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Commentary

Beyond EPLI: Coverage Issues For Employment-Related Claims

By
Brian S. Rudick
and
William D. Wickard

[Editor's Note: Brian S. Rudick and William D. Wickard are attorneys in the Pittsburgh office of Kirkpatrick & Lockhart LLP, Henry W. Oliver Building, 535 Smithfield Street, Pittsburgh, PA 15222 (412-355-6500), where they litigate on behalf of and counsel policyholders concerning insurance coverage matters. The authors would like to acknowledge the efforts of James E. Scheuermann and Julie S. Greenberg, who are also attorneys in the Pittsburgh office of Kirkpatrick & Lockhart LLP, and who authored an earlier article entitled Latest Developments and Principal Issues in Coverage for Employment-Related Claims, presented at Mealey's Sexual Harassment Litigation and Insurance Coverage Conference in October 1998, upon which this commentary is based.

These materials reflect the views of the authors as to important issues with respect to insurance coverage for employment-related claims, but do not necessarily reflect their views as to the resolution of these issues. Moreover, these materials do not necessarily reflect the views of any client of Kirkpatrick & Lockhart LLP or the firm itself. *Replies to this commentary are welcome.]*

I. Comprehensive (Or Commercial) General Liability ("CGL") Policies

A. Coverage Grants

1. Bodily Injury

a. "Bodily injury" often is defined as:

> "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." Miller, S. and P. LeFebvre, Miller's Standard Insurance Policies Annotated I 454.609 (4th Ed. 1995).

b. Key Issue: Whether alleged emotional distress or other mental injuries are within bodily injury coverage when not accompanied by physical manifestations or symptoms.

c. Cases cited by insurers finding no coverage: Smith v. Animal Urgent Care, Inc., 542 S.E.2d 827 (W.Va. 2000) (no coverage for purely mental or emotional harm that arises from a claim of sexual harassment); SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266 (N.J. 1992) (purely emotional injuries not generally covered, but "bodily injury" is an ambiguous term requiring case-by-case analysis); Allstate Ins. Co. v. Diamant, 518 N.E.2d 1154 (Mass. 1988) (no coverage for emotional injuries).

d. Cases cited by policyholders finding coverage: Lavanant v. General Accident Ins. Co. of Am., 595 N.E.2d 819 (N.Y. 1992) (finding coverage under CGL bodily injury coverage for landlord's liabilities to tenants for purely emotional injuries sustained as a result of ceiling collapse); State Farm Mut. Auto. Ins. Co. v. Ramsey, 374 S.E.2d 896 (S.C. 1988) (negligent infliction of emotional distress is bodily injury which is covered under standard CGL coverage). See also Maine Bonding & Cas. Co. v. Douglas Dynamics, Inc., 594 A.2d 1079 (Me. 1996) (finding duty to defend based on allegation of emotional distress despite fact that Maine law requires accompanying physical symptoms because plaintiff may prove physical symptoms at trial).

e. General Accident Ins. Co. of Am. v. Gastineau, 990 F. Supp. 631 (S.D. Ind. 1998): Policyholder sought coverage under CGL policy for defense costs incurred in defending sexual discrimination action brought by former employee. Insurer denied coverage on grounds of lack of "bodily injury" as defined in the policy and on the grounds of the employment exclusion. *Held*: Emotional and psychological damage alleged in the complaint were sufficient to satisfy bodily injury requirement in the CGL policy thereby triggering insurer's duty to defend. "[W]e believe that bodily contact is sufficiently inherent in hostile work environment claims that, without conducting any reasonable investigation into Gastineau's allegations, GAIC's duty to defend Fleet was triggered."

2. Personal Injury

a. In umbrella policies "personal injury" may expressly provide coverage for mental injury, defamation, discrimination or humiliation. Accordingly, many courts have found coverage for defense costs or liabilities under the personal injury coverage.

b. St. Paul Guardian Ins. Co. v. Centrum GS Ltd, 283 F.3d 709 (5th Cir. 2002): Former employee sued employer (a building owner and manager) alleging wrongful termination, intentional infliction of emotional distress, libel, slander, invasion of privacy, fraud, negligence and breach of contract. Former employee alleged that subsequent to his termination, employer circulated "Wanted Posters" to the general public, including tenants and customers of the building, which requested anyone who saw the former employee in the building to call security. Employer sought coverage under personal injury provision of CGL policy that provided coverage for damages for personal injuries that are the result of the employer's business activities and are caused by a personal injury offense. The trial court concluded CGL insurer had no duty to defend or indemnify under personal injury provisions of the policy because alleged damages from personal injury offenses did not arise from the policyholder's business activities. *Held*: The former employee's injuries were caused by the policyholder's business activities and the wrongful termination claim fell under "personal injury" coverage. The policyholders had a duty to protect their tenants and real estate and circulating "Wanted Posters" was warning of a perceived risk. Accordingly, the court concluded the policyholder's actions were consistent with its business activities.

c. McCormack Baron Mgmt. Servs., Inc. v. American Guar. & Liab. Ins. Co., 989 S.W.2d 168 (Mo. 1999): A security agency terminated a security guard after his supervisor provided the property manager with a letter that the security guard had authored (complaining that a co-employee was coming to work intoxicated). The security guard filed a multi-count complaint against the security agency and the property manager alleging, *inter alia*, tortious interference with contract. The property manager's CGL insurer denied coverage and the trial court granted summary judgment for the insurer. *Held*: The insurer was obligated to defend the property manager in the underlying action. The court concluded that the CGL policy's personal injury coverage for an offense that disparages a person's services was not limited to a cause of action of disparagement or injurious falsehood.

d. Golden Eagle Ins. Corp. v. Rocky Cola Café, Inc., 114 Cal. Rptr. 2d 16 (Cal. Ct. App. 2001) (finding coverage for former employee's defamation claim under "personal injury" provision of a CGL policy); HS Servs., Inc. v. Nationwide Mut. Ins. Co., 109 F.3d 642 (9th Cir. 1997) (finding coverage for post-employment defamation of a former employee under CGL policy); Indiana Ins. Co. v. North Vermillion Cmty. Sch. Corp., 665 N.E.2d 630 (Ind. Ct. App. 1996) (coverage for mental anguish and damage to reputation arising from wrongful termination under "personal injury" provision). See also Glen Lincoln, Inc. v. Zurich Ins. Co., No. 95-5621, 1999 WL 58587 (E.D. Pa. Jan. 13, 1999) (insurer must defend policyholder in underlying discrimination suit where CGL policy endorsement extended the definition of "personal injury" to "include discrimination, which is not deemed unlawful under state or federal law which is committed by or at the direction of the named insured or any additional named insured"); Melugin v. Zurich Canada, 57 Cal. Rptr. 2d 781 (Cal. Ct. App. 1996) (insurer must defend policyholder in underlying sexual discrimination suits where CGL policy provided coverage for discrimination "where insurance against same is not prohibited by law" and the discrimination was not necessarily "willful" under state law).

