FirstLook

Issues and Developments in Insurance Law

Letter from the Insurance Company Team

Employers face liability in a variety of contexts; however, commercial general liability ("CGL") policies "generally exclude coverage for injury to an employee 'arising out of and in the course of' the employment."[1] In addition, CGL policies typically "exclude[] loss for 'any obligation of the insured under a workers compensation, disability benefits or unemployment compensation law or any similar law.'"[2] There are coverages available, however, to address these exclusions. For instance, "[e]mployers' liability insurance is traditionally written in conjunction with workers' compensation insurance and is intended to fill gaps by providing protection in those situations in which [an] employee has a right to bring [a] tort action despite provisions of [a] workers' compensation statute, or [the] employee is not subject to workers' compensation law . . . ."[3] Additionally, employment practices liability ("EPL") coverage provides "protection against such claims as wrongful discharge from employment, discrimination, and sexual harassment."[4]

The articles in this edition highlight issues associated with employers' liability and EPL insurance. What trends are emerging in employment litigation, which could implicate EPL coverage? What are the common exclusions to employers' liability insurance? How have courts analyzed language in employers' liability policies? The articles herein will provide you with a "FirstLook" at these forms of insurance.

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[1] § 26:29.Workers compensation and employers liability, 2 Casualty Insurance Claims § 26:29 (4th ed.).

[2] *Id.*

[3] § 225.157.Employers' Liability Insurance; Introduction; Relationship to Workers' Compensation, 16 Couch on Ins. § 225:157 (citing *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.*, 884 P.2d 1048 (Cal. 1994).

[4] § 132:57.Employer activity (employer's liability), 9A Couch on Ins. § 132:57.

INSIDE THIS EDITION:

Takin' Care of Business

Employer Liability: Policies, Exclusions, and Emerging Trends

IN THIS ISSUE

Employer's Liability Coverage and Employment Practices Liability Coverage: Common Elements and Exclusions.

By Mark A. Moses

Generally speaking, Employer Liability Insurance ("ELI") and Employment Practices Liability Insurance ("EPLI") provide employers with insurance coverage for injuries and claims brought on behalf of a given employer's employees against the employer. This article provides insight into the scope of such coverage and the common exclusions thereto.

ELI has traditionally served as a stopgap for any liabilities that workers' compensation insurance cannot cover, either due to exclusions or excess liability.[1] Such policies are traditionally written in conjunction with workers' compensation policies and provide additional coverage for "bodily injury by accident or bodily injury by disease."[2] Although this coverage sounds similar to traditional workers' compensation coverage, insofar as both policies cover accidental injury or disease to an employer's employee, ELI affords the employer additional coverage when the employee can make claims against the employer above-and-beyond or outside the scope of workers' compensation policies.[3] Additionally, ELI generally provides the employer coverage for attorney's fees, court costs, and settlement or judgment proceeds.[4]

However, ELI is not without some exclusions. Typical exclusions can include:

a. liability assumed under a contract;

b. punitive or exemplary damages because of injuries to an employee employed in violation of law;

c. injury to an employee while employed in violation of law with your actual knowledge;

d. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits law or similar law;

e. bodily injury intentionally caused or aggravated by you;

f. injury outside the U.S. or Canada (unless there "temporarily");

g. damages arising out of coercion, criticism, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination against, or termination of any employee or any personnel practices, policies, acts, or omissions;

h. injury to any person in work subject to the Longshore and Harbor Workers Compensation Act (or similar federal regulations);

i. injury to any person in work subject to the Federal Employers Liability Act;

j. injury to a master or member of the crew of any vessel;

k. fines or penalties imposed for violation of federal or state law; and

l. damages payable under the Migrant and Seasonal Agricultural Worker Protection Act, or similar federal law.[5]

Critical to ELI coverage remains the fact that the employee's claim must allege bodily injury by accident or bodily injury by disease. Consequently, ELI does not typically provide coverage for traditional employment claims for discrimination, harassment, and wrongful termination.[6]

