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INSURANCE LAW BLOG

January 16, 2025

Second Circuit Holds That Passing Reference in Underlying Complaint to Code Section is Insufficient to Trigger Duty to Defend

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In the recent case of Tzumi Elecs. *LLC v. Burlington Ins. Co.*, No. 24-342-cv, 2024 U.S. App. LEXIS 32052 (2d Cir. Dec. 18, 2024), the Federal Second Circuit Court of Appeals had occasion to examine a carrier's duty to defend under Coverage B of a Commercial General Liability policy. The underlying case against the insured Tzumi was a class action alleging that Tzumi misrepresented the charging capacity of certain power bank devices that it sold.

The underlying case passively referenced California Civil Code 1770(a)(8), which allows consumers to seek damages for disparagement of the goods, services or business of another by false or misleading representation of fact. The Burlington policy's Coverage B provided coverage for 'personal and advertising injury," defined to include disparagement of Tzumi's competitors. Thus, the insurer that Coverage B was triggered for purposes of the duty to defend.

However, the court found that a mere passing citation, as part of a longer list of general citations, was not enough to support a duty to defend based on disparagement. The court found it notable that the complaint did not contain any factual allegations to support a disparagement claim, in that the misrepresentations that were pled did not reflect on competitor products.

Further, the insured argued that because the settlement agreement contained whereas clauses stating that Tzumi interpreted the complaint to allege disparagement, the duty to defend was triggered. The court disregarded these clauses for purposes of a duty to defend, finding that the whereas clauses were merely the way Tzumi interprets the allegations, and shed no light on the substance of the underlying complaint.

This case illustrates the limited nature of Coverage B "personal and advertising" coverage, which consists of specific enumerated defenses. It also illustrates that a court will look to the substance of the allegations, and not simply passing references or certain "buzzwords" simply to find coverage.

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