Your Coverage Advisor

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#MeToo Liability: Coverage Issues for Employers

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The #MeToo movement began to spread on social media in 2017, fueled by the improprieties of Roger Ailes, Harvey Weinstein and others in the public eye that came to light. The flood of allegations against men in powerful positions has encouraged others to come forward with their own stories of workplace harassment. As a result, businesses began to better educate themselves and their employees, managers, and supervisors on what constitutes sexual harassment. Many also worked to tighten policies and procedures. Better education and updated policies notwithstanding, claims of harassment, continue and employers are looking to their insurers to defend them in court and indemnify them for the associated damages and settlements.

As context, workplace harassment is unlawful under state and federal law when an individual is harassed on the basis of his or her gender or other protected status, such as age, race, or religion. Sexual harassment is the most prevalent type of workplace harassment and often consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Importantly, the harassment does not need to be sexual and can include offensive remarks about a person's gender.

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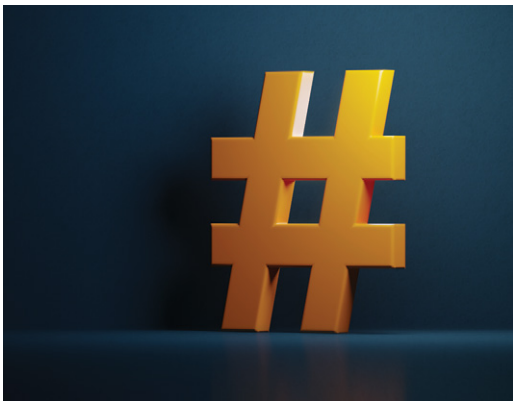

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#MeToo Liability: Coverage Issues for Employers **(Continued from page 1)**

Claims of sexual harassment generally fall into two types, both prohibited by federal and state law: *quid pro quo* and hostile work environment. *Quid pro quo* harassment occurs when a person who can take formal employment actions (like hiring and firing) is the harasser. For instance, if a supervisor conditioned an employee's career advancement on sexual favors, the supervisor commits *quid pro quo* harassment. A hostile work environment occurs when an employee is harassed in a way that unreasonably interferes with the employee's work performance or subjects him or her to an intimidating or offensive work environment. For a hostile work environment claim, the harasser can be a co-worker, a supervisor, or third-party, such as a contractor, client, or even a customer. Primary liability for sexual misconduct belongs to the wrongdoer, however, employers and supervisors face liability as well.

In addition to bringing claims of sexual harassment and discrimination under state and federal law, an alleged victim may assert a number of common law claims as well. These claims include vicarious liability, negligent hiring, negligent supervision, negligent or intentional infliction of emotional distress, and breach of contract. In fact, employees usually assert as many claims as possible against as many individuals as possible, such as officers, directors, managers and supervisors, along with the employer. Further expanding an employer's exposure, it may want to defend and indemnify its named employees, or may be obligated to do so under employment contracts. As to officers and directors, the employer's bylaws may require it to defend and indemnify them for liabilities arising from the operations of the company, which may include the actions of its employees. In sum, an employer may be obligated to defend multiple causes of actions against multiple individuals all arising out of a single incident.

Where should employers look for insurance coverage when faced with claims arising from an employee's allegations of harassment? An Employment Practice Liability Insurance (EPLI) policy is the most likely source of coverage. EPLI policies cover employers and their directors, officers and senior managers for claims brought by employees alleging wrongful employment acts. Some EPLI policies also cover claims brought by customers, clients and other third-parties.

> The cost of defending a sexual harassment lawsuit is usually quite high, so the employer's ability to tender the defense to an insurer is very important.

Directors and Officers (D&O) insurance policies similarly provide coverage for the errors or omissions of a company's officers and directors, which could include such mismanagement as perpetuating a hostile work environment or permitting employees to engage in improper sexual conduct. The coverage provided by D&O policies, however, is typically narrower than that provided by EPLI policies. D&O policies usually contain exclusions for bodily injury and intentional conduct and may contain an "insured vs. insured" exclusion, which would negate coverage for any claim brought by an employee who is also a director or officer covered by the policy.

