Au Pair Agency Entitled to Defense in Wage-Fixing Class Action

In a recent pro-policyholder decision, a federal court in Colorado ruled that, under Massachusetts law, an insurer must defend an *au pair* placement agency under its Travel Agents and Tour Operators General and Professional Liability Policy in a class action lawsuit alleging that the agency conspired to set *au pair* rates of compensation below market rate in violation of federal and state minimum wage laws and consumer protection laws.

In *Cultural Care, Inc. v. AXA Ins. Co.*, No. 17-CV-03153-RBJ, 2018 WL 3008686 (D. Colo. June 15, 2018), the court rejected AXA Insurance Company's claim that it had no duty to defend the class action lawsuit because it asserted claims that were entirely based on violations of the Fair Labor Standards Act (the "FLSA"). The policy excluded coverage for "[a]ny claim or suit based upon or arising out of any violation of the Fair Labor Standards Act or any similar federal, state or local law pertaining to working conditions, hours, employee benefits or wages." In response, Cultural Care Inc. argued that the complaint contained a claim for negligent representation that did not fall within the exclusion and that, therefore, they were entitled to defense of the action.

AXA argued that because the exclusion referred to any claim or suit the court should look to the nature of the lawsuit as a whole to determine whether it had a duty to defend. The lawsuit claimed that Cultural Care paid the *au pairs* less than minimum wage, required their participation in uncompensated training sessions, improperly deducted room and board from their wages, and did not compensate them for other fees. AXA argued that regardless of the negligent representation claim, the essence of the class action complaint was that Cultural Care was alleged to have violated wage laws which are not covered under the policy.

The Colorado federal court rejected AXA's argument, writing that if AXA intended for the exclusion to apply to lawsuits involving FLSA or similar wage laws—even if the lawsuits also contained claims unrelated to such violations—it should have written the insurance policy to explicitly address this idea. The court also rejected AXA's argument that the negligent representation claim, by itself, fell into the exclusion. The court ruled that while Cultural Care was alleged to have misrepresented that the *au pairs* could not receive more than a certain stipend that was determined according to FLSA standards, this claim was not based on any violation of the FLSA itself.

The court also rejected AXA's claim that the intentional conduct exclusion applied. Refusing to look at the essence of the lawsuit as a whole, the court found that the claim for negligent misrepresentation did not allege any intentional acts, regardless of the fact that other claims against Cultural Care did allege intentional conduct. Most importantly, the court ruled that under Massachusetts' "in for one, in for all" doctrine, AXA needed to defend Cultural Care against the entire compliant, even though many of the claims would be excluded if brought individually. Under this doctrine, as long as one claim triggers the insurer's duty to defend, the insurer must defend the entire lawsuit.

With this holding in mind, policyholders seeking a defense under a liability policy should carefully analyze the nature of each claim against them. While the essence of a lawsuit may seem to clearly fall within an exclusion, one covered claim can trigger the insurer's duty to defend the entire suit.

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