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Insurer Has Duty to Defend Where Complaint Against Insured Potentially Stated a Claim for Slogan Infringement

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Insurance Coverage Alert

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On November 8, 2010, the U.S. Court of Appeals for the Ninth Circuit issued an interesting coverage B decision. *Hudson Ins. Co. v. Colony Ins. Co.,* No. 09-55275, 2010 WL 4367014. The National Football League (NFL) sued All Authentic Corporation for allegedly selling counterfeit football jerseys. The NFL alleged that All Authentic had made and marketed "Steel Curtain" jerseys that had the numbers of the four down lineman that made up the legendary Pittsburgh Steelers front four of its early 1970s championship teams. The NFL sued for, among other things, trademark infringement, trademark counterfeiting and trademark dilution.

All Authentic was insured by Hudson Insurance and Colony Insurance. Hudson defended under a reservation of rights. The Colony policy covered "personal and advertising injury," defined as "injury . . . arising out of [the offense of] . . . [i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.'" Colony disclaimed, contending that the NFL action was beyond the scope of the insuring agreement because the complaint did not allege slogan infringement as defined under the Colony policy.

After funding in excess of $900,000 in defense fees and costs, Hudson sued Colony for equitable contribution, seeking 50 percent of the defense amounts paid. Hudson contended that based on allegations in the underlying NFL action, All Authentic faced potentially covered liability for trade dress infringement and slogan infringement in All Authentic's advertisements. The trial court granted Hudson's motion for summary adjudication.

The Ninth Circuit affirmed. In so doing, it rejected Colony's argument that the NFL's action did not state a claim for slogan infringement. The court, repeating axioms about the broad nature of the duty to defend, concluded that facts alleged in the NFL's complaint created the potential for coverage for slogan infringement and the consequent duty to defend.

As noted by the Ninth Circuit, the "technical label on a cause of action does not dictate the duty to defend. . . . It only matters whether the facts alleged or otherwise known by the insurer suggest potential liability or whether they do not." Indeed, the fact that "the NFL complaint never referred to 'steel curtain' as a slogan and never listed slogan infringement as a cause of action" did not

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matter. To create a potential for coverage for slogan infringement, it was enough that the NFL's complaint alleged that "All Authentic sold a 'Steel Curtain Limited Edition Steelers Jersey' on its website, which read[] 'Steel Curtain' across the back and b[ore] the numbers of four Pittsburgh Steelers players."

Accordingly, the Ninth Circuit found that Hudson was entitled to equitable contribution, and that Colony could not avoid the duty to defend under the facts presented.

Practice Note

This case is significant because it reiterates the scope of an insurer's defense obligation under California law. Moreover, it is an important coverage B case in that it illustrates the complexity often presented in determining whether an enumerated offense is implicated in a third-party complaint.

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