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From the Chair

Hal O. Carroll

We have one past and one future event to report.

Leadership Forum. In mid-June, the chair-elect, Tim Casey, and I attended the State Bar Leadership Forum on Mackinac Island. Normally only one of us would attend, but because this is the first year of our section's existence, the council decided to send us both. It was an opportunity to meet with other section chairs and with the leadership of the State Bar, and share ideas about how to expand our section.

Our membership continues to grow and is currently around 354, making us larger than six other sections. We are moving up the list, and hope to pass a few other sections by the end of the year. This section has a lot to offer to practicing lawyers and others in these fields, and the only real requirement for growth is just letting people know we are here. So if each of you will take the opportunity to spread the word, we can continue to grow even faster.

Annual Meeting. Be sure to mark your calendar for Friday, September 19, 2008, at 10 a.m. for our program and business meeting at the Hyatt Regency in Dearborn. The program is entitled "Insights from Insiders," and in keeping with our mission, will include a presentation on insurance and one on indemnity. Commissioner Ken Ross will discuss the operations of the Office of Financial and Insurance Services, and Michael Lynch will explain the operation of indemnity provisions in construction and professional services contracts. The program will be followed by a short business meeting. We will send another e-mail reminder or two as the meeting approaches.

Articles. In this issue, we have two articles on advertising injury as well as our regular features and case law updates. One measure of our section's success has been that authors have volunteered to submit articles for publication in this *Journal*. If you have an idea for an article, just contact any of the council members.

Committees. If you are interested in becoming active in the section but are not certain where to start, consider joining one of our committees, or creating a new one for your particular area of interest. Just contact any of the council members for more information. ■

Hal O. Carroll

Casey on Coverage

Fortuity is Fundamental for Insurance

By Timothy F. Casey, *Kelley, Casey & Moyer PC, tcasey@kcmlaw.com*

Insurance is a risk-spreading mechanism based on the principle that a loss has not yet happened. In other words, the loss must be fortuitous, which generally means happening by accident or chance. If the loss has already taken place or is in progress before the inception of the insurance policy at issue, the loss is not fortuitous. The concept typically is addressed in insurance policy language dealing with the requirement of an "accident" or "occurrence," and also has a basis in common law doctrines often referred to as "known loss," "known risk," and "loss-in-progress."

An automobile policy, for example, may provide in the insuring agreement that it applies only to an "auto accident." A homeowner's or general liability policy may provide that it applies only to injury or damage caused by an "occurrence" to which the coverage applies, and may define "occurrence" as "an accident, including continuous or repeated exposure to conditions," resulting in injury or damage "neither expected nor intended from the standpoint of the insured." Under that definition, the fortuity concept is addressed both by the requirement of an accident, and by the requirement that the injury not be expected or intended by the insured.

In *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 597 (1992), the court held:

> The meaning of "accident" in insurance policies has been defined as:
>
> "anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby-that is, takes place without the insured's foresight or expectation and without design or intentional causation on his part. In other words, an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." Guerdon Industries, Inc v Fidelity & Casualty Co of New York, 371 Mich 12, 18-19; 123 NW2d 143 (1963).

Many policies, including certain ISO forms for commercial general liability coverage, set forth additional fortuity requirements, which may include, for example, language to the effect that the insurance applies only if the injury or damage is caused by an "occurrence," during the policy period, and only if no insured knew before the policy period that the injury or damage had occurred, in whole or in part.

In addition to insurance contract language, the fortuity concept also exists in common law. These doctrines were summarized in *ABO Petroleum, Inc v Colony Ins. Co*, 2005 WL 1050220 (E.D. Mich.): "Under Michigan law, 'insurance provides coverage for fortuitous events only.'. . . 'No coverage exists for events that must happen or that have happened.' . . . 'Michigan recognizes that a completed loss is not covered under an after-acquired insurance policy.' . . . 'The known [risk] doctrine is a common law concept that derives from the fundamental requirement of fortuity in insurance law' . . . 'Its basic premise is that insurance policies are intended to protect insureds against risks of loss, not losses that already have taken place or are substantially certain to occur.' . . . 'For the known risk doctrine, the relevant question is whether the insured knew or reasonably should have known there was substantial probability of a loss before a policy period began.' . . . Under the 'loss-in-progress' doctrine, 'no part of a loss may be insured when it was already in progress before the contract period, that is, when the damage for which coverage is claimed began before the contract period and continues into the contract period.'" (Internal quotes and citations omitted.)

In *American Bumper and Manufacturing Co. v Hartford Fire Ins Co*, 452 Mich. 440, 459 (1996), the Michigan Supreme Court stated: "While Michigan recognizes that a completed loss is not covered under an "after-acquired insurance policy, this Court has yet to apply the loss-in-progress doctrine. . . ." The court in that case concluded it was not necessary to further evaluate that doctrine under the facts at issue. Michigan federal court cases have predicted that the Michigan Supreme Court would recognize the loss-in-progress doctrine. *CPC International Inc v Aerojet-General Corp*, 825 F Supp 795, 810-811 (WD Mich 1993).

In summary, the concept of fortuity is inherent in insurance, as evidenced both by insurance contract language and the common law. ■

The views expressed in this article are those of the author and do not necessarily represent the views of the author's law firm or its clients and do not constitute legal advice as to any particular matter.

Trademark Claims and Advertising Injury

By James K. Thome, *Vandeveer Garzia, PC, jthome@VGpcLAW.com*

It is early morning on the second Monday in October. From behind your desk, you glance out your office window. The rising sun is beginning to burn away a thin veil of fog, revealing rich autumn colors.

You are the vice president, general counsel, and resident agent of Jones Engineering Corporation, formed five years ago by Ed Jones and other engineers who had ideas about designing and manufacturing high-quality, compact audio components. Jones found out how to incorporate small, high-quality speakers with an undulating or "wavy" metallic alloy device, inside a case with an overall semi-circle configuration. The system delivers premium sound in a small package. Under your direction, Jones Engineering negotiated financing, entered into manufacturing agreements, and began advertising and marketing the Jones Wave Radio and Jones Wave Speakers over the Internet. The ads included photographs of the products. Sales have exceeded expectations. Now, sales orders are starting to exceed manufacturing capacity. Mr. Jones has promised you a substantial year-end bonus. Life is good.

> An "accident" or "occurrence" is not a requirement for "personal and advertising injury" coverage.

You sift through a stack of mail delivered Saturday and see a certified letter from a Philadelphia law firm. Half of the entire first page of the letter consists of small print with names on the sides and addresses down the middle: "Boston Office," "New York Office," "Palo Alto Office," and so on. A gnawing ache starts in the pit of your stomach. You continue to read: "infringing Glutz Corporation's registered trademark, Wave Audio Systems," "trade dress infringement," "cease and desist," "violations of federal and state law," "destroy all existing products," "render an accounting of all profits," "we hereby demand a reply to this letter within seven days," and so forth. Life is not so good any more.

