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The Convergence of Intellectual Property, Business Litigation and Insurance Coverage: The Scope of the Advertising Injury Clause Under Michigan Law.

By Todd Rowe

More than ever intellectual property is being considered an asset that can provide a business a competitive edge. As with any asset, the insurance market has stepped up to cover new risks associated with the emergence of intellectual property concepts. In an article titled *The Convergence of Intellectual Property and Insurance Coverage: The Scope of the Advertising Injury Clause Under Michigan Law,* the intersection of intellectual property and insurance coverage is examined. As intellectual property becomes a larger concern in the daily operation of a business, it is important for those who run businesses – as well as those who insure businesses – to understand the relationship between insurance and claims of intellectual property infringement. As such, this article provides a basic introduction to fundamental intellectual property concepts for both those who run businesses and those who provide insurance to those businesses.

First, the analysis begins by tracing the development of the advertising injury clause commonly found n commercial liability insurance policies. In general, insurance coverage under the advertising injury clause is triggered by allegations that an insured's advertising caused an injury to a competitor. Specifically, the coverage analysis is prompted by allegations that an insured infringed a competitor's copyrighted material or trademark. One integral part of any coverage analysis is to determine the strength of the causal nexus between the claimed injury and the allegations of intellectual property infringement. Simply, some jurisdictions require the infringement directly caused the competitor's injury

SECREST WARDLE NOTES:

Intellectual property is no longer a concern exclusively of Fortune 500 companies and high tech companies. Large and small businesses are investing in the protection of their intellectual property rights. There will undoubtedly be an increase in litigation involving intellectual property as companies gain a greater understanding of the value of intellectual property. Whether a business has the proper insurance coverage for infringement claims brought by competitors can prove to be essential to a business' survival. Accordingly, it has become exceedingly important that lawyers, business owners and insurance companies become familiar with basic concepts in intellectual property and how these concepts related to insurance coverage.

while other jurisdictions do not require such a direct relationship. This article stresses the importance of insurers and businesses being aware of the strength of the causal nexus in a given jurisdiction.

Second, this article examines the basic principles of intellectual property in order to provide an understanding of copyright and trademark infringement. This overview demonstrates how intellectual property and a business' advertising activities are intertwined. Consequently, it is easy to understand how the advertising injury clause has become subject to varying interpretations.

Finally, this article discusses the treatment of the advertising injury clause by Michigan courts. Specifically, the Sixth Circuit Court of Appeals' decision in *Advance Watch Co. v. Kemper Nat'l Ins. Co.*, is an example of one interpretation adopted in Michigan courts. In *Advance Watch* the Sixth Circuit held that specific criteria must be met before coverage exists under the advertising injury clause. Simply, Michigan courts tend to require a stronger causal nexus between the insured's advertising activities and the injury. Conversely, there are a number of jurisdictions that require a weaker causal nexus. Consequently, the jurisdiction where a lawsuit is filed can be a significant factor in whether a court will find coverage under the advertising injury clause.

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