



Legal Beat

By MICHAEL SEAN QUINN

Workplace Sex and the Innovative Agent

The mission of insurance agents is a difficult one in many ways. Not only must they get all the paperwork right and make sure others do so as well (no easy task), they must communicate the not always articulate desires and restrictions of prospective insureds and underwriters in an accurate and comprehensive, but also comprehensible, way. Even that is not the most difficult part of the agent's task. In addition they must provide complex advice about all sorts of matters pertaining to insurance, its siblings and its substitutes.

Consequently, agents have to be able to think like both insurers and insureds, as well as subtly appreciate, carefully balance and meaningfully disclose improbable but quite real dangers. Some of these dangers are physical (and perhaps to be insured against), but some are completely social—arising as they do from difficulties and imperfections

in the legal system (a set of purely human conventions, if ever there was one). Many a claim has been derailed in litigation.

This kind of multi-dimensional problem is exemplified by issues surrounding Employment Practices Liability insurance (EPL)—a relative newcomer to the array of insurance products. It covers discrimination of various sorts, which is neither intended nor countenanced by senior management. Usually, EPL is a claims-made policy.

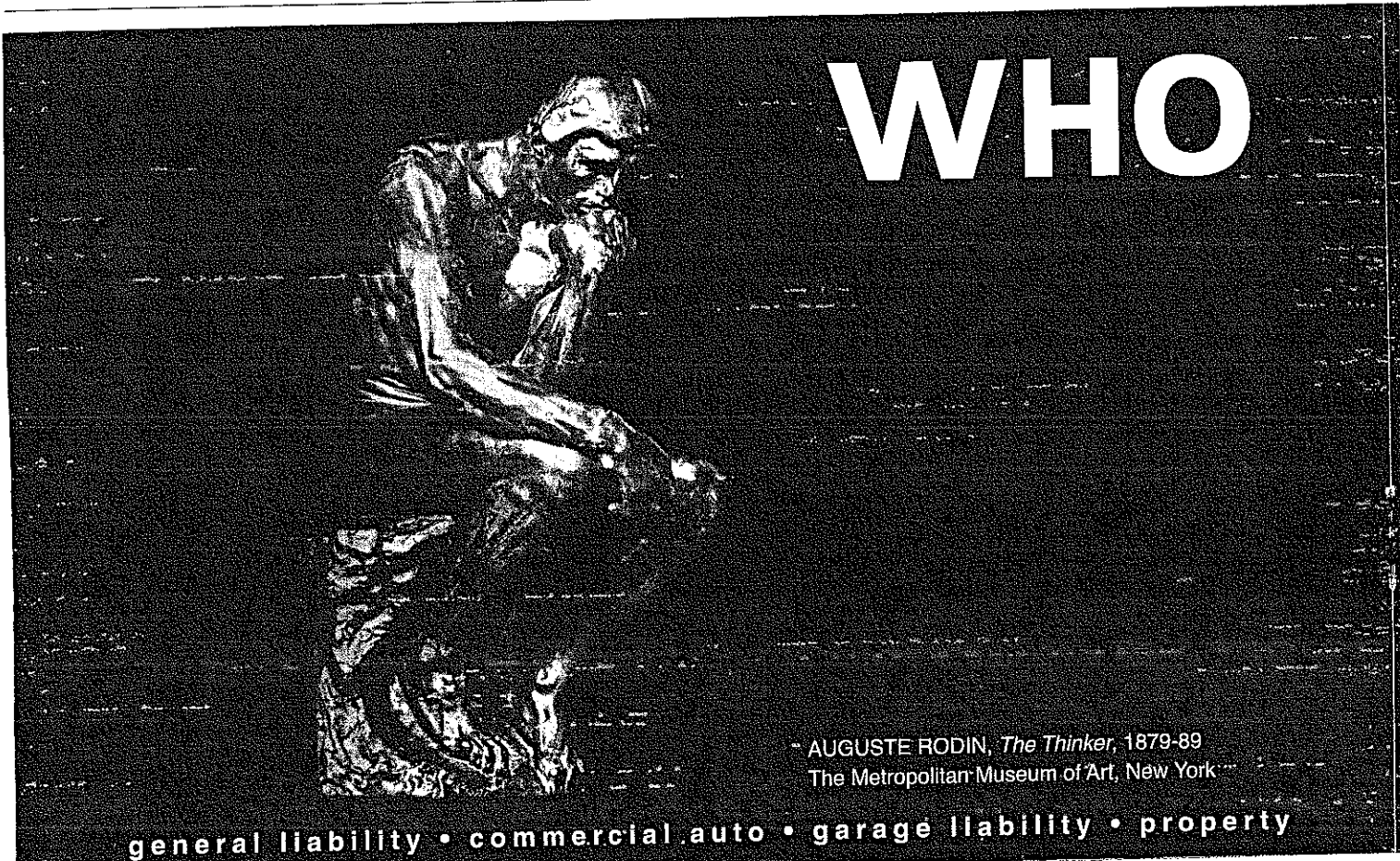
EPL insurance raises interesting questions for the insurance intermediary. Should my customers buy this product? If so, at what price? If not everyone needs EPL coverage, who should buy it? Should it be made available by endorsement? Should it be endorsed upon CGL policies, D&O policies, or maybe both?

