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PERSPECTIVE

Are consumer protection or false advertising claims covered by insurance?

By Peter S. Selvin

Whether consumer protection or false advertising claims are covered by insurance depends on the kind of insurance policies in play. For example, coverage for such claims under a CGL policy is unlikely because an insured's false representation or false advertising about the qualities of its products typically does not fall within any of the "offenses" enumerated under the "advertising injury" coverage grant. *See Applied Bolting Tech Prods v. US Fid & Guar Co.*, 942 F. Supp 1029 (ED Pa 1996), in which the court held that alleged false advertising that an insured's products conformed to certain industry standards did not constitute advertising injury in a lawsuit brought by another manufacturer of the same or similar product. *See also Law v. Golden Eagle Ins. Co.*, 99 Cal. App. 4th 109 (2022), which involved coverage for a consumer's uncertified class action arising from the sale of appetite suppressants and diet products.

The situation changes, however, if a D & O or management liability policy is involved. In such a policy, the existence of a "Wrongful Act" is the trigger for coverage. And importantly covered "Wrongful Acts" are not limited to negligent or unintentional conduct. Thus, "to contend…that the alleged wrongful acts are not covered under the policy because the claimants alleged 'knowing, intentional, and purposeful acts' that do not constitute 'negligence, mistake or error' is misplaced, as the policy does not limit the definition of wrongful acts to acts performed negligently or mistakenly." Charter TWP of *Shelby v. Argonaut Insurance Company*, 2015 WL 9392727, at *8 (Mich. Ct. App.). *See also Amos ex rel. Amos vs. Campbell*, 593 N.W.2d 263, 266 (Minn. Ct. App. 1999) ("The term 'Wrongful Act' has ordinarily been understood to encompass intentional as well as negligent misconduct.").

Two recent cases have addressed coverage for consumer actions under a D & O or Management Liability Policy. Both of those cases focused on the application of the Anti-trust or unfair trade practices exclusion that is commonly found in such policies. A typical formulation of that exclusion reads as follows:

This policy shall not cover any Loss in connection with any Claim alleging, arising out of, based upon or attributable to any violation of any law, whether statutory, regulatory or common, as respects any of the following: anti-trust, business competition, unfair trade practices or tortious interference in another's business or contractual relationships; provided, however, that this exclusion shall apply only to the Company.

In the cases construing this exclusion, the key issue is whether this kind of exclusion bars coverage for consumer claims arising from the sale or marketing of products, as distinct from claims arising from antitrust violations.

In *James River Ins. Co. v. Rawlings Sporting Goods Co. Inc.*, 2021 U.S. Dist. Lexis 20970 (C.D. Cal. 2021), the District Court had to address whether this exclusion barred coverage for claims that the defendant had misrepresented the weight of its baseball bats on their labeling. The consumers brought these claims in a class action complaint, seeking relief under California statutes dealing with unfair competition, false advertising and consumer legal remedies. The policy in James River Policy did not define "unfair trade practices".

In analyzing the coverage issues, the Court in James River rejected the carrier's position that "unfair trade practices" as used in this exclusion encompassed consumer protection claims. The Court based its conclusion on the rule that exclusions are construed narrowly against the insurer. The Court reasoned that the carrier's interpretation of the exclusion would "virtually read the 'misstatement, misleading statement, omission' language right out of the policies' coverage [grant], vitiating them." Id. at *13-*14. As the Court concluded, that insurance policy exclusion could not be read in such a manner as to vitiate the underlying coverage grant. *See also Big Bridge Holdings, Inc. v. Twin City Fire Ins. Co.*, 132 F. Supp. 3d 982 (N. D. Ill. 2015) (finding the term "unfair trade practice" to be ambiguous and resolving that ambiguity in the insured's favor).

Similarly, in *G-New, Inc. vs. Endurance American Insurance Company, et al.*, 2022 Del. Super. LEXIS 371 (September 12, 2022) the Court addressed insurance coverage for settlement payments arising out of a class action in which consumers had alleged that a chocolatier's (Godiva) product labelling was misleading. The plaintiffs' claims were based on New York and California consumer protection statutes.

Godiva's primary and excess management liability policies contained an "Unfair Trade Practices" exclusion which barred coverage for claims "based upon, arising out of or attributable to an actual or alleged violation of the Sherman Anti-Trust Act, the Clayton Act or the Federal Trade Commission Act, as amended, or any other federal, state, local, common or foreign laws involving anti-trust, monopoly, price fixing, price discrimination, predatory pricing, restraint of trade, unfair trade practices or tortious interference with another's actual or prospective business or contractual relationships or opportunities".

The Court in G-New framed the key issue as whether the term "unfair trade practices" includes consumer and false advertising. Id. at * 29. Noting that the underlying settlement agreement did not contain language allocating the monetary payment for unfair trade practices, the Court nonetheless concluded that broad definition of "Loss" under the policy resulted in a finding that the amounts paid under the settlement agreement were covered. Id. at * 31. The Court reserved for future resolution whether any amounts paid under the settlement agreement could be allocated to both covered and uncovered claims.

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