Your Coverage Advisor

When Ads Attack: Recent Cases Defining Advertising Injury


By Anastasia J. Wade
awade@brouse.com


By Alexandra V. Dattilo
adattilo@brouse.com

Commercial general liability ("CGL") insurance policies provide companies with coverage for a variety of damages and liabilities including property damage, personal injury, and advertising injury. The coverage terms for advertising injury are usually found under Coverage B: Personal and Advertising Injury Liability. Advertising injury usually means "injury" caused by (1) oral or written publication that defames another or disparages

(Continued on page 2)

They Say "the Best Offense is a Good Defense"


By David Sporar | dsporar@brouse.com

Most types of liability insurance policies impose upon the insurer two distinct obligations: the duty to indemnify the policyholder for claims covered by the policy and the duty to pay the defense costs of a policyholder in litigation in which covered claims are potentially or arguably asserted against the policyholder. The latter obligation—called the defense obligation or "duty to defend"— requires the insurer not only to provide a legal defense for the policyholder in the litigation, but also requires the insurer to pay the policyholder for the costs the policyholder incurs to the extent the policyholder retains its own legal

(Continued on page 4)

Vol. X, Winter 2015

IN THIS ISSUE

BROUSE McDowell
A Legal Professional Association

another's goods, products, or services, (2) oral or written publication that violates another's right to privacy, (3) using another's advertising idea, or (4) infringement of copyright, trade dress or slogan in an advertisement. The determination of coverage for an advertising injury depends on whether the cause of the injury is actually an advertisement. While this may appear to be a straightforward issue, courts have devoted significant time and analysis determining the scope of the word "advertisement" in a CGL policy and its causal connection to the injury suffered. This article provides a review of recent cases determining whether the allegations asserted in the underlying complaint involve an advertisement and whether that advertisement caused an injury that entitled the policyholder to defense coverage.

The typical CGL policy defines "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." Although television and radio commercials, magazine advertisements and billboards are clearly included as an "advertisement" under this definition, the analysis is harder when considering whether this would apply to features such as product packaging or store displays.

In the case of *E.S.Y., Inc. v. Scottsdale Ins. Co.,* No. 15-21349, 2015 U.S. Dist. LEXIS 143848 (S.D. Fla. 2015), the court was faced with the issue of whether hang tags attached to the policyholder's garments were "advertisements" as defined by the plaintiff's CGL policy. The policyholder argued that the hang tags on the garments were a printed advertisement, whereas the insurer contended that the hang tags were part of the garments themselves. Although the hang tags only provided minimal information, mainly the brand name of the policyholder, they were designed to attract customers. Moreover, the hang tags were attached to the outside of the garments. The court contrasted the policyholder's hang tags with less fanciful hangtags are no more than a price tag sticker attached inside of the garment and, as a result, hidden from the view of a customer. Comparing the two types of hang tags, the court held that the policyholder's hang tags were attached to the garment with the purpose of attracting the customers' attention and were sufficiently exposed to the public to fit under the broad definition of "advertising" under the policy.

Likewise, in *Selective Ins. Co. of Southeast v. Creation Supply, Inc.,* 2015 IL App (1st) 140152-U (2015), the policyholder was asserting insurance coverage for its defense of a trade dress claim involving markers with a square body and end-cap. The complaint alleged that the policyholder advertised the markers in retail store displays. In reviewing the retail store display to determine whether it constituted an advertisement, the court held that the placards placed above the bin of markers displayed the shape and design of the markers to attract customers, and thus, was an advertisement as defined by the insurance policy. However, the court noted that if the display was merely a large bin of the markers and nothing more, it may not constitute advertising.

While the underlying matter must include allegations involving an advertisement, CGL policies also require a causal connection between the injury alleged and the advertising activity at issue. The misconduct alleged must occur in the advertisement itself and the damages alleged must result from the advertisement.