Enter EPLI coverage, which emerged in the early-1990s to afford additional coverage to employers from claims by employees for discrimination, harassment, and wrongful termination.[7] These are typically "claims made" rather than "occurrence" policies and can include the following exclusions:

a. claims asserting actual or alleged bodily injury or property damage arising out of wanton, willful, reckless or intentional disregard of any laws;

b. acts committed with criminal or malicious purpose or intent;

c. damages for losses from violations of the ERISA or other laws concerning benefits;[8]

d. claims based on wrongful acts committed before the date that the EPLI was purchased if any officer was aware or with reasonable diligence could have reasonably foreseen that the wrongful act could lead to a claim; [9]

e. knowing violations of law (public policy exclusions);

f. provisions that exclude or establish reduced sublimits for punitive damages;

g. provisions that exclude coverage for costs associated with providing accommodations or training;

h. claims that fall within workers' compensation or other non-EPL policies;

i. exclusions for criminal or civil fines and penalties; and

j. certain wage payment claims.[10]

In sum, both ELI and EPLI policies provide employers with additional indemnification and defense cost coverage for claims brought against them by their employees. ELI protects the employer against the physical risks that an employee may encounter, whereas EPLI provides it against claims of harassment, discrimination, and wrongful termination, among others. Both coverages are considered by employers in order to afford additional protection that their CGL policies may not cover but contain their own exclusionary provisions

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[1] F. Employers' Liability (EL) Insurance, California Practice Guide: Insurance Litigation Ch. 7G-F.
[2] § 2.IV: Other Types of Insurance, Prac. Guide Def. EPL Claims s 2.IV.
[3] *What Is Employer's Liability Insurance?*, TECH INSURANCE (March 30, 2016), https://www.techinsurance.com/blog/workers-compensation-insurance/What-Is-Employers-Liability-Insurance/
[4] *Id.*
[5] § 40:4.Part Two: Employers Liability, 3 Casualty Insurance Claims § 40:4 (4th ed.).
[6] *See Transamerica Ins. Co. v. Superior Court (Western Indus. Mgmt. Corp.)*, 29 Cal. App. 4th 1705 (2d Dist. 1994).
[7] Employment Practices Liability Insurance Still in Infancy, But Maturing Dynamically, BNA Employment Discrimination Report, Vol. 11 No. 17 (1998).
[8] 46 No. 5 DRI For Def. 21.
[9] 4 9 No. 8 Md. Employment L. Letter 2
[10] Barbara A. O'Donnell, *The First Wave of Decisions Interpreting Employment Practices Liability Policies,* Brief, Fall 2005, at 39, 45.

Emerging Trends in Employment Litigation: Sexual Harassment and Sexual Orientation Discrimination

By Katharine L. Platt

Certainly, there is no shortage of issues that employers can anticipate facing in lawsuits brought by their employees. In particular, sexual harassment and sexual orientation discrimination are two trending issues in employment litigation that are at the forefront of the minds of employment attorneys and employers alike.

The #Me Too Movement and Sexual Harassment Claims

Data released by the Equal Employment Opportunity Commission (EEOC) offers helpful insight into national employment litigation trends. On October 4, 2018, the EEOC published preliminary data for the 2018 fiscal year demonstrating that substantially more sexual harassment claims were filed.[1] Indeed, the EEOC has filed 50% more sexual harassment lawsuits in fiscal year 2018 when compared to the prior year.[2] The filing of sexual harassment charges with the EEOC has also increased by 12% from fiscal year 2017.[3]

This substantial jump in sexual harassment cases should come as no surprise in light of the Me Too Movement, which has launched sexual harassment into the public's awareness. Although the Me Too Movement was originally founded in 2006,[4] it gained sweeping public attention in October of 2017 when actress Alyssa Milano used the #MeToo hashtag on Twitter to encourage survivors of sexual harassment and assault to tweet about their experiences.[5] Within a day after Ms. Milano's tweet, over 30,000 people used the hashtag.[6] Sexual harassment allegations have since emerged in the news regarding such public figures as Hollywood mogul Harvey Weinstein and the CEO and Chairman of CBS Les Moonves, among others.[7] According to Bloomberg Law News, "at least 425 prominent people across industries have been publicly accused of sexual misconduct, a broad range of behavior that spans from serial rape to lewd comments and abuse of power."[8]

Sexual harassment, which is covered by Title VII, is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[9]

