

Massachusetts Supreme Judicial Court Holds Insurers' Duty to Defend Does Not Extend to Counterclaims

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A recent decision by Massachusetts' highest court provides another reason why employers should carefully review their employment practices liability insurance (EPLI) policies. Unless the policy expressly covers counterclaims, employers should be aware that, at least in Massachusetts, the insurer's "duty to defend" a claim brought by an employee or former employee against the employer will not cover claims that the employer seeks to bring in response against the employee.

In *Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, Visionaid terminated an employee for performance issues and misappropriation of company funds; the employee, in turn, sued Visionaid for age discrimination and other claims based on his alleged wrongful termination. Visionaid sought to file a counterclaim against the former employee for misappropriation, but Mount Vernon, Visionaid's EPLI provider, informed Visionaid that the counterclaim would not be covered by the policy. Mount Vernon then filed a declaratory judgment seeking a ruling that its duty to defend Visionaid did not require coverage for the counterclaim.

Visionaid's EPLI policy provided that Mount Vernon had "the right and duty to defend any Claim" and pay 100% of the "Defense Costs" for such claim up to the policy limits. The policy defined "Claim" as "any proceeding initiated against" Visionaid and "defense costs" as "reasonable and necessary legal fees and expenses...resulting from the investigation, adjustment, defense, and appeal of a Claim." But, it did not define "defend." Consequently, the Court looked at the plain meaning of "defend" and concluded that it did not encompass claims initiated by Visionaid. The dissent, written by the Chief Justice, contended that Visionaid's counterclaims were intertwined with its defense and therefore these claims should be covered by the policy.

As a result of this decision, employers should review their EPLI policies to determine the scope of coverage under the policy. If the policy is silent or unclear as to whether counterclaims are covered, employers should contact their insurers or brokers to make sure their policies include coverage of such claims. Contrary to popular belief, an employer need not accept an EPLI policy "as is." Often, terms can be defined or modified to ensure clarity and better coverage. Mintz Levin attorneys have experience reviewing policies and working with EPLI insurers, and are available to assist employers obtain comprehensive EPLI coverage.

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