For example, in the case of *Erie Ins. Exch. v. Compeve Corp.*, 32 N.E.3d 160 (Ill. 1st Dis. 2015), the policyholder sold computers installed with counterfeit Microsoft software. Microsoft sued the policyholder for copyright infringement, among other claims, and the policyholder tendered the defense of the matter to its insurer. The insurer denied the claim, concluding that Microsoft's complaint did not allege an "advertising injury." Although Microsoft alleged that the policyholder advertised its counterfeit software that infringed Microsoft's copyright, Microsoft did not allege that any copyrighted information was included in the policyholder's advertisements. The court held that the advertisement of the infringing product is not the same as an advertisement that infringes a copyright. Therefore, the court held that there was no causal connection between the advertisement of the infringing software and the injury suffered by Microsoft.

Further, in *Md. Cas. Co. v. Blackstone Int'l Ltd.*, 442 Md. 685 (2015), the policyholder used an advertising idea created by its partner in a joint venture without the partner's knowledge and without paying the partner a portion of the profits. The policyholder asserted coverage from its insurer for the resulting suit. The court held that, while the claim involved an advertisement, the injury alleged did not result from the use of the partner's advertising idea, but from the failure to pay for the use. Therefore, the claim arose from a breach of contract and not from the advertisement and was not covered by the policy.

Thus, these courts have concluded that an advertisement will be covered under a CGL insurance policy where the activity alleged does more than provide simple information about the product. Advertisements attract customers to the product or service, which includes making the product more conspicuous to customers just wandering about the store. Moreover, there must be some causal connection between the injury and the advertisement apart from injury caused by the advertised product or service or injury caused by a breach of contract for the advertisement. ■

Advertising injury usually means "injury" caused by:

1. Oral or written publication that defames another or disparages another's goods, products, or services
2. Oral or written publication that violates another's right to privacy
3. Using another's advertising idea
4. Infringement of copyright, trade dress or slogan in an advertisement

counsel for its defense. It is important for a policyholder to understand its contractual right to a defense under its insurance policy. It provides valuable economic protection even when no separate indemnification obligation is ultimately triggered under the policy. The following are some brief pointers for taking advantage of your contractual right to a defense.

When Is the Defense Obligation Triggered?

An insurer's defense obligation is triggered when the complaint filed against the policyholder states a claim that is potentially or arguably within policy coverage. This is a very low threshold. A single allegation can render a claim potentially or arguably within policy coverage—even if the allegation is groundless, false, or fraudulent. If there is any doubt about whether a claim is within the policy's indemnity coverage, then the insurer must provide a defense. A policyholder that finds itself the subject of a lawsuit should look very closely at the complaint filed against it to determine whether that complaint triggers its insurer's duty to defend. In many instances, the insurer's defense obligation will be triggered.

For What Claims Must an Insurer Provide a Defense?

Where a plaintiff asserts multiple claims against the policyholder in a single action, some of which are potentially or arguably within the indemnity coverage of the policy and some of which are not, the insurer generally must provide a defense against all of the claims.

What About Claims Asserted by a Policyholder?

Sometimes a defendant to litigation is able to assert claims against the plaintiff or a third-party; and sometimes a defendant is required to assert such claims. When a policyholder asserts affirmative claims, does its insurer's defense obligation extend to such claims? The answer is maybe. Some courts have held that an insurer's defense obligation extends to such affirmative claims when those claims are sufficiently "defensive" in nature. Examples include claims for contribution or indemnification, where the defendant seeks payment from a third-party to offset and, therefore, diminish its own liability. Whether an insurer's defense obligation extends to such claims will depend on the law applicable to the litigation and the language of the insurance policy.

Can an Insurer Withdraw Its Defense?

Sometimes, through the course of litigation, claims can be dismissed such that they are no longer at issue in the litigation. If the litigation against a policyholder involves multiple claims—some of which trigger the insurer's defense obligation and some of which do not—and the claims that trigger the insurer's defense obligation are dismissed, the insurer's defense obligation will end. Practically speaking, this means that, as of the date of the dismissal of all potentially or arguably covered claims, the insurer generally will not be required to pay for the policyholder's defense.

Can an Insurer Seek Reimbursement for the Cost of Defending the Policyholder?

Nationally, courts are split on the issue of whether an insurer can recover the cost of its defense from the policyholder if the claim is ultimately determined not to fall within the indemnity coverage of the policy. Some courts have held that the insurer may not recover the cost of defending its policyholder unless the language of the insurance policy expressly permits it. Other courts have held that the insurer may recover the cost of defending its policyholder only for claims that were not arguably or potentially within policy coverage. Importantly, one federal court has held that,

(Continued on page 6)

Does Settling without an Insurer's Consent Result in Forfeiture of Coverage in Reservation of Rights Cases?

