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Business Torts:

Insurance Coverage Under the "Advertising Injury" Provision

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In 1976, the insurance industry began marketing the "advertising injury" provision as part of the "broadest package of coverage available to the average insured." Today "advertising injury" coverage remains one of the most valuable components of standard-form liability insurance. Policyholders from all business sectors are well advised to acquaint themselves with this provision.

Scope of Coverage

Policyholders may be entitled to insurance coverage for liabilities on account of copyright violations, trademark infringement, patent infringement or "piracy," antitrust violations, defamation, slander, privacy violations, and unfair competition. This insurance coverage includes payment of attorney's fees and judgments or settlements paid in such actions.

Risk managers and counsel for policyholders should be aware that many of the torts listed in the definition of advertising injury are classic business torts that can take place in relation to a policyholder's advertising. Recent cases have upheld insurance coverage for certain business torts, including coverage for the policyholder's defense expenses under liability insurance.

Controversies over advertising injury insurance coverage generally arise under either the 1973 or 1986 standard-form provisions. The 1973 Broad Form Liability Endorsement states that:

> "Advertising Injury" means injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

There are at least two things worth noting about the 1973 endorsement. First, nearly all of the enumerated torts are intentional. Second, there is no indication that the words used in the definition of "Advertising Injury" are words of limitation.

In 1986, the definition of "Advertising Injury" was changed to mean injury arising out of one or more of the following offenses:

A. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

B. Oral or written publication of material that violates a person's right of privacy;

C. Misappropriation of advertising ideas or style of doing business; or

D. Infringement of copyright, title or slogan.

A policyholder must check its liability insurance policies to verify the language of the advertising injury coverage provision.

Potentially Covered "Offenses"

Potentially covered "offenses" under the advertising provision include copyright violations, trade-

mark or "trade dress" infringement, patent infringement or "piracy," antitrust violations, slander, libel, defamation, or unfair competition. Insurance coverage is available for liability arising from allegations of the above "offenses." These "offenses" may occur in a variety of contexts, some of which are described below.

Copyright Infringement

Coverage is available for liabilities from allegations of copyright infringement. In *Federal Ins. Co. v. Microsoft Corp.* (Fed. Dist. Ct., Washington, 1993), the court held that "Microsoft is entitled to partial summary judgment, as plaintiff Insurance Companies are as a matter of law required to defend any claims brought by Apple that could trigger coverage under the insurance policy." In *Zurich Ins. Co. v. Killer Music, Inc.* (U.S. Ct. of Appeals, 9th Cir., 1993), an insurance company was also required to defend its policyholder in a copyright infringement action.

Trademark or "Trade Dress" Infringement

Coverage is also available for liabilities from allegations of trademark infringement. A California Court of Appeal recently held that trademark and "trade dress" infringement claims may give rise to a duty to defend under the advertising injury coverage provision of liability insurance policies. *Feinberg v. Canadian Ins. Co.* (Ct. of Appeal, Calif., 1993) ("depublished" in California).

Patent Infringement or Piracy

A federal court in the Central District of California has recently held that an insurance company was required to pay a policyholder's legal costs in defending a patent infringement action. *Aqua Queen Mfg. v. Charter Oak Fire Ins.* (Fed. Dist. Ct., Calif., 1993).

Several insurance companies here argued that "piracy" includes patent infringement. In *Intex Plastic Sales Co. v. United National Ins. Co.*, (Fed. Dist. Ct., Calif., 1990), United National Insurance Company told a federal court that it did "not dispute that the term 'piracy' as used in its policy may be interpreted to include patent infringement."

Antitrust Violations

Antitrust violations may be covered under the "personal injury" provision in standard-form liability insurance policies. *Ethicon, Inc. v. Aetna Casualty & Sur. Co.* (Fed. Dist. Ct., New York, 1990). Claims against policyholders based on antitrust law and common law interference with business give rise to a duty to defend the policyholder.

In 1986, Continental Casualty Insurance Company argued that "an antitrust violation is commonly considered unfair competition" and that there is no need to "strain the construction" of the phrase "unfair competition" in an insurance policy to arrive at that conclusion. *CNA Casualty of California v. Seaboard Surety Co.* (Ct. of Appeal, Calif., 1986). A California Court of Appeal agreed.

Libel, Slander and Defamation

A federal court in the Eastern District of Pennsylvania recently held that an insurance company must defend a policyholder against allegations of libel, slander and defamation. *Safeguard Scientifics Inc. v. Liberty Mutual Ins. Co.* (Fed. Dist. Ct., Pa., 1991), affd in part, rev'd in part (U.S. Ct. of Appeals, 3rd Cir., 1992). Even Aetna has argued that defamation and disparagement are covered. In *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, (U.S. Ct. of Appeals, 9th Cir., 1988), Aetna asserted potential coverage for "defamatory or disparaging" material.

Unfair Competition

Some courts have interpreted the phrase "unfair competition" in accord with the narrow common law meaning (*i.e.*, passing off one's goods as those of another). The earliest case to address the use of the term "unfair competition" in the advertising injury liability context held that it applied to torts involving harm to competitors. *Ruder & Finn, Inc. v. Seaboard Surety Co.* (Ct. of Appeals, New York, 1981). (The high court of New York.) Recent cases also find coverage for unfair competition claims.

In the *Seaboard* case, Aetna argued that the advertising injury coverage provision covers statutory unfair competition:

> [This case] establishes that each of the defendants herein have wrongfully denied coverage and defense to the insured, and must reimburse plaintiff all defense fees generated in the underlying action as well as the fees generated for the prosecution of this action.

Aetna is just one of several insurance companies that have urged the courts to apply a broad

meaning to the phrase "unfair competition." The positions of these insurance companies show the reasonableness of the policyholder's position that coverage for "unfair competition" should not be limited to the common law definition.

What to Do

When a policyholder is subjected to an action that alleges copyright violation, trademark infringement, patent infringement (or "piracy"), antitrust violations, defamation, slander, privacy violations, or unfair competition, the underlying action should be examined for potential insurance coverage under the advertising injury provisions of the policyholder's liability insurance policies. The advertising injury coverage provision is found either as a standard insuring agreement within the body of the liability insurance policy or as an endorsement to the policy.

Risk managers or corporate counsel should check to see whether such a liability insurance policy was in effect during the time period of the alleged offense. Next, they should determine whether the underlying action alleges that wrongful acts occurred during the effective period of the liability insurance policy. If it appears that a claim falls within the "advertising injury" coverage provision, a notice of claim should be sent immediately to the policyholder's insurance company or companies.

Think Insurance

There is valuable insurance coverage available to policyholders for the defense and indemnification of many business tort claims under the advertising injury coverage provisions of liability insurance policies. Policyholders who face the various types of actions enumerated in this article should look to their insurance policies for coverage. ■

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