STATE OF MICHIGAN
IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-1367/1387

Advance Watch Company, Ltd.

Plaintiff-Appellant,

vs.

Kemper National Insurance Company,
Travelers Insurance Companies,
Incorporated

Defendant-Respondent.

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PETITION FOR REHEARING

Eugene R. Anderson, Esq.
William G. Passannante, Esq.
Laurie B. Epstein (Awaiting Admission)
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, New York 10020-1182
(212) 278-1328

Amy Bach, Esq.
United Policyholders
Citicorp Center
One Sansome Street, Suite 1610
San Francisco, CA 94104
Attorneys for Amicus Curiae
United Policyholders

Dated: November 27, 1996

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

INTEREST OF THE AMICUS CURIAE

Amicus curiae, United Policyholders, is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. Specifically, United Policyholders engages in educational activities by promoting greater public understanding of insurance issues and consumer rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that the standard form liability insurance policies sold to countless policyholders are interpreted properly by insurance companies and the courts. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts on policyholders' insurance rights and their efforts to have them enforced throughout the country.

FACTS

United Policyholders adopts the statement of facts as set forth in the brief of the Plaintiff-Appellant, Advance Watch Company, Ltd.'s ("Advance Watch") Statement of Facts.

DISCUSSION

Not more than two days after this Court issued its initial opinion, The Travelers Indemnity Company/Aetna Casualty & Surety Company of America ("Aetna/Travelers") began citing the opinion as a basis for coverage denials including the statement that "[t]rademark infringement is not included in the definition of 'advertising injury'." (Aetna/Travelers' Letter Exhibit A). Aetna/Travelers now asserts that "[t]he Advance Watch decision made clear that trademark infringement does not occur in the course of advertising when the gravamen of the complaint is that the merchandise - as manufactured - infringes upon the claimant's trademark." (Aetna/Travelers' Letter Exhibit A). Aetna/Travelers is using this Court's initial opinion to ignore existing law, logic, and terms of standard-form liability insurance policies.

I. THE ADVERTISING INJURY LIABILITY COVERAGE PROVISION PROVIDES COVERAGE FOR ACTS THAT MAY ALSO GIVE RISE TO ALLEGED TRADEMARK INFRINGEMENT LIABILITY.

The advertising injury liability coverage provision provides coverage for acts or events which may be characterized as trademark infringement. Many courts, including Michigan District Courts, have determined that trademark infringement claims are covered under standard-form advertising injury insurance policies. Their decisions have been based on one or more of the following grounds: 1) an expanding number of courts have determined that acts or events characterized as trademark infringement potentially are included under the definition of advertising injury in the Commercial General Liability ("CGL") standard-form insurance

policy; 2) the drafting history of the CGL insurance policy indicates that broad coverage was intended; and 3) Michigan law dictates that ambiguous language in insurance policies should be construed against insurers and in favor of the policyholder.

A. An Expanding Number of Courts have Determined that Acts or Events Characterized as Trademark Infringement Potentially are Included under Either or Both Definitions of Advertising Injury in the Commercial General Liability ("CGL") Standard-Form Insurance Policy.

An expanding number of courts have determined that an alleged trademark infringement constitutes an advertising injury as defined by the Commercial General Liability ("CGL") standard-form insurance policy. Union Insurance Co. v. The Knife Co., 897 F. Supp. 1213, 1216 (W.D. Ark. 1995). "A significant number of federal cases . . . have decided that a trademark is both an 'advertising idea' and a 'style of doing business' and its misappropriation is an advertising injury offense." Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group, 44 Cal. App. 4th 531, 52 Cal. Rptr. 2d 26 (Cal. Ct. App. 1996). The CGL policy, as modified in 1986, provides coverage for advertising injuries, which have been defined as injuries arising from 1) misappropriation of advertising ideas or style of doing business; or 2) infringement of copyright, title or slogan. Both definitions of advertising injury may potentially include trademark infringement. Noyes v. American Motorists Insurance Co., 855 F. Supp. 492 (D.N.H. 1994).

In recognizing that allegations of trademark or trade dress infringements are covered under advertising injury coverage provisions, the Michigan courts have stated that "[i]t is not necessary that the claims even be labeled trademark or trade dress

claims to fall within the policies coverage." Poof Toy Products, Inc. v. United States Fidelity & Guarantee Company, 891 F. Supp. 1228, 1235 (E.D. Mich. 1995).

On October 29, 1996, the California Court of Appeal reissued an opinion entitled Lebas Fashion Imports of U.S.A., Inc. v. ITT Hartford Insurance Group, 44 Cal. App. 4th 531, 52 Cal. Rptr. 2d 26 (Cal. Ct. App. 1996), a copy of which was attached to the Advance Watch's Petition for Rehearing. Lebas confirmed that California Courts of Appeal agree with the majority view that trademark and trade dress claims fall within standard-form general liability policies. Indeed, a number of courts throughout the country have determined that policies containing language identical to that of Aetna/Travelers', cover trademark and trade dress infringement claims. See, e.g., Poof Toy Products, 891 F. Supp. at 1235; J.A. Brundage Plumbing and Roto-Rooter, Inc. v. Massachusetts Bay Insurance Company, 818 F. Supp. 553, 559 (W.D.N.Y. 1993), vacated by reason of settlement; Noyes, 855 F. Supp. at 404-05; and Limelight Productions, Inc. v. Limelite Studios, Inc., 60 F.3d 767 (11th Cir. 1995).

