

DON'T

Roll the Dice with EPL Claims

Employment Practices and Liabilities: Retaliation Claims and Strategies on the Use of Insurance

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What We'll Discuss

- Retaliation Claims – Supreme Court and WA Courts
- How does my EPLI coverage actually work?
- What is an EPLI claim (according to the policy)?
- How do we effectively use the services of the adjuster and legal counsel?
- How can using the EPLI policy benefit my organization?



UT Southwestern Medical Center v Naasar

- Employee alleges discharge was racially and religiously motivated harassment
- Employee alleges that because he complained of the harassment, he was prevented from retaining employment at an affiliated hospital
- The employer argued that regardless of any retaliatory intent, it would not have hired the plaintiff due to other legitimate reasons



UT Southwestern Medical Center v Naasar

- The court ruled that plaintiffs would be required to prove that:
- the retaliation would not have occurred “but for” the wrongful actions of the employer —
- and not by the lessened causation test (“motivating-factor” standard)



UT Southwestern Medical Center v Naasar

- The result is the Supreme Court made retaliation claims harder to prove by imposing a tougher standard of proof on employees with such claims
- Judges and juries deciding these cases will now have to apply different standards of causation to retaliation claims than they apply to claims for discrimination



WA Cases

- Reiber v. City of Pullman – 08/13
- Currier v. Northland Services, Inc. 2014
- Both cases appear to apply the lesser causation test



Retaliation Claims and the EPL Policy

- Not much change as it relates to the use of the EPL policy
- But, let's take a step back....



What Does EPLI Policy Cover?

- A usual insuring agreement states...

“The insurer shall pay Loss on behalf of the Insureds resulting from an **Employment Practices Claim** first made against the insured during the Policy Period...for an **Employment Practices Wrongful Act** by the Insureds.”



What Does EPLI Policy Cover?

- Employment Practices Wrongful Act
 - Usual definition means: An alleged wrongful act such as wrongful dismissal, harassment, failure to hire, breach of employment contract, hostile work environment, and RETALIATION...
 - Retaliation is usually defined:
- Retaliation against an "Employee" arising out of employment by or services performed for the "Insured Entity"



EPLI are Claims Made and Reported Policies

- For coverage to apply, two conditions must be met:
 - the act giving rise to the claim must have occurred on or after the policy's retroactive date and,
 - the claim must be reported to the insurer during the policy term (or within 30 to 90 days following policy expiration, depending upon the individual policy form).



Claims Made v Occurrence Policies

Claims Made Policy

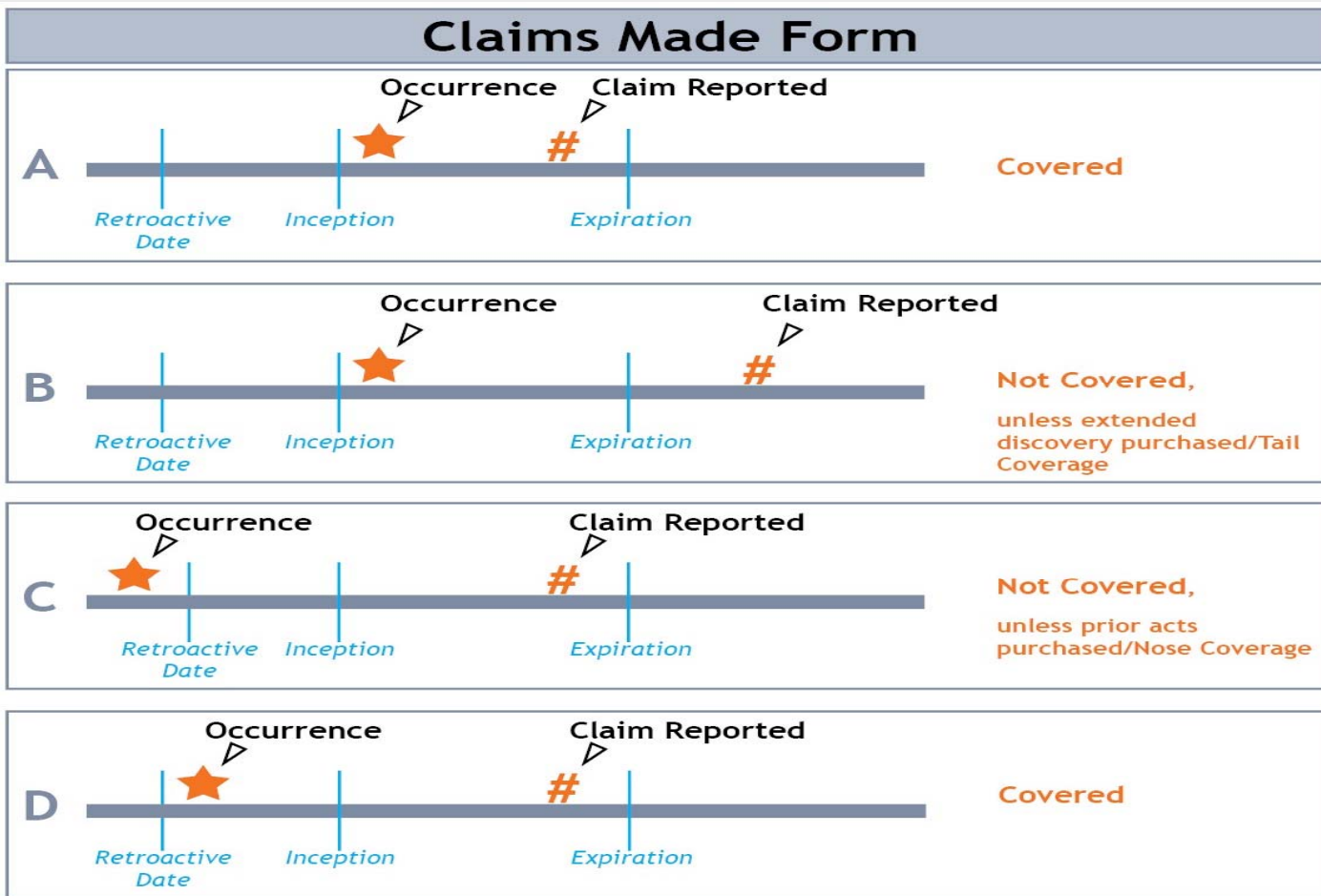
- The policy that is in force at the time of the claim being made is the policy which responds.
- It is NOT the policy that is in force at the time of the alleged wrongdoing.

