

THE INSURANCE COVERAGE/IP COUNSELOR

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The Insurance Coverage/IP Counselor is a quarterly newsletter which addresses the interests of intellectual property practitioners, corporate counsel, chief financial officers, risk managers, insurance brokers and business owners who seek insurance coverage for a full range of intellectual property and business tort claims.

We hope you find *The Insurance Coverage/IP Counselor* informative and useful. If you have a topic you would like to see addressed in future issues, please feel free to call me with your suggestions.

Sincerely,

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*Gauntlett & Associates
Specializes in policyholder insurance
coverage and litigation re patent,
trademark, copyright, trade secret,
business, labor, environmental, and
antitrust disputes*



GAUNTLETT & ASSOCIATES OBTAINS NEW PRO- POLICYHOLDER OPINION WITH RAMIFICATIONS IN THE PROFESSIONAL LIABILITY INSURANCE FIELD

Gauntlett & Associates represented Smith Kandal Real Estate in an insurance coverage dispute in regard to its professional liability. On October 21, 1998, in an opinion written by Judge McDonald, a unanimous court reversed the judgment of the trial court in favor of Continental Insurance. Directions were given to enter judgment on behalf of Smith Kandal Real Estate because neither of the exclusions relied upon by Continental in denying a duty to defend a professional malpractice claim brought against Smith Kandal applied to preclude all potential coverage. Continental, which had issued Errors and Omissions professional liability policies to Smith Kandal Real Estate, denied a defense relying upon both a standard exclusion in its policy, Exclusion O, which is a so-called "property owned" exclusion, and an exclusion added by endorsement to the policy, which provided that the policy did not cover a "claim . . . arising out

In This Issue

Page 1:

Gauntlett & Associates Obtains
New Pro-Policyholder Opinion
With Ramifications in the
Professional Liability Insurance
Field

Pages 2, 3:

Legal News You Can Use

Page 3,4:

Upcoming Speeches and
Publications on Insurance
Coverage and Intellectual
Property

THE INSURANCE COVERAGE/IP COUNSELOR

of activities . . . on behalf of Ventana Ranch.”

The court held that Exclusion O did not apply to the claim brought by the Morgans against Smith Kandal, even though Kevin Smith, one of Smith Kandal’s partners, owned a 25% interest in Ventana Ranch, the entity which sold the property to the Morgans. Based on the definition of “insured,” the court held that Smith Kandal’s interpretation, that Exclusion O only applied if Kevin Smith’s ownership interest in Ventana Ranch was within the scope of his duties for Smith Kandal, was a reasonable one.

The court went on to hold that: “There is no suggestion Smith’s ownership of an interest in Ventana Ranch was an act within the scope of his duties to Smith Kandal. Because Exclusion O is reasonably susceptible to this interpretation, we must resolve the ambiguity against the insurer and in favor of Smith Kandal’s right to a defense even though other equally reasonable constructions of the exclusion are possible.”

The court also found that the “property owned” exclusion was ambiguous even if Exclusion O applied to Kevin Smith, because the exclusion only referred to a single insured. Therefore, the exclusion could be interpreted to be inapplicable to the other insureds, Smith Kandal and the real estate agent who was also named in the claim.

In regard to the Ventana Ranch Exclusion the court determined that the correct analysis was whether the Morgans’ claim arose out of activities on behalf of Ventana Ranch, i.e., whether a causal connection existed between the negligence constituting the claim and the activities conducted on behalf of the seller Ventana Ranch. Because the claim brought against Smith Kandal sought potential liability based on its activities in representing the Morgans and not Ventana Ranch, the exclusion did not eliminate the potential for coverage. Therefore, a duty to defend existed.

According to Stanley H. Shure, Smith Kandal’s counsel, “The court’s ruling helps clarify certain issues in regard to professional liability insurance policies, especially those covering real estate professionals and lawyers.” Most real estate and lawyer professional liability policies contain exclusions similar to Exclusion O. “The court’s ruling that Exclusion O was ambiguous,” Mr. Shure stated, “is likely to benefit many insureds who are denied coverage based on this or similar exclusions.”

