Massachusetts Supreme Court Ruling will Lead to More Disappointments for Employers who Purchase EPLI Policies

Description

By Alicia J. Samolis

Are you sleeping better knowing that you have purchased Employment Practices Liability Insurance ("EPLI") to cover your company against employment claims? Well it may be time to wake up.

Many employers have received rude awakenings about EPLI insurance in the past. Wage and hour claims are often not covered. Leave law claims may also be excluded. Damages exclusions may not cover multipliers and likely will not cover fines. Agency audits typically will not be covered. Intentional act exclusions may result in unanticipated denials of coverage. And now the answers given by the Massachusetts Supreme Judicial Court ("SJC") to three certified questions from the United States Court of Appeals for the First Circuit concerning EPLI Insurance late last week provide another reason for Massachusetts employers to toss and turn at night.

The state's highest court has decided that EPLI insurers have no duty to bring a compulsory counterclaim in a covered employment dispute in *Mount Vernon Fire Insurance Company v. Visionaid, Inc, SJC 12142*. In this case, the employer, Visionaid, fired the employee for embezzlement and, thereafter, was sued by the employee, who claimed the termination was discriminatory. Visionaid undoubtedly patted itself on the back at that point that it had procured EPLI insurance which covered discrimination claims.

But when the employee's complaint was dismissed with the Massachusetts Commission Against Discrimination and brought in the Superior Court, a problem arose. The insurance company would not assert a counterclaim against the employee for embezzlement, pointing to the policy's language defining the "duty to defend" and "defense costs". This presented a real problem for Visionaid, not just because sometimes the best defense is good offense, but also because the claim was compulsory (meaning that if it was not included in the answer, it would be waived and Visionaid would not be allowed to sue the employee later to get its money back).

A separate declaratory judgment suit was filed in the United States District Court for the District of Massachusetts to resolve the question of whether the duty to defend included the duty to prosecute a counterclaim. The District Court ruled for the insurer limiting the "duty to defend" to a defensive posture only and not requiring it to prosecute a counterclaim. The insured appealed to the First Circuit Court of Appeals and the First Circuit, in turn, certified the coverage questions to the Massachusetts SJC.

The SJC answered the questions in favor of the insurer: in Massachusetts the duty to defend does not include counterclaim costs, even if the claim is compulsory.

While courts outside the state have taken different positions, many have sided with the Massachusetts SJC's view of the issue and thus the decision was not a huge surprise. However, the implications of the decision will undoubtedly leave many employers disappointed. This ruling means that employers who have coverage for a claim will have to hire their own counsel to prosecute the portion of the case dealing with a counterclaim.

To the untrained eye, this might not seem too bad. But in reality, it is extremely difficult to split a case between law firms. Unlike the District Court of Massachusetts in Mount Vernon suggested, it is not as easy as having appointed counsel prepare the answer and private (employer paid) counsel prepare the counterclaim. Private counsel will undoubtedly have to review the answer, as the admissions therein have bearing on the counterclaim. Private counsel and appointed counsel can't split a deposition to save the insured 50% of the bill.

Rather all the questions potentially bear on each part of the case. In practicality this results in majority of the work is duplicated by the law firms, meaning where there is a counterclaim, the employer really does not get much benefit of having appointed counsel (or having paid any amount of the insurance). The difficultly in splitting the defense of a case is what undoubtedly lead to the “in for one, in for all rule” which requires insurers to defend all claims in an action where one claim is covered by the policy but the rest are not.

So what is the take-home from *Mount Vernon*? It is not that employers should refrain from purchasing EPLI insurance. Depending on the employer’s turnover, industry, employee demographic and risk inclination, EPLI insurance can be a great purchase. In many employment disputes, no counterclaims exist and when they do, the insurer might voluntarily cover the counterclaim costs, particularly when you agree the amounts recovered reduce the insurer’s liability and where the counterclaim provides settlement leverage.

The real take-home is to (1) fully understand what your insurance policy covers so that you do not overpay for the coverage; and (2) proactively ask your insurer for the coverage you want before you get a claim. So with respect to *Mount Vernon*, employers could ask that the cost of compulsory counterclaims in covered actions be covered.

Date Created
June 26, 2017