Employment Practices Liability Insurance: A Guide to Policy Provisions and Challenging Issues for Insureds and Plaintiffs

Stephanie D. Gironda* and
Kimberly W. Geisler**

Introduction

Employment practices liability insurance (EPLI), in some form, has existed for decades. Stand-alone EPLI policies emerged in the late 1980s with low coverage limits and coverage of only the costs of defending wrongful termination claims.[1] They arose to fill the gap left by general commercial liability policies that typically excluded employment practices claims.[2] In the early 1990s, insurance companies began offering EPLI policies that included both indemnity and defense costs.[3] This coincided with enactment of federal employment laws such as the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), and insurers' expansion of the types of employment claims EPLI covered to include racial discrimination and sexual harassment claims.[4] Large jury verdicts under the Civil Rights Act of

* Stephanie D. Gironda is a veteran counselor and litigator at Wilentz, Goldman & Spitzer, P.A. in Woodbridge, New Jersey. She represents employees in all varieties of employment matters, from negotiation to litigation in both state and federal courts. She also counsels employees on disciplinary matters and disability and religious accommodation requests.

** Kimberly W. Geisler is a partner with Scott Dukes & Geisler, P.C. in Birmingham, Alabama, where she represents management in employment claims before administrative agencies and in state and federal courts. She also provides day-to-day employment advice, Equal Employment Opportunity training, and policy review to companies across a wide range of industries. The authors acknowledge William Stevenson, associate at Scott Dukes & Geisler, P.C., for his assistance in preparing this article.

1. Joseph P. Montelone, *Employment Practices Liability Insurance*, *in* PRACTITIONER'S GUIDE TO THE DEFENSE OF EPL CLAIMS 1, 1 (Ellis B. Murov ed., 2005). The exclusions in early employment practices liability insurance (EPLI) policies have been described as "many and severe." Jeffery P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Development*, 21 W. NEW ENG. L. REV. 323, 333 (1999).

2. Klenk, *supra* note 1, at 324.

3. Montelone, *supra* note 1, at 1.

4. *Id.*; Nancy H. Van der Veer, *Employment Practices Liability Insurance: Are EPLI Policies a License to Discriminate? Or Are They a Necessary Reality Check for Employers?*, 12 CONN. INS. L.J. 173, 186 (2005) ("The 1990s also saw an explosion of employment

1991 and renewed public attention to sexual harassment prompted increased sales of EPLI.[5] Today, EPLI is key to risk management for employers of all sizes, although large corporations are more likely to purchase policies. A 2014 analysis of the EPLI market found that forty-one percent of companies with more than one thousand employees had stand-alone EPLI.[6] Small and mid-size companies have also been attracted to EPLI because a single significant adverse verdict could be devastating.[7]

As EPLI becomes more widespread, attorneys need to understand the structure of a typical EPLI policy and, for employment defense counsel specifically, the special challenges of working with EPLI insurers. This Article provides a guide to typical EPLI policy provisions, as well as issues faced by attorneys representing insureds and plaintiffs. Part I offers an overview of policy provisions that employment lawyers typically encounter. Part II discusses issues facing EPLI defense counsel, including tips for avoiding conflicts of interest arising from the "tripartite relationship." Part III examines strategies for plaintiffs' counsel to maximize coverage under EPLI policies.

I. Typical EPLI Policy Provisions

EPLI covers a business and typically extends to officers, employees, and former employees.[8] The filing of a lawsuit, an administrative complaint, an arbitration claim, or a simple demand letter may trigger coverage.[9] Oral demands are usually insufficient to constitute a claim because of uncertainty about proof and timing.[10] Claims first presented as lawsuits are deemed made upon the insured's receipt of the summons or similar process.[11] Standard EPLI policies usually place on the insurer both the duty to indemnify and the duty to defend.[12] The duty to defend is broader than the duty to indemnify because insurers often must defend claims that do not result in dam-

discrimination class action lawsuits that have been resolved through record breaking settlements.").