By Caroline L. Marks | cmarks@brouse.com

Insurance policies often contain consent-to-settle or similar cooperation provisions that require a policyholder to obtain an insurer's consent before entering into a settlement. When the policyholder wishes to settle an underlying tort case and the insurer - which is defending but has reserved its right to disclaim coverage - refuses to consent to the proposed settlement, can the policyholder settle without forfeiting its indemnity coverage? As with many insurance-law issues, the answer depends on which state's law applies. Courts in some states have held that, in a reservation of rights case, a policyholder forfeits its indemnity coverage by settling without the insurer's consent, absent a showing of bad faith.

The Pennsylvania Supreme Court, however, recently took a different approach. It held that when an insurer defends subject to a reservation of rights to disclaim coverage and refuses to consent to a settlement, the policyholder may accept the settlement over the insurer's refusal. The settlement, however, must be fair, reasonable, and non-collusive, and the policy ultimately must be found to cover the relevant claims. Babcock & Wilcox Co. v. Am. Nuclear Insurers, Pennsylvania Supreme Court No. 2 WAP 2014 (July 21, 2015). Under such circumstances, the insurer must indemnify the policyholder for the settlement amount, subject to the policy limits.

This rule makes imminent sense because it allows the policyholder to protect itself from the potential of a larger judgment for which it ultimately may be responsible if the insurer prevails on its coverage defenses. It also fosters the widely-accepted public policy favoring settlement. Correspondingly, the rule preserves the insurer's right to challenge the fairness and reasonableness of any settlement. Thus, the rule adopted by the Pennsylvania Supreme Court protects the rights of both policyholders and insurers.

Pennsylvania is not alone in adopting this rule, having joined Arizona and other states. Not all jurisdictions, however, have espoused this same approach. Accordingly, before a policyholder decides to settle an underlying tort case over a defending insurer's objection, it should carefully examine the state's law which applies to the dispute. Otherwise, the policyholder risks unintentionally forfeiting its indemnity coverage. ■

even absent a policy provision requiring reimbursement, a policyholder must repay its insurer for defense costs where the policyholder fails to object to the insurer's reservation of its purported right to recoup such costs. *United Nat'l Ins. Co. v. SST Fitness Corp.,* 309 F.3d 914 (6th Cir. 2002). In SST, the Sixth Circuit found that the policyholder's failure to object created a contract implied in fact whereby the policyholder agreed to repay defense costs if the claim was ultimately determined to not fall within the indemnity coverage of the policy. The moral of the story is this: a policyholder should always respond to its insurer's reservation of rights letter as soon as possible and object to any of the insurer's terms or conditions set forth therein that the policyholder finds objectionable, including any assertions of "rights" by the insurer to recover back defense costs.

The right to a defense (or defense costs) is significant and can operate as leverage in a dispute with an insurer. Policyholders should endeavor to timely respond to insurer communications and point to well-established principles of insurance law in order to obtain the full benefit of that leverage over their insurers. ■

The Policyholder's Right to Select Defense Counsel and Control the Defense

By Amanda M. Leffler | aleffler@brouse.com

When named as a defendant in a lawsuit, a policyholder naturally wants to be represented by an attorney that it trusts, who understands the nuances of its business, and who will protect the company's interest to the exclusion of all others. But when the defense to a lawsuit is being paid for by an insurance company, the insurance company will frequently attempt to impose its choice of designated counsel upon the policyholder.

Many policyholders simply accept the counsel appointed by the insurer, without appreciating that, in certain cases, it is the policyholder, not the insurer, who has the right to select counsel. Though insurers frequently dispute the point, when an insurer reserves its rights or when the interests of the policyholder and the insurer otherwise conflict, the control of the defense and the right to select defense counsel rests with the policyholder.

