Employment Practices Liability Coverage: Updates and Strategies in Addressing Employment-Based Claims

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INTRODUCTION

The world is a very different place than it was just a few years ago. The year 2009 will likely go down in history as one of the worst years for employees since the Great Depression. The economy shed more than seven million jobs between January 2008 and December 2009.[1] These layoffs have reached virtually

[1] Department of Labor, Bureau of Labor Statistics, *Current Employment Statistics Highlights November 2009*, http://www.bls.gov/web/ceshighlights.pdf.

every sector in every part of the country. Indeed, for the first time since 1983, more than one in every ten Americans is without a job.[2]

In light of the current economic environment, the risk of exposure to liability in the employment practices context is greater than ever. Wal-Mart, for example, recently settled a race discrimination case for $17.5 million[3] while CalPERS, a California public pension fund, settled an age discrimination case for a record $250 million in 2003.[4] This article discusses the development of Employment Practices Liability Insurance (EPLI) and common issues that arise in the EPLI context.

I. What is EPLI Coverage?

A. Background

EPLI protects employers from liability for wrongful employment practices. Although coverage varies greatly, most EPLI policies cover claims for sexual harassment, discrimination, and wrongful termination.

Like most major insurance developments, EPLI coverage grew out of the increased risk of claims and litigation related to employment practices. Historically, employers attempted to fit employment practices lawsuits into their existing policies, such as commercial general liability (CGL), directors and officers (D&O), and workers' compensation policies.[5] Employers soon found those policies were not intended to cover employment practices like discrimination. Employers needed a new form of insurance coverage for protection against the increasing risk of liability based on employment practices, and EPLI emerged to fill the gap.

B. Increase in Insurers Offering and Insureds Requesting EPLI Coverage

EPLI policies became popular in the mid-1990s because of an exponential increase in the number of employment practices suits. This surge resulted from the passage of the Civil Rights Act of 1991 (the "1991 Act"), which gave employees the option of trying their claims to a jury instead of a judge and provided for both compensatory and punitive damages for certain violations.[6]

The number of Charges filed with the EEOC fluctuated after the passage of the 1991 Act, leveling off by the end of the twentieth century.[7] There was an unprecedented increase in filed Charges in 2008, up fifteen percent compared to 2007.[8] The following chart summarizes the number of Charges filed with the EEOC since 1992[9]:

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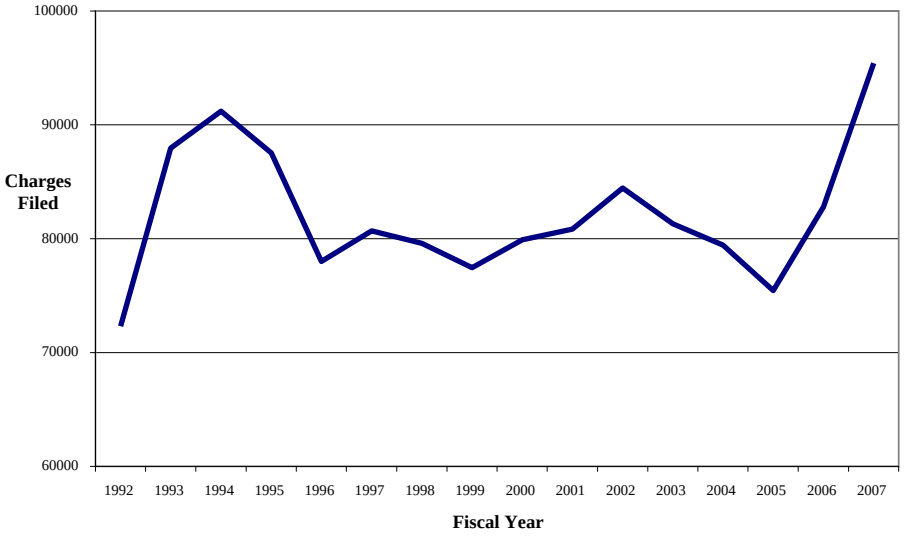
[2] Department of Labor, Bureau of Labor Statistics, Unemployment Rate, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000.
[3] *Judge OKs Wal-Mart Race Bias Suit Settlement*, MSNBC, July 9, 2009 (available at http://www.msnbc.msn.com/id/31831931/ns/business-retail/wid/21370087).
[4] *EEOC nets largest-ever age-discrimination settlement*, Business Management Daily, March 1, 2003 (available at http://www.businessmanagementdaily.com/articles/2749/1/EEOC-nets-largest-ever-age-discrimination-settlement/Page1.html).
[5] James B. Dolan Jr., *The Growing Significance of Employment Practices Liability Insurance*, 34 THE BRIEF 30, 31-32 (Winter 2005).
[6] 42 U.S.C. 1981(a)(2005).
[7] *See* EEOC, Enforcement & Litigation Statistics, All Statutes, http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (hereinafter "EEOC Enforcement & Litigation Statistics").
[8] *Id.*
[9] *Id.*



