



U.S. Department of Justice
Executive Office for United States Trustees

Office of the Director

Washington, D.C. 20530

December 12, 1997

MEMORANDUM

TO: All United States Trustees

FROM: Jerry Patchan
Director

SUBJECT: Employment Practices Liability Insurance for Chapter 12 and 13 Standing Trustees
-- Approval as an Actual and Necessary Expense

A growing concern among employers generally is the increasing number of lawsuits alleging improper employment practices such as age, sex, and racial discrimination, wrongful termination, sexual harassment, and actions under the Americans with Disabilities Act. Representatives of the National Association of Chapter Thirteen Trustees (NACTT) approached the United States Trustee Program (USTP) requesting authorization to allow the purchase of Employment Practices Liability (EPL) insurance as an actual, necessary expense of the trustee operation pursuant to 28 U.S.C. §586(e)(1). EPL insurance provides coverage for defense costs and compensatory damages arising from lawsuits alleging wrongful employment practices; it excludes coverage for intentional acts of discrimination and punitive damages.

The Standing Trustee Subcommittee with the UST/NACTT Liaison Committee have spent much time reviewing this issue. The two groups developed criteria for EPL insurance and heard a presentation from an EPL insurance carrier. The Subcommittee found that the type of coverage currently provided by other approved insurance policies, such as errors and omissions liability, does not cover wrongful employment practices. Given the increasing numbers of lawsuits being filed in the employment practices area, the lack of insurance protection afforded by current authorized policies, and the need to protect the trust, the Subcommittee recommended that EPL insurance be authorized as an actual, necessary expense of the trustee. I concur in the Subcommittee's conclusions, and have approved the purchase of EPL insurance as an actual, necessary expense effective immediately, subject to certain minimum standards.

Attached to this memorandum is a description of the criteria that an EPL policy must meet to be approved for purchase. Generally, EPL policies will not cover punitive damages, fines, or penalties. Also note that once a complainant has proven that an insured individual committed an

intentional act of discrimination, all defense and damage protection stops for that individual; however, the trust is protected.

This insurance is elective, not mandatory. Many trustees may question whether the low probability of a large award against the trust justifies the relatively high premiums. In time, we hope premiums will decrease as more insurance carriers enter the EPL market.

Additionally, premiums should decrease as the individual standing trustees institute formal compensation policies, formal employee performance reviews and other standard personnel management policies that lower the risk of lawsuits. Please work with the trustees in your regions to develop and institute these management practices. Furthermore, many EPL carriers offer loss control seminars; some may even make attendance at such a seminar mandatory. I urge you to encourage the trustees in your region to attend these free classes. Knowledge of employment law and the development of appropriate written policies and procedures concerning employment practices will help minimize the risk of improper actions.

Please advise the trustees in your region of this authorization. If you have any questions, call Sandra J. Forbes at 202/307-2829.

cc: Standing Trustee Coordinator

**POLICY DESCRIPTION ON STANDING CHAPTER 12 AND 13 TRUSTEES’
PURCHASE OF EMPLOYMENT PRACTICES LIABILITY INSURANCE & PAYMENT
OF PREMIUMS AS AN ACTUAL AND NECESSARY EXPENSE FROM THE EXPENSE
ACCOUNT**

Trustees may purchase an employment practices liability (EPL) insurance policy and premiums for such insurance will be considered an actual and necessary expense of the operation of the Standing Trustee. Any deductibles for claims under such policy may be paid from the trustee’s expense account funds along with said premiums. At the same time that the Trustee notifies the insurance carrier of any event or proceeding which may result in a claim, and of all claims made against the EPL policy, the Trustee must notify the United States Trustee. The United States Trustee will monitor the defense of the claim and the number and types of claims, and the Trustee will provide to the United States Trustee such information as the United States Trustee requires in order to perform this duty.

In order for the insurance policy to be approved for purchase, it must meet the following requirements. To the extent these requirements are exceeded, the standing trustee must weigh the costs and benefits and must obtain the approval of the United States Trustee.

I. INSURANCE CARRIER:

The insurance company or reinsurer must be listed on the Treasury Department Circular 570 or possess an A.M. Best Financial Rating of “A or Greater” and, in any event, be domiciled in the United States. The insurance company or the reinsurer must be licensed to do business in the state in which the standing trustee is appointed. Any reinsurer must provide documentation to show agreement to reinsure at least 75% of the covered EPL activity.

II. LIMITS OF LIABILITY:

Up to \$500,000 each claim.

Up to \$500,000 annual aggregate.

III. DEDUCTIBLE:

No more than \$10,000 each claim.

IV. COVERAGE:

! Coverage for Legal Costs and Compensatory Damages resulting from claims alleging wrongful employment practices, including discrimination, sexual harassment, wrongful termination, failure to employ/promote, breach of employment contract, employment related misrepresentation, wrongful discipline,

equal pay violations, wrongful deprivation of career opportunity, negligent evaluation, invasion of privacy, employment related defamation, retaliation, and employment related wrongful infliction of emotional distress.

- ! Coverage for Legal Costs and Compensatory Damages resulting from claims alleging acts of discrimination with regard to another person's employment because of that person's race, religion, creed, age, gender, national origin, disability, handicap, status as an individual with a disability (as defined in the Americans with Disabilities Act (ADA)), sexual orientation or preference and pregnancy.
- ! Coverage for failure to act with respect to public accommodation or accessibility as required by the ADA.
- ! Coverage should include defense costs for insured for allegations of intentional acts of discrimination until the point it is proven in a legal proceeding that the insured committed the act intentionally. At that point, all defense and damages protection will cease for the individual, but will continue for the entity or any other insured named in the suit.
- ! Insurance carrier cannot agree to settle a claim without the consent of the named insured.
- ! Definition of "insured" is to include employees of trustee while acting within the scope of the person's duties as such.
- ! If the policy is not renewed by the insurance carrier, named insured has the right, under certain conditions, to purchase a one-year extension period policy.
- ! Policy period should be one year.
- ! Written notice of cancellation by the insurance carrier is required at least 60 days in advance of cancellation.
- ! Carrier has the duty to defend.
- ! The insurance company or the reinsurer must provide a written statement to the standing trustee that the insurer or reinsurer meets all of the minimum requirements as set forth by the USTP.
- ! Severability provisions

V. PREMIUM:

To be commensurate with acceptable pricing levels developed in conjunction with the

NACTT, ACT², or standing trustees, and reviewed and approved by the United States Trustee. The Trustee must take all steps required by the insurance company to reduce risk so as to reduce premiums.