

EDITORS:

- Meryl R. Lieberman
mlieberman@traublieberman.com
- Copernicus T. Gaza
cgaza@traublieberman.com
- Brian Margolies
bmargolies@traublieberman.com

Individual Highlights:

- No Coverage for Blast Fax Lawsuit 1
- Florida Court Addresses Notice to Underwriter 1
- Illinois Court Addresses Coverage for Trade Dress Infringement 3
- Florida Court Holds Pollution Exclusion Not Applicable to Chinese Drywall Claim 5

First Circuit Holds No Coverage For Blast Fax Lawsuit

By Copernicus T. Gaza

In *Cynosure, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2011 U.S. App. LEXIS 9713 (1st Cir. May 12, 2011), the United States Court of Appeals for the First Circuit, with Retired United States Supreme Court Justice David Souter sitting by special designation, addressed coverage for a “blast fax” claim under a general liability policy.

St. Paul’s insured, Cynosure, had been named as a defendant in an underlying suit based on its conduct in sending unsolicited advertising

facsimiles to plaintiffs, allegedly in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227(b)(1)(C). Cynosure sought coverage for the suit under Coverage B of its general liability policy, specifically for the offense of “making known to any person or organization covered material that violates a person’s right of privacy.” St. Paul denied coverage on the basis that the offense is limited to matters “where an insured makes

Continued p. 2

Florida Court Holds Notice in Renewal Application Not Notice of Claim

By Brian Margolies

In its recent opinion in *Cuthill & Eddy, LLC v. Continental Casualty Co.*, 2011 U.S. Dist. LEXIS 51717 (M.D. Fla. May 16, 2011), the United States District Court for the Middle District of Florida had occasion to consider whether an insured’s notice to broker satisfied a reporting provision in a professional liability policy. Relying on the policy’s plain language, the court held that such notice did not comply with the policy’s plain and unambiguous reporting provisions.

Cuthill concerned coverage under two consecutive claims made and reported professional liability policies issued to

an accounting firm, Cuthill & Eddy (“C&H”). Toward the end of the first policy year, C&H received a letter from counsel for one of its clients. Counsel advised that it had reason to believe that C&H had committed several acts or omissions rising to the level of professional malpractice. The letter formally requested information concerning C&H’s professional liability policy and specifically advised that C&H should place its carrier on notice of a potential claim. C&H claimed that it immediately sent a copy of this letter to its insurance broker. At no time,

Continued p. 4

Blast Fax Coverage (cont.)



known to others covered material that violates some other person's right of privacy.” An unsolicited facsimile, argued St. Paul, does not violate a claimant’s right of privacy in this sense, but rather intrudes on the claimant’s right to be left alone, i.e., to be free of commercial intrusion.

The matter was on appeal from a finding by the United States District Court for the District of Massachusetts in favor of Cynosure. The district court’s ruling was based primarily on a decision by the Massachusetts Supreme Judicial Court (Massachusetts’ highest court) in *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565 (2007), another blast fax case in which the court held that an insured was entitled to coverage for an alleged violation of the Telephone Consumer Protection Act. The policy language in *Terra Nova*, however, pertained to whether the insured had committed the offense of “publication of material that violates a person's right of privacy.” The *Terra Nova* court held that the phrase “right of privacy” as used in the policy language before it was ambiguous, and therefore should be construed in favor of the insured.

Justice Souter concluded that the holding in *Terra Nova* was not determinative of the language before the court, explaining that finding ambiguity in the phrase “publication of material that violates a person's right of privacy” does not necessarily mean that the phrase “making known to any person or organization covered material that violates a person's right of privacy” also is ambiguous. On the contrary, explained Justice Souter, the *Terra Nova* court was careful to state that its decision should be construed as meaning that the phrase “right of privacy” is ambiguous in all contexts, but rather only in the context of the policy language before it. Justice Souter further reasoned that the *Terra Nova* court’s holding was distinguishable since the court

had not considered language similar to that used in the Cynosure policy. Thus, explained Justice Souter, “[w]e therefore think that the *Terra Nova* court did not mean that the ‘making known’ policies here would be treated as similar to ‘publication’ policies, with the consequence that Massachusetts law is a clean slate on our issue”

Justice Souter continued his analysis by contrasting the phrase in the Cynosure policy with that in the *Terra Nova* decision. The key distinction, he explained, was not the difference between the words “making known” and “publication.” Rather, he found determinative the language in the Cynosure policy requiring that the information be distributed to another “person or organization.” This language, he concluded, meant that the offense necessarily requires that the non-recipient’s private information be disclosed to another person or organization. He further explained “that the injury turns on the content of the material communicated to a third party,” i.e., that the information being disclosed must be of a confidential nature in order for one’s right of privacy to have been violated.

