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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SCOTTSDALE INSURANCE COMPANY, Plaintiff and Appellant, v. MV TRANSPORTATION, INC., et al., Defendants and Respondents.	B150991 (Los Angeles County Super. Ct. No. BC231352)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory C. O'Brien, Jr., Judge. Affirmed.

Selman ·Breitman, Neil Selman, Jan L.Pocaterra, Lynette Klawon for Plaintiff and Appellant.

Heller Ehrman White & McAuliffe, Richard DeNatale, Peter F. McAweeney Deanna M. Wilcox; John Andrew Biard for Defendants and Respondents.

This appeal concerns an insurance coverage dispute and the meaning of the phrase "advertising injury," as used in the commercial general liability (CGL) policies issued by appellant Scottsdale Insurance Company (Scottsdale) to respondent MV Transportation, Inc. (MV). We interpret "advertising injury" as not limited to injury only from widespread promotional activities directed to the public at large. Rather, advertising injury, as defined in the CGL policies, includes MV's one-on-one business solicitations that used a common style and promotional information disseminated to more than one customer. MV's complaint potentially sought damages covered by the policies, even though MV's promotional solicitations were in the nature of tailored bid proposals sent to customers in targeted markets.

MV thus correctly tendered to Scottsdale its defense in the underlying action filed by MV's competitor, Laidlaw Transit Services, Inc. (Laidlaw), alleging MV misappropriated information constituting advertising ideas and a style of doing business, including Laidlaw's bidding formula and customer lists. Accordingly, after Scottsdale filed its declaratory relief action in the present case seeking a declaration that it owed no defense obligations and seeking reimbursement of its defense fees, the trial court properly denied summary judgment and ruled in favor of MV and its employees (who are also respondents).

FACTUAL AND PROCEDURAL SUMMARY

The underlying lawsuit by Laidlaw

In January of 2000, Laidlaw filed an action against MV and several of MV's employees who had previously worked for Laidlaw, including MV's new President and Chief Operating Officer (Jon Monson). Laidlaw's complaint against MV and several of its employees alleged causes of action for breach of fiduciary duty, tortious inducement to breach the duty of loyalty and fiduciary duty, intentional interference with contractual relations and with prospective business advantage, misappropriation of trade secrets, and unlawful, unfair and fraudulent business practices.

In essence, Laidlaw's suit alleged certain contractual breaches, unlawful business practices, and misappropriation of trade secrets by using confidential, proprietary information to compete unfairly in bidding for and obtaining new busing contracts in urban public transportation services markets. The complaint specified two markets in particular, Lawrence, Kansas and Indianapolis, Indiana. The confidential, proprietary information included bidding models, bidding formulas, and other nonpublic information used in developing Laidlaw's bids, such as Laidlaw's overhead costs and financial objectives allocated to each project. As alleged in the complaint, MV used such information, as well as Laidlaw's customer list and other trade secrets, to "significantly impede Laidlaw's ability to market itself as a unique provider" of its services.

Soon after Laidlaw filed its complaint, MV's legal counsel tendered the defense to its insurer, Scottsdale. Scottsdale asserted that although one Ninth Circuit case had "concluded that certain trade secret misappropriation claims fall within the scope of the advertising injury liability coverage of a general liability policy," the underlying facts in that case (*Sentex Systems, Inc. v. Hartford Acc. & Indem. Co.*(C.D. Cal. 1995) 882 F.Supp. 930, affd. (9th Cir. 1996) 93 F.3d 578 (*Sentex*)) are distinguishable, and Scottsdale's defense obligations were not triggered by the Laidlaw suit. Nonetheless, Scottsdale agreed to provide a defense to MV with a reservation of rights. Specifically, Scottsdale agreed to provide a defense to MV and the individuals named in the Laidlaw suit under a reservation of certain rights, including the right to seek a declaration of its rights and duties under the policy and "[t]he right to seek reimbursement of defense fees paid toward defending causes of action which raise no potential for coverage, as authorized by the California Supreme Court in *Buss v. Superior Court (Transamerica Ins. Co.)* (1997) 16 Cal.4th 35."