5. Montelone, *supra* note 1, at 2; *see also* L. Kathleen Chaney, *Employment Practices Liability Insurance*, 30 COLO. LAW. 125, 125 (2001) ("The rapid expansion of the EPLI market is attributable to a steady increase in the frequency and severity of employment related claims over the last decade.").

6. Advisen Insurance Intelligence, *Complete the Picture: A Spotlight on the United States Employment Practices Liability Insurance Market*, at 12 (Sept. 2014), http://www.aig.com/content/dam/aig/america-canada/us/documents/business/industry/advisen-whitepaper-final-brochure.pdf [hereinafter *Complete the Picture*].

7. *Id*.

8. *A Guide to Employment Practices Liability Insurance*, THE WORKING PAPER (Phillips Lytle LLP, New York, N.Y.), Mar. 2007, at 2 [hereinafter *The Working Paper*].

9. Montelone, *supra* note 1, at 8.

10. *Id.*

11. *Id.* at 8–9.

12. Francis J. Mootz, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 70–74 (1997).

ages.[13] Insurers accept the duty to defend in exchange for the right to control the litigation.[14]

Most EPLI policies are written on a claims-made basis, meaning coverage is triggered when a claim is first made against an insured during the term of the policy.[15] Policies usually require that claims be reported to the insurer as soon as practicable, but not later than a prescribed period of time after policy expiration.[16] Some older policies may have reporting requirements that are either completely open-ended or require insureds to report claims before the policy expires.[17] Many EPLI policies also contain an awareness provision that allows insureds to report potential claims during the policy period, thereby securing coverage for any actual claim made later.[18]

For attorneys, another important facet of EPLI to consider is that coverage for defense expenses usually is part of the liability limit.[19] Lawyers defending EPLI claims must adequately represent the insured although every billable hour eats into the funds available for indemnification of any future settlement or judgment.[20] Additionally, defense expenses typically are subject to a self-insured retention or deductible.[21] Retention amounts result from negotiations between insurers and policyholders and represent the extent of risk that insureds retain.[22] Many insurers set minimum retentions to avoid exposure to "routine, non-severe claims."[23] There often is an inverse correlation between retention amounts and premiums—policies with high premiums have lower retentions and vice versa.

EPLI covers damages in excess of the retention arising from covered employment practices.[24] Generally, EPLI covers judgments, settlements, back pay and front pay awards, pre-judgment and post-judgment interest, attorneys' fees and costs, and defense expenses.[25] However, EPLI typically excludes punitive damages (unless coverage

13. *Id.* at 70.
14. *Id.* at 74.
15. Writing policies on a claims-made basis "provides two important benefits to the carrier: it minimizes the insurer's responsibility for risks that existed prior to the underwriting and implementation of its loss prevention program, and it allows the insurer to quickly adjust in the face of an unexpected negative loss history by eliminating the long tail of coverage that exists under occurrence-based policies." *Id.* at 58.
16. Montelone, *supra* note 1, at 4.
17. *Id.*
18. *Id.* at 5.
19. Chaney, *supra* note 5, at 127 ("A majority of EPLI policies are 'defense within limits' policies.").
20. *The Working Paper*, *supra* note 8, at 2.
21. Chaney, *supra* note 5, at 127. Generally, the retention includes defense costs and applies on a per claim basis. *Id.*
22. Montelone, *supra* note 1, at 4.
23. *Id.*
24. Chaney, *supra* note 5, at 126.
25. Montelone, *supra* note 1, at 9.

is permitted by applicable state law);[26] fines, penalties, and taxes; amounts due under an employment contract; stock options and deferred compensation; and injunctive relief, such as reinstatement or providing ADA accommodations.[27] To be covered, claims must be made by parties defined in the policy. Depending on the policy, this may exclude leased workers, temporary workers, former employees, or applicants for employment.[28] Most EPLI policies define each "employment practice" as one claim.[29] "Thus, if more than one person makes a claim for the same employment practice, the coverage available under the policy to pay those claims will be limited to a single limit of liability."[30]