3. Property Damage

a. "Property damage" often is defined as:

"(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period." Miller's Policies I, supra, at 454.612.

b. Not often the subject of coverage disputes in employment-related coverage litigation unless there is actual injury to or loss of tangible property, e.g., destruction of personal property at work, slashing tires of automobile, etc. Some courts have held that economic losses alone may not constitute property damage because they usually do not involve physical injury to tangible property. See, e.g., Lamar Truck Plaza, Inc. v. Sentry Ins., 757 P.2d 1143 (Colo. Ct.

App. 1988) (underlying claim of sexual harassment was purely economic and did not allege damage to, or loss of use of, tangible property).

4. Occurrence / Accident

a. "Occurrence" defined: "An accident, including continuous and repeated exposure to conditions which results, during the policy period, in bodily injury or property damage neither expected nor intended by the insured." Trial and Insurance Counsel's handbook for the Commercial General Liability Insurance Policy and Other Business-Related Insurance Policy, § II-101B.

b. Cases cited by policyholders in favor of coverage: Intentional acts are occurrences or accidents as long as the resulting injury was not intended. SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266 (N.J. 1992); United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982 (Pa. Super. 1986). See also Missouri Prop. & Cas. Ins. Guar. Ass'n v. Petrolite Corp., 918 S.W.2d 869 (Mo. Ct. App. 1996) (acts of intentional discrimination were an "occurrence" as defined under the policy interpreted as a whole).

c. Cases cited by insurers in favor of no coverage: Some courts have held that intentional acts are not occurrences or accidents. See American Guar. & Liab. Ins. Co. v. Vista Med. Supply, 699 F. Supp. 787 (N.D. Cal. 1988).

d. North Bank v. Cincinnati Ins. Cos., 125 F. 3d 983 (6th Cir. 1997): Employer sued insurer seeking reimbursement for defense and settlement of an underlying employment discrimination suit. The district court granted summary judgment to the insurer, finding it was not obligated to defend the employer because the policy only covered an "'occurrence' which unexpectedly or unintentionally resulted in 'personal injury'" and the underlying complaint alleged intentional discrimination. The district court also relied on a policy provision that excluded coverage for personal injury arising out of intentional discrimination. *Held*: The district court erred by finding the insurer did not have a duty to defend the employer. The Sixth Circuit U.S. Court of Appeals reversed the district court's grant of summary judgment, finding that the umbrella policy contained an ambiguity that was to be construed against the

insurer. The court stated that a policy that includes a "'definition of personal injury which includes intentional torts and [a] definition of 'occurrence' which excludes intentional torts' [is] inconsistent and create[s] an ambiguity." Accordingly, the court rejected the insurer's argument that "the policy eliminates coverage of intentional discrimination through its definition of 'occurrence.'"

5. Trigger Of Coverage

a. Historic CGL policies are generally "occurrence policies" that provide coverage for injuries occurring within the policy period, regardless of when the claim is made against the policyholder.

b. Examples of trigger of coverage cases in the employment-related coverage area include: Appalachian Ins. Co. v. Liberty Mut. Ins. Co., 676 F.2d 56 (3d Cir. 1982) (finding that, under a single occurrence theory, injuries occurred immediately upon promulgation of the employer's discriminatory employment policy) and Illinois Cent. R.R. Co. v. Accident & Cas. Co. of Winterthur, 739 N.E.2d 1049 (Ill. App. Ct. 2000) (concluding that, under a multiple occurrence theory, the liability "policy in effect at the time an application was tendered by a would-be employee" was triggered with respect to the employment discrimination claim of that employee "because the 'first happening of any material damage' occurred at the time the futile application was submitted").

6. Duty To Defend

a. Duty to Defend: The majority rule provides that the insurer has a duty to defend the whole underlying action where the underlying complaint alleges at least one potentially covered claim under the terms of the insurer's policy. Insurer may also have a duty to defend where the underlying complaint could be amended to allege facts that would support a potentially covered claim. A few recent duty to defend cases may indicate that certain courts are willing to depart from these long-standing rules in certain employment-related coverage settings.

1. International Ins. Co. v. Rollprint Packaging Prods. Inc., 728 N.E.2d 680 (Ill. App. Ct. 2000): CGL insurer sought declaratory judgment that policy provided no coverage for an employee's

claims against the employer for discrimination on the basis of age, national origin and religion and retaliation. *Held*: Insurer had a duty to defend the employer in the underlying lawsuit. The employee made sufficient allegations of a "wrongful eviction" (although it was not a specifically articulated cause of action) to trigger the insurer's duty to defend. See also Schultze v. Continental Ins. Co., 619 N.W.2d 510 (N.D. 2000) (holding that a professional liability insurer would ordinarily have no duty to defend sexual discrimination claims but because the underlying complaint included a defamation claim, the insurer had a duty to defend the entire lawsuit).

2. Butts v. Royal Vendors, Inc., 504 S.E.2d 911 (W.Va. 1998): CGL insurer sought declaratory judgment that policy provided no coverage for an employee's claims against his employer for wrongful discharge and inducement of physician's breach of fiduciary duty by releasing employee to return to work. *Held*: Even though the underlying complaint made no allegations of defamation, the complaint invoked the insurer's duty to defend under personal injury coverage. An insurer's obligation to defend is not dependent on the "precise use of terms within the complaint that would 'unequivocally delineate a claim which, if proved, would be within the insurance coverage.'" Accordingly, "since the critical elements of a false defamatory statement that was published to another which resulted in injury [were] clearly stated on the face of the complaint, the averments of [the employee's] complaint [were] sufficient to invoke [the insurer's] obligation to defend under . . . the Personal and Advertising Injury section."