The EEOC received more than 95,000 Charges in 2008, the most filings since the EEOC was created in 1965.[10] This rise in job losses will likely lead to a rise in lawsuits related to employment practices.

Based on data compiled by the EEOC, the average amount of damages recovered by plaintiffs in employment practices suits has gradually increased.[11] In addition to higher average awards, the availability of punitive damages has increased the number of exceptionally large awards and settlements, several of which exceeded 100 million dollars.[12]

The increasing number of employment-related claims filed, combined with the risk of astronomical judgments, has led to more employers seeking EPLI and insurance companies attempting to meet the demand. Indeed, most major carriers offer some form of EPLI coverage and a large number of Fortune 500 companies have purchased an EPLI policy.[13]

[10] *More Bias Charges Filed in FY08 Than Ever: EEOC*, Law360 (March 11, 2009 http://www.law360.com/articles/91111); *see* EEOC Enforcement & Litigation Statistics, *supra* note 7.
[11] *See* EEOC Enforcement & Litigation Statistics, *supra* note 7.
[12] *See, e.g.*, Diane Cardwell, *City Agrees to Settlement in Parks Dept. Bias Case*, NY TIMES, Feb. 27, 2008 (available at http://www.nytimes.com/2008/02/27/nyregion/27parks.html?scp=1&sq=discrimination+parks&st=nyt) (City of New York , $21 million); *Briefs*, FORT WORTH STAR-TELEGRAM, May 31, 2007, at C2 (US Postal Service, $61 million)*;* Amy Joyce, *Verizon Bias Suit Deal Sets Record; Pregnancy Case Yields Payout of $48.9 Million*, WASH. POST, June 6, 2006, at D1 (Verizon, $49 million); Greg Winter, *Coca-Cola Settles Racial Bias Case*, NY TIMES, Nov. 17, 2000, at A1 (http://www.nytimes.com/2000/11/17/business/coca-cola-settles-racial-bias-case.html?sec=&spon=&partner=permalink&exprod=permalink) (Coca-Cola $192 million), Kurt Eichenwald, *Texaco to Make Record Payout in Bias Lawsuit*, NY TIMES, Nov 16, 1996, at 11 (http://www.nytimes.com/1996/11/16/business/texaco-to-make-record-payout-in-bias-lawsuit.html?pagewanted=1) (Texaco, $140 million).
[13] Joan Gable, et al., *Conflict Between Standards for Employment Discrimination Liability and the Delegation of That Liability: Does Employment Practices Liability Insurance Offer Appropriate Risk Transference?*, 4 U. PA. J. LAB. & EMP. L. 1, 28 (2001).

C. General Differences between EPLI Coverage and Coverage Under D&O and CGL Policies that Provide Coverage by Endorsement for Employment-Related Claims

Employers can obtain coverage for employment practices liability by purchasing a stand-alone policy such as an EPLI policy or a Management Liability Policy or by endorsement to an existing policy, such as a CGL or D&O policy. Although both methods provide coverage for employment-related issues, coverage under stand-alone EPLI policies differs from employment coverage that might be provided by endorsement to an existing policy in several distinct ways.

The first, and most essential, difference between stand-alone policies and coverage by endorsement may be the breadth of coverage. For example, various forms of EPLI policies exist, as do various forms of employment coverage endorsements. The breadth of coverage of course will depend on that particular form's language. As a general matter, though, EPLI policies focus solely on employment-related liabilities. Employment coverage that simply supplements another type of policy form could very well be limited. For example, employment coverage under a D&O policy may cover only the directors and officers and not the company.

Another important difference involves policy limits. Stand-alone EPLI policies come with their own separate policy limits. If employment practices coverage is provided by endorsement to a CGL or D&O policy, however, employment practices liability may be included in the policy's aggregate limit. When coverage for employment practices liability is by endorsement, employment lawsuits can exhaust the coverage limits of the underlying policies, leaving the insured at risk.

