

# ADVERTISING INJURY COVERAGE AND FASHION DESIGNS

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Modern businesses today consider their intellectual property as one of their most valuable assets. This is certainly the case for the fashion industry, where brands rely heavily upon trademark laws in the absence of a more robust copyright framework. Through well orchestrated marketing campaigns, fashion brands can appeal to a market sector based upon price, quality, style, or even status, and create a unique association in the public's mind about their goods. As with any other business, however, selling fashion is not without risk. A brand can face lawsuits for trademark and trade dress infringement, copyright infringement, unfair competition, and defamation just to name a few. If a business took out a Comprehensive General Liability insurance policy, then it should look to its "advertising injury" coverage (referred to as "coverage B") when faced with such a lawsuit.

Understanding such clauses, however, can prove critical. Insurance companies take a narrow view of what constitutes an "advertising injury" which often results in an insurance coverage denial. A policyholder should be prepared to contest such denials especially where there is "sufficient legal uncertainty about the coverage issue" at the time the tender was made.

This is precisely what happened in CGS Industries v. Charter Oak Fire Ins. Co., \_\_\_ F.3d \_\_\_, 2013 U.S.. App. LEXIS 11700 (2nd Cir. June 11, 2013). The case dealt with an insurer's duty to indemnify and defend in the context of an underlying trademark infringement lawsuit. What is interesting about this case – particularly for those unfamiliar with "advertising injury" coverage and insurance law in general – is that although an insurer may not have a duty to indemnify a policyholder, it may have a much broader duty to *defend*.

It is important to understand that standard commercial general liability policies do provide coverage for "advertising injury" caused by an offense committed in the course of advertising the insured's goods, products or services. "Advertising injury" is defined as injury arising out of certain enumerated offenses, including: (1) oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services; (2) oral or written publication of material that violates a person's right of privacy; (3) misappropriation of advertising ideas or style of

doing business; or (4) infringement of copyright, title, or slogan. The term “advertising” generally means widespread promotional activities usually directed at the public at large.

What is conspicuously omitted from the “advertising injury” definition is coverage for trademark infringement. While some policies are phrased as including infringement upon another’s copyright, *trade dress* or slogan in the insured’s advertisement, they almost invariably exclude coverage for trademark infringement. Discerning the difference between covered slogans and excluded trademarks can be difficult, and has resulted in a variety of court decisions.

In CGS Industries, the Second Circuit grappled with the issue of whether an underlying trademark infringement lawsuit based on a jeans rear-pocket stitching design triggered defendant insurer’s duty to indemnify or duty to defend. In the underlying action, CGS Industries Inc. (“CGS”) supplied jeans to Walmart Stores Inc. (“Walmart”). Five Four Clothing, Inc. (“Five Four”), another jeans manufacturer, sued Walmart and CGS for trademark infringement based on CGS’s alleged use of Five Four’s distinctive rear pocket stitching design. CGS then asked that Charter Oak Fire Insurance Company (“Charter”) defend it pursuant to its insurance policy that contained coverage for “advertising injury.” Charter refused, claiming that the allegations in the underlying lawsuit were not covered by the policy.

CGS’s policy provided in relevant part that Charter:

will pay those sums that the insured becomes legally obligated to pay as damages because of . . . “advertising injury” . . . to which this insurance applies. [Charter] will have the right and the duty to defend the insured against any “suit” seeking those damages, even if the allegations of the “suit” are groundless, false or fraudulent. However, [Charter] will have no duty to defend the insured against any “suit” seeking damages . . . to which this insurance does not apply.

CGS’s policy defined “ ‘[a]dvertising injury’ [as] caused by an offense committed in the course of advertising your goods, products or services.” It further defined “advertising injury” as injury arising out of one or more specifically listed offenses, including “[i]nfringement of copyright, title, or slogan.” In other words, CGS’s policy did not cover trademarks.

The lower court concluded that Charter breached its duty to defend CGS in the underlying action. Charter appealed, arguing that it did not have a duty to defend CGS because the stitching did not constitute an infringement of “slogan” or “title” within the meaning of the policy.

