INSURING TITLE VII VIOLATIONS

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I. INTRODUCTION

Title VII was enacted in 1964 to prohibit employment discrimination based on race, sex, religion, color and national origin.[1] The Act allows an employee, or prospective employee, who has suffered from such discrimination to pursue relief through stated judicial procedures. The court may, if it finds the employer intentionally engaged in unlawful employment, enjoin the employer from engaging in the discriminatory practice; or the court may order appropriate affirmative actions such as reinstatement, hiring of the employee, back pay, and/or consequential and punitive damages.[2]

Title VII violations often result from intentional conduct. When this occurs and the employer is insured, courts have struggled with who should bear the financial loss, the employer or the insurance carrier. There are two competing public policy arguments that underlie the insurability of Title VII violations. The first argument is that it is against public policy to allow an insured to collect, from an insurance policy, damages resulting from its own intentional acts. The second is that innocent victims of discrimination might, or often would go uncompensated if insurance coverage was not allowed.

Many insurance carriers voluntarily provide Employment Related Practices Liability coverage to employers in order to allow the employers to shift the financial loss from discrimination claims onto the insurance carrier. However, where the conduct causing the claim is intentional, most courts have deemed it against public policy to allow such insurance coverage because an individual without an insurance policy will be less likely to

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1. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

2. Jerald J. Director, Annotation, *Construction and Application of Provisions of Title VII of Civil Rights Act of 1964 (42 USCA §§ 2000e et seq.) Making Sex Discrimination in Employment Unlawful*, 12 A.L.R. FED. 15 (2001).

engage in intentional tortious conduct.[3] These courts have applied the longstanding doctrine that an insurance company may not assume the risk of loss for damages resulting from an employer's intentional acts.[4] Although this general rule applies to all types of intentional conduct, it holds true for intentional employment discrimination on the theory that an employer, whose own assets are at risk, is less likely to intentionally discriminate in employment decisions.

The competing public policy argument is that in some circumstances, innocent victims of discrimination would go uncompensated if insurance coverage were not allowed, particularly if the discrimination award would bankrupt the employer. Some courts have responded to this competing interest by allowing an insurance carrier to indemnify an employer, and in some cases have imposed coverage on insurance carriers even though the insurance contract contains provisions that would preclude such coverage. However, this policy argument loses its application when an employer is not faced with bankruptcy and has sufficient funds to compensate the victim.

This article argues that both of these public policy arguments can be satisfied by allowing insurance coverage of catastrophic intentional discrimination claims when the employer demonstrates that without the benefit of insurance coverage, it will be forced into bankruptcy as a result of compensating the innocent victim. Part II of this article begins by exploring the purpose of Title VII, the types of discrimination claims that arise under this Act, and the general purpose of insurance policies particular to discrimination claims. It then describes how insurers have attempted to avoid coverage for intentional discrimination in the traditional insurance contracts; how insurers have voluntarily developed insurance coverage for discrimination; and how courts often impose coverage for discrimination onto insurers despite contract provisions that preclude coverage.

Part III presents the public policy issues pertaining to insuring Title VII violations. It surveys the development of the law that prohibits insuring against intentional conduct and the exceptions that have arisen in that law to facilitate the compensation of innocent victims. The survey presents three ways courts deal with this issue: first, insuring intentional discrimination is against public policy; second, insuring intentional discrimination is not against public policy; and third, insuring intentional discrimination is against

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3. Ward S. Connolly, *Sexual Abuser Insurance in Alaska: A Note on* St. Paul Fire & Marine Insurance Co. v. F.H.; K.W., 13 ALASKA L. REV. 265, 286 (1996).
4. *Id.* at 269.

public policy, unless an employer is held vicariously liable for the intentional discriminatory acts of its employees.

Part IV proposes that insurers should not be allowed to indemnify employers for their intentional discrimination except when the employer demonstrates to the court that it faces insolvency if it is forced to compensate the innocent victim without insurance coverage. This approach acknowledges the public policy against insuring intentional conduct, while at the same time serves the public interest of compensating innocent third parties. This article concludes in Part V with a discussion of the benefits of holding employers accountable for their intentional conduct, whether directly committed by the employer or through their employees, and that by holding the employers accountable, the primary purpose of Title VII is promoted.

II. BACKGROUND

A. Title VII Discrimination

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.[5] The employers that are subject to the Act are those "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."[6] The Supreme Court articulated the public interest served by the Act in *McDonnell Douglas Corp. v. Green*,[7] stating, "the broad, overriding interest, shared by employer, employee, and consumer is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions."[8] To promote this interest, Title VII broadly prohibits employment discrimination of any kind, such as, failure to hire or promote, discriminatory terms and conditions of employment, and wrongful termination.[9] In addition to the specific language in the statute, courts have held that employers may not discriminate against individuals with respect to job assignment or transfer,

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5. 42 U.S.C. §§ 2000(e)-2000(6) (West. Supp. 1993).
6. 42 U.S.C. § 2000(e)(b) (West. Supp. 1993).
7. 411 U.S. 792 (1973).
8. *Dep't of Cmty. Affairs*, 450 U.S. at 259 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).
9. DAVID G. CONDON, EMPLOYMENT PRACTICES LIABILITY INSURANCE HANDBOOK "THE EPLI BIBLE" 44 (6th ed. 1998).

promotion and demotion, hours of employment, minimum height requirements, break or lunch periods, seniority, smoking and grooming or dress policies, or fringe benefits such as retirement, pension, death benefits, health insurance, or profit sharing plans.[10]

As a public civil rights act, as opposed to a purely compensatory scheme to aid injured parties, the Act applies to discrimination that is intentionally or unintentionally caused by the employer's employment decisions.[11] Disparate impact and disparate treatment are the two types of discrimination for which injured parties may make claims.[12]

1. Disparate Impact

When a challenged practice is facially neutral but has an adverse effect on the employment opportunities of a protected group, it is deemed to have a disparate impact.[13] A disparate impact case involves unintentional discrimination. Discrimination is unintentional when a particular policy or practice is applied to all employees but has an adverse effect on a particular group of employees. For example, employers are free to implement employee selection criteria. However, when those criteria have a disparate impact on a group of employees within a protected class, the criteria becomes a violation of Title VII.

In *Griggs v. Duke Power Co.*,[14] the employer implemented an employee selection criterion that required either a high school education or that the prospective employee pass a standardized general intelligence test.[15] Chief Justice Burger, writing for the Court, held that the criterion violated Title VII because the employer had not shown that either standard was significantly related to successful job performance, and because both standards operated to disqualify African-Americans at a substantially higher rate than white applicants.[16] This is an example of a disparate impact claim that violates Title VII. Although the employer had no intention of discriminating against the African-American employees who filed suit, the impact of the criterion was discriminatory and unlawful. Thus, disparate impact claims do not require proof of intentional discrimination.

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10. Director, *supra* note 2, at 2.
11. Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 32 (1997).
12. CONDON, *supra* note 9, at 45.
13. *Id.*
14. 401 U.S. 424 (1971).
15. *Id.* at 427–28.
16. *Id.* at 431–32.

