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Practice Group:

Insurance Coverage

In an Opinion with Far-Reaching Implications, the Second Circuit Finds Insurance Coverage for an ERISA Claim

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When a general liability policy expressly provides coverage for employee benefits liability and the plaintiff in the underlying suit alleges a violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), does the insurer have a duty to defend the suit? Resoundingly, yes, according to the United States Court of Appeals for the Second Circuit in a well-reasoned June 10th opinion. The Court's decision in Euchner-USA, Inc. v. Hartford Casualty Ins. Co., No. 13-2021-CV, 2014 WL 2576348 (2d Cir. June 10, 2014), is doubly significant. It is important in its own right for its rejection of commonly asserted insurer defenses to coverage for ERISA claims. Further, future private litigation -- including class actions -- under the Patient Protection and Affordable Care Act ("ACA") may well implicate employee benefits liability coverage issues that have been decided in the ERISA context. Because the ACA provides a new statutory basis for denial-of-benefits claims by employees against their employers and because the exposure for such claims could be substantial, corporate policyholders may find it prudent to revisit their employee benefits liability ("EBL") insurance coverage and the current state of the case law.

I. The Underlying ERISA Claim and the Policy Language

In Euchner-USA, the plaintiff in the underlying claim alleged that she was sexually harassed by a senior executive at Euchner-USA, and that, after she confronted him about his conduct, she was wrongfully terminated as an employee and coerced into accepting a new position as an independent contractor. She further alleged that her misclassification as an independent contractor disqualified her from receiving the benefits she formerly received, including pension benefits under the company's 401(k) plan.[1]

The commercial general liability policy that Hartford issued to Euchner-USA excluded coverage for employment-related practices, but contained an endorsement providing coverage for employee benefits liability. The EBL endorsement required Hartford to pay "'those sums that the insured becomes legally obligated to pay as 'damages' because 'of 'employee benefits injury' to which this insurance applies.'"[2] "Employee benefits injury" was defined as an "injury that arises out of any negligent act, error or omission in the 'administration' of your 'employee benefits programs.'"[3] The Second Circuit applied this language to the allegations of the operative complaint and found that, under governing New York law, Hartford had breached its duty to defend the policyholder in the underlying action, and reversed the District Court's grant of summary judgment to Hartford.

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[1] 2014 WL 2576348 at *1.

[2] Id.

[3] Id.

II. The Court's Sound Coverage Analysis

After a recitation of New York's broad duty to defend rule, in which the "reasonable possibility" of indemnity coverage activates the insurer's duty to defend,[4] the Court focused on three principal issues in reaching its pro-coverage decision: (1) was the alleged misclassification negligent, (2) did the ERISA claim arise from the "administration" of the benefit plan, and (3) did the exclusion for "any dishonest, fraudulent, criminal or malicious act" apply to bar coverage?

Misclassification May Be Negligent. In finding that the underlying plaintiff's claim of misclassification "raised a reasonable possibility of negligence" by the insured, the Court focused on the lack of any allegations (a) as to whether the misclassification was intentional or negligent, (b) that the plaintiff was misclassified with the *purpose* of interfering with her retirement benefits, or (c) that she was subject to unlawful retaliation under section 510 of ERISA, 29 U.S.C. § 1140.[5] The Court further noted that the ERISA claims did not require a showing of intent, with the implication that Hartford, therefore, could not look to the statute to infer coverage-defeating intent.[6] The Court might also have noted that because intent is not an element of an ERISA violation, even allegations of intent should have not defeated coverage, since it would still have been "reasonably possible" that liability might be found on non-intentional grounds.

Misclassification May Be an Act of "Administration" of the Plan. Some courts have limited the term "administration" in EBL coverage to narrow, "ministerial" acts, rather than to "discretionary activity."[7] Accordingly, the Second Circuit's rejection of such an interpretation is significant. "Administration" was defined in the EBL endorsement as: (1) "'giving counsel to your employees . . . with respect to interpreting the scope of your 'employee benefits program' or their eligibility to participate in such programs" and (2) "'[h]andling records in connection with 'employee benefits program[s].'"[8] The Court declined to address the first prong of the definition because "it is clear enough that determining [the plaintiff's] eligibility may reasonably be considered part of the program's record keeping function."[9] The Court further reasoned, in rejecting the "ministerial acts" defense, that "classification of someone either as an independent contractor or as an employee for purposes of program eligibility is not a matter of discretion."[10]

The "Dishonest, Fraudulent . . ." Exclusion. Because the ERISA claim in the operative complaint only alleged that the misclassification was done "improperly and unlawfully," and did not otherwise allege a state of mind, the Court found that that misclassification could be negligent, notwithstanding allegations in other parts of the complaint that the insured acted

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[4] Id. at *3.

[5] Id. at *4.

[6] Id.

[7] See, e.g., Travelers Cas. and Sur. Co. v. Wausau Underwriters Ins. Co., 129 Fed. Appx. 396, 399 (9th Cir. 2005) ("administration" contemplates "administrative and ministerial actions. It does not include discretionary, decision-making activities."); Maryland Cas. Co. v. Economy Bookbinding Corp. Pension Plan and Trust, 621 F.Supp. 410, 413 (D.N.J. 1985) ("administration" refers to "relatively routine, ministerial acts"). Contra, see, e.g., Wyman-Gordon Co. v. Liberty Mut. Fire Ins. Co., 11 Mass. L. Rep. 763, 2000 Mass. Super. LEXIS 286, at *9-10 (Mass. Super. Ct. 2000) (rejecting narrow "ministerial acts" reading and holding that discretionary eligibility determinations are within the scope of "administration").

[8] Euchner-USA, 2014 WL 2576348 at *5.

[9] Id.

[10] Id.

"with discriminatory intent" and "fraudulently".[11] Thereby, the Court implicitly rejected any broad "gravamen of the complaint" argument that might have implicated the exclusions and defeated coverage. On this same analysis, the Court found that Hartford had not met its burden of showing that exclusion for "fraudulent" and "malicious" conduct applied to defeat coverage.[12]

III. The Broader Implications of *Euchner-USA*

The Second Circuit's opinion is especially important for two reasons. First, in certain cases insurers have avoided their EBL coverage obligations by arguing that the "administration" of an employee benefits plan is narrowly confined to "ministerial," nondiscretionary acts.[13] This narrow meaning is not expressly set forth in most EBL coverages and it is clearly not required by standard EBL definitions of "administration" that include, for example, "effecting, continuing or terminating any 'employee's' participation in any benefit included in the 'employee benefit program'." In rejecting this coverage-defeating interpretation of "administration," the Second Circuit has taken a major step forward in securing policyholder rights to EBL coverage.

Moreover, as the ACA is implemented, employees are likely to bring private causes of action -- including class actions -- to vindicate alleged violations of their rights under the statute. The statutory basis for these private causes of action is not found directly within the ACA, but rather in the laws that were amended by the ACA, including ERISA. Private causes of action under ERISA generally arise under sections 502(a)(1)(B), 502(a)(3), and 510.[14] For this and other reasons, decisions regarding the scope of EBL coverage for ERISA claims may be taken as being, at a minimum, persuasive authority for coverage issues arising out of claims for benefits under the ACA. Because ACA-related litigation may be the next "soup du jour" for the class action plaintiffs' bar, policyholders may find it prudent to assess the breadth of their current EBL coverage in light of developing EBL case law and the new entitlements created by the ACA.

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[11] Id.
[12] Id.
[13] See, e.g., note 7 supra.
[14] 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(3), and 1140.