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Hanover's 3rd Circ. Win Exposes Policyholders To Vague Suits

By **Jeff Sistrunk**

Law360, Los Angeles (October 27, 2015, 8:34 PM ET) -- The Third Circuit's recent ruling that Urban Outfitters isn't covered for claims that it violated the Navajo Nation's copyrights because some of the retailer's purported infringement predated its insurance policy period could leave policyholders vulnerable to lawsuits that are unclear as to when wrongful conduct occurred, attorneys say.

Applying the "prior publication" exclusion in Urban Outfitters Inc.'s policy with Hanover Insurance Co., a panel of the appeals court found that a lower court properly nixed coverage for the Navajo Nation's complaint under the policy because the tribe alleged that the retailer engaged in "similar liability-triggering behavior" both before and during Hanover's coverage period.

The panel determined that Urban Outfitters' use of the "Navajo" and "Navaho" names in advertisements for its clothing were part of a continuing pattern of infringement, rejecting the notion that each pattern, design and product identified in the tribe's suit amounted to a "fresh wrong" requiring Hanover to share defense duties with another insurer.

Policyholder attorneys say that the Third Circuit's decision flies in the face of traditional jurisprudence holding that insurers should err on the side of providing a defense if a plaintiff's allegations are unclear and there is a potential for coverage. The panel unfairly assumed based on the limited information in the Navajo Nation's complaint that no potentially covered claims arose during Hanover's policy period, some attorneys say.

"The ruling was a bit disappointing in that it puts policyholders at the mercy of how the plaintiffs draft their complaint," said Lowenstein Sandler LLP partner Lynda Bennett. "It locks the coverage analysis into how well or how detailed the complaint is drafted, which policyholders have no control over. It may be that there were particular works and related wrongful acts that did take place during the Hanover policy period. Under this ruling, though, the insurer still has no defense obligation, which isn't particularly fair."

However, insurer-side attorneys disputed the notion that the Navajo Nation's complaint was vague, pointing to language in the suit alleging that Urban Outfitters had been engaging in infringing conduct since "at least" 16 months prior to the effective date of the Hanover policy.

"I disagree that there was any 'vagueness' here; it wasn't a matter of vagueness," said Ronald P. Schiller, vice chairman of Hangley Aronchick Segal Pudlin & Schiller. "Urban Outfitters was not being deprived of a defense because of a vague complaint, as the complaint alleged wrongdoing clearly beginning 16 months before the policy period started."

Dick Bennett, of counsel at Cozen O'Connor, added that "the insured is always at the mercy of how a plaintiff drafts the complaint."

"In this particular case, the Third Circuit said that the Navajo Nation's allegations were 'remarkably consistent,'" he said. "Maybe a case will come down the pike that has more of a grey area, but the facts of this case were very straightforward."

The Navajo Nation sued Urban Outfitters in Pennsylvania federal court in 2012, claiming the company violated the Lanham Act, Indian Arts and Crafts Act and other intellectual property laws by advertising and selling a slew of products using the tribe's name and mimicking its designs.

U.S. District Judge Thomas O'Neill sided with Hanover in its declaratory judgment action in 2013, ruling that Urban Outfitters' ads released when the insurer's policy was in effect were just an extension of the retailer's earlier conduct.
On appeal, Urban Outfitters asserted that the prior publication exclusion in Hanover's policy, which became active in July 2010, didn't clearly apply to ads the retailer produced after that date because the tribe didn't explicitly allege that those ads were simply reproductions of materials from 2009.

The Navajo Nation provided screenshots showing that the retailer sold some allegedly infringing products in January 2010 and beyond, and Urban Outfitters had argued that was proof that those ads were separate from the ads released before Hanover's policy went into effect.

The Third Circuit panel rebuffed Urban Outfitters' argument that the court should refer to extrinsic evidence to determine whether Hanover has a duty to defend, given the lack of a specific timeline of infringing conduct in the tribe's complaint. The tribe's complaint alone is sufficient to resolve the duty to defend issue, the panel found.

"To abandon the underlying complaint whenever a plaintiff neglects to provide a date-certain tortious conduct timeline would occasion more protracted disputes by eroding the predictability that reliance on a single pleading ensures," U.S. Circuit Judge Jane Richards Roth wrote for the panel.

Lynda Bennett said the Third Circuit's decision "doesn't seem to advance the canon of construction that we see in most jurisdictions" — that where there is a potential for coverage, the insurer must err on the side of providing coverage.

"If it's not clear when the wrongful conduct took place, an insurer should provide coverage until it is established otherwise," she said. "This is the opposite conclusion of what we usually see."

Leaning in part on a Ninth Circuit decision in a similar case, the Third Circuit panel set forth a test to determine if separate ads give rise to fresh wrongs. Mere variations on an ad with a common advertising objective don't constitute fresh wrongs, according to the appellate panel.

In determining whether two sets of ads share a common objective, courts may look to a number of factors, including whether a plaintiff charged the policyholder with separate torts for each alleged violation and whether the ads share a common theme, the panel said.

"The decision is useful and well-written, providing some clarity for litigants on the definition of a fresh wrong," Dick Bennett said. "While this is a case-sensitive issue, the decision will make it easier for future

courts in the circuit to identify fresh wrongs as well."

Schiller said he thinks the Third Circuit crafted a "very reasonable middle-ground approach between the courts" based on substantial similarity between ads.

"I thought the Third Circuit's reasoning regarding the thematically consistent series of ads was unusual for its descriptiveness and specificity," he said.

But Reed Smith LLP partner Traci Rea, who represents policyholders, said she was troubled that the appellate panel accepted the Ninth Circuit's suggestion that courts should look at whether a plaintiff alleged separate torts in analyzing the existence of a fresh wrong.

"In a duty to defend analysis, you don't look at the nature of the claims, but the allegations of conduct," Rea said. "Plaintiffs are unlikely to assert multiple different torts, and you'll rarely see a complaint with one count attached to each violation. This decision puts policyholders at a disadvantage if a court is looking at whether separate claims were made."

In addition, Rea said that she was concerned by the Third Circuit's use of the "common objective" language.

"That's a holding that's rife with mischief and may give rise to confusion down the line," she said. "You could have a violation of different types of advertising ideas with a common objective. Each of those should be a separate harm, getting the policyholder out of the realm of prior publication."

Robert D. Chesler, a shareholder in Anderson Kill PC's Newark office, said the Third Circuit's decision will make it tougher for litigants to move for an early resolution on the question of whether a fresh wrong exists.

"I think whether there is a fresh wrong is a fact-intensive question," Chesler said. "This ruling makes it more difficult for parties to move for summary judgment on the issue — they must first conduct more discovery."

--Editing by Katherine Rautenberg and Emily Kokoll.