In some limited circumstances, an organization's commercial general liability or umbrella policy may provide coverage. To be covered under a general liability policy, the harassing acts or

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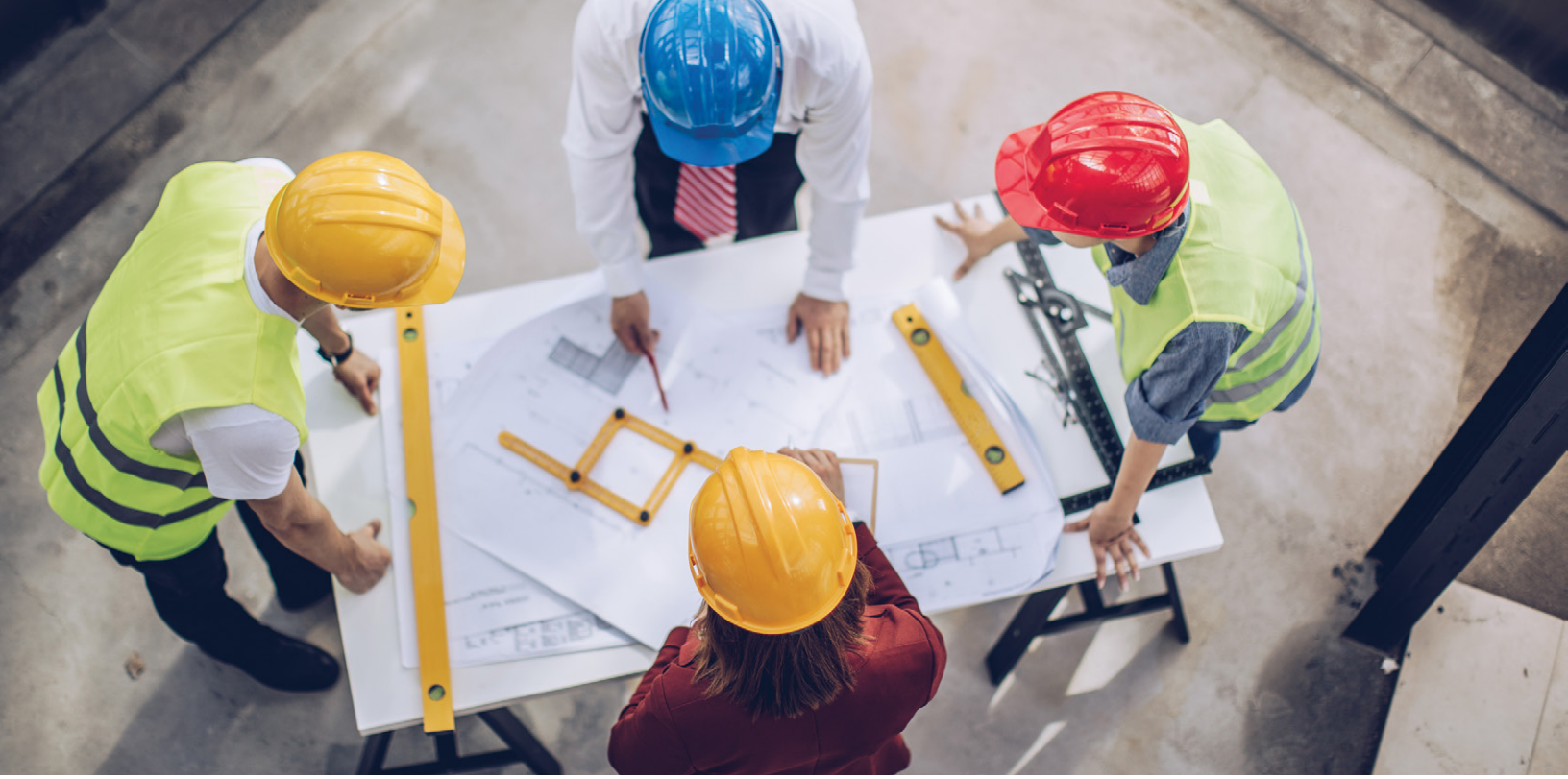
sexual misconduct must have been neither expected nor intended by the insured. Whether an employer expected the sexual misconduct to occur depends on what the employer knew about the wrongful conduct and the wrongdoer's propensity to engage in it. But determining that the wrongful conduct is a covered occurrence under a general liability policy does not end the coverage inquiry. General liability policies often contain an employment practices exclusion or sexual misconduct exclusion that negates coverage for sexual harassment, negligent hiring and negligent supervision claims.

If an employer does not have EPLI or D&O coverage and its general liability policy excludes coverage, occasionally these claims are covered by an umbrella policy, which may provide "broader than primary" coverage. However, coverage under an umbrella is often subject to significant self-insured retentions. It will often be an employer's last resort when seeking coverage for a sexual harassment claim.