Although early EPLI policies covered only wrongful termination claims, policies today include a wider range of employment practices. Beyond constructive and retaliatory discharge, almost all policies cover various forms of discrimination and retaliation, including racial and sexual harassment.[31] Some policies contain a catch-all category covering claims of discrimination based on other protected categories, such as sexual orientation and gender identity—claims not expressly protected by federal statutes but which may be covered by state or local law.[32] Most policies also cover FMLA violations[33] and all forms of harassment.[34] Despite the breadth of modern policies, most still exclude claims based on workers' compensation, the Employee Retirement Income Security Act of 1974 (ERISA), unemployment compensation, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), wage and hour laws,[35] the National Labor Relations Act, and breach of contract.[36]

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26. In some states, it is unlawful to provide coverage for punitive damages because doing so allows insureds to transfer punishment for their harmful conduct to insurers—defeating the purpose of punitive damages. Chaney, *supra* note 5, at 127.

27. Montelone, *supra* note 1, at 9–10.

28. Chaney, *supra* note 5, at 126.

29. *Id.*

30. *Id.*

31. Montelone, *supra* note 1, at 10.

32. *Id.*

33. *Id.*

34. "Harassment coverage has been broadened to include harassment of a non-sexual nature. Broadened definitions of harassment often include coverage for harassment [] which creates a hostile work environment that interferes with performance, or creates an intimidating, hostile, or offensive work environment." Van der Veer, *supra* note 4, at 190.

35. Some insurers now offer coverage for wage and hour claims with low coverage limits. However, coverage is often limited to defense costs. *See, e.g.*, CRC Group, *State of the Market: Wage and Hour* 1, 6 (Oct. 2016), https://www.crcins.com/docs/professional/WageHour.pdf.

36. Chaney, *supra* note 5, at 127; *The Working Paper*, *supra* note 8, at 2. The exclusion for breach of contract usually does not extend to claims by employees attempting to defeat their at-will status by alleging that an employee handbook constitutes a contract of employment. *See* Montelone, *supra* note 1, at 12.

EPLI policies also regularly exclude claims for bodily injury and property damage, which are more likely covered by general liability policies or other forms of insurance.[37] However, EPLI often covers claims for mental anguish or emotional distress associated with covered losses.[38] EPLI also excludes intentional wrongdoing. While discrimination is an intentional act, the intentional wrongdoing exception is generally limited to situations in which final adjudication establishes intentionality.[39] Because so few employment cases are decided on the merits, this exception is rarely of real consequence.[40] Importantly, this exception will not exclude sexual harassment claims based on an employee-harasser's wrongdoing because any liability the business incurs would be vicarious rather than direct.[41]

EPLI policies vary widely with respect to the duty to defend and the related right to select defense counsel. Insurers that assume the duty to defend normally reserve the right to select defense counsel.[42] Insurers tend to use a pre-approved list of firms or individual attorneys with employment litigation experience in a particular market.[43] Insureds with experience with a particular firm may seek to include a policy provision naming that firm as pre-selected counsel.[44] Even if the insured's preferred counsel is not pre-approved before policy issuance, the insurer may consent to the insured's selection after a claim arises. Nevertheless, insurers are more likely to approve such requests if made during policy negotiations.[45]

II. Issues Facing EPLI Defense Counsel

Counsel EPLI insurers retain to defend employment claims face a variety of challenges arising from the "tripartite relationship" among the attorney, the insurer, and the insured.[46] While all three share

37. Montelone, *supra* note 1, at 11.

38. *Id*.

39. Van der Veer, *supra* note 4, at 192–93 ("Prohibiting insurance coverage for intentional conduct is based on two premises. First, no individual or entity should profit from his own malfeasance. Second, many courts will declare void any coverage for acts or conduct that harms others.").

40. Montelone, *supra* note 1, at 12.

41. James B. Dolan, Jr., *The Growing Significance of Employment Practices Liability Insurance*, GPSOLO MAG. (Sept. 2005), www.americanbar.org/content/newsletter/publications/gp_solo_ magazine_home/gp_solo_magazine_index/employmentinsurance.html ("[T]here is widespread agreement that, if the named insured is held vicariously liable for an employee's wrongful acts, coverage exists for the named insured but not for the wrongdoing employee.").

