.2d 244, 246 (Conn. App. Ct. 1995); *Smith v. General Accident Ins. Co. of Am.*, 641 So. 2d 123, 124 (Fla. Dist. Ct. App. 1994); *Hames Contracting, Inc. v. Georgia Ins. Co.*, 440 S.E.2d 738, 739 (Ga. Ct. App. 1994); *Hawaiian Holiday Macadamia Nut Co. v. Industrial Indem. Co.*, 872 P.2d 230, 233 (Haw. 1994); *City of Idaho Falls v. Home Indem. Co.*, 888 P.2d 383, 387 (Idaho 1995); *Dixon Distrib. Co. v. Hanover Ins. Co.*, 641 N.E.2d 395, 398 (Ill. 1994); *Ottumwa Hous. Auth. v. State Farm Fire & Casualty Co.*, 495 N.W.2d 723, 726 (Iowa 1993); *James Graham Brown Found. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 279 (Ky. 1991); *Steptore v. Masco Constr. Co.*, 643 So. 2d 1213, 1218 (La. 1994); *Commercial Union Ins. Co. v. Royal Ins. Co.*, 658 A.2d 1081, 1082 (Me. 1995); *Liquor Liab. Joint Underwriting Ass'n v. Hermitage Ins. Co.*, 644 N.E.2d 964, 967 (Mass. 1995); *Pacific Employers Ins. Co. v. Michigan Mut. Ins. Co.*, 514 N.W.2d 239, 241 (Mich. Ct. App. 1994); *Green Mountain Ins. Co. v. Foreman*, 641 A.2d 230, 232 (N.H. 1994); *Lopez v. New Mexico Pub. Sch. Ins. Auth.*, 870 P.2d 745, 747 (N.M. 1994); *Smith v. Nationwide Mut. Fire Ins. Co.*, 446 S.E.2d 877, 878 (N.C. Ct. App. 1994); *Leiford v. Gutoski*, 877 P.2d 80, 82 (Or. 1994); *Aetna Casualty & Sur. Co. v. Roe*, 650 A.2d 94, 98-99 (Pa. Super. Ct. 1994); *Federated Mut. Ins. Co. v. Piedmont Petroleum Corp.*, 444 S.E.2d 532, 533 (S.C. Ct. App. 1994); *City of Ft. Pierre v. United Fire & Casualty Co.*, 463 N.W.2d 845, 847 (S.D. 1990); *St. Paul Fire & Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831, 834-35 (Tenn. 1994); *Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 121 (Tex. Ct. App. 1994); *City of Burlington v. National Union Fire Ins. Co.*, 655 A.2d 719, 721 (Vt. 1994); *Brenner v. Lawyers Title Ins. Corp.*, 397 S.E.2d 100, 102 (Va. 1990); *Atlantic Mut. Ins. Co. v. Roffe, Inc.*, 872 P.2d 536, 538 (Wash. Ct. App. 1994); *City of Edgerton v. General Casualty Co.*, 517 N.W.2d 463, 470 (Wis. 1994); *Reisig v. Union Ins. Co.*, 870 P.2d 1066, 1068 (Wyo. 1994).

whether it owes the insured a defense.<sup>84</sup> These jurisdictions properly view the eight corners rule as an *inclusory* standard.<sup>85</sup> In other words, every petition or complaint alleging a covered cause of action gives rise to a duty to defend. The eight corners rule is not a valid *exclusionary* standard; that is, the plaintiff's pleaded allegations should not be dispositive of the insurer's duty to defend. There are at least two good arguments for abandoning the eight corners rule. First, an insured should not be penalized for a plaintiff's vague or inartful pleading.<sup>86</sup> This is especially true in those jurisdictions allowing liberal notice pleading. Second, the true focus should be on the four corners of the policy. To hold otherwise is to allow an insurer to turn the plaintiff's complaint or petition into a coverage fortress.<sup>87</sup>

While a standard liability policy speaks in terms of the insurer's right and duty to defend a "suit" against the insured, a "suit" may be something other than a judicial proceeding. As has been frequently litigated with respect to environmental claims, threatened administrative proceedings may trigger an insurer's duty to defend.<sup>88</sup> This may be significant in the wrongful employment practices context, since plaintiffs may be required to exhaust administrative remedies before filing suit,<sup>89</sup> or they may simply elect to pursue administrative remedies. Administrative remediation of alleged wrongful employment practices may trigger an insurer's duty to defend.<sup>90</sup>

An insurer's duty to indemnify its insured, unlike its duty to defend, is linked solely to coverage under the policy at issue. The insurer's duty to indemnify is not implicated until the insured incurs liability for the underlying claim.<sup>91</sup> The timing of an insurer's duty to indemnify is made clear by the standard policy language

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84. See *American Motorists Ins. Co. v. Allied-Sysco Food Serv.*, 24 Cal. Rptr. 2d 106, 112 (Ct. App. 1993); *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 648 N.E.2d 1214, 1217 (Ind. Ct. App. 1995); *Spivey v. Safeco Ins. Co.*, 865 P.2d 182, 188 (Kan. 1993); *Aetna Casualty & Sur. Co. v. Cochran*, 651 A.2d 859, 863-66 (Md. 1995); *Haarstad v. Graff*, 517 N.W.2d 582, 584-85 (Minn. 1994); *Standard Artificial Limb v. Allianz Ins. Co.*, 895 S.W.2d 205, 210 (Mo. Ct. App. 1995); *Union Ins. Co. v. Land & Sky, Inc.*, 529 N.W.2d 773, 776 (Neb. 1995); *SL Indus. v. American Motorists Mut. Ins. Co.*, 607 A.2d 1266, 1272 (N.J. 1992); *Fitzpatrick v. American Honda Motor Co.*, 575 N.E.2d 90, 93-94 (N.Y. 1991); *Great Am. Ins. Co. v. Hartford Ins. Co.*, 621 N.E.2d 796, 798-99 (Ohio Ct. App. 1993); *Deseret Fed. Sav. & Loan Ass'n v. United States Fidelity & Guar. Co.*, 714 P.2d 1143, 1147 (Utah 1986).

85. JERRY, *supra* note 78, at 564.

86. *Cochran*, 651 A.2d at 865-66.

87. *Fitzpatrick*, 575 N.E.2d at 93-94.

88. See, e.g., *Hutchinson Oil Co. v. Federated Serv. Ins. Co.*, 851 F. Supp. 1456, 1552 (D. Wyo. 1994); *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.*, 519 N.W.2d 864, 868-72 (Mich. 1994); *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 870 P.2d 260, 266 (Or. Ct. App.), *modified*, 875 P.2d 537 (1994).

89. For example, Title VII requires administrative exhaustion. See *Davis v. North Carolina Dep't of Corrections*, 48 F.3d 134, 137 (4th Cir. 1995). The exhaustion requirement is important, because it enables the EEOC to obtain employers' voluntary compliance and promote conciliation. See *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994).

90. See, e.g., *Community Unit Sch. Dist. No. 5 v. Country Mut. Ins. Co.*, 419 N.E.2d 1257 (Ill. App. Ct. 1981).

91. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1221 (Ill. 1992); *Mount Vernon Fire Ins. Co. v. Scottsdale Ins. Co.*, 638 A.2d 1196, 1201 (Md. 1994).

under which the insurer promises to "pay on behalf of the insured all such sums which the insured shall become legally obligated to pay as damages."<sup>92</sup> To protect insureds' interests in the interim, and to generally shield insureds from financial calamity in the form of an excess judgment, courts imply a duty on insurers' part to settle claims within policy limits for their insureds' benefit.<sup>93</sup> The implied duty to settle supplements insurers' duty to indemnify.

### *B. Directors' and Officers' Liability Policies*

Unlike CGL policies, directors' and officers' (D & O) liability policies do not follow a standard form and therefore vary significantly between insurers.<sup>94</sup> While generalizations are thus riskier, most D & O policies specifically exclude all bodily injury and property damage claims, and many personal injury claims. A typical D & O policy exclusion provides that the insurer shall not be liable:

[F]or bodily injury, sickness, disease, death or emotional distress of any person, or damage to or destruction of any tangible property, including the loss of use thereof, or for injury from oral or written publication of a libel or slander or of other defamatory or disparaging material or of material that violates a person's right of privacy.<sup>95</sup>

Accordingly, aggrieved employees or former employees who attempt to plead into coverage on bodily injury, property damage or personal injury theories will find the exercise futile.