The cost of defending a sexual harassment lawsuit is usually quite high, so the employer's ability to tender the defense to an insurer is very important. Assuming that an employer has one of the policies described above, whether an insurer is obligated to defend an employer depends on the claims and allegations asserted in the complaint. In Ohio, an insurer must defend its insured when the allegations of the complaint arguably or potentially fall within the coverage of the policy. *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, 179. An insurer that is required to defend an employer against claims arising from sexual harassment or discrimination may ultimately have no duty to indemnify the employer for damages or settlement paid to the accuser. An insurer's duty to indemnify an employer depends on the specific facts and circumstances surrounding the misconduct – the same facts and circumstances that will determine the employer's liability. The following facts and circumstances may be critical to a coverage determination:

- **Who is the accuser (employee, contractor, customer, client, or patient)?**
- **Who is the wrongdoer (employee, contractor, supervisor, director, or employer)?**
- **Where did the wrongful act(s) allegedly take place?**
- **When and how often did the wrongful act(s) allegedly take place?**
- **Was the wrongdoer acting in the scope of his or her employment?**
- **Should the employer have known that the wrongdoer was engaged in misconduct?**
- **Did the employer take action to stop the misconduct?**

In any sexual harassment or discrimination litigation, the allegations in the complaint and circumstances surrounding the misconduct will be key to determining whether a policy provides defense or indemnity. Every available policy should be reviewed for potential coverage, not only when a sexual harassment or discrimination claim is initially made, but whenever previously unknown facts are disclosed or new causes of action are asserted. ■



Additional Insured Coverage for Injuries to Subcontractor's Employee, But Not for Injuries Before Contractor Begins Work

By Nicholas J. Kopcho
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A common requirement in the construction industry is that subcontractors add general contractors as additional insureds on their general liability insurance policies. By requiring additional insured status, general contractors aim to protect against an injured person's claim that the general contractor failed to properly supervise the worksite. As the following cases illustrate, being named an additional insured potentially offers a general contractor additional protection if an injury occurs on the worksite, but it does not guaranty coverage in all circumstances.

The Illinois Court of Appeals recently addressed an additional insured's access to coverage under its subcontractor's commercial general liability policy in *Pekin Ins. Co. v. Twin Shores Mgmt.*, No. 4-18-0513, 2019 WL 1270513 (Mar. 15, 2019). In *Pekin*, Twin Shores sought coverage for claims arising from the death of Michael Williams. Mr. Williams, an employee of Henson Electric, suffered a fatal injury when he fell off a ladder during the course of his work. Henson was a subcontractor of Twin Shores, and Mr. Williams's death occurred during the course of its work on the project.

Pekin insured Henson under a CGL policy that named Twin Shores as an additional insured. The insurance policy covered Twin Shores only for

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Henson's negligent acts or omissions for which Twin Shores could be held vicariously liable, not for Twin Shores own negligent acts or omissions in the construction project.

Mr. Williams's estate brought a tort action against Twin Shores and Henson, accusing Twin Shores of several negligent acts or omissions, including failing to provide scaffolding, a scissor lift and safety equipment. The complaint accused Henson of the same negligent acts or omissions.

Pekin filed a declaratory judgment action seeking a judgment that it had no duty to defend Twin Shores. Pekin argued that because the tort complaint's factual allegations made no claims of potential vicarious liability against Twin Shores for Henson's negligence, the policy provided no coverage. The circuit court held Pekin had a duty to defend Twin Shores, and Pekin appealed.

The Illinois Court of Appeals concluded that Pekin had a duty to defend Twin Shores if the underlying complaint alleged: (1) Henson was negligent, and (2) Twin Shores was vicariously liable for Henson's negligence.

The underlying complaint satisfied the first requirement, as it alleged Henson was negligent. The real issue, then, was whether Twin Shores could be held vicariously liable for Henson's negligence. Even though the subcontracting agreement identified Henson as an independent contractor, in an attempt to sever any vicarious liability Twin Shores may have, the appellate court found that the contract itself was not dispositive. Instead, the court used the Illinois Supreme Court's multi-factor test for distinguishing between an independent contractor and an agent.

In applying the test, the appellate court noted that the complaint alleged Twin Shores had significant authority over Henson's work. This led the appellate court to conclude that Henson was Twin Shores' agent instead of an independent contractor. And, as an agent instead of an independent contractor, Twin Shores could be vicariously liable for Henson's torts. For these reasons the circuit court's judgment was affirmed.

