Intellectual Property Alert: Federal Appeals Court Requires Insurers to Defend Patent Infringement Suit Under Standard Commercial Liability Policies

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Insurance companies consistently assert that Commercial General Liability ("CGL") insurance, routinely purchased by most businesses, provides no coverage for patent infringement lawsuits. An October 17, 2011 decision of a federal appeals court in Colorado has rejected that view, however, holding that CGL insurers may be bound at least to fund an insured company's defense of patent litigation where the invention at issue has potential promotional uses.

In *Dish Network Corp. v. Arch Specialty Ins. Co.*, the United States Court of Appeals for the 10th Circuit held that CGL coverage for "advertising injury" stemming from "misappropriation of advertising ideas" can extend to patent infringement claims. In Dish the insured was alleged to have infringed a patent for an automated customer service telephone system used as a means of conveying content to, and tailoring interactions with, customers. Although the insurers pointed out that the policy did not expressly promise coverage for patent litigation, the Court concluded that "advertising injury" coverage applied. The Court reasoned that the complaint alleged a potentially covered claim because the patented technology "could theoretically be used for advertising purposes," and the complaint left open the possibility that the insured used the technology to promote its products (such as by making "up-sell offers tailored to a specific caller"). In so holding, the Court echoed the reasoning of another federal appeals court in California and an appellate court in the state of Washington, both of which affirmed coverage in similar circumstances.

The *Dish* Court was, however, quick to express agreement with decisions that have held CGL coverage inapplicable to patent cases in which an insured company "manufactured an infringing product and then merely advertised its misdeed." Such conduct may constitute misappropriation of a patented product, but not of an invention that could be characterized as an idea about how to advertise products. Under *Dish*, the key to *defense* coverage lies in whether the complaint (i) alleges misappropriation of a patented product with a potential promotional use, and (ii) does not rule out the possibility that the insured used the product for promotional purposes. Coverage for *liability* likely would hinge on whether the liability is founded on actual misappropriation and use of a patented advertising idea.

In light of *Dish*, and given the high cost of defending patent infringement claims, whenever the patent at issue has a potential promotional application, close analysis of whether the underlying suit could be construed to allege "misappropriation of advertising ideas" is likely to be a worthwhile effort.