Disparate impact claims, unlike disparate treatment claims, do not pose policy concerns regarding insurability because they are not dependent upon a showing of the employer's intentional conduct. When the complaint against the employer alleges disparate impact discrimination, courts generally hold that insurance coverage that indemnifies the employer for such discriminatory acts does not undermine the strong public policy against discrimination embodied in Title VII.[17]

2. *Disparate Treatment*

When an employer intentionally treats an individual less favorably than others due to the individual's membership in a protected group, a disparate treatment claim may arise.[18] Often the person accused of intentional discrimination is someone the employer has legally empowered to act for the employer, such as a supervisor.[19] The employer, in this case, is vicariously liable for the acts of its agents.[20]

To establish a prima facie case of Title VII disparate treatment against an employer, the employee must prove: (1) that she belonged to a protected group; (2) that she applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[21] The plaintiff can prove the employer's intent either directly, by persuading the trier of fact that a discriminatory reason more likely motivated the employer in the employment decision, or indirectly, by showing that the employer's proffered explanation is not worthy of credence.[22] The prima facie case raises an inference of discrimination because the courts presume the acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.[23]

Once a plaintiff has provided sufficient proof to establish a prima facie case of discrimination by a preponderance of the evidence, the burden shifts to the defendant employer to present some legitimate, nondiscriminatory

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17. Mootz, *supra* note 11, at 33.
18. CONDON, *supra* note 9, at 45.
19. *Id.*
20. *Id.*
21. Director, *supra* note 2, at 3 (citing Reno v. Metro. Transit Auth., 977 F. Supp. 812 (S.D. Tex. 1997)).
22. *Id.* (quoting Kim v. Nash Co., 123 F.3d 1046 (1997)).
23. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (citing Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981)).

reason for the employment decision.[24] If the defendant does so, the plaintiff has the burden and opportunity to prove that the legitimate reasons given by the defendant were not true, but were a pretext for discrimination.[25] The plaintiff retains "the ultimate burden of persuading the trier of fact that he has been the victim of intentional discrimination."[26] This allocation of the burdens and the creation of a presumption by establishing a prima facie case is intended to progressively sharpen the inquiry into the elusive factual question of intentional discrimination.[27]

Courts considering disparate treatment claims have struggled with the insurability of the claims due to the public policy against insuring intentional acts of the insured.[28] Some courts apply the public policy against insuring intentional acts to disparate treatment claims without detailed justification.[29] Some courts rely upon state statutes that preclude insurance coverage of intentional acts as a statement of public policy.[30] However, other courts have permitted insurance coverage for disparate treatment claims, despite the presence of intentional acts, on the reasoning that such coverage is not against public policy.[31]

To understand the disparity in the courts' decisions, it is important to first understand how the courts interpret intentional conduct. In disparate treatment cases, courts have interpreted the intent necessary to prove the Title VII violation as "intent to treat one group of people adversely compared to another," as opposed to the "intent to produce the harm."[32]

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24. *Id.* (quoting *Dep't. of Cmty. Affairs*, 450 U.S. at 254).
25. *Id.* at 507–08.
26. *Id.* at 508.
27. *Id.* at 506 (citing *Dep't. of Cmty. Affairs*, 450 U.S. at 255 n.8).
28. Mootz, *supra* note 11, at 33.
29. *Id.* at 35 n.134. *See* Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distrib. Inc., 839 F. Supp. 376, 381 (D.S.C. 1993) ("The discrimination that Ms. Pressley complains of is not the type of action that an employer should be able to insure against.").
30. Mootz, *supra* note 11, at 35 n.135. *See* Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co., 18 Cal. Rptr. 2d 692, 698 (Cal. Ct. App. 1993) (interpreting Cal. Ins. Code § 533, which forbids insurance for willful acts as precluding insurance coverage in a case involving egregious, predatory, and intentional sexual harassment); B&E Convalescent Ctr. v. State Compensation Ins. Fund, 9 Cal. Rptr. 2d 894, 907–09 (Cal. Ct. App. 1992) (holding that liability for disparate treatment employment discrimination is precluded by the public policy embodied in Cal. Ins. Code § 533, as well as in the anti-discrimination statutes); Boston Hous. Auth. v. Atlanta Int'l Ins. Co., 781 F. Supp. 80, 83 (D. Mass. 1992) (interpreting state statute precluding insurance for deliberate or intentional wrongdoing as precluding coverage in light of allegations that the insured flagrantly and deliberately violated anti-discrimination provisions and government orders).
31. Mootz, *supra* note 11, at 36 n.136. *See* Union Camp Corp. v. Cont'l Cas. Co., 452 F. Supp. 565 (S.D. Ga. 1978).
32. CONDON, *supra* note 9, at 45.

With this understanding of how the employer's intentions relate to the success of a claimant in proving a Title VII disparate treatment violation and how the prima facie case establishes a rebuttable presumption of discrimination, the issue remains whether insuring against such violations is against public policy. This issue is best understood after reviewing the purpose and availability of insurance.

B. Insurance

1. Purpose

The general purpose of insurance coverage is to protect the assets of individuals and businesses from fortuitous losses. This protection may be from the loss of property resulting from physical damage such as fire, windstorm, earthquake, or flood; or from the financial loss resulting from the insured's tortious conduct against another party. Because few individuals or businesses can afford large financial losses, insurance provides a mechanism for spreading the risk among all insureds. This allows all individuals and businesses to pay premiums to insurance carriers in order to transfer their risk for such losses to the carrier. The insurance carriers, in turn, collect the premiums and pay for the covered losses suffered by the insureds. Since all insureds do not suffer a loss, the collection of premiums allows the carriers to allocate funds to the losses of those insureds that do experience a loss.

Several insurers voluntarily write coverage for an employer's violations of Title VII discrimination. A number of insurance carriers have developed Employment Practices Liability Insurance policies to respond to the employer's need to transfer the risk of large discrimination claims. Where employees have suffered job-related discrimination from an employer who has not purchased Employment Related Practices Liability insurance, some courts have imposed coverage upon insurance carriers through court decisions even when the insurance policy contained provisions that clearly excluded such losses.[33] In either of these situations, casualty insurance policies cover the violations. A casualty insurance policy, also known as third-party coverage, is one that is written to protect an insured from financial loss resulting from its own tortious conduct toward another party.

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33. Jeffery W. Stempel, *Judge-Made Insurance That Was Not on the Menu:* Schmidt v. Smith *and the Confluence of Text, Expectation, and Public Policy in the Realm of Employment Practices Liability*, 21 W. NEW ENG. L. REV. 283 (1999).

Therefore, this article will focus on casualty insurance policies and how they relate to Title VII violations. The most common casualty insurance policies that are purchased by employers are General Liability policies and Workers' Compensation and Employer's Liability policies. The insurance industry's intention when providing each of these coverages, as related to employment discrimination claims, is consistent with the public policy against insuring intentional acts.

a. General Liability Policies

The General Liability policy obligates the insurer to pay those damages arising from bodily injury, property damage, or personal and advertising injury caused by an occurrence for which the insured is legally obligated to pay.[34] The grant of these coverages is subject to exclusions that bar recovery in certain situations.[35] The amount of money that the insurer may have to pay is limited by the degree of insurance coverage contained in the policy. General Liability policies cover those civil liabilities imposed on the insured due to third parties being injured on the insured's premises, or bodily injury or property damage alleged to be caused by the insured's product.

The typical General Liability policy contains three provisions that have traditionally tended to exclude employment discrimination claims. The first provision is that an insurer only promises to pay for damages, as opposed to equitable relief. A General Liability policy obligates the insurer to pay only the damages the insured becomes legally obligated to pay. Employees seeking redress for discrimination are often awarded back pay, reinstatement and an injunction as to future employment practices.[36] These are equitable remedies that are not regarded as sums payable as damages.[37] This provision of the policy limits the insurer's obligations to avoid compensating insureds for equitable relief awarded to third parties. However, many courts in recent decisions have interpreted this provision more broadly. The majority

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34. Mootz, *supra* note 11, at 33 (citing James T. Hendrick & James P. Wiezel, *The New Commercial General Liability Forms–An Introduction and Critique*, 36 FED'N INS. & CORP. COUNS. Q. 319, 322 (1986)).

35. *Id.* at 11 (citing Richard J. Fitzgerald, *The ISO's General Liability Policy*, J. MO. B., Sept. 1987, at 383).

36. *Id.* at 43 (citing Foxon Packaging Corp. v. Aetna Cas. & Sur. Co., 905 F. Supp. 1139, 1144 (D.R.I. 1995) (no coverage for award of back pay and attorneys fees made by a state commission in response to a charge of racial discrimination)).

