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Sanitizer Co. Faces Tough Ad Injury Coverage Bid In 2nd Circ.

By **Jennifer Mandato**

Law360 (March 21, 2024, 4:02 PM EDT) -- A company accused of falsely advertising that its sanitizing products were effective in disinfecting surfaces faces an uphill battle, experts say, as the Second Circuit is poised to hear oral arguments Monday over whether the company is owed coverage under its commercial general liability policy for an underlying class action.

Twin City is urging the Second Circuit to affirm the dismissal of Tzumi's bid for coverage of a class action accusing the company of making false and misleading claims on the labels of its wipes and other products during the COVID-19 pandemic. (Robert Michael/picture alliance via Getty Images)

Tzumi Innovations LLC maintains that a New York district court erred in ruling that the class' accusations against it did not constitute commercial disparagement, the only definition of personal or advertising injury Tzumi cited in its attempt for coverage. Rather, it told the Second Circuit, there was an "implied comparison" between its Wipe Out! product line and competitor Lysol's products that provided the potential for coverage.

Twin City Fire Insurance Co. is urging the Second Circuit to affirm the lower court's dismissal of Tzumi's bid for coverage, contending that Tzumi's allegedly misleading advertising referred only to its own products and didn't disparage its competitors' products. Under New York precedent, accusations that a company's advertising misled consumers about its own products aren't sufficient to trigger a duty to defend under a policy that provides coverage for disparagement claims, the insurer said.

Here, Law360 breaks down the case in advance of the hearing on March 26.

What's at Stake?

Peter Selvin, chair of Ervin Cohen & Jessup LLP's Insurance Coverage and Recovery Department and policyholder attorney, told Law360 that obtaining coverage under disparagement is difficult and that he expects the court to mimic California precedent in saying that implied disparagement isn't a viable argument.

"It would mean that every time a vendor had an adversary saying 'we're the best' or 'we're great,' if implied disparagement were an available avenue, then in every one of those cases there would be coverage," Selvin said, doubting that the Second Circuit would permit that.

Should the court affirm Twin City's win, Selvin advised that future policyholders in a similar situation to that of Tzumi look to their directors & officers policies as the grant of coverage under a D&O policy is broader than under a CGL policy.

Insurer-side attorney and team lead of Duane Morris LLP's Insurance & Reinsurance industry group Max H. Stern echoed Selvin's concerns, telling Law360 that the policyholder faces an "uphill battle" and that arguments similar to Tzumi's have generally not been successful in New York.

"But, being in a court like the Second Circuit could be an impetus for change and clarification," Stern said.

There are some courts around the country who looked at offense-based coverages and found that the elements of the offense didn't need to be established, just the common understanding of the term, he shared.

"At some point, insurers may want to clarify that their intent is consistent with the majority jurisdictions that focus on the offense," Stern said.

While he added that he doesn't expect an emerging wave of coverage based on Tzumi's "aggressive" attempt to find coverage, Stern noted that class actions pose unique exposures for insurers by "collecting the harms done to many."

"To the extent that there is class action liability, it puts a lot of pressure on insurers who are defending to take action to resolve even uncovered claims because of the large risks that can be involved," he said.

How We Got Here

In July 2022, Kari Proskin filed a nationwide class action against Tzumi, accusing the company of making false and misleading claims on the labels of its Wipe Out! Wipes, Wipe Out! Multi-Surface Wipes and Wipe Out! Multi-Surface Decontaminant Spray during the COVID-19 pandemic.

According to court records, the product labels made consumers believe they were "approved as safe and effective for use as an antimicrobial agent on surfaces in homes" despite Tzumi not having received this approval from the U.S. Environmental Protection Agency.

In 2022, Tzumi reached a settlement with the EPA over the products' deceptive labeling, paying a civil penalty of $1.5 million and issuing a public correction that the products are to be used for skin applications only and not as a surface disinfectant, filings show. The class cited the EPA settlement in its complaint to support its claims which included accusations that Tzumi violated sections of New York General Business Law, three California laws pertaining to unfair competition and false advertising and a section of Massachusetts General Law.

Tzumi tendered the class action to Twin City, but the Hartford unit disclaimed coverage, prompting the company to file suit in November 2022.

In August 2023, U.S. District Judge Ronnie Abrams granted Twin City's motion to dismiss, finding that the Tzumi's disparagement argument failed because the underlying action's allegations focused "solely on Tzumi's own products, and how consumers were allegedly harmed by purchasing products that they otherwise 'would not have purchased … if they had known that the products had not been approved for disinfecting surfaces and were illegal to sell."

Further, Judge Abrams ruled, even if Tzumi sufficiently established that the class action constituted a personal and advertising injury, coverage would still be excluded under the policy's "knowledge of falsity" exclusion, which was triggered by the class action's accusations that Tzumi intentionally made false and misleading claims on its products' labels.

Tzumi's Position

The company told the Second Circuit that the class' accusations were within the scope of coverage as Proskin alleged that Tzumi "selected packaging that resembled the packaging used by registered surface disinfectant wipes such as Lysol." Further, Tzumi said it was accused of using marketing tactics calculated to "draw a comparison" between its products and those that were certified by the EPA as surface disinfectants, in order to falsely imply their equivalence.

Tzumi argued that its marketing confused consumers into believing that the WipeOut! products were approved as safe for use on surfaces and thus disadvantaged competitors whose higher priced products appeared to be inferior.

According to the company, the subject of a disparagement claim need not be the party disparaged. In the present case, Tzumi told the Second Circuit that the class of consumers had direct standing to assert liability stemming from the company's marketing, such as advertisements that disparaged competitors by creating "a preferred comparative advantage" in the marketplace.

Counsel for Tzumi declined to comment.

Twin City's Position

The insurer disputed Tzumi's stance, contending that the lower court correctly found that the class action didn't contain allegations that triggered coverage under the policy.

Tzumi put forth only one basis for coverage, that Twin City had a duty to defend and indemnify under the policy's disparagement provision, the insurer said. Twin City told the Second Circuit that Tzumi's argument was misleading, instead maintaining that the class action didn't contain any "allegations that Tzumi made any statements about a competitor, let alone disparaging ones."

According to the insurer, the lack of allegations pertaining to disparaging statements is enough to conclude the dispute in the insurer's favor.

Additionally, Twin City told the court that the class sued Tzumi under California, New York, and Massachusetts consumer protection statutes, all three of which give only competitors—not consumers—standing to sue for disparagement. As such, the class action can't be construed as a disparagement claim because the class would not have had the standing to bring such a claim, the insurer stated.

A representative of Twin City did not immediately respond to requests for coverage Thursday.

Tzumi is represented by David A. Gauntlett of Gauntlett & Associates.

Twin City is represented by Jonathan M. Freiman of Wiggin and Dana LLP and by Katherine E. Tammaro of Wilson Elser Moskowitz Edelman & Dicker LLP.

The case is Tzumi Innovations LLC v. Twin City Fire Insurance Co., case number 23-1241, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Nick Petruncio.