

No. 08-56527

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HYUNDAI MOTOR AMERICA
Plaintiff-Appellant,

vs.

**NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
AMERICAN HOME ASSURANCE COMPANY,**
Defendants-Appellees

*Appeal from the United States District Court for the
Central District of California, Santa Ana, No. 8:08 cv 00020
Hon. James V. Selna, Presiding*

**MOTION FOR LEAVE TO FILE AND PROPOSED *AMICUS CURIAE*
BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFF-
APPELLANT HYUNDAI MOTOR AMERICA**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae*, United Policyholders is a non-profit organization, it has no parent company, and it has not issued shares of stock.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

United Policyholders respectfully requests leave, pursuant to Federal Rule Appellate Procedure 29, to file an *amicus curiae* brief in this action. United Policyholders' proposed *amicus* brief accompanies this motion and will be submitted in support of Plaintiff-Appellant, Hyundai Motor America ("Hyundai").

United Policyholders was founded in 1991 and is a not-for-profit organization dedicated to educating the public on insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c)(3) and is funded by donations and grants from individuals, businesses and foundations.

In addition to serving as a resource on insurance claims for commercial and individual policyholders, United Policyholders monitors legal and marketplace developments affecting the interest of all policyholders. United Policyholders receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders and policyholder advocates communicate on a regular basis with United Policyholders. This allows United Policyholders to submit important and topical information to courts throughout the country via the submission of *amicus* briefs. United Policyholders participates as *amicus curiae* in cases that involve insurance principles that are likely to affect large segments of

the public. United Policyholders' growing reputation as a source of useful information for appellate courts was confirmed when, among other things, its *amicus* brief was cited in the U.S. Supreme Court's opinion in Humana v. Forsyth, 525 U.S. 299 (1999), and its arguments were adopted by the Supreme Court of California in Vandenberg v. Superior Court, 21 Cal.4th 815 (1999), and TRB Investments, Inc. v. Fireman's Fund Ins. Co., 40 Cal.4th 19 (2006). United Policyholders has filed *amicus* briefs on behalf of policyholders in over one hundred and thirty cases in a range of jurisdictions throughout the United States, including this Court. A list of those cases as well as detailed information about the organization can be found at <http://www.unitedpolicyholders.org/amicus.html>.

This case concerns the proper interpretation of commercial general liability insurance policies, as applied to insurance coverage for "advertising injury." The outcome of this case will have a broad impact on insurance coverage for commercial insureds throughout the country. Due to the importance of this issue, United Policyholders seeks leave to participate as *amicus curiae*. The appearance by United Policyholders as *amicus curiae* herein will assist the Court because it can provide the Court with its perspective on, and expertise in, the substantive issues before the Court.

For the foregoing reasons, United Policyholders respectfully requests that the Court grant this motion for leave to appear as *amicus curiae* and permit the filing of the accompanying brief in support of Hyundai.

Respectfully submitted,

Dated: May 27, 2009

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BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

I. Introduction

This is an insurance coverage action through which Hyundai seeks a declaration that Defendants-Appellees, National Union Fire Insurance Company of Pittsburgh, PA and American Home Assurance Company (collectively referred to herein as the “Insurers”), are obliged to defend the interests of Hyundai in an underlying action captioned as Orion IP, LLC v. Hyundai Motor America, et al., No. 6:05-cv-322 (E.D. Tex.). Hyundai seeks a defense pursuant to the terms of its standard form commercial general liability policies (the “CGL Policies”). The CGL Policies promise to “pay those sums that the insured becomes legally obligated to pay because of...‘advertising injury’ to which this insurance applies.” (E.R.¹ 39). As to the Insurers’ duty to defend, the CGL Policies promise: “We will have the right and duty to defend the insured against any ‘suit’ seeking those damages.” (Id.). The CGL Policies provide further that they apply to, among other things, “‘advertising injury’ caused by an offense committed in the course of advertising your goods, products or services...” (Id.). As is relevant here, “advertising injury” is defined to include: “misappropriation of advertising ideas or style of doing business.” (E.R. 40).

¹ “E.R.” refers to the Excerpts of Record for Plaintiff-Appellant Hyundai Motor America.

After the Insurers denied their duties to defend, Hyundai commenced this declaratory judgment action. In response to the parties' cross-motions for summary judgment, the district court entered judgment in favor of the Insurers. The district court held erroneously that "advertising injury" insured under the CGL Policies did not include "an injury caused by patent infringement even if that injury occurs during the course of an advertising activity." (E.R. 11).