You do some quick and dirty legal research. Applicable federal statutes are contained in the Trademark Act of 1946, also known as the Lanham Act.[1] A trademark or service mark is a word, phrase, symbol, or combination, used in commerce, to designate the origin or source of goods or services and to distinguish goods or services from those of others.[2] One who uses another's mark without consent, where that use is likely to confuse or deceive, "… shall be liable in a civil action."[3] Remedies available to a plaintiff alleging and proving infringement can include a recovery of the infringer's profits, other damages, costs, attorney fees, and destruction of any infringing articles.[4] Injunctive relief is available.[5] Federal courts have original jurisdiction.[6] The Lanham Act also provides remedies for trade dress infringement.[7] Trade dress is not necessarily the brown uniform worn by the UPS driver, but the overall look and appearance of a product when that appearance tends to distinguish the product and indicate its origin.[8]

However, there are defenses. It is permissible to use a word in commerce that is generic or merely descriptive if it used "fairly and in good faith" to describe a product or its qualities. Generic words are not entitled to trademark protection.[9] To be entitled to protection, trade dress must be primarily nonfunctional.[10] An infringement action will be successful only if a plaintiff can show a "likelihood of confusion" as to the source of the goods in question.[11] To determine whether there is infringement, competing marks must be viewed as a whole.[12] Use of a challenged term with a house name distinguishes the name of one business from another and makes confusion less likely.[13]

The ache decreases. You understand that the company decided to use "wave" in the name of its products to describe their configuration and design and the quality of their sound. It could be a generic term in the audio industry. The company always uses "Jones" with its product names and in its advertising. It has never used "wave" alone or in combination with other descriptive or generic terms. Despite similarities in appearance between the Jones Wave products and those of Glutz, you believe that the overall appearance of the Jones products is functional and necessary to create their high-quality sound. Anyone reviewing the company's products on the Internet can easily see that the origin of the products is the Jones Engineering Company. The Philadelphia lawyers can pound sand.

> The reasoning behind these 6th Circuit cases has been widely criticized. . . . the court rejected the idea that "misappropriation" referred only to a common law tort and was, at best, an ambiguous term.

Two weeks later, a one-inch thick (with exhibits), six-count federal court complaint with a laundry list of requests for relief lands on your desk. The complaint includes claims of trademark and trade dress infringement "in the course of advertising, marketing, selling and distributing" the Jones Wave products.[14] Thankfully, there is no temporary restraining

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order or motion for a preliminary injunction. You must hire an outside law firm to handle the litigation, but cringe when you think of the potential costs and expenses. There goes the bonus. On your way to Mr. Jones's office you see the company's director of human resources, insurance, workers' compensation, risk management, information technology, and office supplies, who has an idea. Why not tender the matter to the company's insurance agent to forward to its insurer?

Insurance seems like a stretch, but maybe not. Jones Engineering's only applicable liability insurance policy is the 2004 version of the standard ISO[15] Commercial General Liability Coverage Form.[16] Under "Coverage B, Personal and Advertising Injury Liability," the insurer has agreed to "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies." It has also agreed that it has a "duty to defend the insured" in a suit seeking damages.[17] Coverage applies to an "offense" arising out of the business.[18]

An "accident" or "occurrence" is not a requirement for "personal and advertising injury" coverage. Knowing violations are excluded, but intent or knowledge is not a necessary element of a claim for trademark or trade dress infringement.[19] Under "Section V—Definitions," "advertising injury" includes injury "arising out of ... infringing upon another's copyright, **trade dress,** or **slogan**" in an advertisement.[20] An advertisement is "a notice that is broadcast to the general public … about your products … for the purpose of attracting customers" and includes "material placed on the Internet."[21] Exclusion i excludes coverage for "infringement of trademark" or other intellectual property rights. However, the "exclusion does not apply to infringement in your 'advertisement' of copyright, **trade dress,** or **slogan**."[22] The insurer, in "Supplementary Payments—Coverages A and B," agrees to pay costs of defense, including "expenses" incurred by the insurer, "reasonable expenses incurred by the insured," "costs taxed against the insured," and "interest on the full amount of any judgment" after entry of a judgment.[23] Pursuant to "Section IV—Commercial General Liability Conditions," an insured must send prompt notice of any claim or suit and cooperate and assist in the defense.[24]

This is encouraging. Basic Michigan insurance law indicates that an insurance policy must be enforced in accordance with its plain terms. If there is any ambiguity, interpretation of the policy favors an insured.[25] An insurer's duty to defend is broader than its duty to indemnify. The allegations in the underlying complaint determine whether there is a duty to defend. An insurer must provide a defense if any of the allegations against its insured arguably fall within the coverage afforded by the policy. An insurer also has a duty to look beyond the allegations to analyze whether coverage is possible.[26]

After all, very often the law is not what the last judge said, but what the next judge is going to

So far, so good, but what have the relevant courts said? In *Advance Watch v Kemper National Ins*[27] and *Sholodge v Travelers Indemnity,*[28] the 6th Circuit found no coverage for infringement claims involving, respectively, a product and a service. However, both cases involved the 1986 version of the ISO CGL coverage forms.[29] Those forms do not specifically address trademark and trade dress claims. In *Advance Watch*, the court indicated that trademark and trade dress infringement were not included in coverage for "misappropriation of advertising ideas or style of doing business." The court held that there was no coverage because "misappropriation" referred to a common law tort, and trademark infringement was not specifically included in the coverage itself. This appears to be an ambiguity decided in favor of the insurer. In *Sholodge*, the court found no coverage for claims involving infringement of a service mark under coverage afforded for "infringement of copyright, title, or slogan."

The reasoning behind these 6th Circuit cases has been widely criticized. In *State Auto Property and Casualty v Travelers Indemnity*,[30] the court rejected the idea that "misappropriation" referred only to a common law tort and was, at best, an ambiguous term. The court held that the term referred to wrongful acquisition of property, including intellectual property.[31] In addition, the court indicated that a trademark plays an important role in advertising, so trademark infringement did qualify as an advertising injury and was covered. In *Charter Oak Fire Ins v Hedeen & Companies,*[32] the court held that the same policy language involved in the *Sholodge* decision did provide coverage for claims of trademark infringement. According to the court, "infringement" includes using another's words, and "title" could refer to trademarks.

Since the advertising injury coverage language has changed at least several times in the standard ISO forms since these decisions, the only thing that these decisions might tell us now is that appellate panels can look at similar facts and similar policy provisions yet come to different legal conclusions. After all, very often the law is not what the last judge said, but what the next judge is going to say. Most cases dealing with advertising injury coverage for trademark and trade dress infringement claims involve the 1986 ISO CGL form. Coverage for trademark infringement was specifically excluded

starting with the 2001 ISO CGL form.[33] This reduced coverage under this coverage form and, no doubt, insurers using the form reduced policy premiums accordingly. Now, damage from trademark infringement is excluded but damage from trade dress infringement appears to be covered as long as it arises out of an advertisement.