Sexual harassment claims against employers may include allegations that an employer acted with malice or reckless indifference to an employee's federally protected rights. Punitive damages are available in these cases, though they are capped under Title VII based on employer size.[10] A retaliation claim may accompany a sexual harassment claim and allege that an employer took an adverse employment action against an employee because of such protected activity as lodging an internal complaint, filing an administrative complaint with the EEOC, or filing a lawsuit.[11]

One federal court in particular has taken note of the Me Too Movement and made reference to it in a recently-issued opinion in a sexual harassment case. In *Minarsky v. Susquehanna County*, the United States Court of Appeals for the Third Circuit stated in a footnote: "This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims."[12] The court continued, recognizing, "In many such instances, the harasser wielded control over the harassed individual's employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred."[13] The court went on to cite a statistic that approximately 75% of individuals who experienced harassment never reported it, and victims do not report "because they feared disbelief of their claim, blame, or social or professional retaliation."[14]

This decision illustrates the impact that the Me Too Movement could have on sexual harassment litigation going forward. Although employers are well-advised to ramp up their training efforts to educate their workforces on preventing,

identifying, and reporting sexual harassment in the workplace and to maintain handbook policies prohibiting sexual harassment, employers are, nevertheless, likely to face an increase in these types of lawsuits filed by their employees. Therefore, purchasing available insurance for EPLI liability is another important step that employers can take well in advance of potential litigation.

Sexual Orientation Discrimination

Another trending issue in employment litigation is whether sexual orientation and gender identity are covered under Title VII. Currently, the EEOC interprets Title VII, which bars sex discrimination, to prohibit any employment discrimination based on gender identity or sexual orientation.[15] Since 2013, the EEOC has obtained over $6.4 million in monetary relief for applicants and employees that have experienced this type of discrimination.[16] The EEOC has not yet released statistics for sex discrimination claims for fiscal year 2018, but it has identified in its most recent Strategic Enforcement Plan "protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as an issue that it will prioritize in its enforcement.[17]

Although the EEOC's position on sexual orientation discrimination is clear, a circuit split leaves this issue unsettled until the Supreme Court issues a decision resolving whether Title VII coverage extends to sexual orientation discrimination. The United States Court of Appeals for the Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana* was the first federal appeals court to recognize that Title VII protected individuals from sexual discrimination orientation.[18] The plaintiff in *Hively*, who was a lesbian and part-time professor at a community college, sued her employer for sexual orientation discrimination.[19] The community college did not hire her for a full-time position despite her repeated applications and ultimately ended her contract.[20] The plaintiff alleged that these adverse employment actions were the result of discrimination based on her sexual orientation.[21]

Following an in-depth analysis of prior case law, the court of appeals held that Title VII's prohibition on sex discrimination extends to sexual orientation discrimination.[22] The court reasoned, "The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line."[23]

The Second and Sixth Circuits have similarly recognized that Title VII prohibits sexual orientation discrimination in *Zarda v. Altitude Express and EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*[24] Unlike the Second, Sixth, and Seventh Circuits, however, the Eleventh Circuit has reached the opposite conclusion regarding sexual orientation discrimination. In *Evans v. Georgia Regional Hospital*, the court of appeals held that it was bound by prior precedent and could not find that Title VII prohibited sexual orientation discrimination.[25] The plaintiff in *Evans* was a security guard who was a lesbian and alleged that she was denied equal pay or work, harassed, and physically assaulted or battered because she did not "carry herself in a traditional womanly manner" and "identified with the male gender, because of how she presented herself."[26]

Given this widening circuit court split, it is likely that the Supreme Court will agree to hear this issue in the near future and resolve whether Title VII can be interpreted as prohibiting discrimination based on sexual orientation. Legislation at the state or local level may also impact whether sexual orientation discrimination is permitted in the workplace.

Continuing developments in sexual harassment and sexual orientation discrimination cases are to be expected in the coming months and into 2019. As the Me Too Movement continues to receive extensive media coverage, the number of sexual harassment lawsuits filed will likely continue to rise. Additionally, the circuit court split regarding whether Title VII protects employees from sexual orientation discrimination may widen even more before the Supreme Court steps in to decide this issue. As courts grapple with these two issues, employers can prepare themselves for possible outcomes in cases involving sexual harassment and sexual orientation discrimination, as well as purchase EPLI insurance. Employers should also maintain their prevention efforts by implementing handbook policies, establishing a reporting protocol, and providing suitable training to their workforces.