The district court's judgment is contrary to law and merits reversal. First, in concluding that an "advertising injury" does not include an injury caused by patent infringement, the district court relied on Simply Fresh Fruit, Inc. v. Continental Ins. Co., 94 F.3d 1219, 1222 (9th Cir. 1996). The statement relied on from Simply Fresh Fruit, however, is no longer valid, Homedics, Inc. v. Valley Forge Ins. Co., 315 F.3d 1135, 1139 (9th Cir. 2003), and it is clear that "advertising injury" may include injury caused by patent infringement. Second, the district court failed to apply properly the California Rules governing the interpretation of insurance policies, including the requirement to interpret ambiguous insurance policy language in a manner that protects the objectively reasonable expectations of the insured. Bank of the West v. Superior Court, 2 Cal.4th 1254, 1264-65 (1992). Third, the district court failed to appreciate that insureds have an objectively reasonable expectation of coverage for infringement claims that involve methods

for advertising or marketing. See, e.g., Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1507 n.5 (9th Cir. 1994).

For all of the foregoing reasons United Policyholders² submits this *amicus curiae* brief in support of Hyundai. Reversal of the Order appealed from is necessary in order to ensure that (1) standard form CGL Policies are interpreted correctly in accordance with California law; and (2) the objectively reasonable expectations of policyholders -- all policyholders -- are protected, as required under California law.

II. The District Court Erred When It Held That An “Advertising Injury” Cannot Include Patent Infringement

In entering summary judgment for the insurers, the court below held as follows: “As plainly stated in Simply Fresh Fruit...[,] the Ninth Circuit has previously held that, ‘as a matter of law, patent infringement cannot occur in the course of an insured’s advertising activities.’” (E.R. 11). The reliance by the court below on this statement from Simply Fresh Fruit is contrary to governing law and warrants reversal. As confirmed by this Court, the statement from Simply Fresh Fruit relied on by the district court has since been invalidated: “[t]he foundational basis for the holdings in these opinions -- specifically that advertising cannot give

² In accordance with Fed. R. App. P. 29(c)(3), a concise statement of the identity of United Policyholders, its interest in this case and the source of its authority to file are set forth in the accompanying motion for leave to file this *amicus* brief and incorporated herein as if set forth in full.

rise to a cause of action for direct patent infringement -- has been invalidated by recent changes in patent law.” Homedics, 315 F.3d at 1139 (referencing the opinions in Simply Fresh Fruit and Everest and Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 229 (9th Cir. 1994)); see also Maxconn Inc. v. Truck Ins. Exch., 74 Cal.App.4th 1267, 1274 (1999) (“[T]he amendment of the [patent] statute has nullified the argument that patent infringement could not arise out of the insured’s advertising activities as a matter of law.”).

Even without the amendment of the patent statute, the Supreme Court of California, in its seminal decision on insurance coverage for “advertising injury,” acknowledged that insurance coverage for an “advertising injury” may be available when a patent infringement claim is based on an advertisement. Bank of the West, 2 Cal.4th at 1275. In accordance with Bank of the West, this Court has also recognized the possibility of “advertising injury” coverage for patent infringement claims: “in Bank of the West, the California Supreme Court appears to leave open the possibility that in some cases, a patent infringement claim may be ‘based on . . . the advertisement. . . .’” Iolab, 15 F.3d at 1507 (quotation omitted). Addressing the availability of “advertising injury” coverage for patent infringement claims specifically, this Court stated:

The Bank of the West court did not provide examples of what constitutes a patent infringement claim based on advertising of a patented invention. Although the issue is not before us, where the advertising and the infringing sales are merged, as in sale of a

patented product by mail order catalogue, or where an entity uses an advertising technique that is itself patented, a court might possibly hold that the infringement arises out of or is committed in the advertising.

Iolab, 15 F.3d at 1507 n.5 (emphasis added).

As explained further by this Court in Homedics, a covered “advertising injury” will be found generally where: “(1) there is a causal connection between allegations in the third party complaint and the insured’s advertising activities; and (2) the allegations in the third party complaint fit into one of the enumerated offenses in the commercial general liability policy that could be considered advertising injuries.” Homedics, 315 F.3d at 1139 (citing, *inter alia*, Bank of the West, 2 Cal.4th 1273-74).

Most often, insurance claims involving patent infringement fail because the policyholder is unable to establish the requisite causal connection between the injury alleged by the underlying claimant and the policyholder’s advertising. See Amazon.com Int’l, Inc. v. Am. Dynasty Surplus Lines Co., 85 P.3d 974, 977 (Wash. Ct. App. 2004) (“Amazon I”). Typically, the basis of patent infringement claims “is the sale of infringing products, not their advertisement.” Id. As numerous courts have explained, insured “advertising injury” does not “occur where the injury is caused by the subsequent advertising of an already infringing product.” Id. at 978; see also Simply Fresh Fruit, 94 F.3d at 1222-23 (allegation that defendant infringed on patent for automated fruit slicer and then advertised

improved product did not meet causation requirement for advertising injury); Microtec Research, Inc. v. Nationwide Mut. Ins. Co., 40 F.3d 968, 971 (9th Cir. 1994) (harm caused by misappropriation of competitor company’s software code, not by subsequent advertising that might have misled customers); Gitano Group, Inc. v. Kemper Group, 26 Cal.App.4th 49, 60 (1994) (infringement of patented method for acid washing jeans, where the jeans were later advertised, did not constitute advertising injury).