In contrast, a separate case involving additional insureds, *Mt. Hawley Ins. Co. v. Zurich Am. Ins. Co.*, Wash. Ct. App. Div 1. No. 77379-8-I, 2019 WL 1487726 (Apr. 1, 2019), required the court to decide whether Zurich had a duty to defend the companies named as additional insureds on a contractor's commercial liability policy after a person was injured on the additional insured's property.

This case did not involve a general contractor and a subcontractor like *Pekin*, but instead a property, Granite Marketplace, LLC (Granite), and property manager, JSH Properties, Inc. (JSH), who hired a contractor, Fisher & Sons, Inc., d/b/a JTM Construction (JTM), to fix the property's sidewalk. The agreement's terms required JTM to provide Granite and JSH with primary insurance coverage as additional insureds on JTM's commercial liability insurance policy.

Along with being additional insureds, Granite and JSH obtained additional insurance through Mt. Hawley. The Mt. Hawley policy specifically stated it is excess over "other primary insurance available to [Granite and JSH] covering liability for damages arising out of the premises or operations, or the products and completed operations, for which [Granite and JSH] have been added as an additional insured by attachment of an endorsement."

JTM obtained the necessary permits to begin the sidewalk repair on November 6, 2012, but did not begin any repair work that day. The next day, November 7, 2012, Kim Jennett was injured when her foot became stuck in a sidewalk hole that JTM was to repair in front of Market Place. Jennett filed suit against Granite, JSH, and JTM, alleging that her bodily injuries were caused by their negligence.

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Granite and JSH tendered their defense to JTM and, thus, to Zurich. Zurich declined to accept the tender, claiming that because JTM had not yet started work when the incident occurred it was not responsible for the injury, and thus Zurich was not required to defend Granite and JSH as additional insureds. Zurich defended only JTM, while Mt. Hawley defended Granite and JSH.

JTM successfully moved for summary judgment in the Jennett lawsuit, and after JTM's dismissal Granite and JSH settled the lawsuit. Mt. Hawley paid Granite's and JSH's defense and settlement costs. Mt. Hawley then filed suit against Zurich, alleging that Zurich breached its duty to defend and indemnify Granite and JSH in the Jennett lawsuit, and due to the breach Mt. Hawley was entitled to subrogation from Zurich in amounts equaling Zurich's obligation for Granite's and JSH's defense costs, indemnity, or other damages related to the Jennett lawsuit.

Mt. Hawley contends Zurich had a duty to defend Granite and JSH in the Jennett lawsuit because the policy covered claims for injuries if Granite's and JSH's liability for the injuries is caused by the acts or omissions of JTM. Granite and JSH argued that JTM's delay in fixing the sidewalk was an act or omission requiring coverage under the Zurich policy, and that act or omission directly caused Granite and JSH to be found liable for Jennett's injuries. Zurich asserted that Jennett's personal injury was not caused by an act or omission of JTM.

After evaluating the parties' competing insurance contract interpretations, the court held that even if Mt. Hawley was correct about its interpretation, Zurich's policy did not provide coverage because JTM did not undertake any obligation to complete the sidewalk repair before the day of the incident, and thus it could not possibly have omitted to repair the sidewalk earlier. Hence, Zurich had no duty to defend Granite or JSH because no JTM act or omission caused Jennett's injuries. ■

Crucial Coverage for Advertising Injuries and the Insurer's Broad Duty to Defend

By Christopher T. Teodosio | cteodosio@brouse.com

Overlooking coverage for advertising injury can be detrimental to policyholders and their businesses when they receive a cease and desist letter or complaint that touches on marketing activities. Commercial general liability (CGL) insurance policies typically provide coverage for advertising injury "caused by an offense committed in the course of advertising [the policyholder's] goods, products or services." *We Do Graphics, Inc. v. Mercury Cas. Co.*, 124 Cal.App.4th 131, 137, 21 Cal.Rptr.3d 9, 12 (Cal.App.2004). An "advertising injury" means an "injury arising out of one or more of the following offenses: (a) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services; (b) Oral or written publication of material that violates a person's right of privacy; (c) Misappropriation of advertising ideas or style of doing business; or (d) Infringement of copyright, title or slogan. *Transcontinental Ins. Co. v. Jim Black & Assoc., Inc.*, 888 So.2d 671, 677 (Fla.App.2004), aff'd, 932 So.2d 516 (Fla.App.2006). This article will analyze the broad nature of how courts have defined "advertisement" or "advertising idea" for

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purposes of determining whether the allegations in a complaint trigger coverage or a duty to defend under a CGL policy.

