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NEWSLETTER

No Coverage for False Advertising Claims Under Three Separate Policies

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The United States District Court for the District of Massachusetts held that multiple insurers had no obligation to defend or indemnify a policyholder against suits filed by a competitor and consumers alleging false and deceptive advertising. *Welch Foods, Inc. v. Nat'l Union Fire Ins. Co.*, 2010 WL 3928704 (D. Mass. Oct. 1, 2010).

The policyholder, a juice company, sold fruit juice that was labeled as including grape and pomegranate juice with a pomegranate displayed on the front of the bottle. It described the same product in a similar manner in other forms of advertising. The fruit juice, however, did not contain pomegranate as a primary ingredient. A competitor who sold pomegranate juice brought suit against the policyholder for false and misleading advertising, and a class action suit was brought on behalf of consumers of the juice company's products for false advertising and deceptive labeling. The juice company tendered the suits for coverage under three different policies, and each insurer denied coverage for both suits.

The first insurer, whose policy provided coverage for any actual or alleged "breach of duty, neglect, error, misstatement, misleading statement, omission or act" by the policyholder, contended that an "antitrust" exclusion, which precluded coverage for Loss arising out of "antitrust violations, price fixing, price discriminations, unfair competition, deceptive trade practices and/or monopolies," barred coverage for the two suits. The juice company contended that the exclusion, which was titled an "antitrust exclusion" in the heading, should be interpreted to apply only to antitrust claims. The court, rejecting the policyholder's arguments, held that the exclusion barred coverage for the suits because headings, by the policy's terms, did not define the policy's scope of coverage and the exclusion broadly encompassed a range of "anti-competitive" behavior, such as deceptive trade practices, not simply antitrust claims.

The second insurer denied coverage for the two suits because those suits did not allege a covered "personal or advertising injury" as required by its policy's coverage grant. The court held the second insurance policy did not apply because the two suits did not allege disparagement in a written publication or use of another's advertising idea in the policyholder's advertising.

The third insurer contended that its policy did not afford coverage for the two suits because the two suits did not allege a "Media Wrongful Act" or a "Professional Services Wrongful Act" as required by its policy. The policy defined "Media Wrongful Act," in relevant part, as "any actual or alleged act, error, omission when

committed or allegedly committed by the insured . . . in connection with the creation or dissemination of Covered Media, including but not limited to any of the following: disparagement, or any other form of defamation or . . . misappropriation of . . . information or ideas." The policyholder contended that the two suits alleged that the juice company disparaged its competitor and misappropriated the competitor's ideas. The court held that the suits alleged loss arising only from the content of the juice company's advertising and not its "creation or dissemination." The court also held the advertising did not disparage the competitor as the competitor was not mentioned in the advertising and did not misappropriate its competitor's ideas by using the same ingredient as its competitor in a product. The court also held that the two suits did not allege a wrongful act in the performance of professional services, which the policy defined as "promotional or marketing materials." The court held that professional services coverage was intended to protect against suits by clients who hired the policyholder to provide professional services and not to cover claims by competitors.