42. *The Working Paper*, *supra* note 8, at 3.

43. *Id.*

44. *Id.* ("If the employer requests specific counsel during policy negotiations and the counsel is qualified to handle labor and employment matters, most carriers will allow an employer to designate its own counsel.").

45. *Id.*

46. David H. Anderson, *Balancing the Tripartite Relationship Between Defendant, Defense Counsel, and Insurer*, 88 ILL. B.J. 384, 384 (July 2000).

the basic goal of defending the claim, the insurer and the insured may disagree on strategy. For example, an employer seeking to protect its reputation may desire vindication at trial, while the insurer may prefer settling within policy limits to avoid additional defense costs.[47] Sometimes, though, an insured may want to settle a claim quickly to avoid damaging relations with another business, even though the insurer would prefer pursuing litigation vigorously to obtain a more favorable settlement offer.[48] The seeds of potential conflicts between insurers and insureds can be sown at the beginning of litigation, such as when an employee brings both covered and non-covered claims or when the insurer only defends a claim under a reservation of rights. Defense counsel is often placed in the middle, trying to balance the interests of the insurer and the insured. This section surveys common issues employment defense counsel face in the tripartite relationship.

A. Who Is the Client?

Navigation of ethical questions starts with attorneys knowing whom they represent.[49] Depending on the jurisdiction, counsel will have one client (the insured employer) or two clients (both the insured and the insurer).[50] The label "client" comes with several rights, including the right to sue a lawyer for malpractice, to confidentiality, and to conflict-free representation.[51] According to the Restatement (Third) of the Law Governing Lawyers, an attorney-client relationship arises when:

> "(1) [A] person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and (2) either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . ."[52]

This basic statement of law is not particularly helpful to the attorney attempting to resolve the conflicts posed by the tripartite relationship.

Most states follow the "two-client theory," meaning that "both the insured and the insurer are clients of the defense attorney."[53] The two-client theory is based on the expectation that most cases settle quickly

47. *Id.*

48. *Id.*

49. Amber Czarnecki, *Ethical Considerations Within the Tripartite Relationship of Insurance Law—Who Is The Real Client?*, 74 DEF. COUNS. J. 172, 173 (2007) ("The very nature of the tripartite relationship, the hiring of an attorney by a non-party to represent another party to a lawsuit, leaves the defense attorney to wonder whether he has one client or two.").

50. Anderson, *supra* note 46, at 385.

51. Czarnecki, *supra* note 49, at 173–74.

52. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

53. Czarnecki, *supra* note 49, at 174; *see also* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 96-403, n.2 (1996) ("Today, absent a contrary agreement as to

within policy limits and that conflicts of interest are rare.[54] In many two-client states, substantive law identifies the insured as the "primary" client.[55] A growing minority follow the "one-client theory," making the insured employer the attorney's only client, despite the insurer paying the attorney.[56] The one-client theory seeks clarity for attorneys and alleviation of fears that "allowing an insurer to have an attorney-client relationship weakens the attorney's loyalty to the insured."[57] It will become even more important for employment attorneys to familiarize themselves with these rules as more states adopt the one-client theory.[58] Accurately identifying the client is critical to navigating the ethical and practical challenges likely to arise in the tripartite relationship.

B. Who Controls the Defense?

Once the client is identified, the attorney, insurer, and insured must determine who controls the defense, a question especially important in two-client jurisdictions.[59] Because insurers pay for the defense, EPLI policies usually allow them to steer the defense and control costs with litigation management guidelines. Such guidelines articulate insurers' rules and procedures for defense counsel to follow:

> Litigation management guidelines typically include a statement of the insurer's goals (quality legal services at the lowest possible cost); a delineation of the respective duties of the claims professionals and the attorney; standard procedures for handling lawsuits, including required periodic consultations with or submissions to the claims manager to permit insurer direction of the case; an enumeration of tasks which require the insurer's prior approval . . . and staffing guidelines and limitations.[60]

Increasingly, EPLI carriers use internal or external auditors to review legal bills to ensure compliance with guidelines.[61] Such detailed billing guidelines can influence an attorney's litigation judgment.[62]

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the identity of the client, the prevailing view appears to be that the lawyer represents both the insured and the insurer, at least for some purposes.").