Occurrence Policy

- It is the policy in force at the time of the occurrence that responds.
- The policy in force at the time of the claim being made MAY NOT be the policy which responds.



Test



Difficulties in the EPLI Claims Process

- Failure to notify the insurer of the claim.
- Engaging legal counsel without insurer's consent.
- Attempting to settle a claim without the insurer's consent.
- Interrelated wrongful acts.



Difficulties in the EPL Claim Process

Notice Provision of the EPLI Policy

- The policy usually defines when notice has been made against the insured as “...when the Insured receives written notice of the claim”.
- But, check the wording of your policy, as the policy can be endorsed to define who within the insured’s organization is the designated “noticed individual”.



Difficulties in the EPL Claim Process

Incidents that Could Give Rise to a Claim

- The EPLI policy provides the ability to report “incidents” that are likely to produce a “claim”.
 - Examples:
 - An injured worker complains that he is being treated differently for filing a workers’ compensation claim.
 - Employee’s attorney asks for personnel records.
 - Terminated employee’s final words as they head out the door “I have been retaliated against!”
 - Don’t forget about third party EPL...(if you have the coverage)...complaints from vendors or customers about unwanted advances or jokes.



Difficulties in the EPL Claim Process

“So, I have a retaliation claim. I will just call my attorney...”

Consent Issues

- The consent clause usually sets the requirement for the insured to obtain the consent of the insurer before engaging legal counsel or entering into a settlement, regardless of the retention.



Consent (continued)

- Thus, to have legal costs erode the Self-Insured Retention (SIR), the claim must have been received by the insurer;
- And, consent has been received by the insurer to the use of counsel.



Difficulties in the EPL Claim Process

Who Controls the Defense of a Claim?

- Usually Insurer Duty to Defend – Insurer has the duty to defend any claim alleging a covered act under the policy.
- If the insured has a desire to engage certain legal counsel, it needs to be endorsed to the policy.
- Don't wait until a claim happens...if you want certain counsel, this needs to be agreed upon at the policy inception or renewal– Talk to your broker.



Difficulties in the EPL Claim Process

Interrelated Claims

- A clause of the policy which allows claims with the same set of circumstances to be considered one claim.
- Same nexus of facts.



Benefits of Reporting an Incident

- Ensures the incident, should it turn into a covered claim, is properly reported to the insurer – protecting coverage.
- Defense costs could erode the retention.
- Additional claims that could arise from the incident could be considered related – potentially savings on retention.



Practical Discussions at Renewal of Your EPLI Policy

- Discuss the particular wording of the claim made and reported provision of your EPLI policy with HR and other departments.
- Do you have any “incidents” that should be reported?
- Don’t forget international exposures.
- Call your broker with questions.....

