HUNTON& WILLIAMS

Insurance Litigation Alert

August 2011

New Jersey Appellate Court Holds That Mere Ancillary Advertising Of A Policyholder's Business Is Not Enough To Implicate Advertising Injury Exclusion Under Contracts for Business Owners and Commercial Umbrella Liability Insurance

On August 1, 2011, a New Jersey appellate court, in *Penn Nat'l Ins. Co. v. Group C. Commc'ns*, 2011 N.J. Super. Unpub. Lexis 2077 (N.J. Super Ct. App. Div. August 1, 2011), reversed summary judgment in favor of an insurer, holding that a policyholder's advertising of its business and services was not enough to implicate an exclusion that precluded coverage for those "whose business is," among other things, advertising. The court further held that a policyholder's entitlement to coverage under the advertising injury and property damage provisions of its business owner's and commercial umbrella liability insurance policies for alleged violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C.A. § 227, must be determined by the finder of fact and that personal injury coverage under its commercial umbrella liability policy did not apply.

Background

Group C Communications, Inc. ("Group C") is an "integrated business to business media company," which comprises national magazines, trade shows and web communities. To promote its 2005 trade show, Group C rented a list of potential attendees from the Chicago Convention and Tourism Bureau and hired a company to send fax advertisements to entities on that list. On April 14, 2005, a fax advertisement was sent to more than 40 recipients, including G.M. Sign, Inc. ("GM"), which had never done business with Group C. After receiving the fax, GM filed a class-action complaint against Group C, alleging that Group C's unsolicited faxes to the potential trade show attendees violated the TCPA.

Group C was insured by Penn National Insurance Company ("Penn National") under both a business owner's policy (the "Primary policy") and a commercial umbrella policy (the "Umbrella policy"). Pursuant to the policies, Group C notified Penn National of the class-action suit and requested a defense and indemnification. Penn National denied coverage and initiated a declaratory judgment action, but offered to defend the class-action subject to a reservation of rights while the declaratory judgment action was pending. Group C accepted the defense and counterclaimed against Penn National, seeking a declaration that Penn National owed a defense and that Penn National's denial constituted a breach of its duty of good faith and fair dealing.

After discovery, the trial court granted summary judgment in favor of Penn National, finding that Penn National had no duty to defend or indemnify Group C with respect to the underlying class-action suit. In so holding, the trial court found that 1) there was no coverage under the advertising injury provisions of the policies; 2) there was no coverage under the property damage provisions of the policies; and 3) there was no personal injury coverage under the Umbrella policy. Group C appealed.

Holding

The appellate court reversed Penn National's award of summary judgment as to the advertising injury and the property damage coverage determinations. The Primary policy afforded advertising injury coverage for injury "caused by an offense committed in the course of advertising your goods, products, or services." The Umbrella policy provided coverage for excess damages because of an "Advertising Injury Liability." Coverage was excluded under both policies, however, for advertising injury arising out of "an offense committed by an insured whose business is advertising, broadcasting, publishing, or telecasting." Thus, while the policies generally afforded coverage for liabilities arising from a policyholder's business-related advertising activities, to the extent Group C's business was advertising, broadcasting, publishing or telecasting, coverage would not be available.

Group C argued that the policies were ambiguous, since they could be read to both provide and exclude coverage for advertising liabilities. The court rejected that argument, finding the pertinent exclusionary language to be unambiguous. The court then applied a standard articulated in *Am. Employers' Ins. Co. v. DeLorme Publ'g Co.*, 39 F. Supp. 2d 64, 81 (D. Me. 1999), to determine the scope and application of the advertising injury exclusions. The court concluded that the exclusions applied only where the primary nature of the policyholder's business was "advertising, broadcasting, publishing or telecasting." But, as the court explained, where any of the enumerated activities, including advertising, are merely ancillary to the policyholder's business, the exclusions would not apply. Thus, the court reversed the lower court's award of summary judgment, but held that whether any "advertising, broadcasting, publishing or telecasting" was primary or ancillary to Group C's business presented a question to be decided by the finder of fact.

Next, the court considered whether the class-action suit implicated coverage under the property damage sections of the policies. According to the class-action allegations, "receiving defendant's junk faxes caused the recipients to lose paper and toner consumed in the printing of defendant's faxes." Group C argued that this allegation amounted to "property damage" under the policies because it constituted a "loss of use of tangible property that [was] not physically injured." Group C also argued that the damage resulted from an "unexpected" and "unintended" "occurrence."

In determining whether the occurrence was unintended or unexpected and, therefore, an "accident," the court looked to whether "the alleged wrongdoer intended or expected to cause an injury," as required under New Jersey law. This, according to the court, required an examination of Group C's subjective intent. The court found that Group C's evidence raised a factual issue as to whether Group C held a good faith belief that fax recipients were willing to receive the faxes. Thus, the court found there to be a genuine issue of material fact as to whether the alleged damage was expected or intended. The court concluded, therefore, that the trial court's award of summary judgment to Penn National on the property damage issue was improper.

Lastly, the court affirmed the award of summary judgment with respect to personal injury coverage under the Umbrella policy. The plain language of the Umbrella policy required that coverage for personal injury "arise out of conduct of your business, excluding advertising, publishing, broadcasting, or telecasting done by or for you." Because there was no dispute that transmission of the faxes was done for Group C, there could be no personal injury coverage under the plain language of the personal injury provision.

Implications

Penn National reiterates that courts will strive to interpret insurance contracts according to the ordinary meaning of their terms, before resorting to rules of policy construction. The decision also serves as a reminder, however, that courts will consider practical implications while ascertaining the ordinary meaning of policy terms, such that policy construction does not lead to absurd results, as would have occurred in *Penn National* had the court applied the advertising injury exclusions to preclude coverage where the policyholder engaged in only ancillary advertising of its products or services.

The decision also serves as a reminder that, even though a court may properly resolve questions of policy construction and interpretation as a matter of law, it remains the function of the finder of fact to apply the court's policy construction to the facts where the parties are not in agreement as to those facts.

Finally, *Penn National* illustrates how allegations of property damage, even where seemingly benign, such as the loss of toner and paper resulting from an unsolicited fax, may be enough to trigger an insurer's duty to defend. Policyholders, therefore, should remain vigilant about assessing all of the effects from a loss event and report all such loss or damage when seeking coverage.

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