54. Czarnecki, *supra* note 49, at 174–75 (citing Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593 (Ariz. 2001)).

55. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 08-450, n.19 (2008).

56. Czarnecki, *supra* note 49, at 176.

57. *Id.* (citing Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294 (Mich. 1991)).

58. *Id.* at 177.

59. Amy S. Moats, *A Bermuda Triangle in the Tripartite Relationship: Ethical Dilemma Raised By Insurers' Billing and Litigation Management Guidelines*, 105 W. VA. L. REV. 525, 526–27 (2003) ("Problems created by the eternal triangle are even more difficult in dual-client states because the attorney must fulfill ethical obligations to both the insured and the insurer.").

60. Czarnecki, *supra* note 49, at 182 (quoting Danny M. Howell, *Defense Counsel and Coverage Implications of the Tripartite Relationship*, 13 COVERAGE, no. 7, Nov.–Dec. 2003)).

61. Moats, *supra* note 59, at 532.

62. *Id.* at 533.

For example, an attorney may be unlikely to pursue a particular course of action if an insurer refuses to pay for it.[63] EPLI carriers frequently require pre-approval for fundamental litigation tools, such as "(1) hiring an expert; (2) hiring an investigator; (3) taking depositions; (4) videotaping depositions; (5) filing motions; (6) undertaking discovery; (7) expenditures for travel; (8) computerized legal research; and (9) determining how many attorneys may attend depositions, hearings, and trials."[64] These limits present potential conflicts of interest between insurers and insureds that may force attorneys to consider their ethical duties to both parties.

The ABA's Model Rules of Professional Conduct articulate general principles governing litigation management guidelines. Model Rule 1.8(f) states:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
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> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected . . . .[65]

Similarly, Rule 5.4(c) provides that: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[66]

Because of the potential for conflicts in these situations, several states offer ethical guidance to lawyers operating under litigation management guidelines.[67] Other states more strictly hold that insurer-issued litigation guidelines violate rules of professional conduct.[68] Still other jurisdictions allow litigation guidelines if the insured gives informed consent after full disclosure of the "possible risks and implications of the limitations."[69] Finally, a few states determine whether litigation guidelines are acceptable on a case-by-case basis.[70]

The ABA maintains that litigation guidelines do not usually raise ethical concerns because insureds impliedly consent to them when they contract for insurers to pay costs of defense and indemnifica-

63. *Id.*
64. Czarnecki, *supra* note 49, at 182.
65. MODEL RULES OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 1983).
66. MODEL RULES OF PROF'L CONDUCT r. 5.4(c) (AM. BAR ASS'N 1983).
67. Moats, *supra* note 59, at 538–39.
68. *Id.* (collecting authority); *see also In re* Rules of Prof'l Conduct and Insurer Imposed Billing Rules & Procedure, 2 P.3d 806, 814 (Mont. 2000) (billing guidelines conflicted with counsel's duties to client).
69. Moats, *supra* note 59, at 539.
70. *Id.*

tion.[71] However, the ABA advises that attorneys who believe that their professional judgment is impaired by litigation guidelines should consult with both insureds and insurers.[72] In consultation, insurers can agree to withdraw or modify an offending guideline or insureds can agree to limited representation.[73] If the three parties cannot agree on litigation strategy, "the resulting conflict between the insurer's directives and the insured's immediate interests requires the lawyer to withdraw from representing the insurer and to protect the immediate interests of the insured in the litigation."[74]

