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It's No Secret: Misappropriation of Trade Secrets Claim Without Advertising Will Not Trigger Coverage

Insurance Law Update

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U.S. Court of Appeals for the Fifth Circuit

In *Continental Cas. Co. v. Consolidated Graphics, Inc.*, ___ F.3d ___, 2011 WL 2644736 (5th Cir. (Tex.) July 7, 2011), the U.S. Court of Appeals for the Fifth Circuit held that Sentry Insurance Company and Continental Casualty Company owed no obligation to provide advertising injury coverage for a claim of misappropriation of trade secrets.

Consolidated Graphics hired a disaffected employee from a competitor, who schemed to take his former employer's confidential price information, profit charts and marketing strategies. The former employer sued Consolidated, alleging it also schemed to steal this information. The Sentry and Continental policies issued to Consolidated provided coverage for "advertising injury," which included injury arising out of misappropriation of advertising ideas, but only if committed "in the course of advertising" the insured's goods, products or services. The District Court found, and the Fifth Circuit assumed, that allegations regarding pricing promotions did not involve misappropriation of advertising ideas.

Even though the term "advertising" was not defined in the policy, the Fifth Circuit declined to stretch the interpretation of that term to encompass the allegations against the insured. The court surveyed case law holding that "advertising" implies a "public notice of some sort," as evidenced in "marketing devices" intended to induce the public to patronize a business. The advertising injury coverage thus contemplates a dissemination to the public (through media such as newspapers, television or radio). The court cited from several other jurisdictions in support of the proposition that the "ordinary and popular" meaning of advertising means widespread promotional activities directed to the public at large, and it rejected broader definitions that would encompass statements made by a seller in any manner in connection with the solicitation of business. The court concluded that, at most, the employee hired by Consolidated away from its competitor had direct contacts with certain customers, but that these contacts fell short of an injury caused "in the course of" advertising goods or services, since there was no public dissemination of any kind. Thus, advertising injury coverage could not be established.

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