



## Legal Corner

### ***Colony Ins. Co. v. Expert Grp. Int'l Inc.***

#### **Colorado Ruling Holds that MPL Policy May Insure Claims Brought by Non-healthcare Related Professionals for Denial of Proper Wages**

By Jason P. Minkin and Nicholas R. Novak

On May 17, 2017, a Colorado federal district court held that a professional liability policy for healthcare professionals may insure an au pair placement agency for claims brought by au pairs who claimed they were denied proper wages. While the court expressed some confusion as to why such a policy would have been issued to an au pair agency that is not in the business of providing healthcare services, the court nonetheless found that the au pairs' claims based on breach of fiduciary duty and negligent misrepresentation were sufficient to fall within the scope of coverage, thereby obligating the insurer to provide a defense. *Colony Ins. Co. v. Expert Grp. Int'l Inc.*, 2017 WL 2131368 (D. Colo. May 17, 2017).

Expert Au Pair, Go Au Pair Operations LLC, and Au Pair International Inc. (collectively the "Au Pair Agencies") were sued by their au pairs for allegedly colluding to depress au pair wages in breach of the Sherman Antitrust Act, the Racketeer Influenced and Corrupt Organizations Act, and the Fair Labor Standards Act, among other claims.


Colony, the insurer, defended the Au Pair Agencies under a reservation of rights, and then filed a declaratory judgment action seeking a determination that coverage was unavailable. Colony argued that its healthcare provider errors and omissions policies did not provide coverage for the action because the gravamen of the claims against the Au Pair Agencies involved the denial of proper wages which, according to Colo-

ny, did not constitute the provision of "professional services," which is necessary to implicate the coverage under the policies. The court agreed with Colony, as it related to the antitrust and collusion claims which were brought solely against Au Pair International, finding that the errors and omissions policies simply do not insure those types of risks as price fixing does not fall within the policies' definition of "professional services." Thus, Colony had no duty to defend Au Pair International.

However, the inquiry did not end there, as the court considered whether the breach of fiduciary duty and negligent misrepresentation claims against Expert Au Pair and Go Au Pair potentially fell within the scope of coverage. Those claims, the court noted, were based on allegations that the Au Pair Agencies gave erroneous advice and information to their au pairs about the terms of their employment. According to the court, such claims were related to counseling activities to the au pairs, thus constituting "counseling" services within the policies' definition of "professional services."

Colony argued that the breach of fiduciary duty and negligent misrepresentation claims were nonetheless barred by policy exclusions for claims arising out of intentional misconduct, for improper personal profit, or for employment-related practices, among other defenses. The court disagreed. The court determined that the policy exclusions did

not apply to preclude a defense obligation because the breach of fiduciary duty and negligent misrepresentation claims do not depend on establishing intentional misconduct, receiving improper profits, or an employment relationship, but rather can be grounded in negligent misconduct that is otherwise potentially covered. As a result, the court found that Colony had to defend Expert Au Pair and Go Au Pair.

The court also expressed some confusion as to why Colony would issue a professional liability policy that was designed to cover healthcare professionals to au pair agencies that do not provide healthcare services. The definition of "professional services" in the policies included many provisions that were entirely inapposite to the Au Pair Agencies' business, such as providing x-rays and mental health treatment. Although this disconnect between the policy terms and the risks being insured was not determinative of whether a duty to defend was found to exist, ensuring that the coverage grant is more narrowly tailored to the specific business of the policyholder can avoid the type of confusion that was seen in the *Colony Ins. Co.* case and the time and expense that may follow as a result. 

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