Insurers' detailed billing requirements may also present problems for insureds and counsel, especially if insurers employ third-party auditors.[75] These issues go beyond mere inconvenience. For example, a bill's detailed time entry may reveal confidential information regarding the insured's representation.[76] Although EPLI policies usually grant the insurer access to the insured's confidential information, attorneys still owe certain duties to the insured-client under the Rules of Professional Conduct.[77] Model Rule 1.6(a) states that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation . . . ."[78]

The ABA has cautioned against "disclosure of confidential information to a third party auditor absent the insured's informed consent."[79] Indeed, disclosure of confidential information to a third-party auditor may result in waiver of the attorney-client privilege.[80] However, the ABA "recognizes the propriety of submission of detailed bills and other confidential information to the client's insurer unless

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71. Ellis B. Murov, *Ethical Issues Arising Out of Defense of Claims Under Employment Practices Liability Policies*, *in* PRACTITIONER'S GUIDE TO THE DEFENSE OF EPL CLAIMS 303, 306 (Ellis B. Murov ed., 2005) (citing ABA Comm'n on Ethics & Prof'l Responsibility, Formal Opinion 01-421 (2001)).

72. *Id.*

73. *Id.*

74. *Id.*

75. Anderson, *supra* note 46, at 391 ("In addition to house counsel, insurers increasingly have been using outside auditing services to review bills submitted to insurers by defense counsel in an effort to reduce costs.").

76. "Time sheets and '[b]illing records may . . . reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided to the insured. This information generally is protected by the confidentiality rule or the attorney-client privilege or both.'" Murov, *supra* note 71, at 307 (quoting ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001)).

77. Czarnecki, *supra* note 49, at 183.

78. MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 1983).

79. Murov, *supra* note 71, at 307 (citing ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 01-421 (2001)).

80. *Id.* at 308 (citing state ethics opinions); *see also* United States v. MIT, 129 F.3d 681 (1st Cir. 1997) (privileged billing information given to government auditors waived attorney-client privilege).

disclosure will adversely affect 'a material interest of the insured.'"[81] In sum, an attorney should consult with the insured and, if possible, get written consent before (1) disclosing information to the insurer that could materially affect coverage, and (2) disclosing information to a third-party auditor.[82]

C. Who Controls Settlement?

Perhaps no part of a case presents such fertile ground for conflicts between the insurer and the insured as settlement. Traditionally, insurers maintained the exclusive right to settle covered claims.[83] However, as the prevalence of employment practices claims grew, employers demanded more control over settlement.[84] In response, insurers began including "hammer clauses" in policies to limit their exposure if employers refuse to accept a settlement the insurer favors.[85] A hammer clause, also known as a "consent to settle" provision, provides that:

> [I]f the insurer can obtain an opportunity to settle, that is, an offer that the plaintiff has stated he or she would accept, then, if the insured refuses to consent to the insurer settling the claim, the insurer's liability under the policy will be capped at the amount of the foregone settlement plus defense expenses incurred through that point in time.[86]

A hammer clause "permits the insured to object to a settlement opportunity, but it requires the insured to bear the cost of making a bad decision."[87] Some hammer clauses are less severe, only requiring insureds "to pay a percentage of the defense costs or indemnity beyond the rejected settlement amount."[88]

Regardless of specific policy language regarding settlement control, defense counsel will face a difficult situation if the insured and the insurer disagree about settlement. Settlement offers may reveal differences in the motives and goals driving the insurer and the insured employer. There is often tension between the insurer's desire to settle "quickly and cost-effectively" and "the insured's desire to fight the claim in employment-related cases, which are often emotional

81. Murov, *supra* note 71, at 307 (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421).

82. *Id.* at 309.

83. Klenk, *supra* note 1, at 339. If the insurance policy gives the insurer the right to control settlement, the insurer may be considered the insured's agent for purposes of settlement. *See* Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828 (3d Cir. 1995) (insured could not prevent liability insurer from entering into settlement agreement on insured's behalf).