Additionally, carriers ordinarily write EPLI policies on a claims-made basis. CGL policies, by contrast, typically provide occurrence-based coverage. Carriers that do write employment liability endorsements to CGL policies usually do so on a claims-made basis.

Finally, the duty to defend also may distinguish EPLI policies from employment practices coverage under D&O policies. Unlike D&O policies, which usually provide for indemnification or advancement of defense costs, EPLI policies often contain a duty to defend provision. The duty to defend provision will enable the carrier to exercise control over the defense of the employment claim. In addition, some EPLI policies contain panel counsel provisions, requiring the insured to select counsel from a pre-determined list of firms.

D. Unique Aspects of EPLI Coverage

EPLI coverage usually includes a number of unique aspects worth considering. One such aspect of EPLI coverage is settlement procedure. Traditional EPLI policies typically give the insurer the right to control the settlement process and settle cases, usually with the insured's consent. That said, many EPLI policies include a so-called "hammer clause," which provides that if an insured does not consent to a settlement, then the insurer is not liable for any settlement or judgment that exceeds the refused settlement amount.

Many EPLI providers closely scrutinize insureds' internal employment practices. Some insurers require that applicants for EPLI disclose details of internal policies regarding discrimination and harassment.[14] Some insurers also require EPLI audits as a condition for coverage. This could involve a review of

[14] *See, e.g.* Chubb Group of Insurance Companies, Employment Practices Liability Coverage Application, http://www.chubb.com/businesses/csi/chubb4974.pdf (application requiring detailed information regarding human resources departments and practices).

employment practices, handbooks, and procedures for dealing with complaints of wrongful practices.[15] Finally, more insurance companies are offering assistance to policyholders' human resources departments to prevent wrongful employment practices in the first place. For example, certain carriers offer model employment practices policies and forms, training modules, consultant services, employment practices hot-lines, and comprehensive manuals that summarize pertinent employment laws and potential employment practices issues.[16]

II. Who is an "Insured" Under EPLI Policies?

EPLI policies generally provide a fairly broad definition of the persons and entities covered. For example, a typical EPLI policy's Insuring Agreement will provide coverage for all "Insureds" and list both (1) the "Organization" or "Company" and (2) any "Insured Person" as an "Insured." "Organizations" are designated in the policy's Declarations page and typically include subsidiaries of the company purchasing the policy. Included in the policy's definition of "Insured Person" may be the following:

i. Full-time, part-time, temporary, leased, or seasonal "Employees" or "Volunteers" of the "Organization";
ii. Third parties (such as clients and customers);
ii. Directors or officers of the "Organization";
iii. "Managers" or "Supervisors";
iv. "Independent Contractors" working for the named insured; and/or
v. Individual owners and their spouses and families for partnerships and sole proprietorships with coverage.

The precise meaning of each category of "Insured Person" under an EPLI policy may become critical once coverage becomes an issue. The inquiry, however, is not limited to whether an individual's job description fits within the policy's definition of "Insured Person." In fact, many policies also limit these definitions to certain circumstances, stating that a particular person is only an "Insured Person" "while acting in his her capacity" as employee, manager, supervisor, etc. Also, some policies include coverage for former, current, and/or future persons who work for the insured entity.

In light of the wide span of types of employment relationships and because employment liabilities can be triggered even when a worker is not employed full time, many policyholders want to know who exactly qualifies as an "employee." One such example is "leased" employees. This situation arises when an outside, non-insured company (the "leasing" company) contracts with an insured company (the "client" company) to permit a worker technically employed by the leasing company to perform services for the client company. Client companies prefer this method of hiring workers because they need not worry about insurance or other benefits-related expenses. When an EPLI policy does not (1) name the leasing company as an insured or (2) list "leased employees" as insured persons, there generally will be no coverage for claims arising from a leased worker's actions.[17] Although the client company may direct the employee's day-to-day activities, the leasing company ultimately retains the rights and obligations of the