3. Buss v. Superior Court of Los Angeles, 939 P.2d 766 (Cal. 1997): Policyholder tendered defense of underlying action containing both potentially covered claims and claims that apparently were not covered to its CGL insurers. One insurer agreed to provide a defense but, following settlement of the underlying action, refused to contribute to the settlement. Policyholder brought suit against insurer for contribution to settlement and in-

surer filed claims against policyholder for reimbursement of defense costs. *Held*: Where underlying action is "mixed," that is, containing claims that are potentially covered and claims that are not covered, insurer has a duty to defend underlying action in its entirety. In order for the insurer to defend the action meaningfully, insurer "cannot parse the claims, dividing those that are at least potentially covered from those that are not. To do so would be . . . futile." However, upon conclusion of underlying action the insurer may seek reimbursement for identifiable defense costs paid for the defense of claims that were not at least potentially covered by the policy.

A strong dissent in Buss takes the majority opinion to task for ignoring express policy language obligating the insurer to defend the entire "suit." Buss is an ill-considered decision that, in ignoring the language of the policy, encourages coverage litigation on the apportionment issue.

4. Roman Mosaic and Tile Co. v. Aetna Cas. & Sur. Co., 704 A.2d 665 (Pa. Super. 1997): Policyholder brought coverage action against its CGL insurer for defense and indemnification in underlying Title VII action. Underlying complaint alleged facts that were potentially covered under policy. *Held*: "[T]he actual details of [the plaintiff's] injuries are not dispositive of whether [the insurer] has a duty to defend. Rather, it is the nature of the allegations and claims that fixes the determination." Court equated the phrase "arising out of" with "but-for" causation and found that policyholder failed the but-for test because the underlying plaintiff's injuries were not causally connected with the facts supporting potentially covered claims. Court read the underlying complaint as alleging that plaintiff's injuries arose from sexual harassment and not from the facts supportive of a covered claim, and hence found that the insurer owed no duty of defense or indemnity. Court also found unpersuasive the policyholder's argument regarding the differences between Pennsylvania fact pleading and federal notice pleading requirements.

Roman Mosaic relied on a 1949 decision of the Pennsylvania Supreme Court in stating the "rule" that the duty to defend depends upon "the nature" of the allegations of the underlying complaint. See Springfield Twp. v. Indem. Ins. Co. of N. Am., 64 A.2d 761 (Pa. 1949). In so doing, the Roman Mosaic court failed to acknowledge that Springfield Township had been effectively overruled 10 years later in Cadwallader v. New Amsterdam Cas. Co., 152 A.2d 484 (Pa. 1959), which set forth Pennsylvania's broad duty to defend rule that had been consistently applied by Pennsylvania courts until Roman Mosaic's aberrant decision.

5. Duff Supply Co. v. Crum & Forster Ins. Co., No. Civ. A. 96-8481, 1997 WL 255483 (E.D. Pa. 1997): Policyholder brought suit against its CGL insurer seeking defense and indemnity for underlying Title VII sexual harassment action. Complaint in underlying action alleged facts in support of hostile work environment claims that could be construed as a claim for defamation. *Held*: Where potentially covered claim may be construed from the facts contained in the complaint, insurer has a duty to defend the entire action despite the fact that the complaint does not explicitly title a count in terms that potentially brings it within the scope of coverage. Court noted that if this was not the rule "then the unartful pleader would be the darling of the insurance industry."

6. Bradley Corp. v. Zurich Ins. Co., 984 F. Supp. 1193 (E.D. Wis. 1997): Policyholder brought suit against its CGL insurer for failing to defend it against discrimination claims brought by former employee. Underlying complaint alleged facts sufficient to support a claim for slander that would be covered by the CGL policy, although no count in complaint was titled "slander." *Held*: "[T]he choice of legal theory stated in the tendered complaint is not determinative of the duty to defend; the question instead is 'whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers.'" Thus,

by pleading facts sufficient to support a claim for slander, the underlying complaint raised at least a possibility of a covered claim thereby triggering the duty to defend.

7. American Mgmt. Ass'n v. Atlantic Mut. Ins. Co., 641 N.Y.S.2d 802 (N.Y. Gen. Term. 1996), aff'd by, 651 N.Y.S.2d 301 (N.Y. App. Div. 1996): Policyholder sued its umbrella insurer for failing to defend it in an underlying age discrimination suit. *Held*: Insurer had duty to defend the policyholder in the age discrimination suit because it "alleged enough facts to make a *prima facie* claim for disparate impact discrimination" even though complaint also alleged intentional age discrimination. Because an "insurer is obligated to defend an action brought against the insured whenever the complaint alleges a cause of action covered by the policy," the insurer was obligated to defend the underlying suit.

B. Exclusions

1. Expected Or Intended

a. Majority Rule: "Expected and intended" exclusionary language in the occurrence definition potentially bars coverage only when the insured intended both the act and the resulting bodily injury or property damage. Some courts have held that the insured generally is found to intend resulting injury if he desired to cause the consequences of his act or acted knowing that that the consequences were substantially certain to result. Intentional acts are considered occurrences or accidents unless the corporate policyholder's responsible management intends the resulting injury or damage. SL Indus., Inc. v. American Motorists Ins. Co., 607 A.2d 1266 (N.J. 1992).

See also Maine State Acad. of Hair Design v. Commercial Union Ins. Co., 699 A.2d 1153 (Me. 1997): Policyholder was sued by former employee in an underlying action for sexual harassment.

Held: "Expected or intended" language in policy and employment exclusion did not eliminate potential for coverage. For purposes of liability insurance, the accidental nature of an injury derives from the unintentional nature of the consequences resulting

from the act. Accordingly, "expected or intended" exclusion does not automatically bar coverage for intentional acts.

b. Cases cited by insurers: Some courts have held that intentional acts are not considered occurrences or accidents, regardless of whether the resulting harm was intended. American Guar. & Liab. Ins. Co. v. Vista Med. Supply, 699 F. Supp. 787, 791-92 (N.D. Cal. 1988) (in employment related coverage case, "reject[ing] the argument that while the act was intentional, the damages were not"); Save Mart Supermarkets v. Underwriters at Lloyd's London, 843 F. Supp. 597 (N.D. Cal. 1994) (same).

