## V. UNDERSTANDING THE RISKS INSURED UNDER EPL POLICIES.

### 41.13 Understand What the Insuring Agreement Provides.

Understanding the coverage afforded under any policy begins with the insuring agreement. No standard language has gained acceptance, but most EPL agreements share some common traits. Most policies provide that the insurer will pay losses resulting from wrongful acts that arise from the employment relationship. For example, one standard insuring agreement provides, "We shall pay those amounts the 'insured' is legally required to pay by reason of a 'claim' arising out of your 'wrongful employment practice' to which this insurance applies" [West Bend Mut. Ins. Co. v. Rosemont Exposition Servs., Inc., 880 N.E.2d 640, 643 (Ill. App. Ct. 2007)].

### 41.14 Understand What Wrongful Acts Are Covered.

**41.14[1] "Wrongful Employment Acts" Usually Encompass a Number of Offenses.** EPL policies provide coverage for specific wrongful acts. In order to fall within coverage the claim asserted against the insured must arise from a covered act. Most insurers define these wrongful acts by reference to a number of broadly worded offenses. These offenses are grouped into a short-hand definition, such as "wrongful employment practice," "wrongful employment act" or another similar term. For convenience sake, this section uses the term "wrongful employment acts" to refer to these covered offenses generally. The term wrongful employment act usually encompasses a number of offenses. Below is a brief summary of the offenses that typically fall within EPL policies:

**41.14[2] Discrimination.** Most EPL policies provide coverage for the offense of discrimination, which insurers typically define to include claims arising out of the violation of federal, state or local employment discrimination laws. These laws may prohibit discrimination based on a person's race, color, religion, creed, age, sex, disability, marital status, national origin, pregnancy, HIV status, sexual orientation or preference, or veteran or military status. Typically, a claim may be based on any adverse employment decision, including actual or constructive termination, demotion or refusal to promote, or any other change or modification in the terms of employment. Applicants for employment may also bring discrimination claims if an employer fails to hire them. As explained further below, most EPL policies extend coverage to apply to applicants as well as to employees.

**41.14[3] Harassment.** EPL policies typically define wrongful employment acts to include claims based on sexual harassment. These claims usually include allegations involving quid-pro-quo harassment, in which an employer makes unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature. Quid-pro-quo harassment may exist when (a) the employer makes the unwelcome conduct a condition of employment or (b) the unwelcome conduct influences

employment decisions. Harassment, as defined by an EPL policy, may also extend to hostile work environment claims, in which unwelcome conduct of a sexual nature interferes with an employee's performance or creates an intimidating, hostile or offensive working environment within the insured organization.

**41.14[4] Retaliation.** EPL policies generally define retaliation to include adverse treatment of an employee by an employer after the employee has taken some lawful action related to his or her employment. Such lawful actions could include filing a discrimination claim, seeking leave under the Family and Medical Leave Act, requesting an accommodation under the Americans with Disabilities Act or filing a worker's compensation claim. Some policies may also cover retaliation for whistle blower or *qui tam* actions under federal or state false claims statutes.

> ⊠ **Strategic Point:** EPL policies may afford coverage for a retaliation claim, even though the employee's original claim may not be covered. For example, most EPL policies do not insure claims made under the Americans with Disabilities Act ("ADA") or similar state or local legislation. Nevertheless, many policies will provide coverage for a claim by the employee that the employer retaliated against him or her for making a claim under the ADA. This is an important aspect of coverage, as employment counsel has observed that often employers face a greater exposure from retaliation than from the underlying claim.

**41.14[5] Adverse Employment Decisions.** Most EPL policies provide coverage for specified adverse employment decisions by an employer, such as firing or demotion. Sometimes the insurer batches these acts within the definition of a wrongful employment act, or other similar term. For example, one definition provides that a wrongful employment decision includes:

> allegations of wrongful demotion, retaliation, misrepresentation, promissory estoppel and intentional interference with contract; which arise from an employment decision to employ, terminate, evaluate, discipline, promote or demote [Andrews Transp., Inc. v. CNA Reinsurance Co., 166 F. Supp. 2d 516, 519 (N.D. Tex. 2001)].

When a policy does not define the wrongful acts covered under the policy, rules of interpretation would apply the common, everyday meaning to the term. Many courts would give the term wrongful acts (without a specific definition) an expansive meaning, and almost any allegation of detrimental action related to an employee's job could fall within coverage.