But what constitutes an "advertisement"? It appears that the term has been defined in the ISO CGL coverage forms but not until the 1998 version.[34] *Citizens Insurance v Pro-Seal*[35] was a recent case concerning claims about a product in an infringing package involved in one sale to a specific customer. In a predictable 4-3 opinion, the Michigan Supreme Court held that the packaging was not an advertisement pursuant to the definition in the policy; therefore, the alleged offense did not arise out of advertising, and that on this basis, there was no duty to insure or defend the insured. The opinion does not discuss what CGL form was involved or whether it was a nonstandard form, but it appears that the language that the Court quoted with respect to personal and advertising injury is similar to the language that is in the 1998 through 2004 versions. There was no discussion of a trademark exclusion, so the suspicion is that the policy involved was the 1998 ISO CGL form. Additionally, the quoted definition for "advertisement" is not as expansive as that contained in the 2001 and 2004 versions. The quoted definition for "advertisement" in the case is material that is "broadcast or published to the general public or specific market segment about your goods, products, or services for the purpose of attracting customers or supporters."

The Court found that information on a package containing a product sent to a single customer was not a notice disseminated to the general public for the purpose of attracting customers, even though another potential customer might casually observe the package at some time. The Court indicated that the insurer was not required to defend the insured based on the allegation concerning the package, but did not discuss any other issues or obligations related to advertising injury coverage or any other allegations in the underlying case. A dissenter indicated that language on a package that described its contents, directed to a customer, did constitute a "notice" to a particular "market segment" for purposes of attracting that customer. The definition did not refer to "potential" customers, a requirement found by the majority somewhere, but not in the policy definition of "advertisement."

The dissent found a duty to defend and indicated that the majority ignored the allegations in the underlying complaint in its decision. It seems more likely that the "advertisement" definition will be met if there is a dissemination of promotional information, in some fashion, to a specific, identifiable group rather than a single customer.

In *Citizens,* the Court indicated that the analysis in *Poof Toy Products v United States Fidelity & Guaranty*[36] did not apply since "advertising" was not defined in the policy in question. The Court indicated that there could be no trademark or trade dress infringement without advertising, so the advertising requirement in the coverage was met by the nature of the allegations. Likewise, the discussions about a "course of advertising" in *GAF Sales v Hasting Mutual Ins Co*[37] and *Shefman v Auto-Owners Ins Co*[38] do not apply any longer because "advertising" was not defined in the policies involved in those cases.

The Court indicated that there could be no trademark or trade dress infringement without advertising, so the advertising requirement in the coverage was met by the nature of the allegations.

Of course, as the cases and relevant coverage provisions indicate, there must be a connection between any claimed damages and an enumerated, covered offense. The injury must arise out of the claimed objectionable activity.[39]

However, even if the insurance policy specifically excludes coverage for trademark infringement claims, could claims involving the same words be covered under other policy provisions if the plaintiff uses those words ways other than as a trademark? In *Cincinnati Insurance v Zen Design Group,*[40] the plaintiff in the underlying case alleged trademark and trade dress infringement arising out of the defendant's use of the phrase "The Wearable Light" to describe a flashlight. "Slogan" was not defined in the policy in question, nor is it defined in the ISO 2004 CGL form. The Court indicated that one of the plain meanings of a slogan is a catchword or catch phrase. The Court also indicated that a slogan by definition is not a trademark but could serve as one in the proper context.[41] The Court held that, since a claim for slogan infringement could be derived from the allegations in the complaint, the insurer had a duty to defend the entire underlying case, even though the plaintiff claimed that the phrase in question was a trademark. The Court relied heavily on Michigan insurance law in its opinion and mentioned *Advance Watch*[42] in parts of the opinion, but it did not discuss the holding in *Sholodge.*[43] *Sholodge* involved Tennessee insurance law. However, the Court in *Sholodge* relied on *Advance Watch,* which was originally a Michigan case. Nevertheless, it appears that there could be an argument that there is coverage under "slogan" despite the existence of the trademark exclusion when the same or similar words are used as a mark and a slogan.

So, where are we? In this matter, the plaintiff has specifically included allegations of trade dress infringement arising, at least in part, out of advertising on the part of Jones Engineering. The objectionable catchword is "wave" and its use with other terms. You immediately send the suit papers to your agent,who

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sends them on to the insurer. Three weeks later, the insurer agrees to provide a defense under a reservation of rights. Life is good again … at least for now. ■

Endnotes

1 15 USC 1051-1127.

2 15 USC 1051, 1052, 1127.

3 15 USC 1114(1), 1125.

4 15 USC 1117, 1118.

5 15 USC 1116.

6 15 USC 1121.

7 15 USC 1125.

8 *Two Pesos, Inc v Taco Cabana*, 505 U S 763, 112 S Ct 2753, 120 L Ed 2d 615 (1992).

9 15 USC 1115(B)(4), 1064, 1065(4); *Abercrombie & Fitch v Hunting World, Inc,* 537 F 2d 4 (2d Cir 1976); *Nartron Corp v STMicroelectronics, Inc*, 305 F 3d 397 (6th Cir 2002).

10 15 USC 1091, 1115(b)(8), 1125(a)(3); *Herman Miller v Palazetti Import and Exports*, 270 F 3d 298 (6th Cir 2001).

11 15 USC 1114(1), 1125; *Frisch's Restaurants, Inc v Elby's Big Boy of Steubenville, Inc,* 670 F 2d 642 (6th Cir 1982) *cert den*, 459 U S 916 (1982); *Carson v Here's Johnny Portable Toilets*, 698 F 2d (6th Cir 1983).

12 *Little Caesar v Pizza Caesar*, 834 F 2d 568 (6th Cir 1987).

13 *Autozone, Inc v Tandy Corp,* 373 F 3d 786 (6th Cir 2004).

14 While virtually all complaints filed alleging infringement or misappropriation of trademarks and trade dress include related state and common law claims, this article is only intended to address trademark and trade dress infringement claims and insurance coverage for those claims.

15 Insurance Services Office, Inc.

16 ISO Form CG 00 01 12 04.

17 ISO Form CG 00 01 12 04, Coverage B, §1 a.

18 ISO Form CG 00 01 12 04, Coverage B, §1 b (1).

19 ISO Form CG 00 01 12 04, Coverage B, §2 a; *Lorillard Tobacco v Amouri's Grand Foods*, 453 F 3d 377, 381 (6th Cir 2007).

20 ISO Form CG 00 01 12 04, Section V – Definitions, §14 g, emphasis added.

21 ISO Form CG 00 01 12 04, Section V – Definitions, §1.

22 ISO Form CG 00 01 12 04, Coverage B, §2 i, emphasis added.

23 ISO Form CG 00 01 12 04, Supplementary Payments, §§1, 4, 5, 6 and 7.

24 ISO Form CG 00 01 12 04, Section IV – Commercial General Liability Conditions, §2.

25 *Henderson v State Farm*, 460 Mich 348 (1999).

26 *Allstate v Freeman*, 432 Mich 656 (1989); *American Bumper v Hartford*, 452 Mich 440 (1996).

27 99 F 3d 795 (6th Cir 1996).

28 168 F 3d 256 (6th Cir 1999).

29 ISO Form CG 00 01 11 86.

30 343 F 3d 249 (4th Cir 2003).

31 *State Auto* at 257.

32 280 F 3d 730 (7th Cir 2002).

33 ISO Form CG 00 01 10 01.

34 ISO Form CG 00 01 07 98.

35 477 Mich 75, 730 N W 2d 682 (2007).

