IV. ADDRESSING MULTIPLE CLAIMS.

41.11 Consider Insurance Provisions as to Multiple Claims and Interrelated Wrongful Acts.

41.11[1] Consider the Related Acts Clause. Frequently, an employer's decision may result in multiple claims filed by several employees. Alternatively, a single employee may assert more than one claim (*e.g.*, an EEOC charge followed by a retaliation claim). Insurers offer claims-made coverage with a per-claim limit of liability. Because employment acts frequently result in more than one claim, EPL underwriters add language that specifies how the parties should treat multiple claims. This provision is sometimes referred to as a related acts clause. One typical related acts clause stated, "[A]ll Related Claims will be treated as a single Claim made at the time the first of such Related Claims was made." [Janjer Enterprises., Inc. v. Executive Risk Indem., Inc., 97 Fed. Appx. 410, 412 (4th Cir. 2004)]. The same policy defined "Related Claims" as:

> [A]ll Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, events or Employment Practices Wrongful Acts or the same or related series of facts, circumstances, situations, transactions, events or Employment Practice Wrongful Acts [*id*.].

The related acts clause serves to limit an insurer's liability in generally two scenarios: (1) when multiple claimants bring separate claims due to a single employment decision; and (2) when a claimant makes multiple claims based on the same employment decision.

41.11[2] Applying the Related Acts Clause to Claims Involving Multiple Claimants. When an employment claim involves more than one claimant, often a dispute arises over available limits of liability. [This assumes, of course, that the aggregate limit is more than the per claim limit; frequently the aggregate is equal to the per claim limit]. As long as each claimant's allegations arise from a similar or related wrongful act, the related acts clause should aggregate these separate claims into a single claim for purposes of determining the limits available under the policy. Under these circumstances, multiple claims asserted against an insured should not increase the limits of coverage available to the policyholder.

Although not an EPL case, the decision in *Gregory v. Home Ins. Co.* [876 F.2d 602 (7th Cir. 1989)] is instructive with respect to the application of the related acts clause. In *Gregory*, an attorney represented a company attempting to obtain investors for a video production. The attorney wrote an opinion letter that the production was not a security for tax purposes. The investors took income tax deductions based on the attorney's opinion. The Internal Revenue Service, however, later ruled that the investment scheme constituted a security. As a result of this ruling, the IRS charged the investors with interest and penalties. In turn, the

investors filed a class-action lawsuit against the production company and the attorney, and the production company filed a cross-claim against its attorney [*id.* at 603].

The insured attorney had a malpractice policy that provided a $500,000 per claim limit of liability and a $1 million aggregate limit. The attorney and his malpractice carrier disputed whether the multiple claimants resulted in two or more claims. The attorney sought a declaratory judgment that the class action constituted multiple claims or that the class action and the cross-claim constituted multiple claims. The trial court granted summary judgment to the insurer and the Seventh Circuit affirmed.

The Seventh Circuit observed that the malpractice policy provided that, "Two or more claims arising out of a single act, error, omission or personal injury or a series of related acts, errors or omissions or personal injuries shall be treated as a single claim" [*id.* at 604]. The court decided without analysis that the class action claims were a single claim. With respect to the cross-claim by the client, the court ruled that this claim was related. The court reasoned that the term "related" encompassed either a causal or logical connection, and that the advice given to the client was related to the advice given to the investors [*id.* at 605, 606].

41.11[3] Applying the Related Acts Clause When Multiple Claims Arise from a Single Wrongful Act. The second circumstance implicating the related acts clause arises when the same employment decision generates more than one claim. For example, a claimant might file an EEOC charge, followed by a lawsuit. Both are claims. If the claimant files an EEOC charge in one policy period, and then files a lawsuit in a subsequent policy period, the issue of the number of claims also will overlap with notice issues.

⊠ **Strategic Point — Insured:** If the insured failed to provide notice of the administrative claim during the first policy period, it will likely argue that the subsequent lawsuit is a new claim in order to avoid the effect of the notice clause.

⊠ **Strategic Point — Insurer:** Where the policy contains a related acts clause that is pertinent, the insurer should consider arguing that the late notice bars coverage of both the administrative action and the lawsuit.