In reliance on Iolab, however, courts have found a potential coverage for underlying claims of patent infringement where an entity is alleged to have used an “advertising technique that is itself patented.” Amazon.com, Inc. v. Atlantic Mutual Ins. Co., No. C05-00719RSM, 2005 WL 1711966, at *8 (W.D. Wash. July 21, 2005) (“Amazon II”) (advertising injury coverage found where underlying claimant “created a specific technology that is to be used in digital advertising, and [the policyholder] has adopted this idea in the course of its advertising”); Amazon I, 85 P.3d at 978 (“By contrast here, the alleged injury derived not merely from misappropriation of the [patented item], but from *its use as the means to market goods for sale*. In other words, the infringement occurred in the advertising itself.”) (emphasis in original).

Thus, the declaration by the court below that a covered “advertising injury” cannot, as a matter of law, include an injury caused by patent infringement was

erroneous and warrants reversal. In accordance with the holdings in Bank of the West and Iolab, among others, an insured “advertising injury” can arise in connection with a policyholder’s alleged patent infringement, especially “where an entity uses an advertising technique that is itself patented.” Iolab, 15 F.3d at 1507 n.5. As discussed more fully below, instead of summarily dismissing Hyundai’s insurance claim based on the incorrect assumption that “advertising injury” can never include patent infringement, the district court should have, in accordance with California law, determined whether the insured, under the particular facts and circumstances of this case, had an objectively reasonable expectation of coverage for the underlying patent infringement claims.

III. The District Court Failed To Interpret The CGL Policies In Accordance With California Law

Although the court below acknowledged that, “[t]he general rules of contract interpretation apply to a determination of coverage under an insurance policy,” (E.R. 9), it failed to either address those rules or to apply them correctly in this case. The correct application of those rules of contract interpretation dictates a different result and warrants the reversal of the district court’s decision.

The rules governing the interpretation of insurance policies have been summarized by the California Supreme Court as follows:

The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. (Civ. Code, § 1636.) If contractual language is clear and explicit, it governs. (Id., § 1638.)

On the other hand, “[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.” (*Id.*, § 1649; see *AIU, supra*, 51 Cal.3d at p. 822, 274 Cal.Rptr. 820, 799 P.2d 1253.) This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, “the objectively reasonable expectations of the insured.” (*AIU, supra*, at p. 822, 274 Cal.Rptr. 820, 799 P.2d 1253.) Only if this rule does not resolve the ambiguity do we then resolve it against the insurer. (See *AIU, supra*, at p. 822, 274 Cal.Rptr. 820, 799 P.2d 1253.)

Bank of the West, 2 Cal.4th at 1264-65.

These governing rules of insurance policy interpretation and construction “stem from the fact that the insurer typically drafts the policy language, leaving the insured little or no meaningful opportunity or ability to bargain for modifications.” Montrose Chem. Corp. v. Admiral Ins. Co., 10 Cal.4th 645, 667 (1995) (quoting AIU Ins. Co. v. Superior Court 51 Cal.3d 807, 822 (1990)). In sum, “[b]ecause the insurer writes the policy, it is held ‘responsible’ for ambiguous policy language, which is therefore construed in favor of coverage.” *AIU*, 51 Cal.3d at 822.

The district court failed to adhere to these rules when it concluded that an “advertising injury” does not include “an injury caused by patent infringement....” (E.R. 11). First, the district court failed to acknowledge that the phrase “misappropriation of advertising ideas or style of doing business” has already been deemed ambiguous by California courts. See, e.g., Lebas Fashion Imps. of USA, Inc. v. ITT Hartford Ins. Group, 50 Cal.App.4th 548 (1996). Second, the district

court made no attempt to interpret that operative phrase in a manner that protects the “objectively reasonable expectations of the insured.” See Bank of the West, 2 Cal.4th at 1265.