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[1] EEOC Releases Preliminary FY 2018 Sexual Harassment Data, EEOC, https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm (last visited Oct 8, 2018).
[2] *Id.*
[3] *Id.*
[4] Me Too Movement, https://metoomvmt.org/ (last visited Oct 8, 2018).
[5] Stephanie Zacharek et al., TIME Person of the Year 2017: The Silence Breakers, TIME (2017), http://time.com/time-person-of-the-year-2017-silence-breakers/ (last visited Oct 8, 2018).
[6] *Id.*
[7] *Id.*; Ronan Farrow, Leslie Moonves Steps Down from CBS, After Six Women Raise New Assault and Harassment Claims, THE NEW YORKER (2018), https://www.newyorker.com/news/news-desk/as-leslie-moonves-negotiates-his-exit-from-cbs-women-raise-new-assault-and-harassment-claims (last visited Oct 8, 2018).
[8] Riley Griffin et al., #MeToo: One Year Later, BLOOMBERG, Oct. 5, 2018, https://www.bloomberg.com/graphics/2018-me-too-anniversary/.
[9] 29 C.F.R. § 1604.11(a).
[10] 42 U.S.C. § 1981a(a)(1), -b(1).
[11] *Facts About Retaliation,* EEOC, https://www.eeoc.gov/laws/types/retaliation.cfm (last visited Oct 8, 2018).
[12] *Minarsky v. Susquehanna County*, 895 F.3d 303, 313 n.12 (3d Cir. 2018).
[13] *Id.*
[14] *Id.*
[15] *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Oct. 8, 2018).
[16] *Id.*
[17] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017 - 2021, EEOC, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm (last visited Oct 8, 2018).
[18] *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017).
[19] *Id. at 341.*
[20] *Id.*
[21] *Id.*
[22] *Id. at 351.*
[23] *Id. at 350-51.*
[24] *Zarda v. Altitude Express,* 883 F.3d 100 (2d Cir. 2018)*; EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018).
[25] *Evans v. Georgia Reg'l Hosp.,* 850 F.3d 1248, 1255 (11th Cir. 2017).
[26] *Id. at 1251.*

The Policy Giveth And The Policy Taketh Away: Creating Ambiguity in First Mercury Insurance Company, Inc. v. Russell

by Michelle Lee Dougherty

Generally speaking, the "[l]anguage in an insurance policy should be given its plain, ordinary meaning."[1] Exclusions will generally be strictly construed against the insurer and in favor of the insured.[2] Moreover, ambiguous terms in insurance policies must be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.[3] Nevertheless, unambiguous terms in an insurance policy, even those within exclusions, are not subject to judicial construction or interpretation, but full effect must be given to the plain meaning intended.[4]

Typically, employers are offered three types of insurance coverage for bodily injury claims[5]: (1) commercial general liability (CGL) coverage; (2) workers' compensation coverage; and (3) "stop gap" employers' liability coverage. *Erie v. Stage Show Pizza*, 210 W.Va. 63, 67, 553 S.E.2d 257, 261 (2001). The West Virginia Supreme Court of Appeals has previously commented that "[a] commercial general liability policy protects a business against numerous kinds of liability claims, but it is generally accepted that the standard policy does not provide coverage for any claim brought by an employee against his or her employer arising out of the employment." *Id.*

On the other end of the spectrum is workers' compensation coverage which is "coverage specifically for employee claims against an employer which are compensable under a state's workers' compensation laws." *Id.* Workers' compensation coverage "protect[s] an employer from expensive and unpredictable litigation, and provide[s] compensation to an employee" outside of the "common-law rules of liability and damage[s]." *Id.* at 68; 553 S.E.2d at 262.

