PLUNKETT & COONEY
Rapid Report
Legal Updates When You Need Them
Issued by the Insurance Practice Group April 27, 2007

Michigan Supreme Court Reverses Appellate Court's Finding of Advertising Injury Insurance Coverage

In the case of *Citizens Ins. Co. v. Pro-Seal Service Group, Inc.*, No. 130099, (Mich. Sup. Ct. April 25, 2007), the Michigan Supreme Court held that allegations of trademark and trade dress infringement do not trigger a duty to defend under a Commercial General Liability (CGL) policy where such claims do not arise out of an advertisement. The court reversed the intermediate appellate court's determination that the insurer was required to defend, holding that the Michigan Court of Appeals failed to enforce the policy terms of the CGL policy as written and, specifically, failed to adopt the policy's definition of the term "advertisement."

The insured, Pro-Seal, sold and repaired mechanical seals used in oil production facilities in Alaska. An employee of one of Pro-Seal's major competitors, Flowserve, discovered that two Flowserve seals had been repaired by Pro-Seal and then shipped to a customer in the original Flowserve packaging with the name "Pro-Seal" affixed to the outside of the package. Flowserve filed suit against Pro-Seal in the United States District Court for the District of Alaska, alleging that Pro-Seal created confusion in the marketplace by infringing upon Flowserve's trademarks or product marks, and by using Flowserve's packaging.

Pro-Seal was insured under a CGL policy issued by Citizens. Citizens denied a duty to defend or indemnify and, thereafter, filed a declaratory judgment action in Michigan seeking judicial confirmation of its coverage decision. The trial court granted Citizens' dispositive motion on the basis that the policy excluded coverage for advertising injuries that are "knowingly made." Without addressing whether there was advertising injury, the trial court concluded that, because the complaint alleged an intentional course of conduct, the "knowingly made" exclusion applied to preclude coverage.

The Michigan Court of Appeals reversed, holding that the allegations fell within the definition of "personal and advertising injury," defined as "[i]nfringing upon another's . . . trade dress . . . in your 'advertisement.'" While the Flowserve complaint did not reference trade dress infringement, the appellate court found such a claim to be implied by virtue of the similarity between the concepts of trademark and trade dress. The court then found that such infringement occurred in the course of Proseal's advertising – a requisite condition to insurance coverage - concluding that allegations of "trade dress infringement inherently involve advertising activity." Finding that coverage was owed, the appellate court vacated the judgment of the trial court.

Citizens applied for leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the Supreme Court, after holding oral argument, issued an opinion reversing the appellate court decision.

The Supreme Court held that the appellate court erred by failing to rely upon the CGL policy's definition of the term "advertisement" when determining that coverage was owed. The policy defined an advertisement as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." The Supreme Court held that Pro-Seal's alleged actions did not constitute an "advertisement" because there was no allegation or suggestion that Pro-Seal "publicly disseminated information about its goods and services for the purpose of attracting the patronage of potential customers."

Pro-Seal argued that the infringement was alleged to have occurred in Pro-Seal's advertisement, even under the CGL policy's definition of the term and, therefore, it was entitled to insurance coverage. By placing its sticker on the original packaging of a Flowserve seal that Pro-Seal had repaired for a customer, it was argued that Pro-Seal had provided "notice" of its "goods" or "services." Because the repaired seal was returned via a distribution center, rather than directly to the customer, Pro-Seal continued, this notice could be seen by customers who visited the distribution center and, therefore, the notice was "published" for the "purpose of attracting customers."

The Supreme Court disagreed, holding that Flowserve's complaint alleged only that Pro-Seal sent a specific product to a specific customer for the purpose of completing a single transaction. "At best, Pro-Seal's argument that it expected that other customers might view the package at the distribution center and, as a result, would be encouraged in doing business with [Pro-Seal] was an incidental and remote benefit that does not fundamentally alter the fact that this was a single transaction with a specific customer." The court concluded that Pro-Seal's act of shipping a seal in Flowserve's packaging did not constitute an "advertisement" and, therefore, any alleged infringement arising from the packaging did not trigger advertising injury coverage under the policy.

The Supreme Court's decision in *Pro-Seal* will have significant impact on the interpretation of advertising injury liability claims, having reversed the published Michigan Court of Appeals decision that expansively applied such coverage. The court's opinion also clarifies that, in Michigan, allegations of trademark and trade dress infringement are not immune from the condition precedent to coverage that such offenses arise out of the insured's advertisement.

Citizens was represented in the trial court proceedings by James Lilly, and in the appellate proceedings by Jeffrey Gerish, both of Plunkett & Cooney.

Should you have any questions about the *Pro-Seal* decision, or about insurance coverage for advertising injuries in general, please feel free to contact your Plunkett & Cooney attorney, or in the alternative, Jeffrey Gerish at (248) 901-4031, James Lilly, at (313) 983-4307, or any other member of Plunkett & Cooney's Insurance Practice Group. A practice group directory can be found at www.plunkettcooney.com.

For a complete of copy of *Citizens Ins. Co. v Pro-Seal Service Group, Inc.*, No. 130099, (Mich. Sup. Ct. April 25, 2007), click here.

Blmfield.PD.FIRM.867736-1