In December of 2000, Laidlaw and MV agreed to settle the suit by Laidlaw. Pursuant to the settlement agreement, MV and the individual defendants agreed to return to Laidlaw documents containing allegedly misappropriated bid models, bid formulas and other trade secrets, and to refrain from using such material in developing MV's bids or

proposals to customers in the public transportation market. However, the settlement agreement did not require that MV pay any money to Laidlaw. Attorney fees and costs incurred in defending the Laidlaw suit were approximately $340,000.

The coverage dispute between Scottsdale and MV

Scottsdale issued two CGL insurance policies to MV, one effective from December 1, 1998, to December 1, 1999 (hereinafter, the first CGL policy), and the other from December 1, 1999, to December 1, 2000 (hereinafter, the second CGL policy). The first CGL policy contained an agreement by which Scottsdale agreed to defend MV against any suit and to pay any damages due to "'advertising injury' caused by an offense committed in the course of advertising [MV's] goods, products or services." The policy defined the term "advertising injury" as including the "[m]isappropriation of advertising ideas or style of doing business."

The second CGL policy also obligated Scottsdale to pay MV's damages and costs of suit for any advertising injury. The policy language, however, was somewhat different from that in the first CGL policy. Specifically, the second CGL policy defined advertising injury as, in pertinent part, "[t]he use of another's advertising idea in [the insured's] 'advertisement.'" And the policy defined "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about [the insured's] goods, products or services for the purpose of attracting customers or supporters."

During the course of the underlying Laidlaw litigation, in June of 2000, Scottsdale filed the present declaratory relief action against MV and other defendants named in the Laidlaw action. After settlement in the underlying action, Scottsdale moved for summary judgment seeking a determination that it owed no legal defense obligations, and seeking reimbursement of the full amount paid for defense costs and fees and a declaration that it owed no further costs and fees. The trial court denied Scottsdale's motion for summary judgment and ruled that it had a duty to defend. The court observed that Laidlaw "alleged a broader audience than simply" the two cities noted in the complaint where MV

sought business (i.e., Lawrence, Kansas and Indianapolis, Indiana), and concluded that "[b]roadly construed, the . . . [c]omplaint alleged misappropriation of Laidlaw's 'advertising ideas,' for which there is at the very least the potential of coverage, and therefore Scottsdale's duty to defend is established as a matter of law."

DISCUSSION

Standard of Review

We review the record and determine this appeal in accordance with the customary rules of appellate review following a summary judgment ruling. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843-857.) The general rule is, of course, that summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).)

"'The trial court must decide if a triable issue of fact exists. If none does, and the sole remaining issue is one of law, it is the duty of the trial court to determine the issue of law.' [Citation.] [¶] On appeal, this court must conduct de novo review to determine whether there are any triable factual issues. [Citation.] Likewise, because the 'interpretation of an insurance policy is a question of law, [we must] make an independent determination of the meaning of the language used in the contract under consideration.' [Citation.]" (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481; see also *Milazo v. Gulf Ins. Co.* (1990) 224 Cal.App.3d 1528, 1534.)

The broad duty to defend

A CGL insurance policy, as here, typically obligates the insurer to defend its insured, or to pay its insured's defense costs, in a lawsuit or claim that is potentially covered. The duty to defend is "broad," and "California courts have been consistently solicitous of insureds' expectations" regarding a defense. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295, 296 (*Montrose*).) "Any doubt as to whether

the facts establish the existence of the defense duty must be resolved in the insured's favor." (*Id.* at pp. 299-300.)

An insurer thus must defend a lawsuit which *potentially* seeks damages covered under the policy, even if coverage is in doubt and ultimately does not develop. (*Id.* at p. 295.) The defense "obligation can be excused only when the third party complaint '"*can by no conceivable theory raise a single issue which could bring it within the policy coverage*."'" (*Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group* (1996) 50 Cal.App.4th 548, 556, quoting *Montrose, supra*, 6 Cal.4th at p. 300.)

The general rule is that "[t]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy." (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081; see also *Montrose, supra*, 6 Cal.4th at p. 295.)

In considering whether the allegations give rise to a duty to defend, "it is not the form or title of a cause of action that determines the carrier's duty to defend, but the potential liability suggested by the facts alleged or otherwise available to the insurer." (*CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 609.) Because current pleading rules liberally allow amendment, the insurer must defend if there is any possibility that the complaint could still be amended to state a covered claim. (*Id.* at pp. 610-612; see also *Montrose, supra*, 6 Cal.4th at p. 296.)