36 891 F Supp 1228 (ED Mich 1995).

37 224 Mich App (1997).

38 262 Mich App 631 (2004).

39 ISO Form CG 00 01 12 04, Section V—Definitions, §14; *Citizens Ins* at 87; *Shefman* at 638; *GAF* at 262. The "arising out" requirement can be the subject of a detailed analysis on its own.

40 329 F 3d 546 (6th Cir 2003).

41 Citing *Microstrategy, Inc v Motorola, Inc, 245 F 3d 335, 342 (4th Cir 2001).*

42 99 F 3d 795 (1996).

43 168 F 3d 256 (6th Cir 2003).

Indemnity Case Summary

Significant Indemnity Decisions

By Noreen L. Slank, *Collins, Einhorn, Farrell & Ulanaoff, noreen.slank@ceflawyers.com*

Upstream Indemnitee's Voluntarily Assumed Liability Does Not Flow to Downstream Indemnitors

Lynn v Detroit Edison, unpublished opinion per curiam of the Court of Appeals, Docket Nos. 258942, 258943 (released May 23, 2006)

The general outline of the case

Lynn was a catastrophically injured CCG employee hurt while installing Comcast's cable onto a utility pole owned by Edison. His case settled for $3.15 million, and many years later the parties' respective contractual indemnity obligations were untangled by summary disposition hearings in the trial court. Review by the Court of Appeals followed.

CCG, Lynn's employer, agreed to indemnify Comcast. Comcast agreed to indemnify Edison. In the end, Comcast was required to pay Edison back for everything Edison paid to Lynn, plus Edison's defense costs. CCG in turn would have to pay everything Comcast paid to Lynn plus Comcast's defense costs. But CCG would *not* be required to pay what Comcast had agreed to pay for Edison's liability (or Edison's defense costs).

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Insurance Case Summary

Significant Insurance Decisions

By Deborah A. Hebert, *Collins, Einhorn, Farrell & Ulanaoff, deborah.hebert@ceflawyers.com*

In the past couple of months, the Supreme Court has decided many of the cases reported as pending in our last issue. Several have been resolved by way of orders rather than full opinions.

Supreme Court Opinions

Judicial Tolling Abandoned

McDonald v Farm Bureau Ins Co
___ Mich __ (2008), Case No. 132218

In a logical extension of principles previously announced in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562 (2005) and *Rory v Continental Ins Co*, 473 Mich 457 (2005), the court has now formally abrogated judicial tolling for insurance contract claims. Unless the terms of the contract so provide, "express limitations periods in optional insurance contracts are not automatically tolled as a matter of law by filing a claim." Sl op, p 9. Instead, parties are bound by the time limitations imposed by the plain terms of their contracts. And when the contract requires the filing of a "legal action" within a prescribed period, claimant must file "a lawsuit;" tendering a claim to the company is not enough. Equitable estoppel, on the other hand, remains a viable common law mechanism for trumping contractual time limitations, but only if the insured can show that (1) the insurer's "acts or representations induced [the insured] to believe that the limitations period clause would not be enforced, (2) [the insured] justifiably relied on this belief, and (3) [the insured] was prejudiced as a result of her reliance on her belief that the clause would not be enforced." Sl op, p 14. An insurer's mere delay in rendering a decision will not support an estoppel claim.

OFIS Review of Pre-Authorization Requirement

Ross v Blue Care Network of Michigan
___ Mich ___ (2008), Case No. 131711

This case interprets the review procedures implemented by the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901, *et. seq*., which was enacted to regulate HMOs and other insurance providers. The court was asked to decide "whether the Commissioner of the Office of Financial Insurance Services (OFIS) is bound by the recommendations of an independent review organization (IRO) on issues of medical necessity and clinical reviews" in deciding whether an insurer must pay for services under a health insurance plan. The IRO is made up of clinical peer reviewers, usually physicians, while the commissioner is not required to have any medical expertise. The court concluded that, based on the comprehensive statutory scheme devised by the legislature, "the commissioner is not bound by such recommendations" of the IRO. Sl op, p 1. Rather, the commissioner, after considering the IRO report, has discretion to make the final determination.

Plaintiff's husband was diagnosed with a particularly aggressive form of multiple myeloma. He was insured under an HMO policy with Blue Care Network, which required pre-authorization for any out-of-network care, unless medically necessary, and then only on an emergency basis. Plaintiff initially sought treatment with the University of Michigan Medical Center, an approved provider, but his cancer was so aggressive that his doctor there referred him to the Myeloma Institute in Little Rock, Arkansas (one of two facilities in the world specializing in multiple myeloma). Faced with a dire prognosis, plaintiff and her husband immediately traveled to Arkansas and treated there for several months. When BCN denied payments for the services, plaintiff appealed to the Commissioner's office. The IRO report recommended full payment, but the commissioner decided that Blue Care Network only had to pay those services rendered through a certain date, a period of time during which plaintiff's husband's life was in jeopardy. Once he was out of danger, plaintiff was required to obtain pre-authorization for the continued care of her husband out-of-network. The Commissioner's decision was upheld by the court as an appropriate exercise of the discretion afforded under the act.

Supreme Court Orders

Kreiner Reaffirmed

Minter v City of Grand Rapids, ___ Mich ___ (2008)
Jones v Olson, ___ Mich ___ (2008), Case No 133988

In our last issue, we reported that the Supreme Court had heard oral arguments on applications for leave in two "*Kreiner*" cases. On April 25, 2008, the Supreme Court issued its orders in those cases, *Jones v Olson*, ___ Mich ___ (2008), and *Minter v City of Grand Rapids*, ___ Mich ___ (2008). In both cases, the majority reinstated trial court orders of summary disposition for defendants under *Kreiner v Fischer*, 471 Mich 109 (2004).

In *Jones* (Supreme Court No. 132285), plaintiff fractured a vertebrae, and was off work for six months, during which time he was unable to engage in activities such as hunting,

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snowmobiling, softball, yard work, and long recreational walks. Plaintiff wore a cervical collar, took medication, and underwent physical therapy for several months. He was unable to drive for three months and had difficulty feeding and dressing himself for two months. The Court of Appeals found more than a "minor interruption" in plaintiff's lifestyle, but the Supreme Court disagreed and reinstated the trial court's summary disposition order because "plaintiff was generally able to lead his normal life in spite of his injuries." The court pointed out that "plaintiff's injuries were substantially similar to those considered in *Kreiner's* companion case, *Straub v Collette*.

In *Minter v City of Grand Rapids*, (Supreme Court No. 133988), plaintiff claimed a mild closed-head injury and a permanent scar above her right eyebrow. The majority adopted the dissenting opinion of the Court of Appeals (Murray, J), which concluded that plaintiff's life was not markedly changed as a result of her injuries. Before the accident, plaintiff was receiving Social Security disability benefits because of chronic, long-term back pain related to kidney surgery. She was generally inactive and relied on family to assist her with household chores. As a result of the motor vehicle accident, plaintiff suffered a mild closed-head injury (headaches and dizziness), a fractured toe, a cervical strain and a laceration, all of which resolved within four months, except for the scar, which photographs revealed to be relatively minor. The Supreme Court decided that plaintiff had failed to show a change in the trajectory of her life.