Is the product reliable? Some of the exclusions are quite open-ended. This will

tempt some insurers. And it is unclear how this product fits the paradigm of liability insurance. Liability insurance is for fortuities, i.e., accidents and their close kin. Nowadays the main coverage desired under EPL policies is for gender discrimination in its various forms. This is true even though other forms of discrimination are covered. But sexual harassment is hardly ever accidental. Can courts, which love the principle of fortuity, be trusted to enforce EPL policies expansively? How can this be explained to insureds? Can my customers rely on the product?

Furthermore, the culture seems to be getting tougher about sexual harassment recoveries. Groups of women are making substantial recoveries because they have systematically been paid less than their male counterparts and sometimes because of the glass ceiling reality. At the same time, it appears to be getting more difficult for individual women to prevail in sexual harassment cases. This is particularly true in the so-called hostile environment cases, where there is no *quid pro quo* (no "this for that" sexual deal offered), but there is sufficient aggressive sexuality in the work place to change the conditions of employment.

Of course, hostile environment cases can be won. In *Scribner v. Waffle House*, Chief



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Judge Jerry Buchmeyer, of the Northern District of Texas, awarded the plaintiff nearly \$700,000 in actual damages and over \$7.4 million in punitive damages. This was just last year. Then again, if his 194-page opinion is accurate, the treatment of the plaintiff was not just a scandal; it was downright outrageous. Here is but an example: a supervisor placed a Polaroid camera between the legs of unsuspecting women and snapped pictures. Obviously, this is an extreme case—even so, Waffle House is currently attempting to obtain coverage from its insurers.

Changing tide

On the other hand, attitudes are hardening. Paula Jones lost her case against President Clinton without even a trial. Jay Leno openly ridicules both Jones and Clinton without mercy. The will of the harassment defense bar to go to trial appears to be stiffening. Women are becoming less sympathetic to the idea of awarding big judgments for what they regard as semi-invited mild harassment. (Minor harassment is not actionable at all.) It is commonplace to observe that many prominent feminists excuse Clinton in the Monica Lewinsky

affair, even if Linda Tripp's reports are the absolute truth. The same attitude must carry over to other cases of voluntary involvement, if the virtue of consistency means anything. Apparently, some promi-



nent feminists no longer believe that striking differentials in power inevitably undermine the voluntary character of all adult sexual relations in the work place.

These changes—if they are real—presage a tougher legal environment for female plaintiffs in Title VII-type cases.

The already difficult lot of insurance agents advising clients as to the need for EPL insurance has been made more complicated recently. On June 26, 1998, the United States Supreme Court decided two significant Title VII civil rights cases, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*.

Both of these cases were hostile environment cases. In both of them, the issue was the vicarious liability of employers for the sexually harassing acts of supervisors. To be precise, the issue was whether a business is vicariously (i.e., automatically) liable for the sexual misconduct of a supervisor, when the business was not independently negligent.

The facts of both cases are similar. In *Faragher* the plaintiff was a lifeguard on a public beach. The supervisor repeatedly made lewd remarks, spoke of women in deprived terms and touched women lifeguards in offensive ways. In *Ellerth* the supervisor again and again made boorish sexual remarks, as well as offensive physical gestures. At one point, the supervisor felt the

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plaintiff's knee during a promotion interview.

In both cases, the broad issue was whether the employer of both the victim and the supervisor were liable for the supervisor's conduct, even though the employer had done nothing wrong and certainly had neither authorized nor encouraged the harassment. Obviously, each supervisor was an agent of the organizational defendant. At the same time, sexual conduct with subordinates was not and never is within the scope of the supervisor's employment. Isn't such behavior

like a detour from the agent's appointed rounds for which the employer has no vicarious liability?

Who takes the blame?

Yet such conduct is fairly predictable, in the aggregate, so perhaps the risk of liability ought to be placed upon employers as a cost of doing business. Perhaps the cost should be charged to the enterprise rather than the victim. If such conduct is charged to the enterprise, of course, it can be insured against. This argument is a historic foundation of strict liability in tort

for product defects. Perhaps it should carry over.

