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NEWS & EVENTS

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TLSS Partner Eric D. Suben Obtains Summary Judgment for Insurer in Advertising Injury Dispute

Related Attorneys:

The underlying claim was a commercial dispute in which a dental management company ("DMC") sued the insured dental practice in two lawsuits based on breach of the acquisition agreement and management services agreement between them. In those agreements, the DMC licensed certain trademarks and domain names to the dental practice. In the first lawsuit, filed in New Jersey, the DMC alleged infringement. In the second lawsuit, filed in New York, the DMC alleged violation of the contractual non-disparagement clause in the acquisition agreement.

The insurer acknowledged a duty to defend the New Jersey lawsuit subject to allocation between covered and non-covered claims pursuant to *SL Industries v. American Motorists Ins. Co.*, 128 N.J. 188 (1992), reserving its rights to deny coverage under exclusions applicable to intellectual property ("IP") infringement and breach of contract. The insurer denied coverage for the New York lawsuit, because although defamation was an enumerated "personal and advertising injury" offense in the policy, the sole defamation allegation was a breach of the contractual non-disparagement clause.

In the subsequent coverage litigation, the insurer and the dental practice cross-moved for summary judgment. On behalf of the insurer, TLSS argued that there was no coverage for the New Jersey lawsuit because the claim information it received did not include trade dress, slogan, or anything else within the exception to the IP exclusion. Moreover, as alleged in the underlying pleadings, any infringement was necessarily a breach of contract and excluded as such. TLSS further argued that coverage was excluded for the New York lawsuit because, as pled, any defamation constituted a breach of contract.

The Special Master, in his report and recommendation, found that while exceptions to the IP exclusion could potentially apply on appropriate facts, the sole allegations in the New Jersey lawsuit were infringement of trademarks and domain names, which were specifically excluded. In any event, the breach of contract exclusion applied, based on the existence of a contractual license of IP rights to the insured dental practice. He further concluded that the breach of contract exclusion applied to bar coverage for the New York lawsuit. The Superior Court judge adopted the Special Master's report and recommendation in full, granting TLSS's motion for summary judgment.

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