Resolved: No-Fault Property Damage Limits Govern Over the Motor Carrier Safety Act

Michigan Dept of Transp v Initial Transport, Inc
___ Mich ___ (2008), Case No. 134798

On May 16, 2008, the Supreme Court issued an order deciding an apparent conflict between the $1,000,000 property liability limits of Michigan's No-Fault act, MCL 500.3121(5), and the $5,000,000 "financial responsibility" requirement of the Motor Carrier Safety Act, MCL 480.11a, applicable to motor carriers engaged in transporting hazardous materials. The court held that the Motor Carrier Safety Act did not create an exception to the $1 million cap on property damages under Michigan's no-fault act.

Resolved: UM Coverage Not Dictated by Tortfeasor Defaults

Manzella v State Farm Mutual Automobile Ins Co
___ Mich ___ (2008), Case No. 233620

The Supreme Court issued its order in this case on March 21, 2008, deciding that a UM carrier is *not* bound by the default judgment entered against a tortfeasor. The majority adopted the reasoning of the dissenting opinion of the Court of Appeals (Donofrio, J.), which cited the language of the insurance policy as requiring an agreement between the parties as to the amounts payble under UM, or a submission of the dispute for a determination on the merits.

More to Come on *Kreiner*

Benefiel v Auto Owners Ins Co
___ Mich ___ (2008), Case No.135778

On May 30, 2008, the Supreme Court granted leave in *Benefiel v Auto Owners*, ___ Mich App ____ (2007), a UM claim by a plaintiff involved in two accidents within one year. The parties were instructed to address (1) whether plaintiff's "whole life," for purposes of assessing "normal lifestyle," properly included pre-existing, non-permanent impairments sustained in the earlier accident, and if so, which party bears the burden of establishing that the pre-existing impairments are not permanent; (2) whether the Court of Appeals correctly considered the time period before the plaintiff's first accident; (3) whether it was proper for the Court of Appeals to both reverse the trial court's order of summary disposition and rule that plaintiff was seriously impaired as a matter of law, and (4) whether defendant must be deemed responsible for all injuries and damages if it is impossible to separate the injuries sustained in the two accidents.

Court of Appeals Opinions - Published Opinions

Duty To Defend/Other Insurance Clauses

Citizens Ins Co v Secura Ins Co,
___ Mich App ___ (2008), Docket No. 267959

This opinion reemphasizes the insurer's broad duty to defend, arising as it does in the context of an "other insurance" clause. Defendant son was operating defendant mother's car when he was involved in a fatal accident. Secura insured the mother's car, while Citizens insured vehicles owned by the son. Both the mother and the son were sued in a third-party tort action. The son's policy with Citizens contained an "other insurance" clause, making it excess over any other available insurance if the insured was operating a non-owned car, as he was here. Secura agreed that its policy was primary if the insured car was being used with the owner's permission, but refused to defend the son because there was a question of fact about the mother's consent. The Court of Appeals looked to MCL 257.401(1), which presumes consent among certain family members, and held that this "presumption, taken together with the plaintiff's allegations" of consent in the complaint, meant that "Secura has a duty to defend." Whether Secura also had a duty to indemnify would depend on the ultimate "factual or legal determination that [the mother] expressly or impliedly consented to [the son's] use of her vehicle."

Court of Appeals - Unpublished Opinions

UM Coverage Not Triggered By Lawn Tractors

Medel v St. Paul Travelers Cos, Inc.
Decided April 15, 2008 (Docket No. 272769)

Plaintiff's decedent was fatally injured when a van insured by St. Paul Travelers struck the lawn tractor on which decedent was riding. Plaintiff sought UM benefits under the St. Paul Travelers policy. The Court of Appeals agreed with the plaintiff that a lawn tractor was a "land motor vehicle" within the meaning of the policy because it was a "vehicle with a motor that travels on land." *But* the lawn tractor was not a vehicle for which insurance was mandated by law and thus did not trigger UM benefits.

Title Insurance

Burke v Ramblewood Manor Homes Ass'n
Decided May 29, 2008, Case No. 277 808

This title insurance dispute arose out of the sale of a condominium. The new owners erroneously believed that their deed included a car port. Much of the opinion addresses the Michigan Condominium Act, but the new owners also sued their title insurance company for failing to cover their claim. The policy expressly excluded costs, attorney fees, or expenses that arise by reason of "[r]ights of co-owners . . . in common elements as set forth in the Master Deed" and/or "[c]ovenants, conditions, restrictions, easements, and right of ways, if any, affecting the common elements." The Court found that the exclusion applied.

Homeowner's Policy –Untimely Fire Claim

Carpenter v Michigan Basic Property Ins Assc
Decided June 3, 2008, Case No. 277742

The court reversed the trial court's denial of summary disposition for this homeowner's insurer because the endorsement to the policy, which shortened by one year the time for filing suit against the insurer to one year, was not ambiguous.

Replacement Value on a Homeowner's Policy

Helsel v Farm Bureau General Ins Co
Decided June 10, 2008, Case No. 276749

Where a homeowner's policy provided for replacement value of a home damaged by fire on the condition that the insured serve notice of the "completion of any additions or improvements in excess of $5,000," the insured was not required to provide notice of ongoing, incomplete projects just because of the amounts spent. "We hold that, as a matter of law, plaintiffs were in the midst of an improvement – a remodeling of their basement – at the time of the fire but that the improvement had not yet been completed. Accordingly, they were not required to notify defendant about the improvement in order to retain their replacement cost coverage." But where the policy also provides that replacement costs will be paid only in the event of actual replacement, the insured is entitled to only actual costs until the replacement is made. "Plaintiffs must proceed with the replacement in order to obtain the replacement cost." ■

No-Fault First-Party Case Report

By Daniel Steele, *Vandeveer Garzia, PC*
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There were two noteworthy first-party no-fault cases in the last quarter. One was in the Court of Appeals and the other was in the Supreme Court.

Causal link between high cholesterol and auto accident is question of fact.

In *Scott v State Farm*, 278 Mich App 578; ___ NW2d ___ (2008), (docket no. 276544) the Court of Appeals looked at the causal relationship between plaintiff's high cholesterol and an automobile accident. The auto accident occurred in 1981. The high cholesterol was diagnosed in 1991. In 2004, the no-fault carrier denied payment for two cholesterol medications. Plaintiff's treating doctor opined that the high cholesterol was:

> "… at least partially related to her traumatic brain injury. Her inability to exercise influences her weight. Additionally, her cognitive problems influence her eating behaviors."

The Court of Appeals held that the trier of fact must decide whether the high cholesterol problem arose out of the accident. The defendant has filed an application for leave to appeal. The plaintiff's brief in opposition was filed June 16, 2008 and the application is pending.

No-fault benefits denied to woman scraping snow and ice off vehicle.

