LJN LAW JOURNAL NEWSLETTERS

The Insurance Coverage Law Bulletin®

An ALM Publication

Volume 11, Number 1 • February 2012

Insurance Coverage For the 2011 Thailand Floods

By Gary Thompson and John Shugrue

In late 2011, floodwaters from the monsoon season overwhelmed the low-lying areas of Thailand, including within Bangkok. In addition to the tragic loss of life and sickness to individuals, the floods caused major property damage and business interruption. Damage estimates are in the range of US $45 billion. *Time Magazine*, Dec. 2, 2011 ("Thailand Cleans Up; Areas Remain Flooded"). Many factories remain closed, and major crops like rice have been negatively impacted. Reuters, Oct. 28, 2011 ("Floods may damage quarter of Thai rice crop, exports hit"). Thailand is a critical link in international supply chains, notably automotive and computer components. For example, many of the factories that make hard disk drives have been flooded, leading some industry analysts to predict future worldwide shortages of hard disk drives. *The New York Times*, Nov. 6, 2011) ("Thailand Flooding Cripples Hard-Drive Suppliers"). One hard-drive manufacturer, Western Digital, reported estimated flood damage costs at between $225 and $275 million, with an insurance claim expected to lower the net impact. *The Orange County Register*, Dec. 2, 2011 ("Western Digital restarts flooded Thai plant").

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When Does a 'Claim' Arise for Purposes of an Employment Practices Liability Insurance Policy?

By Caroline L. Marks and Christopher F. Cariño

Many times a policyholder-employer can predict the potential for an employment-related claim long before that claim materializes into formal litigation. An employee, for example, may complain to a supervisor about an unlawful employment practice. She then may submit a written complaint to human resources. If that complaint does not get resolved to her satisfaction, the employee may file a complaint with an administrative agency, such as the Equal Employment Opportunity Commission ("EEOC"), or have her attorney send a letter to the policyholder-employer. After exhausting her administrative remedies, the employee may file a lawsuit.

Employers insure against losses arising from certain employment-related claims by obtaining employment practices liability insurance ("EPLI") policies. Critical to those policyholder-employers is the question of at what stage of the process, described above, must the insurers be placed on notice. The failure to give timely and proper notice, under certain circumstances, could result in the forfeiture of coverage. As will be explained below, the answer to this question often is controlled by the policy's definition of a "claim." The definition, however, varies among different EPLI policies. In addition, the specific content of an employee's complaint can affect the answer. This article analyzes different trends in the law concerning what constitutes a "claim" for purposes of an EPLI policy.

How Do Employers Become Aware of Employment-Related Claims?

Disagreements and complaints unquestionably play a role in the modern-day workplace. Employees spend a large part of their day interacting with a variety of people having different personality types, and they sometimes encounter stressful or uncomfortable situations. These situations typically do not resolve themselves and, if allowed to fester, can lead to a variety of employment-related claims being brought against the employer.

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To combat the deleterious effects of these situations, many employers have adopted open-door policies, which enable employees to air any grievances and, correspondingly, allow employers to promptly address any problems. The law encourages this practice, with a host of employment-related claims actually requiring an employee to exhaust these methods before seeking redress in the courts. In fact, an employer may insulate itself from liability from unlawful harassment by implementing certain internal procedures. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that an employer has an affirmative defense to certain sexual harassment claims where an employee unreasonably fails to take advantage of any preventive or corrective procedures provided by the employer); *see also Ferraro v. Kellwood Co.*, 440 F.3d 96, 102 (2d Cir. 2006) (applying the *Ellerth* defense to a disability harassment claim); *Allen v. Michigan Dep't of Corr.*, 165 F.3d 405, 411 (6th Cir. 1999) (concluding that although *Ellerth* "dealt with claims of sexual harassment, [its] reasoning is equally applicable to claims of racial harassment"); *Stofsky v. Pawling Cent. Sch. Dist.*, 635 F.Supp.2d 272, 295 (S.D.N.Y. 2009) (applying the *Ellerth* defense to an age harassment claim).