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[15] *See e.g.*, Kenneth J. Diamond, *Employment Practices Liability Insurance*, 10-268 LABOR AND EMPLOYMENT LAW § 268.07(3) (Matthew Bender 2009).
[16] Chubb Group of Insurance Companies, Employment Practices Liability Loss Prevention, http://www.chubb.com/businesses/csi/chubb2141.html; SEYFARTH SHAW LLP, EMPLOYMENT PRACTICES LOSS PREVENTION GUIDELINES, A PRACTICAL GUIDE FROM CHUBB, http://www.chubb.com/businesses/csi/chubb2215.pdf (2005).
[17] *See* Home Ins. Co. v. Liberty Mut. Fire Ins. Co., 830 N.E.2d 186, 188-89 (Mass. 2005).

employer.[18] When policies do not expressly cover leased employees, courts will look to who decides the worker's employment status, the level or rate of his or her pay, the level of his or her benefits, and who ultimately takes responsibility for payroll, payroll tax, insurance, and other administrative matters.[19]

EPLI policies commonly define "employee" as "any person who receives wages or a salary from [the insured entity] for work that is directed and controlled by [the insured entity]."[20] Thus, courts often must look to who remunerates the worker to determine whether the policy covers a claim against the worker. Even if the policy does not define "employee," courts may look to the ordinary usage of the term.[21] Also, many policies require that the worker be "acting in his or her capacity" to be considered an "employee." This seemingly limits coverage, therefore, when a claim alleges the worker committed acts arguably outside the scope of his or her employment—such as discrimination or harassment.[22] This results in fact-intensive inquiries as to whether the worker acted within his or her scope of employment.[23] In a situation such as this, courts have held, though, that an insured entity may still be entitled to coverage when parties seek to hold it vicariously liable for such acts by the worker.[24]

It is also important to recognize the common distinction between the meaning of "manager" and "supervisor" under an EPLI policy. EPLI policies usually define "manager" as some natural person who is or will later become a manager, member of a board of managers, or some equivalent executive of the insured entity. So, an employee who may be, for example, a "store manager" may not constitute a covered "manager" under most EPLI policies.[25] A person holding this position would need to seek coverage as an "employee" or "supervisor," assuming the policy permits coverage for either.

EPLI policies also raise the question of coverage for independent contractors. A policy expressly including an independent contractor as an insured may state the following: "Insured Person means an Independent Contractor working for the Organization, but only while acting in his or her capacity as such and only if the Organization agrees in writing to indemnify the Independent Contractor for liability arising out of a Claim." Coverage for independent contractors will not be assumed. Thus, for independent contractors to obtain coverage under an EPLI policy, the policy must list "independent contractors" as "insured persons." When covered, a common definition of "independent contractor" may be "any natural person working for the Organization in the capacity as an independent contractor pursuant to an Independent Contractor Services Agreement." Thus, although not an employee of the company, a contractor may receive the benefit of coverage as long as the claim is brought against the contractor in his or her capacity as a contractor and the contractor and insured company have some sort of written agreement confirming that relationship.

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[18] *Id.*
[19] *Id.* at 189.
[20] *See, e.g.*, Valley Imaging Partnership Medical Group LP v. RLI Ins. Co., 268 Fed.Appx. 644, 645-46 (9th Cir. 2008).
[21] *See* Trout v. Liberty Nw. Ins. Corp., 961 P.2d 235, 237-38 (Or. Ct. App. 1998) (looking to whether the worker at issue was an employee "in the ordinary sense").
[22] *See* Mo. Pub. Entity Risk Mgmt. Fund v. Investors Ins. Co. of Am., 451 F.3d 925, 928 (8th Cir. 2006).
[23] *See* Interlocal Risk Financing Fund of N.C. v. Ryals, 186 N.C.App. 679 (N.C. Ct. App. 2007) (stating that the determination of whether a worker acted within the scope of his or her employment so that he or she may be considered an "employee" is one for the jury).
[24] *Id.* at 929 ("[T]he fact that [the worker's] alleged conduct was not within the scope of his duties does not preclude coverage for [the insured entity].").
[25] *See* Acuity v. N. Central Video, LLLP, No. 1:05-CV-010, 2007 WL 1356919, at *6-7 (D.N.D. May 7, 2007) (holding that a store manager may not be considered a "manager").

