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ALERT

Duty to Defend Determined by Claims Actually Asserted, Not Speculation

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Applying California law, the United States District Court for the Northern District of California has held that an insurer had no duty to defend an action that sought only damages for uncovered "wage and hour" claims even though the complaint also alleged an element of a potentially covered but unpled cause of action for invasion of privacy. *Gauntlett v. Ill. Union Ins. Co.*, 2011 WL 5191808 (N.D. Cal. Nov. 1, 2011).

A former employee of the insured law firm brought suit against her employer asserting causes of action for certain violations of the federal labor code, including failure to pay overtime wages, failure to pay wages of a resigned employee and failure to provide rest breaks and meal periods. In addition to alleging facts in support of these causes of action, the complaint alleged that before she resigned, her desktop computer had been accessed without her authorization and several thousands of her stored e-mails had been deleted.

The insurer denied coverage to the law firm on the grounds that the former employee sought to recover as damages only amounts purportedly owed to her under the wage and hour laws, and the policy explicitly carved out from the definition of "Loss" for which there was coverage "amounts owed under federal, state, or local wage and hour laws." The policy also excluded claims under federal labor laws and similar state laws.

In the coverage litigation that followed, the insured took the position that, notwithstanding the uncovered "wage and hour" claims, the allegations regarding the former employee's computer and emails triggered the duty to defend because such allegations supported a potentially covered cause of action for invasion of privacy. The court

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disagreed, pointing out that, not only was such a claim not asserted, the limited allegations in the complaint were not sufficient to make out such a claim. According to the court, the fact that a complaint may mention an element of an unasserted potentially covered cause of action does not create an obligation on the part of the insurer to defend the action. Rather, as the court held, the duty to defend is determined by the actual claims alleged and not by speculation about claims that may have been alleged.