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Managing and Defending Employment Litigation with High Exposure But Questionable Liability

I. THE IMPORTANCE OF EARLY CASE EVALUATIONS

Upon receipt of a lawsuit, the first question for an insured or insurer alike is typically, "What is this case worth?" Although the question appears simple, it is a loaded question that requires a careful case evaluation, which requires analysis of the complaint or charge, allegations, evidence, case law, venue, jurisdiction, opposing counsel, judge, and jury verdicts. In the employment context, many unique factors go into this evaluation, including, but not limited to: the nature of the claims and the statutes implicated by the claims, the plaintiff's compensation upon termination, whether the plaintiff has searched for and/or found comparable replacement employment (mitigation of damages), whether the plaintiff is claiming garden-variety emotional distress or has received a diagnosis of a mental health condition, and whether there is an experienced plaintiff's counsel. In addition, there may or may not be caps on damages depending on the statutes involved and the jurisdiction in play.

Why is the answer to the above question important? The answer will guide the insured's and insurer's litigation/resolution plan and form the insured's and insurer's expectations for the case. As a result, the answer to the above question is critical, and accuracy is imperative. In the employment litigation context, determining this answer early is even more important due to the potential accrual of back pay and attorneys' fees and potential significant statutory damages, which the plaintiff is entitled to recover if successful at trial.

An early, thorough case evaluation is extremely important so as to be able to answer the above question and provide sound direction and advice to the insured and insurer. The case evaluation exercise is counsel's first opportunity to discover the answer to the question and work collaboratively with the insurer and insured. In the context of employment litigation, the evidence can be voluminous. Witnesses may be supervisors, decisionmakers, co-workers, alleged harassers, non-employees, significant others, family, spouses, medical providers, and former and subsequent employers.

There may also be a lot of documents to review, including personnel files, emails, texts, notes, phone records, medical records, handbooks, payroll records, and time records. The evaluation process involves collecting and analyzing this evidence and interviewing witnesses, to allow counsel to make judgments to determine the strengths and weaknesses, and corresponding value of the case. A written case evaluation operates as a vehicle upon which counsel can develop and recommend a settlement and/or litigation strategy to the insurer and the client. As the matter proceeds, it is important for defense counsel to supplement the case evaluation report as new facts or developments are learned in the case.

II. ALTERNATIVE DISPUTE RESOLUTION

Statistically, most employment lawsuits are resolved through alternative dispute resolution, which may include the following methods: negotiations, mediations (or settlement conferences), or arbitrations. Many jurisdictions even require mediation or a settlement conference as part of an early resolution program or a scheduling order. Regardless, each method of alternative dispute resolution has its pros and cons.

The most flexible approach to alternative dispute resolution is negotiations. Counsel may agree or decline to enter into negotiations at any time. There is no need to schedule a third party neutral. Negotiations can start immediately between counsel. There is no additional expense, other than the time of counsel. It is not binding, and either party can unilaterally end negotiations. However, there is no obligation of good faith. In addition, because there is no third party neutral, disagreements and emotions of the respective clients may create an impasse. With the employer-employee relationship, litigation can sometimes be more akin to a divorce, requiring a third party neutral to assist in the potential resolution process.

Mediation can either be binding or nonbinding, but most often, it is nonbinding. In nonbinding mediation, the mediator acts as a third party neutral to facilitate resolution. The mediator usually requires a fee, unless the mediator is a judge and the mediation is a part of a settlement conference. There is an obligation of good faith and usually the parties (and insurer) are required to attend or be present by phone. Although scheduling the mediator can cause delays in mediating the case, the parties will dedicate a half or a whole day (or sometimes more, depending on the complexity of the case) to the mediator to resolve the case.

Although less common than negotiations and mediations, arbitrations are also available. In the employment litigation context, arbitrations typically arise from an employment contract of some type or a restrictive covenant agreement. Arbitrations are binding and do not usually include appeal rights. Arbitrations are different than the negotiations or mediation options mentioned above because if as part of the process they do not yield a resolution of the matter, the parties will put forth their respective cases and an arbitrator will make a binding decision on the merits. In addition, arbitrations are more expensive than the negotiations or mediation options mentioned

above because the parties must pay an arbitrator for pre-hearing proceedings, the arbitration itself and for the time the arbitrator spends in rendering a decision.

Of course, these factors should be analyzed before deciding which method to recommend. Because employment actions accrue additional damages as they progress in the form of back pay and attorneys' fees and given the potential significant statutory damages involved as well, it is even more important to explore early alternative dispute resolution.

III. PUBLICITY AND PUBLIC RELATIONS

In light of the me-too movement, media has become more interested in exposing employment lawsuits to viewers/readers. This has caused an additional element of publicity and public relations considerations for insureds and insurers, especially in the context of retail, restaurants, and hospitality clients, where many times there are well-known brands and names involved. Customers are often concerned with the integrity and reputation of the establishments they visit. Although publicity is a large consideration for insureds, publicity will not likely impact the liability and damage assessment of the case. On the rare occasion, however, publicity of lawsuits with sensational or heinous facts, even when these lawsuits have questionable liability, can create a high exposure situation. In those circumstances, publicity is a factor to weigh in whether to continue to litigate or seek early resolution.

