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Court upholds "Pay and Walk" Provision in Liability Insurance Policy

By Barry R. White

Liability insurance policies typically impose two separate obligations on an insurance company: 1) the obligation to pay for a lawyer to defend the insured if the insured gets sued (known as the "duty to defend"); and 2) the obligation to pay any judgment against the insured, up to the policy maximum, if the insured loses the lawsuit. Occasionally, insurance companies seek to avoid their duty to defend by simply paying the policy maximum to a claimant in return for a release of the insurance company (but not necessarily a release of the insured). The Wisconsin Court of Appeals recently ruled that paying the policy limit absolved an insurance company of any further obligation to defend the insured.

The case is Young v. Welytok, decided on April 5, 2011. In that case, Young sued Welytok for injuries he sustained in an automobile accident allegedly caused by Welytok's teenage daughter. Welytok had $100,000 of insurance. However, Young claimed he had damages of $500,000. The insurance company attempted to negotiate a settlement for less than $100,000, but those efforts were unsuccessful. Next, the insurance company offered to pay Young $100,000 in return for a complete release of Welytok, the insurance company and the daughter. When those efforts also proved unsuccessful, the insurance company paid Young $100,000 in return for a release of the insurance company, a release of Welytok up to the sum of $100,000 and an agreement not to sue the daughter.

Shortly after receiving the insurance company's payment, Young sued Welytok for damages over and above the $100,000 already paid. Welytok claimed that the insurance company still had to defend Welytok in the lawsuit notwithstanding having already paid the full $100,000 policy limit to Young.

The Court of Appeals noted that the insurance policy in question contained a "pay and walk" provision that said the insurance company would not "defend any suit after [its] limit of liability has been offered or paid." The Court of Appeals explained that in order to be effective, these provisions must be conspicuous and must make it clear to the insured that the insurance company can be relieved of its obligations by paying the policy limit. The Court of Appeals pointed out that pay and walk provision in Welytok's policy was in capital letters and some terms were in bold. For that reason, the Court of Appeals held that it was conspicuous and further held that it was plainly worded and would not confuse a reasonable person in the insured's position. Accordingly, the Court of Appeals ruled that the insurance company was relieved of any further obligation to Welytok once it paid the $100,000 policy limit.

Welytok had some additional complaints, however. Welytok claimed that Young's damages were less than he claimed, that the insurance company failed to properly investigate the damages before paying Young, that the insurance company only paid Young because it did not want to incur legal fees to defend Welytok and that the insurance company did not tell Welytok that it was going to pay Young. The Court of Appeals said none of that mattered. Under the insurance policy, Welytok had contracted to receive $100,000 of insurance and that is what Welytok got – how or why the $100,000 was paid did not matter.

The conclusion, of course, is to make sure your limits of liability are sufficient and to recognize that, notwithstanding your insurance coverage, you could end up paying for your own defense of a lawsuit once your insurance company pays out the policy maximum. WBB

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Effective IT Policies: A Necessity in the Digital World

By Ryan M. Billings

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Today, many employees spend the majority of their work hours in front of a computer. One consequence of this is that employers must wrestle with whether to allow personal use of computers by employees and, to what extent. Another consequence is that, when disputes arise and litigation looms, more and more of the evidence relevant to business disputes exists in electronic form. Collecting, reviewing and producing electronic information in litigation can be a huge expense. A well thought-out and comprehensive Information Technology ("IT") policy is critical to aid employers in dealing with these issues in an efficient manner.

Consider a situation faced by a client of mine a few years back. Within a period of three days, scores of employees suddenly left the company, all of them joining a competitor. The employer was left with the suspicion of foul-play, but the evidence was scant... that is, until the forensic expert we hired examined the employees' computers.

> *12 terabytes of data:*
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> *Put into context, if the information were printed on single-spaced letter paper, it would amount to over 5 billion pages.*

Buried in the recesses of their hard drives was evidence that a few ringleaders had been planning the move for over a year, during company time, with company resources. We had found our smoking gun, but the evidence consisted of personal emails from the employees' personal email accounts, accessed and sent during work hours. Because the company's IT policy was not clear on the use of personal email accounts during business hours, introducing this evidence became an uphill battle. We eventually prevailed and obtained a fabulous result for our client, but the fight was long and costly. An appropriate IT policy, drafted with the advice of counsel, would have eliminated this issue and allowed our client to pursue its legal claims without costly motion practce.

Consider as well, the recent litigation between Google and Viacom over YouTube, in which Google was ordered to turn over 12 terabytes of data during discovery. To put this in context, if the information were printed on single-spaced letter paper, it would amount to over 5 billion pages, greater than the sum of the printed collection of the Library of Congress. The sheer enormity of the task of reviewing such a huge amount of information, selecting relevant documents and removing privileged material, boggles the mind.

> *"...more and more of the evidence relevant to business disputes exists in electronic form. Collecting, reviewing and producing electronic information in litigation can be a huge expense."*

While few businesses have the data-storing capacity of Google, electronic discovery is becoming a greater and greater part (and expense) of litigation. The Wisconsin Rules of Civil Procedure were recently amended to make it easier for parties in litigation to pursue electronic information (sometimes called e-discovery), and the trend of ever-increasing electronic discovery in litigation shows no signs of slowing down. A proper IT policy - covering for instance, such issues as how, when, and for how long data is stored - can minimize the difficulty of harnessing e-discovery to pursue a company's legal goals.

