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Issues in Managing Current High Profile Claims Under EPL, Cyber, and Professional Liability Policies

I. Higher Profile Claims May Create Additional Claims Management Issues

It may seem that claims alleging hostile work environment and harassment, cyber incidents and data breaches, and claims arising under technology oriented statutes are on the rise. It's likely that the newsletters and alerts you receive every morning, i.e. *Law 360, Above the Law*, etc., will include breaking news impacting these areas. For example, there are reports of substantial company-wide hostile work environment investigations and settlements, recurring cyber and data breach claims, and privacy violation claims. Leaving aside whether the actual number of these claims has increased, there is no doubt that the complexity of these claims and the issues they raise can create challenging issues for claims management professionals. We will focus on some of these "higher profile" claims that could be covered under EPL, Cyber, E&O and D&O policies, and whether they are creating any unique claims management issues.

We should clarify our working definition of "higher profile" claims for our discussion. It's not intended to suggest that a particular claim is front page material. Rather, they are the types of claims which, by their subject matter or area, seem to be reported more frequently and, in turn, tendered for coverage. These claims may create coverage and claims management issues that may not be as common in other claims. For our purposes, we'll focus on: (i) employment related claims, more specifically, multiple claims or a pattern of discrimination/harassment complaints in the workplace, and related hostile work environment claims; (ii) cyber/data breach claims, and (iii) privacy violation claims under statutes such as the Biometric Protection Privacy Act (BIPA). We'll extend the discussion, because of the overlap

that we are seeing in some of these larger claims, to claims which may trigger analysis under more than one policy, and the claims management issues that may arise when that occurs. We will explore whether these claims create unique issues, coverage issues that may be triggered, and exclusions/policy language that could be relevant such as prior knowledge, relatedness and intentional acts.

II. Employment Practices Liability Claims and Related Coverage Issues

Let's look first at Employment Practices Liability ("EPL") related claims including claims of sexual or gender based harassment, abusive or hostile work environment claims and discrimination. The Me Too movement has resulted in several high profile claims, investigations, and settlements. Some of the more well-known hostile work environment and harassment claims have led to claims against the company's Board of Directors for breach of duty and related type claims for failing to take appropriate steps to investigate hostile work environment or harassment complaints, or for failing to act on allegations of misconduct, sometimes triggering D&O or other policies. But leaving aside the larger claims for a moment, you may have concluded based on your individual observations, that there has been an increase in the number of general employment related complaints within the workplace as a whole, regardless of the market or industry.

A typical EPL Policy would cover employment related wrongful acts which include claims of sexual or gender based harassment, hostile work environment, and discrimination claims on a claim made basis. More specifically, the definition of Employment Practices Wrongful Act under such a policy might include, among other acts:

1. Wrongful dismissal, discharge or termination (either actual or constructive) of employment, including breach of an implied employment contract;

2. Employment related harassment (including but not limited to sexual harassment);

3. Employment-related discrimination (including but not limited to discrimination based on age, gender, race, color, national origin, religion, sexual orientation or preference, pregnancy or disability);

4. Employment-related retaliation;

5. Employment-related misrepresentation to an Employee or applicant for employment with the Insured organization;

6. Libel, slander, humiliation, defamation or invasion of privacy (solely when employment related);

7. Wrongful failure to promote;

8. Wrongful deprivation of career opportunity, wrongful demotion or negligent Employee evaluation, including giving defamatory statements in connection with an Employee reference;

9. Employment related wrongful discipline;

10. Failure to grant tenure or practice privileges;

11. Failure to provide or enforce adequate and consistent organization policies or procedures relating to employment;

12. Violations of the following federal laws (as amended) including all regulations promulgated thereunder: a. Family and Medical leave Act of 1993; b. Americans with Disabilities Act of 1992 (ADA); c. Civil Rights Act of 1991; d. Age Discrimination in Employment Act of 1967 (ADEA), including the Older Workers Benefit Protection Act of 1990; or e. Title VII of the Civil Rights Law of 1964 (as amended) and 42 U.S.C. Section 1983, as well as the Pregnancy Discrimination Act of 1978;

13. Violation of an Insured Person's civil rights relating to any of the above; or

14. Negligent hiring, retention, training or supervision, infliction of emotional distress, failure to provide or enforce adequate or consistent organizational policies and procedures, or violation of an individual's civil rights, when alleged in conjunction with respect to any of the foregoing items 1 through 13.[i]