D & O policies also include an "insured vs. insured exclusion," providing that the insurer shall not be liable for any claim against a director or officer made by another director or officer, or by the corporation.<sup>96</sup> Designed to prevent friendly

92. HANOVER INSURANCE, HANDBUSINESS BUSINESSOWNERS INSURANCE POLICY 17 (1989) (on file with author).

93. *Magnum Foods, Inc. v. Continental Casualty Co.*, 36 F.3d 1491, 1504 (10th Cir. 1994) (Oklahoma law); *Carrier Express, Inc. v. Home Indem. Co.*, 860 F. Supp. 1465, 1478-79 (N.D. Ala. 1994); *Jordan v. United States Fidelity & Guar. Co.*, 843 F. Supp. 164, 171 (S.D. Miss. 1993); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 893 P.2d 39, 45 (Ariz. Ct. App. 1994); *Camelot by the Bay Condominium Owners' Ass'n v. Scottsdale Ins. Co.*, 32 Cal. Rptr. 2d 354, 360 (Ct. App. 1994); *Flickinger v. Ninth Dist. Prod. Credit Ass'n*, 824 P.2d 19, 24 (Colo. Ct. App. 1991); *Brookins v. Goodson*, 640 So. 2d 110, 113 (Fla. Dist. Ct. App. 1994); *Southern Gen. Ins. Co. v. Holt*, 416 S.E.2d 274, 276 (Ga. 1992); *Levier v. Koppenheffer*, 879 P.2d 40, 46-47 (Kan. Ct. App. 1994); *Smith v. Audubon Ins. Co.*, 656 So. 2d 11, 15 (La. Ct. App. 1995); *Hartford Casualty Ins. Co. v. New Hampshire Ins. Co.*, 628 N.E.2d 14, 16-17 (Mass. 1994); *State ex rel. Shelton v. Mummert*, 879 S.W.2d 525, 529 (Mo. 1994); *Venetsanos v. Zucker, Facher & Zucker*, 638 A.2d 1333, 1340 (N.J. Super. Ct. App. Div. 1994); *Continental Casualty Co. v. Kinsey*, 513 N.W.2d 66, 69 (N.D. 1994); *Motorists Mut. Ins. Co. v. Said*, 590 N.E.2d 1228, 1232 (Ohio 1992); *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848 (Tex. 1994); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130, 138 (Utah Ct. App.), *cert. denied*, 853 P.2d 897 (Utah 1992); *Shrader v. State Farm Mut. Auto. Ins. Co.*, 882 P.2d 813, 826 (Wyo. 1994).

94. *Machson & Moriteleone*, *supra* note 9, at 70.

95. NATIONAL UNION FIRE INS. CO. OF PITTSBURGH, PA., DIRECTORS AND OFFICERS INSURANCE AND COMPANY REIMBURSEMENT POLICY 3 (1988) (on file with the author).

96. Davis J. Howard, *The "Insured vs. Insured" Exclusion and the Concept of Dual Capacity*, 17 INS. LITIG. REP. 95, 95 (1995).

or collusive suits,<sup>97</sup> the "insured vs. insured" exclusion may affect wrongful employment practices litigation.

In *Foster v. Kentucky Housing Corporation*,<sup>98</sup> the defendant's former executive director, Robert Martinez, sued the KHC's officers and directors when they fired him in alleged violation of his employment contract. The KHC's insurer, Lloyd's, denied coverage. Lloyd's relied on the "insured vs. insured" exclusion in the KHC policy. The exclusion provided:

Underwriters shall not be liable to make any payment for Loss in connection with any Claim made against the Directors or Officers, or the Organization by or on behalf of the Organization, or any affiliate of the Organization, or any other Director or Officer except to the extent that such claim is in the form of a crossclaim, third party claim or otherwise for contribution or indemnity which is part of the terms of this policy; provided, however, that this exclusion shall not apply to any claim brought by or on behalf of any employee of, or any volunteer working for the Organization where such employee or volunteer is not also a Director or Officer of the Organization.<sup>99</sup>

The policy defined "Directors and Officers" as directors or officers, KHC employees or staff members, and volunteers working for the KHC.<sup>100</sup>

The district court granted the insurer's motion for summary judgment. Martinez clearly fell within the policy definition of "Directors and Officers," thus giving effect to the "insured vs. insured" exclusion.<sup>101</sup> The court rejected the defendants' argument that the exclusion only applied to friendly or collusive suits. The court found "no ambiguity in the exclusion . . . and decline[d] to rewrite the insurance contract to enlarge the risk of the insurer."<sup>102</sup>

The *Conklin Co. v. National Union Fire Insurance Co.*<sup>103</sup> court concluded that the exclusion did not apply to a wrongful discharge suit by a former officer. The *Conklin* court articulated three reasons for its decision. First, the "insured vs. insured" exclusion is intended to bar friendly or collusive suits in which a corporation sues its directors or officers to obtain coverage benefits. That is not the situation in a wrongful discharge suit, which is clearly adversarial, rather than collusive or friendly.<sup>104</sup> Second, the plaintiff was suing simply as a wronged employee and not in his capacity as an officer. Since he was merely asserting a personal claim, he could not be termed an "insured" within the meaning of the

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97. *Slaughter v. American Casualty Co.*, 842 F. Supp. 371, 374 (E.D. Ark. 1993), *rev'd on other grounds*, 37 F.3d 385 (8th Cir. 1994); Howard, *supra* note 96, at 95.

98. 850 F. Supp. 558 (E.D. Ky. 1994).

99. *Id.* at 559.

100. *See id.*

101. *Id.* at 561.

102. *Id.*

103. Civ. No. 4-86-860, 1987 WL 108957 (D. Minn. Jan. 28, 1987).

104. *Id.* at \*2.

exclusion.<sup>105</sup> Third, the court found the exclusion to be ambiguous, thus requiring its construction against the insurer.<sup>106</sup>

### C. Workers' Compensation and Employer's Liability Policies

Workers' compensation insurance and employer's liability coverage are provided in a single policy. Workers' compensation coverage is typically designated as Coverage A or Part One, while employer's liability coverage is Coverage B or Part Two. Both coverages insure against employees' bodily injury caused or aggravated by employment conditions.

Employer's liability coverage is a "gap filler." It covers employers for the few claims of employees that are not preempted by the exclusive remedy provisions of state workers' compensation laws.<sup>107</sup> If a particular claim is covered by workers' compensation, there is no coverage under the employer's liability section of the policy.<sup>108</sup> Employer's liability insurance affords so-called "gap filler" coverage because it covers claims falling in the "gap" between workers' compensation and general liability coverages. Standard CGL policies exclude bodily injury to "[a]n employee of the insured arising out of and in the course of employment by the insured."<sup>109</sup> The operation of this exclusion is best exemplified by *McLeod v. Tecorp International, Ltd.*,<sup>110</sup> in which the Supreme Court of Oregon held that it barred coverage for a former employee's wrongful discharge claim.<sup>111</sup>

### IV. Litigating Coverage for Wrongful Employment Practices

Insurers aggressively resist attempts to impose coverage for wrongful employment practices, and they are often successful for obvious reasons. For example, a Title VII disparate treatment plaintiff must establish that her employer acted with discriminatory intent.<sup>112</sup> Liability policies do not cover intentional acts; intentional acts are not within the meaning of "occurrence" and liability policies contain an intentional acts exclusion. Thus, a Title VII disparate treatment claim standing alone is insufficient to trigger coverage.<sup>113</sup> The same reasoning holds true for indepen-

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105. *Id.*

106. *Id.*

107. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co.*, 884 P.2d 1048, 1056 (Cal. 1994).

108. *Transamerica Ins. Co. v. Superior Court*, 35 Cal. Rptr. 2d 259, 264 (Ct. App. 1994); *see, e.g.*, *Cowen v. Mercury Fin. Co.*, 607 So. 2d 1067, 1068-69 (La. Ct. App. 1992); *Truck Ins. Exch. v. Vassholz*, 839 S.W.2d 22, 23-24 (Mo. Ct. App. 1992); *Progressive Casualty Ins. Co. v. Marca*, 788 P.2d 490, 491-92 (Or. Ct. App. 1990).

109. *MILLER & LEFEBVRE*, *supra* note 60, at 434.2; *see, e.g.*, *National Union Fire Ins. Co. v. National Convenience Stores*, 891 S.W.2d 20, 21-22 (Tex. Ct. App. 1994).

110. 865 P.2d 1283 (Or. 1993).