The Second Circuit affirmed, holding that Charter’s duty to defend was triggered because there was sufficient ambiguity as to whether the pocket stitching design may be considered a “title” so as to trigger

the duty to defend. In reaching this conclusion, the Second Circuit examined the differing standards for the duty to indemnify and the duty to defend.

New York law distinguishes between the duty to indemnify and the duty to defend, applying very different presumptions to each. Hugo Boss Fashions, Inc. v. Federal Insurance Co., 252 F.3d 608, 615 (2d Cir. 2001). In deciding whether an insurance policy requires an insurer to indemnify an insured's loss, a court must first examine whether there is a "reasonable basis for a difference of opinion as to the meaning of the policy." Fed. Ins. Co. v. Int'l Bus. Machs. Corp., 18 N.Y.3d 642, 646 (2012). If there is, "the language at issue would be deemed to be ambiguous and thus interpreted in favor of the insured." Id.

The duty to defend, however, is broader than the duty to indemnify and an "even stronger presumption in favor of coverage" applies. Hugo Boss, 252 F.3d at 615; see also Hanover Ins. Co. v. Cowan, 568 N.Y.S.2d 115, 116 (2d Dep't 1991). Even where the insurer ultimately has no duty to indemnify due to policy exclusions, it may still be "obligated to defend the insured until the applicability of the exclusion [is] determined." Hugo Boss, 252 F.3d at 615. To avoid the duty to defend, an insurer "must demonstrate that the allegations of an underlying complaint place that pleading solely and entirely within the exclusions of the policy and that the allegations are subject to no other interpretation." Id.

Keeping these principles in mind, the court went on to examine whether the rear-pocket stitching could properly be considered a "title" or a "slogan." Since both terms were undefined by the policy, the appeals court looked to federal law to provide their meaning.

With respect to "slogan," the court examined whether there is an "overwhelming current of judicial opinion" as to how that term should be defined. Relying upon Hugo Boss, the court noted that federal courts generally define "slogans" as "phrases used to promote or advertise a house mark or product mark, in contradistinction to the house or product mark itself." Hugo Boss, 252 F.3d at 618. Given the fact that a pocket stitching was not a phrase, but could be construed as a house mark or product mark, the court concluded that the stitching was clearly and unambiguously not a "slogan."

With respect to "title," the court generally observed that the vast majority of cases find that because infringement of trademarks was specifically not mentioned in the policy, then "title" must mean "the name or appellation of a product" and not "design elements such as a pocket stitching that may serve as a trademark." CGS Industries, at 12. However, the court also observed that there are a handful of cases that "define title in a way that could arguably include a design or symbol similar to the pocket stitching at issue here." CGS Industries, at 14; see Priceless Clothing Co. v. Travelers Cas. Ins. Co., 2011 WL 1900121 (N.D. Ill. May 19, 2011), quoting 15 U.S.C. 1127 (defining "title" as "names and related trademarks"; then

noting that “trademarks” is defined as a “word, name, symbol, or device, or any combination thereof”); see also Zurich Ins. Co. v. Amcor Sunclipse N. Am., 241 F.3d 605, 608 (7th Cir. 2001) (“‘title’ refers to names and related trademarks”). The court noted that although the stitching could not be considered “the name or appellation of a product,” it certainly could be considered a design or symbol. Under the Hugo Boss framework, these cases created sufficient legal uncertainty around the meaning of “title” to trigger the insurer’s duty to defend, at least until the uncertainty surrounding the term was resolved. The court went on to suggest that an insurer may separately file for a declaratory judgment as to the meaning of “title” while at the same time complying with its duty to defend.

Accordingly, the CGS case provides some insight as to how the Second Circuit will interpret the words “title” or “slogan” in advertising injury cases, and particularly within the context of fashion designs. In CGS, Charter could have sought a declaratory judgment, but it never did. Its duty to defend therefore was ongoing, and its failure to defend constituted a breach of the policy.

Understanding when these obligations are triggered is critical when faced with a lawsuit arguably falling within the “advertising injury” coverage clause. It is important to immediately check the policy, and be prepared to challenge any denial of coverage.