Additionally, for federal discrimination claims, an employee must exhaust the administrative remedies available through the EEOC before commencing any litigation. 42 U.S.C. § 2000e-5(e), (f) (requiring an employee to pursue an EEOC charge before filing a Title VII lawsuit); 42 U.S.C. § 12117(a) (requiring an employee to pursue an EEOC charge before filing a lawsuit under the Americans with Disabilities Act); 29 U.S.C. 626(d) (requiring an employee to pursue an EEOC charge before filing a lawsuit under the Age Discrimination in Employment Act). There are analogous administrative remedies applicable to state-law discrimination claims, as well. *See, e.g.*, COLO. REV. STAT. § 24-34-306(14); TEX. LAB. CODE § 21.202(a).

The purpose of such procedures is to resolve workplace disputes without resorting to time-consuming and costly litigation that places a substantial burden on the parties and the justice system. Yet, even with these mechanisms in place, the volume of employment litigation is reaching an all-time high. For EPLI policyholders, this means they must be versed in the ever-evolving legal landscape to determine if, or when, these pre-litigation procedures constitute "claims" under their policies.

What Is a 'Claim' Under EPLI Coverage?

EPLI policies generally are offered on a claims-made basis. In contrast to an occurrence-based policy, these policies are designed to protect a policyholder against claims made during the policy period. *Williams v. Synergy Care, Inc.,* No. 07-0137, 2008 WL 2945918, at *3 (W.D.La. July 29, 2008). The inquiry into what constitutes a "claim," thus, is significant in determining whether coverage applies and when a policyholder should provide notice to its insurer. While there appears to be considerable overlap among many EPLI policies, there is variation in the definition of the term "claim."

Some policies provide a general definition, defining a "claim" as "any judicial, administrative or other proceeding against any Insured for any Employment Practices Wrongful Act." *Munsch Hardt Kopf & Harr P.C. v. Executive Risk Specialty Ins. Co.*, No. 3:06-CV-01099, 2007 WL 708851, at *1 (N.D.Tex. Mar. 8, 2007). Other policies, in contrast, incorporate a more detailed definition of the term "claim," stating that it is:

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Caroline L. Marks is a shareholder in the Cleveland, OH, office of Brouse McDowell, and **Christopher F. Cariño** is an associate in the Akron, OH, office of Brouse McDowell. They regularly represent policyholders in insurance coverage disputes.

The Insurance Coverage Law Bulletin®
Coverage Law Bulletin®

The Insurance Coverage Law Bulletin® (ISSN 1541-0773) is published by Law Journal Newsletters, a division of ALM.

The Insurance Coverage Law Bulletin 023148
Periodicals Postage Paid at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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> (1) a written demand for monetary or non-monetary relief (including any request to toll or waive any statute of limitations); or
> (2) a civil, criminal, administrative or arbitration proceeding for monetary or non-monetary relief which is commenced by:
> (i) service of a complaint or similar pleading; or
> (ii) return of an indictment (in the case of a criminal proceeding); or
> (iii) receipt or filing of a notice of charges.

Lodgenet Entertainment Corp. v. American Intern. Specialty Lines Ins. Co., 299 F.Supp.2d 987, 991 (D.S.D. 2003); *see also Specialty Food Sys. Inc. v. Reliance Ins. Co. of Illinois*, No. 99-30176, 1999 WL 1095639, at *1 (5th Cir. Nov. 3, 1999) (defining "claim" as "any written demand or notice received by an Insured from a person or any administrative agency advising that it is the intention of a person to hold the Insured responsible for the consequences of a Wrongful Employment Practice and includes any demand received by an Insured for damages and/or the service of suit."). Although less common, a third category of policies provides no definition of "claim" at all. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Cary Cmty. Consol. Sch. Dist. No. 26*, No. 93C6526, 1995 WL 66303, at *3 (N.D.Ill. Feb. 15, 1995).

Notwithstanding these definitional differences, courts have attempted to develop more uniform guidelines for determining what conduct constitutes a "claim," based on the stage of pre-litigation procedure at issue.