Typically, the definition of “Claim” or “Employment Practices Claim” under an EPL Policy is broad and includes “(a) a written demand against an Insured for damages or other relief; (b) a civil, judicial, administrative, regulatory or arbitration proceeding or a formal governmental investigation against an Insured seeking damages or other relief, commenced by the service of a complaint or similar pleading, including any appeal therefrom; (c) a civil proceeding against an Insured before the Equal Employment Opportunity Commission or any similar federal, state or local governmental body, commenced by the filing of a notice of charges, investigative order or similar document;

or (d) a criminal proceeding brought for an Employment Practices Wrongful Act in a court outside of the United States against any Insured, commenced by a return of an indictment or similar document, or receipt or filing of a notice of charges."[ii]

Although the definitions of Employment Practices Wrongful Act and Employment Practices Claim under the Policy may be broad, there may be threshold issues of whether a particular event or complaint that has been tendered satisfies those definitions under the EPL Policy. Absent a judicial proceeding, regulatory matter, or other investigation, it may be more difficult to evaluate a claim that alleges general workplace harassment or a prolonged history of a hostile work environment to determine if the claim constitutes a "written demand for damages or other relief" thereby potentially triggering coverage. It may be that the claim is sufficient to meet the definitions; however, do allegations of historic and perhaps decades-old work place misconduct raise any issues? While there is an abundance of case law addressing whether a particular complaint constitutes a claim, special issues may be present when reviewing some of the more recent claims due to the nature of the claim, how specific the allegations are, and when the conduct that is the subject of the claim is first alleged to have occurred.

Assuming that a claim has been tendered and the definition of claim has been satisfied, the prior knowledge exclusion and interrelated wrongful acts provisions of the EPL Policy may also raise some challenging issues. Insureds are usually required to warrant in connection with an application or renewal of insurance coverage that they have no knowledge of facts or circumstances which could give rise to a claim. In *Maxum Indem. Co. v. Sullivan Vineyards Corp.,*[iii] the Court addressed the prior knowledge issue in connection with an analysis of several claims, including claims brought under an EPL Policy. In finding that coverage was barred under the prior knowledge exclusion, the Court framed the prior knowledge issue and relevant considerations as follows:

> Maxum (Insurer) claimed in Count III that it is entitled to a judgment declaring that it is not obligated to provide SVC with insurance coverage for the Former Employees' lawsuit under the Policy's prior knowledge exclusion. Id. ¶ 144. Maxum has asserted that the Proposal asked SVC if it knew of any fact or circumstance that might result in an employment liability claim. Id. ¶ 133. Maxum has further asserted that SVC falsely denied such knowledge and, in so doing, failed to disclose employee complaints and allegations that Kelleen Sullivan had harassed SVC employees before the Proposal was submitted. Id. ¶¶ 134-38.
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> Maxum has also claimed in Count III that the Defendants are barred from coverage for the Former Employees' lawsuit under the prior knowledge exclusion. This exclusion provides that Maxum is not liable for any claim under the EPL Section arising from a fact, circumstance, or situation that should have been set forth in the Proposal. See id. ¶ 45. Maxum has alleged that SVC falsely answered the question in the Proposal that would have alerted Maxum to the facts underlying the Former Employees' lawsuit against Defendants, namely Kelleen Sullivan's alleged harassment of those employees from June to August 2015. See id. ¶¶ 132-44. In sum, Maxum has alleged facts demonstrating that there is no coverage for the underlying action. (emphasis supplied).

Likewise, the Policy may include an "Interrelated Wrongful Acts" exclusion. Typically, this exclusion would exclude from coverage any Wrongful Act that was the subject of a prior claim or notice, or which constitutes an Interrelated Wrongful Act. A common definition of Interrelated Wrongful Acts in an EPL Policy was noted in *MF Nut Co., LLC v. Cont'l Cas. Co.,*[iv] as follows: "…the Policy defines "Interrelated Wrongful Acts" as "any Wrongful Acts which are logically or causally connected by reason of any common fact, circumstance, situation, transaction or event."