A. The Phrase “Misappropriation of Advertising Ideas or Style of Doing Business” Is Ambiguous

In Lebas Fashion, the California Court of Appeal determined that the phrase “misappropriation of advertising ideas or style of doing business” was ambiguous and covered an underlying claim of trademark infringement. Lebas Fashion, 50 Cal.App.4th at 563. The Lebas Fashion court agreed with the policyholder that the operative terms “‘misappropriation,’ ‘advertising idea’ and ‘style of doing business’ do not have a single, plain and clear meaning.” Id. at 560. In reaching that conclusion, the court considered the many different definitions of each of the operative terms.³

³ In that regard, the Lebas Fashion court stated:

For example, Webster’s Third New International Dictionary (1981) page 1442, defines “misappropriate” to mean, among other things, “to appropriate dishonestly for one’s own use” and “to appropriate wrongly or misapply in use.” The word “idea” is defined as a “presentation of sense, concept, or representation,” as well as: “an object of a concept,” “a conception or standard of any perfection,” “a visible representation of a conception” and “a product of reflection or mental concentration: a formulated thought or opinion.” (Id. at p. 1122.) Finally, the word “style” is defined, among other words, as a “mode of expressing thought in oral or written language.” Examples include, “a manner of expression characteristic of an individual, a

The Lebas Fashion court then proceeded to examine those words not in isolation, but in light of the disjunctive phrases that are used in the insurance policy: “‘misappropriation of an advertising idea’ and ‘misappropriation] of [a] style of doing business.’” Id. at 561. It first rejected the insurer’s contention that “‘misappropriation” has a single plain and clear meaning and can only refer to the common law tort of misappropriation. To the contrary, the Lebas Fashion court concluded that, “it is equally reasonable, for example, to ascribe to the term misappropriation the more general meaning of ‘to take wrongfully’ as it is to limit it to its technical common law sense.” Id. at 562 (citation omitted). The court then proceeded to find that the phrases “advertising idea” and “style of doing business” were also susceptible of multiple meanings:

Similarly, while the misappropriation of an “advertising idea” certainly would include the theft of an advertising plan from its creator without payment, it is also reasonable to apply it to wrongful taking of the manner or means by which another advertises its goods or services. As we have already explained, one of the basic functions of a trademark is to advertise the product or services of the registrant. For the same reason, a trademark could reasonably be considered an integral part of an entity’s “style of doing business.” One need look no further than today’s current crop of expensive television commercials advertising high fashion jeans, heavily endorsed athletic shoes or distinctively styled fast food restaurants to know the truth of that statement.

period, a school, or other identifiable group” as well as “the manner, tone, or orientation assumed in discourse.” (Id. at p. 2271.).

Id. at 560 n.7.

Id. at 562-63 (emphasis added); see also Atlapac Trading Co. v. American Motorists Ins. Co., No. CV 97-0781 CBM, 1997 WL 1941512, at *6 (C.D. Cal. Sept. 19, 1997) (in accordance with the holding in Lebas Fashion, court concludes that phrase “misappropriation of advertising ideas or style of doing business” is ambiguous); Novell, Inc. v. Federal Ins. Co., 141 F.3d 983, 987 (10th Cir. 1998) (“courts have construed the phrase ‘misappropriation of . . . style of doing business’ in varying ways”).

B. The District Court Failed to Interpret the Phrase “Misappropriation of Advertising Ideas or Style of Doing Business” in a Manner that Protects the Objectively Reasonable Expectations of the Insured

Once the Lebas Fashion court concluded that the operative policy language was ambiguous, it proceeded, in accordance with the holding in Bank of the West, to attempt to resolve that ambiguity “by interpreting the language used in the sense in which [the insurer] believed that [the insured] understood it at the time of policy issuance; or, to put it another way, we must look to the objectively reasonable expectations of [the insured].” Lebas Fashion, 50 Cal.App.4th at 563. The court accomplished that task by “examining the language in the context of its apparently intended function in the policy and with due consideration to the circumstances in this case.” Id. (citation omitted). To that end, the Lebas Fashion court reviewed the historical development of the policy language by the insurance industry.

An examination of that drafting history revealed that the phrase “misappropriation of advertising ideas or style of doing business” was inserted into the standard form general liability policy in 1986 when it replaced coverage for “piracy” and “unfair competition.” *Id.* at 558. The insurance industry, through its industry organization, the Insurance Services Office (“ISO”),⁴ explained, at the time, that, despite the change in phraseology, there was no change in the scope of coverage. Eugene Anderson, et al., Insurance Coverage Litigation, §16.02 [B] (2d ed. 2000 & 2006 Supp.) (referred to hereinafter as “Insurance Coverage Litigation”). At least one California court has found that the insurance industry’s representation to be persuasive with respect to the unchanged scope of coverage. Atlapac, 1997 WL 1941512, at *7 (“the scope of coverage afforded to policy holders for ‘unfair competition’ in the pre-1986 standard insurance policies

⁴ ISO is a nonprofit trade association that provides rating, statistical, and actuarial policy forms and related drafting services to approximately 3,000 nationwide property or casualty insurers. Policy forms developed by ISO are approved by its constituent insurance carriers and then submitted to state agencies for review. Most carriers use the basic ISO forms, at least as the starting point for their general liability policies. (New Castle County v. Hartford Acc. and Indem. Co., (3d Cir.1991) 933 F.2d 1162, 1181; see also 3 Cal. Insurance Law & Practice, Property and Liability Insurance (1986) § 49.04, at pp. 49-9 to 49-10.)