EEOC Charges

One area that has witnessed considerable development is whether an EEOC charge constitutes a "claim" under EPLI and similar policies. Such a determination is significant because, if an EEOC charge is a "claim," the failure to report it to an insurer could bar coverage for any subsequent litigation covering the same set of facts.

While earlier cases reflect a split of authority, they likewise evidence efforts by the courts to find coverage for the policyholder. Several courts concluded that insurance carriers needed to provide coverage for employment lawsuits, despite the filing of related EEOC charges prior to the coverage period. In *Lodgenet Entertainment*, 299 F.Supp.2d 987, for example, the insurer argued that it had no obligation to provide the policyholder a defense in connection with a sexual harassment lawsuit brought during the coverage period by a former employee. According to the insurer, it had no coverage obligation because the claim arose before the effective date of the EPLI policy by virtue of the filing of a related EEOC charge.

The court flatly rejected the insurer's attempt to avoid its coverage obligations, despite the fact that the policy defined the term "claim" to include:

> an Equal Employment Opportunity Commission ("EEOC") (or similar state, local or foreign agency) proceeding or investigation commenced by the filing of a notice of charges, service of a complaint or similar document of which notice has been given to an Insured.

The court held that, while the definition clearly provided that the term "claim" included EEOC proceedings, the lawsuit — although borne out of the EEOC charge — was a separate claim and should be covered under the policy. *Id.* at 993. According to the court, the definition of "claim" did not state that all suits or proceedings arising out of the same facts constituted a single "claim." *Id.* at 992.

In addition, the court analyzed the notice provision, which provided that:

> If written notice of a Claim has been given to the Insurer pursuant to Clause 7(a) above, then *any Claim which is subsequently made* against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim for which such notice has been given, or alleging any Employment Practices Violation which is the same as or related to any Employment Practices Violation alleged in the Claim of which such notice has been given, shall be considered made at the time such notice was given.
> *Id.* (Emphasis in original).

The court observed that this notice provision would be superfluous if the parties intended a "claim" to encompass all types of proceedings arising out of the same facts. *Id.* at 992. In other words, the court found that the policy language indicated that multiple "claims" could arise from the same set of facts. *Id.* at 993. As such, coverage existed for the policyholder under its EPLI policy.

The court in *Cary Community Consolidated School District* took a different approach, but it similarly concluded that an EEOC charge predating the policy period did not preclude coverage for a subsequent, related age discrimination lawsuit. Because the policy at issue lacked a definition of the term "claim," the court used a "garden variety" dictionary definition: "Demand for money or property as of right, *e.g.* insurance claim." 1995 WL 66303 at *3. Applying that definition, the court noted that, at the time of the filing of the charge, the EEOC lacked authority to impose damages. It further pointed to the fact that, because the employee did not resign her employment until several months after the lawsuit, she likely had no colorable claim for money damages. Based on these facts, the court decided that the EEOC proceedings did not constitute a "claim" under the policy, and the insurer was obligated to defend the claim against the policyholder. *Id.* at *4; *see also City of Santa Rosa v. Twin City Fire Ins. Co.*, 140 N.M. 434, 437 (2006) (holding that the mere filing of an EEOC charge was not a claim under a policy that defined the term as a suit for damages, because the charge was unaccompanied by any request for relief, such as an actual

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demand for reinstatement or compensation).

Notwithstanding these earlier decisions, courts have become increasingly consistent in coverage determinations involving EEOC charges. The trend is toward holding that an EEOC charge is a "claim" under an EPLI policy, oftentimes to the detriment of the policyholder. For example, in *American Center for International Labor Solidarity v. Federal Insurance Company*, 548 F.3d 1103, 1104 (D.C. Cir. 2008), the court reviewed an EPLI policy that defined a "claim," in relevant part, as a "formal administrative or regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document."

While the parties agreed that the EEOC's proceedings were "administrative" and "commenced by the filing of a notice of charges," they disagreed whether the proceedings were "formal." The policyholder argued that because the EEOC conducted only an investigation (*i.e.*, it held no hearing and the results of the investigation did not serve to adjudicate liability), its proceedings must be deemed informal. According to the policyholder, because the EEOC charge was not a "claim," it was not required to notify the insurer until it became aware of the litigation. Both the policyholder and the insurer agreed that if the EEOC charge constituted a claim, the policyholder did not provide timely notice.

