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Insurers' Broad Duty To Defend Employment Claims In Calif.

By **Cheryl Sabnis** (January 31, 2018, 12:32 PM EST)

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On Jan. 17, 2018, the Ninth Circuit issued a long-awaited ruling in the matter of PHP Insurance Service Inc. v. Greenwich Insurance Co., a declaratory judgment action between California insureds and their employment practices liability insurance (EPLI) provider involving a dispute regarding coverage for a putative class action asserting California wage and hour and related claims. This ruling affirms a 2015 summary judgment order by a California federal court, holding that while the wage and hour claims asserted in the complaint were not subject to a duty to indemnify, the EPLI insurer did have a duty to defend under California law. This ruling brings with it a helpful reminder to holders of EPLI policies not to shy away from tendering employment claims to their insurers.

In 2012, employees of PHP filed a putative class action complaint asserting violations of California's wage and hour laws based upon misclassification and failure to pay overtime. According to the complaint, the putative class was comprised predominantly of Vietnamese-speaking individuals, including recent immigrants and others unsophisticated regarding their employment rights. The plaintiffs alleged that PHP purposefully hired such persons to improperly take advantage of their lack of knowledge regarding their rights, compelled them to work through meal periods, restricted their workplace communications and required some individuals to change their Vietnamese names to "American" names. These introductory allegations aside, the lawsuit asserted only wage and hour claims premised on violations of the California's Labor Code and its Unfair Competition Law as well as a California Private Attorney General Act (PAGA) claim. PHP ultimately settled its dispute with the employees on a class basis.

While this action was pending, PHP tendered the complaint to Greenwich Insurance Company, its EPLI insurer, who denied coverage. PHP filed a declaratory judgment action in California federal court seeking a declaration that Greenwich had a duty to both defend and indemnify PHP in the underlying action. The parties filed competing summary judgment motions and, on Aug. 12, 2015, the district court issued an order finding Greenwich had a duty to defend PHP in the underlying action, but not a duty to indemnify it. See PHP Ins. Serv. Inc. v. Greenwich Ins. Co., 15-cv-00435-BLF, 2015 U.S. Dist. LEXIS 106274, *16 (N. D. Cal. Aug. 12, 2015).

Under California law, the rule concerning whether or not the duty to defend has been triggered is quite different from the rule triggering a duty to indemnify. The duty to defend in California arises when a third party potentially seeks damages within the coverage of the policy. An insured need only show that

the underlying claim may fall within policy coverage, while the insurer must prove that it cannot. If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage.

The district court found that the complaint's allegations concerning the alleged targeting and mistreatment of Vietnamese individuals and recent immigrants suggested potential coverage for "harassment" and/or "discrimination" claims as defined by the policy. Even though such claims were not asserted in the underlying lawsuit, the district court held that Greenwich's policy promised to defend PHP against "any covered Claim, even if the allegations in such Claim are groundless, false or fraudulent." Because the allegations of the complaint met the policy's definitions of "discrimination" and "harassment," the district court deemed them sufficient to demonstrate the possibility of coverage under the policy triggering the duty to defend. The fact that the claims pursuant to which recovery was actually sought were wage and hour claims did not change the duty to defend analysis: As long as the facts alleged or otherwise known by the insurer suggested potential liability, then the duty to defend was triggered. To avoid this duty, the insurer needed to show there is no longer any potential for coverage.

Greenwich appealed the order, which the Ninth Circuit has now affirmed, agreeing that the allegations of discrimination and harassment in the complaint were "potentially covered" by the policy's definitions of discrimination and harassment. Accordingly, the Ninth Circuit affirmed the district court's holding that the duty to defend had been triggered and PHP was entitled to a defense from Greenwich under the EPLI policy.

There are a couple lessons to be taken from this recent ruling:

- Employers should not think of EPLI coverage solely in terms of the duty to indemnify. Because the duty to defend is broader than the duty to indemnify under California law, an EPLI insurer may be obligated to defend even where underlying claims might not be covered. Employers should err on the side of tendering claims to their EPLI insurers, rather than assuming that benefits are unavailable.

- Consult coverage counsel to aid in understanding EPLI policy benefits and coverage and assist in enforcing rights to those benefits. Coverage counsel can help ensure employers understand the EPLI coverage they hold and get the benefit of that coverage. The clock is ticking to tender once a claim is filed. Ensuring in-house counsel and risk managers have a working understanding of the terms of an EPLI policy can better ensure that covered claims are tendered early and the full benefits of the duty to defend are realized.

- The "facts" alleged in complaints have as much to do with EPLI policy benefits as the alleged claims do. Although the Ninth Circuit's ruling is not expected to have an impact on the way plaintiff attorneys style their complaints, the ruling makes it clear that extraneous factual allegations in a complaint, can trigger insurance coverage for defense fees and costs even if the asserted claims are not covered under the policy. Plaintiff-side attorneys who include such allegations in their complaints potentially arm an employer with added financial resources to defend employment litigation.

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