In between lies a gap, hence the name "stop gap" coverage, which is coverage for "claims made against a business by injured employees whose claims are not generally compensable under the workers compensation system." *Id.* "An

'employers' liability' policy therefore exists to 'fill the gaps' between workers' compensation coverage and an employers' general liability policy." *Id.*

The questions raised in *West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Assoc., Inc.*, 228 W.Va. 360, 719 S.E.2d 830 (2011), and *First Mercury Ins. Co., Inc. v. Russell*, 239 W.Va. 773, 806 S.E.2d 429 (2017), centered around coverage for deliberate intent actions permitted under the West Virginia Workers' Compensation Act.[6]

In *Summit Point*, at issue was a workers' compensation policy, Part Two of which was an employer's liability policy. One of the arguments made by the insured was that the "West Virginia Intentional Injury Exclusion Endorsement" was ambiguous because the title of the coverage under which the endorsement was found was "Part Two – Employers Liability Insurance Coverage." The insuring language provided, in pertinent part, that "[t]his employers liability insurance applies to bodily injury *by accident*," and provided that the covered damages would include damages:

> **1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;**
> **2. for care and loss of services; and**
> **3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee; provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and**
> **4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as an employer.**

***Summit,* 228 W.Va. at 372, 719 S.E.2d 843. As such, the *Summit Point* Court held that the insuring agreement could not be read as providing coverage for deliberate intent claims.**

The *Summit Point* insured also argued that an exclusion was ambiguous because it simply referred to W.Va. Code § 23-4-2, without specific reference to subsection (d) (2) (i) or (d) (2) (ii). The language of "West Virginia Intentional Injury Exclusion Endorsement" states, in relevant part:

> **C. Exclusions**
> **This insurance does not cover**
> **5. Bodily injury caused by your intentional, malicious or deliberate act, whether or not the act was intended to cause injury to the employee injured, or whether or not you had actual knowledge that an injury was certain to occur, or any bodily injury for which you are liable arising out of West Virginia Annotated Code § 23–4–2.**

***Id.* The Court rejected the insured's arguments, finding first that the Part One – Worker's Compensation portion of the policy clearly provides that the insured is responsible "for any payments in excess of the benefits regularly provided by the workers' compensation law including those required because: 1. of your serious and willful misconduct, or arising out of West Virginia Annotated Code § 23-4-2; . . . . 3. you fail to comply with a health or safety law or regulation . . . ." *Id.* Furthermore, according to the Court, Part Two – Employers' Liability Coverage expressly applies only to bodily injury caused by accident. *Id.* Importantly, the Court found the language of the exclusion to be conspicuous, plain and clear, as required by West Virginia law, and excluded deliberate intention claims arising under either (d) (2) (i) or (d) (2) (ii).**

However, the Court's 2017 ruling in *Russell* found that a similar exclusion was ambiguous because the insurer's stop gap endorsement: (1) expressly utilizes the term "stop gap" in its heading, which would imply coverage for a deliberate intent action brought by an employee; (2) contains language attempting to limit coverage to "bodily injury by accident" or "bodily injury by disease"; and (3) expressly excludes coverage for deliberate intent actions. The Supreme Court of Appeals of West Virginia ruled that this combination of factors—"a Stop Gap endorsement that provides coverage for

deliberate intent actions, and an accompanying plain and clear exclusion denying the very same coverage"—creates an ambiguity that must be resolved in favor of the insured.

In *Russell*, the employer had a CGL policy with a stop gap endorsement titled "Stop Gap – Employers Liability Coverage Endorsement – West Virginia." *Russell*, 239 W.Va. at 777-778, 806 S.E.2d at 433-434. The insuring language in the stop gap endorsement at issue in Russell provides:

> **COVERAGE – STOP GAP – EMPLOYERS LIABILITY**
>
> **1. Insuring Agreement**
>
> **a. We will pay those sums that the insured become legally obligated by West Virginia Law to pay as damages because of "bodily injury by accident" or "bodily injury by disease" to your "employee" to which this insurance applies…….**

***Id.* at 778, 806 S.E.2d at 434. The endorsement contains an exclusion which states, in relevant part:**

> **2. Exclusions**
> **This insurance does not apply to:**
> **…**
> **l. West Virginia Workers' Compensation Law, Sect. 23-4-2**
> **"Bodily injury by accident" or "bodily injury by disease" caused by any action determined to be of deliberate intention as specified under West Virginia Workers Compensation Law, Sect. 23-4-2.**

