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Commercial general liability policies cover trademark infringement

Canada - Macera & Jarzyna - Moffat & Co

International
Infringement

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Commercial general liability (CGL) policies frequently include coverage for 'advertising injury'. Advertising injury often exists with respect to claims made against the insured for infringement of trademarks, copyrights and patents and coverage can be an optional endorsement under CGL policies. While damages caused in the course of advertising are covered by the policy, there are certain exclusions and preconditions.

Marc Anthony Cosmetics Inc was a Canadian corporation that marketed and sold its haircare and other products in Canada and elsewhere. It had used the phrase "Oil of Morocco" on its packaging for a line of haircare products and was sued in California for trademark infringement. A corresponding action was commenced in Canada.

Mark Anthony's liability insurance provider, Chubb Insurance Company of Canada, took the position that it had no duty to defend Marc Anthony in the California complaint based upon its interpretation of exclusions in the insurance policy, whereupon Royal & Sun Alliance Insurance Company of Canada (RSA), which was Marc Anthony's umbrella insurer, defended the California litigation. The litigation was settled, and RSA brought an application against Chubb in the Ontario Superior Court of Justice for reimbursement of C$6 million in defence costs (*Royal & Sun Alliance Insurance Company of Canada v Chubb Insurance Company of Canada*, 2016 ONSC 3927).

The Chubb policy included coverage for advertising injury and personal liability, and also provided that Chubb had a duty to defend. While Chubb agreed that there was the possibility of coverage for trademark infringement in the California action arising from an advertisement, and that this possibly constituted an advertising injury under the policy, it refused coverage due to two exclusions in the policy.

The first exclusion removed coverage in cases where the advertising injury was "intended by the insured". The California complaint alleged Marc Anthony had intended the advertising injury. The Ontario court held that the widest latitude should be given to allegations in the pleadings in determining whether they raise a claim within policy coverage. After examining the pleadings, the court held that the true nature and substance of the California complaint was trademark infringement and that intention to injure was not a necessary part of the pleaded causes of action, and thus the first exclusion did not exclude the duty to defend.

The second exclusion limited coverage for any actual or alleged advertising injury arising out of IP infringement not related to advertising. The court examined Chubb's position letter regarding the Canadian action which it defended and found that it was inconsistent with the position Chubb had taken in the California action regarding their exclusion clause. Chubb had agreed to provide a defence in the Canadian action in which there was no difference between the pleadings that justified a different outcome regarding the duty to defend. The wording of the exclusion clause was cumbersome and did not clearly exclude coverage. The duty to defend is broader than the duty to indemnify and any ambiguity must be resolved in favour of the insured.

The court held that Chubb was obligated to defend Marc Anthony in the California complaint and was required to reimburse RSA for all sums paid to defend the California complaint, and to contribute, on Marc Anthony's behalf, towards the costs of implementing the global settlement of the underlying actions. In addition, Chubb was ordered to pay RSA costs in the Ontario proceeding fixed at C$21,000.

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