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MARCH 26, 2021 • NO. 2

DEI Claims in Higher Education: Why Control over the Claims Resolution Process Matters and What Universities Need to Know to Maximize Their Influence over the Outcome

When more than just university dollars are at stake, understanding and maximizing control over the claims resolution process in advance is essential for higher education policyholders.

Diversity, equity, and inclusion ("DEI") have always been controversial topics at colleges and universities, but the last several years have seen DEI debates amplified to the greatest degree as more educational institutions take open and affirmative steps toward addressing discrimination and intolerance on campus.

At a time when issues of racial injustice and implicit bias are so much in the forefront of the national conscious, even *nascent* allegations of student or employee discrimination (or reverse discrimination) can subject institutions to instantaneous and major public relations ("PR") crises that come at a great cost to a university's reputation, which is paramount to its continued success.

Negative PR, however, is not the only thing schools must contend with in this new environment. Claims that universities and colleges have violated federal or state anti-discrimination laws, or failed to adhere to their own anti-discrimination or DEI policies, are now more than ever resulting in formal lawsuits, in addition to complaints filed with state anti-discrimination commissions and other similar oversight bodies.

Consider Smith College, for example, where a former employee plans to sue the school—in addition to filing a claim with the Massachusetts Commission Against Discrimination, for creating a "racially hostile workplace" after Smith mandated anti-bias training for its white employees in the aftermath of an alleged July 2018 racial profiling complaint by a student. Or a community college in San Diego, where five current and former Black employees are suing for a "palpable climate of anti-Blackness at Southwestern College." DePaul University was sued twice in six months by Black professors for alleged discrimination in the form of "irregularities," "increased scrutiny," and "microaggressions" in the tenure track evaluation process that violated DePaul's anti-discrimination policies. A former employee of Cal State University, Northridge also filed a lawsuit against the university for discrimination, harassment, retaliation, and failure to accommodate a disability. Further, in May 2020, U.S. District Court Judge Indira Talwani permitted a breach of contract and section 1981 claim by a former student disciplined by Harvard University for sexual assault to move forward against the university on grounds that the university racially discriminated against the student in its handling of a Title IX complaint.

These claims come at a significant cost to educational institutions—not only in terms of immediate crisis management response and defense costs—but in settlements, which are often expensive, multifaceted, and even at times, *unconventional.* The University of Iowa, for example, reportedly agreed to pay a former field hockey coach and her partner a total of $6.5 million to settle two discrimination lawsuits. New York University recently reached a settlement that reportedly involved an agreement to effectuate new anti-discrimination policies and training, in addition to maintaining records of discrimination complaints and the university's response to them.

All too often policyholders are caught off guard when they discover too late in the process that their strategy for resolution does not align with that of their insurer, and this problem is only compounded when the insured finds itself with a policy that limits or eliminates the insured's "say" in how matters are to be resolved.

When the stakes are so high for higher education policyholders, university risk managers must understand *in advance* who has the final say over how to handle DEI claims and how the insured can maximize their influence.

DO YOUR COVERAGE HOMEWORK BEFORE A DEI CLAIM RESPONSE COMES DUE

As an institution of higher education, it is critical to understand your insurance coverage as it relates to DEI claims before they happen. By the time an incident occurs, it is too late to review your policies. These claims require a swift and decisive response by risk managers in order to minimize damage and a *proactive* approach is necessary.

What questions should you ask when examining your coverage?

- Does the policy afford coverage for "immediate" response costs, such as starting an investigation or hiring a PR firm to craft a public response? Whose consent is required then? Who determines when the "crisis" is over, and costs are no longer covered?

- Who controls what in substantively responding to the claim? Namely, does your insurance carrier get to determine (i) how you defend a claim, such as which defense counsel will represent you, and (ii) the timing of when and how much to settle for versus engaging in litigation and potentially rolling the dice at trial?

- Whose consent is required when deciding to litigate or settle a claim and on what basis can consent be withheld? Does your policy contain a "pride" provision? Does it contain any alternative consent provision that proscribes consequences if consent is unreasonably withheld?

Understanding these issues in advance can make or break your response and either prevent devastating consequences or bring them to bear.

