Developments in Employment Practices Liability Insurance: A Trap for the Unwary

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By John Orr

In January 2010, the Connecticut Supreme Court ruled that an Employment Practices Liability ("EPL") insurer may preclude coverage for a wrongful termination lawsuit if the same employee had filed a claim for unemployment benefits before the policy's "prior and pending proceeding" date.

In *National Waste Associates, LLC v. Travelers Casualty and Surety Company of America* (CT SC 18380 January 19, 2010), a terminated employee filed an unemployment benefits claim in 2005. Two years later, she filed a lawsuit against her former employer, asserting claims for wrongful termination. As with most EPL policies, the policy at issue contained an exclusion for claims arising out of facts alleged in civil, criminal, or administrative proceedings filed before the policy's prior and pending proceeding date, often the date the company first incepted coverage. Applying the exclusion, the insurer asserted that the wrongful termination lawsuit arose out of facts asserted in the unemployment hearing, which the insurer deemed to be an "administrative proceeding" filed before the policy's 2007 prior and pending proceeding date.

The *National Waste* decision reveals what some may regard as an unintended consequence of the prior and pending proceeding exclusion. Unlike administrative actions such as EEOC charges, where the alleged wrongful employment practice (such as discrimination) is the central claim for the agency to determine, claims for unemployment benefits may never require determination of any such practice. Instead, the practice simply may be raised as a factor of termination. If, in the prior case, the alleged wrongful practice is not asserted as a legal claim for which relief should be granted, is it appropriate for the insurer so broadly to apply the prior and pending proceeding exclusion? By affirming the insurer's coverage denial after construing the policy's wording, the Connecticut Supreme Court believed so.

Among the lessons that insureds and their brokers should learn from this decision is to evaluate and, where appropriate, negotiate more protective language in the policy at renewal. At least one EPL insurer, for example, has responded to the decision by offering an endorsement which provides that it will not consider an unemployment hearing as an "administrative proceeding" when determining coverage. If language alternatives are not available, however, insureds should consider implementing internal procedures that ensure tracking and, where necessary, notification of unemployment proceedings to the EPL insurer as claims or potential claims. How and under what circumstances claims or potential claims should be noticed to the insurer often requires careful consideration of numerous other policy issues. Accordingly, insureds should evaluate notification concerns on a case-by-case basis and should do so in consultation with their broker and counsel.

If you have any questions or would like to discuss these or any other EPL insurance issues, please contact your Integro Management Risk professional.

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About Integro
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