Montrose Chemical Corp., 10 Cal.4th at 671 n.13.

remained the same for policy holders for ‘misappropriation of advertising ideas or style of doing business’ in the current standard insurance policies.”).⁵

The fact that there was no change in the scope of coverage when the standard form CGL policy was modified to cover “misappropriation of advertising ideas or style of doing business” was significant because courts and even insurers, including AIG (the parent company of Defendant-Appellees), had previously acknowledged that “piracy” could include the offense of “patent infringement.” For example, the Supreme Court treated the terms “piracy” and “infringement” interchangeably in a patent infringement case: “One who seeks to pirate an invention, like one who seeks to pirate a copyright book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright...

⁵ Even those courts that have accorded little weight to insurance policy drafting history materials have at least considered those materials in fulfilling their function of discerning the objectively reasonable expectations of the insured. See, e.g., Mez Industries, Inc. v. Pacific Nat. Ins. Co., 76 Cal.App.4th 856, 871 n.15 (1999). Indeed, the relevance of drafting history materials and the important role those materials play in the interpretation of policy language was lauded by the California Supreme Court:

Most courts and commentators have recognized, however, that the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues. (See, e.g., Maryland Casualty Co. v. Reeder (1990) 221 Cal.App.3d 961, 968 [270 Cal.Rptr. 719].) Such interpretative materials have been widely cited and relied on in the relevant case law and authorities construing standardized insurance policy language.

Montrose Chem. Corp., 10 Cal.4th at 670-71.

duplication is a dull and very rare type of infringement.” Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 607 (1950). Numerous other courts, including those in California, have held that the term “piracy” may be construed to include claims of patent infringement. See Union Ins. Co. v. Land & Sky, Inc., 529 N.W.2d 773, 778 (Neb. 1995); New Hampshire Ins. Co. v. R.L. Chaides Constr. Co., 847 F.Supp. 1452, 1456 (N.D. Cal. 1994); National Union Fire Insurance Company of Pittsburgh, PA v. Siliconix, Inc., 729 F.Supp. 77, 79 (N.D. Cal. 1989); Omnitel v. Chubb Group of Ins. Cos., 26 U.S.P.Q.2d 1933 (Cal. Super. Ct. 1993).

AIG itself represented that coverage for “piracy” under CGL policies can implicate an insurer’s duty to defend its policyholder against patent infringement claims. In marketing materials for its “Patent Infringement Liability Insurance,” AIG claims:

Who can be subject to a patent infringement suit?

Any person or corporation who manufactures, advertises, sells or distributes a product, or uses a manufacturing process...may be subject to a patent infringement suit...

Doesn’t my insurance carrier have to defend my company under the Comprehensive General Liability policy?

Maybe. There has been highly contested litigation between insurers and their insureds...Arguments have been made that language referring to unfair trade practices and/or piracy may extend coverage, or at least a duty to defend patent infringement suits...Many insurance companies are specifically excluding coverage [under their current

policies] for patent infringement or are revising policy language to clarify their intent not to cover this type of action.

Insurance Coverage Litigation, §16.04[E]16-76-76.1 (quoting AIG “Patent Infringement Liability Insurance, Q & A”) (emphasis added).

In 1986, the insurance industry also deleted the trademark infringement exclusion from the standard form CGL policy. The Lebas Fashion court found this piece of drafting history significant:

In the mind’s eye of an objectively reasonable insured, that elimination could well represent a conscious recognition of trademark infringement as an offense subject to advertising injury coverage. Indeed, the fact that the trademark exclusion was dropped from the policy could contribute to the objectively reasonable expectation that a trademark infringement was now a covered act under the advertising injury clause.

Lebas Fashion, 50 Cal App.4th at 566.⁶

Based on all of these factors, the Lebas Fashion court concluded that, “it would appear objectively reasonable that ‘advertising injury’ coverage could now extend to the infringement of a trademark.” Id. at 565.