**41.14[6] Other Torts.** Some insurers include other workplace torts within the definition of wrongful employment acts, although this is less common. Some other torts that insurers have included as insured wrongful

acts in EPL policies include employment-related:

- Defamation, libel and/or slander, (including giving negative statements in connection with an employee reference);
- Humiliation, mental anguish, and infliction of emotional distress;
- Invasion of privacy; and
- Misrepresentation.

Because third parties may bring discrimination claims based on a variety of theories, some insurers have begun to offer expanded coverage, which insures against discrimination claims brought by third parties.

**Consider:** Other types of policies, such as commercial general liability policies, may provide coverage for some workplace torts. For example, defamation and invasion of privacy torts typically fall within the "personal and advertising injury" offenses under commercial general liability policies. In order to maximize coverage for a policyholder, counsel should review all of the insured's liability policies for coverage for employment claims.

**Warning:** Sometimes a claim potentially is covered under two different types of liability policies, such as an EPL policy and a CGL policy. In these situations, depending on the language of the policies' other insurance clauses, the insurers may dispute which carrier must defend and indemnify their common insured. If such a dispute arises, the policyholder should not allow the dispute to impact its coverage. Both carriers owe the insured a good faith obligation to meet their obligations under each policy, regardless of whether a dispute exists between the insurers.

**Cross References:** Steven J. Polansky, Committee Perspective: Insurance Law Committee: *Integrating "Other Insurance" Clauses: Allocation of Coverage Across Multiple Policies*, For the Defense, Vol. 44, No. 5 (Defense Research Institute, May 2002); Randall L. Smith and Fred A. Simpson, *Excess Other Insurance Clauses and Contractual Indemnity Agreements Shifting an Entire Loss to a Particular Insurer*, 30 T. Marshall L. Rev. 215 (Fall 2004); Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 Pepp. L. Rev. 1373 (Feb. 1995).

## 41.15 Consider the Coverage Afforded Under an EPL Policy.

**41.15[1] Broad Coverage Is Often Provided.** An insurer must respond only to claims that fall within the insuring agreement [Samson v. Apollo Res. Inc., 64 Fed. Appx. 418 (5th Cir. 2003)]. EPL policies provide coverage only for disputes arising out of a master/servant relationship [*see* Clarendon National Ins. Co. v. City of York, 290 F. Supp. 2d 500, 506 (M.D. Pa. 2003), *aff'd*, 121 Fed. Appx. 940 (3d Cir. 2005); General Star Indem. Co. v. V.I. Port Authority, 2007 U.S. Dist. LEXIS 4444, at *10 (D.V.I. 2007)].

The insuring agreement under most EPL policies provides a broad grant of coverage. In addition, courts often broadly interpret the grant of coverage. Sometimes, these two factors combine so that an EPL policy may afford coverage greater than the insurer intended.

**Example:** In *Andrews Transp., Inc. v. CNA Reinsurance* [37 Fed. Appx. 87, 2002 U.S. App. LEXIS 9384 (5th Cir. 2002)], the Fifth Circuit reversed a district court's ruling and held that an EPL insurer had a duty to defend allegations that its insured had wrongfully withheld taxes and unemployment contributions from truckers working for the insured.

The district court granted summary judgment to the insurer because, among other reasons, the wrongful withholding allegations by the truckers fell outside the definition of "wrongful employment decision." The district court determined that the truckers' allegations did not involve any decision to "employ, terminate, evaluate, discipline, promote or demote," concern a "breach of an implied employment contract or breach of the covenant of good faith and fair dealing in the employment contract or involve some other employment decision that violates public policy."

On appeal, the Fifth Circuit ruled that the allegations against the insured constituted an insured event under the policy. The definition of "wrongful employment decision" included "other employment decisions which violate public policy." The court determined that the insured violated Texas public policy by withholding contributions to the Texas unemployment compensation fund from the truckers' paychecks. The court observed that "Texas expresses its public policy in its statutes," and that withholding contributions to the unemployment fund from employee paychecks violated the Texas Labor Code [*id*. at *3]. By violating the Texas Labor Code, the court concluded that the insured had violated Texas public policy. Accordingly, the Fifth Circuit ruled the claim fell within the policy's insuring agreement.

**41.15[2] Many Acts Related to Employment Do Not Constitute Covered Wrongful Acts.** Although the insuring agreement of most EPL policies affords broad coverage for wrongful employment acts, not every dispute involving an employment relationship will fall within the coverage afforded under an EPL policy. Most reported cases addressing coverage under the insuring agreement of an EPL policy have dealt with situations in which an employee sues an employer for acts related to the employment relationship, but that do not fall within the policy definition of a wrongful employment act.