The court rejected the policyholder's characterization of the EEOC's proceedings. The court reasoned the proceedings are governed by extensive regulations, which dictate every facet of the EEOC's work. *Id.* at 1104-06. Specifically, the EEOC examines every charge, begins an investigation, gives an initial opinion, attempts to resolve the issue quickly, and commits resources to the most pressing cases. As the court noted, "[t]hat role, specified by statute and structured by regulation, can hardly be considered informal." *Id.* at 1106. As a result, the court determined that the insurer properly denied coverage as it did not receive timely notice of the "claim." *Id.*; *but see Capella Univ., Inc. v. Executive Risk Specialty Ins. Co.*, 617 F.3d 1040, 1042 (8th Cir. 2010) (analyzing similar policy language, but distinguishing *American Center* on the basis that the proceedings were before the Department of Education, Office of Civil Rights, not the EEOC, and, as such, were not "formal" because they are less regulated and are not a prerequisite to filing a lawsuit).

Similarly, in *Munsch Hardt Kopf & Harr P.C.*, 2007 WL 708851, the court examined whether an EEOC charge fell under the definition of the term "claim" to determine if a policyholder provided timely notice. Under the EPLI policy, a claim was defined as "any judicial, administrative or other proceeding against any Insured for any Employment Practices Wrongful Act." The policy also defined "related claims" as "all claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, or Employment Practices Wrongful Acts." Related claims were treated as a single claim under the policy.

Based on this language, the court held that the EEOC charge alleging discrimination and the subsequent discrimination lawsuit were related and, therefore, constituted a single claim. *Id.* at *3. This conclusion affected the policyholder's notice obligations under the policy. Specifically, the court reasoned that because there was a single claim, the notice period began to run from the date the policyholder learned of the EEOC charge. *Id.* at *5. As a result, the court determined that the policyholder did not provide timely notice under the policy and was not entitled to coverage for the discrimination lawsuit.

While these recent decisions may appear to favor insurers, the trend may be due in large part to more specific policy language that expressly includes administrative proceedings. *See Fulton Bellows, LLC v. Fed. Ins. Co.*, 662 F.Supp.2d 976, 990 (E.D.Tenn. 2009) ("The Policy defines an Employment Claim as including a claim of discrimination filed with the EEOC."); *Am. Ctr. for Int'l Labor Solidarity v. Federal Ins. Co.*, 548 F.3d 1103; *Munsch Hardt Kopf & Harr P.C.*, 2007 WL 708851. Nonetheless, policyholders should review their EPLI policies carefully if they receive an EEOC charge and be aware that court decisions excluding EEOC charges from the definition of "claim" are becoming rare.

Employee Complaints in the Workplace

Courts have only recently begun to address the issue of whether an internal employee complaint constitutes a claim under an EPLI policy. *See, e.g., Commonwealth Orthopedic Ctrs., P.S.C. v. Philadelphia Indem. Ins. Co.*, No. 09-109, 2010 WL 4568805 (E.D.Ky. Nov. 3, 2010) (insurance carrier refusing coverage because the policyholder received an internal complaint of sexual harassment four years prior to employee's lawsuit); *Cornett Mgmt. Co., LLC v. Lexington Ins. Co.*, No. Civ.A. 5:04CV22, 2006 WL 898109, at *7 (N.D.W.Va. Mar. 31, 2006) (holding that the letter of resignation asserting several potential causes of action was not a claim because there was no demand for compensation for loss or damage). While the case law in this area is limited, a common theme remains: Policy language remains critical to this determination. But, unlike the filing of EEOC charges, each internal complaint may have a unique factual component that may (or may not) be dispositive of whether the complaint meets the definition of a "claim."