2. Various Employment Exclusions

a. Employment Exclusion: Policy may exclude coverage for "bodily injuries to an employee of the insured arising out of and in the course of employment by the insured . . ."

1. Agricultural Ins. Co. v. Focus Homes, Inc., 212 F.3d 407 (8th Cir. 2000): Employees brought sexual harassment suit against policyholders and the parties settled after binding arbitration. Subsequently, the insurers brought a declaratory judgment action, arguing they had no duty to defend or indemnify the parties. Insurer relied on an exclusion in the CGL policy that barred coverage for "'bodily injury' to . . . an 'employee' of the Insured arising out of and in the course of . . . employment by the Insured . . . [or] performing duties related to the conduct of the Insured's business . . . whether the Insured may be liable as an employer or in any other capacity." *Held*: The employment exclusion in the policy barred coverage. The complaint identified policyholders as their employer and the allegations in the complaint only addressed the policyholders as an employer. Thus "there was no coverage under the CGL policy because of the employer's liability exclusion."

2. Scottsdale Ins. Co. v. Scholl-Fassnacht, No. Civ.A.00-CV-268(CRW), 2000 WL 875693 (E.D. Pa. June 26, 2000): Employee sued her employer for equitable relief and monetary damages to redress the deprivation of civil rights

she suffered after she was allegedly sexually harassed at work. The CGL insurer sought a declaratory judgment that the employee exclusion barred coverage. The exclusion eliminated coverage for claims of "bodily injury to an employee of the insured arising out of and in the course of his employment by the insured for which the insured may be held liable as an employer or in any other capacity." *Held*: The employee exclusion applied to bar coverage because all of the employee's "claims were based on her employment relationship with [the policyholder] and any injuries she incurred [were] causally connected with her employment with the [policyholder]." The court rejected the policyholder's argument that the exclusion did not apply to conduct that occurred while the employee was not "on the clock per se," concluding that "whether the claimant is actually working at the time of the injury is of no moment."

3. American Motorists Ins. Co. v. L-C-A Sales Co., 713 A.2d 1007 (N.J. 1998): Former employee sued policyholder for wrongful termination on the basis of age. Policyholder sought coverage under CGL policies containing employment exclusion. *Held*: Employment exclusion in CGL policy precluded policyholder from obtaining coverage under the policy for damages arising from employee's wrongful termination claims. Policyholder argued that the bodily injuries alleged by the former employee arose from the wrongful termination and not in the course of his employment and therefore damages for such were not excluded from coverage. Ignoring the black-letter rule of construction that exclusions are to be narrowly construed, the court found that "[t]he phrase 'arising out of' has been defined broadly in other insurance coverage decisions to mean conduct 'originating from,' 'growing out of' or having a 'substantial nexus' with the activity for which coverage is provided," and thus bodily injury arising from wrongful termination arose in course of employment and is not covered.

L-C-A Sales may effectively overrule prior pro-policyholder decision of New Jersey interme-

diate appellate court in New Brunswick Scientific Co. v. Continental Ins. Co., No. A-5664-94T2, slip op. (N.J. Super. App. Div., April 18, 1996), reprinted in Mealey's Emerg. Ins. Disp. at § G-1 (May 28, 1996).

4. St. Paul Fire & Marine Ins. Co. v. Seagate Tech., Inc., 570 N.W.2d 503 (Minn. Ct. App. 1997): Insurer had no duty to defend policyholder in action brought by a female employee who was assaulted by a co-employee with whom she had had a personal relationship that had terminated prior to the assault, when the CGL policy contained the "arising out of and in the course of employment" exclusion.

5. Globe Indem. Co. v. Mohenis Servs., Inc., No. 97-3849, 1998 WL 409026 (E.D. Pa. June 29, 1998): In coverage action arising in connection with claims brought under the Americans With Disabilities Act, finding CGL policy that *expressly provided coverage for discrimination* under personal injury coverage was ambiguous *when two different employment exclusions also purported to bar coverage entirely for discrimination claims.* Meaning of ambiguous policy language was issue of fact for the jury.

6. Compare SCI Liquidating Corp. v. Hartford Ins. Co., 526 S.E.2d 555 (Ga. 2000): Insurer contended that there was no coverage for a Title VII sexual harassment claim where an umbrella policy exclusion barred coverage for claims "arising out of and in the course of their employment." *Held*: The "arising out" of exclusion did not exclude coverage for claims originating from a sexual harassment suit. The exclusion was only triggered if an injury both arises out of and in the course of employment. Because sexual harassment claims do not "arise out of employment" under Georgia law, the exclusion was not applicable. See also Byrd v. Richardson-Greenshields Secs., Inc., 552 So.2d 1099 (Fla. 1989) (stating that for purposes of Workers' Compensation policy, "the injury must 'arise out of' employment in the sense that it is

caused by *a risk inherent* in the nature of the work in question . . . . We conclude that as a matter of public policy, sexual harassment should not and cannot be recognized as a 'risk' inherent in any work environment").

7. Zaiontz v. Trinity Universal Ins. Co., 87 S.W. 3d 565 (Tex. Ct. App. 2002): Employee recovered a judgment against his employer's president after he was injured in the course of his employment while spraying a chemical compound. CGL and umbrella insurers denied coverage and refused to defend the suit based, in part, on an employee exclusion that barred coverage for "bodily injury" to "[a]n employee of the insured arising out of and in the course of employment by the insured." The employee sued his employer's insurers to collect his judgment. *Held*: The employee exclusion in the employer's CGL and umbrella policies did not preclude the employee from obtaining coverage. The policies contained a "Separation of Insureds" clause, meaning "the employee exclusion applie[d] *only* if the insured who is actually seeking coverage under the policy is the injured claimant's employer." Because the president of the employer was the insured actually seeking coverage and not the employer itself, the employee exclusion did not apply. Nevertheless, the court held that coverage was excluded because (1) the president was not an insured under the CGL policy for purposes of the employee's suit and (2) the umbrella policy contained a pollution exclusion that barred coverage.

