

New Laws, New Liabilities

by Mark Garbowski and Robert M. Horkovich

It has been a busy year for legal changes that could affect your company's insurance and liability profile. Policyholders should review their coverages, and adjust policy terms and limits to confront these changes in liability exposure. Three cases deserve special attention.

The Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act of 2009 effectively overturns a 2007 Supreme Court ruling (*Ledbetter v. Goodyear Tire & Rubber Co.*) that the statute of limitations for a wage difference discrimination claim starts from the initial decision to pay a female worker less money than a male counterpart, even if the pay disparity continued for years.

The Ledbetter Act restarts the 180- or 300-day statute of limitations clock each time a worker receives a paycheck that reflects a pay disparity, greatly extending the time in which a worker may bring a discriminatory pay claim against the employer. Although *Ledbetter* only dealt with sex-based pay disparity, the new law also includes claims based on race, age, religion and disability. Successful claimants can recover up to two years of back pay from the date the discrimination charge is filed.

Employers should consider whether their employment practices liability insurance (EPLI) policies adequately cover the new risks created by the Ledbetter Act. Some EPLI policies exclude or limit coverage for lost wages and back pay, except under limited circumstances. Also, because EPLI policies are generally sold on a claims-made basis, you should determine if your retroactive date extends back far enough to cover claims based on events that occurred years ago.

Delaware and D&O Indemnification

A 2008 Delaware court decision (*Schoon v. Troy*) held that a former director's right to advancement of expenses under a corporation's bylaws did not vest until an indemnifiable claim was asserted. As such, the corporation could amend its bylaws to eliminate the right to advancement of expenses with respect to former directors before a claim was made. In response, the Delaware legislature amended its General Corporation Law, Section 145(f), providing that a "right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired" by amendment after the relevant acts or omissions take place, unless "the provision in effect at the time of such act or omission explicitly authorizes such

elimination or impairment after such action or omission has occurred." As a result, Delaware directors and officers are more secure in their right to indemnification. Companies should make sure that both their by-laws and D&O liability insurance policies are in alignment with their intentions and this new law.

Negating Stoneridge

In late July, Senator Arlen Specter (D-PA) introduced the "Liability for Aiding and Abetting Securities Violations Act of 2009." The bill would overturn the 2007 Supreme Court decision (*Stoneridge Investment Partners v. Scientific-Atlanta*) that involved a claim by shareholders of Charter Communications against companies that did business with Charter, alleging that certain transactions were structured to inflate Charter's cash flow to meet earnings expectations.

The defendant counterparties argued that they could not be held liable for aiding and abetting securities fraud and the Supreme Court agreed. Specter's bill could overturn that ruling, however, and place greater risk on all counterparties to transactions with companies that later suffer earnings shortfalls, as well as on their accounting, financial and legal advisors.

Many D&O and E&O policies have special coverages and provisions applicable to claims involving securities issued by the policyholder. If Specter's bill passes, policyholders should consider whether their policies provide adequate protection for claims involving the securities of other entities. After such a law is passed there is often a surge in litigation—which can be expensive even when a claim is dismissed—that determines the scope of the law. Policyholders should check whether their policies require defense costs to be advanced or reimbursed after the fact. Other provisions worth noting are exclusions for fraudulent and willful conduct, which should have clauses indicating they will only apply if the allegations are proven by judgment. ■

