



Resistance is Futile: Insurers' Broad Duty to Defend in California

The Ninth Circuit Court of Appeals recently upheld and solidified California's broad duty to defend standard for insurers. In *PHP Ins. Serv., Inc. v. Greenwich Ins. Co.*,¹ the court upheld summary judgment in favor of the policyholder, finding that the insurer ("Greenwich") had a duty to defend the policyholder in the underlying case. The court explained that California courts have repeatedly held that even remote facts buried within an underlying action that may potentially give rise to coverage are sufficient to invoke the duty to defend.

In the underlying class action suit, the plaintiffs alleged that their employer, PHP Insurance Service, violated the California Labor Code ("CLC") by hiring recent Vietnamese immigrants or new graduates unsophisticated in employment and labor rights and depriving them of overtime pay, adequate meal and rest periods, and compensation for vested vacation hours, and failing to maintain payroll records. The Vietnamese employees were also allegedly required to change their names to American-sounding names.

PHP Insurance Service sought coverage for the lawsuit under its Employment Practices Liability Insurance policy (the "EPLI Policy"), which was issued by Greenwich. While the class action suit did not allege causes of action for discrimination or harassment, both of which would have been covered under the EPLI Policy, the court of appeals upheld the trial court's determination that the complaint triggered Greenwich's duty to defend.

The trial court reasoned, and the court of appeals affirmed, that if there is potential for coverage of even a single claim, the insurer has a duty to defend all claims asserted against the insured. In their analyses, courts compare the terms of the policy with the allegations in the underlying complaint, along with any extrinsic facts known to the insurer at the time of tender, to see whether there is a potential for coverage. The trial court determined that there was a possibility that the plaintiffs could assert claims arising out of their factual allegations of harassment and discrimination, thereby triggering the duty to defend until it could be shown that there was no longer any potential for coverage. The court of appeals affirmed the trial court's conclusion that the allegations regarding the policyholder's predatory practice of hiring Vietnamese immigrants and insisting that they change their names fell within the EPLI Policy's coverage for discrimination and harassment.

Greenwich argued that it had no duty to defend due to the EPLI Policy's exclusion for claims "based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving ... any actual or alleged violation of ... the Fair Labor Standards Act ["FLSA"] ... or similar provisions of any federal, state or local statutory law or common law". However, the court of appeals upheld the trial court's determination that this exclusion did not clearly eliminate the duty to defend the claims brought pursuant to CLC Sec. 226, which requires itemized wage statements, on the basis that no provision in the FLSA requires such statements.

This case serves as an important reminder that an insurer's duty to defend is not extinguished unless it can definitively prove that there is no possibility of coverage for the underlying suit. As such, in California, insurers should avoid resisting their obligation to pay their insureds' legal fees.

For more information please call [Malcolm Ranger-Murdock](tel:951-365-3149) at 951-365-3149 or email at mrm@sdvlaw.com.

1. 08 F. App'x 921 (9th Cir. 2018).