Once triggered, the duty to defend continues "until the underlying lawsuit is concluded [citation], or until it has been shown that there is *no* potential for coverage." (*Montrose, supra*, 6 Cal.4th at p. 295.) And an insurer seeking to terminate its duty to defend must "establish *the absence of any such potential*" with facts that "eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage." (*Id.* at p. 300.)

"If the parties dispute whether the insured's alleged misconduct is potentially within the policy coverage, and if the evidence submitted does not permit the court to eliminate either party's view, then factual issues exist precluding summary judgment in the insurer's favor." (*American Cyanamid Co. v. American Home Assurance Co.* (1994) 30 Cal.App.4th 969, 975.) If the insurer cannot prevail on summary judgment, "'the duty to defend is then *established,* absent additional evidence bearing on the issue.'" (*Ibid*., citing *Horace Mann Ins. Co. v. Barbara B., supra,* 4 Cal.4th at p. 1085; see also *Montrose, supra,* 6 Cal.4th at p. 301.)

If and when an insurer establishes that no claim can possibly be covered, then its duty to defend is "extinguished only prospectively and not retroactively: Before, the insurer had a duty to defend; after, it does not have a duty to defend further." (*Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 58.)

Accordingly, in determining whether an insurer has a duty to defend, we first compare the allegations of the complaint with the terms of the policy. (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 276.)

Comparison of the allegations of the complaint with the terms of the policy

According to Scottsdale, no covered activity was alleged in the Laidlaw complaint. As viewed by Scottsdale, the underlying complaint focused on MV's use of Laidlaw's proprietary information to underbid Laidlaw in busing contracts and to compete unfairly, and the CGL policies covered advertising injuries that were not at issue in the complaint. Scottsdale argues that, as construed by relevant case law, the term "advertising" means "widespread promotional activities directed to the public at large," and it can never encompass "solicitation of a customer through a one-on-one competitive bidding procedure with a product specifically designed for that customer."

However, Scottsdale's own definition of "advertising injury" in its two CGL policies is not so restrictive. The first policy provided that "advertising injury" includes, in pertinent part, an injury arising out of "[m]isappropriation of advertising ideas or *style of doing business*." (Italics added.) The second policy was worded

somewhat differently. It defined "advertising injury" as including the "use of another's advertising idea in [the insured's] 'advertisement,'" with the term "advertisement" defined, in pertinent part, as "a notice that is . . . published to . . . *specific market segments about [the insured's] . . . services for the purpose of attracting customers*." (Italics added.)

It is thus apparent that the broad concept of "advertising injury," used in the two policies, encompasses more than Scottsdale's narrow interpretation would permit. The notion of injury from advertising reasonably encompasses MV's alleged misappropriation of Laidlaw's proprietary bidding formula, bidding models and customer lists used by MV in its "style of doing business," as described in the first policy. And the second policy's use of the term "advertisement" includes use of another's ideas by disseminating information in "specific market segments" with the intention "of attracting customers."

The complaint alleged that MV used confidential, proprietary information, including "customer lists," to "significantly impede Laidlaw's ability to market itself as a unique provider" of its services. This denotes more than a single, isolated incident and bespeaks of MV's move into the market for Laidlaw's services, even beyond the two cities specified in the complaint.

MV's solicitation of busing contracts on an individual basis by exploiting Laidlaw's customer lists, its proprietary bidding model and formula, and Laidlaw's financial profiles of objectives and project costs is within the broad scope of the policies' definitions of advertising injury. It is of no consequence that MV sent seriatim, to one potential customer at a time, each of its bid solicitations and promotional material. The point is that the complaint alleged facts indicating, in the language of the policies, that MV used Laidlaw's "customized style of doing business" and sent information to "a specific market segment" about its services "for the purpose of attracting customers." The language in the policies is broad enough to encompass

focused and sequential customer contact to several customers, and no language specifically precludes such coverage.