111. *Id.* at 1287-88; *accord* *Loyola Marymount Univ. v. Hartford Accident & Indem. Co.*, 271 Cal. Rptr. 528, 530-31 (Ct. App. 1990); *Board of Educ. of E. Syracuse-Minoa Central Sch. Dist. v. Continental Ins. Co.*, 604 N.Y.S.2d 399, 400 (App. Div. 1993) (retaliatory discharge and sexual harassment claims).

112. *See supra* note 18 and accompanying text.

113. *See, e.g.*, *Jackson County Hosp. v. Alabama Hosp. Ass'n Trust*, 619 So. 2d 1369, 1372 (Ala. 1993).

dent sexual harassment<sup>114</sup> and age discrimination claims.<sup>115</sup> An employee's wrongful discharge is an intentional act precluding coverage.<sup>116</sup> Coverage questions are not always so easily resolved, however.

#### A. Coverage Under Various Liability Policies

Regardless of whether the policy at issue is a CGL policy or a D & O policy, the coverage issues are similar. Policy language is always the key determinant.

##### 1. Intentional Acts

Most wrongful employment practices coverage litigation centers on the insured's intent. *Rideout v. Crum & Forster Commercial Insurance*<sup>117</sup> is an illustrative case.

The *Rideout* plaintiffs filed complaints with a state agency alleging that their employer, Hub Manufacturing, discriminated against them by denying them equal pay, the opportunity to work overtime, and promotions based on their sex. Shortly thereafter, Hub laid off the plaintiffs as part of a general short-term layoff. When Hub did not recall them, the plaintiffs amended their administrative complaints to add retaliatory discharge claims.<sup>118</sup> An administrative hearing officer concluded that Hub unlawfully discriminated and retaliated against the plaintiffs, and awarded them each damages exceeding \$45,000.<sup>119</sup> When Hub went out of business, thus defaulting on the administrative awards, the plaintiffs attempted to garnish Hub's CGL insurers.

The insurers argued that there was no coverage because Hub's discriminatory acts did not constitute an "occurrence." The insurers reasoned that Hub expected or intended to deprive the plaintiffs of their wages, and to cause them emotional distress.<sup>120</sup> The *Rideout* court embraced the insurers' arguments.

Because Hub, in discriminating against the plaintiffs because of their sex and retaliating against them because of their complaints, intended or was substantially certain that the plaintiffs would suffer the type of harm they did suffer, the plaintiffs' claims do not constitute an "occurrence" under the policies in question.<sup>121</sup>

The court rejected the plaintiffs' argument that Hub "negligently or recklessly discriminated against them."<sup>122</sup> The plaintiffs' argument ignored the administrative

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114. See, e.g., *Commercial Union Ins. Cos. v. Sky, Inc.*, 810 F. Supp. 249, 252-54 (W.D. Ark. 1992); *Sena v. Travelers Ins. Co.*, 801 F. Supp. 471, 473-76 (D.N.M. 1992); *State Farm Fire & Casualty Co. v. Compupay, Inc.*, 654 So. 2d 944, 946-47 (Fla. Dist. Ct. App. 1995).

115. See, e.g., *Kline v. Kemper Group*, 826 F. Supp. 123, 128-30 (M.D. Pa. 1993), *aff'd*, 22 F.3d 301 (3d Cir. 1994); *Sage Co. v. Insurance Co. of N. Am.*, 480 N.W.2d 695, 698 (Minn. Ct. App. 1992).

116. See, e.g., *Jackson County Hosp. v. Alabama Hosp. Ass'n Trust*, 652 So. 2d 233, 235-36 (Ala. 1994); *City of Muncie v. United Nat'l Ins. Co.*, 564 N.E.2d 979, 983 (Ind. Ct. App. 1991).

117. 633 N.E.2d 376 (Mass. 1994).

118. *Id.* at 377.

119. *Id.* at 377-78.

120. *Id.* at 378-79.

121. *Id.* at 380.

122. *Id.* at 379.

hearing officer's finding that Hub intentionally discriminated against them.<sup>123</sup> The *Rideout* court also rejected the plaintiffs' argument that even if Hub intentionally discriminated against them, the company did not intend the resulting harm. The court agreed with the trial judge's conclusion that "Hub either intended or was substantially certain" that oppressing and retaliating against the plaintiffs as it did would cause them emotional harm.<sup>124</sup>

The Supreme Court of Illinois reached a different result in *Dixon Distributing Co. v. Hanover Insurance Co.*<sup>125</sup> *Dixon* is a wrongful employment practices potpourri, involving retaliatory discharge analysis, personal injury coverage, and public policy argument.

The *Dixon* plaintiff alleged that he was discharged in retaliation for filing a workers' compensation claim. The employer's commercial umbrella policy with International Insurance Co. provided personal injury coverage. The International policy defined "occurrence" as "'an offense which results in Personal Injury, other than an offense committed with *actual malice* or the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the insured."<sup>126</sup> The policy did not define "actual malice."

The plaintiff pleaded in his complaint that his termination was intentional, willful and wrongful. International contended that these allegations were the equivalent of actual malice so that the plaintiff's claim did not constitute an "occurrence."<sup>127</sup> The insurer stood on its position when the plaintiff amended his complaint to allege that his termination was "intentional and in retaliation of and solely for the exercise of [his] rights under the Illinois Workers' Compensation Act."<sup>128</sup> The court found flaws in International's reasoning.

An act can be done intentionally without being . . . done with actual malice. Moreover, included in the [policy] definition of personal injury are acts that contain an element of intent. Were we to equate intentional conduct with actual malice, coverage for certain intentional conduct would be provided under the definition of personal injury and then be taken away under the definition of occurrence. This would render the definition of personal injury superfluous and would create an ambiguity where none exists . . . . [C]ourts will not distort the language of a policy to create an ambiguity where none exists . . . .

Likewise, the allegation that [plaintiff's] termination was in retaliation for filing workers' compensation claims cannot be construed to mean actual malice. An essential predicate of a claim for retaliatory discharge is an allegation that the employer's conduct be in retaliation for the employee's activities. The retaliatory nature of the discharge, in this

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123. *Id.*

124. *Id.* at 380.

125. 641 N.E.2d 395 (Ill. 1994).

126. *Id.* at 398 (emphasis added).

127. *Id.*

128. *Id.* at 399.

context, does not mean that the discharge was committed with actual malice, but merely that the discharge was causally related to the filing of the workers' compensation claim . . . . Since the allegations in the amended complaint cannot be construed to mean actual malice, they do not fall beyond the scope of the policy's coverage.<sup>129</sup>

International additionally argued that coverage for the plaintiff's retaliatory discharge claim would violate public policy. It argued that "such coverage is against public policy because it insures against intentional misconduct."<sup>130</sup> The *Dixon* court rejected this argument, as well.<sup>131</sup>

The court noted the general rule that an insurance policy indemnifying an insured for damages resulting from its own intentional misconduct is void as against public policy.<sup>132</sup> However, there was no Illinois case law, statutory authority, or legislative directive to support International's public policy argument. In the absence of clearly articulated reasoning or authority, the *Dixon* court declined to adopt a policy against insuring for damages resulting from intentional misconduct on the facts presented.<sup>133</sup>

The Supreme Court of Iowa relied on the "reasonable expectations doctrine" to find coverage in *Clark-Peterson Co. v. Independent Insurance Associates, Ltd.*<sup>134</sup> In the underlying action, plaintiff Neil Brown obtained a substantial judgment against Clark-Peterson on a wrongful termination theory. Brown successfully alleged that Clark-Peterson discriminated against him because he was an alcoholic.<sup>135</sup>

Clark-Peterson was insured by Cincinnati Insurance Co. under a contractor's umbrella liability policy. The policy afforded personal injury coverage, and "personal injury" was defined to include discrimination or humiliation.<sup>136</sup> In order to qualify as an "occurrence" under the policy, the subject act or event had to "unexpectedly or unintentionally" result in personal injury.<sup>137</sup> Finally, the policy contained a discrimination exclusion, providing that the policy did not apply to personal injury liability "arising out of discrimination including fines or penalties imposed by law . . . committed by you or at your direction."<sup>138</sup>

When Cincinnati would not indemnify Clark-Peterson for Brown's judgment, the insured filed a declaratory judgment action. The trial court ruled that the policy did not cover Brown's claim because Clark-Peterson intentionally discriminated against him. The trial court nevertheless held that Clark-Peterson was covered by virtue of

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129. *Id.* (citations omitted).

130. *Id.* at 401.

131. *Id.*

132. *Id.*

133. *Id.*

134. 492 N.W.2d 675 (Iowa 1992).

135. *Id.* at 676.

136. *Id.* at 676 n.3.