⁶ Although discounted by the court below (E.R. 11 n.3), it is relevant to note that the Insurers involved in this appeal later added a patent infringement exclusion to their insurance policies. California courts, and others, recognize that exclusions are utilized by insurers to eliminate coverage for risks that are otherwise covered. Collin v. American Empire Ins. Co., 21 Cal.App.4th 787, 802-03 (1994) (“exclusions remove coverage for certain risks which are initially within the insuring clause”) (citation omitted). There would have been no need for the Insurers to add an exclusion for patent infringement claims unless such claims were covered potentially.

Approximately three years after Lebas Fashion was decided, the same judicial panel addressed the issue of whether a patent infringement claim was covered as a “misappropriation of advertising ideas or style of doing business.” Mez Industries, Inc. v. Pacific Nat’l Ins. Co., 76 Cal.App.4th 856, 867-72. Looking back, the Mez court characterized its decision in Lebas Fashion as follows:

In Lebas, we did not find that clause to be ambiguous in the abstract. We only reached the conclusion we did in the *context* of (1) the language of the policy, (2) the general circumstances of that particular case and (3) “common sense.” We examined the policy language in that context with regard to its intended function in the policy and attempted to evaluate the insured’s *objectively* reasonable expectation under that criteria.

Mez, 76 Cal.App.4th at 870 (emphasis in original) (citation omitted).

Following the same rigorous analysis that had been employed previously in Lebas Fashion, the Mez court proceeded straight to determining whether the patents involved in Mez “could reasonably be considered an ‘advertising idea’ or a ‘style of doing business.’” After considering the drafting history of the operative policy language, the precise nature of the underlying claims asserted against the policyholder and the case law, the Mez court that, “[i]n the *context of the facts and circumstances of this case*, the policy terms ‘misappropriation of an advertising idea or style of doing business’ . . . simply could not be reasonably read by a layperson to include either patent infringement or the inducement thereof.” Mez,

76 Cal.App.4th at 872 (emphasis in original). The Mez court made it clear that the basis for its conclusion was found in the fact that the “patents [at issue] did not involve any process or invention which could reasonably be considered an ‘advertising idea’ or a ‘style of doing business.’” Id.

More recently, this Court employed the same analysis in another case involving an underlying claim of patent infringement. Homedics, 315 F.3d at 1140-41. As in Mez, this Court began by analyzing the insured’s objectively reasonable expectations: “We must determine whether [the insured’s] contention that the [underlying] patent infringement claims fit under the offense of ‘misappropriation of advertising ideas or style of doing business’ is consistent with [the insured’s] objectively reasonable expectations.” Id. at 1140. This Court likened the underlying patent infringement in the case before it to the one involved in Mez, stating that, “[s]imilar to Mez, the underlying . . . actions at issue here do not allege violation of a method patent involving advertising ideas or a style of doing business.” Id. at 1141. As a consequence, this Court concluded that, “the terms ‘misappropriation of an advertising idea or style of doing business’ cannot be read in an objectively reasonable manner to include the underlying Nikken actions.” Id.

United Policyholders respectfully submits that the court below failed to apply California law correctly when it failed to engage in the same rigorous

analysis as employed by the courts in Lebas Fashion, Mez and Homedics. As made clear by the holding in Lebas Fashion, the phrase “misappropriation of advertising ideas or style of doing business” and its constituent terms are ambiguous. Accordingly, under controlling California law, the court below was obliged to interpret the operative policy language in accordance with the insured’s objectively reasonable expectations of coverage. The particular facts and circumstances at issue in Lebas Fashion led that court to conclude that there was an objectively reasonable expectation of coverage by the insured, whereas, the particular facts and circumstances in Mez and Homedics led those courts to conclude that there were no objectively reasonable expectations of coverage. In all events, an examination of the particular facts and circumstances was undertaken and, indeed, required under California law.

The court below, however, failed to interpret the CGL Policies in light of the particular facts and circumstances presented by this case. Indeed, it is clear that the court below considered the nature of the patents allegedly infringed by Hyundai to be irrelevant and focused improperly only on the labels placed on the underlying claims by the underlying plaintiff: “regardless of the nature of the patent allegedly infringed, the only liability arising from the Orion suit is liability for patent infringement.” (E.R. 10). Under California law, however, “the pleaded allegations coupled with extrinsic facts” determine coverage, “not the label chosen

by the pleader.” Stellar v. State Farm Gen. Ins. Co., 157 Cal.App.4th 1498, 1506 (2007); see also Vanderburg v. Superior Court, 21 Cal.4th 815, 841 (1999) (“whether a particular claim falls within the coverage afforded by a liability policy is not affected by the form of the legal proceeding [or] the legal theory asserted by the” injured party.) (quotation omitted). Accordingly, reversal is warranted.