LEVERAGING CONTROL OVER CLAIM STRATEGY AND OUTCOMES

Your School's Interests Come First

A basic but a fundamental principle to remember when navigating DEI claims with insurance carrier involvement is that they cannot prioritize their interests ahead of yours in settlement strategy and execution. In other words, your insurance company cannot advise you to settle a DEI claim rather than defend it simply because it would be less expensive for the insurer's bottom line.

Courts routinely hold that insurance companies essentially have a fiduciary obligation to those they insure, and are in fact compelled to disregard their own financial interests when resolving claims, particularly where the policy affords most or all control to the insurer. *See, e.g., Pavia v. State Farm Mut. Auto. Ins. Co.,* 82 N.Y.2d 445, 452, 626 N.E.2d 24, 27 (1993) ("insurers typically exercise complete control over the settlement and defense of claims against their insureds, and, thus, under established agency principles may fairly be required to act in the insured's best interests"); *Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am.,* 65 N.J. 474, 323 A.2d 495 (1974) (recognizing that by virtue of insurance policy terms proscribing an insured from settling on his own behalf, insurer has made himself the agent of the insured in this respect, so that relationship of the insurer to its insured regarding settlement is one of inherent fiduciary obligation); *LaRocca v. State Farm Mut. Auto. Ins. Co.,* 47 F.R.D. 278, 280 (W.D. Pa. 1969) ("the insurance company and its counsel are in command at the conduct of the suit, and therefore act in an agency or fiduciary"). Even in jurisdictions that do not maintain that insurance companies should completely disregard their own interests, for example, if there is a conflict of interest, the insurer still must take actions, like paying for cumis counsel, so that the insured's interests remain protected. *See, e.g., State Farm Fire & Cas. Co. v. Superior Ct.,* 216 Cal. App. 3d 1222, 1226, 265 Cal. Rptr. 372, 374 (Ct. App. 1989).

Your School's Reputation Matters

Perhaps in no other industry does reputation matter more than in higher education. A school's reputation is its currency—a reflection of countless years of strategic leadership and the contributions of thousands of students, professors, staff, and researchers. A good reputation in secondary education is not easily won, but quickly lost. In other words, it matters a great deal.

Your insurance carrier may tell you that they cannot (or are under no obligation to) factor in reputational harm or negative publicity into the calculus of whether to settle or litigate a claim. If your policy contains *any* insured-favorable consent language, however, do not accept this outcome without protest.

Policies often contain "consent-to-settle" clauses, which are sometimes known as pride provisions. As with everything in insurance these days, these clauses can take on a variety of forms that range from clauses that allow an insured to veto a settlement without ramification to those that may hold an insured responsible for any judgement and/or attorneys' fees in excess of the settlement amount for which the insurer sought the insured's consent. You can assume that if your school's contract contains such a pride provision that you are paying extra on your premium for it and should make use of it. Understanding when and how you can withhold and/or leverage consent in response to a carrier that wants to litigate or settle against their wishes is key to maintaining control over strategy.

There is precedent for court's recognizing that inclusion of pride provisions indeed reflects a valuable right bargained for by the insured, paid for in the form of higher premiums, that affords the insured the wholesale right to control the decision of whether litigation will be pursued if it could jeopardize an insured's reputation. *See, e.g., Brion v. Vigilant Insurance Co.,* 651 S.W.2d 183 (1983) (Missouri appellate court held that an insurer could be held liable to its insured when the insurer unilaterally settled a malpractice suit within policy limits without the consent of the insured, causing the insured to suffer loss of business income and injury to his reputation); *Lieberman v. Emps. Ins. of Wausau,* 84 N.J. 325, 336, 419 A.2d 417, 422 (1980) (Supreme Court of New Jersey holding that the insured, a neurosurgeon, could proceed with a breach of contract cause of action against his insurer for settling a malpractice suit within policy limits without his consent that caused injury to his reputation, acknowledging that the holding was a reflection of the need for courts to harmonize its construction of the insurance contract with the fiduciary responsibilities of the insurer to its insured).

