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Getting Insurance Coverage for Your Intellectual Property Claims: Healing Advertising Injuries

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Intellectual Property accounts for the majority of all property owned by modern corporations. Because it is therefore fiercely protected, liability for alleged Intellectual Property infringement is a major risk facing corporations today. Indeed, corporations face lawsuits for copyright infringement, trademark and "trade dress" infringement, patent infringement and piracy, antitrust violations, unfair competition, defamation, privacy violations, and even blast faxes.

Corporations confronted with such lawsuits should look to their Comprehensive General Liability ("CGL") policies for "advertising injury" insurance coverage. Unfortunately, insurance companies continue to take an overly narrow view of the broad "advertising injury" insurance coverage included in CGL policies sold to corporate policyholders. When faced with insurance coverage denials for "advertising injury" claims, policyholders should be prepared to contest them, considering the points below.

'Advertising Injury' Insurance Coverage

Depending on the CGL policy's vintage, "advertising injury" provisions may cover liability for copyright infringement, trademark and "trade dress" infringement, patent infringement or piracy, antitrust violations, unfair competition, defamation, or privacy violations. Coverage includes payment of attorney's fees incurred in defending such actions as well as potential recovery for settlements or judgments paid in such actions.

In the 1970s, "advertising injury" insurance coverage was marketed and sold as part of the "broadest package of coverage available to the average insured." Over the years though, the "advertising injury" insurance coverage provisions changed.

The ISO Introduction and Overview for the 1986 standard form CGL Policy Revision indicated that no change to narrow the scope of insurance coverage was intended with regard to the "advertising injury" provisions. Noticeably absent from the 1986 definition of "advertising injury," however, were the terms "unfair competition" and "piracy."

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The policy form was again revised in 1998 and in 2001. These forms combined "personal injury" and "advertising injury" into a single coverage for "personal and advertising injury" and replaced two of the covered offenses with other similar offenses. The 2001 form included an exclusion for certain Intellectual Property claims. Policyholders should check their CGL policy to determine which version of the "advertising injury" provisions appears in the policy.

'Advertising Injury' Insurance Coverage May be Available for Copyright, Trademark, 'Trade Dress' and Patent Infringement

Courts have found broad insurance coverage for various Intellectual Property claims under a CGL policy's "advertising injury" provisions.

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Insurance coverage is expressly available for liabilities from allegations of copyright infringement, which takes place when a person or entity exercises the rights reserved exclusively for the copyright owner without authorization. Courts have often found that insurance companies have a duty to defend and indemnify policyholders in copyright infringement actions under the "advertising injury" coverage provisions.

Insurance coverage also may be available for liabilities from allegations of trademark and "trade dress" infringement, which occur when one party uses the mark of another in commerce without authorization in a manner deemed likely to cause confusion in the mind of the consumer. Courts have held that insurance companies have a duty to defend and indemnify policyholders in trademark and "trade dress" infringement actions under the "advertising injury" coverage provisions

Additionally, insurance coverage may be available for certain liabilities stemming from allegations of patent infringement. A number of courts have found no coverage for patent infringement, but insurance coverage may be available for a particular fact pattern. Inducement to infringe a patent often may occur in connection with advertising or marketing activities. There are many ways in which one can induce infringement of a patent, one of which is through advertising an infringing device or method. Courts have held that insurance companies have a duty to defend and indemnify their policyholders against assertions of inducing patent infringement. Also, courts interpreting the meaning of the term "piracy" in certain "advertising injury" provisions have found that patent infringement is a form of "piracy."

The 2001 policy form's "advertising injury" provisions included an exclusion for Intellectual Property claims. Importantly though, actions that allege "copyright, trade dress and slogan" infringement are explicitly excepted from the exclusion. Policyholders should argue a broad interpretation of these terms to continue to receive the promised "broadest package of coverage available to the average insured."

In spite of the recent changes to the policy form, policyholders should still closely analyze whether they may find "advertising injury" insurance coverage for certain kinds of Intellectual Property actions.

'Advertising Injury' Insurance Coverage for Unfair Competition

Many Intellectual Property infringement actions are also accompanied by unfair competition claims. Courts have found insurance coverage for unfair competition actions. The earliest case to address the use of the term "unfair competition" in the "advertising injury" insurance coverage context held that it applied to torts involving harm to competitors.

Insurance companies themselves have acknowledged, in a number of contexts, that there should be no artificial limitation of insurance coverage for unfair competition to archaic common law offenses only. The positions of these insurance companies on the unfair competition issue show the reasonableness of policyholders' position that insurance coverage for unfair competition should not be limited to an ancient common law definition, rather than the common understanding of unfair competition, including statutory unfair competition and antitrust violations. Moreover, the case law describing the bounds of "unfair competition" confirms that the term is vague.