***Id.* at 779, 806 S.E.2d at 435.**

In *Russell*, the West Virginia Supreme Court of Appeals upheld the Mason County trial court ruling that the policy is ambiguous because it promises to provide coverage for damages because of bodily injury to employees, but excludes coverage for the two types of claims an employee can bring against a West Virginia employer. The *Russell* Court was very careful to distinguish its holding from the holding in *Summit Point* as being based on the fact that the insurance provision at issue was stop gap coverage:

> **The dispositive issue herein is whether coverage exists for a statutory deliberate intent action when the employer's commercial general liability policy is amended by an endorsement that includes a "Stop Gap – Employers Liability Coverage Endorsement – West Virginia" that expressly provides coverage for bodily injury to employees, as well as exclusion for statutory deliberate intent claims. After careful review of the circuit court's order, the briefs, and the record submitted on appeal, and the oral arguments of the parties, we find the policy at issue in this case to be internally inconsistent and therefore ambiguous. Accordingly, we interpret the policy in favor of the insured[.]**

***Id.* at 775, 806 S.E.2d at 431.**

The Court explained that the insurer's CGL policy contains a standard exclusion for "bodily injury" to an employee, as well as a stop gap endorsement. A stop gap endorsement is traditionally intended to cover the gap in coverage between a typical CGL policy—which does not provide coverage for bodily injuries to employees—and workers' compensation coverage. *Id.* at 778, 806 S.E.2d at 434. The Court, therefore, held that the stop gap endorsement "operates to provide coverage for the deliberate intent claims …, and the conflicting exclusion may not be enforced." *Id.* at 780, 806 S.E.2d at 436.

The take away from *Russell* is that the Supreme Court of Appeals of West Virginia will look not only at the content of the provision at issue but also at the headings of each provision to determine if the language of the policy is ambiguous.[7]

Essentially, if the heading giveth and the content taketh away, the Court will likely find ambiguity and find in favor of the coverage for the insured.

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[1] Syl. Pt. 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W.Va. 430, 345 S.E.2d 33 (1986), *overruled, in part, on other grounds by National Mut. Ins. Co. v. McMahon & Sons*, 177 W.Va. 734, 356 S.E.2d 488 (1987), *abrogated on other grounds by Potesta v. United States Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998).

[2] S*tate Bancorp, Inc. v. United States Fidelity & Guar. Ins. Co*., 199 W.Va. 99, 104, 483 S.E.2d 228, 233 (1997); *National Mut. Ins. Co. v. McMahon & Sons, Inc*., 177 W.Va. 734, 356 S.E.2d 488, Syl. Pt. 5 (1987).

[3] *Id.,* at Syl. Pt. 4; *Marshall v. Fair, 1*87 W.Va. 109, 416 S.E.2d 67 (1992); *Jones v. Motorists Mut. Ins. Co.,* 177 W.Va. 763, 356 S.E.2d 634 (1987).

[4] *Rich v. Allstate Ins. Co.*, 191 W.Va. 308, 445 S.E.2d 249 (1994); *Ward v. Baker*, 188 W.Va. 569, 425 S.E.2d 245 (1992).

[5]Although not a bodily injury coverage, and not at issue in *Erie v. Stage Show Pizza; West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Assoc., Inc.; West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Assoc., Inc.; or First Mercury Ins. Co., Inc. v. Russell* discussed herein, another type of insurance available to employers is employment practices liability insurance (EPLI). EPLI provides coverage to employers against claims made by employees alleging sexual harassment, discrimination, wrongful termination, and breach of employment contract, as well as other employment-related issues.

[6] As a general rule, an employer in good-standing with the West Virginia Workers' Compensation Fund "is not liable" for the injury or death of any employee occurring in the course of and resulting from employment. See W. Va. Code §23-2-6. However, under the exception to the general immunity provided to employers under the workers' compensation laws of West Virginia, an employee may bring a direct civil action against his employer for "deliberate intent." See W.Va. Code § 23-4-2(d)(2).

[7] Although not the *Russell* Court's express reasoning, the *Summit Point* and *Russell* cases are distinguishable because the Summit Point policy was a CGL policy, while the *Russell* policy was an employer's liability policy.

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