   For an extended discussion of the significant limitations on the scope of this version of the employment exclusion, see J.E. Scheuermann and A.W. Tamarelli, Jr., The Narrow Parameters of the Employment Exclusion, 11 John Liner Rev. 39 (Fall 1997).

b. Other Employment Exclusions

   1. Another form of an employment exclusion provides:

> This insurance does not apply to: "Bodily injury" [or "Personal injury"] to:
>
> (1) A person arising out of any:
>
> (a) Refusal to employ that person;
> (b) Termination of that person's employment; or
> (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination *directed at that person*, . . .
>
> Despite the insurance industry's attempt to treat this form of employment exclusion as an "absolute" exclusion, the requirement that the employment-related practices, policies, actions or omissions be "directed at" the underlying claimant places severe limitations on the scope of this exclusion. At a minimum, for example, because most hostile work environment and disparate impact claims under Title VII are not "directed at" the person, they would not be barred by this exclusion.

2. Golden Eagle Ins. Corp. v. Rocky Cola Café, Inc., 114 Cal. Rptr. 2d 16 (Cal. Ct. App. 2001): CGL insurer sought declaratory judgment that employment-related practices exclusion barred coverage for sexual harassment and defamation suit. *Held*: The exclusion did not apply to the alleged defamation and it was potentially covered. The defamatory statement that the underlying plaintiff was a "sexually promiscuous and calculating bitch" was not made in the context of her employment, nor was the remark directed to her performance during employment or to anything else relating to her employment.

3. Zurich Ins. Co. v. Smart & Final Inc., 996 F. Supp. 979 (C.D. Cal. 1998): CGL insurer sought declaratory judgment that employment-related practices exclusion barred coverage for employee's allegations of false arrest and false imprisonment by the insured employer. *Held*: The exclusion did not apply to the alleged false

arrest and imprisonment. "Rather, as applied to a false arrest or imprisonment claim, the undefined phrase 'other employment-related practices, policies, acts or omissions' is ambiguous." See also Mactown, Inc. v. Continental Ins. Co., 716 So. 2d 289 (Fla. Ct. App. 1998) (finding employment-related practices exclusion inapplicable to claim of negligent retention and finding that employer's "liability, if any, under negligent retention count is separate and apart from [the employee's] alleged intentional act"); Barnes v. Employers Mut. Cas. Co., No. 03A01-9812-CH-00403, 1999 WL 366587 (Tenn. Ct. App. June 8, 1999) (holding that claim for malicious prosecution of a former employee for theft is not barred by employment-related practices exclusion).

4. Moroni Feed Co. v. Mutual Serv. Cas. Ins. Co., 287 F.3d 1290 (10th Cir. 2002): Policyholder's former president brought defamation suit against policyholder and CGL insurer denied coverage. *Held*: An exclusion that barred coverage for "injury arising out of the employment practices of the insured, including wrongful dismissal of, or wrongful termination of, or discrimination against any officer or employee" was unambiguous and barred coverage. Defamation by employees within the scope of their employment could be considered an "employment practice."

   For an extended discussion of the significant limitations on the scope of this version of the employment exclusion, see J.E. Scheuermann and M.A. May, The Employment-Related Practices Exclusion: An Absolute Bar to Coverage? Absolutely Not, 13th Annual Midyear Meeting of the Insurance Coverage Committee (March 8-10, 2001).

5. A third form of employment exclusion provides:

   "This policy will not apply . . . to any liability of [the policyholder] arising out of injury of an employee in the course of employment by you . . . whether [the policyholder] may be liable as an employer or in any other capacity."

The U.S. Court of Appeals for the Fourth Circuit has found that the unqualified use of the term "injury" in this form of employment exclusion bars coverage for claims of sexual harassment, discrimination, and constructive discharge. Gates, Hudson & Assoc., Inc. v. Federal Ins. Co., 141 F.3d 500 (4th Cir. 1997).

6. Cyprus Plateau Mining Corp. v. Commonwealth Ins. Co., 972 F. Supp. 1379 (D. Utah 1997): Policyholder purchased CGL policy containing exclusion stating: "This Policy does not cover Personal Injury including Bodily Injury to any employee of any Insured under this policy for which the Insured or his indemnitee may be held liable." Policyholder's employee was injured in the course of employment and policyholder sought coverage under its CGL policy. *Held*: Use of phrase "any insured" in the context of this exclusion is ambiguous and must be construed against the insurer. Even though the purpose of the exclusion was to bar coverage under the CGL policy that was duplicative of Workers' Compensation coverage, the fact that the exclusion is subject to more than one reasonable interpretation necessitates a construction in favor of the policyholder resulting in coverage for the underlying injuries. See also Sphere Drake Ins. v. Shoney's Inc., 923 F. Supp. 1481 (M.D. Ala. 1996) (concluding that exclusion barring coverage for "bodily injury to any employee of the insured for which the insured may be held liable as an employer or in any other capacity" could not preclude coverage where fact issues remained about whether underlying sexual harassment claimants' injuries were suffered within their course of employment).

II. Workers' Compensation ("WC")/ Employer's Liability ("EL") Policies

A. Coverage Grants

1. WC Coverage: WC policies generally provide coverage for bodily injuries to employees for which an employer may be liable under a Workers' Compensation act, which typically makes the employer strictly liable for an employee's accidental bodily injury arising out of and in the course of

his or her employment. Nonetheless, the California Supreme Court has held that a WC insurer had no duty to defend an employer-policyholder from a former employee's wrongful termination suit that alleged he was terminated because he was not white. La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co., 884 P.2d 1048 (Cal. 1995) (rejecting employer's argument that policy was ambiguous and it could have reasonably expected that its insurer would defend it in the underlying suit because "the policy's language is susceptible of no other objective construction than providing coverage solely for workers' compensation benefits, or claims, proceedings, or suits for such benefits and not for civil suits for damages").

2. EL Coverage: EL policies are intended to fill a potential gap in coverage where the employee's bodily injury does not fall within the WC policy and is excluded under a CGL employment exclusion. EL policies generally provide coverage for "bodily injuries" to employees who are not within the protection of a Workers' Compensation statute, e.g., because of "opt out" provisions or because the Workers' Compensation Statute allows the employee to bring a claim against his or her employer for injuries resulting from intentional torts (see, e.g., W. Va. Code Ann. § 23-4-2 (West 1998)).

