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CASE SUMMARY: COVERAGE FOR "ADVERTISING INJURY" WAS NOT CLEARLY EXCLUDED IN A TRADEMARK INFRINGEMENT CLAIM

Insurance law – Commercial general liability insurance – Advertising injury – Intellectual property – Duty to defend – Exclusions

Royal & Sun Alliance Insurance Co. of Canada v. Chubb Insurance Co. of Canada

In a trademark infringement claim coverage for “advertising injury” was not clearly excluded by “Expected or Intended Advertising Injury or Personal Injury” or “Intellectual Property Laws Or Rights” exclusions in liability policy.

[2016] O.J. No. 3348

2016 ONSC 3927

Ontario Superior Court of Justice

June 16, 2016

W.M. Matheson J.

The applicant Royal & Sun Alliance Insurance Co. of Canada (“RSA”), the insured’s umbrella insurer, sought a declaration that the respondent Chubb Insurance Co. of Canada (“Chubb”), the insured’s primary liability insurer, had a duty to defend the insured in proceedings brought in California.

The insured was a Canadian corporation that marketed and sold its hair care and other products in Canada and elsewhere. The plaintiff in the California litigation alleged that the insured infringed its trademarks and its trade dress. The insured notified Chubb of the complaint and asked that it be defended. Chubb took the position that two exclusions in the policy operated to exclude coverage and therefore it had no duty to defend. RSA assumed the insured’s defence and ultimately settled the claims.

Chubb relied on two exclusions: 1) an exclusion entitled “Expected or Intended Advertising Injury or Personal Injury”, and 2) an exclusion entitled “Intellectual Property Laws Or Rights”. The issue regarding the advertising exclusion was whether the Advertising Injury was “intended by the insured” and therefore excluded. The Court concluded that throughout the pleadings there were allegations of both intentional and unintentional conduct and therefore the true nature of the claim was not limited to intentional infringement. Accordingly, the Court found that this exclusion did not apply to exclude a duty to defend.

The issue with respect to the Intellectual Property Laws or Rights exclusion was that it was so broadly worded that it had the potential to exclude coverage for any “advertising injury”. The Court ultimately concluded that it did not clearly exclude coverage.

In the result, the Court declared that Chubb had an obligation to defend the insured in the underlying US complaint and to pay all defence costs incurred by the insured and the applicant in the underlying actions and that Chubb was obliged to reimburse RSA for the sums RSA paid to defend the insured in the US complaint and towards the costs of implementing the global settlement of the underlying actions.

This case was digested by Cameron B. Elder and edited by David Pilley of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at celder@harpergrey.com or dpilley@harpergrey.com or review their biographies at http://www.harpergrey.com.