Applicable case law

It is appropriate to construe the disputed policy language "in the context of [the] instrument as a whole, and in the circumstances of [the] case." (*Ziman v. Fireman's Fund Ins. Co.* (1999) 73 Cal.App.4th 1382, 1388.) Any ambiguity in the terms of the policy must be construed to protect the "'objectively reasonable expectations of the insured.'" (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265, citation omitted (*Bank of the West*.) Therefore, "[s]o long as coverage is available under any reasonable construction, the insurer will be held liable." (*ML Direct, Inc. v. TIG Specialty Ins. Co.* (2000) 79 Cal.App.4th 137, 142.)

Here, it is reasonable to expect that Scottsdale's policies would provide for MV "protection against the type of liability which would ordinarily grow out of its kind of business." (*Ritchie v. Anchor Casualty Co.* (1955) 135 Cal.App.2d 245, 257.) There is no indication that MV directed its solicitation of busing contracts to the public at large, and Scottsdale is presumed to have understood the nature of MV's promotional and business activities when it sold it insurance that covered advertising injury. (*Ibid.*; see also *Southeastern Express Systems v. Southern Guaranty Ins. Co.* (1995) 34 Cal.App.4th 1, 11.) Courts will "not sanction a construction of the insurer's language that will defeat the very purpose or object of the insurance." (*Ritchie v. Anchor Casualty Co., supra,* 135 Cal.App.2d at p. 257.)

Contrary to Scottsdale's contention, MV's interpretation of "advertising injury" is also consistent with the California Supreme Court's analysis in *Bank of the West, supra,* 2 Cal.4th 1254. The Court in *Bank of the West* rejected the insured's arguments that the definition of a covered injury, in that case damage from "unfair competition," should be based on its dictionary meaning or its statutory definition in the Business and Professions Code, and it limited the scope of insurance coverage to an injury based on the common law tort of unfair competition. (*Id.* at pp. 1263, 1265.) The Court

concluded that the term "unfair competition" only referred to a civil wrong that could support an award of damages. (*Id.* at pp. 1263, 1265.)

Scottsdale inappropriately focuses on a footnote in *Bank of the West* in which the Court observed, "Although we need not address the issue, we note that courts have disagreed on the question of what constitutes 'advertising' for these purposes. Most of the published opinions hold that 'advertising' means widespread promotional activities directed to the public at large[] . . . [and does not] also encompass personal solicitations." (*Id.* at pp. 1276-1277, fn. 9.) Apart from MV's assertion that the Supreme Court's dicta 10 years ago regarding the narrow definition of "advertising" in other jurisdictions is now outdated by more recent case law, *Bank of the West* did not address the language in the insurance policies at issue in the present case.

The relevant policy language in *Bank of the West* provided that "'"Advertising injury" means injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, unfair competition, or infringement of copyright, title or slogan.'" (*Bank of the West, supra,* 2 Cal.4th at p. 1262, italics omitted.) As discussed above, the relevant language of the policies in the present case is worded quite differently.

In fact, the policy language at issue here is similar to that in *Sentex, supra,* 882 F.Supp. 930, affd. 93 F.3d 578. In *Sentex*, the insured sued its CGL insurer asserting that the insurer had a duty to defend against a competitor's allegations that a former employee had misappropriated trade secrets and confidential information used while employed by the insured. Much as in the present case, the complaint in *Sentex* alleged misappropriation of customer lists, methods of billing jobs, marketing techniques, and other inside and confidential information. And the insured used such information to solicit business from customers of its competitor. (*Id.* at p. 935.) The District Court held that the competitor's allegations in the complaint were potentially within the scope

of the CGL policy which covered "advertising injury" that included, as here, "[m]isappropriation of advertising ideas or style of doing business." (*Id.* at p. 934.)

The District Court in *Sentex* found that some "courts have defined 'advertising activity' as broadly as possible 'to encompass a great deal of activity,'" and that "the term 'advertising' encompasses the kind of personal, one-on-one and group solicitations" engaged in on behalf of the insured. (*Sentex, supra,* 882 F.Supp. at p. 939.) The court reasoned, in part, that giving "'advertising activity' a narrow interpretation is only reasonable if the term is contained in an advertising injury exclusion," and that "[i]f an insurer wants to avoid such a broad interpretation of the term 'advertising,' it can narrow the term's scope by defining it in the policy." (*Id.* at p. 940.) The Ninth Circuit affirmed, aptly observing: "This policy's language, given its ordinary meaning, does not limit itself to the misappropriation of an actual advertising text. It is concerned with 'ideas,' a broader term." (*Sentex, supra,* 93 F.3d at p. 580.) "In this day and age, advertising cannot be limited to written sales materials, and the concept of marketing includes a wide variety of direct and indirect advertising strategies." (*Ibid.*) We agree with that analysis.