137. *Id.*

138. *Id.*

the reasonable expectations doctrine. The Supreme Court of Iowa agreed with the trial court on both points.<sup>139</sup>

The *Clark-Peterson* court reasoned that the discrimination exclusion gutted the personal injury coverage afforded when discrimination was included in the definition of "occurrence."<sup>140</sup> The court stated that "[t]o deny discrimination coverage in the present case would be to withdraw with the policy's left hand what is given with the right."<sup>141</sup> The court succinctly dismissed the insurer's argument that the discrimination exclusion did not eviscerate the personal injury coverage because the policy still covered disparate impact claims, thus barring application of the reasonable expectations doctrine. Quite simply, Brown's case was not based on disparate impact.<sup>142</sup>

*Jostens, Inc. v. Northfield Insurance Co.*<sup>143</sup> is among the most recent reasonable expectations/illusory coverage cases involving wrongful employment practices. In *Jostens*, the EEOC filed gender and age discrimination cases against Jostens Learning Corporation. Jostens ultimately entered into a conciliation agreement with the EEOC, but not before incurring attorneys' fees and costs exceeding \$300,000.<sup>144</sup>

Jostens was insured under an umbrella liability policy issued by Northfield Insurance Co. The Northfield policy covered both bodily injury and personal injury claims, and included discrimination within the definition of personal injury. The policy excluded coverage for discrimination (1) arising out of statutory violations; (2) committed by or with the insured's knowledge or consent; (3) against employment applicants or current or terminated employees; or (4) based on race, creed, color, sex, age or national origin.<sup>145</sup> When Northfield declined to reimburse Jostens for its legal fees and expenses, Jostens filed a declaratory judgment action. The district court sustained Northfield's summary judgment motion and Jostens appealed.

The appellate court summarily disposed of Jostens' reasonable expectations argument, observing that "Jostens could not have been under more than a momentary delusion that the policy afforded coverage" given the language and location of the exclusions.<sup>146</sup> The court turned next to the concept of illusory coverage. The illusory coverage doctrine, like the doctrine of reasonable expectations, qualifies the general rule that courts construe insurance policies as written.<sup>147</sup> In short, the doctrine provides that liability insurance policies should "'be construed so as not to be a delusion' to the insured."<sup>148</sup>

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139. *Id.* at 676.

140. *See id.* at 678.

141. *Id.* at 679.

142. *Id.* at 678.

143. 527 N.W.2d 116 (Minn. Ct. App. 1995).

144. *Id.* at 117.

145. *Id.*

146. *Id.* at 118.

147. *Id.*

148. *Id.* (quoting *Motor Vehicle Casualty Co. v. Smith*, 76 N.W.2d 486, 490-91 (Minn. 1956)).

The *Jostens* court believed that the illusory coverage doctrine is best applied where part of the premium is specifically allocated to a particular coverage, and that coverage proves to be "functionally nonexistent."<sup>149</sup> There was no parol evidence suggesting that Jostens understood that some portion of its premium was allocated to discrimination coverage. The court therefore construed the policy according to its plain language, and affirmed the trial court's entry of summary judgment for Northfield.<sup>150</sup>

## 2. Public Policy and Insurance for Intentional Acts

Insurers may defend declaratory judgment and bad faith actions by asserting that public policy forbids coverage for wrongful employment practices in which the employer's intent to discriminate is a key element. Title VII disparate treatment claims are perhaps the best example of those claims lending themselves to the public policy defense. Courts sometimes strain to find disparate impact claims in disparate treatment cases in order to determine coverage.<sup>151</sup> Even where intentional discrimination is the sole issue, courts are sharply divided.

Florida adopted a pro-insurer position in *Ranger Insurance Co. v. Bal Harbour Club*.<sup>152</sup> *Bal Harbour* involved a deed restriction that prohibited occupation by "anyone not a member of the Caucasian race or having more than one-fourth Hebrew or Syrian blood."<sup>153</sup> The restriction further prohibited conveyance of the property to anyone who was not a member of the Bal Harbour Club. When the Club refused to admit the prospective purchasers of the restricted property, a Jewish family named Skolnik, the Skolniks sued. The Skolniks alleged that the Club's rejection of their application was a willful violation of their rights, and precluded them from obtaining good and marketable title. The Club tendered the Skolnik's suit to Ranger, which defended under a reservation of rights. The Club settled the suit for \$25,000, and Ranger then filed a declaratory judgment action.<sup>154</sup>

The trial court entered summary judgment in the Club's favor. The court ordered Ranger to reimburse the Club for the settlement.<sup>155</sup> Ranger appealed, and a district appellate court certified the following question to the Supreme Court of Florida: "Does the public policy of Florida prohibit an insured from being indemnified for a loss resulting from an intentional act of religious discrimination?"<sup>156</sup> The supreme court answered affirmatively.<sup>157</sup>

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149. *Id.* at 119.

150. *Id.*

151. *See, e.g.,* Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178, 1185 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980).

152. 549 So. 2d 1005 (Fla. 1989).

153. *Id.* at 1006.

154. *Id.*

155. *Id.*

156. *Id.* at 1005.

157. *Id.*

The *Bal Harbour* court first examined whether the availability of insurance would stimulate wrongdoers to violate the law.<sup>158</sup> The club and the lower appellate court both suggested that making intentional religious discrimination insurable would not encourage such discrimination. The supreme court believed that their supposition lacked empirical support and "defie[d] human experience."<sup>159</sup>

Once a person has insurance, he will take more risks than before because he bears less of the cost of his conduct . . . . Insurance therefore tends to increase the likelihood that the insured risks will come to pass . . . . If an insurance policy were to cover a city's wilful racial discrimination, the people making policy for the city would indulge their own preference for discrimination at little risk to themselves. The city would pay in higher rates, but given the insurance each employee would be more likely to discriminate.<sup>160</sup>

Second, the court examined the purpose served by imposing liability. If compensating victims is the primary purpose, indemnification may be acceptable. On the other hand, if deterring wrongdoers is the primary purpose, indemnification is not a significant consideration.<sup>161</sup> The court concluded that the primary purpose served by imposing liability for intentional discrimination is deterrence. Because of intentional discrimination's unique nature, however, the policies of compensation and deterrence are compatible.<sup>162</sup>

The Club contended that were intentional discrimination uninsurable, many discrimination victims would be unable to collect their damage awards.<sup>163</sup> The court made short work of this argument.

The bulk of discrimination cases are brought against commercial enterprises that have discriminated in the marketplace or workplace. These businesses generally have far greater resources than do individuals and to hold the acts of such parties uninsurable [will] result in relatively few instances where the injury [will] go uncompensated. Such was the case in the present claim.<sup>164</sup>

The *Bal Harbour* court also rejected the Club's argument that punitive damages adequately deter intentional discrimination.<sup>165</sup> The court thought the availability of punitive damages to be insufficiently certain.<sup>166</sup> Moreover, Florida's premier antidiscrimination statute did not provide for punitive damages, and those statutes

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158. *Id.* at 1007.

159. *Id.* at 1008.

160. *Id.* (quoting *Western Casualty & Sur. Co. v. Western World Ins. Co.*, 769 F.2d 381, 385 (7th Cir. 1985)).

161. *Id.*

162. *Id.*

163. *Id.* at 1009.

164. *Id.*

165. *Id.*

166. *Id.*

that did provide for punitive damages did so in amounts providing only "a token wrist slap to a large corporate offender."<sup>167</sup>

A California court reached the same conclusion in *Coit Drapery Cleaners v. Sequoia Insurance Co.*<sup>168</sup> The issue in *Coit* was whether a provision of the California Insurance Code barring coverage for insured's willful acts, and the policy's intentional acts exclusion, foreclosed coverage for a sexual harassment claim.<sup>169</sup> The *Coit* court reasoned that "the public and statutory policy of this state against sexual harassment . . . would not be well served by a ruling [exonerating] a perpetrator from payment of damages for his own willful act of sexual gratification, by shifting such liability to an insurer."<sup>170</sup>

A number of courts stand at the opposite pole from *Bal Harbour* and *Coit*.<sup>171</sup> The Sixth Circuit expressly rejected the *Bal Harbour* court's conclusion in *School District for the City of Royal Oak v. Continental Casualty Co.*<sup>172</sup>

*Royal Oak* involved an elementary school teacher's claim that she was denied tenure because of her religion. The teacher sued the school district under 42 U.S.C. § 1983. A jury ultimately awarded her compensatory damages of \$500,000 (divided equally between lost wages and emotional distress) and \$50,000 in punitive damages.<sup>173</sup> The case was settled for \$250,000 while on appeal. When the school district's insurer, Continental, refused to pay the settlement, the district sued. The district court granted the school district's summary judgment motion and Continental appealed.