The Court's decision in *Maxum* raises issues that may be of interest when analyzing current employment related claims which raise allegations of past harassment or hostile work environments conditions. In *Maxum*, the Insurer alleged that the Insured knew of the alleged harassment and failed to disclose it in its application for EPL insurance. The facts as reported in the decision supported this conclusion and coverage was denied. In cases where current employment claims raise an allegation that the conduct complained of existed for a prolonged period of time or was known to management, additional investigation may be warranted to determine whether the prior knowledge exclusion may apply. Given that recent claims may, in some cases, include allegations of long-standing company-wide harassment, the initial review of these types of claims after they have been tendered may be more intensive and detailed to determine the potential application of the prior knowledge exclusion. Additional information may be requested from the Insured in an initial coverage letter in order to explore whether the Insured had knowledge of any facts which could trigger the exclusion. Knowledge by the Insured of prior complaints of harassment or hostile work environment may result in consideration of the whether the prior knowledge exclusion should be raised. Application of the prior knowledge exclusion will also require close review of the policy to determine whether the alleged facts must be known to specific individuals within the company such as the senior risk manager, general counsel or other officer.

Another potential issue is the recent trend of employers to refer or outsource the investigation of serious allegations of harassment, particularly those involving company-wide misconduct, or allegations directed against higher level management or the Board, to an outside "independent" law firm or consultant. Companies have been turning to independent outside law firms to investigate serious cases of widespread harassment and other employee misconduct with increased frequency. In February 2018, for example, Wynn Resorts hired an outside law firm to investigate allegations of sexual harassment and misconduct and related claims.[v] From a claims management standpoint, the use of independent outside investigations may become more common place. Clearly, these investigations will lead to additional cost and other issues which may increase the costs of defense, such as discovery related disputes and challenges to the independence or adequacy of the investigation.

Finally, we are seeing more employment claims also including allegations that Human Resources, senior management and the Board of Directors were made aware of allegations of misconduct in the workplace or other forms of harassment and discrimination years earlier yet failed to act on these complaints or conducted inadequate investigations. These types of complaints may trigger application or at least review of other polices such as the company's Directors and Officers Policy for potential coverage. The application of these polices to these types of claims will turn in large part on the allegations of the Complaint and whether claims are made against the Board and management for failure to act or similar type conduct which may be covered.

III. Cyber and Privacy Related Statutory Claims

Considering that reports of large scale data beaches resulting in the loss of personal identifiable information are increasing, it's no surprise that issues surrounding cyber insurance policies continue to be some of the most often reported topics and are the subject of multi-day seminars. As legislation impacting cyber breaches evolves, it is reasonable to expect that claims resulting from these breaches will increase and perhaps even change in nature depending on new legislation.

For example, on May 25, 2018, Europe's General Data Protection Regulation ("GDPR") will take effect. GDPR is a comprehensive regulation "designed to harmonize data privacy laws across Europe, to protect and empower all EU citizens data privacy and to reshape the way organizations across the region approach data privacy."[vi] The GDPR makes clear that it applies to organizations located within the EU as well as organizations "located outside of the EU if they offer goods or services to, or monitor the behaviour of, EU data subjects. It applies to all companies processing and holding the personal data of data subjects residing in the European Union, regardless of the

company's location."[vii] Among other things, the GDPR expands the definition of what is considered personal data of a customer and breach notification requirements and establishes substantial fines for noncompliance.[viii] Companies located within the U.S. that process and hold personal data of customers located in the EU will need to consider the impact of the regulation on its business.

Likewise, the New York Department of Financial Services Regulation 500 requiring banking, insurance and financial services companies to report data breaches continues to evolve. Section 500.02 of the regulation requires that entities subject to the regulation must develop and maintain "… a cybersecurity program designed to protect the confidentiality, integrity and availability of the Covered Entity's Information Systems."[ix] Regulation 500 imposes strict requirements on companies ranging from the creation of incident response and notification plans, appointment of a Chief Information Security Officer, and Penetration Testing and Vulnerability Assessments (Section 500.05).[x]

For purposes of our discussion, given the limited time we have, we will focus issues that seem to consume most time when handling cyber related claims and claims brought under privacy type statutes such as Illinois' Biometric Information Privacy Act.[xi] That said, the nature of the cyber and privacy claims will often trigger consideration of coverage under various types of polices including general liability, technology E&O, products liability and standalone cyber policies. The current marketplace for cyber insurance continues to evolve, and while more standalone polices are being written, the "silent" coverage for cyber claims continues to be an issue. In July 2017 it was reported in *Property Casualty 360º* that "given the limited take-up of affirmative cyber coverage, the potential for an event to trigger losses from "silent cyber" in a traditional line of business is a growing concern for Insurers and regulators alike."[xii]