3. "Arising out of and in the course of employment": EL policies typically provide coverage for accidental bodily injury with any causal nexus to claimant's employment. See, e.g., Commercial Union Insurance Company, Workers Compensation and Employers Liability Insurance Policy WC 00 00 00 A at 2 (August 1991).

   a. Intentional Acts: The Sixth Circuit U.S. Court of Appeals has held that intentional acts committed by the employer against the employee may "arise out of and in the course of" employment as this phrase is found in coverage grant of EL policy. Lumbermens Mut. Cas. Co. v. S-W Indus. Inc., 39 F.3d 1324 (6th Cir. 1994). The Sixth Circuit held that an EL policy provided coverage for employee's lung injuries that occurred as a result of exposure to toxic fumes on the job and alleged to result from his employer's intentional tort. Insurer argued that intentional tort cannot arise out of employment, but the court rejected this argument, stating "[i]t strains credulity, therefore, for the . . . insurers in this case to contend that these injuries did not arise out of and in the course of . . . employment." See also Melton v. Industrial Indem. Co., 103 Cal. Rptr. 2d 222 (Cal.

Ct. App. 2001) (Ordered Not Published) (concluding that WC policy covered claims against the employer for improperly discharging an employee for filing a WC claim and "intentional act" exclusion did not bar coverage).

b. See also Knox v. Combined Ins. Co. of Am., 542 A.2d 363 (Me. 1998) (claims of sexual harassment and assaults are covered under WC policy if facts reveal that harassment and assaults arose out of and in the course of employment). But cf., Davis v. Dillmeier Enters., Inc., 956 S.W.2d 155 (Ark. 1997) (no remedy under WC statute for claim of discrimination based on physical disability); HDH Corp. v. Atlantic Charter Ins. Co., 681 N.E. 2d 847 (Mass. 1997) (WC insurer had no duty to defend policyholder against claims of emotional distress caused by sexual discrimination and wrongful termination when claimant, a former employee, had not preserved right to sue).

4. Bodily Injury: Claims of hostile work environment and sexual harassment may fall within the scope of bodily injury coverage because bodily contact is sufficiently inherent in hostile work environment claims that an insurer's duty to defend will be triggered by such allegations. General Accident Ins. Co. of Am. v. Gastineau, 990 F. Supp. 631 (S.D. Ind. 1998). See also EEOC v. Southern Publ'g Co., Inc., 894 F.2d 785 (5th Cir. 1990) (concluding a WC/EL insurer was obligated to defend a policyholder in an underlying sexual harassment suit because the complaint's allegations of "*physical pain* as well as embarrassment, humiliation and emotional distress . . . [were] sufficient . . . to allege 'bodily injury'").

5. Employer Negligence: Where a plaintiff alleges an employer's negligence caused the plaintiff's injuries, the employer may have good cause for coverage under its WC and EL policies. Seminole Point Hosp. Corp. v. Aetna Cas. & Sur. Co., 675 F. Supp. 44 (D.N.H. 1987) (concluding that insurer was obligated to defend and indemnify an employer with respect to its allegedly negligent supervision and investigation of sexual harassment incidents).

B. Exclusions

1. Employment Exclusion: EL policies may contain some form of employment exclusion, excluding from coverage damages arising from specific employment-related injuries.

Schmidt v. Smith, 713 A.2d 1014 (N.J. 1998): EL policy contained exclusion for bodily injuries caused by sexual harassment. Policyholder sought coverage under EL portion of WC policy for a suit by an employee for sexual harassment. *Held*: Provision of EL policy excluding from coverage bodily injuries from sexual harassment is violative of statutorily-declared public policy and is therefore void. Court noted that state statute required corporation to have sufficient insurance coverage for obligations arising from bodily injury to employees. The Court held that a coverage exclusion for non-bodily injury damages from sexual harassment would be valid as long as coverage is not excluded for sexual harassment bodily injuries, including emotional injuries accompanied by physical manifestations.

2. Contract Exclusion: EL policy may also contain exclusion for amounts owed by policyholder pursuant to a contractual obligation. There do not appear to be any court decisions construing an EL policy's contract exclusion. Because the language of the exclusion is usually the same as the contract exclusions that appear in other liability policies, courts may construe them similarly. See Section III (B)(1), infra.

III. Errors and Omissions ("E&O") / Directors and Officers ("D&O") Policies

A. Coverage Grants

There are no standard form E&O or D&O policies. The lack of standard E&O and D&O forms means that even slight differences in policy wordings may be critical in assessing coverage from one policy to the next.

1. A Common Coverage Grant in an "E&O" Policy Provides:

"The Company shall pay on behalf of the Insured Person all loss for which the Insured Person is not indemnified by the Insured Organization and which the Insured Person becomes legally obligated to pay on account of any claim made against him, individually or otherwise . . . for a Wrongful Act committed, attempted, or allegedly committed or attempted, by the Insured Person. . . ."

Chubb Insurance Company, Executive Liability and Indemnification Policy, 14-02-0494 (January 1985), reprinted in International Risk Management Institute, Inc., Directors and Officers Liability Insurance Coverage Analysis ("IRI, D&O Coverage") at X.E.2.

2. A Common Coverage Grant In A D&O Policy Provides:

"This policy shall reimburse the Company for Loss arising from any claim or claims which are first made against the Directors or Officers . . . for any Wrongful Act in their respective capacities as Directors or Officers of the Company, but only when and to the extent that the Company has indemnified the Directors or Officers for such Loss."

National Union Fire Insurance Company, Directors and Officers Insurance and Company Reimbursement Policy 47353 (August 1988), reprinted in IRI, D&O Coverage at X.E.3.

3. Claims Made Coverage:

E&O and D&O policies are typically "claims made" policies. That is, they indemnify a policyholder for claims made against it during the policy period (or during an extended reporting period) regardless of when the acts or omissions giving rise to those claims occurred or when the resulting injury occurred.

a. Claim: The term "claim" may be defined in the policy as "(1) a written demand for monetary or non-monetary relief or (2) civil, criminal, or administrative proceeding for monetary or non-monetary relief which is commenced by a complaint, indictments or administrative notice of charges."

   A typical demand letter would fall within the first part of this definition.

b. National Union Fire Ins. Co. of Pittsburgh, PA v. Cary Cmty. Consol. Sch. Dist. No. 26, 93 C 6526, 1995 WL 66303 (N.D. Ill. Feb. 15, 1995): E&O insurer defended age discrimination claim brought against policyholder and brought declaratory judgment action that second E&O insurer was responsible for all the costs of defense and settlement because the claim was made during its policy period. The policy did not define "claim" and the court defined "claim" as "a demand for money or property as of right." *Held*: Second E&O insurer was obligated to defend the claim because a claim had first been made during its policy period. Although policyholder had received an EEOC first notice of age discrimination prior to the policy period, it explicitly stated no action was required at the time. Accordingly, the court concluded that a claim was

first made when the policyholder received an EEOC second notice which included a signed charge and required a response.