Continental argued that even if its policy did not specifically exclude the teacher's discrimination claim, public policy made the claim uninsurable.<sup>174</sup> The *Royal Oak* court applied what it called the "stimulation test," focusing on the causal connection between the wrongful act and the existence of insurance coverage.<sup>175</sup> Simply stated, was the wrongful act stimulated by the prospect of indemnification?<sup>176</sup>

Applying the stimulation test, the court thought that the school district's liability for denying tenure should be insurable.

The clash of personalities, culture and values that allegedly led in this case to the . . . unfavorable tenure recommendation could easily be duplicated in almost any school district . . . Perhaps the existence of liability insurance might occasionally "stimulate" such a contretemps,

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167. *Id.*

168. 18 Cal. Rptr. 2d 692 (Ct. App. 1993).

169. *See id.* at 697.

170. *Id.* at 698.

171. *See, e.g.,* New Madrid County Reorganized Sch. Dist. No. 1 v. Continental Casualty Co., 904 F.2d 1236, 1242 (8th Cir. 1990) (Missouri law); University of Ill. v. Continental Casualty Co., 599 N.E.2d 1338, 1351 (Ill. App. Ct.), *appeal denied*, 606 N.E.2d 1235 (Ill. 1992); Independent Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co., 515 N.W.2d 576, 579-80 (Minn. 1994).

172. 912 F.2d 844 (6th Cir.), *reh'g denied*, 921 F.2d 625 (1990).

173. *Id.*

174. *Id.* at 847.

175. *Id.* at 848.

176. *See id.*

but common sense suggests that the prospect of escalating insurance costs and the trauma of litigation, to say nothing of the risk of uninsurable punitive damages, would normally neutralize any stimulative tendency that insurance might have.<sup>177</sup>

The court further reasoned that public policy favors enforcement of insurance policies according to their terms.<sup>178</sup> In the absence of contrary Michigan law on the insurability of discrimination awards, and given Continental's policy language apparently affording coverage, the court turned a deaf ear to the insurer's public policy argument.<sup>179</sup> "Had [Continental] wished to exclude coverage for intentional religious discrimination in employment, it could and should have said so."<sup>180</sup>

### 3. Discrimination as "Personal Injury"

As previously demonstrated, the personal injury coverage available under many CGL policies often provides the best avenue for an employer seeking defense and indemnity. *United States Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*<sup>181</sup> and *Western Casualty & Surety Co. v. Adams County*<sup>182</sup> are exemplary cases.

In *United States Fire*, two women, once employed by United Service Company (USC), sued their former employer for a variety of wrongs. The plaintiffs alleged USC should be held liable for intentional infliction of emotional distress, invasion of privacy, breach of contract, assault and battery, and slander.<sup>183</sup> The subject USC manager allegedly called one of the plaintiffs "a whore and a slut," and referred to the other as "a f-----g Jew broad."<sup>184</sup> USC's insurance policy covered employment related claims for defamation and invasion of privacy. The policy excluded coverage for intentional violations of the law "related to discrimination or unfair employment practices" by USC and its directors, officers and shareholders.<sup>185</sup> The harassing supervisor was not among the excluded categories of USC personnel. The plaintiffs' complaint did allege, however, that he was USC's agent, and that some of his discriminatory actions were ratified by others in the USC hierarchy.<sup>186</sup>

The *United States Fire* court held that USC's liability insurer was obligated to defend the action. Under the circumstances, the plaintiffs' allegations were potentially or arguably within coverage. The defamation and invasion of privacy allegations were covered if it could be established that the underlying actions or statements were taken or made without discriminatory intent.<sup>187</sup>

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177. *Id.*

178. *Id.* at 849.

179. *Id.*

180. *Id.*

181. 511 N.E.2d 127 (Ohio Ct. App. 1986).

182. 534 N.E.2d 1066 (Ill. App. Ct. 1989).

183. *United States Fire*, 511 N.E.2d at 128.

184. *Id.* at 129.

185. *Id.*

186. *Id.*

187. *Id.*

The plaintiffs in *Western Casualty & Surety Co. v. Adams County*<sup>188</sup> sued the County under 42 U.S.C. § 1983, alleging that the County violated their constitutional rights to due process and equal protection by purposefully assessing their property in excess of legal limits. The County tendered the matter to its CGL insurer, Western Casualty, which responded by filing a declaratory judgment action. The County prevailed at the summary judgment stage and Western Casualty appealed. The insurer argued, *inter alia*, that the plaintiffs' complaint did not allege a cause of action for personal injury as defined in its policies.<sup>189</sup>

The policies at issue included the standard CGL definition of an "occurrence."<sup>190</sup> The policies defined "personal injury" as:

(1) bodily injury, sickness, disease, disability or shock, including death arising therefrom, and, if arising out of the foregoing, mental anguish and mental injury; (2) false arrest, false imprisonment, wrongful eviction, wrongful entry, wrongful detention, or malicious prosecution; or (3) libel, slander, defamation of character, humiliation, or invasion of the rights of privacy, unless arising out of advertising activities; and (4) racial or religious discrimination not committed by or at the direction of the insured or any executive officer, director or stockholder thereof, but only with respect to the liability other than fines and penalties imposed by law; caused by an occurrence during the policy period.<sup>191</sup>

The *Adams County* court seized on endorsements to the policies excluding coverage for willful police misconduct.<sup>192</sup> The court essentially reasoned that because the plaintiffs' tax claims were not excluded under the police endorsements, they must be covered.<sup>193</sup> The court touched on the definition of personal injury and started into some analysis,<sup>194</sup> but then rushed ahead to conclude that the plaintiffs' claims were covered.<sup>195</sup> The appellate court went so far as to distort a trial court statement by Western Casualty's counsel to support its coverage decision.<sup>196</sup>

*Adams County* is, quite simply, a terrible decision. The case demonstrates how far some courts will stretch policy language in order to find potential coverage for civil rights allegations.<sup>197</sup>

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188. 534 N.E.2d 1066 (Ill. App. Ct. 1989).

189. *Id.* at 1067.

190. *Id.* at 1068.

191. *Id.* at 1068-69.

192. *See id.* at 1069-70.

193. *See id.* at 1070.

194. *See id.* at 1069-70.

195. *Id.* at 1070-71.

196. The insurer's attorney conceded that the policies might conceivably cover some civil rights claims. *See id.* at 1070. That sort of concession during argument hardly extrapolates to an admission of coverage for tax-related § 1983 claims based on intentional conduct, especially given the *Adams County* court's unwillingness to explain its personal injury analysis.

197. Gary M. Poplow & Bradley S. McMillan, *Employers' Liability Coverage for Disability*

A case at the opposite end of the spectrum from *Adams County is Jefferson-Pilot Fire & Casualty Insurance Co. v. Sunbelt Beer Distributors*.<sup>198</sup> In *Jefferson-Pilot*, plaintiff Deana Pressley sued her former employer, Sunbelt, for violating 42 U.S.C. § 1981 and the Equal Pay Act. Pressley, who Sunbelt once employed as an account representative, alleged that she was fired for dancing with African American men at a social gathering following a marketing function.<sup>199</sup> Sunbelt's CGL insurer, Jefferson-Pilot, refused to defend or indemnify Sunbelt in connection with Pressley's suit.

Pressley's complaint sought damages for loss of earnings, loss of benefits, loss of earning capacity and harm to her reputation.<sup>200</sup> The court quickly concluded that Pressley's action did not allege property damage,<sup>201</sup> and the court further reasoned that she suffered no bodily injury.<sup>202</sup> The question thus became whether Pressley's complaint fell within personal injury coverage. The *Jefferson-Pilot* court concluded that it did not.

Pressley's complaint did not include a cause of action specifically listed in the policy definition of personal injury. Sunbelt argued that Pressley's complaint could be interpreted to fall into the last personal injury category, which provided coverage "for [o]ral or written publication of material that violates a person's right of privacy."<sup>203</sup> Because Pressley did not plead a cause of action for invasion of privacy, however, the court concluded that her action was not covered.<sup>204</sup>

#### 4. Discrimination Claims and "Property Damage"

The plaintiffs in *Lapeka, Inc. v. Security National Insurance Co.*<sup>205</sup> sued the beer distributor that laid them off following a consultant's report urging a reduction in force. The plaintiffs claimed damages for age discrimination, loss of benefits, pain, embarrassment and humiliation.<sup>206</sup> Lapeka was insured under a CGL policy issued by Security National. Lapeka tendered the matter to Security National three times; each time the insurer denied coverage. The plaintiffs eventually recovered more than \$500,000 from Lapeka. Lapeka then demanded that Security National indemnify it in connection with the plaintiffs' claims. When Security National refused, Lapeka sued the insurer for the alleged breach of its duties of defense and indemnity.<sup>207</sup>

The policy defined "property damage" as "(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use

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*Discrimination Under the ADA*, BRIEF, Winter 1995, at 22, 26.