84. Klenk, *supra* note 1, at 339.

85. *Id.*

86. Montelone, *supra* note 1, at 7.

87. Klenk, *supra* note 1, at 340.

88. Thomas E. Deer, *Settlement Issues and Strategies for EPL Claims*, *in* PRACTITIONER'S GUIDE TO THE DEFENSE OF EPL CLAIMS 265, 267 n.5 (Ellis B. Murov ed., 2005).

and viewed as precedent-setting by the insured."[89] In other situations, employers may desire a quick resolution to avoid embarrassment or bad publicity, while insurers want to continue litigation in hope of a lower settlement.[90] The EPLI policy's structure may also lead to conflicts when a settlement offer is made. For example, the insured may be especially resistant to settle if the proposed amount is within the self-insured retention.[91] Similarly, an insurer may want to reject an offer at or near policy limits if a larger judgment seems likely because the insurer's indemnification duty is capped by the policy's coverage limit.[92] However, an insurer's refusal to settle within policy limits may create grounds for a bad faith claim by the insured.[93]

Difficult situations also arise if a settlement proposal includes reinstatement of a terminated employee.[94] While many employment laws, including Title VII and the ADA, permit reinstatement as a form of equitable relief, most terminated workers prefer not to accept reinstatement.[95] Counsel should anticipate conflicts between employers (who must deal with the practical problems of re-integrating a terminated employee) and insurers (who may favor reinstatement to reduce a monetary settlement). If an employee desires reinstatement—or a court order requires it—counsel for insureds should determine if the policy addresses reinstatement and communicate with both the employer and insurer to explain potential conflicts and complications with reinstatement.

Counsel must remember that the insured employer always retains the right to reject the insurer's desired settlement. Even if policy language explicitly gives the insurer the right to settle, an employer may choose to pursue litigation even if doing so amounts to a policy breach.[96] The ABA addressed this situation in a Formal Opinion, stating:

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89. *Id.* at 265. Employers who refuse to settle risk losing coverage altogether because the refusal may be deemed a violation of the "cooperation clause" found in most policies. *Id.* at 267.

90. *Id.* at 265–66.

91. Mary Beth Nebel & James K. Horstman, *High Stakes and Hard Decisions: Serving the Tripartite Relationship* 12, http://www.crayhuber.com/articles/tripartite.pdf (last visited Oct. 9, 2017).

92. Murov, *supra* note 71, at 323 ("The insurer . . . has nothing to lose by rejecting a policy limits settlement offer and trying the case, as, if it loses, its liability is policy limits *in absence of some other basis of liability.*").

93. *Id.* at 324.

94. *Id.* at 320–22.

95. Joseph E. Slater, *The American Rule That Swallows the Exceptions,* 11 EMP. RTS. & EMP. POL'Y J. 53, 81 (2007) ("[T]he reinstatement remedy is problematic in practice. The majority of workers discriminated against decline reinstatement. One can imagine why a reasonable worker would not wish to return to a company that had illegally fired her, but lengthy delays make this attitude even more likely . . . .").

96. *See* Nebel & Horstman, *supra* note 91, at 14 ("As a party to the suit, it is always the insured's decision whether to settle or proceed to trial. Choosing to proceed to trial when the insurer wishes to settle may jeopardize the insured's insurance coverage, but this is a choice to be made by the insured nonetheless.").

> If a lawyer for an insured knows that the insured objects to a settlement, the lawyer may not settle the claim against the insured at the direction of the insurer, without giving the insured an opportunity to reject the defense offered by the insurer and to assume responsibility for his own defense at his own expense.[97]

Lawyers who participate in settlement against the insured's wishes have been held liable for malpractice.[98] Even if the insurer has a contractual right to settle without the insured's consent, counsel must be aware of ethical obligations to follow client wishes.[99] A lawyer with an irreconcilable conflict between the insured and the insurer over settlement may have no choice but withdrawal.[100]

As a practical matter, insurers use good business judgment in their relationships with employer-clients. Insurers are likely to negotiate with insureds to reach consensus rather than to enforce hammer clauses. Counsel can lay the groundwork for avoiding these conflicts early on by ensuring that both insureds and insurers have realistic expectations about the litigation's costs and potential outcome. An attorney's early candid assessment of a case's strengths and weaknesses and the employer's potential monetary liability, injunctive relief, and negative publicity in the event of an adverse verdict can inform later negotiations between the insured and the insurer at the settlement stage.