Although EPLI policies may purport to cover subsidiaries and affiliates of the named insured company, there may nevertheless be bars to coverage for these entities. The Fifth Circuit's holding in *Cooper Industries LLC v. American International Specialty Lines Insurance Co.* illustrates this.[26] In *Cooper*, the policy's Declarations page named only one insured entity, but the policy also contained an "Extension of Named Insured" endorsement that listed all affiliates of the named insured as "additional workplaces."[27] The named insured's parent company, seeking coverage under the EPLI policy, contended that the endorsement created a "single collective insured."[28] The Fifth Circuit, however, refused to interpret the endorsement as an extension of insureds.[29] Instead, the court concluded that the "Extension of Named Insured" endorsement referred to coverage for acts of named insureds that could occur at additional workplace locations owned by the named entity's affiliates.[30] With that in mind, policyholders and carriers at the outset should look carefully at this area of the policy to ensure that the intended coverage is placed.

III. What is a "Claim"?

Whether a "claim" has been made against the insured has fundamentally important consequences. While EPLI policies vary, a "claim" is usually necessary to trigger coverage; and a "claim" often must be reported to the insurer within a specified time frame. Additionally, depending upon the EPLI policy, "claim" can mean anything from an actual complaint to a demand letter written by an employee. The latest EPLI ISO form contains the following provision defining "claim":

> "**Claim**" means a "suit" or demand made by or for a current, former or prospective "employee" for damages because of an alleged "wrongful act."[31]

Other EPLI policy forms define "claim" as including a "written demand against any Insured for monetary damages or other relief."[32] The ISO form defines "suit" as a "civil proceeding in which damages because of a 'wrongful act' to which this insurance applies are alleged" and includes arbitration proceedings, any other alternative dispute resolution proceeding and:

> Any administrative proceeding or hearing conducted by a governmental agency (federal, state or local) having the proper legal authority over the matter in which such damages are claimed.[33]

Several courts have examined this language in the context of EEOC Charges, employee demand letters and other types of notifications or announcements of potential employee demands with varying results. The cases addressing these issues tend to be recent and only a handful of decisions concerning EPLI policies are officially published.

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[26] 273 Fed.Appx. 297 (5th Cir. 2008).
[27] *Id.* at 301.
[28] *Id.* at 300.
[29] *Id.* at 306.
[30] *Id.* at 303.
[31] Form EP 00 01 11 09 at p. 7 (emphasis added).
[32] *See* MedPointe Healthcare, Inc. v. Axis Reinsurance Co., No. 08-1494, 2009 WL 901959 (D. N.J. March 31, 2009).
[33] *Supra* note 31.

a. Employee Letters and Demands

Courts addressing this issue have focused on the plain meaning of the policy in determining whether employee letters alleging discrimination or other employment-related wrongful acts qualify as "claims" under the subject EPLI policies. Where the subject policy's definition of "claim" required that some type of monetary demand is made by the employee, a resignation letter as well as a letter seeking reinstatement did not qualify as "claims" absent the requisite monetary demand.[34]

In *SNL Financial, LC v. Philadelphia Indem. Ins. Co.,*[35] the Western District of Virginia addressed a policy which included in its definition of "claim" the requirement that it include a written demand for relief. The court found that correspondence between an employee's attorney and the insured did not explicitly include a "written demand for monetary or non-monetary relief" and therefore no "claim" was made at the time of the exchange of correspondence. In this case, in addition to the correspondence, the employee's attorney made an oral settlement demand of the insured. Because this demand was not "in writing" the court found that no claim had been made at that time.[36]

In *MedPointe Healthcare, Inc. v. Axis Reinsurance Co.,*[37] the U.S. District Court for the District of New Jersey examined whether an employee's letter demanding reinstatement as well as a later EEOC Charge qualified as "claims" for the purposes of the EPLI policy at issue. In that case, MedPointe was issued two consecutive annual EPLI policies by Axis for 2003-04 and 2004-05. Both policies defined "claim" as:

> (i) a written demand against any Insured for monetary damages or other relief,
> (ii) a civil proceeding against any Insured commenced by the service of a complaint or similar pleading,
> (iii) a formal, administrative, investigative or regulatory proceeding by or before the Equal Employment Opportunity Commission (EEOC) ... against any Insured commenced by a notice of charges, formal investigative order or similar document.[38]

The underlying case that formed the basis of the coverage action between MedPointe and Axis concerned an employee named Conchita Smith who was terminated from her employment at MedPointe on October 13, 2003. Four days after Ms. Smith's termination, an attorney sent a letter on her behalf to MedPointe requesting "reconsideration of her termination as well as full reinstatement."[39] MedPointe "declined to reconsider" the termination. In August 2004, Ms. Smith brought an EEOC Charge alleging that she was terminated by MedPointe on the basis of age, gender, race and disability.[40] MedPointe received notice of the Charge about a week later from the EEOC in a form that advised "no action is required by you at this time." A little more than a month later, the EEOC wrote the parties advising that the EEOC was closing its file because Ms. Smith failed to respond within thirty-days as required by the EEOC. This notification however granted Ms. Smith the "right to sue" within ninety days of the dismissal of the Charge. Ms. Smith thereafter filed suit against MedPointe in December 2004.