Moreover, Scottsdale's reliance upon language in *El-Com Hardware, Inc. v. Fireman's Fund Ins. Co.* (2001) 92 Cal.App.4th 205, 209 (*El-Com Hardware*) is misplaced. That case addressed a CGL policy defining "advertising injury" as including, as here, "[m]isappropriation of advertising ideas or style of doing business." The court found that the offending product had been advertised in the insured's catalog and that use of a catalog met the "commonly understood meaning of advertising" (*id.* at p. 217), which entails "widespread promotional activities." (*Ibid.*)

We agree with *El-Com Hardware* that a commonly understood meaning of advertising is widespread promotional activities. But we find the term may include other contexts as well, and that the critical facts in *El-Com Hardware* are distinguishable. That case addressed use of a widely distributed catalog and did not have to confront, as here, an insured's dissemination of individual proposals tailored to

the individual needs of each of at least two customers identified in the complaint, as well as likely others on the list of customers taken by MV. We thus deem injury from even such individual and focused solicitations, made sequentially to more than one customer, as within the scope of the policy's broad definition of "advertising injury."

Finally, we find Scottsdale's reliance on *Peerless Lighting Corp. v. American Motorists Ins. Co.* (2000) 82 Cal.App.4th 995 (*Peerless*) unpersuasive. *Peerless* involved the same policy language as here, covering "advertising injury" arising out of "[m]isappropriation of advertising ideas or style of doing business." (*Id.* at p. 1000.) In *Peerless*, the insured was a lighting manufacturer that submitted a bid to another company looking for specialized lighting. To make its bid more acceptable to the company, the insured responded to the company's requirements by submitting a modified sample lighting fixture with its proposal. The sample lighting fixture allegedly was very similar in overall appearance to that of another manufacturer, which sued alleging violations of trademark laws; i.e., infringement of so-called trade dress. The insured tendered its defense to its insurer, which rejected the tender of defense on the ground that the allegations in the complaint did not meet the definition of advertising injury. (*Id.* at pp. 1001-1002.)

If confronted with the facts in *Peerless*, we would agree with the insurer, as did the appellate court in *Peerless*. The insured in *Peerless* was involved in one episode stemming from a single solicitation by one bid with one offending sample product. As previously discussed, the present case involves individual and focused solicitations, made sequentially to more than one customer, and is thus within the scope of the policies' broad definition of "advertising injury." As did the court in *Peerless*, we reject the notion that "solicitation of a *single* customer with a tailor-made product in the course of a competitive bidding process . . . amounts to 'advertising.'" (*Id.* at p. 1012.) But here there was, as previously discussed, more than just a single customer.

Conclusion

The pertinent allegations in the complaint potentially sought damages within the coverage of the CGL policies issued by Scottsdale. The trial court properly denied Scottsdale's motion for summary judgment on its complaint seeking a declaratory judgment and reimbursement of its defense costs.[1]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P.J.

We concur:

NOTT, J.

ASHMANN-GERST, J.

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[1] It is thus unnecessary to address MV's assertion that the hundreds of e-mail announcements Mr. Monson sent after starting his new position at MV, as revealed in MV's opposition to summary judgment, are cognizable as extrinsic evidence that constituted advertising activity or even caused Laidlaw's alleged damages.

It is also unnecessary to address MV's claim that Scottsdale is not entitled to retroactive reimbursement, pursuant to *Buss v. Superior Court* (1997) 16 Cal.4th 35, because Scottsdale allegedly never attempted to extinguish its duty to defend while the underlying Laidlaw litigation was ongoing. We note in that regard that although Scottsdale moved for summary judgment after settlement in the underlying action, it filed the present declaratory relief action against MV during the course of the underlying Laidlaw litigation. And Scottsdale asserts that it delayed its motion for summary judgment in deference to MV's complaints about prejudice from having to defend at the same time the then-pending underlying action.