



Missouri Upholds Disclaimer of Advertising Insurance Coverage

By Robert D. Chesler and Eric Jesse – July 20, 2011

Food product manufacturers and distributors, like other commercial policyholders, often do not realize that they have almost no coverage for intellectual property infringement. While general liability policies in the past contained such “advertising injury” coverage, that coverage has now almost vanished. The lack of coverage for this risk is highlighted in the recent federal court decision, *Interstate Bakeries Corp. v. OneBeacon Ins. Co.*, 2011 U.S. Dist. Lexis 18560 (W.D. Mo 2011). In that case, the court held that an insurer did not have a duty to defend its insured, a bread and bakery products distributor, in a trademark infringement claim brought by a competitor, even though the insured had an advertising liability policy. As a consequence, the policyholder had to pay its own legal fees associated with defending the competitor’s lawsuit as well as any settlement or damages that the insurer would otherwise have paid if coverage had existed.

Interstate Bakeries is particularly cautionary because the insured specifically purchased a policy designed to cover its advertising liability so that it had a reasonable expectation of coverage. The denial of coverage underscores how careful a company must be in reviewing its insurance policies for intellectual property and advertising injury coverage. The decision also demonstrates that despite a company’s best efforts, the risk always exists that the insurer will deny coverage.

In *Interstate Bakeries*, the food distributor, Interstate Bakeries Corporation (IBC), claimed that its insurer had a duty to defend it under an “advertiser advantage policy” in a trademark infringement lawsuit brought by one of IBC’s competitors, Flowers Bakeries. IBC’s potential liability arose because it used the phrases “nature’s pride” and “nature’s choice” to promote a potential bread product line. Flowers, however, trademarked “nature’s own” for its bread products. IBC only used the “nature’s pride” and “nature’s own” phrases in private meetings with IBC’s customers, major supermarkets, to gauge their interest for a potential new product line. It did not use those phrases in print or broadcast media to consumers. Based on these facts, the insurer denied defense and coverage; the court likewise found no duty to defend.

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The advertising liability policy provided coverage for an “occurrence” arising from, among other things, “infringement of title or slogan.” “Occurrence” was defined as “acquisition, creation and compilation of matter for advertising” and “the exhibition, dissemination or display of advertising through any medium.” “Advertising” was defined as “advertising, publicity, press releases or promotion of the insured’s . . . products.” IBC’s presentation to its customers—which resulted in a trademark infringement lawsuit—appears, at first glance, to be an “occurrence.” IBC “created” matter for the “promotion” of its product that was “displayed through any medium.” However, the insurance company successfully argued otherwise.

- What is advertising?
OneBeacon argued that an “occurrence” and “advertising” is “publicly focused” and intended to cover “public information available to consumers at large.” Because the marketing meeting between IBC and its customer was not “publicly focused,” the insurer successfully denied coverage.
- What is a product?
OneBeacon also denied coverage because IBC’s marketing involved “potential future products” and not an actual “product” on the market.
- What is a slogan or title?
Lastly, the court found that no duty to defend existed because IBC’s use of “nature’s pride” and “nature’s choice” was not “slogan or title” infringement because Flowers’ “nature’s own” was the name of its product rather than a catchphrase. As a result, Flowers’ lawsuit involved alleged trademark infringement, which was expressly excluded under IBC’s advertising policy.

There are several takeaways from *Interstate Bakeries*:

- Make sure that you purchase the right insurance coverage. All insurance policies are not standard, and you need an insurance broker or consultant who fully understands that what may appear to be minor differences in policy language can prove dispositive when making a claim.
- Insurance companies may deny coverage regardless of a policyholder’s expectations. *Interstate Bakeries* involved an advertising insurance policy and an advertising liability claim. IBC had every reason to believe that it had done its due diligence and had purchased the correct coverage. Regardless, the insurer successfully denied coverage.
- When choosing an insurance broker or coverage lawyer, look for someone with specific experience with the area of insurance coverage. Insurance coverage has become increasingly complex, and you need someone who is fluent in the language of insurance. In this regard, broker malpractice may be a consideration when an insurer denies coverage.

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- Placing an insurer on notice is critical. In *Interstate Bakeries*, the court interpreted IBC's seven-month delay in providing notice to the insurer and IBC's failure to identify the Flowers lawsuit on its renewal applications as evidence that IBC did not expect coverage under its advertising policy. In many states and under many different types of insurance policies, both late notice of the claim and failure to list a potential claim on the insurance application can be absolutely fatal to coverage.

Policyholders wish that insurance coverage were a simple topic. Often it is not, and it seems to grow more complex every year. Whether purchasing an insurance policy or making a claim, a company must be vigilant in protecting its rights.

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