 (Continued from page 6)

Conflicts of Interest Are Common

Consider a fairly simple situation: A policyholder is named as a defendant in a suit that alleges that the company's conduct was intentional or, alternatively, that the conduct was at least negligent, resulting in the plaintiff's injury. If the jury in that case ultimately determines that the company acted intentionally, the insurer would not be required to indemnify the policyholder for the verdict because most policies exclude coverage for intentional injury. If the jury ultimately determined that the policyholder was negligent, however, the insurer would have to indemnify the policyholder. The insurer agrees to defend the claim, but reserves its right to later deny indemnity coverage if the policyholder's conduct was intentional.

In the foregoing example, the interests of the policyholder and the insurer conflict. The policyholder, of course, would be best served if the jury returned a negligence verdict that would be indemnified by the insurer. The insurer, however, would be able to avoid indemnity coverage if the jury found that the policyholder acted so as to intentionally cause harm. This inherent conflict between the insurer and the policyholder means that the policyholder gets to select its own counsel to defend it in the lawsuit.

An Insurer's Refusal to Acknowledge the Policyholder's Rights

Some insurers are reluctant to acknowledge a policyholder's right to select counsel when the insurer has reserved rights or when the interests of the policyholder and insurer otherwise conflict. Many insurers will prefer to select counsel, in part because they have negotiated low hourly rates with certain "panel" counsel.

If an insurer remains insistent that it has such a right, in spite of the Ohio law to the contrary, the policyholder has a decision to make. If the policyholder is satisfied both that the insurer-selected counsel is competent to handle the matter and that such counsel understands he or she represents only the policyholder, then the policyholder may be comfortable acceding to the insurer's choice of counsel. But if the policyholder is not satisfied on these points, or if other circumstances compel the policyholder to use defense counsel of its choice, the policyholder typically will be better served to decline the insurer's choice, retain its own counsel, sue the insurer for breach of contract and, if the circumstances are egregious enough, for bad faith.

The Bottom Line

If there is a potential conflict between you and the insurer, or another reason why you do not want to accept the insurer's selection of counsel, consider the following:

- **Is the insurer-appointed counsel competent in the field?**
- **Has the insurer-appointed counsel explicitly agreed that he or she represents solely the policyholder, and does not also represent the insurer, as required by the Ohio Rules of Professional Conduct?**
- **Will the insurer-appointed counsel expressly agree that he or she will protect all interests of the policyholder, including interests in regard to any insurance coverage issues or disputes?**
- **Has the insurer-appointed counsel agreed that he or she is prohibited from sharing any attorney-client or work product protected materials in the file that relate to the coverage dispute?**

Determining the answers to these questions will better equip you to decide whether you will accept, or decline, the insurer's selection of counsel. ■

Office Locations

Akron

388 South Main Street
Suite 500
Akron, OH 44311-4407

Phone: 330.535.5711

Cleveland

600 Superior Avenue East
Suite 1600
Cleveland, OH 44114-2604

Phone: 216.830.6830

Lorain County

5321 Meadow Lane Court
Suite 7
Sheffield Village, OH 44035-0601

Phone: 440.934.8080

Insurance Recovery Attorneys

Lucas M. Blower
Nicholas P. Capotosto
Christopher J. Carney
Alexandra V. Dattilo
Clair E. Dickinson
Keven Drummond Eiber
Matthew K. Grashoff
Christopher G. Hawley
Kerri L. Keller
Gabrielle T. Kelly
P. Wesley Lambert
Amanda M. Leffler
Sallie Conley Lux
Caroline L. Marks
Meagan L. Moore
Andrew P. Moses
Amanda P. Parker
Charles D. Price
Paul A. Rose
Anastasia J. Wade

Attorney Highlights

The firm received the 2016 Best Law Firms ranking.

Christopher J. Carney, Clair E. Dickinson, Keven Drummond Eiber, Meagan L. Moore and Paul A. Rose were named to the Best Lawyers in America 2016.

Amanda M. Leffler, Anastasia J. Wade, Alexandra V. Dattilo, Gabrielle T. Kelly and David Sporar spoke at the Brouse McDowell 2015 Annual Insurance Coverage Conference on October 1, 2015 at The Embassy Suites in Independence, Ohio.

Amanda M. Leffler and Amanda P. Parker presented at the Patrolmen's Benevolent Association Mid-States Meeting on November 12, 2015, on the topic of Insurance Coverage for Police Misconduct.

Kerri L. Keller was appointed to the City of Hudson Economic Growth Board.