4. No "Entity" Coverage: D&O coverage typically provides coverage only to the corporation (or association) for amounts it is legally obligated to reimburse the directors or officers in connection with claims made against them by third parties. It typically does not provide coverage for claims against the corporation (or association) itself. Olympic Club v. Interested Underwriters at Lloyd's London, 991 F.2d 497 (9th Cir. 1993).

5. Definition of "Loss": "Loss" typically includes "damages, judgments, settlements, costs and defense of legal actions, claims, or proceedings and appeals therefrom."

   Issue: Whether this definition includes coverage for equitable monetary relief or injunctions. See Harristown Devel. Corp. v. International Ins. Co., CIV. A. No. 87-1380, 1988 WL 123149, at *1 (M.D. Pa. Nov. 15, 1988) (citing cases).

6. Wrongful Acts:

   a. Coverage for Intentional Acts: Courts have held that the following definition of "Wrongful Act" provides coverage for intentional acts:

      Any actual or alleged error, misstatement, misleading statement, act or omission, or neglect or breach of duty by the Directors or Officers in the discharge of their duties solely by reason of their being Directors and Officers of the Company.

      New Madrid County Reorganized Sch. Dist. No. 1 v. Continental Casualty Co., 904 F.2d 1236 (8th Cir. 1990); Eveleth v. St. Paul Fire & Marine Ins. Co., 515 N.W. 2d 576 (Minn. 1994).

   b. No Coverage for Intentional Acts: Where "Wrongful Act" is defined in the policy as "negligent act, error, omission, misstatement, or misleading statement committed or alleged to have been committed" by the policyholder or its directors or officers, one court has held

that a claim of intentional retaliatory discharge was not covered. Golf Course Superintendents Ass'n v. Underwriters at Lloyd's of London, 761 F. Supp. 1485 (D. Kan. 1991).

The court rewrote the policy language so that "negligent" modifies not only "act," but also all of the following terms.

7. Defense Obligations: Often E&O or D&O insurers have no duty to defend the policyholder. These policies often provide instead a duty to reimburse policyholder for defense costs. The D&O policy sometimes gives the insurer the right to settle any employment practices claim subject to the policyholder's written consent. If the policyholder withholds consent, the insurer's liability for all loss may not exceed the amount for which it could have settled the claim plus defense costs incurred as of the date such settlement was proposed in writing by the insurer.

8. Allocation Issues: D&O policies commonly contain provisions requiring the insurer and the policyholder to use their best efforts to determine a fair and proper allocation between themselves of the amounts incurred in the defense or settlement of a claim or any related judgment.

Allocation may occur by claims, i.e., covered versus uncovered claims (claim allocation), or by persons, i.e., insured versus uninsured persons (party allocation). Where the policy does not provide guidelines for allocation, courts may employ their own allocation approaches:

a. Relative Exposure Approach: This method allocates coverage responsibility between insured and uninsured parties according to the relative risk of exposure of the various parties involved.

b. Larger Settlement Approach: Settlement allocated between parties to the extent that the settlement is demonstrated to be higher because of activities of uninsured persons who were sued or whose activities contributed to the suit.

c. Claims Allocation: Allocation on claims basis is often avoided by pre-settlement nego-

tiation, but some courts have undertaken fact-specific analysis of pleadings and the record from the underlying case to avoid protracted coverage litigation. See American Home Assurance. Co. v. Libbey-Owens-Ford Co., 786 F.2d 22 (1st Cir. 1986) (court applied fact-based allocation analysis to allocate underlying settlement responsibility).

d. Defense Cost Allocation: General rule is that defense costs need not be allocated as long as the costs are reasonably related to defense of covered claims.

For a more complete discussion of the allocation issue, see P.J. Kalis, T.M. Reiter, and J.R. Segerdahl, Policyholder's Guide to the Law of Insurance Coverage, Chap. 11 (Aspen Law and Business 1997).

B. Exclusions

1. Insured v. Insured Exclusion: This common exclusion typically bars coverage for suits by one named insured (e.g., the corporation or a director) against another named insured (e.g., another director). The purpose of the exclusion is to bar coverage for collusive or friendly suits. Courts have found that it is not a bar to a wrongful termination suit brought by a former director or officer, Conklin Co. v. National Union Fire Ins. Co., 1987 WL 108957 (D. Minn. Jan. 28, 1987), or by employees who allege violations of the Age Discrimination in Employment Act, Township of Center v. First Mercury Syndicate, 117 F.3d 115 (3d Cir. 1997). Cf. Franklin Holding Corp. (Del.) v. National Union Fire Ins. Co. of Pittsburgh, PA, 689 N.Y.S.2d 492 (N.Y. App. Div. 1999) (excluding coverage due to the insured v. insured exclusion but quoting policy provision that noted the exclusion did not apply to "wrongful termination of employment claims brought by a former employee other than a former employee who is or was a Director of the Company").

2. Contractual Obligations Exclusions: E&O policies often contain a provision that in certain instances excludes amounts owed pursuant to contractual obligation. The majority of courts find that this exclusion does not bar coverage for back pay awards.

a. New Madrid County Reorganized Sch. Dist. No. 1, Enlarged v. Continental Cas. Co., 904 F.2d 1236 (8th Cir. 1990): Policyholder was sued in a civil rights action and found liable for back wages. *Held*: Under E&O policy, contract exclusion precluding coverage for contractual obligations did not operate to bar coverage for back wages. Court found that because the underlying action was not purely contractual, insured could recover amounts owed in back wages under E&O policy.

b. School Dist. for City of Royal Oak v. Continental Cas. Co., 912 F.2d 844 (6th Cir. 1990), implicitly overruled on other grounds by, Salve Regina Coll. v. Russell, 499 U.S. 225 (1991): Policyholder was sued in underlying action for discrimination and found liable for back wages. Insurer denied coverage under contractual obligations exclusion. *Held*: Contract exclusion did not bar coverage for back wages owed because "an exclusion of liability insurance coverage for contractually assumed obligations to third parties is operative only where the insured would not have been liable to the third party absent the insured's agreement to pay." Thus, even though the applicable collective bargaining agreement prohibited discrimination, suit by employee against insured did not allege claims for breach of that contract, thus rendering inapplicable the contractual exclusion.

