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Client Alert

Appellate Decision Finding Insurance Coverage for California Wage And Hour Class Action

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In the last several years there has been an explosion of wage and hour class action cases in California. The cases cover a range of theories, but the most common claims involve allegations that the employer improperly classified employees as exempt from receiving overtime pay, failed to provide required rest and meal breaks, and failed to pay for all hours worked by non-exempt employees, all in violation of the California Labor Code. A new decision by the California Court of Appeal can help employers obtain insurance coverage for those wage and hour claims under Directors & Officers and Employment Practices Liability policies.

To date, insurers have uniformly denied coverage for wage and hour actions. Insurers make numerous arguments in denying coverage, but typically argue that there is no coverage because of 1) an exclusion for Fair Labor Standards Act ("FLSA") claims and 2) an argument that money paid as a result of a wage and hour action constitutes uninsurable restitution.

While there are numerous coverage disputes concerning wage and hour actions, there are no published decisions on the issue. Insurers have frequently relied on an unpublished United States District Court decision, *Big 5 Corporation v. Gulf Underwriters Insurance Company*, No. CV 02-3320WJR(SHX), 2003 WL 22127029 (C.D. Cal. July 14, 2003) to deny coverage. In *Big 5*, a trial court rejected coverage for a wage and hour claim on the basis that California wage and hour claims were "similar" to excluded FLSA claims and were thus also excluded. The *Big 5* decision contains very little analysis of the policy, and until now, no California appellate court has considered the issue.

Following the *Big 5* decision, Southern California restaurant chain Mimi's Cafe engaged Pillsbury to seek coverage from its insurer for a pending wage and hour class action claim that later settled. The insurer

denied the claim, and Pillsbury initiated coverage litigation in Orange County. Select filed a motion for summary judgment. The trial court barred substantive oral argument at the hearing, and later issued a terse decision rejecting coverage by relying on the *Big 5* decision. Mimi's appealed, and Pillsbury persuaded the California Court of Appeal to reverse the trial court, and reject the *Big 5* decision as precedent because it fails to cite or explain relevant policy provisions. The Court of Appeal also rejected the insurer's arguments concerning whether the claim fell within the definition of "loss," and whether the FLSA exclusion applied. The Court of Appeal rejected all of the insurer's arguments, ruling in favor of Mimi's Café. The decision can be found online at *SWH Corporation d/b/a/ Mimi's Cafe v. Select Insurance Company*, Nos. G036145, G036627, 2006 WL 2786930 (Cal. App. 4th Dist. Sept. 28, 2006). Although the decision is unpublished, the Court's detailed discussion will provide support for an employer seeking insurance coverage for a wage and hour claim.

The lack of appellate decisions addressing wage and hour insurance coverage results from several factors, including the fact that California wage and hour class actions are still relatively new, that many employers and risk managers mistakenly assume no coverage is available, and that many policies now contain private arbitration provisions.

Arbitration decisions are not usually public record, but an action in which Pillsbury represented the employer, *Del Taco, Inc. v. National Union Insurance Company*, (February 17, 2006), provides additional support for the trend of finding coverage for wage and hour actions. In *Del Taco*, an arbitration panel of the American Arbitration Association issued a final award finding that the FLSA exclusion was ambiguous because the term "similar" was inherently ambiguous and therefore it was unclear if the California Labor Code was indeed "similar" to the FLSA. The panel (which included a retired Justice from the Court of Appeal and a retired trial court judge) further found that the policy was ambiguous and that coverage was available for settlements of claims for Labor Code penalties. See Kimberly L. Buffington, "Examining Ambiguous Policy Language," *Risk Management Magazine*, October 2006, at 48; Dina Berta, "Operators Eye Insurance Relief From Wage-And-Hour Legal Costs," *Nation's Restaurant News*, August 7, 2006.

Insurance coverage disputes are fundamentally contract disputes that require careful consideration of the specific policy in question in addition to legal precedent. Given that wage and hour class action settlements virtually always run into millions of dollars, a careful evaluation of insurance coverage and pursuit of denied claims can be a highly cost-effective strategy.

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