Policyholders should equally be on the lookout for provisions that allow a carrier to settle claims "as it deems expedient," as this has been the death knell to many cases in which an insured seeks to hold the insurer liable for engaging in settlements that damaged the insured's reputation. For example, in *W. Polymer Tech., Inc. v. Reliance Ins. Co.,* 32 Cal. App. 4th 14, 27, 38 Cal. Rptr. 2d 78, 85 (1995), the California Court of Appeal held that where a policy contains a settlement clause that permits the insurer to settle "as it deems expedient" any claim or suit, even if the suit's allegations are "groundless, false or fraudulent...," the court held that no reasonable reading of this language, which seemingly gives the insurer unfettered discretion, could serve as the basis to require the insurer to forgo settlement in favor of preserving the insured's reputation.

When You Can Withhold Consent and How to Do it Reasonably

Not every contract will grant your institution a clear-cut pride provision that gives you "veto" power as to the decision of whether to settle or litigate a claim. More likely than not, your insurance carrier may have more say over how to handle your claim than you do. And when no insured-favorable clauses or provisions are present, barring statutory authority to the contrary the insurance carrier ultimately has the final decision on settlement or litigation. What then?

Insurers still have a duty to settle and to act on that duty in good faith. As mentioned above, an insurance company cannot blindly ignore the insured's interests, even when the insurer, by the terms of the policy, has more control over the settlement. An insurer still has to act in good faith towards the policyholder. If the claimant wants to settle and makes a reasonable offer within policy limits, the insurer must consider it and may have a duty to settle in those circumstances.

If your insurer refuses to settle, you usually have three potential options for withholding your consent to proceed with litigation:

1. You can offer to contribute to a portion of the settlement to resolve the lawsuit.

2. You could settle the action with your own funds. If you choose this option, you should still inform your insurer and ask to waive any voluntary payments clause.

3. You could go forward with the litigation but protect yourself from excess judgement by assigning a bad-faith claim to the third party, asking them to agree not to execute against your assets.

Policyholders should proceed with caution, however. Liability contracts may expressly prohibit policyholders from making voluntary payments toward the defense or settlement of any claim or suit. Also, policies may contain provisions that state that if the insured does not consent to a recommended settlement, the ultimate liability of the insurer can be capped to not exceed the amount recommended. Before you proceed with any of these options, you should always consult an experienced insurance coverage attorney.

Ramifications for Carriers Who Ignore Your Interests

An insurance carrier may face several consequences if it ignores your wishes. When your insurer does not abide by the duty to settle, it is a breach of contract and in most instances renders the insurer liable for all ensuing damages, even if they exceed policy limits. In some states, it is considered a tort when the insurance company rejects a settlement within policy limits, which means the policyholder can potentially recover punitive damages and attorney's fees as well. These repercussions depend, of course, on the nature of your contract with the carrier, as well as the claim but may include:

- Waiver of insurer-favorable consent provisions;
- Paying for settlements that exceed the school's policy limits; and
- Paying for consequential damages for additional harm to schools.

These potential consequences could serve as considerable leverage for policyholders that want to convince their carriers to settle rather than litigate.

The Importance of Having a Consent Provision in Your Policy

Although schools have a few ways to oppose or influence a carrier's decision to settle, without an insured-favorable consent provision in your policy, your insurance company can very well settle out from under you no matter what (or how valid) your objections to settlement are. What's more, in the absence of an insured-favorable consent provision, the chances of getting a bad faith verdict against your carrier as a result of a bad settlement are potentially eliminated depending on the law in your state. *See, e.g., Feliberty v. Damon,* 72 N.Y.2d 112, 116 (1988) (holding that an insurer cannot be found guilty of bad faith for failing to advise of or obtain its insured's consent for settlement, even though it damaged the medical professional's reputation, where the policy did not specify insured consent was required).

The easiest and most cost effective way to ensure greater control over settlement outcomes is to negotiate for a policy that specifically requires the insurer to obtain your consent before proceeding with litigation or settlement of a claim brought against your university.

As a college or university, you may very likely have to deal with a DEI claim relating to harassment or discrimination in the near future. How you handle this claim is important for your institution's reputation as well as its bottom line. A DEI-related claim against your institution is already a lot to deal with. Don't let the situation spiral out of your control by giving too much power to an insurance carrier who may be more concerned about its own financial interests than the dangers the situation presents to your institution.

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