Conventionally, lawsuits harm the reputation of the insureds, and many insureds see litigation as an opportunity to rebut the allegations and rebuild their reputations. However, that rarely happens. Instead, most employment cases are resolved prior to trial, and insureds therefore often lose the opportunity to rebuild their reputations during litigation. Instead, with careful consideration of the language of the settlement agreement and release (confidentiality and non-disparagement provisions by way of example), a sound public relations plan may be the best means for the insured to rebuild its reputation.

Depending on the situation, insureds at times retain public relations firms to assist them during lawsuits to manage their image with customers. Insureds can work with a public relations firm to develop a litigation public relation strategy, prepare post-litigation communications and talking points, and manage media relations and customer perceptions.

IV. CASE SCENARIOS

There are a few more common scenarios where there can be high exposure with questionable liability in the employment law setting:

Sensational and Heinous Facts

Restaurant – The plaintiff accused her former co-worker of sexual harassment. For employer liability for a co-worker's alleged harassment, there must be notice to someone at the employer who could reasonably be expected to refer the complaint and/or conduct to management. Here, at least from the employer's perspective, there was no notice to anyone at the employer who could reasonably be expected to refer the complaint and/or conduct to management. However, the plaintiff was sexually assaulted at her home, and the facts were gruesome. In addition, there were pictures and texts to substantiate the sexual assault. Although liability for sexual harassment was questionable based on the lack of notice, the value of this lawsuit was high exposure because it easily shocked the senses of potential jurors and the public at large. Furthermore, this lawsuit was sitting in a jurisdiction that did not have caps on emotional distress damages or punitive damages.

Retailer – The plaintiff, a former employee, accused co-workers of racial harassment. During times of low customer traffic, the employees engaged in pranks and name-calling. The name-calling included referring to each other by racial slurs, regardless of race. The plaintiff was African-American, and the coworkers were Caucasian. The plaintiff went to the restroom, and while the plaintiff was inside the restroom, the four Caucasian employees sprayed a flammable substance on the bottom of the door and locked the door shut. While the plaintiff was inside the locked bathroom, he saw the flames from under the door and had a panic attack. He was rushed to the emergency room, where he reported what happened to the medical personnel and the police. The employees were all engaged in mutual pranks and name-calling and were not motivated by a racial animus. However, the plaintiff attempted suicide because of the incident and produced a journal in discovery outlining his depression and post-traumatic stress disorder. The independent medical exam also confirmed the diagnoses. Even though the evidence was strong that the Caucasian employees were not motivated by the plaintiff's race, the allegations were sensational and local news exposed the story, which caused the case to be high exposure.

High Wage Earners

Retailer – Plaintiff, a former-CEO of a retailer, was terminated because the company was on the verge of bankruptcy. Plaintiff's salary at the time of her termination was $2,000,000.00 a year. Plaintiff could not find comparable replacement work and alleged lost wages were in excess of $4,000,000.00. Even though the company was on the verge of bankruptcy under the management of the plaintiff, the plaintiff brought an age discrimination lawsuit. Despite there being no evidence of age animus and the fact that the plaintiff was terminated by board made up of individuals older than the plaintiff, the case settled quickly because every month lost wages increased by well north of one hundred thousand dollars.

Class-Actions

Low Wage Earners and Predictive Scheduling in the Restaurant Industry – A class action was filed in a jurisdiction that required fast serve restaurants to provide good faith estimates of work schedules before or upon hire to employees. The restaurant's good faith estimates, although substantially completed by the employer, failed to include the address of the employer, which was a technical defect. Based on the number of class members and look-back period, and the corresponding potential statutory penalties, the damage exposure amounted to $5,000,000.00. Arguably, the employer was substantially compliant with the legal requirements for the good faith estimates, but based on the high exposure of the case, the case resolved due to the high exposure.

V. WHEN SETTLEMENT IS NOT AN OPTION

Although statistically speaking settlement is the most likely result for insureds and insurers in the employment law context, sometimes settlement attempts fail, and the parties reach impasse. In these instances, the insured needs to vigorously defend the case. As part of the insured's defense, there are other methods to attempt to posture the case for resolution as well. For example, in employment cases, an offer of judgment can be an effective tool for early resolution to cap attorneys' fees, depending on the jurisdiction. With preclusion of an additional accrual of attorneys' fees, plaintiff's counsel may be more inclined to attempt to reach a settlement by informal means or attend a mediation to attempt to do so.

In addition, depending on the evidence, there may be an opportunity for defense counsel to file a motion for summary judgment, which can be used as leverage to initiate further settlement discussions or early disposition of the case by judgment in favor of the defendant. Defense counsel should evaluate the case carefully to assess the strengths and weaknesses of a summary judgment motion and advise the insured and insurer on this important issue.

Again, arbitration agreements are sometimes at play in employment litigation. As such, enforcing arbitration agreements might provide leverage when settlement is not otherwise an option given the plaintiff involved. Many plaintiff's attorneys do not want to spend the time and money fighting over the threshold issue of whether an arbitration agreement is enforceable. Also, with successful enforcement of an arbitration agreement, the parties will typically have to put in the time and money to prepare their cases sooner and the case will be decided by the arbitrator if the matter proceeds to an arbitration hearing.

For class actions, there may be an opportunity to obtain leverage through opposition to a motion for class certification (which could significantly limit an insured's liability). Lastly, where there are uncovered claims or where there is a high deductible policy or a policy whereby the defense fees deplete the coverage limits, the insured's

inability to pay can sometimes be very compelling to opposing counsel and/or the plaintiff(s) when considering whether to engage in alternative dispute resolution.