JONES DAY

COMMENTARY

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IN SHORT

The Situation: Reversing a pair of federal district court rulings, the Fifth and Ninth Circuits have held that insurers must defend commercial general liability policyholders in advertising injuries related to IP litigation.

The Result: Policyholders facing IP claims welcome these rulings, hoping that the decisions are signs that the courts are trending toward interpreting CGL policies to cover the defense and indemnification of these types of claims.

Looking Ahead: It's unclear whether the recent trend indicated by the two decisions will continue. Policyholders should carefully examine the advertising injury provisions of their general liability insurance policies regarding IP disputes.

In a pair of recent decisions, the Fifth and Ninth Circuits issued separate policyholder-friendly opinions broadly construing the language of commercial general liability ("CGL") insurance policies in connection with intellectual property litigation. Reversing federal district court rulings granting summary judgment for the insurers, both opinions found that the insurers had a duty to defend their policyholders, because the complaints alleged potentially covered advertising injuries within the terms of the CGL policies.

These rulings are welcome news for commercial policyholders facing intellectual property claims, as they indicate courts' growing trend of interpreting CGL policies to cover the defense and indemnification of advertising injury claims related to IP litigation.

Uretek (USA) Inc. v. Continental Casualty Co. (5th Cir.)

The Fifth Circuit's *Uretek* ruling on July 28, 2017, involved an insurance coverage dispute between Uretek, a roadway maintenance and repair company, and Continental Casualty Company ("Continental"), which had sold a CGL policy to Uretek. In the underlying litigation, Uretek sued its competitor, Applied Polymetrics Inc. ("Applied") for patent infringement, and Applied asserted a counterclaim against Uretek for misrepresenting to Applied's customers and potential customers that Applied could not work on various projects without infringing on Uretek's patent. Continental refused to defend Uretek against Applied's counterclaim.

In the ensuing insurance coverage litigation, the district court granted summary judgment in favor of Continental, holding that Continental's duty to defend was not triggered because Applied had not alleged that Uretek told customers that Applied had infringed the patent. On appeal, the Fifth Circuit reversed the district court's entry of summary judgment for Continental.

The Fifth Circuit's reasoning turned on its interpretation of the word "disparage." The policy required Continental to defend Uretek against suits seeking damages for "personal and advertising injury … arising out of" several offenses, one of which was the publication of material that "disparages a person's or organization's goods, products or services." The court used a dictionary definition for "disparage" because it "is not a technical or industry-specific term" and ruled that "[a] statement to a competitor's customer that the competitor is undertaking work that it has no legal right to

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undertake disparages that competitor and the services it offers by clear implication." The court concluded that, when resolving all disputes about the term "disparage" in favor of the policyholder and interpreting the complaint liberally, the term was sufficiently broad to include Applied's allegations.

Crum & Forster Specialty Ins. Co. v. Willowood USA, LLC et al. (9th Cir.)

Echoing the Fifth Circuit's decision in *Uretek*, the Ninth Circuit handed down its *Willowood* decision only four days later on August 1, 2017. In *Willowood*, the underlying litigation concerned Repar, a distributor of agricultural pesticides containing an active ingredient trademarked as Tebucon, and Willowood, a joint venture with Repar's primary stockholders. Repar sued Willowood for trademark infringement and breach of contract stemming from Willowood's alleged unauthorized use of Repar's trademark.

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The parties settled these claims, and Willowood sought coverage for its defense and settlement costs under three general liability insurance policies that covered advertising injury "arising out of ... [t]he use of another's advertising idea in your 'advertisement.'" The district court found that the insurance policies did not cover Repar's claims, and it twice granted summary judgment for Willowood's insurers, holding that they had neither a duty to defend the suit nor a duty to indemnify the settlement costs.

On appeal, the Ninth Circuit disagreed with the district court's finding that the complaint alleged no potentially covered claims. Adopting an unduly narrow construction of the phrase "arising out of," the district court had concluded that any harm to Repar was caused by Willowood's alleged misuse of the trademarked name, rather than by actual advertising. In contrast, the Ninth Circuit explained that courts "broadly interpret" the term "arising out of" when used within a policy's insuring clauses, holding that the "complaint specifically alleged injury from Willowood's use of Repar's advertising idea—the TEBUCON name—in Willowood's advertising."

The court concluded that the allegations of the complaint had sufficiently put the insurers on notice of the possibility of covered liability for advertising injury, which triggered their duty to defend. The court reversed the grant of summary judgment as to the duty to defend and remanded for trial the question of the insurers' indemnity obligations for the settlement, finding that there was an issue of triable fact as to whether the settlement was for a covered claim.

Policyholder Implications

The Fifth and Ninth Circuit's well-reasoned *Uretek* and *Willowood* decisions indicate courts' growing trend of construing the broadly worded advertising injury provisions of CGL policies to afford coverage for IP-related litigation, including defense costs. Whether this trend will continue remains to be seen. Commercial policyholders should carefully examine the advertising injury provisions of their general liability insurance policies in connection with their IP disputes. In addition, policyholders should also review their umbrella liability insurance policies, as many such policies may provide even broader coverage for advertising injuries.

TWO KEY TAKEAWAYS

1. Circuit court rulings in *Uretek (USA) Inc. v. Continental Casualty Co.* and *Crum & Forster Specialty Ins. Co. v. Willowood USA, LLC et al.* could indicate a trend of construing the broadly worded advertising injury provisions of CGL policies to afford coverage for IP-related litigation.
2. Policyholders should still verify the pertinent provisions of their CGL policies, and also examine their umbrella liability coverage, as it may provide even broader coverage.

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