

# Amended Complaint Is Claim “First Made” When Original Complaint Was Filed

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In an unreported decision, a federal magistrate judge, applying Wisconsin law, has held that an amended complaint that added a new defendant and asserted a new count was a claim “first made” under the language of an EPL Policy when the original complaint was filed prior to the policy's inception. *Preston v. Wis. Health Fund*, No. 02-C-0448 (E.D. Wis. Feb. 12, 2004).

The insurer issued a claims-made EPL policy to the Wisconsin Health Fund. The policy stated that a claim “is first made when any Insured first becomes aware...of the filing of a complaint...or other similar document or pleading commencing a judicial, administrative, or other proceeding against an Insured.” The policy also provided that related claims “will be treated as a single Claim made at the time the first of such Related Claims was made,” and defined “Related Claims” as “all 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, or events of Employment Practices Wrongful Acts.”

Prior to the policy's inception date, the underlying plaintiff filed an administrative action and a lawsuit against the health fund and one of its directors, alleging gender and age discrimination and tortious interference with an employment contract. During the policy period, the underlying plaintiff filed an amended complaint in the lawsuit, adding another one of the health fund's directors as a defendant and asserting a new count of conspiracy against all of the defendants. The insurer denied coverage for the amended complaint, which it deemed to be a related claim to the original complaint filed prior to the inception of the policy period. The health fund then filed a third-party complaint against the insurer.

The court held that the insurer properly denied coverage. It reasoned that the policy provided that a claim is first made when “any” insured becomes aware of the filing of a complaint against an insured. It therefore rejected the argument that the claim against the additional insured added in the amended complaint was not made as to him until he became a defendant.

The court also concluded that the amended complaint was a “related claim” to the original complaint, and thus arose before the policy's inception date. The court reasoned that “[w]hether a claim is a ‘related claim’ is determined by the facts and underlying circumstances, not the particular parties or legal theories,” and that the allegations in the administrative action and the original and amended complaints in the lawsuit related to

the same set of facts or circumstances. As to the additional defendant, the court explained that it "defies common sense" to hold that a claim that two employees interfered with an employment contract shared no factual nexus with a claim that one of those employees interfered with the same contract. As to the additional count in the complaint, the court stated that the "plaintiff could not allege a claim of conspiracy without alleging what the defendants conspired to do."

For more information, please contact us at 202.719.7130.