C. The District Court Failed to Appreciate that Insureds Have an Objectively Reasonable Expectation of Coverage for Claims of Infringement Involving Methods for Advertising or Marketing

Courts faced with determining whether an infringement claim constitutes an “advertising injury” under a standard form CGL policy have distinguished between underlying infringement claims that involve methods for advertising or marketing (or, stated another way, an idea about the solicitation of business and customers or a plan for interacting with consumers) and those that do not. Compare Iolab, 15 F.3d at 1507 n.5 (“where an entity uses an advertising technique that is itself patented, a court might possibly hold that the infringement arises out of or is committed in the advertising”) and Lebas Fashion, 50 Cal.App.4th at 565 (“taking into account that a trademark could reasonably be considered to be part of either an advertising idea or a style of doing business, it would appear objectively reasonable that ‘advertising injury’ coverage could now extend to the infringement of a trademark”) with Mez, 76 Cal. App.4th at 872 (the “patents [at issue] did not involve any process or invention which could reasonably be considered an

‘advertising idea’ or a ‘style of doing business’”) and Homedics, 315 F.3d at 1141 (“[s]imilar to Mez, the underlying [patent] actions at issue here do not allege violation of a method patent involving advertising ideas or a style of doing business”).

This Court relied on this very distinction in finding “advertising injury” coverage in a case involving underlying allegations of misappropriation of trade secrets, and in distinguishing its prior opinion in Simply Fresh Fruit:

It is significant that [the underlying] claims for misappropriation of trade secrets relate to marketing and sales and not to secrets relating to the manufacture and production of security systems. Cf. Simply Fresh Fruit, Inc. v. Continental Ins. Co., 84 F.3d 1105, 1107-08 (9th Cir. 1996)⁷ (holding that an insurer had no duty to defend under an advertising-injury provision where the third party’s allegations concerned the misappropriation of trade secrets which related to the methods for processing fruit rather than advertising or marketing).

Sentex Systems, Inc. v. Hartford Accident & Indem. Co., 93 F.3d 578, 580 (9th Cir. 1996) (emphasis added). The Third Circuit, thereafter, distinguished this Court’s holding in Sentex Systems on the basis of that same distinction:

The [Sentex] appellate court found that “[i]t is significant that [the] claims for misappropriation of trade secrets relate to marketing and sales and not to secrets relating to the manufacture and production of security systems.” Sentex Sys., Inc. v. Hartford Acc. & Indem. Co., 93 F.3d 578, 580 (9th Cir.1996). We would agree. Here, by contrast, the complaint does not allege that [the policyholder] misappropriated methods of gaining customers; it alleges that [the policyholder]

⁷ This opinion in Simply Fresh Fruit was later amended and superseded by Simply Fresh Fruit, Inc. v. Continental Ins. Co., 94 F.3d 1219 (9th Cir. 1996).

misappropriated information about the manufacture of dipper buckets and then advertised the resulting product.

Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 748 (3d Cir. 1999) (emphasis added).

A subsequent Third Circuit opinion following Frog, Switch perfectly frames the distinction between patent infringement claims involving methods for advertising and marketing and those that do not. Green Machine Corp. v. Zurich-American Ins. Group, 313 F.3d 837 (3d Cir. 2002). In Green Machine, the policyholder sought insurance coverage in connection with a lawsuit alleging that Green Machine’s manufacturer, sale and promotion of certain concrete-cutting saws infringed, and induced others to infringe, the underlying plaintiffs’ products and methods patents. With respect to whether the claims asserted against the policyholder constituted a “misappropriation of advertising ideas” the Green Machine court reasoned as follows:

We have recently held that “to be covered by the policy, allegations of ... misappropriation have to involve an advertising *idea*, not just a nonadvertising idea that is made the subject of advertising.” Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 748 (3d Cir. 1999). Misappropriating advertising ideas is the wrongful taking of an idea about the solicitation of business and customers.

* * * *

Allegations that Green Machine stole a patented method for cutting concrete and also advertised the results of that theft, does not convert the underlying theft into “advertising injury.” Id. at 744.

Green Machine, 313 F.3d at 839-40 (emphasis added).

In concluding that the underlying allegations did not give rise to a covered “misappropriation of style of doing business,” the Green Machine court stated:

In Frog, Switch, we explained that “style of doing business” is “a plan for interacting with consumers and getting their business.” Id. at 749-50. Style of doing business, therefore, refers to a company’s *marketing* approach, not its production or product. [The underlying plaintiff’s] method of cutting concrete is like a “product.” It is not a marketing strategy or a “plan for interacting with consumers and getting their business.” [The underlying plaintiff] alleges not that Green Machine copied its marketing strategy or style of attracting customers, but that Green Machine copied its patented method for cutting concrete in order to sell its own saws, thereby inducing others to infringe on the patented method as well. These allegations do not state a claim for misappropriation of [the underlying plaintiff’s] marketing style used to sell its concrete-cutting method, but rather for theft of the underlying method itself.