To read the policy language any other way, explained Justice Souter, would be incorrect grammatically. In support of this, he pointed out that under Cynosure’s interpretation of the policy language, “the modifying phrase ‘that violates a person's right of privacy’ would refer to ‘making known,’ not to ‘material.’ But to do that, the modifier would have to jump back over the words ‘to any person or organization covered material,’ and that would be not only a broad jump, but an unlikely one at all, since the phrase ‘that violates . . .’ has an obvious antecedent in its contiguous neighbor, ‘covered material.’” Such a reading, he explained, was too awkward and unusual, and as such, “unlikely to be reasonable.”

Continued p. 6

Illinois Court Addresses Coverage for Trade Dress Infringement Claim

by Meryl R. Lieberman

In its recent decision *Priceless Clothing Co. v. Travelers Casualty Ins. Co. of America*, 2011 U.S. Dist. LEXIS 53833 (N.D.Ill. May 19, 2011), the United States District Court for the Northern District of Illinois had occasion to consider the scope of advertising injury coverage afforded under a general liability policy. In particular, the court addressed whether “infringement of title” encompasses the offense of “infringement of trade dress.”

Travelers’ policy originally contained a standard form definition of advertising injury that included, among other things, injury arising out of the infringement of another’s trade dress. By endorsement, however, the policy’s definition of advertising injury was deleted in its entirety and replaced with a narrower definition limiting advertising injury coverage to the offenses of infringement of copyright, title or slogan. Travelers’ insured, Peerless, was sued for alleged trade dress infringement and unfair

competition. The suit contained no allegations of infringement of any name or related trademark. Peerless nevertheless argued that trade dress infringement was encompassed within the offense of “infringement of title” and as such triggered coverage under the policy.

The court disagreed, holding that infringement of title and infringement of trade dress were two entirely different offenses. “Title,” explained the court, refers to properties such as “names and related trademarks,” and as such, infringement of title typically is synonymous with trademark infringement. “Trade dress,” on the other hand, refers to “the total image of a product,” encompassing characteristics such as “size, shape, color or color combinations, texture, graphics, or even particular sales techniques.” The court therefore concluded that “trade dress is different from ‘names and related trademarks,’ and thus does not fall within the policy’s coverage for infringement of title.”



“trade dress is different from ‘names and related trademarks,’ and thus does not fall within the policy’s coverage ...”

Notice of Claim (cont.)



however, did C&H give notice of the letter directly to its insurer, Continental, while the first policy was in effect, nor did it report the letter to Continental in connection with the subsequent policy renewal. C&H was later sued by its client during the period of the renewal policy, and C&H gave first notice of the matter to Continental shortly thereafter.

Continental denied coverage under both policies, and in the ensuing coverage litigation, C&H argued that it was entitled to coverage under the renewal policy. In support of this assertion, C&H claimed that the initial letter it received during the first policy period was notice of a potential claim only, and that the claim was not first made until suit was filed, which was while the second policy was in effect. The court, however, readily dismissed this argument on the basis of a provision in the renewal policy's insuring agreement stating that coverage was available for a claim only to the extent that prior to the policy's inception date, the insured had no basis to believe that any act or omission might reasonably be expected to be the basis of a claim. The court concluded that prior to the inception date of the renewal policy, C&H clearly believed that it would be the subject of a malpractice claim, as evidenced by several pieces of correspondence to which C&H was a party.

Notice to underwriter does not satisfy policy requirement of giving notice to claim department.

C&H argued in the alternative that coverage was available under the earlier policy based on a provision contained therein stating that if the insured gave notice of potential claim during the policy period, "then any claim that is subsequently made against you and reported to us shall be deemed to have been made at the time such written notice." C&H argued that by providing its insurance broker with a copy of the initial letter, while the first policy was still in effect, it complied with the policy's notice

of potential claim provision. In support of its contention, C&H cited to an endorsement to the policy governing "PREMIUM OR CLAIM DISPUTES," which stated that "Should you have a dispute concerning your premium or about a claim, you should contact your agent." C&H argued that this endorsement expressly allowed it to give notice of claim to its broker, and superseded any policy language to the contrary.

The court rejected each of C&H's arguments. In doing so, the court avoided addressing the issue of whether the insured's broker could constitute an agent of Continental's for notice purposes. Rather, the court relied exclusively on the language of the policy to reach its holding. First, the court cited to specific policy language stating that notice of any claim, or potential claim, should be reported to Continental's professional liability claims director at a specific Chicago, Illinois address. This provision, explained the court, dispelled any notion that notice of potential claim could be directed anywhere other than to Continental directly. This conclusion, the court explained, was underscored by a provision in the policy stating that "[n]otice to any of our agents or knowledge possessed by any such agent or any other person shall not act as a waiver or change in any part of this policy." The court explained that even if C&H's broker did qualify as Continental's agent, this latter provision "required [C&H] to notify [Continental] and not an agent of [Continental] to report a claim or potential claim under the policy."

