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Ninth Circuit Issues Strong Decision Emphasizing Insurer's Obligations Regarding the Duty to Defend Insureds in Slogan Infringement Action

In an important decision favoring policyholders, the Ninth Circuit recently discussed the breadth of an insurer's duty to defend its insured under California law, even where no potentially covered causes of action are alleged in the underlying complaint. The Ninth Circuit just issued this decision in *Hudson Insurance v Colony Insurance*, addressing coverage in trademark (and counterfeit sales) cases. Commercial general liability policies ("CGL") generally have "advertising injury" endorsements that exclude coverage for claims "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights." But these exclusions typically have this exemption: "this exclusion does not apply to infringement, in your advertisement, of copyright, trade dress or slogan." Carriers always try to read this exemption from the exclusion narrowly.

However, in this case the Ninth Circuit disagreed and reasoned:

> "Here, in contrast, the facts alleged in the NFL complaint state that All Authentic sold a "Steel Curtain Limited Edition Steelers Jersey" on its website, which "reads 'Steel Curtain' across the back and bears the numbers of four Pittsburgh Steelers players." As the district court noted, "A fair reading of the [NFL complaint] reveals that 'Steel Curtain' is used to promote fan loyalty to the Steelers (an NFL Member Club) in general, and a subset of Steeler players in particular." The district court concluded that this potentially stated a claim for *slogan infringement* because a "slogan" is a "brief attention-getting phrase used in advertising or promotion."

In addition, because the complaint "potentially" stated a cause of action for infringement, the insurance carrier still had a duty to defend. The Ninth Circuit gave easily rejected Colony's argument that the attorneys for NFL Properties consciously chose not to include a slogan infringement claim and therefore no duty to defend existed. The Ninth Circuit concluded that there was no basis under California law for such an argument.

Ultimately, this opinion offers an additional avenue for asserting coverage under a CGL policy and emphasizes an insurer's broad duty to defend their insureds.

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