198. 839 F. Supp. 376 (D.S.C. 1993).

199. *Id.* at 378.

200. *Id.* at 378-79.

201. *Id.* at 379.

202. *Id.*

203. *Id.* at 381.

204. *Id.*

205. 814 F. Supp. 1540 (D. Kan. 1993).

206. *Id.* at 1543.

207. *Id.* at 1544.

thereof . . . or (2) loss of use of tangible property which has not been physically injured or destroyed . . . ."<sup>208</sup> In other words, the policy employed the standard CGL policy definition.

Security National contended that none of the plaintiffs in the underlying discrimination action alleged property damage within the meaning of the policy. The insurer specifically argued that no tangible property was claimed to have been damaged. Lapeka countered by pointing out that the plaintiffs alleged that it breached an implied contract of employment. Lapeka argued that an implied employment contract constituted tangible property within the meaning of the Security National policy.<sup>209</sup>

The *Lapeka* court concluded that an implied employment contract is not tangible property for insurance coverage purposes. The court relied in part on the *Black's Law Dictionary*<sup>210</sup> definition of "tangible property" in reaching its conclusion.<sup>211</sup> The insured could offer no authority for its urged policy interpretation. The court held that Security National did not have a duty to defend Lapeka based on the definition of property damage in its policy.<sup>212</sup>

The issue in *Aetna Casualty & Surety Co. v. First Security Bank*<sup>213</sup> was whether lost wages, diminished earning capacity or damage to reputation constitute "tangible property" for purposes of property damage coverage.<sup>214</sup> The insured argued that lost wages and diminished earning capacity represented a loss of money, and that money is tangible property. Ergo, the underlying suit against the insured for wrongful termination alleged a loss of tangible personal property.<sup>215</sup> The *First Security* court concluded that the insured's argument lacked merit.

[A]llegations of loss of wages and diminished earning capacity constitute intangible property. Wages to be received in the event of continued employment and an employee's earning capacity constitute expectations, not entitlements. The suit . . . does not contain any allegations of an injury to tangible property that produced the consequential damages of lost wages and reduced earning capacity . . . . [T]he "property damage" provision of the . . . policy does not provide coverage for [the plaintiffs'] allegations of lost wages and diminished earning capacity.<sup>216</sup>

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208. *Id.* at 1549.

209. *Id.*

210. BLACK'S LAW DICTIONARY 1456 (6th ed. 1990).

211. *Lapeka*, 814 F. Supp. at 1549.

212. *Id.*

213. 662 F. Supp. 1126 (D. Mont. 1987).

214. *Id.* at 1129.

215. *Id.*

216. *Id.* at 1129-30.

Similarly, the plaintiff's allegations that her termination damaged her reputation concerned intangible property.<sup>217</sup> Absent property damage there was no "occurrence," and therefore no liability coverage.<sup>218</sup>

#### 5. D & O Coverage and "Wrongful Acts"

D & O policies provide that the insurer shall pay directors' and officers' losses arising out of claims for alleged wrongful acts. A "wrongful act" is usually defined as:

[A]ny breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Directors or Officers of the Company in their respective capacities as such or any matter claimed against them solely by reason of their status as Directors or Officers of the Company.<sup>219</sup>

In order to trigger D & O coverage, then, an alleged wrongful employment practice must constitute a wrongful act within the meaning of the subject policy.

In *Golf Course Superintendents Association of America v. Underwriters at Lloyd's, London*,<sup>220</sup> the GCSAA sued Lloyd's to recover under its D & O policy in connection with a civil rights claim. Zahid Iqbal sued the GCSAA for retaliatory discharge when he was fired after he filed a civil rights action. A jury awarded Iqbal \$50,000 and Lloyd's refused to indemnify the GCSAA for the amount of the judgment.<sup>221</sup>

The GCSAA and Lloyd's filed cross-motions for summary judgment. The policy definition of "wrongful act" was critical. The policy defined a "wrongful act" as "any negligent act, error, omission, misstatement or misleading statement committed or alleged to have been committed by [GCSAA] or its Directors, Officers, employees or the members of its committees while in the operation, administration or management of services provided by [GCSAA]."<sup>222</sup>

Lloyd's contended that the policy did not cover liability for claims based on intentional conduct. Of course, in the underlying suit, the GCSAA was found to have retaliated against Iqbal for his civil rights claim. A retaliatory discharge is intentional conduct, Lloyd's argued. The district court embraced Lloyd's argument.<sup>223</sup>

The policy definition of "wrongful act" included only negligent conduct. The definition did not include any intentional conduct, such as retaliating against employees for the exercise of their rights.<sup>224</sup> The GCSAA argued that the wrongful act definition was ambiguous, because the term "negligent" in the phrase "negligent

217. *Id.* at 1130.

218. The court also concluded that the plaintiff's suit did not allege "bodily injury." *See id.*

219. DIRECTORS AND OFFICERS INSURANCE AND COMPANY REIMBURSEMENT POLICY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. 2 (Aug. 1988) (on file with the author).

220. 761 F. Supp. 1485 (D. Kan. 1991).

221. *Id.* at 1486-87.

222. *Id.* at 1487.

223. *Id.* at 1489.

224. *Id.*

act, error, omission, misstatement or misleading statement" could be interpreted to only modify the word "act."<sup>225</sup> If so, intentional errors or omissions would be covered under the policy.<sup>226</sup> The court made short work of this argument, believing that it made better sense to read "negligent" to modify every relevant term in the definition. It would be self-defeating to limit "wrongful acts" to negligent acts, but simultaneously cover intentional errors or omissions.<sup>227</sup>

Beyond the "wrongful act" language, the policy included an endorsement expressly excluding prior sex discrimination claims from coverage.<sup>228</sup> The GCSAA contended that the endorsement excluding coverage for previously filed sex discrimination claims evidenced the parties' intent to cover prospective discrimination claims, such as Iqbal's.<sup>229</sup> The court rejected this argument, as well:

First, we note that our construction of the policy does not bar coverage for *all* discrimination claims; claims of discriminatory impact, as opposed to discriminatory treatment, could still be covered . . . . Therefore, it is possible for the parties to intend to exclude coverage of claims for intentional conduct, without intending to exclude coverage of all future claims of discrimination. Additionally, it is impossible to ignore the insurance contract's definition of what *is* covered. The policy should not be construed only in light of what is expressly excluded from coverage.<sup>230</sup>

Finally, the GCSAA argued that it could have discharged Iqbal in ignorance of the law or based on the advice of counsel.<sup>231</sup> The *Lloyd's* court correctly noted that this would not make the discharge unintentional. A jury found the GCSAA liable for intentional misconduct. Iqbal's retaliatory discharge was not a "wrongful act" covered by the policy at issue.<sup>232</sup>

#### *B. Workers' Compensation and Employer's Liability Coverage*

The leading case in this area is *La Jolla Beach & Tennis Club v. Industrial Indemnity Co.*<sup>233</sup> In *La Jolla*, Adnan Saleh alleged that he was fired as a restaurant manager because of his race or nationality. Saleh sued the Club's predecessor, among others, for breach of an employment agreement, breach of the implied covenant of good faith and fair dealing, wrongful termination, intentional infliction of emotional distress, and the violation of the Fair Housing and Employment Act.<sup>234</sup> The Club's predecessor tendered defense of Saleh's complaint to Industrial

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225. *Id.* at 1490.

226. *Id.*

227. *Id.*

228. *Id.* at 1487.

229. *Id.* at 1490.

230. *Id.* (citation omitted).

231. *Id.* at 1491.

232. *Id.*

233. 884 P.2d 1048 (Cal. 1994).

234. *Id.* at 1049-50.

Indemnity, its workers' compensation and employer's liability insurer. Industrial refused to defend. The parties ultimately settled and the Club then filed a declaratory judgment action against Industrial.

Industrial moved for summary judgment, arguing that it had no duty to defend the Club under either Part 1 (workers' compensation) or Part 2 (employer's liability) of its policy. The trial court sustained the motion. The Club then appealed, solely on the ground that Industrial had a duty to defend under the workers' compensation portion of the policy.<sup>235</sup> A lower appellate court reversed, and Industrial petitioned the Supreme Court of California for review.

