Does the Commercial General Liability Policy Cover Trademark Infringement?

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The Commercial General Liability (CGL) Policy is a standard, widely-used insurance policy for businesses that provides general liability coverage, including coverage for bodily injury, property damage and advertising injury. However, for policyholders facing lawsuits over trademark infringement, ambiguity in the CGL's definition of "advertising injury" may create tensions between the insurer and the insured. If the "advertising injury" definition encompasses trademark infringement, the insurer will likely have a duty to defend the insured against the claims and pay damages up to the policy limit on behalf of the insured. Alternatively, if the definition excludes trademark infringement, the insurer has no obligation to defend or pay a policyholder's damages.

Insurance companies and their insureds often turn to the courts for clarification on this issue. In *General Casualty Co. of Wisconsin v. Wozniak Travel Inc.*, 762 N.W.2d 572 (Minn. Mar. 19, 2009), the Minnesota Supreme Court held that, under Minnesota law, trademark infringement was within the scope of the insurer's CGL policy, triggering the insurer's duty to defend the insured.

This novel case involved J.R.R. Tolkien's books, *The Hobbit* and *The Lord of the Rings*. As the books grew in popularity, the Saul Zaentz Company, d/b/a Tolkien Enterprises (Tolkien), secured the exclusive rights to use and license certain trademarks and copyrights relating to the works. Tolkien claims rights in the term "Hobbit" and uses the mark in advertising and merchandising. When Tolkien discovered a Minnesota-based travel company doing business under the name Hobbit Travel, Tolkien sued Hobbit Travel in federal court for trademark infringement, among other claims.

General Casualty Company of Wisconsin (General Casualty) was, at the time of the suit, Hobbit Travel's insurer. Hobbit Travel was covered by General Casualty's CGL policy for "advertising injury", defined as an injury arising out of an "infringement of copyright, title or slogan." Based on this

definition, General Casualty argued that its CGL would not cover trademark infringement, and the federal court referred to question to the Minnesota Supreme Court.

The Minnesota Supreme Court noted that most insurance policies, like the CGL, are form contracts drafted by insurance companies and not open to negotiation. As such, they constitute "contracts of adhesion" and, when a dispute arises regarding the contract's ambiguous terms, the terms should be construed against the insurer and in favor of finding coverage for the insured.

Relying on this method of interpretation, the Court found that, although the word "trademark" was not included in the definition of "advertising injury," the scope of the policy language was broad enough to include the injury. Second, the Court examined the phrase "infringement of title". Based on a broad definition of "title" and the reasoning of a majority of courts around the country, the Court held "infringement of title" encompassed trademark infringement claims and constituted an "advertising injury" as defined by the CGL. As a result of the decision, General Casualty owed a duty to defend Hobbit Travel against claims of trademark infringement made by Tolkien.

The CGL is one of many insurance policies a business can select to protect itself against claims of trademark infringement or other alleged intellectual property violations. Additionally, the coverage of the CGL will vary depending on the language of the clause and the interpretation of the courts in a particular jurisdiction. A business should consult with its insurance provider and legal counsel to select a policy that adequately covers the business' intellectual property activities.

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