If an ounce of prevention is worth a pound of cure, thinking about and handling issues related to electronic information through a well-drafted, customized IT policy *before* a disaster occurs can lead to substantial savings. Implementing an effective IT policy or revising an outdated one, with the aid and advice of an attorney experienced in such matters, can thus be a wise investment. WBB

Retaliation - An IED for Employers

By Michael M. Berzowski

Simply put, retaliation cases occur when an employer engages in an adverse employment action as a result of an employee participating in a protected activity. These cases make it possible for an employer to win the battle and lose the war, that is, to prevail on the underlying discrimination case but then to incur a substantial financial mauling because of retaliation. Worse yet, would be losing the underlying discrimination case **and** the retaliation claim.

More knowledgeable employees, an entitlement attitude, desperation, the possibility of a free lawyer, a friendly regulatory agency, actual retaliatory incidents and other factors have led to a sharp spike in retaliation claim filings. In fiscal 2009, retaliation claims comprised thirty-six percent of the total claims filed with the EEOC – 33,613 out of 93,277.

There are three essential elements to a retaliation claim, the first of which is the employee opposed a discriminatory event or participated in covered proceedings. The opposition is protected from retaliation as long as the employee's conduct is based upon a reasonable good-faith belief that an employer practice violates some anti-discrimination law and the opposition itself is reasonable. Covered proceedings would include making the charge, testifying, assisting or participating in an investigation, proceeding, hearing or litigation under the various laws enforced by the EEOC or the WDWD.

The second element to a retaliation claim is an adverse action. Examples include denial of promotion, refusal to hire, demotion, suspension, denial of job benefits and discharge. Also threats, reprimands, poor evaluations, harassment or other adverse treatment. Depending upon the nature of the action, they can occur before, during or after employment.

The last element to a retaliation claim is a causal connection between the protected activity and the adverse action. For a claim to be successful there must be proof that the employer took adverse action because the aggrieved employee, also known as the charging party, engaged in a protected activity.

The proof of the retaliatory motive can be either direct or circumstantial evidence. Although there could be direct evidence such as a written or oral statement explaining that the employee's protected conduct triggered the adverse action, chances are greater than not that circumstantial evidence will be relied upon. What usually happens in retaliation cases is that the evidence raises an inference that retaliation was the cause of the challenged action. The employer then has a chance to produce evidence of a legitimate non-retaliatory reason for the challenged action with the employee then having a chance to prove that the employer's stated reasons are a pretext to hide the retaliatory motive.

Examples of circumstantial evidence include the length of time between the protected activity and the adverse action allegation, poor job performance, work rule violations, insubordination and negative job references. An unsettling aspect of this is that an underperforming employee could prevail if it can be shown there was uneven enforcement of rules. In other words, the employee was treated differently from similarly situated employees or maybe the reason asserted for the adverse action is not believable.

The remedies for a successful charging party could include temporary injunctive relief, as well as compensatory and punitive damages. Damages under the EPA and ADEA are not subject to statutory caps.

Bear in mind that the charging party need not be the person who engaged in the opposition – for example, a father (because his son who is also an employee opposed an unlawful employment action). Another example is refusal to hire because the employer was aware the candidate opposed her previous employer's discriminatory practices. In order to reduce the possibility of retaliation claims, an employer should have a clear-cut, non-retaliation policy which, among other things, encourages employees to complain about unlawful conduct without the fear of reprimand. In addition, managers and supervisors should be trained with regard to retaliation. Finally, if a claim is in fact filed, counseling should occur for managers, supervisors and co-workers regarding their conduct and it should be documented.

A good starting point for obtaining additional information is the EEOC Compliance Manual Section 8, available through the EEOC website. Responsible employers should have a good working grasp of this publication so as to avoid retaliation claims. WBB

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AT THE FIRM...

John A. Sikora has an article entitled "Structuring the Build-to-Suit Like Kind Real Estate Exchange" in the first quarter 2011 edition of *Real Estate Taxation*.

Megan Wiseman, WBB's librarian, has been elected to serve as Vice President/President Elect for the Law Librarians Association of Wisconsin.

Ryan M. Billings is now admitted to practice in Wisconsin. He is already licensed to practice in New York, having come to WBB from Cravath, Swaine, & Moore LLP's New York office, Congrats, Ryan!

Registration is now open for our upcoming Estate Planning Conference. This annual event will take place at the Wisconsin Club. Past topics include: Special Needs Trusts, Wisconsin Pooled and Community Trusts, Buy-Sell Agreements as a Planning Tool for the Business Owner, and Estate Planning for Vacation Homes. This year promises the same great variety and timely topics; we hope to see you there! Please see our website for more details and to register, or contact Megan Wiseman at 414-270-2559 (mkw@wbb-law.com)

2011 Schedule of Events

ESTATE PLANNING CONFERENCE
June 7, 2011

TAX & BUSINESS SEMINAR
September 21, 2011

EMPLOYMENT LAW CONFERENCE
October 19, 2011

All events will be held at the Wisconsin Club at 900 W. Wisconsin Ave., Milwaukee. Please check our website (wbb-law.com) for more event information.