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Attention Employers: Dust Off Your EPLI Policies, ASAP

October 6, 2011

Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co., No. 3:07-cv-00303 (M.D. Tenn. Sept. 16, 2011)

The United States District Court for the Middle District of Tennessee put those employers with Employers Practices Liability Insurance (EPLI) policies on high alert a few short weeks ago upon handing down its decision in *Cracker Barrel Old Country Store, Inc. v. Cincinnati Insurance Co.*, No. 3:07-cv-00303 (M.D. Tenn. Sept. 16, 2011). In disposing of Defendant's Motion for Summary Judgment, the court held that a lawsuit brought against Cracker Barrel by the EEOC on behalf of ten former Cracker Barrel employees did not fall within the definition of "claim" found within Cracker Barrel's insurance policy. Thus, in this instance, Cracker Barrel's EPLI policy with Cincinnati Insurance Company was essentially worthless.

It is common practice for employers to purchase an EPLI policy to protect their interests in the event they are sued for various types of employment claims, such as discrimination, harassment, or retaliation. Over the course of two years, ten Cracker Barrel employees filed charges with the EEOC alleging sexual and racial harassment, race discrimination, retaliation, and constructive discharge. The underlying suit between the EEOC and Cracker Barrel settled for $2,000,000, plus $700,000 in attorneys fees. Clearly, the allegations in the EEOC's suit against Cracker Barrel were of the class of claims covered by the EPLI policy. Despite Cracker Barrel's timely notice to Cincinnati regarding the EEOC suit, Cincinnati denied the claim. When Cincinnati refused to reimburse Cracker Barrel's expenses, Cracker Barrel sought relief in federal court.

According to Cincinnati, they did not have a duty to defend or indemnify Cracker Barrel because the EEOC's lawsuit was not a "claim" under the EPLI policy at issue and, pursuant to the language of the policy, only lawsuits *brought by employees*, not lawsuits brought on behalf of employees, were covered. A "claim" under the EPLI policy is defined as: "'a civil, administrative or arbitration proceeding commenced by the service of a complaint or charge, which is brought by any past, present or prospective employee(s) of the insured entity.'" *Cracker Barrel*, No. 3:07-cv-00303, slip op. at 6 (internal quotation marks omitted).

The court agreed. In finding in favor of Cincinnati, the court held that the policy, as well as the definition of a "covered claim," was clear and unambiguous; in order for a proceeding to be covered, it must be brought by an employee. In reaching its decision, the court reviewed relevant definitions in other EPLI policies and determined that there were "no instances where the relevant definition restricted claims to those 'brought by an employee.'"

Cracker Barrel, No. 3:07-cv-00303, slip op. at 12. However, the court did come across a policy in which proceedings brought by the EEOC were explicitly covered. Ultimately, the court lamented that it could not "find ambiguity where none exists merely because Plaintiff did not bargain for the coverage that it expected." *Cracker Barrel*, No. 3:07-cv-00303, slip op. at 13.

While an appeal to the Sixth Circuit is likely forthcoming, employers with EPLI policies should review their policy's language to determine whether coverage is provided for any lawsuits brought by government agencies, such as the EEOC or the DHR.