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Warren, McVeigh & Griffin, Inc. Griffin Communications, Inc.
1420 Bristol Street North, Suite 220, Newport Beach, CA 92660
Tel 949/752-1058 | www.griffincom.com

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Defense Cost Insurance Coverage is Broad in Scope: "Domain Name" Claims — A Case in Point

By Joshua Gold

Generally speaking, when policyholders buy liability insurance, they are buying two categories of insurance coverage within the same insurance policy: (1) defense cost insurance coverage; and (2) indemnity insurance coverage (e.g., insurance coverage for settlements, judgments and other costs for claims brought against the policyholder). In many instances, the value of the defense cost insurance coverage is just as great to the policyholder as the value of the indemnity insurance coverage.

Defense Cost Insurance Coverage Is Broad In Scope

Courts have regularly recognized that an insurance company's defense obligation is to be broadly construed. For example, one Illinois appellate court has noted in its holding that "it is well settled that an insurer's duty to defend is much broader than its duty to indemnify." To obtain a defense under most policies, a policyholder need only show that there is a potential for coverage. Courts have also ruled that the insurance company's obligation to provide insurance coverage for its policyholder's defense is not just determined by the facts alleged in the underlying claimant's complaint, but also by facts stemming from any source which would create the potential for insurance coverage.

Defense Coverage for "Domain Name" Claims

The breadth of a policyholder's right to defense cost insurance coverage was recently addressed in the context of litigation stemming from Internet activities of a policyholder. The policyholder at issue had purchased general liability ("GL") insurance which included insurance coverage for "advertising injury" claims. The policyholder had been sued by a claimant that sold magazines and other products online. The claimant charged the policyholder with "statutory and common law trademark and trade name infringement as well as injury to business reputation and common law unfair competition" in connection with the policyholder's use of a domain name. The policyholder's liability insurance companies refused to honor their obligations to provide defense cost insurance coverage to the policyholder and suit was brought.

After the policyholder enforced its rights to insurance coverage in the trial court, the insurance companies appealed the verdict. The federal appellate court presiding held that the trial court correctly decided the dispute and that the insurance companies were bound to cover the policyholder's insurance claim. The appellate court affirmed the trial court's ruling that an insurance company's obligation to defend is triggered if even "a single allegation" of a complaint is potentially within the insurance coverage of the liability insurance policy. The court also noted that the insurance company adopted an "excessively narrow interpretation of the policy language," and that the policyholder established that at least one allegation in the underlying claimant's complaint was covered under the advertising injury provisions of the GL policy.

Claims Canvassing The Legal Spectrum

The court's ruling above leads to a related tenet of insurance law. Because the duty to defend is broadly construed, a defense is owed even where the same underlying claim contains covered and "uncovered" allegations. By way of background, several causes of action will typically be present in any lawsuit against a policyholder. Some causes of action will clearly be covered, while others may be specifically excluded from coverage.

If multiple causes of action are brought against the policyholder, an insurance company must provide coverage for the covered causes of action and also coverage for those excluded under the insurance policy as well. In one insurance coverage dispute where the insurance company sued its policyholder, the court explained that:

> *it is well established that ... once the duty to defend is found to exist with respect to one or some of the theories of recovery advanced in the underlying litigation, the insurer must defend the insured with regard to the remaining theories of recovery as well.*

Similarly, another court held that where the underlying complaint alleges several theories of recovery against the insured, the duty to defend arises "even if only one such theory is within the potential coverage of the policy."

Technology related claims, like most other types of claims, often contain numerous allegations and causes of action which potentially are covered and potentially fall under exclusions. As such, policyholders must carefully review insurance company arguments against coverage where the potential for insurance coverage exists — even if it is nothing more than a "single allegation" that potentially comes within the insuring provisions of the policy.

Joshua Gold *is Editor of the E-Business Insurance Alert. Mr. Gold specializes in insurance coverage analysis, consulting and litigation, with an emphasis on directors' and officers' (D&O) insurance, errors and omissions (E&O) insurance, online and Internet liability, property insurance coverage issues and off-shore market insurance products. Mr. Gold is the Co-Chair of the Computer & Technology Subcommittee for the American Bar Association Section of Litigation, Insurance Coverage Litigation Committee. He can be reached at via e-mail at jgold@andersonkill.com.*