**Example:** In *Samson v. Apollo Res. Inc.* [64 Fed. Appx. 418, 2003 U.S. App. LEXIS 6158 (5th Cir. 2003)], the court ruled an insurer had no

duty to defend or indemnify its insured under an EPL policy because the wage claim fell outside the insuring agreement. An employee had asserted a wage claim against the employer under the Fair Labor Standards Act [*id.* at *1]. The policy's definition of wrongful employment acts did not include wage claims, but did include employment misrepresentations [*id.* at *4]. The insured employer argued that its failure to pay the claimant constituted an employment misrepresentation. The court rejected the insured's argument after determining that a wage claim did not require a showing of a misrepresentation [*id.*].

**Example:** In *Noxubee County School Dist. v. United Nat'l Ins. Co.* [883 So. 2d 1159 (Miss. 2004)], over 100 employees and former employees of Noxubee County School District sued their employer for failing to pay them overtime in violation of the Fair Labor Standards Act. The School District sought coverage under a School Board Legal Liability policy, which included coverage for "wrongful employment acts." The insurer denied coverage and the school board sought declaratory relief. The insurer moved for summary judgment, which the trial court granted. The Mississippi Supreme Court affirmed. In doing so, the court found that the claims fell outside the policy definition of a "wrongful employment act." The policy defined a "wrongful employment act" to include the "refusal to employ," the "termination of employment," or "coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or other employment-related practices, policies, acts or omission" [*id.* at 1164]. The court ruled that, "It is clear to this Court that Noxubee County's deliberate decision not to compensate its employees for overtime pay is neither a "wrongful act" nor a "wrongful employment act" within the definitions under this policy" [*id.*].

### 41.15[3] Not All Workplace Torts Fall Within an EPL Policy.

**Example:** In *Woo v. Fireman's Fund Ins. Co.* [114 P.3d 681 (Wash. App. 2005), *rev'd on other grounds*, 164 P.3d 454 (Wash. 2007)], an employee of a dentist quit after the dentist played a practical joke on her. The dentist had agreed to perform dental surgery on his employee. While the employee was under general anesthesia, the dentist placed false teeth, which resembled a boar's tusk, in the employee's mouth, and took pictures. Upon learning of the joke, the employee quit and later sued the dentist for, among other things, assault, outrage, battery, invasion of privacy, false light, non-payment of overtime wages, lack of informed consent and negligent infliction of emotional distress. The dentist had professional liability, employment practices liability and CGL coverage with the same insurer. The dentist tendered the lawsuit under all three policies but the insurer refused to defend. The

dentist settled with his former employee and sued the insurer for breach of contract and bad faith.

On appeal, the Washington Court of Appeals reversed the trial court's grant of the dentist's motion for summary judgment on the duty to defend. Under the EPL policy, the appellate court noted that the policy afforded coverage for damages as a result of sexual harassment, discrimination or wrongful discharge that arise out of a wrongful employment practice. The parties agreed that the only portion of the EPL policy at issue was wrongful discharge arising out of a wrongful employment practice. The policy defined "wrongful discharge" as:

> [T]he unfair or unjust termination of an employment relationship which: breaches an implied agreement to continue employment; or inflicts emotional distress upon the employee, defames the employee, invades the employee's privacy or is the result of fraud [114 P.3d at 683-684].

The dentist argued that the complaint set out a claim for wrongful discharge, based on the ex-employee's allegation that she left upon learning of the practical joke and never returned. The court disagreed, observing that the practical joke caused the ex-employee's injury, rather than her decision to quit. More importantly, the ex-employee had not pleaded a cause of action for wrongful termination. "There is no wrongful termination tort based on boorish behavior by one's employer, unless such behavior violates an employment contract, discrimination statutes, the constitution or public policy" [*id.* at 687]. Because the insured had not committed a wrongful employment act, the insurer had no obligation under the EPL policy. The court also found no duty to defend under the professional liability or CGL policies. Later, the Washington Supreme Court agreed that the insurer had no duty to defend under the EPL policy [164 P.3d at 464].

**Warning:** Although coverage under most EPL policies is very broad, it is not unlimited. Not all insurance brokers are well-versed in employment law and EPL policies. Insureds therefore should consider consulting with employment counsel or coverage counsel before buying a policy. A careful review of the risks faced by the insured and an examination of the coverages proposed by the insured's broker will go a long way towards ensuring the client has adequate protection.

