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## **PRESS RELEASE**

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### **AN EPLI CLAIM COUNSEL'S COMMENTARY**

The following article is by Scott R. Schaffer, Esq., Senior Partner with Wilson, Elser, Moskowitz, Edelman & Dicker LLP (WEMED). Scott is the Claims Counsel for a number of EPLI insurance carriers. **This article provides insight into the thought process of carriers and their attorneys.**

### **EMPLOYMENT PRACTICES LIABILITY INSURANCE CLAIMS HANDLING CONSIDERATIONS; A CLAIM COUNSEL'S COMMENTARY**

As “outside” claims counsel for Employment Practices Liability (“EPL”) insurers, our principal functions are twofold: (1) to evaluate and opine on coverage; and (2) to monitor and resolve covered claims.

#### ***Coverage Counsel***

As coverage counsel, we analyze the claim and the subject policy, recommend a coverage position to the insured, and communicate the insurer’s position to the insured. The coverage letter discusses the general operation, and the terms, conditions and limitations, of the policy, and sets forth the basis for the insurer’s coverage position. The coverage letter may be an acknowledgment of coverage, a reservation of rights, or a coverage denial. With the exception of certain standard exclusions, and “prior knowledge,” “claims made,” and/or “late notice” issues, EPL policies tend to afford broad coverage. Hence, in many EPL claims, at least defense coverage will be afforded pursuant to a reservation of rights with respect to indemnity.

#### ***Coverage Denials***

The prospect of a coverage denial is not taken lightly. In order to best insulate the insured from extra-contractual exposure, there must be a reasonable basis upon which to articulate a disclaimer for the entire claim. The pertinent exclusions and coverage considerations should be unambiguous and clearly apply to the claim.

As a courtesy, the insurer’s coverage observations can be previewed with the insured and its broker, and the insured can be afforded the opportunity to withdraw its notice of claim rather than have the insurer formally deny coverage. In our experience, this is appreciated by the insurer and the broker. A disclaimer letter may not have to be issued and the insured may be able to close its file.

Another alternative to an outright disclaimer would be for the insurer to defend the claim pursuant to a reservation of rights and simultaneously commence a DJ action against the insured seeking a judicial declaration of non-coverage. A defense of the underlying claim would be provided until such time as the court relieves the insurer of such obligation. A potential problem with this approach is that the underlying claim may be concluded, or may need to be resolved, before the insurer's rights and obligations are adjudicated in the DJ action.

If, ultimately, coverage is to be outright denied, the insurer needs to be familiar with the legal considerations. First, there is always the prospect that the insured will commence a coverage action against the insurer or attempt to implead the insurer into the underlying claim. A coverage action may seek to impose extra-contractual liability. Second, the insurer will not have any input into the defense and/or settlement of a claim that otherwise may have been efficiently disposed of had coverage been afforded. The insurer may not be pleased with the amount of "loss" incurred by the insured if presented with a renewed demand for coverage at claim conclusion.

If coverage is denied, the insured will generally be free to defend (or not defend) and settle (or not settle) the claim as it sees fit. The insured may default on the claim or enter into a "non-recourse" settlement with the claimant. In either event, whether by operation of law or by contractual assignment, the claimant may proceed directly against the insurer to collect on the claim. With denials of coverage, insurers should be cognizant that policy "cooperation" clauses may be held to be inapplicable.

### ***Defense/Reservation of Rights***

It is appropriate to reserve rights when there is at least a possibility that some aspect of the claim will not be covered when all of the facts have come to light and/or there has been an adjudication of liability against the insured. It has been espoused that "the duty to defend is broader than the duty to indemnify." This has generally been taken to mean that if one aspect of the claim is covered, but others are not, the entire claim will have to be defended. This concept, of course, is subject to state by state analysis, and the pertinent policy terms and conditions.

For instance, there are certain EPL policy forms that require an allocation of defense costs where there are both covered and non-covered aspects of a claim. In a civil action, the allocation percentage can be arrived at by comparing the number of covered counts versus the number of non-covered counts in the complaint. This is just one policy methodology. There are other policy forms which provide that all legal fees and expenses "reasonable related" to the defense of covered counts shall be included among the defense costs to be satisfied by the insurer. This concept has been adopted in the law of various states and may control the adjustment of a particular EPL claim in the absence of policy language to the contrary.

On occasion, the covered aspect of the claim will be dismissed while the non-covered aspect remains pending. It is not generally recommended that the EPL insurer than deny coverage and withdraw from the defense. The safer course of conduct would be for the insurer to continue to defend and to re-assert the reservation of rights. The insurer should re-emphasize that it does not have an indemnity obligation with respect to the remaining aspects of the claim. The insurer may also wish to consider commencing a DJ action to seek a judicial declaration relieving the defense obligation.

If the policy contains a “duty to defend,” counsel from the insured’s EPL panel will be appointed to defend the insured, sometimes subject to the insured’s consent. If the policy does not contain a duty to defend and/or the insured has the right to select its counsel of choice, the EPL insurer will oftentimes seek our guidance in determining whether to consent to the insured’s counsel. Whether appointed by the insurer or selected by the insured, defense counsel’s client is always the insured not the insurer. Moreover, if the defense is afforded pursuant to a reservation of rights, depending upon applicable state law, the insured may also be entitled to so-called “Cumis counsel.”

### ***Monitoring Counsel***

As the insured is adequately represented in claims for which coverage has been afforded, our function on behalf of the EPL insurer expands to include that of monitoring counsel. In this role, it is our responsibility to: (1) establish a meaningful dialogue with both the insured and defense counsel; (2) follow the progress of the claim; (3) evaluate the underlying facts and circumstances; (4) assess the insured’s liability and damages exposures; (5) estimate the costs that would be incurred in defending the claim to a litigated conclusion; and in collaboration with defense counsel, (6) develop and implement a cost-effective resolution strategy that is in the best mutual interests of the insured and the insurer.

In conducting an investigation and analysis as monitoring counsel, the insured’s employment manual or handbook, and personnel files on the claimant and other employees involved in the claims, are obtained and reviewed. An “on-site” inspection of the insured’s facility may be conducted, and meetings with the insured’s representatives and defense counsel may be scheduled. We can review pleadings and motion papers, and analyze deposition testimony, as part of our continuing investigation. Oftentimes, we will be asked to serve as the insurer’s representative at mediations and settlement conferences. The goal as monitoring counsel always is to encourage the economic adjustment of the claim in a manner that is consistent with the terms, conditions, limitations and exclusions for which the insured and insurer have contracted.

### ***A Final Word***

All in all, our service as counsel for EPL insurers encompasses all aspects of claims management, from the preparation of initial acknowledgement letters to the resolution of claims and almost everything in between. We appreciate every opportunity to share our experience with EPL insurers, insured and defense counsel alike.

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Contact: Philip L. Blais  
[Phil@blaisexcess.com](mailto:Phil@blaisexcess.com)

**Houston Office**  
820 Gessner, Suite 1750  
Houston, Texas 77024  
(713) 780-7787 Phn (713) 780-3533 Fax

**Dallas Office**  
4570 Westgrove, Suite 245  
Addison, Texas 75001  
(972) 818-4090 Phn (972) 818-4088 Fax

**Austin Office**  
P.O. Box 92824  
Austin, Texas 78709  
(512) 894-3460 Phn (512) 858-1266 Fax

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