The Club first contended that it reasonably expected that Industrial would defend it in an employee's civil action alleging claims partially compensable under California's Workers' Compensation Act. The Club's argument ran counter to the policy's express language, which provided that Industrial would defend only claims or suits for benefits payable by workers' compensation insurance.<sup>236</sup> The Supreme Court rejected the Club's argument, and the Court of Appeal's conclusion, that Industrial had to expressly exclude civil suits for damages in order to disclaim coverage.<sup>237</sup> Moreover, to construe the workers' compensation portion to include the duty to defend employees' civil suits for damages would render the employer's liability portion of the policy superfluous. The court reasoned that the parties did not reasonably expect or intend to effectively read out the employer's liability coverage.<sup>238</sup>

The Club asserted, however, that they reasonably expected coverage under Part 1 because the policy promised that Industrial would "defend *any* claim, proceeding or suit."<sup>239</sup> The *La Jolla* court succinctly rejected this argument, pointing out the need to read the entire clause. The policy did not promise to defend *any* claim or suit; rather, Industrial promised to defend any claim or suit for benefits payable under workers' compensation insurance.<sup>240</sup> Of course, Saleh's suit did not seek the payment of workers' compensation benefits.

Alternatively, the Club argued, Industrial had a duty to defend the Saleh suit because it potentially sought damages covered by the policy. The Club argued that such potential existed because Saleh's suit provided the opportunity to resolve essentially all of the conditions precedent to Saleh's receipt of workers' compensa-

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235. *Id.* at 1050.

236. Part 1 of the policy provided, in pertinent part:

We will pay promptly when due the benefit required of you by the workers compensation law . . . . We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits.

We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.

*Id.* at 1056.

237. *Id.*

238. *Id.*

239. *See id.* at 1057.

240. *Id.*

tion benefits.<sup>241</sup> The Club had to craft this back door argument because it was clear that regardless of the merits of Saleh's claims, the trial court never had jurisdiction to award workers' compensation benefits.<sup>242</sup> The *La Jolla* court closed this back door on the Club by stating that

[no California precedent] suggests that the duty to defend one action is triggered by the prospect that the insured may face a claim for materially different relief in some other action brought in a distinctly different forum, merely because the actions are premised on similar factual allegations. Indeed, such a rule would render the duty to defend virtually unlimited. There is always some possibility that facts alleged in one forum could, in the future, form the basis for a covered claim in a different action. Were this the test, however, *any* judicial or administrative action involving an employer-employee relationship could be characterized as a "predecessor" claim for workers' compensation benefits. Workers' compensation insurers would thus be required to defend employers in criminal prosecutions because the alleged acts may have resulted in harm to their employees, in Equal Employment Opportunity Commission investigations because that agency has the authority to issue "right to sue" letters, and in grand jury proceedings due to that body's power to recommend the filing of civil actions, which could then, conceivably, lead to the filing of a workers' compensation claim.<sup>243</sup>

The court made clear that the proper test is whether the underlying action for which a defense and indemnity are sought potentially seeks relief with the policy's coverage.<sup>244</sup>

Similarly, the court rejected the Club's curious argument that to adopt Industrial's position would expose employers to the risk that settlements of civil suits will include the payment of workers' compensation losses.<sup>245</sup> The court observed that perhaps some employers might elect to foreclose subsequent workers' compensation claims by including such claims in other individual settlements. However, such agreements between employers and employees do not alter the terms of insurance policies, nor do they create for workers' compensation insurers a duty to defend civil actions.<sup>246</sup>

The Club next argued that the court could not reasonably distinguish between "compensation" (and thus "benefits") and "damages" when determining Industrial's duty to defend under the policy.<sup>247</sup> This argument also failed. First, California workers' compensation statutes expressly contrast the terms "compensation" and

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241. *Id.*

242. *Id.*

243. *Id.* at 1057-58.

244. *Id.* at 1058.

245. *Id.*

246. *Id.*

247. *Id.*

"damages." Second, the policy clearly reflected the differences between the two by providing for workers' compensation "benefits" in Part 1, and employers' civil liability for "damages" in Part 2.<sup>248</sup>

Finally, the Club asserted that the court's failure to find a duty to defend under the workers' compensation coverage essentially eviscerated the exclusive remedy provision of California's workers' compensation scheme.<sup>249</sup> The *La Jolla* court answered simply: "It does not."<sup>250</sup> California supreme court precedent made clear that the workers' compensation and judicial systems are distinct. The court concluded that Industrial's policy was not ambiguous, and that workers' compensation insurers have no duty to defend employees' civil suits for damages.<sup>251</sup>

The Supreme Court of Iowa rejected workers' compensation coverage for sexual harassment claims in *Ottumwa Housing Authority v. State Farm Fire & Casualty Co.*<sup>252</sup> The court observed that under Iowa workers' compensation law, an employer's immunity "is the quid pro quo by which [it] gives up [its] normal defenses and assumes automatic liability," while employees give up their rights to common law verdicts.<sup>253</sup> When the *Ottumwa* plaintiffs filed their sexual harassment claims in state and federal courts, the quid pro quo for the Housing Authority's surrender of its normal defenses vanished. The basis for workers' compensation founded on the same alleged discrimination likewise vanished. Thus, the court concluded, there could be no workers' compensation coverage.<sup>254</sup>

### C. Conclusion

Many wrongful employment practices suits will trigger insurers' duty to defend. So long as a plaintiff pleads just one theory that does not include intent as an element (e.g., disparate impact or negligent infliction of emotional distress), the insurer probably has to defend the entire suit, even if the policy at issue specifically excludes other bases for recovery.<sup>255</sup> If a policy is ambiguous with respect to coverage for wrongful employment practices, basic principles of insurance policy construction favor insureds. Ambiguities in insurance policies are always resolved

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248. *Id.*

249. *See id.* at 1059.

250. *Id.*

251. *Id.*

252. 495 N.W.2d 723 (Iowa 1993).

253. *Id.* at 729 (quoting *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776, 779 (Iowa 1989)).

254. *Id.*

255. *See, e.g.*, *Lime Tree Village Community Club Ass'n v. State Farm Gen. Ins. Co.*, 980 F.2d 1402 (11th Cir. 1993). This is fundamental liability insurance law. *See Pennzoil Co. v. United States Fidelity & Guar. Co.*, 50 F.3d 580, 583-84 (8th Cir. 1995) (interpreting North Dakota law); *National Union Fire Ins. Co. v. Glenview Park Dist.*, 632 N.E.2d 1039, 1042-43 (Ill. 1994); *Employees Ins. Representatives v. Employers Reinsurance Corp.*, 653 So. 2d 27, 29 (La. Ct. App. 1995); *White Mountain Constr. Co. v. Transamerica Ins. Co.*, 631 A.2d 907, 909-10 (N.H. 1993); *Ledford v. Gutoski*, 887 P.2d 80, 83 (Or. 1994); *Atlantic Mut. Ins. Co. v. Badger Medical Supply Co.*, 528 N.W.2d 486, 491 (Wis. Ct. App. 1995).

in the insured's favor,<sup>256</sup> and courts generally construe policies to effect coverage.<sup>257</sup>

Insurers that do not intend to cover wrongful employment practices should explicitly exclude them.<sup>258</sup> Beyond specific exclusions, insurers should define "occurrence" and "personal injury" so as to preclude coverage for wrongful employment practices. Assuming that they appropriately word their policies, the coverage field tilts decidedly in insurers' favor. Courts are not free to torture policy language, or to create ambiguities where there are none, in order to resolve policies against insurers.<sup>259</sup>

### *V. Employment Practices Liability Insurance*

A number of large insurers recently began writing Employment Practices Liability Insurance (EPLI). EPLI is offered either as an endorsement to CGL policies, or as a separate policy.<sup>260</sup> EPLI coverage varies significantly between insurers.<sup>261</sup>