B. Drafting History, Which Shows that the Endorsement Sold Was Intended To Provide Broad Coverage, Should Be Used by the Court as an Interpretive Aid.

The drafting history of the CGL insurance policy indicates that broad coverage was intended. The California Court of Appeal held that:

> we may not consider drafting history to *defeat* an insured's objectively reasonable expectations of coverage arising from the policy language utilized by the insurance industry draftsmen . . . Those draftsmen had it within their power to make clear

> the full scope of the coverage offered as well as any limitations which they wished to place thereon . . . Their failure to do so cannot justify our rejection of an insured's objectively reasonable expectations as to coverage which arise from the words chosen by the drafters.

Lebas Fashion Imports, 44 Cal. App. 4th at 33 n.13.

When there is a question regarding the interpretation of a policy courts have embraced the use of drafting history. See Montrose Chemical Corp. v. Admiral Insurance Co., 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 897 P.2d 1, modified, reh'g denied, 11 Cal. 4th 219 (1995). The California Supreme Court in Montrose used drafting history to interpret the policy at issue in the case, and recognized that "[m]ost courts and commentators have recognized that the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues." Id. The drafting history of the advertising injury liability coverage provision provides support for the view that the terms of that provision, such as "misappropriation," should be broadly interpreted. This Court should look to the drafting history of the CGL advertising injury coverage provision.

The Insurance Services Office, Inc. ("ISO") is a trade association of insurance companies which develops standard form policies and rates for use by the insurance industry.[1] The ISO

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[1]. The United States Supreme Court has observed the following regarding standard form insurance policies and ISO:

> Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers... is the almost exclusive source of support services in this country for CGL insurance. ISO develops standard

Memorandum regarding the broad form endorsement -- including the advertising injury endorsement -- shows that the insurance industry intended to sell exceedingly broad coverage.

In or about 1976, to provide expanded coverage under the standard form Comprehensive General Liability Policy, the Insurance Services Office, Inc. ("ISO"), a trade association of insurance companies which develops standard form policies and rates for use by the insurance industry, filed in all states, on behalf of its subscribers, members and service purchasers, a "BROAD FORM COMPREHENSIVE GENERAL LIABILITY ENDORSEMENT G222."

ISO included an "Explanatory Memorandum" with its filing of the BROAD FORM COMPREHENSIVE GENERAL LIABILITY ENDORSEMENT G222, which states, in part:

> "This endorsement was developed for use with the Comprehensive General Liability Policy only since this endorsement is designed to expand on the broad coverage already provided by the CGL policy . . ..
>
> We believe that the coverage afforded under this endorsement is the broadest package of coverage available to the average insured . . ..
>
> The following is a general description of the coverages provided under this endorsement: . . .
>
> Advertising injury covers the insured for various types of injuries such as piracy, unfair competition, infringement of copyright, etc., arising out of the insured's advertising, promotional or publicity activities."

> policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms.

Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2896 (1993) (citations omitted).

(emphasis added) (Exhibit B). The ISO Explanatory Memorandum shows how broadly ISO interpreted the coverage of the broad form endorsement including the advertising injury coverage provision.

1. Aetna/Travelers Represented that Advertising Injury Coverage is Broad.

Aetna, a subsidiary of Aetna/Travelers, advertised Broad Form CGL Endorsement, which includes the advertising injury provision, in a sales pamphlet entitled "Cheaper by the Dozen." (Exhibit C) Aetna, did not narrowly define advertising but represented that coverage was provided for injury "arising out of . . . advertising, promotional or publicity activities" (emphasis added). When selling insurance policies Aetna/Travelers interpreted advertising coverage provision broadly. They should be required to do the same now that a claim has been made.

C. Ambiguous Terms in Insurance Policies Should Be Interpreted to the Benefit of the Policyholder.

When faced with an ambiguous insurance policy, Michigan courts have applied well-established rules to determine how an insurance policy should be interpreted. "Ambiguity exists when, after reading the policy, reasonable persons could differ as to its meaning . . . an insurance contract is clear only if it could be understood one way . . . Courts construe ambiguous language in insurance policies against the insurers . . . and in favor of the insured." Poof Toy Store Products, 891 F. Supp at 1231; Allstate Insurance Co. v. Freeman, 432 Mich. 656, 665-67, 443 N.W. 2d 734 (1989).

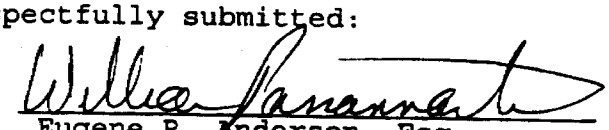
CONCLUSION

The November 5, 1996 opinion is contrary to nationwide precedent and is already being used by Aetna/Travelers improperly as a weapon against their policyholders.

For all the foregoing reasons, United Policyholders respectfully requests that this Court grant Plaintiff-Appellant Advance Watch's petition for rehearing and reverse the original determination that the allegation of trademark infringement was insufficient to provide a potential for coverage under Advance Watch's policy.

Dated: New York, New York
November 27, 1996

Respectfully submitted:

By: 

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