The Supreme Court in *Willer v Titan*, 480 Mich 1177 (2008), in lieu of granting leave, reversed a trial court judgment and denied first-party benefits to a woman who was scraping ice and snow from her car windshield. The Supreme Court stated that the record failed to show that the causal connection between the plaintiff's injuries and her scraping the windshield of her vehicle was anything beyond "incidental, fortuitous or 'but for' such that the injuries arose out of the "ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" within the meaning of MCL 500.3105(1). ■

The Drafting Table

The Contract "Safety Audit" and Risk Transfer

By Hal O. Carroll, *Vandeveer Garzia, PC, hcarroll@VGpcLAW.com*

Insurers routinely conduct safety audits before insuring a business's property, but far less frequently do they review the insured's underlying contracts for indemnity exposure.

Consider this scenario: The insured runs a business that draws a lot of customers, and the appearance of the property is important. To enhance the appearance, the insured hires a company to do some landscaping. The landscaping company creates a hazard (one of the few that are not "open and obvious"), a customer is injured, and sues both the insured and the landscaping company. In the contract is this sentence: "The customer [the insured] hereby agrees to defend and indemnify [the landscaping company] for any claim that arises out of [the landscaping company's] performance of this contract." Landscaping company turns to the insured and demands that the insured defend and indemnify it if it is held liable because of its own fault. The insured hands the demand off to the insurer under the "insured contract" language of the GL policy.

Normally, one would expect the party that is at fault (the landscaping company) to agree to protect the party who gets sued because of that fault, and if the insured had been paying attention, it would have stricken the clause, which runs backward. This is an extreme example of a scenario that happens quite often. The insured becomes liable on an indemnity clause and looks to the insurer to pay the obligation as an insured contract.

Contractual indemnity is a matter of language. Under the law, subject only to the "sole negligence" limitation imposed by MCL 691.991, an innocent party can be required to indemnity an at-fault party, if that is what the contract provides.

Even putting aside the fairly extreme example above, in the world of indemnity, there is a world of difference between a clause that requires an insured to indemnify someone for any claims "arising out of the [insured's] performance of the contract" and for claims "caused by the act or omission" of the insured. A change of a few words can make a dramatic change in the result.

Attorneys whose clients are in business know how hard it is to interest the client in a contract review. There are few things that an attorney can do for a client who is in business that are more cost-effective than a preventive contract review. Yet it is a hard sell, not so much because of a conscious distaste on the part of the client, but because people in business are focused on their business. If they think about liability at all, they look to their insurer for protection.

The Audit

That is why the insurer is in a better position to conduct a "contract safety audit," paralleling the kind that is done for hazard insurance. The same contract review would benefit the insured as well as the insurer. Insureds and insurers are sometimes adverse when disputes arise, but in this situation their interests coincide. Even without considering the interests of the insurer, the insured has a strong interest in minimizing its exposure as indemnitor and maximizing its potential as indemnitee.

Some applications for professional liability policies routinely ask if the prospective insured has any knowledge of pending or anticipated claims. Parallel questions could easily be inserted into an application for a general liability policy. The questions could be something like:

1. Does the applicant use a written contract with general contractors?
   If yes, attach a copy
   If no, attach an explanation
2. Does the applicant use a written contract with subcontractors or suppliers?
   If yes, attach a copy
   If no, attach an explanation
3. Does an attorney review the contract before use?
4. Does the standard contract contain an indemnity or hold harmless clause for the benefit of the applicant?

The insurer can then have counsel review the contracts and recommend changes. It may well be, of course, that the insured has no choice if it is a subcontractor and is given a contract written by the general contractor. If so, at least the insurer has a better idea of the magnitude of the risk it is undertaking. If the insured has its own subcontractors, there is more of an opportunity to transfer the risk downstream.

The review is not appropriate for all insureds, of course. Apart from flagging all insureds whose contracts have created liability in the past, the insurer can sort prospective insureds by the type of industry and the amount of business done.

The content of the review is a matter of a critical reading of the indemnity and insurance clauses. Indemnity clauses are infinitely variable, and each clause has to read as a whole, but each clause typically has some core "trigger" language that defines when the obligation to indemnify arises.

Common Indemnity Language

Language like "arising out of [the insured's] performance of the contract" is broad. It generally creates the indemnity obligation as long as there is a simple causal link between the work and the injury. If an insured's employee is free of fault and injured by the negligence of another subcontractor, that loss nonetheless arises out of the performance of the contract.

On the other hand, language like "caused by [the insured's] act or omission" is narrower. It generally requires that the source of the injury be a negligent act of the insured. In some situations, tort reform may eliminate the indemnity obligation entirely when the clause is written this way. *MSI Construction v Corvo Iron,* 208 Mich App 340, 344; 527 NW2d 79 (1995) and *Ormsby v Capital Welding, Inc, 255 Mich App 165, 193; 660 NW2d 730* (2003) (rev'd on other grounds, 471 Mich 45; 684 NW2d 320 (2004).

The phrase "actual or alleged" in front of "act or omission," however, could expand the obligation, though the cases are not entirely clear.

There is much more involved in the interpretation of indemnity clauses, of course. There may be "step-over" language, requiring the insured to indemnify an upstream contractor for that contractor's indemnity obligation. The indemnity obligation itself might be limited to "defense" and not mention indemnity, in which case the obligation is only to defend. Conversely it might require only "indemnity," so the defense obligation rests with the indemnitee. Indemnity clauses tend to be applied literally.

Insuring Language

The contract may also have insuring language and this should be reviewed as well, to determine how much coverage the insured is required to provide, whether the insured is required to make the general contractor a named insured or an "additional insured," and if so, whether the policy is required to be primary, and whether the general contractor's policy contributes or not.

In an ideal world, there is more that the insurer would want to know. Are there other subcontractors who may be co-indemnitors? Do they have the same contract language? What kinds of "other insurance" clauses are there in other policies that may be on the risk? Still, the above illustrates in broad outline how a contract review could be conducted.

One of the benefits of this process is educating the insured to be more aware of the issues involved and to understand a little better how indemnity works. This alone can have a beneficial long-term effect on the insured's (and the insurer's) exposure. More tangibly and more immediate, it can result in changes to contract language that will have the same benefits.

A contract review of this type would not eliminate all risks, but it would reduce the number and the aggregate magnitude of the risks, as policies are renewed and the underlying contracts reviewed and revised. It is a long-term strategy to transfer as much risk as possible from the insured (and its insurer) to other parties (and their insurers). ■

What Practitioners Should Know About Advertising Injury Coverage

By James A. Johnson ©2008

"It is common for insurance policies to give with the right hand and then take away with the left."

Insurance coverage for advertising injury liability is provided by the advertising injury provisions in the Commercial General Liability (CGL) policy. The CGL policy is the primary risk-transfer method used by most businesses and is the most frequently litigated policy. The CGL policy provides coverage for liability and defense costs resulting from injury or damage to third parties caused by the insured. The standard CGL policy typically covers four categories of liability: property damage, bodily injury, personal injury, and advertising injury.

For advertising injury coverage to attach under the standard 1986 ISO policy form, which is still in widespread use for coverage analysis, the insured must establish that the injury arose out of an enumerated offense, that the offense was committed during the policy period, in the course of the insured's advertising, and a causal connection between the injury complained of and the insured's advertising.