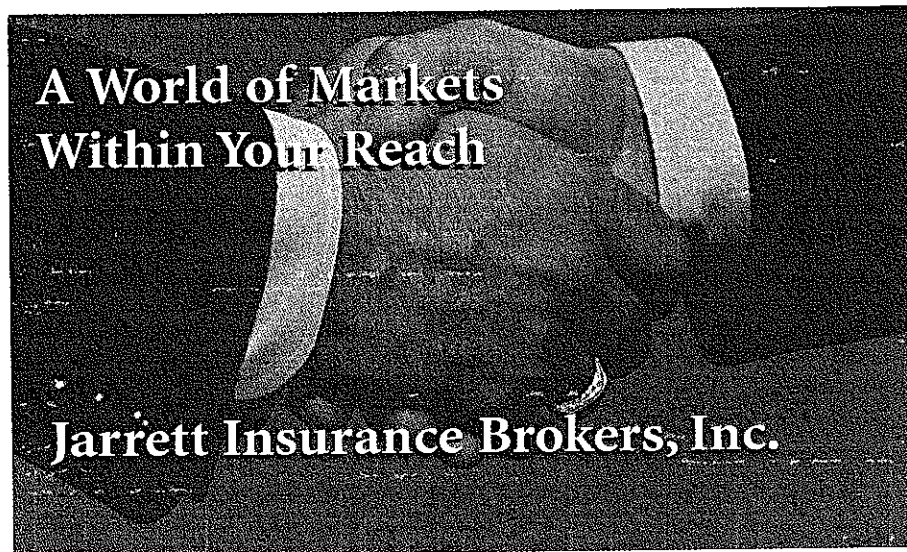
Ultimately, the Supreme Court adopted the view that supervisors have access to subordinate women whom they can sexually harass as a result of their supervisory authority. It is the position of the supervisor in the employment hierarchy within the business that makes the harassment possible. Hence, employers should be vicariously liable since supervisors are aided in accomplishing their purpose by the existence of his agency relationship with the employer. There is nothing new about this rule. It is nothing but agency law applied in a new context. It is also a variation on the enterprise theory of liability just discussed.

In the best tradition of common law courts, the United States Supreme Court also created a new affirmative defense for employers. It has two elements. First, to defeat liability the employer must prove that it "exercised reasonable care to prevent and correct promptly any sexually

To defeat liability the employer must prove that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."

harassing behavior." Second, to defeat liability the employer must prove that the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Notice that the court has grafted a common law device onto a statutory scheme.

Usually, proving this affirmative defense will require an employer to show that it had an effective anti-harassment policy which was suitably publicized and in support of which there were appropriate administrative arrangements. As a general rule, this affirmative defense will require the employer to prove that it had an adequate and effective grievance mechanism. Often, the employer will have to demonstrate that the plaintiff unaccountably failed to pursue her complaint inside the



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company and either remained silent or walked out.

Solving the Problem

So what do these cases mean for insurance agents? How do they impact her advisory function?

Of course, EPL insurance is a significant and attractive option—it pays defense costs, which are frequently the insured's largest exposure. Then again, if a business creates a satisfactory anti-harassment policy, publicizes it inside the company, hires lawyers and human resource people to hold training sessions, and institutes a well publicized and effective grievance procedures, the chances are good that businesses can defeat liability fairly, quickly and without enormous expense.

Promulgating standards and administrative structures is never cheap. Ideally, a rational business will try to strike a balance between internal reform and external insurance. Moreover, it's extremely likely that insurers will take *Faragher* and *Ellerth* to heart and require evidence of satisfactory preventive and corrective machinery as part of the application process. There are significant analogues already in place for various kinds of malpractice insurance. Such matters are now one significant component of forward-looking risk management.

Sophisticated insurance agents are frequently one-quarter risk managers, at least. An internal administrative structure for preventing, controlling and correcting sexual harassment is now critical to the risk management program of every company with more than a few employees.

One of the services some insurance brokers perform is to help arrange for appropriately tailored anti-harassment training and administrative structures. Soon, ready-to-wear standards and structures will be available from off-the-rack software, and many companies will take comfort in the idea that such material will defeat Title VII liability.

This idea is false, of course. Appropriate control standards, procedures and structures will defeat liability only if they are genuinely rooted in the culture of the business of the defendant. Facilitating such transformations is a long way from traditional insurance agency functions, but it is on the same continuum, and addressing such matters is unavoidable, especially if insurers begin inspecting (or auditing) for it.

In the heydays of pure, free market capitalism, businesses—even quite large ones—could police their own personnel matters. Those days are waning. Inch-by-inch, spot-by-spot the law is more and

more requiring businesses to act as fair, deliberate and rational entities in dealing with their employees. *Faragher* and *Ellerth* are but two more turns of this wheel.

Similarly, businesses are accustomed to governmental entities and insurance companies requiring various kinds of safety programs. Now, government and soon various insurance companies will semi-require anti-harassment programs. Some carriers already do. These programs will end up being quite expensive. Then again, they should drive down the price of

insurance at least a little. Agents will play a significant role in these changes.

But how will they be compensated for their effort? Commissions on insurance products sold may not be sufficient, and they may have a distortive effect on agent perceptions and activities. So what's next? Hourly fees? Saints preserve us. ■

Quinn is an Austin-based attorney with the law firm of Sheinfeld, Maley & Kay. He was recently selected to receive the 1998 Outstanding Law Journal Article Award by the Texas Bar Foundation.



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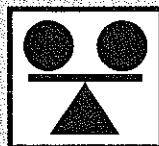
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