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[34] *See* Cornett Management Co., LLC v. Lexington Ins. Co., No. Civ.A. 5:04CV22, 2006 WL 898109, *6 (N.D.W.Va March 31, 2006) (resignation letter does not constitute a claim because the letter does not contain an "allegation of damages" as required by the policy).
[35] No. 3:09cv-00010, 2009 WL 3150870, *4 (W.D.Va. September 30, 2009).
[36] *See id.*
[37] No. 08-1494, 2009 WL 901959 (D. N.J. March 31, 2009)
[38] *Id*. at *1.
[39] *Id*. at *2.
[40] *Id.*.

Six days after service of Ms. Smith's complaint, MedPointe sent notification to Axis of the suit. Axis declined coverage on the basis that the policies were not triggered because a claim "was not filed during the 2003-04 Policy when MedPointe received the letter from Ms. Smith, seeking reinstatement, or after MedPointe received notice of the EEOC Charge."[41] Axis argued that because Ms. Smith's complaint concerned the same conduct forming the basis of the original letter and the EEOC Charge, the complaint was not a new "claim" that would trigger coverage under the second policy. In the resulting coverage litigation, the court found that factual issues precluded summary judgment on the issue of whether Ms. Smith's October 2003 letter seeking reinstatement constituted a "claim." The letter did not "request damages or insinuate that a claim for discrimination [was] being made" and therefore the court found that a juror could reasonably believe that the letter was not a "claim" as defined by the policy but simply a request to return to work.[42] The court was not persuaded by the insurer's argument that the letter should be considered a "claim" because it was sent by a lawyer and thus was "adversarial in nature."[43]

b. EEOC Charges

One threshold issue confronting insurers and policyholders alike is whether an EEOC Charge or similar state employment commission charge is a qualifying "claim" under an EPLI policy. Some policies do not define "claim" with as much specificity as the ISO form when it comes to an insured's receipt of an EEOC Charge. This circumstance has resulted in several recent conflicting decisions with regard to application of the EPLI policy language.

As discussed above, the Axis policy provision defining "claim" in *MedPointe* specifically included EEOC administrative proceedings. In that case, the court found that the EEOC Charge "fit squarely" within the definition of "claim" as an "administrative proceeding" before the EEOC.[44] However, the court found that a genuine dispute of fact existed barring summary judgment as to whether MedPointe was obligated to report the EEOC claim in order to obtain coverage for Ms. Smith's subsequent lawsuit. The court stated that because the EEOC dismissed the Charge and was closing its file, "a reasonable executive may surmise that Smith's claim had been decided against her" thus negating any need to actually report the claim.[45] As for the nearly two month period that passed between the EEOC Charge notice and notification that the EEOC was dismissing the Charge, the court similarly found issues of fact precluding summary judgment as to whether MedPointe was obligated to report the claim prior to the dismissal under the policy's "as soon as practicable" reporting standard.[46] The court recently denied a motion for reconsideration in which Axis argued that MedPointe was obligated under the plain meaning of the policy to give notice once it received notice of the EEOC Charge – regardless of the "reasonable executive's" belief on the merits and status of the claim.[47]

In *American Center for Intern. Labor Solidarity v. Federal Ins. Co.*,[48] the District of Columbia Circuit Court of Appeals found that an EEOC proceeding qualified as a "claim" requiring notice to the insurer. In that case, "claim" was defined in the Federal policy as including a "formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar

[41] *Id*. at *2.
[42] *Id*. at *3.
[43] *Id*..
[44] 2009 WL 901959,at *3.
[45] *Id*. at *4.
[46] *Id*.
[47] *See* D. N.J. Docket No. 08-1494.
[48] 548 F.3d 1103 (D.C. Cir. 2008).

