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Second Circuit Holds Punctuation Cannot Create Ambiguity in CGL Policy Exclusion

BY:

In *Spandex House, Inc. v. Hartford Fire Ins. Co., et al.,* No. 19-2784, 2020 WL 3263340 (2d Cir. June 17, 2020), a fabric wholesaler (Rex Fabrics) sued Spandex House for copyright infringement, alleging that Spandex House "created, sold, manufactured, caused to be manufactured, imported and/or distributed" fabrics and garments identical Rex Fabrics's designs. It was further alleged, in amended pleadings, that Spandex House infringed Rex Fabric's copyrights through its "marketing" and "advertising," in addition to its manufacturing, distribution, and sales activities. Spandex House sought coverage for the suit under its CGL policy issued by Hartford, which denied coverage based upon the policy's Intellectual Property ("IP") Exclusion. Spandex House challenged the disclaimer based upon the Advertising Exception to the exclusion, which restored coverage if the only allegation in the claim or "suit" involving any intellectual property right is limited to:

1. Infringement, in your "advertisement" or on "your web site", of:
   (a) Copyright;
   (b) Slogan; or
   (c) Title of any literary or artistic work; or
2. Copying, in your "advertisement" or on "your web site", a person's or organization's "advertising idea" or style of "advertisement".

Spandex House argued that the placement of commas around the phrase "in your 'advertisement' or on 'your website' " rendered that phrase a non-restrictive clause, thereby generating several reasonable interpretations of the policy language. Thus, Spandex House argued that the phrase could be omitted from the text of the Advertising Exception entirely, or read as a mere illustration, i.e., a type of infringement that results in coverage. The Second Circuit was not persuaded by these arguments and found in favor of the insurer.

The court found that the plain language of the Advertising Exception, read in context, unambiguously applied where the sole allegation pertaining to intellectual property rights in the underlying suit was limited to enumerated kinds of infringement or copying that are causally linked to the insured's advertising or web site. In this regard, the court observed that the phrase "in your advertisement" "frequently appears in insurance policies like the one at issue here, and has long been recognized as requiring a causal connection between the alleged injury and the insured's advertisement." (citations omitted). The court expressly rejected Spandex House's assertion that the foregoing language was rendered ambiguous because the phrase was set off by commas, noting that under New York law "[p]unctuation in a contract may serve as a guide to resolve an ambiguity that has not been created by punctuation or the absence therein, but it cannot, by itself, create ambiguity." (Citations omitted).

Avoiding the obvious pun, the court found Spandex House's alternative interpretations of the Advertising Exception were not compelling, noting that the district court properly concluded that Hartford was under no duty to defend because the IP Exclusion and Advertising Exception "explicitly condition coverage on the particular contents and structure of the third-party complaint (namely, that it must contain either no IP-related allegations or *solely* the narrow subset of IP-related allegations set forth in the Advertising Exception)." The complaint was replete with infringement allegations unrelated to advertising, which precluded the possibility of coverage and, therefore, Hartford did not have a duty to defend.