37. *Id.* at 44 (quoting Sch. Dist. of Shorewood v. Wausau Ins. Companies, 488 N.W.2d 82, 91 (Wis. 1992)).

rule now construes the term "damages" in accord with the plain meaning of the term and the reasonable expectations of the insured in order to find coverage for these equitable remedies.[38]

The second provision included in General Liability policies preventing payment of employment discrimination claims is the requirement that "bodily injury" be defined as "injury, sickness or disease."[39] Employees frequently allege only economic, reputational, or mental injury.[40] The traditional rule is that emotional distress resulting from discriminatory treatment does not constitute a bodily injury, unless it is manifested as independent physical impairments, such as migraine headaches, sleeplessness, etc.[41] This, too, is now changing as courts reject this limitation to physically manifested injuries and conclude emotional distress is an affliction of the body constituting bodily injury.[42] However, even where a court interprets "bodily injury" to include emotional distress, the General Liability policy contains an exclusion for bodily injury to an employee arising out of and in the course of employment.[43] This eliminates claims that are more appropriately covered in the employer's Workers' Compensation and Employer's Liability policy. Most courts hold that bodily injury caused by discrimination does arise out of and in the course of employment and, therefore, is not covered by the General Liability policy.[44]

The third provision of the typical General Liability policy that avoids coverage of discrimination claims is that the policy defines an "occurrence" as an "accident."[45] Since discriminatory behavior often involves intentional conduct, such conduct is not an "accident" and, therefore, not an "occurrence."[46] Further, most policies contain an exclusion for any injuries "expected or intended from the standpoint of the insured."[47] This limits the policy by excluding coverage for intentional discrimination claims.

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38. *Id.* (citing Liberty Mut. Ins. Co. v. Those Certain Underwriters at Lloyd's, 650 F. Supp. 1553, 1560 (W.D. Pa. 1987)).
39. *Id.*
40. *Id.*
41. *Id.* (citing Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distrib., Inc., 839 F. Supp. 376, 379 (D.S.C. 1993)).
42. *Id.* at 44–45 (citing Griffin v. Cameron Coll., Inc., 1997 WL 567958, at *2 (E.D. La. Sept 11, 1997) (rejecting a bright-line distinction between physical and mental injuries in medicine or in law, and holding that a discrimination complaint alleging mental pain and anguish and embarrassment falls within the "bodily injury" definition)).
43. *Id.* at 47
44. *Id.*
45. *Id.* at 45.
46. *Id* at 46.
47. *Id.*

Several courts have interpreted General Liability policies to provide coverage for discrimination claims, even though the original intent of insurance carriers, and the pricing and underwriting of these policies, contemplated that employment discrimination claims would not be covered in General Liability policies. The insurance industry has responded to the employers' need to transfer the risk of large losses resulting from discriminatory employment practices by developing Employment Related Practices Liability policies. These will be discussed after first determining whether insurers intend to cover employment discrimination claims in Workers' Compensation and Employer's Liability policies.

b. Workers' Compensation and Employer's Liability Policies

The typical General Liability policy excludes any injury that arises out of and in the course of employment. This leaves a gap in coverage that is filled by the Workers' Compensation and Employer's Liability [hereinafter WCEL] policy. The WCEL policy pays all benefits due from the employer pursuant to the governing workers' compensation law.[48] These laws vary by state, and generally impose no-fault liability on employers for death benefits, medical and rehabilitation expenses, and/or lost wages for employees that are injured during and in the course of their employment.[49] This allows the employers to avoid more expansive tort liability.[50] The Employer's Liability coverage contained in the WCEL policy promises to pay those damages the insured becomes legally obligated to pay to employees who have suffered accidents or disease arising out of and in the course of employment, but which fall outside the scope of the workers' compensation statutes.[51]

Victims of Title VII violations cannot rely upon the workers' compensation statutory benefits as compensation for the damages they have incurred. Most state statutes establish that workers' compensation benefits are administrative remedies as opposed to civil remedies.[52] For example, if an employee has been a victim of a Title VII violation, such as sexual harassment, and she files for workers' compensation benefits as dictated by the state statute, she will likely be denied the benefits because most courts

48. *Id.* at 8.
49. *Id.*
50. *Id.* (citing Suckow v. NEOWA FS, Inc., 445 N.W.2d 776, 779 (Iowa 1989)).
51. *Id.* at 9 (citing JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE 4571, 4625 (Berdal ed. 1979)).
52. Bond Builders, Inc. v. Commercial Union Ins. Co., 670 A.2d 1388, 1390 (Me. 1996) (citing 39-A M.R.S.A. § 104 (Supp. 1995)).

have found that bodily injuries resulting from sexual harassment fall outside of the workers' compensation system. Further, if the employee files a civil suit, the workers' compensation benefits will not be triggered because such benefits cannot be ordered as damages in a civil action.[53] This administrative requirement eliminates coverage for tort liability in the Workers' Compensation section of the WCEL policy.

The employer cannot rely upon the WCEL to pay the Title VII victim's damages, due to the contractual relationship between the employer and the insured. There are three provisions in the typical WCEL policy that eliminate coverage for Title VII violations. The first provision is an exclusion that bars recovery if there have been any illegal or willful acts by the insured employer. A violation of Title VII would be deemed an illegal act and, in disparate treatment cases, a willful act. Therefore, claims arising out of such violation would not be covered. The second provision excludes coverage under the Employer's Liability section of the policy for injury intentionally caused or aggravated by the insured. Therefore, where the conduct complained of is intentional discrimination, this policy will not respond through either the Workers' Compensation or the Employer's Liability sections of the policy. The third provision, added by some insurers, excludes any liability for personnel policies and practices, including discrimination and harassment.[54] The courts generally enforce these exclusions.[55]

The insurance industry has drafted the General Liability and the Workers' Compensation and Employer's Liability policies to avoid coverage for discrimination claims. Insurers continue to be unwilling to provide such insurance within the traditional liability policies covering third-party claims against the insured or in policies covering workers' injuries.[56] However, the insurance industry has not left the employers' need to transfer this risk unanswered. Instead, the industry has developed Employment Practices Liability Insurance [hereinafter EPLI] policies to respond to that need.

2. *Insurance Industry's Voluntary Coverage of Discrimination*

Although the insurance industry has attempted to keep coverage for employment-related offenses out of the traditional coverage forms mentioned

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53. Mootz, *supra* note 11, at 40–41.
54. *Id.* at 42 (citing Gen. Star Indem. Co. v. Sch. Excess Liab. Fund, 888 F. Supp. 1022, 1028 (N.D. Cal. 1995)).
55. *Id.* (citing Bond Builders, Inc. v. Commercial Union Ins. Co., 670 A.2d 1388, 1390 (Me. 1996)).
56. Stempel, *supra* note 33, at 315.

above, the industry has not been unresponsive to the need of insureds for such coverages. Many insurers have been willing to write coverage for employment discrimination claims as a unique type of business liability.[57] They do so as a separate insurance product that is carefully tailored to the risk, and is more closely monitored by the insurance carrier than is possible when the coverage is offered as a part of the traditional insurance coverage.[58] There are no standard coverage forms for these policies.[59] The policies have been developed in such a way as to afford the insurers the opportunity to better underwrite, price, monitor, and control the exposures.[60]

The typical EPLI policy covers liability arising out of the insured's employment-related offenses committed against the insured's employees.[61] Coverage generally includes the cost of judgments or settlements, as well as defense costs.[62] EPLI policies often contain exclusions for intentional acts, punitive damages, equitable relief, and injunctive relief. Insurers exclude intentional acts because this is deemed to be against public policy. Equitable and injunctive relief are also excluded because they are not deemed to be damages. In many states, punitive damages are deemed uninsurable because of the insured's intent to do harm.[63] Therefore, punitive damages are excluded in the EPLI policies.[64] Detailed analysis of these exclusions is beyond the scope of this article. However, it is important to note that claims resulting from intentional discrimination and judgments or settlements awarding equitable relief, injunctive relief, and/or punitive damages are not covered under EPLI policies.