Advertising injury coverage is one of the most valuable components of liability insurance. The purpose of this article is to provide guidance and to update insurance professionals and intellectual property lawyers on advertising injury claims as that coverage has evolved in the 1986, 1998, and 2001 policy forms. In the Insurance Service Office (ISO) 1986 CGL policy form, advertising injury includes one or more of the following offenses:

1. 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;
2. Oral or written publication of material that violates a person's right of privacy;
3. Misappropriation of advertising ideas or style of doing business; or
4. Infringement of copyright, title, or slogan.

What is Advertising?

The operative event for this coverage is advertising. The injury must occur during the course of the named insured's advertising activities. This causal nexus must be established before an advertising injury offense can trigger coverage. In *Citizens Insurance Co v Pro-Seal Service Group, Inc*[1] the Michigan Supreme Court upheld Citizens' denial of a defense to Pro-Seal because the claim did not arise out of an advertising injury as defined by the policy.

Advertising injury coverage is one of the most valuable components of liability insurance.

What are advertising activities? The common meaning of "advertising" is to announce, give notice of, make known, call attention to, or publish to the attention of the public.[2] Nonetheless, courts differ on this issue, from widespread dissemination to the public at large[3] to one-on-one solicitation.[4] Advertising activity can be fact-specific and jurisdictional.

Here are some specific examples:

The act of affixing its seal to another manufacturer's packing before mailing to a specific customer is not advertising.[5]

The physical reproduction and sale of a look-alike teapot is not advertising.[6]

A policyholder's use of the claimant's trade secrets and customer lists were not advertising activities.[7]

A proposal to a particular company to do business together was held not advertising.[8]

Unsolicited advertisements for basketball tickets sent to fax machines came within the defendant's advertising injury coverage.[9]

Most courts hold that patent infringement cannot occur in the course of advertisement. The consensus is that patent infringement cannot have a causal connection to the policyholder's advertising activities. The tort of patent infringement occurs when the patent idea is used, not when it is advertised. And patent infringement is not an enumerated offense in the policy. Thus, patent infringement claims do not satisfy the prerequisites for advertising injury coverage.[10]

The above reasoning also applies to trademark coverage. A trademark can be any word, name, slogan, symbol, design, device, or any combination thereof that identifies products or services.[11] The primary function of trademark law is to protect consumers from confusion and deception. To constitute infringement, the unauthorized use must create a likelihood of public confusion as to the source of the goods or services. Trademark infringement, in the insurance coverage context, requires that the infringer advertise the trademark during the course of the infringement. Unlike patent infringement, it is not possible to allege a claim for trademark, service mark, trade name, or trade dress infringement without the infringing mark being used to identify the goods or services to the

public. Allegations of trademark and trade dress infringement inherently involve advertising activity.[12]

But trademarks and service marks are not slogans or titles, nor do they come within the scope of misappropriation of advertising ideas or the style of doing business.[13]

Trademark infringement, in the insurance coverage context, requires that the infringer advertise the trademark during the course of the infringement.

Where a lawsuit alleges only patent infringement generally and not a predicate offense, it is insufficient to establish the requisite advertising injury.[14]

But compare *Hudson Universal v Aetna Ins Co,*[15] opining that the unauthorized use of a trademark constituted infringement of title and slogan, with *Advance Watch Co v Kemper National Ins Co*[16] holding that trademark infringement did not arise in the course of advertising.

After digesting *Hudson* and *Advance Watch,* applying New Jersey and Michigan law respectively, consider *Energex Systems Corp v Fireman's Fund Ins Co.*[17] The New York Court held that there was no coverage for alleged patent infringement claim, but trademark claims based on the same facts were covered. The *Energex Systems* Court rejected the narrow construction of the term "misappropriation of advertising ideas or style of doing business" and found that the requisite nexus communication was satisfied by Energex's direct mail advertisements.

In Texas, under the 1976 ISO CGL policy with a broad form endorsement, the Corpus Christi Court of Appeals reversed the trial court in *CIGNA Lloyds' Ins Co v Bradley's Electric, Inc.*[18] The Texas Court of Appeals held that CIGNA, Texas Pacific, and United National did not owe a duty to defend in a patent infringement lawsuit. Texas follows the complaint allegations rule and does not require an inquiry beyond the four corners of the complaint to ascertain whether the express allegations for inducement of patent infringement are based on the insured's advertising activities.

Cyberspace Issues

A paramount question is whether an e-mail solicitation or a website owner providing information or content posting on the Internet can trigger advertising injury coverage under the 1986 standard CGL policy. A related question is what part, if any, of a company's website constitutes advertising about the company's goods, products, or services when mixed with entertainment or news.

Resolving the issue of coverage for an advertising injury requires the analysis of three principal issues:

1. Whether the policyholder's alleged misconduct occurred in the course of its advertising;
2. Whether the policyholder's alleged misconduct qualifies as one or more of the predicate offenses; and
3. Whether there is a sufficient causal connection between the advertising and the alleged injury.

1998 Revision. In 1998, the ISO revised the standard CGL policy form by combining "personal injury" and "advertising injury" into a single coverage, and this change remains in the 2001 version. The 1998 edition defines advertisement as "a notice that is broadcast or published to the general public or specific market segments about your goods, products, or services for the purpose of attracting customers or supporters."

2001 Revision—Internet Activities. The 2001 edition includes specific Internet activities within the definition of advertising:

1. Material placed on the Internet or on similar electronic means of communication; and
2. Regarding websites, only that part of a website that is about your goods, products, or services for the purposes of attracting customers or supporters.

Further, the offense of "misappropriation of advertising ideas or style of doing business" is replaced by "the use of another's advertising idea in your advertisement." Infringement of copyright, title, or slogan is changed to "infringing upon another's copyright, trade dress, or slogan in your advertisement."

A paramount question is whether an e-mail solicitation or a website owner providing information or content posting on the Internet can trigger advertising injury coverage under the 1986 standard CGL policy.

2001 Changes—Exclusions. Additionally, the ISO made four significant exclusions in 2001:

1. The intellectual property exclusion
2. Advertising injury coverage for website designers and Internet search, access, content, or service providers.
3. Personal and advertising injury arising out of an electronic chat room or bulletin board that the policyholder hosts, owns, or exercises control over.
4. The unauthorized use of another's name or product in the policyholder's e-mail address, domain name, or metatag or other similar tactics designed to mislead another's potential customers.

The 1998 and 2001 revisions impose new restrictions to each of the requirements for coverage set out above under the 1986 CGL policy form. A requirement that the offense occur "in your advertisement" replaces the requirement of an enumerated offense committed "in the course of advertising

Continued on next page

What Practitioners . . .
Continued from page 13

activities." Now, the offense must occur "in" an advertisement, which requires a more specific causal nexus than the 1986 language, "in the course of advertising activities."

The new policy language of advertisement, infringing upon another's copyright, trade dress, or slogan in your advertisement and use of another's advertising ideas eliminates the advertising injury offenses of infringement of title and misappropriation of advertising ideas or style of doing business in the 1998 and 2001 ISO policy forms. Also, the 2001 edition excludes liability arising out of infringement of trademark or other intellectual property rights, except for infringement of copyright, trade dress, or slogan in the insured's advertisement. Moreover, the 2001 policy form excludes liability arising out of patent infringement.

