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Lanham Act False Advertising Claims Not Precluded by "False Advertising" or "Trademark Infringement" Exclusions

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In *Nat'l Union Fire Ins. Co. v. Expedia, Inc*., 2020 WL 5893326 (W.D. Wash. Oct. 5, 2020), the District Court for the Western District of Washington addressed whether certain "false advertising" and "trademark infringement" exclusions barred coverage for a federal false advertising claim brought under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). In 2016, a class action lawsuit was filed in the U.S. District Court for the Northern District of California against Expedia by four hotel operators. Plaintiffs accused Expedia of a bait-and-switch marketing scheme whereby it advertised deals at hotels with which it had no contractual relationship and, when a customer attempted to make a reservation at one of those hotels, Expedia gave the impression that there were no rooms available on the requested dates and directed consumers to its contracting partners. Expedia tendered the defense of the lawsuit to National Union, which agreed to defend under a full reservation of rights.

National Union provided Special Risk Insurance to Expedia including "Special Professional Liability" and "Media Content" coverage. While the underlying complaint asserted five causes of action, the sole remaining claim at issue in the declaratory action was one for false advertising in violation of the Lanham Act. National Union argued that claims or losses arising from allegations of false advertising or trademark infringement were excluded from the applicable coverage provisions. In particular, the Media Content coverage barred coverage for any claim "alleging, arising out of, based upon or attributable to (1) false advertising or misrepresentation in advertising of an Insured's products or services."

The parties disagreed regarding the meaning of the phrase "of an Insured's products or services" in this context. National Union argued that anything and everything Expedia says in its advertising is in furtherance of its own business interests and is therefore uncovered "advertising of [its] products or services." Expedia, on the other hand, argued that the exclusion applies only to misrepresentations about its own products or services, not those services or products of another.

The District Court agreed with Expedia in holding that the exclusion did not apply in all instances of false advertising as National Union claimed, only in those instances regarding advertisement of *Expedia's own products and services*. According to the District Court, National Union's interpretation was problematic in several ways. First, National Union's position gave no meaning to, or ignored, the phrase "of an Insured's products or services," which focuses the exclusion on the insured's products or services, not those of another. Relatedly, the court reasoned that National Union ignored the allegations of the underlying complaint. In support of their Lanham Act claims, for example, the hotel operators specifically alleged that Expedia misrepresented "the nature, characteristics, or qualities of *[the hotel operators']* services or commercial activities." Thus, the false advertising allegations pertained to hotels that were not a part of Expedia's services. As such, the District Court found the exclusion did not apply and coverage was not be excluded.

National Union also relied on a “trademark exclusion,” which precluded coverage for claims “alleging, arising out of, based upon or attributable to…(3) any infringement of trademark or trade dress by any goods, products or services, including any goods or products displayed or contained in any” form of media content. According to the District Court, the hotel operators’ Lanham Act claim could succeed without having to show that they have a protectable trademark or that Expedia infringed on their intellectual property rights. None of the elements of the sole remaining claim required proof of an intellectual property right or its infringement. Instead, the court reasoned that displaying a phone number, making false statements about a competitor’s services, or utilizing search engine links did not turn on the existence and infringement of a trademark. Plaintiffs specifically accused Expedia of falsely representing information regarding unaffiliated hotels on its websites, and therefore, did not arise out of the hotel operators’ intellectual property. For these reasons, the District Court held that the “trademark exclusion” also did not apply. Having found that National Union had a duty to defend under the Media Content coverage, the Court did not determine whether National Union also had a duty to defend under the professional liability coverage part.In *Nat’l Union Fire Ins. Co. v. Expedia, Inc*., 2020 WL 5893326 (W.D. Wash. Oct. 5, 2020), the District Court for the Western District of Washington addressed whether certain “false advertising” and “trademark infringement” exclusions barred coverage for a federal false advertising claim brought under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). In 2016, a class action lawsuit was filed in the U.S. District Court for the Northern District of California against Expedia by four hotel operators. Plaintiffs accused Expedia of a bait-and-switch marketing scheme whereby it advertised deals at hotels with which it had no contractual relationship and, when a customer attempted to make a reservation at one of those hotels, Expedia gave the impression that there were no rooms available on the requested dates and directed consumers to its contracting partners. Expedia tendered the defense of the lawsuit to National Union, which agreed to defend under a full reservation of rights.