The court further rejected C&H's argument that the policy's "PREMIUM OR CLAIM DISPUTES" endorsement

Continued p. 6

Florida Court Holds Pollution Exclusion Not Applicable To Chinese Drywall Claim

By Brian Margolies

Florida courts historically have given broad application to the pollution exclusion, refusing to draw a distinction between traditional and non-traditional environmental pollution. *Deni Assocs. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135 (Fla. 1998). The recent decision by the United States District Court for the Middle District of Florida in *Auto-Owners Ins. Co. v. Am. Bldg. Materials*, 2011 U.S. Dist. LEXIS 52837 (M.D.Fla. May 17, 2011), held that an absolute pollution exclusion did not bar coverage for an underlying Chinese drywall claim not on the basis of whether the drywall-related gases were a “pollutant,” but rather on the basis of the insured’s operations.

The insured, American Building Materials (“ABM”) was sued for having provided a developer with Chinese-manufactured drywall that subsequently was installed in several homes throughout Florida. ABM sought coverage for this suit under a commercial general liability policy issued by Auto-Owners. Auto-Owners agreed to provide ABM with a defense under a reservation of rights, but commenced a declaratory judgment action, arguing, among other things, that its policy’s absolute pollution exclusion precluded coverage for the underlying suit. The exclusion barred coverage for:

f.(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

The court held that this exclusion did not apply where the sole allegation against ABM was

that it supplied the defective drywall. Citing to *Scottsdale Insurance Company v. American Safety Indemnity Co.*, No. 1:10-cv-0445-WS-N, at *10-12 (S.D. Ala. Nov. 10, 2010), another matter considering the application of an absolute pollution under identical circumstances, the court concluded that the phrase “performing operations” is unequivocally stated in the “present tense,” requiring that the pollution event happen while the insured is performing operations, not after. As a supplier of the drywall, the court explained, the insured’s operations were complete upon delivery of the drywall and the pollution event necessarily happened thereafter. Thus held the court, the exclusion was not applicable to the claim against ABM.

The *Auto-Owners* decision is the second major Chinese drywall-related decision issued by a Florida federal court this year. In *General Fidelity Ins. Co. v. Foster*, No. 09-80743 (S.D.Fla. March 24, 2011), the United States District Court for the Southern District of Florida held that the total pollution exclusion applied to a Chinese drywall claim brought against a contractor. In *General Fidelity*, the issue before the court was whether the emissions from the defective drywall constituted a “pollutant” in the first instance. The *Auto-Owners* court, by contrast, addressed a different aspect of the pollution exclusion specific to the absolute pollution exclusion, namely, whether the pollution event resulted from the insured’s operations. Thus, while *Auto-Owners* is not inconsistent with *General Fidelity* and the established body of Florida case law holding that pollution exclusions are not limited to traditional environmental pollution, the *Auto-Owners* decision nevertheless shows that the nature of the insured’s work may influence coverage, at least for the purpose of an absolute pollution exclusion.



**TRAUB LIEBERMAN
STRAUS &
SHREWSBERRY LLP**

7 SKYLINE DRIVE
HAWTHORNE, NY
(914) 347-2600

100 METROPLEX DRIVE
SUITE 203
EDISON, NJ
(732) 985-1000

303 WEST MADISON
SUITE 1200
CHICAGO, IL
(312) 332-3900

FIRST CENTRAL TOWER
360 CENTRAL AVE, 10th FL
ST. PETERSBURG, FL 33701
(727) 898-8100, FL

Website at:

www.traublieberman.com

Notice to Broker (cont.)

allowed C&H to give notice of claim to its broker. The court determined that this provision “only gives the insured instruction regarding the manner in which to resolve disputes about claims.” By contrast, explained the court, “the policy plainly required [C&H] to notify [Continental] directly.” In so concluding, the court pointed out that

the endorsement contained no language otherwise altering or superseding the plain terms of the policy’s notice of potential claim provision.

Blast Fax Coverage (cont.)

Thus, the *Cynosure* court held that based on the language before it, a claim involving unsolicited facsimiles do not qualify for coverage absent some disclosure of private information. *Cynosure* adds to the growing body of case law across the country pertaining to coverage for blast fax cases. *See, e.g., Penzer v. Transp. Ins. Co.*, 605 F.3d 1112 (11th Cir. 2010); *St. Paul*

Fire & Marine Ins. Co. v. Brother Int'l Corp., 319 Fed. Appx. 121 (3d Cir. 2009). The court’s decision underscores the importance of focusing on a policy’s specific definition of personal and advertising injury to determine when looking to case law precedent on this issue.

About Traub Lieberman Straus & Shrewsberry LLP

Traub Lieberman Straus & Shrewsberry LLP has a national practice dedicated to insurance-related issues on all varieties of policies, including general liability, professional liability, pollution liability, directors and officers, employment practices and reinsurance.

This bulletin is intended for information purposes only and does not reflect the opinions of any author or this firm. This bulletin should not be relied on as legal advice.