Insurance Coverage for 'Trade Dress' Infringement

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Introduction
There are many different types of coverages that businesses typically carry in their insurance portfolio - workers compensation, property, health, business auto, and Commercial General Liability ("CGL"). The CGL usually provides two important benefits to the insured. First, the CGL provides general liability coverage for "occurrences" or "accidents", subject to certain stated exclusions. It will provide payment for sums that the insured becomes "legally obligated to pay" -- i.e. damages or settlements as a result of a lawsuit or a dispute. This is called the "indemnity" obligation. Second, the standard CGL also contains a duty to defend. This benefit is often as important as the indemnity obligation because it requires the insurance carrier to provide a defense of a claim. Defense of a lawsuit, such as a complex intellectual property dispute, can be very expensive and last many years.

Insurance coverage for intellectual property issues is typically found in the "advertising injury" section, usually Section B, of a standard CGL. The title - "advertising injury" - is somewhat misleading when one considers the types of claims for which coverage has been sought. Policyholders have attempted to obtain coverage for a wide variety of intellectual property claims - from patent infringement, trademark infringement, copyright infringement, and trade dress violations to unfair competition - under the definitions of "advertising injury" coverage.

The Insurance Service Organization ("ISO") is the non-profit trade organization that produces standardized insurance policy forms. Many of the CGL policies currently in use are ISO forms or variations of ISO forms. In 1986, ISO revised its CGL form to change the coverage for "advertising injury".

The 1986 CGL form Section B defines "advertising injury" as follows:

> "Advertising injury" means 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.

Kalis, Reiter & Segerdahl, Policyholder?s Guide to Insurance Coverage, ?8.03[B] (1998); Mathias, Shugrave & Morrison, Insurance Coverage Disputes, ? 9.03[4] at 9-48 (1996).

As you can see, none of these sections mention anything about trade dress infringement.

"Misappropriation of Ideas or Style"

"Misappropriation of ideas or style of doing business" is a phrase that was first introduced in the

1986 Form and replaced the terms "piracy" and "unfair competition" which were present in the 1973 form. Insureds have attempted with little success to obtain coverage for "patent infringement" claims under the concept of "misappropriation." Insureds have been more successful in finding coverage for trade dress and trademark claims. It now appears that the majority view is that trade dress and trademark infringement claims are covered under the "misappropriation" concept. Poof Toy Products, Inc. v. U.S. F.&G., 891 F. Supp. 1228, 1234 (E.D. Mich 1995); Union Ins. Co. v. Knife Co., Inc., 897 F. Supp. 1213, 1216 (W.D. Ark. 1995).

Until recently, no Court applying Texas law had answered the question of whether the phrase "misappropriation of style of doing business" covered allegations of trade dress infringement. However, the United States District Court for the Northern District of Texas confronted the issue and concluded that coverage for trade dress infringement is provided under this section of the standard CGL.

Claim for Trade Dress Infringement Violating the Lanham Act Constitutes an "Advertising Injury" in Texas

In a case of first impression, the United States District Court for the Northern District of Texas held that a claim for trade dress infringement violating section 43(a) of the Lanham Act. 15 U.S.C. 1125(a) (1996) invokes coverage under the "misappropriation of style of doing business" advertising injury provisions of the standard CGL. Industrial Molding Corporation v. American Manufacturers Mutual Insurance Co. 17 F. Supp. 2d 633 (N.D. Tex. 1998).

In this case, IMC was sued by County Line Limited L.L.C. under the Lanham Act for alleged trade dress infringement (the "Underlying Suit"). The Underlying Suit involved the trade dress of a Christmas tree stand. County Line alleged, among other things, intentional copying of distinctive trade dress, and misrepresentation that the IMC?s stands were affiliated with County Line?s stands. The suit prayed that IMC be enjoined from using the Christmas tree stand in advertising, marketing or sales and also sought damages. IMC tendered its defense to its carrier which denied coverage based on the Sixth Circuit?s opinion in Advance Watch Co. v. Kemper National Ins. Co. 99 F.3d 795 (6th Cir. 1996). IMC brought a declaratory judgment action against the carrier. The District Court for the Northern District of Texas held that there was potential coverage for trade dress infringement.

The Court found that in order for IMC to establish potential coverage, it had to prove:

1. The allegations in the underlying complaint must raise a potential for liability under one of the covered offenses:

2. IMC must have engaged in "advertising activity" during the policy period when the alleged "advertising injury" took place; and

3. There must be a causal connection between the alleged injury and the "advertising injury". Id. at 637.

The Court addressed the threshold issue of whether trade dress infringement is a covered offense under the CGL policy. The Court noted that trade dress is protected under section 43(a) of the Lanham Act, 15 U.S.C. 1125, which prohibits any person from using a term, name, symbol or device, or any combination thereof, which is likely to confuse, mistake or deceive as to the manufacturer, origin or description of a good. The Court also noted that the phrase "style of doing business" is not defined in the CGL, but most Courts have concluded that the phrase refers to the

"manner in which a business is operated, rather than the substance of the business itself and equate "style of doing business" to the concept of trade dress protected under the Lanham Act. " Id. at 638. The Court rejected the carrier?s argument that misappropriation referred only to the common law cause of action for misappropriation. The Court found that since the phrase "style of doing business" was not defined, it had to be construed in accordance with the policyholder?s reasonable expectations, taking into account the context of the policy and the ordinary meaning of the words. Id. The Court found that the phrase "misappropriation of style of doing business" in the CGL included trade dress infringement. Id.

The next step in the analysis was to determine whether IMC had engaged in "advertising activity". Once again, the policy did not define this key term. The Court turned to Black?s Law Dictionary for a definition of "advertise", which means " to advise, announce, apprise, command, give notice of, inform, make known, publish", and found that the complaint in the Underlying lawsuit undoubtedly accused IMC of engaging in unlawful advertising activity. Id. at 640. Finally, the Court found that IMC had established the causal nexus by showing the nexus between alleged advertising activities and the alleged damages. Therefore, there was potential coverage under the CGL and the carrier was required to defend IMC in the Underlying Suit.

Conclusion

Two key phrases ? "misappropriation of style of doing business" and "advertising" are not defined in the typical CGL. Trade dress by its very nature involves the "style of doing business". Therefore, it is appropriate that trade dress infringement should be included in the covered offense of "misappropriation of style of doing business". In addition, given its ordinary meaning, "advertising" is a broad term which could mean "Notice given in a manner designed to attract public opinion" and to "give notice of". With such an expansive definition of advertising, it would appear that many defendants in cases in which trade dress violations are alleged may successfully invoke the carrier?s duty to defend. This alone is a very valuable benefit in many instances.