Although insurers have developed EPLI policies that specifically provide coverage for employment related practices, few employers purchase the coverage. It is often considered too costly, and the policies often impose a substantial monetary retention for which the employer remains responsible. Self-insured retention or a deductible of $100,000 or greater is common among those insurance carriers who provide the coverage. For the premium charged, many employers opt to take the chance that they will not incur an employment related claim or, if they do, that the courts will find coverage under the traditional insurance contracts that the employers have purchased.

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57. *Id.* at 314–15.
58. *Id.* at 315
59. Mootz, *supra* note 11, at 13.
60. *Id.* at 13–14.
61. *Id.* at 13.
62. *Id.*
63. CONDON, *supra* note 9, at 88.
64. *Id.*

3. Court-Imposed Coverages

Where an employer has not purchased an Employment Practices Liability policy, courts may find coverage in the traditional policies. There are two ways in which a court may interpret insurance policies in order to impose coverage where the language of the policy does not clearly provide such coverage.[65] The first occurs when the courts find ambiguity in the insurance contract and, therefore, read the contract against the drafter, which is the insurance carrier.[66] The second interpretation imposes coverage to protect the reasonable expectations of the insured.[67]

a. Reading Against the Drafter

Frequently courts find insurance policies ambiguous. In these situations, employers may argue that they understood the policy, or interpreted the policy, as if it provided the coverage. An employer will likely prevail with this argument if the employer's interpretation is a reasonable construction of the policy language.[68] It is not necessary that the employer's interpretation is the *only* reasonable interpretation, or even *the* most reasonable interpretation. It is only necessary that the employer's interpretation is *a* reasonable one.[69] For example, the Fifth Circuit Court of Appeals found coverage for a sexual discrimination claim against an employer in *Western Heritage Insurance Company v. Magic Years Learning Centers and Child Care, Inc.*[70] In *Western Heritage Insurance Company*, the employer had purchased a General Liability policy that contained an employer liability exclusion and an intentional acts exclusion.[71] It also contained a Physical and/or Mental Abuse Limitation Endorsement that read as follows:

> In consideration of the premium charged, it is hereby understood and agreed that Bodily Injury and Property Damage includes any act, which may be considered sexual in nature and could be classified as an Abuse, Harassment, Molestation, Corporal Punishment or an Invasion of an individual's right of Privacy or control over their physical and/or mental

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65. Mootz, *supra* note 11, at 19.
66. *Id.* at 20.
67. *Id.* at 22.
68. *Id.* at 20.
69. *Id.*
70. 45 F.3d 85 (5th Cir. 1995).
71. *Id.* at 87–88.

> properties by or at the direction of an Insured, an Insured's employee or any other person involved in any capacity of the Insured's operation . . . .[72]

The court held that this endorsement that granted coverage for sexual harassment made the employer's liability exclusion and the intentional acts exclusion ambiguous.[73] If the court were to enforce the employer's liability exclusion and the intentional acts exclusion to exclude coverage for sexual harassment, then the Physical and/or Mental Abuse Limitation endorsement would be meaningless.[74] This is an example of how courts have found coverage for an employer's Title VII violations despite exclusions within the insurance contract for employer's liability or for intentional acts.[75] This same approach can be used to find ambiguity when an employment practices liability exclusion is contained in the policy.

b. Protecting Reasonable Expectations

Another way that courts impose coverage for Title VII violations is by interpreting the contract consistent with the insured's reasonable expectations. This doctrine is more carefully applied and is only invoked where an exclusion "(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction."[76] Generally, the insured will argue that the policy is unconscionable or provides illusory coverage for the premium charged.[77] The insurer will prevail against these arguments if the exclusion is clear, and the exclusion highlights the fact that the coverage is included.[78] These two precautions protects the reasonable insurance purchaser from being surprised about the limitations of his or her insurance policy.[79]

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72. *Id.* at 88.
73. *Id.* at 88–89.
74. *Id.*
75. Mootz, *supra* note 11, at 20 (citing W. Heritage Ins. Co. v. Magic Years Learning Ctr. & Child Care, Inc., 45 F.3d 85, 88 (5th Cir. 1995), which held that a policy provides coverage for a claim of sexual harassment when a "physical abuse" coverage endorsement renders later exclusions ambiguous, since the court must adopt the construction of the policy urged by the insured so long as it is not unreasonable); Tr., Missoula County Sch. Dist., No. 1 v. Pac. Employer's Ins. Co., 866 P.2d 1118, 1124 (Mont. 1993), which held that a policy exclusion of damages paid for sums owed pursuant to a contract was ambiguous with regard to the employee's statutory claims for bad faith termination and recovery of lost wages and must be read in favor of the employer).
76. Mootz, *supra* note 11, at 24 (quoting Clark-Peterson Co., Inc. v. Indep. Ins. Ass'n, 492 N.W.2d 675, 678 (Iowa 1992)). Eviscerate is defined as to disembowel or to gut (Clark-Peterson Co., Inc. v. Indep. Ins. Ass'n, 492 N.W.2d 675, 678 (Iowa 1992).
77. *Id.* at 24 n.83.
78. *Id.* at 25.
79. *Id.*

The Supreme Court of Iowa applied the reasonable expectations doctrine in *Clark-Peterson Co., Inc. v. Independent Insurance Ass'n*.[80] In the underlying suit, the IowaCourt of Appeals, affirming the trial court decision, held Clark-Peterson liable for intentional discrimination by improperly terminating an alcoholic employee.[81] This employer had purchased an Umbrella Liability policy that provided coverage similar to a General Liability policy. An Umbrella Liability policy covers claims that either exceed the limits of liability in the General Liability policy or that are excluded from the General Liability policy but are not excluded on the Umbrella Liability policy. Clark-Peterson's Umbrella Liability policy defined "occurrence" to mean "an accident, or a happening or event, or a continuous or repeated exposure to conditions which occurs during the policy period which unexpectedly or unintentionally results in Personal Injury."[82] "Personal Injury" was defined to include discrimination or humiliation.[83] The Umbrella Liability policy also contained an exclusion stating, "this policy does not apply: . . . (h) to any liability for Personal Injury arising out of discrimination including fines or penalties imposed by law, if (1) insurance coverage therefore is prohibited by law or statute, or (2) committed by or at your direction . . . ."[84] The court held that the termination was an intentional act that did not meet the definition of an occurrence.[85] Further, the employer directed the termination and, therefore, the employee's claim was not covered under the precise wording of the policy.[86]

Despite the fact that coverage was effectively excluded under the employer's Umbrella Liability policy, the court held the insurer liable for the underlying claim.[87] It did so by applying the reasonable expectations doctrine. To apply the reasonable expectations doctrine, either the words of a policy must be found so ambiguous that an ordinary layperson would misunderstand the coverage, or the insurer must have fostered coverage expectations through the surrounding circumstances.[88] Once either of these situations are deemed to apply, then "the objectively reasonable expectations of applicants and intended beneficiaries regarding insurance

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80. 492 N.W.2d 675, 679 (Iowa 1992).
81. *Id.* at 676.
82. *Id.* at 676 n.3.
83. *Id.*
84. *Id.*
85. *Id.* at 677.
86. *Id.*
87. *Id.*
88. *Id.*

policies will be honored even though painstaking study of the policy provisions would have negated those expectations."[89] The reasonable expectations may be proven by the underlying negotiations or inferred from the circumstances surrounding the purchase of the policy.[90]

The Iowa Supreme Court affirmed the appellate court's decision that the insured was entitled to recover pursuant to the reasonable expectations doctrine.[91] The court did so because the definition of "personal injury" granted coverage for discrimination or humiliation.[92] The insurer and insured had explicitly agreed upon this coverage. The definition of "occurrence" eliminated intentional conduct and, thus, excluded disparate treatment claims.[93] This exclusion eviscerated the coverage for intentional discrimination.[94] The Iowa Supreme Court further found that one reason Clark-Peterson purchased the policy was due to the availability of discrimination coverage.[95] Because the ordinary layperson could have reasonably expected coverage for discrimination, the insurer was held liable to pay the judgment awarded in the underlying case.[96] This case provides an example of how some courts,applying the reasonable expectation doctrine, impose coverage on an insurer despite the apparently clear language of the policy excluding such coverage.