## 41.16 Consider Coverage for Breach of Employment Contract Claims.

**41.16[1] Insurance Policies for Breach of Employment Contracts Vary Widely.** Most employees do not have employment agreements and operate as at-will employees. Nevertheless, litigation involving employment agreements can have higher stakes because it often involves officers or highly compensated employees. Insurers have taken widely divergent

approaches toward providing affirmative coverage for breach of employment contracts. Some insurers expressly afford coverage for breach of employment contracts, and others afford coverage for oral or implied contracts of employment but not for written employment contracts. Other insurers specifically exclude coverage for breach of contract claims. Thus, close attention must be paid to insurance provisions on this subject. Because of the stakes involved in employment-contract litigation, and the divergent approaches taken by insurers, coverage for employment contracts warrants separate consideration.

**41.16[2] Consider the Moral Hazard Aspect.** Outside of the EPL market, insurance policies typically do not cover breach of contract claims. As explained by the Seventh Circuit, coverage for breach of contract claims involves "severe moral hazard" [Krueger Int'l Inc. v. Royal Indem. Co., 481 F.3d 993, 996 (7th Cir. 2007) (Posner, J.)]. Moral hazard is the incentive that insurance may create to tempt the insured to commit the act insured against [*id.*]. As an example of moral hazard, Judge Posner noted the incentive to burn down one's house if the house is insured for more than its value to the owner [*id.*].

The EPL policy at issue in *Krueger* provided coverage for the breach of an oral contract, but not a written contract. The court observed that employers generally can control their written contracts, but not necessarily the oral contracts entered into by their employees. The moral hazard element is avoided because the breach of an oral contract is typically an unavoidable accident from the employer's point of view [*id.*].

Despite the potential moral hazard, however, some underwriters affirmatively insure against the breach of any employment contract (except, perhaps, collective bargaining agreements). If a policy affords affirmative coverage for breach of contract claims, the underwriter will typically address the moral hazard issue by limiting the damages payable under the policy. A policy affording affirmative coverage for employment contracts usually will bar payment for future pay, severance pay or penalties payable under the contract.

**41.16[3] Consider EPL Coverage Disputes Over Partnership and Shareholder Agreements.** One likely area of dispute with respect to coverage for employment contracts concerns contracts that are ancillary to employment, such as partnership or shareholder agreements. The Seventh Circuit considered such a dispute in *Krueger*, and concluded that the breach of a shareholder agreement fell outside the coverage of an EPL policy [481 F.3d at 995]. In *Krueger*, several Krueger managers owned company stock, although a shareholder agreement permitted Krueger to repurchase the stock if the employees left the company. The employees left Krueger, and the company repurchased the stock at a price lower than the price the employees contended they were entitled to receive. The employees sued Krueger for the difference in value of the repurchased

stock and contended that the company CFO had orally modified the stock purchase agreement giving the employees the right to the higher stock price. The jury agreed and found for the employees.

Krueger sued its insurer for indemnification for the judgment. The insurer moved for summary judgment, which the district court granted, and the Seventh Circuit affirmed. The Seventh Circuit held that although the policy afforded coverage for the breach of an oral employment contract, the shareholder agreement that the CFO of the company modified was not an employment contract, and therefore, the oral modification of the contract did not fall within the policy's coverage [*id.* at 995].

⊠ **Strategic Point:** Whether the insuring agreement carves out the breach of an employment agreement from the definition of a wrongful employment act, or excludes breach of employment contract claims, is important. Although either formula ostensibly achieves the same end (the absence of coverage for contract claims) the manner used by the insurer has consequences. The location of a term affects the burden of proof. Insureds must establish a claim falls within the insuring agreement, while an insurer must establish the application of an exclusion to a claim.

◗ **Cross Reference:** For additional discussion concerning contract exclusions, *see* § 41.23[6] below.

## VI. UNDERSTANDING THE APPLICATION OF THE FORTUITY AND KNOWN LOSS DOCTRINES.

### 41.17 Understand the Fortuity Doctrine and Its Application to EPL Coverage.

**41.17[1] EPL Coverage Runs Counter to the Fortuity Doctrine.** A widely recognized tenet of liability insurance is that coverage exists only for fortuitous events [*see* § 1.06[3] above]. EPL policies, however, afford coverage for employment decisions, which are inherently intentional acts. Because EPL policies insure arguably non-fortuitous, intentional acts, they run counter to the fortuity doctrine.

