

ALERT

Professional Liability Insurer Has Duty to Defend Insured Against Claim for Failure to Comply with Prevailing Wage Laws

November 25, 2013

The United States District Court for the Western District of Washington has held that a claim against an insured general contractor based on its subcontractor's alleged failure to comply with prevailing wage laws potentially involved "professional services" and thus triggered its professional liability insurer's duty to defend. *Bayley Constr. v. Great Am. E&S Ins. Co.*, 2013 WL 5913424 (W.D. Wash. Nov. 1, 2013).

The insured, a general contractor, was awarded a contract by a municipal owner for the renovation of a community center, and the insured in turn hired a subcontractor to perform certain work on the project. During the course of the project, the municipal owner learned that the subcontractor was illegally paying its workers on the project less than the amount of the state's prevailing wage, and after an investigation, it served the insured with a notice stating that it intended to withhold contract payments in the amount of unpaid wages and penalties. The insured tendered the notice to its insurer, which declined to defend the insured on the basis, *inter alia*, that the claim did not involve "professional services." In relevant part, the term "professional services" was defined to mean "Construction Management, Pre-Construction Consulting Services and Design Services."

In the coverage action that followed, the court ruled that the insurer breached its duty to defend because the claim arguably could impose covered liability on the policyholder. In so ruling, the court rejected the insurer's argument that "paying workers the appropriate prevailing wage does not require special skill or judgment, but rather is an obligation common to every public works contractor." The court

Practice Areas

- D&O and Financial Institution Liability
- E&O for Lawyers, Accountants and Other Professionals
- Insurance
- Professional Liability Defense

observed that neither of the parties had supplied any precedent defining the term “professional services” in the context of a construction management or prevailing wage claim, and it found that the insurer should not have relied on “equivocal case law to give itself the benefit of the doubt rather than its insured.” The court also found that while the failure to pay workers the prevailing wage might not rise to the level of “professional services” in the abstract, it could “in the context of overseeing a large construction project with multiple subcontractors.”

The court also rejected the insurer’s argument that the notice sent to the insured did not seek covered relief since the notice referred to the unpaid wages as “liquidated damages,” which were carved out from the policy’s definition of “loss.” The court reasoned that the notice made clear that subsequent administrative proceedings could alter the wages and penalties due, and it concluded that “the mere appearance of the term ‘liquidated damages’” was not an appropriate basis for deciding that the claim was “clearly not covered by the policy.” The court further found that the claim could seek “loss” given that the insured could be forced to pay prevailing wages twice: once in the form of the subcontractor’s lump-sum contract, and again in the form of relief sought by the claim.

The opinion is available [here](#).