III. Issues Facing Plaintiffs' Counsel

Plaintiffs' attorneys want to maximize the possibility that EPLI will cover a settlement or award. Plaintiffs' counsel need to draft complaints to ensure coverage, but EPLI must also be considered throughout representation because coverage influences negotiation and litigation decisions.

EPLI policy coverage varies, making it critical for plaintiffs' counsel to know coverage limits before litigation begins. Because it is difficult to obtain a defendant's policy before litigation, plaintiffs' counsel should know which claims are generally covered by EPLI in the employer's region. In the alternative (or in addition), plaintiffs' counsel can simply ask defense counsel if the employer is covered. Defense counsel are often willing to reveal the existence of an EPLI policy, although generally not its specific terms, before litigation.

Counsel should carefully draft the complaint to include claims covered by EPLI. Drafting is easy if a plaintiff has a strong claim that insurance will invariably cover, but it becomes more complex if the covered claim is weak. Counsel must weigh the benefits of includ-

97. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 96-403 (1996).
98. Murov, *supra* note 71, at 321 (citing cases).
99. *Id.*
100. *Id.*

ing a claim covered by EPLI in the complaint against the negatives of pressing a weaker claim, including possible dismissal. This choice becomes more complicated if the covered claim arises under federal law but the plaintiff would prefer to litigate in state court. Including a federal law claim risks removal to federal court, while foregoing the claim may keep the suit in state court. Of course, the client must be fully informed and understand the reasons for counsel's decisions.

It is imperative for a plaintiff's attorney to obtain the defendant's EPLI policy as soon as possible after litigation commences. Federal Rule of Civil Procedure 26 requires initial disclosure of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action."[101] Thus, counsel may obtain a defendant's EPLI policy very early in litigation under federal rules. In state courts, plaintiffs' counsel should examine state civil procedure rules to determine the earliest time to request a defendant's insurance policy.[102] Until the defendant's EPLI policy is reviewed, plaintiffs' counsel may not know which claims are covered by the policy. In addition, policy limits vary substantially, making it critical for plaintiffs' counsel to know the limits before discussing settlement.

There are other issues for plaintiffs and their lawyers to discuss. If a plaintiff's claims are covered by EPLI and not subject to a policy exception or exclusion, the plaintiff must decide the litigation strategy. One strategy is to exceed the defendant's deductible as quickly as possible so that the plaintiff will have access to a larger settlement from the insurer. Another strategy is to limit expenses (by restricting motion practice, for example) because defense costs are part of the total policy limits and a plaintiff would prefer that money be allocated to settlement rather than litigation expenses.

Conclusion

The increasing prevalence of EPLI is unsurprising. Federal and state employment claims have increased, as have employers' corresponding desires to protect themselves and their businesses from potentially crippling liability. Attorneys for both insureds and plaintiffs must understand standard EPLI policy terms and the impact of those terms

101. FED. R. CIV. P. 26(a)(1)(A)(iv).

102. Some state courts require initial disclosure of an insurance agreement without a request by the plaintiff. *See, e.g.*, MINN. R. CIV. P. 26.01. Other state courts require plaintiffs to wait until written discovery to request a copy of a defendant's insurance policy. *See, e.g.*, ALA. R. CIV. P. 26. In New Jersey, the rule is: "A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." N.J. R. 4:10-2(b). Although not stated in the rule, it is common practice in New Jersey to include a request for a defendant's insurance policy at the end of a complaint.

on coverage. Defense counsel must recognize challenges and ethical issues that may arise in the tripartite relationship among employers, insurers, and defense attorneys. Plaintiffs' attorneys need to recognize how these issues impact their clients' claims from complaint filing through litigation and settlement negotiations.