C. Summary

Title VII prohibits employment discrimination based on race, sex, religion, color, and national origin. This prohibition includes both disparate impact and disparate treatment. Insureds often seek coverage for both of these types of claims under their insurance policies. The typical General Liability policy and the Workers' Compensation and Employer's Liability policy both contain provisions that usually prevent coverage for intentional employment discrimination claims. The insurance industry has responded to the needs of employers by developing Employment Practices Liability Insurance policies that specifically address employment discrimination.

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89. *Id.* (quoting Aid (Mut.) Ins. v. Steffen, 423 N.W.2d 189, 192 (Iowa 1988)).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 678.
95. *Id.* at 677.
96. *Id.* at 679.

However, these policies also contain provisions that would eliminate coverage for intentional discrimination.

Some courts have found coverage in insurance policies where the policy contained exclusions that would otherwise prevent such coverage. The courts have imposed liability upon the insurers when courts find the policy language ambiguous by reading the contract against the drafter, which is the insurer. Alternatively, even when the policy language is very clear that coverage for a particular claim is not included, courts have imposed liability on the insurer to protect the insured's reasonable expectations. Courts may do this to prevent injustice either to the insured that was surprised to learn that his or her policy did not provide the coverage, or to the innocent third-party that has suffered loss and would go uncompensated if insurance coverage was not found.

With this understanding of Title VII, insurance industry products, and how the courts have responded to finding no coverage for Title VII violations, the next part of this article will discuss the public policy against insuring Title VII intentional discrimination. Regardless of whether the court imposes coverage on the insurance carrier by reading the policy against the drafter or by protecting the reasonable expectations of the insurance purchaser, the court must interpret the insurance contract consistent with the public policy. Contracts that are against the public policy are not enforceable.[97] Therefore, even where insurance companies have voluntarily provided coverage for employment discrimination, if that discrimination is intentional and it is deemed against public policy to insure against intentional acts, the insurance contract may not be enforced. Part III will present the public policy arguments against insuring intentional acts, which includes violations of Title VII by intentional discrimination.

III. PUBLIC POLICY OF INSURING INTENTIONAL CONDUCT

The public policy arguments regarding insuring Title VII violations focus on the insurability of disparate treatment claims; disparate impact claims do not involve intentional acts and are, therefore, deemed insurable.[98] Public policy arguments generally result in very uncertain outcomes because

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97. Mootz, *supra* note 11, at 31 (citing RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979); E. Allen Farnsworth, CONTRACTS §§ 5.1–5.9 (2d ed. 1990)).

98. *Id.* at 32. *See* Save Mart Supermarkets v. Underwriters at Lloyd's London, 843 F. Supp. 597, 606 (N.D. Cal. 1994) (interpreting Cal Ins. Code § 533) (West 1993); Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co., 641 N.Y.S.2d 802, 808 (N.Y. Sup. Ct. 1996) (analyzing the New York Insurance Department letter dated May 31, 1994), *aff'd*, 651 N.Y.S.2d 301 (N.Y. App. Div. 1996).

typically cases can be found on both sides of any public policy argument.[99] There are two main arguments relevant to the insurability of disparate treatment Title VII violations.[100] First, to hold insurance companies financially liable for the intentional acts of their insureds is to give a license to the insureds to engage in those acts.[101] Second, to do otherwise may be to deny compensation to innocent victims.[102] When determining whether the availability of insurance acted as a license to intentionally discriminate, courts analyze whether the insurance coverage induced the insured to engage in misconduct.[103] To understand the nature of these two arguments, one must first understand the development of the general rule against insuring intentional acts.

A. First-Party Coverages

First-party coverages indemnify the insured for losses suffered as a result of damage to his or her own property. Common examples are insurance policies issued to cover the insured's home and personal property. The general rule against insuring intentional acts of the insured developed when insurers sought relief from liability for property that was intentionally destroyed by the owner of the property in order to collect the insurance proceeds.[104] An exception to this rule also developed.[105] When an insured intentionally burns down his house, innocent co-insureds, such as mortgagees, should be entitled to recover some portion of the proceeds unless the policy has a clear exclusion for intentional acts.[106]

B. Third-Party Coverages

Third-party coverages are those coverages that protect the insured from the financial consequences of his or her own tortious conduct. An example of a third-party coverage is a General Liability policy that protects the

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99. Connolly, *supra* note 3, at 285.
100. *Id.* at 285–86 (citing Gary L. Fontana & Anthony J. Barron, *Insurance Coverage for Intentional Acts*, Insurance Claims and Coverage Litigation 1993, at 3–4 (PLI Order No. A4–4415, 1993)).
101. *Id.*
102. *Id.* at 286.
103. St. Paul Fire & Marine Ins. Co. v. F.H.; K.W., 55 F.3d 1420, 1423 (9th Cir. 1995).
104. *Id.* (citing Dairy Queen v. Travelers Indem. Co., 748 P.2d 1169, 1172 (Alaska 1988) (principles of public policy deny insured right to recover when he or she intentionally sets fire to property)).
105. *Id.*
106. Connolly, *supra* note 3, at 268–69 (citing Atlas Assurance Co. of Am. v. Mistic, 822 P.2d 897 (Alaska 1991)).

insured from the financial consequence of an injury to a third party who has come onto the insured's premises and was injured because the insured negligently failed to keep his or her property in a safe condition. Insurers have tried to apply the general rule against insuring intentional acts to third-party coverages. However, courts have struggled with the public policy of doing so. With regard to discrimination claims, courts have taken one of three positions. One group of courts has held that it is against public policy to insure discrimination claims. A second group of courts has held that it is not against public policy to insure discrimination claims. A third group of courts holds that it is not against public policy to insure against the liability vicariously imposed on an insured for discrimination claims.

1. Against Public Policy

Ranger Insurance Co. v. Bal Harbour Club, Inc.[107] is a leading case for the premise that insuring against intentional discrimination would undermine the public policy against discrimination.[108] The Florida Supreme Court applied a two-part balancing test weighing the public policies at stake.[109] It first determined whether the existence of insurance coverage stimulates discrimination, and then determined whether the anti-discrimination statute is intended primarily to compensate the victim or to deter wrongdoing.[110] Phil and Rona Skolnick were a Jewish couple attempting to purchase a home in an area that required country club membership.[111] The property at one time was subject to a deed restriction that prohibited occupation by anyone not a member of the Caucasian race or by anyone having more than one-fourth Hebrew or Syrian blood.[112] Although this restriction had expired, the deed further provided that the seller could not convey the property to anyone who was not a member of the Bal Harbour Club.[113] The country club denied the plaintiffs' membership and the Skolnicks alleged that the denial was due to their religious affiliations.[114] The Skolnicks brought suit against Bal Harbour alleging that Bal Harbour had willfully disregarded their rights and that Bal Harbour's actions precluded them from obtaining good and marketable title to the

107. 549 So. 2d 1005 (Fla. 1989). This case dealt with the issue of housing discrimination.
108. *Id.* at 1005.
109. *Id.* at 1007–08
110. *Id.*
111. *Id.*
112. *Id.* at 1005–06.
113. *Id.* at 1006.
114. *Id.*

property.[115] The suit was settled by Bal Harbour paying the Skolnicks $25,000.[116]

The Florida Supreme Court determined that those persons wishing to impose their own preference for discrimination on others would be insulated from the financial consequences of such action if insurance were allowed to indemnify them.[117] Further, the court stated that "anti-discrimination statutes are primarily intended to deter discriminatory behavior as a matter of civil rights law, and that aggrieved persons would not be left without adequate remedy in the absence of insurance coverage since most suits are brought against commercial enterprises."[118] The court held that the availability of insurance coverage for intentional discrimination violates the public policy and the underlying purposes of civil rights statutes.[119] Thus, the court prohibited from indemnifying Bal Harbour for the loss that resulted from its own intentional discrimination against the Skolnicks.