Id. at 840-41 (emphasis added). Thus, allegations involving the wrongful taking of an idea about the solicitation of business and customers, or a plan for interacting with consumers, fall within the coverage afforded for a “misappropriation of advertising ideas or style of doing business.”

As these cases clearly establish, policyholders have an objectively reasonable expectation of coverage when an infringement claim involves a method of advertising or marketing, including the wrongful taking of an idea about the solicitation of business and customers or a plan for interacting with consumers. The district court erred when it failed to consider that objectively reasonable expectation of coverage and to interpret the CGL Policies in that light. Indeed, the district court went so far as to state that there was no potential for coverage “even

if the . . . patents [at issue] are actually inventions regarding ‘advertising ideas.’” (E.R. 10). That statement simply does not withstand scrutiny in light of the language of the insurance policies and under all of the cases discussed herein.

Even a cursory review of the underlying complaint in this case reveals that the underlying plaintiff was alleging the misappropriation of methods for advertising or marketing. (E.R. 25-27; Hyundai Br.⁸ at 40). Stated simply, the underlying plaintiff alleged that Hyundai misappropriated the patented method for customers to preview cars and car parts on Hyundai’s website. (Hyundai Br. at 33). This clearly implicates an idea about the solicitation of business and customers or a plan for interacting with consumers.

In the two cases involving underlying claims of patent infringement closest to those involved here, the courts appreciated the distinction between patents involving methods for advertising or marketing and those that do not and found that the insurers had a duty to defend. See Amazon I and Amazon II.

In Amazon I, Amazon.com sought a defense in response to a lawsuit alleging that it had infringed upon patents by misappropriating software for use on Amazon.com’s website to market goods to the public. In holding that the underlying complaint alleged a misappropriation of an advertising idea or style of doing business, the court reasoned as follows:

⁸ “Hyundai Br.” refers to the Brief For Plaintiff-Appellant Hyundai Motor America.

Patent infringement arising from the manufacture of an infringing product is not an advertising injury even if the infringing product is used in advertising. But patent infringement may constitute an advertising injury “where an entity uses an advertising technique that is itself patented.” That was the essence of [the underlying] allegation against Amazon. Giving the required liberal construction to the pleadings, [the underlying plaintiff] alleged that its patented music preview technology was an element of Amazon’s advertisement. The [underlying] complaint thus conceivably alleged misappropriation of an idea concerning the solicitation of business and customers.

Amazon I, 85 P.3d at 977 (emphasis added).

In Amazon II, Amazon.com sought a defense against three patent infringement claims based on Amazon’s alleged use of the patents to sell products and services on Amazon.com’s website. In finding a duty to defend, the Amazon II court held as follows with regard to one of the underlying complaints:

Furthermore, the alleged injury triggers defendant Atlantic Mutual’s duty to defend because the advertising injury relates to the wrongful taking of an idea by plaintiff Amazon.com. Patent infringement may constitute an advertising injury “where an entity uses an advertising technique that is itself patented.” Amazon, 120 Wash.App. at 616, 85 P.3d 974 (emphasis omitted) (quoting Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1507 n. 5 (9th Cir.1994)). [The underlying plaintiff] has created a specific technology that is to be used in digital advertising, and [the policyholder] has adopted this idea in the course of its advertising. Further, plaintiff’s alleged patent infringement is the direct cause of [the underlying plaintiff’s] alleged harm, and therefore a causal relationship exists between the advertising and the injury.

Amazon II, 2005 WL 1711966, at *8 (emphasis added).

For the same reasons, the highly similar allegations in the underlying complaint filed against Hyundai gave rise to a potential for coverage and,

accordingly, the Insurers had a duty to defend the interests of Hyundai against those allegations. Gray v. Zurich Ins. Co., 65 Cal.2d 263, 265 (1966). The patents that were allegedly infringed unquestionably involve an idea about the solicitation of business and customers or a plan for interacting with consumers and, therefore, fall potentially within the coverage for “misappropriation of advertising ideas or style of doing business.” The district court erred when it ruled otherwise.

IV. Conclusion

For all of the foregoing reasons, *Amicus Curaie* United Policyholders respectfully requests this Court to reverse the district court, hold that the underlying patent infringement claims may be covered as an “advertising injury” under the standard form CGL Policies and enter summary judgment in favor of Hyundai.

Dated: May 27, 2009

Respectfully submitted,

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

HYUNDAI MOTOR AMERICA
Plaintiff-Appellant,

vs.

**NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
AMERICAN HOME ASSURANCE COMPANY,**
Defendants-Appellees

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 6,291 words.

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I certify that on May 27, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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