Cornett Management, 2006 WL 898109, is instructive on the interplay between the express policy language and the specific circumstances involved with an internal complaint. In that case, an employee lodged an internal complaint alleging sexual harassment through a company hot line. Frustrated with

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the result of the policyholder's investigation, the employee tendered her resignation letter, which further detailed the sexual-harassment allegations. The employee later filed a lawsuit against the policyholder based on the allegations in her internal complaints. The policyholder asserted that the employee's telephone complaint and resignation letter constituted a "claim" within the meaning of its EPLI policy. The court disagreed.

The court first analyzed the relevant policy language, which defined a "claim" as "a written demand or notice received by an Insured in which damages likely to be covered by this policy are alleged." Reviewing the dictionary definition of "damages," the court concluded that a "claim" must include a request for monetary compensation. The court acknowledged that the letter and telephone complaint asserted several potential causes of action. *Id.* at *7. Neither, however, alleged "damages" that would be covered under the policy. *Id.* Additionally, the verbal complaint through the company hot line could not be construed as a "written demand." *Id.* at *8. The court, therefore, held that a "claim" did not materialize until the employee filed suit, and, consequently, the claim was outside the coverage period. *Id.*

A similar issue arose in *MedPointe Healthcare Inc. v. Axis Reinsur. Co.*, Civ. No. 08-1494, 2009 WL 901959 (D.N.J. Mar. 31, 2009), but, in that instance, the employee's letter was sent by her attorney. Moreover, the policy contained a different definition of "claim" in that it included demands for damages and "other relief." The letter stated that the employee found her termination after 17 years "greatly disturbing," and she requested that the policyholder reconsider its position and reinstate her. After the policyholder denied reinstatement, the employee filed an EEOC charge alleging age, sex, race, and disability discrimination and subsequently instituted a discrimination lawsuit. In holding that there was a material issue of fact as to whether the attorney's letter constituted a "claim," the court acknowledged that the letter did not request damages, nor did it insinuate a claim of discrimination. *Id.* at *3. Because an attorney faxed the letter to the policyholder, however, the letter could be viewed as adversarial in nature and constitute a "written demand." *Id.* Given these competing interpretations, the court denied the insurance carrier's motion for summary judgment on the issue of whether the insurer properly denied coverage. *Id.* at *3-4.

It is evident that policy language is the starting point for any determination as to whether an employee's internal complaint meets the definition of "claim" in an EPLI policy. As demonstrated by these two cases, however, the substance of the employee's complaint (*i.e.*, the remedies the employee is seeking) and the circumstances surrounding it (*i.e.*, is the involvement of legal counsel) matter.

Conclusion

Courts are providing more guidance as to what constitutes a "claim" under an EPLI policy. Unfortunately for policyholders, a great deal of uncertainty remains. This uncertainty potentially places policyholders in a no-win situation. On the one hand, the law encourages policyholder-employers to solicit employee grievances in hope of resolving them early. On the other hand, providing a forum for airing complaints may give rise to a "claim" under an EPLI policy and accelerate the period in which a policyholder-employer must provide notice to its insurer or otherwise risk losing coverage for a later lawsuit.

Nonetheless, in order to best guard against losing EPLI coverage through the failure to timely notify an insurer of a potentially covered claim, a policyholder should first review its policy. Because of the variances in the definition of "claim" in EPLI policies, a policyholder should not make any assumptions about the policy's language. The policyholder also should analyze the particular facts of any internal complaint to determine if it even arguably falls within the policy's definition of "claim." While these measures may not eliminate all uncertainty as to whether a particular pre-litigation event gives rise to a "claim" under an EPLI policy, they will greatly reduce the possibility that a policyholder will face an employment claim without coverage.

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Such impacts to manufacturing or agricultural operations can have downstream effects on export markets and supply chains across the world. Businesses in the United States and elsewhere may have what are known as "contingent business interruption" losses, which in turn might be insured under their first-party property policies. A company with losses from the Thailand flooding should consider several areas of possible insurance coverage.

Property Damage and Flood Exclusions

The standard commercial property insurance policy covers "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." "Covered Property" typically includes the policyholder's building, equipment, personal property, and stock, as well as the personal property of others. "Covered Cause of Loss" usually refers to a form attached to the policy that either will: 1) include "all risks of direct physical loss" except those excluded by the form (an "all risk" form), or 2) include only certain "named perils."

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