document." [49] The underlying action against the insured involved an employee's allegation of discrimination under Title VII of the Civil Rights Act of 1964. After obtaining a right to sue letter from the EEOC, the employee filed suit against the insured. Federal denied coverage for the suit on the basis that under its policy "claim" encompassed the EEOC Charge as it was a "formal" proceeding and thus the insured's failure to report the original Charge was fatal to perfection of the insured's later tender of the lawsuit. In the ensuing coverage litigation, the insured argued that EEOC investigations are not "formal" because no actual hearing is held and the EEOC has no authority to "adjudicate liability."[50] The D.C. Circuit disagreed with the insured finding that EEOC proceedings are "formal" in that the appropriate analysis is not whether liability is ultimately adjudicated but rather what the proceedings "ultimately end up involving."[51] Because the EEOC proceedings are governed by "extensive regulations" and can have "serious consequences for their targets," the court found that the proceedings had the requisite formality to qualify as a "claim" under the Federal policy language.[52]

The U.S. District Court for the Northern District of Texas adopted a similar approach in *Munsch Hardt Kopf & Harr P.C. v. Executive Risk Specialty Ins. Co.*[53] In that case, the Executive Risk policy defined "claim" as "any judicial, administrative or other proceeding against any Insured for any Employment Practices Wrongful Act circumstances, situations, transactions, or Employment Practices Wrongful Acts."[54] Based on this language, the Texas court found that an EEOC Charge did indeed involve a formal administrative proceeding against the insured for discrimination and therefore qualified as a "claim" under the policy.[55]

Similar definitions of "claim" under other professional liability policy forms, have yielded varying results based on "formal administrative proceeding" language. *See e.g., Nat'l Stock Exch. v. Fed. Ins. Co.*[56] (holding that SEC investigative proceeding was a "formal administrative proceeding," and therefore a "claim"); *Capella Univ. v. Exec. Risk Specialty Ins.*[57] (D. Minn 2008) (holding Dept. of Education, Office of Civil Rights investigation not a "formal" investigation under Educator's Professional Liability Policy).

Several other courts have examined whether EEOC Charges are "claims" without engaging in the "formal administrative proceeding" debate at issue in the above cases, also to mixed results. *See e.g., Specialty Food Systems, Inc. v. Reliance Ins. Co. of Illinois*[58] (EEOC Charge is a "claim" even if it does not contain a "demand" for damages); *City of Santa Rosa v. Twin City Fire Ins. Co.*[59] (EEOC Charge is not a "claim" under policy language because it did not include a "demand"). As to policies that do not actually define "claim," several courts have found that EEOC Charges do not qualify as "claims" under the rationale that EEOC Charges do not contain any demand that would trigger the notice provisions of a claims-made policy. *See Bensalem Township v. W. World Ins. Co.*[60] (holding that EEOC Charge did not constitute a

[49] *Id*. at 1104.
[50] *Id*. at 1105.
[51] *Id*.
[52] *Id*. at 1106.
[53] No. 3:06-CV-01099, 2007 WL 708851 (N.D. Tex. March 8, 2007).
[54] *Id*. at *1.
[55] *Id*. at *3.
[56] No. 06 C 1603, 2007 WL 1030293 (N.D. Ill. Mar. 30, 2007)
[57] District Court opinion unavailable; case is currently on appeal to the 8th Circuit Case Nos. 08-2382, 08-3673, 08-3675, 09-1121.
[58] 45 F.Supp.2d 541 (E.D. La. 1999).
[59] 143 P.3d 196 (N.M. Ct. App. 2006).
[60] 609 F. Supp. 1343 (E.D. Pa. 1985).

"claim" under a policy that failed to define that term); *Nat'l Union Fire Ins. Co. v. Cary Cty. Consol. Sch. Dist.*[61] (same).

CONCLUSION

The EEOC recorded over 95,000 Charges in 2008 alone claiming among other things, employment discrimination on the basis of race, gender and age. This number will likely rise in the future as the impact of recession-related layoffs continue. Consequently, EPLI coverage claims have increased implicating numerous issues relating to the nature of the EPLI claims-made coverage. EPLI policies are not uniform and contain different provisions concerning, among other things, who is an insured, how a claim is defined and reporting requirements. Because EPLI policies are a relatively new insurance product, practitioners should pay particular attention to the particular policy language at issue recognizing that there is not currently any uniform EPLI policy form utilized by all carriers the provide insurance in this area.

[61] No. 93C6526, 1995 WL 66303, at *3 (N.D. Ill. Feb. 15, 1995).