2. *Not Against Public Policy*

Courts which hold the view that insuring discrimination claims is not against public policy have applied the "innocent third-party" exception that developed from the first-party coverage claims. For example, the Seventh Circuit recognized that "public policy considerations that preclude insurance coverage for self-inflicted injury lose a great deal of their force in the context of insurance for tortious liability to innocent third parties."[120] Addressing the concern that the insured is induced to engage in the misconduct by the existence of insurance coverage, several courts have held that when liability insurance is designed to compensate innocent third parties for injuries caused by the intentional misconduct of insureds, the insurance coverage may indemnify without violating the public policy.[121] Similarly, in an often-cited case from a Michigan Court of Appeals, the court held that a doctor's professional liability insurance policy may cover damages to a

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115. *Id.*
116. *Id.*
117. *Id.* at 1008 (quoting W. Cas. & Sur. Co. v. W. World Ins. Co., 769 F.2d 381, 385 (7th Cir. 1985)).
118. Mootz, *supra* note 11, at 34–35 (citing Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005 (Fla. 1989)).
119. *Id.* at 35.
120. Connolly, supra note 3, at 286–87 (citing United States Fire Ins. Co. v. Beltmann N. Am. Co., Inc., 695 F. Supp. 941, 948 (N.D. Ill. 1998), *rev'd* on other grounds, 833 F.2d 564 (7th Cir. 1989)).
121. St. Paul Fire & Marine Ins. Co. v. F.H.; K.W., 55 F.3d 1420, 1423 (9th Cir. 1995).

patient whom the doctor had sexually abused.[122] The court stated that "it is unlikely that the insured was induced to engage in the unlawful conduct by reliance upon the insurability of any claims arising therefrom or that allowing insurance coverage here would induce future similar unlawful conduct by practitioners."[123] Relying on this reasoning, other courts have held that it is not against public policy to permit innocent victims of an insured's intentional misconduct to be compensated by the insured's professional liability policies.[124]

Similar public policy arguments have been rejected in cases involving public school districts that have obtained insurance for liabilities arising out of wrongful acts.[125] Coverage is usually provided in Directors and Officers Liability policies or Errors and Omissions Liability policies that do not contain exclusions for intentional acts.[126] The insurance carriers writing these policies must rely upon public policy arguments to avoid coverage for intentional discrimination.[127] The Sixth Circuit Court of Appeals expressly rejected the analysis from *Ranger* in *School District for the City of Royal Oak v. Continental Casualty Co.*[128] The court held that the insurance carriers are responsible for protecting themselves by drafting discrimination exclusions into their policies.[129] Further, the court determined that inquiring into the stimulative effect of the availability of insurance against discrimination is too unmanageable as a legal test.[130] The court stated: "perhaps the existence of liability insurance might occasionally 'stimulate' such a contretemps, but common sense suggests that the prospect of escalating insurance costs and the trauma of litigation, to say nothing of the risk of uninsurable punitive damages, would normally neutralize any

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122. *Id.* (citing Vigilant Ins. Co. v. Kambly, 319 N.W.2d 382 (Mich. Ct. App. 1982)).
123. *Id.*
124. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Jacobson, 826 F. Supp. 155, 164–65 (E.D. Va. 1993) (public policy does not forbid patients from being compensated by doctor's professional liability policy for doctor's intentional insemination of them with his own sperm), *aff'd*, 48 F.3d 778 (4th Cir. 1995); St. Paul Fire & Marine Ins. Co. v. Shernow, 610 A.2d 1281, 1285–86 (Conn. 1992) (public policy does not prohibit indemnity for compensatory damages flowing from dentist's intentional sexual assault of patient); St. Paul Fire & Marine Ins. Co. v. Asbury, 720 P.2d 540, 542 (Ariz. Ct. App. 1986) (because Arizona public policy favors compensating injured persons, victims of doctor's sexual abuse can be compensated through his professional liability policy).
125. Mootz, *supra* note 11, at 36.
126. *Id.*
127. *Id.*
128. 912 F.2d 844, 847–50 (6th Cir. 1990).
129. *Id.*
130. *Id.*

stimulative tendency the insurance might have."[131] Therefore, the court held that the insurance policy provided coverage for intentional discrimination.

3. Vicarious Liability Exception

As a middle road between the previous two extremes, courts have developed a vicarious liability exception to the public policy against insuring intentional acts. The United States Supreme Court in *Burlington Industries, Inc. v. Ellerth*[132] considered whether an employer can be vicariously liable under Title VII for an actionable hostile work environment.[133] Although the Supreme Court did not address the issue of insurability of the employer's vicarious liability, the *Ellerth* case is the basis for the understanding that an employer will be held liable for its employees' discriminatory acts. The Supreme Court discussed vicarious liability of the employer when the discrimination results in tangible employment action, disparate treatment, and when the discrimination is in the form of harassment and either does or does not result in tangible employment action.[134] To determine whether an employer is vicariously liable in either of these situations, the Court turned to the principles of agency law because the term "employer" is defined under Title VII[135] to include "agents."[136]

The Restatement of Agency § 219(1) states, "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[137] Early federal court decisions held that employers were not liable for discriminatory acts by their employees because discrimination under Title VII requires proof of intentional conduct and it was not the employers who acted intentionally.[138] However, the *Burlington* Court recognized that the law now imposes liability on the employers if the employee's "purpose, however misguided, is wholly or in part to further the master's business."[139] The Court further relied upon the Restatement's

131. *Id. See e.g.* New Madrid County Reorganization Sch. Dist. No. 1 v. Cont'l Cas. Co., 904 F.2d 1236, 1241–43 (8th Cir. 1990); Indep. Sch. Dist. No. 697, Eveleth v. St. Paul Fire & Marine Ins. Co., 515 N.W.2d 576 (Minn. 1994) (opining that a school district will not discriminate against its employees simply because it carries wrongful acts insurance coverage; nor does such insurance give license to the school district for committing intentional wrongs).
132. 524 U.S. 742 (1998).
133. *Id.* at 746–47.
134. *Id.* at 759–64.
135. 42 U.S.C. § 2000e(b) (West Supp. 1993).
136. *Burlington*, 524 U.S. at 754.
137. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).
138. *Burlington*, 524 U.S. at 756.
139. *Id.* (quoting W. Keeton, et al., PROSSER AND KEETON ON LAW OF TORTS § 70 (5th ed. 1984)).

definition of conduct within the scope of employment, whether or not intentional, as conduct "actuated, at least in part, by a purpose to serve the employer," even if it is forbidden by the employer.[140] The Court acknowledged, that every Federal Court of Appeals that has considered the issue, has determined that an employer is vicariously liable for the discriminatory acts of its employees that result in tangible employment action.[141] Further, by applying the law of agency, the Court held:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.[142]

This raises the question whether the employee's intent can be imputed onto the employer for the purposes of excluding coverage under insurance policies either by imposing an intentional act exclusion within the policy or by finding that public policy prohibits insuring intentional acts.

Some states have addressed the insurability of intentional acts by statute. For example, California has enacted the California Insurance Code section 533,[143] which the California Courts of Appeal have interpreted as "an implied exclusionary clause which by statute is to be read into all insurance policies."[144] Insurance Code section 533 codifies the general rule prohibiting insurance policies from indemnifying insureds against liability due to the insured's own willful wrong based on public policy considerations.[145] However, the California Courts of Appeal have also found that section 533 does not apply where the plaintiff is not personally at fault.[146] In another California case, the California Court of Appeals held that section 533 does not preclude indemnification when the cause of action was predicated upon vicarious liability of an employer for an employee's act under the doctrine of respondeat superior, and not upon the employer's own

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140. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1958)).