3. Bodily Injury: D&O policies may also exclude coverage for bodily injury. Philadelphia Indem. Ins. Co. v. Maryland Yacht Club, Inc., 742 A.2d 79 (Md. Ct. Spec. App. 1999) (concluding bodily injury exclusion did not apply where policyholder had discharged an employee for filing a workers' compensation claim and not for his work-related injury because the "nexus between [the employee's] wrongful discharge action and his bodily injury claim is too attenuated to permit the [D&O] insurer to invoke the bodily injury exclusion").

IV. Homeowner's Policies

A. Coverage Grants

Another often-overlooked potential source of insurance coverage for employment-practices claims is homeowners insurance. When an aggrieved

employee sues both the employer and the employee who allegedly caused the injury, the defendant employee may seek coverage under his/her homeowners policy. It is important to note that homeowners insurance is an occurrence-based policy that typically covers damages for bodily injury or property damage caused by an occurrence. See Aetna Cas. & Sur. Co. v. Ericksen, 903 F. Supp. 836 (M.D. Pa. 1995) (concluding homeowners insurer had duty to defend policyholder in a libel suit where plaintiff alleged policyholder had publicly and falsely accused plaintiff of sexual harassment in the work place).

B. Exclusions

1. Business Pursuits

a. Greenman v. Michigan Mut. Ins. Co., 433 N.W.2d 346 (Mich. Ct. App. 1988): Employee sued the policyholder, alleging the policyholder sexually harassed her while she was working in a law firm. Policyholder sued his homeowners insurer for failing to defend him in the underlying lawsuit and the trial court granted the insurer summary disposition. *Held*: The "business pursuit" exclusion applied to bar coverage. The court stated that "[t]he complained of acts themselves need not be performed for profit; the acts need only be performed during the business pursuit of the insured." Consequently, because the complained of acts occurred in the law firm where the policyholder and underlying plaintiff worked and the law firm's activities were continuous and for profit, the "business pursuit" exclusion applied. See also United Food Serv., Inc. v. Fidelity & Cas. Co. of N.Y., 594 N.Y.S.2d 887 (N.Y. App. Div. 1993) (concluding "business pursuits" exclusion in homeowners policy applied to bar coverage for property damage caused by an employee to a hotel while attending a management seminar in his capacity as vice-president of sales).

b. Scheer v. State Farm Fire & Cas. Co., 708 So. 2d 312 (Fla. Dist. Ct. App. 1998): *Held*: Even though an underlying complaint alleged that the policyholder had touched his co-workers' breasts and buttocks during the course of his employment, the trial court erred by concluding the "business pursuits" exclusion barred homeowners coverage. Because the exclusion applied to conduct "primarily taken in furtherance of a business interest," the court concluded that the policyholder's actions were not related to and did not arise out his profession.

c. Smith v. Sears, Roebuck & Co., 447 S.E.2d 255 (W.Va. 1994): A co-worker sued the policyholder for assault and battery after the policyholder allegedly attacked his co-worker in the employer's parking lot after the two began arguing about their commissions. *Held*: The "business pursuit" exclusion did not preclude homeowners coverage. The court concluded that denial of summary judgment was proper because even though "the initial disagreement between the parties was related to business, the conflict occurred after the parties had left their work place." See also Aetna Cas. & Sur. Co. v. Ericksen, 903 F. Supp. 836 (M.D. Pa. 1995) (concluding homeowners policy "business pursuit" exception did not apply to policyholder's allegedly libelous discussion of her internal sexual harassment complaint with a newspaper reporter).

d. Distinguishing Between "Business Pursuit" and "In the Course of Employment":

Krevolin v. Dimmick, 467 A.2d 948 (Conn. Super. 1983): College student sued his professor, alleging the professor negligently threw a piece of chalk that struck him in the eye. The professor impleaded his homeowners insurer after it refused to defend him. The carrier justified its failure to defend on the basis of the "business pursuits" exclusion. *Held*: Although the professor's actions were clearly within the course of his employment, the "business pursuits" exclusion did not apply to bar coverage. The court determined that the insurance policy must be construed as a whole and what constituted a "business pursuit" had to be determined in the context of the policy. Accordingly, the court stated that two other exclusions ("bodily injury . . . arising out of the rendering of or failing to render professional services" and "bodily injury . . . arising out of any premises, other than the insured premises, owned, rented or controlled by any insured, but this exclusion does not apply to bodily injury to any residence employee arising out of an in the course of his employment by any insured") would help determine what the insurer meant by "business pursuits." Consequently, the court stated that "business pursuits" was not synonymous with "in the course of employment."

2. Expected Or Intended

Homeowners policies usually contain an "expected or intended" exclusion that is similar to the "expected or intended" exclusion contained in most CGL policies and courts may construe them similarly. See Section I (B)(1), supra.

For an extended discussion of the issues discussed in this outline, see:

- J.E. Scheuermann and M.A. May, The Employment-Related Practices Exclusion: An Absolute Bar to Coverage? Absolutely Not, 13th Annual Midyear Meeting of the Insurance Coverage Committee (March 8-10, 2001)

- J.E. Scheuermann and A.W. Tamarelli, Jr., "The Narrow Parameters of the Employment Exclusion," 11 John Liner Rev. 39 (Fall 1997)

- J.E. Scheuermann and J.K. Baillie, "Employer's Liability and Errors and Omissions Insurance Coverage for Employment-Related claims," 18 Western New Eng. Law Rev. 71 (1996)

- J.E. Scheuermann and J.K. Baillie, "Liability Insurance Coverage for Employment-Related Claims," 11B Law of Liability Insurance (ed. R.H. Long, Matthew Bender, 1995)

- J.E. Scheuermann, "Insurance Coverage for Employment-Related Claims," 28 Tort & Ins. L. J. 778 (Summer 1993)

- P.J. Kalis, T.M. Reiter, and J.R. Segerdahl, Policyholder's Guide to the Law of Insurance Coverage, Chaps. 11, 12 (Aspen Law and Business 1997)