Therefore, policyholders are permitted to argue that unfair competition is a broad term and many such claims should be covered under the "advertising injury" provisions.

'Advertising Injury' Insurance Coverage for Blast Faxes

Courts consistently have found that advertising injury provisions in CGL policies confer a

duty to defend and indemnify policyholders for so-called "blast fax" violations of the Telephone Consumer Protection Act ("TCPA"). Generally, the TCPA makes it unlawful for a person to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine. CGL policies typically define "advertising injury" as "oral or written publication of material that violates a person's right to privacy." While insurance companies have argued that violations under the TCPA are not covered by the typical "advertising injury" provisions, many courts have held otherwise.

For example, the Supreme Court of Florida in *Penzer v. Trans. Ins. Co.*, No. SC08-2068, 2010 WL 308043 (Fla. January 28, 2010), answered a certified question from the U.S. Court of Appeals for the 11th Circuit regarding insurance coverage under the "advertising injury" provisions for unsolicited facts advertisements sent in violation of the TCPA. The court held "that an advertising injury provision in a commercial liability policy that provides coverage for an 'oral or written publication of material that violates a person's right of privacy' provides coverage for blast-faxing in violation of the TCPA."

Policyholders should continue to pursue and argue for the broadest possible interpretations of "advertising injury" insurance coverage, including for blast fax liability.

Do Not Take 'No' for an Answer When Presenting an 'Advertising Injury' Insurance Coverage Claim

Insurance companies know that denying claims on dubious grounds will induce a measurable percentage of policyholders to simply walk away. Do not help pad their profit margins. If a claim falls under the "advertising injury" provisions of your CGL policy, do not take "No" for an answer.

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A Look Back: Key Developments in Insurance Recovery

By William G. Passannante

Here are a few among the many of 2009's developments in insurance recovery at Anderson Kill:

Environmental Insurance. On March 9, 2009, the California Supreme Court ruled in favor of the State of California regarding the State's insurance coverage for environmental clean-up of the Stringfellow waste site. *State of California v. Allstate Ins. Co.*, 45 Cal. 4th 1008, 201 P.3d 1147 (Cal. March 9, 2009). The court ruled that if a loss is caused by covered and uncovered events, and the policyholder cannot prove exactly how much is covered, the insurance company must pay for the whole loss up to policy limits. The decision limited the use of the onerous "anti-concurrent causation clause." The California Supreme Court also held that policyholders do not lose insurance coverage just by putting their waste

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in sites that are meant to contain them. An insurance company must prove that the policyholder expected or intended that the waste would be released from the site into the environment to deny coverage.

Food Borne Illness Insurance. On June 18, 2009, in a decision that will cheer the food-service industry, the Superior Court of New Jersey granted partial summary judgment in favor of franchisees of Taco Bell Restaurants against Underwriters of Lloyds, which sold Trade Name Restoration, Loss of Business Income and Incident Response Insurance for Food Borne Illness (TNR) policies to the franchisees. *Quick Service Management, Inc., v. Underwriters of Lloyds, et al*.

Asbestos Insurance. On June 20, 2009, a Texas state court denied an insurer's motion for partial summary judgment, enabling ASARCO LLC to pursue a claim for recovery of millions of dollars in legal expenses stemming from asbestos claims against Fireman's Fund Insurance Company (FFIC). *ASARCO LLC, et al. v. Fireman's Fund Ins. Co., et al*. In a March 11 ruling in the same case, the court also ruled that the "asbestosis" exclusion bars coverage only for asbestosis claims and does not bar coverage for any other asbestos-related disease.

Mortgage Insurance. A significant number of clients with exposure to real estate-related businesses are facing wrongful denials, or even attempted improper recession, of mortgage insurance, credit insurance and similar policies. These disputes are in their nascent stages and are of crucial importance to policyholders in these industries. Mortgage insurance companies reportedly are seeking to recoup a portion of the losses engendered by their poor underwriting during the housing bubble by seeking to rescind as many as 25% of all policies — a figure nearly quadruple the industry average.

Toxic Tort Insurance. We represented a major policyholder in resolving a multi-party, multi-state toxic tort case while obtaining primary and excess insurance.

Disability Insurance. We secured 14 years worth of past benefits and interest due under a disability policy for a claim first denied in 1995. The Second Circuit Court of Appeals reversed the decision of the District Court and directed entry of summary judgment in favor or our client. On remand, the District Court held that the attempt to limit the policyholder's recovery based on the policy's recurrent disability provision would be both substantively and procedurally unconscionable, leading to settlement.

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