

## ALERTS AND UPDATES

### California Court Rules That Insurer Has No Duty to Defend or Indemnify Prop. 65 Claim

July 15, 2011

In a unanimous decision on June 10, 2011—in *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co.*<sup>1</sup>—the California Court of Appeal for the Second District held that an insurer had no duty to defend or indemnify its insured for claims against the insured's alleging violation of Proposition 65, the [California Safe Drinking Water and Toxic Enforcement Act of 1986](#). On July 11, 2011, the decision was certified for publication.

Travelers issued a commercial general liability (CGL) policy to Ulta, a nail-products manufacturer, for a one-year period from 2006 to 2007. The policy required Travelers to defend "any suit" seeking damages that the insured "becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage.'" An underlying action was filed against Ulta and others manufacturers, distributors and sellers of nail products, alleging that the nail products contained dibutyl phthalate (DBP), a chemical known to cause reproductive toxicity. Ulta tendered the suit to Travelers, and Travelers denied coverage. Ulta ultimately incurred more than \$200,000 to defend against the suit, and settled the suit for \$25,000. Ulta then sued Travelers for breach of contract and bad faith, contending that Travelers' refusal to defend and indemnify Ulta was unreasonable.

Travelers demurred on the grounds that its policy only afforded coverage for sums Ulta became legally obligated to pay "as damages" for "bodily injury" and "property damage," and that the underlying action did not allege either—the suit solely sought civil penalties under Proposition 65 and injunctive relief, which were neither covered nor potentially covered damages under the policy. Ulta argued that the underlying action alleged facts that gave rise to a potential for coverage because the allegations relating to DBP potentially give rise to bodily injury claims. The trial court had sustained Travelers' demurrer without leave to amend, and the California Court of Appeal affirmed, concluding that "neither the pleadings nor the extrinsic evidence in the underlying action revealed a possibility the Proposition 65 claim being asserted against Ulta might be covered by the Travelers policy."

In its reasoning, the appellate court determined that the suit was brought on behalf of the general public, and contained no allegation that the plaintiff suffered any injury due to exposure to Ulta's products. Instead, the suit asserted one cause of action under Proposition 65 based on the allegation that Ulta and others failed to provide clear and reasonable warnings in violation of the California Health and Safety Code. Because the civil penalties for the statutory violations did not arise from a claim for bodily injury (or property damage), the court concluded that Ulta did not become legally obligated to pay damages for bodily injury, and the policy was not triggered. The court rejected Ulta's argument that the facts alleged in the suit gave rise to potential bodily injury claims, and instead found that Travelers had no duty to defend Ulta based on "unpled claims by [the plaintiff of the underlying action] that might implicate the policy."

The court also rejected Ulta's argument that leave to amend should be granted. Ulta argued that it could cure any defect in its complaint by proffering extrinsic evidence (e.g., discovery responses asserting that bodily injury could result from exposure to DBP, and declaration from a toxicologist) showing that the underlying action could give rise to a duty to defend. *Citing Gunderson v. Fire Ins. Exchange*<sup>2</sup>, the court held that "[a]n insured may not trigger the duty to defend by speculating about ... ways in which the third party claimant might amend its complaint at some future date."

## For Further Information

If you have any questions about the information addressed in this Alert, please contact [Max H. Stern](#), [Brian A. Kelly](#), [Christina Cahalan Marshall](#), any [member](#) of our [Insurance and Reinsurance](#) industry group, or the attorney in the firm with whom you are regularly in contact.

## Notes

1. *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Cas. Co.*, No. B224584 (Cal. App. 2 Dist. June 10, 2011).
2. *Gunderson v. Fire Ins. Exchange*, 37 Cal. App. 4th 1106, 1144 (Cal. App. 1st Dist. 1995).

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