With regard to claims under privacy type statutes, although claims under the Biometric Information Privacy Act for example are appearing with more frequency, there are few reported decisions analyzing the Act and its requirements, let alone coverage opinions addressing the statute. In *Norberg v. Shutterfly, Inc.,*[xiii] the U.S. District Court for the Northern District of Illinois provided the following discussion:

> The BIPA was enacted in 2008, and to this date, the Court is unaware of any judicial interpretation of the statute. The parties have provided none and the Court's own research was also fruitless. Turning to the plain language of the statute, the BIPA provides guidelines and limitations on the collection, retention, disclosure, and storage of biometric identifiers and information. 740 Ill. Comp. Stat. 14/15. The statute defines a biometric

> identifier as: "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," and excludes: writing samples, signatures, photographs, biological samples, demographic data, tattoos, or physical descriptions. Id. § 10. Biometric information is defined as "any information . . . converted, stored, or shared, based on an individual's biometric identifier used to identify an individual[,]" excluding information derived from items excluded from the above definition. Id. The statute further prohibits private entities from collecting biometric information from individuals absent express consent from the individuals following a written disclosure of the collection and a public policy for handling and disposing of that biometric information. Id. § 15. The statute also provides for a private cause of action against any company or private entity that is in violation of the BIPA. Id. § 20. Here, Plaintiff alleges that Defendants are using his personal face pattern to recognize and identify Plaintiff in photographs posted to Websites. Plaintiff avers that he is not now nor has he ever been a user of Websites, and that he was not presented with a written biometrics policy nor has he consented to have his biometric identifiers used by Defendants. As a result, the Court finds that Plaintiff has plausibly stated a claim for relief under the BIPA.

The nature of cyber and privacy breach claims continues to expand, running from traditional data breach claims to cyber extortion and claims which sound more in technology errors and omissions than cyber. Careful review of the claim or complaint is critical in order to make threshold determinations of potential polices which may cover the claim. Moreover, the urgency of many cyber claims may make initial coverage reviews difficult if not impossible in some cases. Often, a forensic report from an outside vendor will be needed before a full coverage analysis can be undertaken. Insureds may also look to retain a data breach coach while accessing the problem and formulating a plan. These events will require more active claims management involvement in the early days of the claim. This may include working with outside technology vendors and forensic experts to evaluate the claim. Consideration should be given to utilizing provisions, if present in applicable policies, which require the Insured to provide additional information to assist in evaluating a claim such as requests for the Insured's cyber and compliance programs and incident response plans.

ENDNOTES

[i] *Cal. Dairies Inc. v. RSUI Indem. Co., 2009 U.S. Dist. LEXIS 72989 (*United States District Court for the Eastern District of California, August 11, 2009).

[ii] *Scottsdale Indem. Co. v. Convercent, Inc*., 2017 U.S. Dist. LEXIS 187939 (United States District Court for the District of Colorado, November 14, 2017.

[iii] 2016 U.S. Dist. LEXIS 164505, (U.S. District Court, N.D. Ca., Nov. 4, 2016

[iv] 2013 U.S. Dist. LEXIS 5894 (U.S. District Court, District of Hawaii, January 14, 2013

[v] *Law Firm to Help With Wynn Sexual Misconduct Investigation,* Las Vegas Review-Journal, February 3, 2018

[vi] *See* GDPR Portal; https://www.eugdpr.org/eugdpr.org.html

[vii] *See* GDPR Portal; https://www.eugdpr.org/eugdpr.org.html

[viii] Article 4 of the GDPR defines personal data as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."

[ix] NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, 23 NYCRR 500 Section 500.02. *See also*, N.Y. Department of Financial Services website: http://www.dfs.ny.gov/about/cybersecurity.htm

[x] *Id.*

[xi] Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/1 et seq. (Source: P.A. 95-994, eff. 10-3-08.)

[xii] *Property Casualty 360º* July 27, 2017, *Uncovering Silent Cyber Risk*

[xiii] 152 F. Supp. 3d 1103, (U.S.D.C. ND Ill., December 29, 2015)