Example: In *Pantropic Power Prods. v. Fireman's Fund Ins. Co.* [141 F. Supp. 2d 1366, 1368 (S.D. Fla. 2001), *aff'd,* 34 Fed. Appx. 968 (11th Cir. 2002)], the court had found the insured failed to timely report an administrative charge during one policy period. The insured therefore argued that a lawsuit in the subsequent policy period constituted a new claim, for which it provided timely notice. The insured contended that the lawsuit included new claims for relief not raised in the

administrative action. In particular, the insured argued that the claimant included a retaliation claim in the lawsuit, which could not have arisen until after the claimant filed the administrative charge.

The policy, however, included a related acts provision stating that claims arising from "the same wrongful employment practice or series of similar or related wrongful employment practices" are deemed to be a single claim for the purposes of the notice provision [*id.*]. Accordingly, the insurer argued that the administrative action and the lawsuit arose from the same wrongful practice or series of related wrongful employment practices. Therefore, the two matters constituted a single claim.

The court agreed with the insurer, reasoning that claims that are causally connected or that arise from similar factual circumstances are related for purposes of the notice provision. The court found that the sexual harassment and retaliation claims shared a temporal proximity and involved the same individuals. Because the two claims were causally connected, they constituted a single claim, which was first made against the insured in the first policy period [*see also* Am. Center for Int'l Labor Solidarity v. Fed. Ins. Co., 518 F. Supp. 2d 163, 174 (D.D.C. 2007) (ruling that a second claim filed against a supervisor was related to the employee's original suit against the employer); Munsch Hardt Kopf & Harr P.C. v. Exec. Risk Specialty Ins. Co., 2007 U.S. Dist. LEXIS 16647 (N.D. Tex. 2007) (ruling that an administrative action and a later lawsuit were related claims, and as a result, the insured's failure to timely report an EEOC charge violated the policy's notice provision)].

Where the policy is ambiguous with respect to whether multiple claims could arise from one set of facts, however, the court may find that an administrative action and a subsequent lawsuit are distinct claims.

Example: In *Lodgenet Entertainment Corp. v. American Int'l Specialty Lines Ins. Co.* [299 F. Supp. 2d 987 (D.S.D. 2003)], the policyholder purchased consecutive EPL policies from his insurer. The policies afforded claims-made and reported coverage, and required the insured to report claims within 30 days after the end of the policy period [*id.* at 990].

A former employee of the insured filed an administrative charge with the EEOC alleging sexual harassment. The claimant made the charge, and the insured received the charge shortly before the end of the first policy period. The insured, however, did not inform the insurer of the administrative charge. The claimant filed suit in the subsequent policy period, and the insured gave the insurer prompt notice of the lawsuit.

The insurer denied coverage and litigation ensued. On summary judgment, the parties appear to have agreed that the notice of the administrative action was untimely. The insured argued, however, that it was entitled to summary judgment because the lawsuit constituted a separate claim. The insurer cross-moved for summary judgment on the grounds that the administrative action and lawsuit arose from the same facts, and therefore, constituted a single claim [*id.* at 991].

The court granted summary judgment in favor of the insured, observing that the definition of claim in the policy did not provide that all suits or proceedings arising from the same set of facts would be deemed a single claim. The Notice/Claim Reporting provision stated:

> If written notice of a Claim has been given to the Insurer pursuant to Clause 7(a) above, then any Claim which is subsequently made against the Insureds and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim for which such notice has been given, or alleging any Employment Practices Violation which is the same as or related to any Employment Practices Violation alleged in the Claim of which such notice has been given, shall be considered made at the time such notice was given [*id.* at 992].

The court found that the language "a Claim" and "any Claim which is subsequently made" supported the insured's position that more than one claim could arise from the same set of facts [*id.*].

41.12 Consider the Time Restrictions on Coverage of a Wrongful Act.

41.12[1] Understand the Significance of the Retroactive Date and the Extended Reporting Period. Although the most important timing issues regarding EPL policies are the date of the claim against the insured and the date of notice to the insurer, EPL policies also typically place limitations on when the wrongful acts giving rise to coverage may take place in order for coverage to exist. The earliest date on which a covered wrongful act may take place is usually known as the "retroactive date." Most EPL policies provide that coverage exists only for claims arising from wrongful acts that take place after the retroactive date.

An insurer typically sets the retroactive date to the initial date the insured purchases insurance with the carrier. If the insured has had claims-made coverage in place with another carrier, sometimes the subsequent insurer will set the retroactive date based on the date the insured first purchased claims-made coverage for a risk.

The latest date on which a covered wrongful act may take place is the last day of the policy period. Accordingly, the policy will respond to a claim first made against the insured during the policy period, as long as the claim is based on a wrongful act that took place after the retroactive date.