It does not appear any cases have addressed this incongruity in the EPL policy. It is possible the issue will remain academic. As discussed in § 41.24[3] below, EPL policies often have exclusions for intentional, criminal and fraudulent acts. These exclusions will likely resolve many potential disputes that might otherwise implicate the fortuity doctrine. It will also be interesting to see if insurers raise common law fortuity as a defense; it requires more than a little fortitude to expressly grant coverage for quid-pro-quo harassment and then argue that coverage for these acts is barred. Despite these caveats, it is impossible to rule out fortuity arising as an issue. Accordingly, this issue receives brief treatment below.

**41.17[2] Consider the Concept of Fortuity.** It is widely recognized that the fortuity doctrine is rooted in the very meaning and purpose of insurance. Insurance is an arrangement for transferring and distributing risk [Public Employees Benefits Program v. Las Vegas Metropolitan Police Dep't, 179 P.3d 542, 549 (Nev. 2008)]. An event, which is certain to occur, is not a risk [Perzy v. Intercargo Corp., 827 F. Supp. 1365, 1371 (N.D. Ill. 1993)]. Courts have recognized that a non-fortuitous loss affords grounds for insurers to decline coverage [RLI Ins. Co. v. Maxxon Southwest, Inc., 108 Fed. Appx. 194, 198 (5th Cir. 2004) (citations omitted) (applying Texas law)]. If liability is certain to occur, or if one of the parties controls the risk of loss, then no real transfer of risk takes place, and thus no enforceable insurance exists.

Some jurisdictions have incorporated the fortuity doctrine into their insurance code. A New York statute defines "fortuitous event" as "any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party" [N.Y. Ins. Law § 1101(a)(1)]. California goes a step further; California Insurance Code Section 533 provides, "an insurer is not liable for a loss caused by the willful act of the insured" [*see* Cal. Ins. Code § 250]. This code section is a part of every policy of insurance written in California and is the equivalent to an exclusion in the policy [American States Ins. Co. v. Borbor, 826 F.2d 888, 894 (9th Cir. 1987)].

◗ **Cross References:** Daniel Aronowitz, *When Loss Is Not a Loss*, 14

Coverage 1 (Jan./Feb. 2004); Eric Mills Holmes, Appleman on Insurance 2d § 116.3 (concerning representative cases on fortuity, public policy, and liability coverage of insured's intentionally caused harm).

**41.17[3] Consider Limitations on Coverage Under the Fortuity Doctrine in Other Lines of Insurance.**

**Consider:** As explained above, there is uncertainty with respect to how the fortuity doctrine would apply to EPL coverage and it does not appear any cases have addressed this question. The fortuity issue has arisen, however, in connection with other lines of insurance that might provide guidance on how courts would resolve the problem with respect to EPL insurance.

**41.17[3][a] Directors' and Officers' ("D&O") Insurance.** A court applied the fortuity doctrine to bar D&O insurance coverage for certain claims, despite the fact that the D&O policy arguably afforded coverage for intentional acts [*see* Waste Corp. of America, Inc. v. Genesis Ins. Co., 382 F. Supp. 2d 1349, 1352 (S.D. Fla. 2005)]. In that matter, the insured sought indemnification after it settled a lawsuit alleging it had breached several employees' stock purchase agreements. The D&O policy insured against claims for "wrongful acts," which the policy defined as an "actual or alleged act, omission, misstatement, misleading statement, neglect, error or breach of duty by the Directors or Officers" [*id.*]. This definition of wrongful act arguably insures against intentional conduct. Nevertheless, the insurer denied coverage, arguing that the breach of contract was not fortuitous because the insured had control over whether to abide by the contract [*id.*]. Coverage litigation followed and the parties both moved for summary judgment. The court agreed that public policy prohibited insuring against a breach of contract and accordingly granted summary judgment for the insurer.

**41.17[3][b] Commercial General Liability ("CGL") Insurance.** Decisions concerning CGL policies are another potential gauge of how courts may treat fortuity arguments under EPL policies, although it is significant that the grant of coverage in EPL policies differs significantly from the grant of coverage in CGL policies. Courts interpreting CGL policies have considered whether certain employment acts constituted accidents, which is akin to determining whether the conduct was fortuitous [*see, e.g.*, Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 774 N.E.2d 687, 692 (N.Y. 2002) (recognizing the term "accident" requires fortuitous event)].

Most courts considering the issue hold that allegations of disparate impact discrimination are accidental for purposes of CGL insurance [*see, e.g.*, Solo Cup Co. v. Federal Ins. Co., 619 F.2d 1178 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980) (finding a disparate impact claim was

accidental because liability did not require proof of a discriminatory motive)]. It also appears most courts agree that negligent hiring, supervision and retention claims, which derive from intentional conduct, are accidental under CGL policies [*see, e.g.*, United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648 (Iowa 2002)].