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256. See *State Farm Fire & Casualty Co. v. Midgett*, 892 S.W.2d 469, 471 (Ark. 1995); *Browder v. United States Fidelity & Guar. Co.*, 893 P.2d 132, 133 (Colo. 1995); *Infinity Yachts, Inc. v. St. Paul Fire & Marine Ins. Co.*, 655 So. 2d 1259, 1261-62 (Fla. Dist. Ct. App. 1995); *Rackouski v. Dobson*, 634 N.E.2d 1229, 1231 (Ill. App. Ct. 1994); *Linder v. Ticolor Title Ins. Co.*, 647 N.E.2d 37, 39 (Ind. Ct. App. 1995); *Cincinnati Ins. Co. v. Hopkins Sporting Goods*, 522 N.W.2d 837, 839 (Iowa 1994); *Arco Indus. Corp. v. American Motorists Ins. Co.*, 531 N.W.2d 168, 172 (Mich. 1995); *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994); *Katskee v. Blue Cross/Blue Shield of Neb.*, 515 N.W.2d 645, 649 (Neb. 1994); *Serrett v. Kimber*, 874 P.2d 747, 749 (Nev. 1994); *Concord Gen. Mut. Ins. Co. v. Mitchell*, 637 A.2d 903, 904 (N.H. 1994); *Handelsman v. Sea Ins. Co.*, 647 N.E.2d 1258, 1260 (N.Y. 1994); *Wickham v. Equity Fire & Casualty Co.*, 889 P.2d 1258, 1260 (Okla. Ct. App. 1994); *Anderson v. First Farwest Life Ins. Co.*, 890 P.2d 999, 1002 (Or. Ct. App. 1995); *Jennings v. Midville Gold Club*, 636 A.2d 707, 708 (R.I. 1994); *Diamond State Ins. Co. v. Homestead Indus.*, 456 S.E.2d 912, 915 (S.C. 1995); *Rogers v. Allied Mut. Ins. Co.*, 520 N.W.2d 614, 616 (S.D. 1994); *Gredig v. Tennessee Farmers Mut. Ins. Co.*, 891 S.W.2d 909, 912 (Tenn. Ct. App. 1994); *Smith v. State Farm Fire & Casualty Co.*, 531 N.W.2d 376, 379 (Wis. Ct. App. 1995).

257. See *Arkansas Farm Bureau Ins. Fed'n v. Ryman*, 831 S.W.2d 133, 135 (Ark. 1992); *Tepe v. Rocky Mountain Hosp. & Medical Servs.*, 893 P.2d 1323, 1327 (Colo. Ct. App. 1994); *Yount v. Maisano*, 627 So. 2d 148, 151 (La. 1993); *Centermark Properties v. Home Indem. Co.*, 897 S.W.2d 98, 100-01 (Mo. Ct. App. 1995); *Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28 (N.D. 1995); *General Accident Ins. Co. v. Safeco Ins. Cos.*, 443 S.E.2d 813, 818 (S.C. Ct. App. 1994).

258. *Independent Sch. Dist. No. 697 v. St. Paul Fire & Marine Ins. Co.*, 515 N.W.2d 576, 579 (Minn. 1994); see, e.g., *Old Republic Ins. Co. v. Comprehensive Health Care Assocs.*, 2 F.3d 105 (5th Cir. 1993); *Transamerica Ins. Co. v. Superior Court*, 35 Cal. Rptr. 2d 259 (Ct. App. 1994).

259. See *Heyman Assocs. No. 1 v. Insurance Co. of Pa.*, 653 A.2d 122, 130 (Conn. 1995); *Sentinel Ins. Co. v. First Ins. Co. of Haw.*, 875 P.2d 894, 915 (Haw. 1994); *Oakley Transp. v. Zurich Ins. Co.*, 648 N.E.2d 1099, 1104 (Ill. App. Ct. 1995); *Unified Sch. Dist. No. 259 v. Sloan*, 871 P.2d 861, 866 (Kan. Ct. App. 1994); *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 226 (Ky. 1994); *Reynolds v. Select Properties, Ltd.*, 634 So. 2d 1180, 1183 (La. 1994); *Hammer v. Investors Life Ins. Co. of N. Am.*, 511 N.W.2d 6, 8 (Minn. 1994); *Jasper v. State Farm Mut. Auto. Ins. Co.*, 875 S.W.2d 954, 957 (Mo. Ct. App. 1994); *Dalton Buick, Oldsmobile, Pontiac, Cadillac v. Universal Underwriters Ins. Co.*, 512 N.W.2d 633, 639 (Neb. 1994); *Soundview Assocs. v. New Hampshire Ins. Co.*, 625 N.Y.S.2d 659, 660 (App. Div. 1995); *Still v. Fox*, 644 N.E.2d 1133, 1136 (Hamilton County, Ohio Mun. Ct. 1994); *Shadoan v. Liberty Mut. Fire Ins. Co.*, 894 P.2d 1140, 1142 (Okla. Ct. App. 1994); *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 440 S.E.2d 367, 369 (S.C. 1994).

260. *Geoffrey L. Isaac & Gina M. Brown, Coverage for Sexual Misdeeds*, NAT'L L.J., May 22,

EPLI policies typically insure the purchasing corporation or entity, as well as its directors, officers, employees and former employees. Variations between carriers on who is an insured center on employees and former employees. Some EPLI policies cover only managerial or supervisory employees, both current and former. Some insurers do not define an "insured" to include former employees.<sup>262</sup>

EPLI policies generally are written on a claims-made basis.<sup>263</sup> In other words, the insured event is the filing of the claim itself, and the claim must be made during the policy period. A claim may be defined as:

[A] written demand or notice received by the insured in which damages are alleged. Claim includes a civil action or an administrative proceeding in which damages are alleged or an arbitration proceeding for such damages to which you must submit or to which you submit with our consent. Claim shall not include labor or grievance arbitration subject to a collective bargaining agreement, employment handbook or other employment policies or procedures.<sup>264</sup>

EPLI coverage is often provided via "ultimate net loss" or "self-liquidating" policies, meaning that defense costs are included within coverage limits. Most EPLI policies cover judgments (including pre- and post-judgment interest), back pay and statutory attorneys' fees. EPLI policies generally do not insure against fines, penalties, multiple damages, punitive damages, benefit awards, and nonmonetary relief.<sup>265</sup>

As a general rule, EPLI policies cover discrimination, sexual harassment, wrongful termination, the failure to employ or promote, and wrongful discipline.<sup>266</sup> For example, an "insured event" means:

(1) your Employee or former Employee, or an applicant for employment with you, alleging Discrimination by an insured, or (2) your Employee or former Employee alleging Sexual Harassment by an insured, or (3) your former Employee alleging Wrongful Termination by an insured. Alleging means lodging a complaint or charge with your management or supervisory Employee(s) or with any government agency or commencing a civil action.<sup>267</sup>

1995, at B11, B11; Machson & Monteleone, *supra* note 9, at 711.

261. ABA Committee Discusses Employment Liability Insurance, *Individual Employment Rts. Cases* (BNA), Apr. 11, 1995, at 1, 2.

262. BETTERLEY RISK CONSULTANTS, INC., EMPLOYMENT PRACTICES LIABILITY INSURANCE: POLICY COMPARISON (1994) [hereinafter BETTERLEY POLICY COMPARISON] (on file with the author).

263. Machson & Monteleone, *supra* note 9, at 711.

264. EMPLOYMENT RELATED PRACTICES LIABILITY INSURANCE POLICY, NEW HAMPSHIRE INSURANCE COMPANY 6 (1991) (specimen policy on file with the author).

265. BETTERLEY POLICY COMPARISON, *supra* note 262.

266. *Id.*

267. EMPLOYMENT RELATED PRACTICES LIABILITY INSURANCE POLICY, AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY 6 (Mar. 1993) (specimen policy on file with the author).

Given the differences between insurers' policies, it is difficult to detail the various exclusions.<sup>268</sup> However, it can safely be stated that most policies exclude workers' compensation liability, contractual liability, bodily injury and property damage liability, liability imposed under the Employee Retirement Income Security Act (ERISA), and strikes and lockouts.<sup>269</sup> Some EPLI policies also exclude liability for retaliatory action linked to an employee's refusal to perform an illegal, unlawful or unethical act, or for retaliatory action against a claimant for her role in an "insured event."<sup>270</sup>

#### VI. Conclusion

There is nothing to suggest that the current tide of employment litigation will recede. To the contrary, the proliferation of employment-related statutes and regulations probably heralds a continuing increase in wrongful employment practices claims and litigation. As that tide rises, more and more businesses will look to their insurers for defense and indemnity. The result will be a growing body of insurance law requiring courts' and practitioners' attention, and increased economic pressures on liability insurers. How and to what extent Employment Practices Liability Insurance will effect wrongful employment practices litigation remains to be seen.

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268. Machson & Monteleone, *supra* note 9, at 713.

269. See BETTERLEY POLICY COMPARISON, *supra* note 262.

270. EMPLOYMENT RELATED PRACTICES LIABILITY INSURANCE POLICY, AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY 2 (1993) (specimen policy, on file with author).