As noted above, some policies may afford a short period after the policy expires in which an insurer may report a claim. The extended reporting period serves only to provide additional time in which to report a claim. It does not extend the time during which a covered wrongful act may take place.

41.12[2] Consider the Continuous Course of Conduct Issue.

41.12[2][a] When the Policy Is Silent on the Issue. One area of potential conflict arises when the insured has been engaged in a continuous course of conduct that begins before the retroactive date, and then continues after the retroactive date. Although not an EPL case, *Mutual Fire, Marine & Inland Ins. Co. v. Vollmer* [508 A.2d 130 (Md. 1986)] is instructive. The Court of Appeals of Maryland held that coverage existed under a claims-made malpractice policy for a continuing omission that began before the policy's retroactive date and continued after the retroactive date [*id.* at 134].

In the underlying case, a woman sued her doctor for failing to diagnose cancer. The doctor ordered an x-ray of the woman's lungs on July 26, 1975. While reviewing the x-ray, the doctor allegedly missed a tumor and instead diagnosed the woman with walking pneumonia. The woman alleged malpractice for the doctor's failure to diagnose the tumor as well as his failure to follow-up on her condition after the date of the x-ray.

The doctor's malpractice insurer sought to deny coverage, arguing the malpractice occurred on July 26, 1975, when the doctor misdiagnosed the x-ray. Because the malpractice occurred before the August 1, 1975 retroactive date, the insurer contended that the claim fell outside of coverage.

The court of appeals disagreed, finding that the plaintiff alleged an ongoing omission by the doctor that began before the retroactive date and continued past that date. The court held, "The policy is silent on its application where malpractice is alleged to have been committed both before and after the retroactive date. Consequently, the rule applicable here is to resolve ambiguity against the drafter of the policy and in favor of coverage" [*id*. at 134; *but see* Coregis Ins. Co. v. Blancato, 75 F. Supp. 2d 319 (S.D.N.Y. 1999) (holding a policy did not cover a malpractice suit alleging an attorney missed a statute of limitation before the retroactive date but continued to represent client after the retroactive date)].

41.12[2][b] When the Policy Has a Continuous Course of Conduct Provision. Some policies expressly provide that a continuous course of conduct beginning before the retroactive date and continuing after that date will fall outside of the policy's coverage. For example, a policy might provide that the "entirety of the wrongful conduct" must take

place before the retroactive date. Under these circumstances, however, an insurer may have an obligation under the policy if the policyholder commits some *independent* wrongful act after the retroactive date [*see* Schultze v. Continental Ins. Co., 619 N.W.2d 510 (N.D. 2000)].

In *Schultze*, the claimant, an employee of the insured, alleged she had engaged in a sexual relationship with the insured for many years. The relationship began before the policy period and continued through the inception of the policy. During the policy period, the claimant ended the relationship. She claimed the insured then fired her and accused her of embezzlement. The claimant sued the insured for sexual harassment, wrongful discharge and defamation [*id.*].

The insurer denied coverage for the claim, asserting the wrongful employment practices began before the retroactive date in the policy. After its insured sued it, the insurer moved for summary judgment based on the retroactive date and the trial court granted the insurer's motion. On appeal, however, the North Dakota Supreme Court reversed. The court found that the alleged relationship, the sexual discrimination and wrongful termination represented a continuous pattern that began before the prior acts date. The court agreed that if these had been the only allegations, then the insurer would have had no duty to defend under the policy [*id.* at 514].

The court ruled, however, that the defamation count arose after the retroactive date. The insured did not accuse the claimant of embezzlement until after the policy period began, and the court observed that the defamation count could have arguably arisen on its own, even in the absence of the sexual harassment allegations. Because the potential for coverage existed under the policy, the court ruled the insurer had a duty to defend [*id.* at 515].

> **Strategic Point:** There is little an insured can do to avoid the effect of the retroactive date. Often, claims that implicate the retroactive date also implicate several other coverage defenses, such as the known loss doctrine and/or misrepresentation on the policy application (these defenses are discussed below at § 41.24[1]). If, however, the retroactive date is silent concerning a continuing course of conduct, a case exists for coverage for claims based on wrongful acts occurring after the retroactive date. If the policy bars coverage for events that begin before the retroactive date, as in *Schultz*, the insured may have to find some ground for coverage that arose independently after the retroactive date. If coverage is barred by the retroactive date, the insured should examine its occurrence-based coverage in effect at the time of the wrongful conduct.