Reductions in coverage. In summary, the ISO's 1998 and 2001 revisions substantially reduce coverage for intellectual property claims. And there is scant case law interpreting key words and phrases such as "specific market segments," "in your advertisement," "broadcast," and "general public." General counsel and risk managers of companies with significant intellectual property risks should consider purchasing specialty insurance products in addition to the standard form CLG policy. These products are designed to cover specific risks and contemporaneously fill gaps in the reduced coverage in the standard form CGL Policy.

Conclusion

The Michigan Supreme Court in *Citizens Ins Co v Pro-Seal Service Group* held that for advertising injury coverage to attach, there must be some public dissemination of information about the insured's goods and services. The Court stated in pertinent part:

> We conclude that the purpose for placing a Pro-Seal label on the Flowserve container in this instance was to identify for *that specific customer* the source of the seal to allow that specific customer to contact defendant with any questions or complaints about that product. Accordingly, we conclude that the harm alleged to have been caused by Pro-Seal's act of shipping a seal in a Flowserve container did not "arise out of an advertisement" and therefore, plaintiff was not obligated to tender a defense based on this allegation under the terms of the CGL policy.[19]

Advertising is the quintessential commercial speech, and advertising injury is a tort that quintessentially consists of advertising. There is not much uniformity between jurisdictions or circuits on advertising injury coverage under the standard CGL policy. If a lawsuit is filed, the practitioner should plead with specificity one or more of the covered offenses together with the *operative advertisement***.**

No matter what version of the CGL policy you are dealing with, it is absolutely necessary for counsel to read and understand the case law of the jurisdiction that will be applied by the Court in deciding the insurance coverage dispute. Moreover, insurance policies are contracts, and unless you read them carefully, you will not focus on the important facts and issues of your case. The information in this article is intended to provide practitioners and insurance professionals with an advance starting point. ■

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Endnotes

1 477 Mich 75; 730 NW2d 682 (2007)

2 See, *e.g.,* American Heritage Dictionary, Third Ed., p 26.

3 *International Insurance Co v Florists' Mutual Insurance Co,* 559 NE 2d 7, 10 (Ill. App. 1990).

4 *New Hampshire Insurance Co v Foxfire, Inc,* 820 F Supp 489,494 (ND Cal 1993); see also *Farmington Cas Co v Cybedogic Tech, Inc*, 996 F Supp 695, 700-02 (ED Mich 1998).

5 *Citizens Ins Co v Pro-Seal Service Group, Inc,* 477 Mich 75; 730 NW2d 682 (2007).

6 *Ekco Group Inc v The Travelers Indemnity Co of Illinois,* 273 F3d 409 (1st Cir. 2001).

7 *GAF Sales & Servo v Hastings Mutual Ins*, 224 Mich App 259; 568 NW2d 165 (Mich. App. 1997).

8 *Smart Foods, Inc. v. Northbrook Prop. & Cas. Co.* 35 Mass App Ct 239, 618 NE2d 1365 (Mass App 1993).

9 *TIG Insurance Co v Dallas Basketball Ltd,* 129 SW3d 232 (Tex App -Dallas 2004).

10 *Maxconn Inc v Trucking Insurance Exchange*, 88 Cal Rptr 2d 750 (Cal App 6th Dist. 1999); *Westfield Insurance Co v Argonics In.*, 1999 US Dist Lexis 19397 (ED Mich Dec. 13, 1999).

11 Lanham Act 45 USC § 1127.

12 *Poof Toy Products, Inc v United States Fidelity & Guaranty Co,* 891 F Supp 1228, 1235-1236 (ED Mich 1995); *Bay Electric Supply, Inc v Travelers Lloyds Ins Co*, 61 F Supp 2d 611 (SDTex 1999); *EI-Com Hardware, Inc v Fireman's Fund Insurance Co,* III Cal Rptr 2d 670 (Cal Ct App 2001).

See also *RC Bigelow Inc v Liberty Mut Ins Co*, 287 F3d 242 (2nd Cir

2002): duty to defend where allegations came within the plain meaning of the policy, where complaint stated trade dress infringement by copying its packaging then using that packaging in published ads, even though the competitor did not expressly plead advertising injury claim.

13 *Advance Watch Co, Ltd v Kemper National Insurance Co,* 99 F 3d 795 (6th Cir 1996), 878 F. Supp 1034, 1042 (E.D. Mich. 1995), *Sholodge, Inc v Travelers Indemnity Co of Illinois,* 168 F. 3d 256 (6th Cir 1999).

14 *United National Insurance Co v STT Fitness Corp,* 182 F 3d 447 (6th Cir 1999); see also *Konami v Hartford Ins Co of Illinois*, 761 N E 2d 1277 (2002) (patent infringement claims are not covered under the advertising injury provisions absent express allegations that the insured had induced patent infringement in its advertising).

15 987 F Supp 377 (D NJ 1997).

16 *Supra*, note 12.

17 1997 WL 358007 (SD NY July 25, 1997).

18 33 SW3d 102 (Tex App Corpus Christi 2000).

19 477 Mich 75, 86-87.

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The indemnity environment

It is common that when a worker is injured on a job site, there will be multiple contractors servicing the site. Those multiple contractors and subcontractors will often enter into contracts to indemnify the party that brings them to the site. Unscrambling the indemnity obligations as between "downstream" and "upstream" parties can present Gordian Knot complexities.

The parties' contracts (edited for clarity)

Comcast agreed to "indemnify" and "defend" Edison "for all claims…for injury… which may arise out of or [be] caused by the erection, maintenance, use or removal" of Comcast's cables onto Edison's utility poles, except when those claims are "caused by or result[] from [Edison's] sole negligence." As is so frequently the case, there was likely negligence aplenty in addition to Edison's. CCG agreed "to indemnify" and "defend" Comcast against "all claims" "arising from or in connection with" "the work" being performed and CCG's "entry upon…the work site."

The question presented

Did the Edison part of the settlement with CCG's employee (and Edison's defense costs), which Comcast agreed to contractually assume, arise out of or in connection with the work that CCG was performing for Comcast on the Edison utility pole? Short answer: No. The Court of Appeals ruled that the broad language of the indemnity agreement was not broad enough to sweep in the indemnity liability that Comcast had itself voluntarily assumed:

> Although the [contract between Comcast and CCG] provides for broad indemnity, we conclude that the agreement does not encompass "upstream indemnity," such that CCG is automatically liable for Comcast's voluntary contractual indemnity to Edison. However, the language does encompass indemnity liability for Lynn's claims against Comcast, and thus CCG is liable for indemnification with respect to Comcast's settlement with Lynn.

Practice implications

If your "downstream" client has not assumed direct liability to an "upstream" party via a step-over clause, *Lynn v Detroit Edison* gives your client the means to erect a dam between itself and the upstream party's liability. A "step-over" clause is one where a party expressly agrees to assume toward another the obligations that the party it is contracting with agreed to assume toward that party. See, e.g., *Polomba v City of East Detroit*, 112 Mich App 209, 216 315 NW2d 898 (1982) and *Robinson v A.Z. Shmina*, 96 Mich App 644, 651; 293 NW2d 661 (1980). ■

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