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No Coverage Exists for Patent Infringement Claims Where the Allegedly Infringing Patent Is Not Used In Advertisement

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U.S. District Court for the District of Colorado

In *Dish Network Corp. v. Arch Specialty Ins. Co.*, ___ F.Supp.2d ___, 2010 WL 3310025 (D.Colo. Aug. 19, 2010), the U.S. District Court for the District of Colorado held that DISH's commercial general liability (CGL) carriers had no duty to defend underlying patent infringement claims related to interactive call processing technologies under the advertising injury provisions in their policies because the patents at issue were not used directly in DISH's advertising and do not constitute marketing ideas.

Applying Colorado law, the court analyzed whether patent infringement claims asserted in an underlying action pending in California federal court were potentially covered under CGL policies providing advertising injury coverage for "misappropriation of advertising ideas or style of doing business." Stopping short of holding that patent infringement cannot constitute advertising injury, the court agreed with earlier decisions finding that patent infringement may qualify as an advertising injury where it involves the use of an advertising technique that is itself patented. The court reasoned that if the complained-of advertisement incorporates a patented advertising technique as an element, then coverage may be implicated. However, where the patent is simply a means of conveying the advertisement, such as the interactive call processing technology patents at issue here, the allegations do not fall within the advertising injury offense of "misappropriation of an advertising idea."

The court further held that DISH's alleged patent infringements do not qualify as misappropriation of a "style of doing business" because the allegations involve technologies for methods of communication in general, not a marketing idea developed by the underlying plaintiff for the specific purpose of conducting its own business.

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