141. *Id.* at 760.

142. *Id.* at 765.

143. Cal. Ins. Code § 533 ("An Insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others.").

144. Connolly, *supra* note 3, at 281–82 (quoting United States Fid. & Guar. Co. v. Am. Employers' Ins. Co., 205 Cal. Rptr. 460, 464 (Cal. Ct. App. 1984)).

145. Arenson v. Nat'l Auto. & Cas. Ins. Co., 286 P.2d 816, 818 (Cal. 1955).

146. *Id.*

intentional acts.[147] These are examples of courts that have acknowledged that insuring against intentional acts is against public policy, but have made an exception when the liability is imposed vicariously. Although these cases are specific to the California statute, this rationale may be generalized to apply to all questions of vicarious liability imposed upon employers for an employee's intentional conduct.

The development of the public policy arguments against insuring intentional conduct began in cases where the plaintiffs pursued first-party coverage when they had intentionally destroyed their own property; and courts established that such recovery was against public policy. As insurers began seeking relief from the insured's liability to third parties when the insured intentionally injured them, the courts began taking different approaches. The fact that court decisions render differing results is not explained by the application of different tests. Instead, each court applies a balancing test, weighing the benefit to the plaintiff of permitting insurance coverage against the harm to society of encouraging future intentional wrongdoing.[148] The courts that prohibit insurers from indemnifying insureds for their intentional acts accept the argument that to do otherwise would give license to insureds to discriminate. Courts that permit insurance reject the idea that denying coverage will reduce discrimination.[149] A third group of courts take the middle road by allowing insurers to indemnify those insureds, who are vicariously liable for an agent's intentional acts. These courts emphasize the importance of compensating innocent victims. This middle road has allowed employers to transfer their liability for intentional discrimination by their employees to insurance companies.

IV. INSURING INTENTIONAL DISCRIMINATION TO COMPENSATE INNOCENT VICTIMS

Courts continue to employ the balancing test in intentional discrimination cases and the results continue to be diverse. The Supreme Court has not yet considered a case directly challenging the public policy behind Title VII as it pertains to insuring intentional discrimination claims. The time has come for a consistent approach to these cases. *Ranger Insurance Co. v. Bal Harbour Club, Inc.*,[150] contained a thorough analysis of this topic and should

147. Fireman's Fund Ins. Co. v. City of Turlock, 216 Cal. Rptr. 796, 804 (Cal. Ct. App. 1985).
148. Mootz, *supra* note 11, at 37.
149. *Id.*
150. 549 So. 2d 1005 (Fla. 1989).

be used as the basis for denying insurability of Title VII disparate treatment claims. However, in those cases where an innocent third-party will remain uncompensated, an exception should be made to allow for insurance coverage only where the insured can prove that the employer will become bankrupt if it is forced to compensate the injured party without the benefit of insurance coverage.

A. Title VII's Purpose: Deterring Discrimination and Compensating the Victim

Courts holding that insuring against intentional discrimination is against public policy rely on *Ranger* to support their position. In *Ranger*, the Florida Supreme Court analyzed the purpose of the anti-discrimination statutes to determine if the primary purpose was to compensate the victim or to deter wrongdoers.[151] If the purpose was to compensate the victim, then the availability of insurance is consistent with that purpose.[152] However, if the purpose was to deter wrongdoers, then the availability of insurance is not a paramount consideration.[153] The court reviewed the state statutes and commented that Florida's Human Rights Act is patterned after Title VII of the Civil Rights Act of 1964.[154] The primary purpose of both the federal and state acts is "to eliminate discrimination in employment and that its secondary purpose is to compensate victims of discrimination."[155] The court determined that the purpose of compensating victims of discrimination is not compromised by prohibiting indemnification, because most discrimination cases are brought against commercial enterprises that have far greater resources than individuals.[156]

B. Insurance Availability: Encouraging Discrimination

In *Ranger*, the Florida Supreme Court considered the nature of the conduct giving rise to the allegation of discrimination.[157] The case raises a legitimate concern that the availability of insurance will directly stimulate the

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151. *Id.* at 1008–09.
152. *Id.* at 1008.
153. *Id.*
154. *Id.* at 1009.
155. *Id.* (quoting comment to Florida Statutes §§ 760.01–760.10 (1987)).
156. *Id.* at 1009.
157. *Id.* at 1007–08.

intentional wrongdoer to violate the law.[158] Conversely, insurance might remove the employers' incentive to proactively monitor the workplace to minimize the possibility of future discrimination claims. The court distinguished intentional acts such as assault and battery, arson, recklessness and drunken driving.[159] These acts are crimes that carry with them substantial deterrents independent of potential civil liability.[160] Further, risk of personal injury is a deterrent to negligence, recklessness, or drunken driving.[161] Alternatively, discrimination is not a crime, and no risk of injury exists to discourage the prejudiced from intentionally harming others by the exercise of their own biases.[162] In contradicting the defendant's and District Court's supposition, that making intentional discrimination insurable will not encourage such discrimination, the Florida Supreme Court pointed to the lack of empirical support for such supposition and argued that it defied human experience.[163] It further quoted Judge Easterbrook of the United States Court of Appeals, for the Seventh Circuit, who stated:

> Once a person has insurance, he will take more risks than before because he bears less of the cost of his conduct. A person with insurance on his driving may take less care on the road. Insurance therefore tends to increase the likelihood that the insured risks will come to pass. Sometimes the increase is likely to be small—the driver is probably more interested in his own neck than in small increases in his financial liability. Other risks, however, could be affected more substantially. If an insurance policy were to cover a city's wilful racial discrimination, the people making policy for the city could indulge their own preference for discrimination at little risk to themselves. The city would pay in higher rates, but given the insurance each employee would be more likely to discriminate.[164]

The Florida Supreme Court agreed with Judge Easterbrook that allowing insureds to transfer the financial consequences of their intentional discrimination to insurers would encourage the insureds' employees to discriminate more freely. Therefore, the court determined that discrimination is a type of behavior that will be encouraged if the perpetrator bears no risk of personal harm due to the existence of insurance.[165] To

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158. *Id.* at 1007.
159. *Id.*
160. *Id.* at 1008.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* (quoting W. Cas. & Sur. Co. v. W. World Ins. Co., 769 F.2d 381, 385 (7th Cir. 1985)).
165. *Id.*

allow insurance would defeat the goals of Title VII to eliminate discrimination.

C. Public Policy: Compensate the Innocent Victim

Many courts have found *Ranger* unpersuasive and allowed insurability of intentional discrimination claims, either by emphasizing the public policy of compensating innocent victims or the vicarious liability exception against insurability of intentional discrimination. The primary concern of both of these viewpoints is that an innocent victim may go uncompensated if insurance carriers are not allowed to indemnify the insureds. This concern can be met, while both being consistent with *Ranger* and recognizing that the public policy is against insuring intentional discrimination due to the encouraging effect of insurance availability, by limiting its application only where the defendant clearly demonstrates an inability to compensate the innocent victim. This will allow insurance coverage only in truly catastrophic claims that would drive the employer into bankruptcy.

Arguably, courts might disagree on what constitutes enough financial inability to allow for insurance indemnification. Therefore, the rule should require the individual or commercial entity to prove that paying the innocent victim would result in bankruptcy. The primary benefit to this rule is that an innocent victim is assured that she will be able to collect the judgment that is awarded to her without worrying about the employer filing bankruptcy. This rule has three additional benefits: (1) the deterrence objective of Title VII will be preserved; (2) the employers and employees will benefit because the employers will remain in business despite a truly catastrophic claim; and (3) the insurance industry will benefit because it will be able to underwrite, monitor, and price insurance coverages in order to realize a profit.

