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INSURANCE LITIGATION ALERT

July 2009 Vol. 31

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Business Liability Policy's Intellectual Property Rights Exclusion Bars Coverage For Claims Arising Out of Trademark Violations

The United States District Court for the District of Maryland held in *Marvin J. Perry, Inc. v. Hartford Casualty Insurance Co.*, No. RWT-08-138 (D. Md. May 19, 2009), that a business liability policy's intellectual property rights exclusion barred coverage for advertising injury caused by alleged trademark violations.

Perry & Wilson, Inc., d/b/a Marvin J. Perry & Associates, ("P&W") purchased the trade name and mark "Marvin J. Perry & Associates" in 1993 from the insured, Marvin J. Perry, Inc. ("MJP"). Subsequently, P&W alleged that MJP continued to use the trade name and trademark after 1993, which violated P&W's common law and federal statutory rights. MJP sought coverage for the alleged "advertising injury" from its business liability insurer, Hartford Casualty Insurance Company ("Hartford").

Hartford denied MJP's claim, asserting that the policy's intellectual property rights exclusion barred coverage for P&W's allegations of trademark violations. After settling its dispute with P&W, MJP sued Hartford to recover defense costs. The court held that the intellectual property rights exclusion barred coverage.

The Hartford Policy

The insuring agreement in Hartford's policy provided that Hartford would, among other things:

> pay on behalf of the insured those sums that the insured becomes legally obligated to pay as damages because of … "personal and advertising injury" to which this insurance applies. [Hartford] will have the right and duty to defend the insured against any "suit" seeking those damages. However, [Hartford] will have no duty to defend the insured against any "suit" seeking damages for … "personal and advertising injury" to which this insurance does not apply.

Hartford's policy defined "personal and advertising injury" as any injury arising out of, *inter alia*, "infringement of copyright, slogan or title of any literary or artistic work, in your advertisement." The policy defined "advertisement" as "the widespread public dissemination of information or images that has the purpose of inducing the sale of goods, products or services through radio, television, billboard, magazine, newspaper, the

Internet … or any other publication that is given widespread public distribution."

The intellectual property rights exclusion contained in the Harford policy provided, on the other hand, that coverage would be barred for liability "arising out of any violation of any intellectual property rights, such as patent, trademark, trade name, trade secret, service mark or other designation of origin or authenticity." The exclusion did not apply to infringement of copyright or slogan "unless the slogan is also a trademark, trade name, service mark or other designation of origin or authenticity."

District Court's Decision

The district court held that the intellectual property rights exclusion operated to bar coverage for MJP's claim. The court explained that under Maryland law, an insurer's duty to defend arises if the allegations against the insured allege potentially covered claims. In determining whether a claim is potentially covered, Maryland courts follow a modified version of the "eight corners rule," which provides that a court may consider only the relevant underlying complaint and insurance policy. The court noted, however, that the rule has been modified to now permit insureds to produce extrinsic evidence demonstrating a potential for coverage. Insurers, in contrast, are not permitted to present countervailing extrinsic evidence, and any doubt as to whether there is a duty to defend is resolved in favor of the insured. Further, the court explained that it remains the rule in Maryland that exclusions in an insurance policy are strictly construed against the insurer. Clear, specific, unambiguous exclusions must be enforced as written, provided that the terms do not violate Maryland statute or public policy.

Applying these principles, the court found that while the allegations of the complaint were within the scope of coverage, the intellectual property rights exclusion applied to bar coverage. P&W's allegations of trademark infringement, dilution and diminishment of P&W's famous mark, and advertising injury as a result of MJP's continued use of the trade name, logo, website and trademark fell under the plain language of the exclusion.

In analyzing the exclusion, the court noted the absence of Maryland and Fourth Circuit law interpreting the exclusion. The Eastern District of Tennessee had given a narrow reading to the exclusion, while the Sixth and Seventh Circuits had applied the intellectual property rights exclusion to relieve an insurer of its duty to defend. Finding that the exclusion's language was unambiguous and expansive, the district court agreed with the Sixth and Seventh Circuits, and applied the exclusion.

The district court rejected the plaintiff's argument that its claims of unfair competition and interference with business relationships were not excluded. Although denominated as distinct causes of action, these claims were excluded because they arose out of a violation of intellectual property rights excluded by the policy language.

Implications

The court's decision reinforces the rule that courts will apply unambiguous policy terms as written, even where those terms are policy exclusions that ultimately result in an absence of coverage. The decision also reinforces the principle that the substantive factual allegations of a claim, and not necessarily the legal cause of action, will determine whether any policy provision applies.