A CGL policy generally defines an advertisement as a "notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." *See* ISO Form CG 00 01 04 13. Radio, television and internet advertisements are obvious examples. Courts, however, have taken an expansive view as to what constitutes an advertisement or an advertising idea when determining whether there is coverage or if an insurer has a duty to defend.

An advertising idea can include concepts as broad as an idea on how to acquire new customers or new business. Indeed, the United States Court of Appeals for the Third Circuit found that an advertising idea is defined as "an idea about the solicitation of business and customers." *Green Mach. Corp. v. Zurich American Ins. Group,* 313 F.3d 837, 839 (3d Cir. 2002). Courts have also found that an advertising idea encompasses "ideas in connection with marketing and sales and for the purpose of gaining customers" or "an idea calling for public attention to a product or business especially by proclaiming desirable qualities so as to increase sales or patronage." *CAT Internet Servs., Inc. v. Providence Washington Ins. Co.,* 333 F.3d 138, 142 (3d Cir. 2003); *American Ass'n v. Goregis Ins. Co.,* 282 F.3d 582, 587 (8th Cir. 2002).

Like their expansive interpretation of an advertising idea, courts have found a broad range of activities are considered advertisements for purposes of an insurer's duty to defend under a CGL policy, including: the unauthorized use of a marathon runner's name in advertising a company's running shoes. *Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc.*, 480 Mass. 480, 106 N.E.3d 572 (2018); trademark infringement. *Kim Seng Co. v. Great Am. Ins. Co. of New York*, 179 Cal.App.4th 186, 1038, 179 Cal.App.4th 1030, 1038, 101 Cal.Rptr.3d 537, 543 (Cal.App.2009), as modified on denial of reh'g (Dec. 7, 2009) ("[I]nfringement could reasonably be considered as one example of a misappropriation, and taking into account that a trademark could reasonably be considered to be part of either an advertising idea or a style of doing business, it would appear objectively reasonable that 'advertising injury' coverage could now extend to the infringement of a trademark."); and attaching a similar hang tag on garments. *E.S.Y., Inc. v. Scottsdale Ins. Co.*, 139 F.Supp.3d 1341, (S.D.Fla.2015).

Because of the broad nature of coverage for an advertising injury, it is important for policyholders to scour the complaint or cease and desist letter when a third-party is alleging infringement on an advertising idea. Furthermore, it is helpful to view the allegations in the complaint or cease and desist letter broadly, based on courts' interpretation of what can fall into this coverage. ■

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Anastasia J. Wade

Attorney Highlights

Joseph K. Cole was appointed to the OSBA Council of Delegates.

Stacy RC Berliner and **Andrew W. Miller** presented on "Restatement of Law, Liability Insurance and Its Future" at the Cleveland Metropolitan Bar Association on May 30, 2019.

Amanda M. Leffler was a co-presenter on "Emerging Cyber and Computer Coverages and Exclusions," at the PILC Spring Meeting in Austin, Texas, May 9-10, 2019.

Amanda M. Leffler and **P. Wesley Lambert** presented with Jim Dixon at a Brouse seminar, "Beware of Gaps in Insurance Coverage in the Wake of Ohio Supreme Court's Ohio Northern Decision," on May 7, 2019.

Bridget A. Franklin and **Meagan L. Moore** celebrated their 10-year anniversary with Brouse McDowell at the firm's Service Awards Breakfast on April 9, 2019.

Amanda M. Leffler and **Andrew W. Miller** spoke on "The Exchange - Hedging Your Bet: Going Beyond Insurance When Disaster Strikes" at the Beyond Insurance Conference in Las Vegas, Nevada, March 28 - 29, 2019.

Amanda M. Leffler and **P. Wesley Lambert** presented on "Insurance Coverage for Defective Construction Claims," at the Ohio Home Builders Association Spring Meeting in Columbus, Ohio on March 6, 2019.

Brouse McDowell sponsored the ABA's Litigation Insurance Coverage Committee Seminar in Tucson, Arizona, held February 27-March 2, 2019.

Brandi L. Doniere published an article titled "For Texas Insurers, Liability is Separate from Defense Costs," for *Law360* on February 8, 2019.

Gabrielle T. Kelly published an article titled "Insurance Coverage for Regulatory Penalties Resulting from a Data Breach," for *The Cleveland Metropolitan Bar Journal,* February 2019.

Brouse McDowell is a proud sponsor of the Northeast Ohio RIMS Chapter for 2019.

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7th Annual Insurance Coverage Conference
Thursday, October 10, 2019

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