In contrast, most courts agree that intentional discrimination and harassment are not accidental [*see, e.g.*, Russ v. Great American Ins. Cos., 464 S.E.2d 723, 725 (N.C. App. 1995) (holding an insurer had no duty to defend claims of intentional infliction of emotional distress based on sexual harassment)]. To the extent an insured employer is found vicariously liable for its employee's intentional conduct, an insurer typically has no duty to indemnify the insured [*see, e.g.*, Presidential Hotel v. Canal Ins. Co., 373 S.E.2d 671, 673 (Ga. Ct. App. 1988); *but see* Downey Venture v. LMI Ins. Co., 78 Cal. Rptr. 2d 142, 163 (Cal. Ct. App. 1998) (ruling the prohibition against insuring intentional conduct under Section 533 of the California Insurance Code does not extend to claims for vicarious liability)].

**41.17[3][c] Analogies to EPL Insurance.** Because of the difference in risks covered and policy language used, these D&O and CGL cases likely will have only limited applicability in any EPL dispute. To the extent these cases may forecast how courts would approach fortuity in the EPL context, it appears doubtful that any challenge to an EPL claim based on fortuity would prevail against derivative claims based on an employer's negligence. These courts have delineated between circumstances in which the insured intended to cause specific harm to the employee, and situations in which the insured acted intentionally, but did not intend any specific harm. Accordingly, if an employer deliberately discriminates against its employees (and it likely would require an egregious case, given the affirmative grant of coverage), then the fortuity doctrine defense to coverage might have some traction.

> **Cross Reference:** Eric Mills Holmes, Appleman on Insurance 2d § 120, *et seq.* (concerning coverage for employment discrimination).

**41.18 Consider the Known Loss and Loss in Progress Doctrines.** Corollaries to the concept of fortuity are the "known loss" and "loss in progress" doctrines. These aspects of the fortuity doctrine focus on the proposition that insurance coverage is precluded where the insured is (or should be) aware of an ongoing progressive loss or known loss at the time it purchases the policy [Two Pesos v. Gulf Ins. Co., 901 S.W.2d 495, 501 (Tex. App. 1995)]. An insurer has no duty to defend or indemnify a known loss, unless the parties intended the known loss to be covered [Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1210 (Ill. 1992)].

Most claims-made policies incorporate a number of express provisions to protect the underwriter from a known loss or a loss in progress. The

claims-made nature of the policy should eliminate most losses in progress. Claims-made policies also typically include known loss exclusions. In addition, applications for EPL coverage are likely to include questions concerning the insured's claim history, any existing claims and any circumstances of which the insured is aware that may result in any claim against the insured. The failure to list a known claim will likely give rise to a misrepresentation defense, and potentially give the insurer the right to rescind the policy [*see, e.g.*, United States Specialty Ins. Co. v. Bridge Capital Corp., 482 F. Supp. 2d 1164 (C.D. Cal. 2007) (upholding insurer's rescission of EPL policy upon finding that insured had failed to disclose material information on its application concerning the true scope of two employees' claims)].

Although the common law known loss and loss in progress doctrines may appear redundant in a claims-made policy, these concepts occasionally afford an insurer a coverage defense.

**Example:** In *City of Sterling Heights v. United Nat'l Ins. Co.* [2004 U.S. Dist. LEXIS 1869 (E.D. Mich. Feb. 11, 2004), *reconsideration granted by, in part, and denied by, in part,* 2004 U.S. Dist. LEXIS 30677 (E.D. Mich. Apr. 9, 2004)], the court sent the loss in progress defense to the jury after rejecting the E&O insurer's other coverage defenses. The court rejected the insurer's argument that a state court action and later federal court action by the same claimant constituted a single claim. The court also rejected the insurer's argument that a known loss exclusion barred coverage. Accordingly, the court found that the insured had made a claim during the insured's policy period. The court reserved for trial the insured's argument that the knowledge of the state court claim constituted a known loss or loss in progress [*id.* at *32-33].

◗ **Cross Reference:** Paul S. Ryerson, *Risky Business: The Limited Role of the Extra-Contractual "Known Loss" and "Loss-In-Progress" Doctrines in Liability Insurance Coverage Litigation*, 6-24 Mealey's Litig. Rep. Ins. 10 (1992).