Employers will be deterred from the intentionally discriminatory acts because they will have to pay the victim for damages resulting from such conduct from their own financial resources, unless they show the court that they will suffer bankruptcy. Deterrence is preserved because most judgments will be non-catastrophic, and the employer, therefore, will have to pay for the judgments out-of-pocket. The showing of eminent bankruptcy will cause negative publicity, focusing not only on the discrimination but also on the employer's poor financial state. Further, employers will likely experience employee turnover as employees learn of the financial state of their employer. All of these are significant concerns for any commercial entity, and will cause it to seriously consider the acts of its employees and

its employment practices. The public interest of reducing discrimination will be served by making the employers bear the financial consequences of their intentional acts while providing compensation for the innocent victims.

Employers and employees alike will benefit from this rule because the employer will be assured of the ability to remain in business despite a judgment for a catastrophic discrimination claim if she has purchased an EPLI policy. By enforcing the public policy against insuring intentional discrimination, some employers, particularly smaller employers that meet the Title VII threshold of employing fifteen or more employees but are unable to fund for catastrophic employment practices claims, would be forced out of business and the community would suffer. The employees would be dependent upon unemployment insurance and various social services until they are able to obtain other employment. Allowing insurance to compensate the victim of the employment discrimination, if the employer can demonstrate that it would become insolvent, will eliminate the negative impact of unemployment.

Allowing insurance for employment-related claims only when the claims are catastrophic is also beneficial to the insurers who voluntarily provide coverage for employment-related practices, including discrimination. These insurers can control their results by more closely underwriting the financial condition of their insureds. Rates can be based upon analysis of the insured's financial records, allowing the insurers to collect more premium where it appears the insured will be more likely to pay a claim due to the insured's financial condition. The increased premium provides incentive for insurers to write coverage for those insureds who are financially weak. Also, the increased premium will provide an incentive for employers to implement monitoring policies and procedures, to reducing the likelihood that one of their employees will intentionally discriminate against other employees.

Insurers will also benefit from this solution because it minimizes court-imposed insurance coverage where no coverage was intended. As insurers are able to voluntarily write the coverage at a profit, causing the premiums for this coverage to become more affordable, employers will be able to purchase the coverage. Courts may then recognize that those employers who have not purchased the available coverage have decided to self-insure this exposure.

By adopting and enforcing the rule that insurance coverage for intentional discrimination claims is prohibited except where the employer shows eminent insolvency, courts can provide a consistent approach to the public policy underlying Title VII. The innocent victims will be

compensated. The employers will be deterred from such intentional discrimination. The insurance industry will be able to underwrite the coverages to obtain a profit and to make the coverage more affordable for all employers. However, as courts implement this rule, they must also abolish the vicarious liability exception.

D. Abolishing the Vicarious Liability Exception

As discussed in Part III of this article, some courts have taken a middle road by recognizing the public policy against insuring intentional acts but allowing insurance coverage when the employer is held vicariously liable for an employee's intentional discrimination against another employee. To avoid encouraging intentional discrimination by allowing insurance coverage for liability under the vicarious liability doctrine, this exception to the rule against insuring intentional conduct should be abolished. Those courts that have found it unjust to prohibit insurance for the liabilities that have been vicariously imposed upon the employer should consider the power that the employers have in establishing the corporate culture. Courts currently recognize the corporate culture in many discrimination claims, and recognize its importance by requiring a plaintiff, who is proving her prima facie case, to directly persuade the trier of fact that a discriminatory reason more likely motivated the employer in the employment decision. Statements about changes in the corporate culture by top executives have a probative value as to possibly discriminatory acts performed by lower level supervisors.[166] Also, courts consider the atmosphere in which the company made its employment decisions as circumstantial evidence of intentional discrimination.[167] The corporate culture may be shown through a supervisor's statement about the employer's employment practices or managerial policy by indicating the atmosphere in which a company makes its employment decisions.[168]

Inquiry into the corporate culture is currently made only when the employee is alleging that the employer intentionally discriminated against her, as opposed to cases in which the employer is held vicariously liable for an employee's intentionally discriminatory actions. However, these are examples of how the courts recognize that a corporate culture is created by upper level management. If a lower or middle level manager makes

166. Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 93 (2d Cir. 2001).
167. *Id.* at 92–93 (quoting Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 642 (3d Cir. 1993)).
168. *Id.* (citing Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 333 (3d Cir. 1995)).

employment decisions based upon discriminatory reasons, that manager apparently feels comfortable in making those types of decisions. A corporate culture against such decisions would make these managers feeling uncomfortable in making such decisions.

To meet the deterrence objective of Title VII, employers should be held to a standard of demonstrating intolerance of managers who make employment decisions based on discriminatory reasons. This standard can be demonstrated by evidence of the following: (1) the employer has educated all of its employees of its policy of not tolerating discriminatory decisions; (2) the employer has provided the employees with ways of reporting such decisions; and (3) the employer has consistently responded to such decisions with significant punitive consequences whenever the employer has learned that a manager has made such a decision. Although this is the type of evidence that employers may currently use to rebut a presumption of the employers' intentional discrimination in sexual harassment cases, as illustrated in *Ellerth*, the employer should not escape this scrutiny when it is being held vicariously liable. If the employer can make this showing, the intention of the manager who made the intentionally discriminatory decision should not be imputed upon the employer. Otherwise, the court should impute that intent upon the employer barring indemnification by an insurer. Whenever an employer is challenged with a claim of intentional discrimination, and she is held liable due to vicarious liability, she should not escape the financial consequences by relying upon a vicarious liability exception to the rule against insuring intentional conduct. Insurance coverage should not be allowed, unless the employer demonstrates that it will suffer bankruptcy if she is forced to pay the damages to the victim. This will motivate the employer to actively establish a corporate culture in which all managers and employees know that discrimination will not be tolerated. When all employers take proactive measures to affect their corporate culture in such a way, then the objective of Title VII will be met and discrimination will be deterred.

V. CONCLUSION

Title VII of the Civil Rights Act of 1964[169] prohibits employment discrimination based on race, sex, religion, color, and national origin.[170]

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169. 42 U.S.C. §§ 2000(e)–2000(6) (West Supp. 1993).

170. Tex. Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 259 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).

The primary purpose of the statute is to eliminate employment discrimination.[171] Where disparate treatment is alleged, an employer is held liable for the damages when a prima facie case of intentional discrimination is proved. This can be done by proving the employer's intent to discriminate, or by holding the employer vicariously liable for an employee's intentional discrimination.

Court decisions have varied widely when determining whether public policy allows for the financial consequences of these actions to be transferred to insurance carriers. Some courts have imposed such transfer to insurance carriers despite provisions in the insurance contract that would preclude coverage of discrimination claims. These decisions have defeated Title VII's primary purpose because the employers have less interest in controlling their exposure to discrimination claims when they know that an insurance carrier will pay the damages.[172]

To promote Title VII's primary purpose, it is necessary to eliminate insurance coverage for intentional discrimination except when the employer demonstrates to the court that it will become insolvent if it compensates the innocent victim for her damages. Doing so is consistent with the public policy against insuring intentional acts; it is consistent with the public policy of compensating innocent victims; and it encourages employers to proactively establish a corporate culture that does not tolerate discrimination. As a byproduct of this rule, insurers will be able to develop, underwrite, and price insurance products that will respond to intentional discrimination only when the employer proves eminent insolvency. This will make the coverage affordable to all employers, and will allow the insurance industry freedom from court-imposed coverages. It will also promote stable employment of those employees who would lose their jobs if the employer were forced into bankruptcy. The primary purpose of Title VII, which is to deter discrimination, will be promoted by holding employers accountable for their intentional conduct and their corporate culture.

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171. Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 So. 2d 1005 (Fla. 1989).

172. Where coverage is found in an insurance policy, the insurer must also pay for defending the suit. For a detailed discussion regarding an insurer's duty to defend, *See* Francis J. Mootz, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1 (1997).