

Wisconsin Court of Appeals Finds Coverage for Claimed Misappropriation of Internet Advertising System

January 16, 2013

The Wisconsin Court of Appeals recently held that an insurer had a duty to defend under a commercial general liability (CGL) policy against allegations of advertising injury based on the use of another's "advertising idea." *Air Engineering, Inc. v. Industrial Air Power, LLC*, 2013 Wis. App. LEXIS 9 (Jan. 9. 2013).

Air Engineering bought air compressors and related products and sold them to end-user customers. It developed proprietary systems and techniques to determine how and where to purchase products, a database allowing salespeople to access customer information, a website for which it created source code, and, most importantly, a system to target potential customers based on their online searches (called the Internet Advertising System). The Internet Advertising System allowed Air Engineering to, among other things, design and place Google ads which appeared when search terms are typed and which contain domain names leading to websites that provide information about Air Engineering's replacement products and how to purchase those products. Air Engineering asserted that these proprietary systems were confidential and of great economic value.

Air Engineering sued Industrial Air and two of its former employees, alleging that Industrial Air used information from its proprietary systems, including the Internet Advertising System, to create and operate its business, to market its products and services, and to solicit business from Air Engineering's present and prospective customers. The complaint alleged, among other things, misappropriation of trade secrets. The defendants sought coverage under their CGL policy. Their liability insurer intervened in the lawsuit seeking a declaration that there was no duty to defend because there was no possibility of coverage under the policy for any of the claims. The trial court agreed.

The Wisconsin Court of Appeals reversed holding that the insurer had a duty to defend under the "Advertising Injury" section of the CGL policy (Coverage B), which provides coverage for an "advertising injury" arising out of identified "offenses," including the "use of another's advertising idea in the [insured's] advertisement." The court employed a three-part analysis in making its determination.

First, the court held that the complaint alleged a covered offense under the advertising injury section of the policy. Here, the court noted that the undefined phrase "advertising idea" means an idea for calling attention to a product or business. It held that Air Engineering's Internet Advertising System was developed to advertise its products to the public in order to facilitate sales. Industrial Air's claimed use of the system, was thus "use of another's advertising idea" in the insured's "advertisement."

Second, the court held that complaint alleged that the insured engaged in advertising activity. Here, the court compared the allegations in the complaint to the policy definition of advertisement: "a notice ... broadcast ... to the general public or specific market segments about your goods, products or services for the purposes of attracting customers." The court noted that the Internet Advertising System designs and places ads when certain search terms are entered, which ads contain domain names leading to purchase such products. It therefore concluded that using the Internet Advertising System to place Industrial Air's ads was an "advertisement."

Finally, the court held that the complaint alleged a causal connection between Industrial Air's advertising activity and Air Engineering's alleged advertising injury. Here, the court concluded that the complaint alleged that Industrial Air used its Air Engineering's advertising idea to draw past and potential customers away, thus causing a loss to Air Engineering. Accordingly, the causal connection requirement was met.

The internet is now a dominant form of advertising for goods and services and, as a consequence, has resulted in increased claims for advertising injuries. The Air Engineering decision provides support for insurance coverage for such claims consistent with the decisions of other courts addressing advertising injuries in this emerging area.

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