JONES DAY

COMMENTARY

JANUARY 2019


# Massachusetts High Court Expands Insurance Coverage for False Advertising Lawsuits

## IN SHORT

**The Situation:** False advertising lawsuits between competitors under the Lanham Act can be expensive to defend. While there are strong arguments that standard liability insurance policies may cover such claims, insurers frequently deny them and force coverage litigation.

**The Development:** The Massachusetts Supreme Judicial Court ("SJC") held in September 2018 that Vibram USA, Inc. ("Vibram"), a shoe manufacturer whose marketing included unauthorized references to marathon runner Abebe Bikila, can enforce its insurers' duty to defend with respect to a Lanham Act lawsuit brought by Bikila's heirs.

**Looking Ahead:** When sued for false advertising, companies should consider reviewing their insurance policies as promptly as possible, and keep in mind that courts have broadly construed "advertising idea," a key term on which advertising injury insurance coverage often depends.

Since 2014, when the U.S. Supreme Court tacitly encouraged competitors to police each other's advertising through Lanham Act litigation in the case *Pom Wonderful v. Coca Cola*, there has been a marked increase in false advertising lawsuits brought under the Lanham Act. When the challenged advertising affects an important product line for one or both companies, false advertising litigation can lead to scorched-earth battles with serious ramifications. Lawyers with winning track records in such cases, as well as expert witnesses, can be expensive. As a result, when companies are sued for false advertising, it can have substantial and unexpected effects on the budgets of legal departments.

Fortunately, commercial general liability insurance policies frequently cover the cost of defense (plus any liability incurred) with respect to false advertising litigation under coverage parts known as "Advertising Injury" or "Personal and Advertising Injury." However, relevant case law varies from state to state, and insurers frequently deny coverage initially, essentially daring policyholders to fight their denials in court. A frequent dispute is whether a given case falls within the definition of "Advertising Injury." There are two independent prongs of that definition most frequently relied upon by policyholders: "disparaging" the goods or products of another, and use of another's "advertising idea." Much of false advertising insurance jurisprudence focuses on these terms.

The recent case *Holyoke Mutual Insurance Company vs. Vibram USA*, 480 Mass. 480 (2018) was the SJC's first decision to address the meaning of the term "advertising idea," and the SJC's decision was quite favorable for policyholders. Because interpretation of insurance policies is generally a matter of state law, decisions by the highest court of a state carry substantial importance.

> Policyholders and defense lawyers should avoid falling into the same trap as the Massachusetts trial court by failing to recognize potentially covered allegations embedded in false advertising complaints.

By way of background, Vibram manufactures minimalistic shoes that simulate the feeling of walking barefoot. The company named a line of its shoes "Bikila" in reference to famous Ethiopian runner Abebe Bikila, who won a Gold Medal in the marathon at the 1960 Olympics while running barefoot. The heirs of Bikila sued Vibram in a Washington federal district court, alleging that Vibram had invoked Bikila's name without permission. Bikila's heirs asserted claims under the Lanham Act, state statutes, and common law.

The Massachusetts trial court initially rejected Vibram's claim for insurance coverage. It construed the underlying claims to be for alleged violations of intellectual property rights and, based upon an intellectual property exclusion in Vibram's policies, the lower court found no duty to defend. In reversing the trial court, the Massachusetts SJC determined that the allegations do constitute the use of an advertising idea, relying on allegations that Bikila's heirs had engaged in their own marketing activities to capitalize on Bikila's legacy. The court held that "the Bikila family's advertising idea was using the name Bikila, and the legacy that name conveyed, to attract business to each of their ventures." Because Vibram was accused of using that same idea, the SJC held that the lawsuit alleged the use of another's advertising idea, and therefore found that the insurer was required to defend.

When rendering the initial decision, the trial court fell into the trap of assuming that there was not a claim that Vibram used another's advertising idea simply because such a claim was not expressly pled, and because the non-covered intellectual property claims appeared to predominate. However, an insurer generally must defend a complaint if facts pled anywhere in the complaint – even if not its main focus – could potentially support a covered claim. This holds true even if the potentially covered claim is not expressly pled.

Policyholders and defense lawyers should avoid falling into the same trap as the Massachusetts trial court by failing to recognize potentially covered allegations embedded in false advertising complaints. Because of that misimpression, policyholders may sometimes fail to give prompt notice of Lanham Act lawsuits to their insurers. The consequences of late notice can be severe – insurers typically argue that there is no duty to pay pre-notice defense costs, and in certain states, insurers argue that late notice causes coverage to be forfeited altogether. Given the high cost of defending Lanham Act lawsuits, failing to give prompt notice can be an extremely costly oversight.

## TWO KEY TAKEAWAYS

1. When a Lanham Act lawsuit is filed, the complaint should be reviewed promptly for allegations that potentially reflect "advertising injury," as that phrase is defined in the insurance policies at issue.

2. In undertaking this review, the analysis should include the underlying facts, not just the specifically plead causes of action. If those facts potentially state a claim falling within the definitions of coverage, a strong argument can be made that the insurer should defend.



Richard D. Milone
Washington


John G. Froemming
Washington


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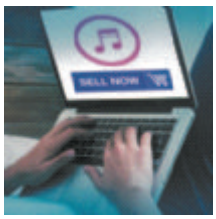

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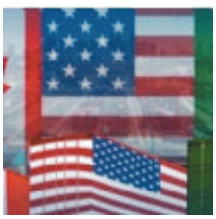

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