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EEOC Lawsuit Not a Claim under Employment Practices Liability Policy

Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co., No. 3:07-cv-00303 (M.D. Tenn. Sept. 21, 2011).

The Middle District of Tennessee recently held that a lawsuit brought by the Equal Employment Opportunity Commission (EEOC) did not constitute a claim under the terms of the employment practices liability (EPL) policy before the court and, accordingly, the insurer had no duty to defend or indemnify its policyholder.

In *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, No. 3:07-cv-00303 (M.D. Tenn. Sept. 21, 2011), 10 employees of the plaintiff policyholder filed charges of discrimination against it with the EEOC and the corresponding state agency. The policyholder notified its insurer, Cincinnati Insurance Company (Cincinnati) of the charges. Ultimately, based upon the charges filed, the EEOC brought suit against the policyholder for multiple alleged violations of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991 (EEOC lawsuit). The parties eventually settled the case when the policyholder agreed to pay \$2,000,000 into a settlement fund that would be allocated among the charging parties. The policyholder also incurred defense costs exceeding \$700,000 before settlement was reached. The policyholder then brought suit against Cincinnati, seeking a declaration that Cincinnati had a duty to defend and indemnify it in connection with the EEOC lawsuit and seeking damages for breach of contract and bad faith. Both parties moved for summary judgment.

In its motion, Cincinnati argued that the EEOC lawsuit did not constitute a claim under the policy. The policy defined claim as

a civil, administrative or arbitration proceeding commenced by the service of a complaint or charge, *which is brought by any past, present or prospective ‘employee(s)’ of the ‘insured entity’ against any ‘insured’ for any of the following twelve listed causes . . . [w]rongful termination of employment; or . . . [v]iolation of any federal, state or local law*

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that concerns employment discrimination, including sexual harassment . . . (emphasis added).

Notably, Cincinnati did not dispute that the EEOC lawsuit fell within the enumerated causes of action in the policy and raised claims for “[v]iolation of any federal, state or local law that concerns employment discrimination.” Cincinnati argued, however, that because the lawsuit was brought solely by the EEOC, it was not brought by an employee of the insured and was therefore not even arguably covered under the policy.

The policyholder countered that, under basic grammar rules, when one uses a comma followed by the word “which,” the phrase following the word “which” modifies solely the subject immediately preceding the comma. The court identified this rule as the “last antecedent rule.” Under the policyholder’s interpretation, then, the phrase “which is brought by any past, present or prospective ‘employee’” modified only the phrase “complaint or charge.” Thus, only the complaint or charge had to be brought by an employee, here the 10 charging parties. Under the policyholder’s construction, the “civil, administrative or arbitration proceeding” did not have to be brought by an employee to constitute a claim under the policy.

Despite first noting that Tennessee construes any ambiguities in insurance policies against the insurer and in favor of coverage, the district court nevertheless refused to apply that rule of policy construction to its interpretation of the term claim, finding that the term was not ambiguous. The court then found that it need not apply the last antecedent rule articulated by plaintiff because it found that the policy was not ambiguous. The court held that the phrase “a civil, administrative or arbitration proceeding commenced by the service of a complaint or charge” was the subject of the sentence, and was modified in its entirety by the limiting phrase “which is brought by any past, present or prospective ‘employee(s).’”

The court further held that, even under the policyholder’s interpretation, the EEOC lawsuit still would not constitute a claim because it was not commenced by the service of a charge but rather by the service of a complaint. The court thus found irrelevant the fact that the lawsuit was based upon the EEOC charges because the complaint that commenced the action was not brought by an employee.



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Finally, the court found persuasive the fact that other insurers' EPL policies did not contain the limiting employee language, discounting the fact that the policyholder understood that it had purchased coverage for precisely these types of lawsuits by purchasing the Cincinnati policy. The *Cracker Barrel* decision is therefore instructive to policyholders, reminding them that they should be careful to confirm that their EPL policies provide coverage for claims brought by the EEOC.

Keywords: insurance, litigation, Tennessee, EPLI, employment practices liability insurance, claim, EEOC, last antecedent rule

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