Judge McDonald’s opinion will also help other courts in interpreting professional liability policies containing exclusions which exclude coverage for “claims” arising out of various types of conduct. Under the court’s ruling, one must look at the specific allegations of misconduct which make up the claim to

determine whether, in fact, the claim is causally connected to the excluded conduct. “Many insurers, such as was the case here,” according to Mr. Shure, “interpret similar exclusions very broadly so that they deny coverage for claims even when the excluded conduct is only remotely related to the insured’s alleged wrongful acts.”

Smith Kandal Real Estate was represented by Stanley H. Shure of Gauntlett & Associates, Irvine, California. Mr. Shure’s areas of specialization include officers and directors liability insurance as well as professional liability insurance. Mr. Shure is the author of the Amicus Curiae brief Gauntlett & Associates has filed on behalf of policyholders in the pending California Supreme Court case of Vandenburg v. Superior Court. In Vandenburg the California Supreme Court will address the very important issue of whether comprehensive general liability insurance coverage can be based upon the breach of contractual obligation.

LEGAL NEWS YOU CAN USE

Elan Pharmaceutical Research Corp. v. Employers Insurance of Wausau,
144 F.3d 1372 (11th Cir. 1998)

The court held that the allegations of patent infringement through the commercialization of clinical studies fell within coverage for the “advertising injury” offense of

“infringement of ... patent” in the policies. The court found that distributions of clinical studies to promote commercial interests in a new drug was “advertising activity” within the meaning of the policy, which required “widespread distribution of material.” Further, the dissemination of this information to doctors, hospitals, and other health professionals as alleged in the complaint was held to “adequately set out a sufficiently causal connection between advertising activity and the advertising injury of patent infringement.” The court also found that Wausau was only liable for the costs of defending the lawsuit after the date of tender.

Foundation for Blood Research v. St. Paul Marine & Fire Insurance Co., 730 A.2d 175 (Me. 1999)

The Maine Supreme Court found a duty to defend on the following certified issue:

“Does a duty to defend exist under the legal ‘comparison test’ in the context of the ‘advertising injury’ or ‘personal injury’ provisions of the General Liability Policy issued by St. Paul for an underlying third party complaint, which asserts claims of inducing patent infringement when the complaint is devoid of any concrete factual allegations describing the circumstances of the alleged injury?” Reciting the definitions of personal and advertising injury offenses which included “written or

spoken material that belittles the products, work or completed work of others,” the court noted:

“From these definitions, it would seem that any acts of FBR, from either its business activities or its advertising activities, which belittled a product of another, and which then led a third party to infringe the patent would be covered.”

Everett Associates, Inc. v. Transcontinental Insurance Co., No. C-97-4308 SC, 1999 U.S. Dist. LEXIS 9691 (N.D. Cal. May 26, 1999)

Judge Conti found that claims for “offer for sale” patent infringement, viable after January 1, 1996, potentially fell within the standard form 1986 ISO CGL policy’s “advertising injury” coverage for the offenses of “misappropriation of advertising ideas or style of doing business” as well as “infringement of . . . title.” The court found that an appropriate nexus arose between claims for “offer for sale” patent infringement and the insured’s advertising, as damages for “corrective advertising” sought in the underlying action were based solely on Everett’s advertisements. The court found that the first publication exclusion asserted by the insurer did not preclude either a defense or indemnity since distinct advertisements created liability following the inception of the policy. It also rejected a public policy attack on the allegations of

willful infringement, finding that, even though no opinion of counsel had been sought prior to the willful infringement judgment, the scienter to establish willfulness for patent claims was distinct from that for assertion of the public policy exclusion under Insurance Code §533

UPCOMING SPEECHES AND PUBLICATIONS ON INSURANCE COVERAGE AND INTELLECTUAL PROPERTY

David Gauntlett will speak at the following forums:

- ABA, Tort and Insurance Practice Section at their annual meeting in Atlanta, Georgia on August 5 - 11, 1999.
- All Ohio Annual Institute on Intellectual Property Law seminar on September 30, 1999 (Cleveland, OH) and October 1, 1999 (Cincinnati, OH).
- Glasser Legal Works Presentation on October 13, 1999 (San Francisco, CA)

David Gauntlett is the author of numerous works including “Exposing the Duplicity of Insurer Analysis of ‘Advertising Injury’ Offenses” published in Mealey’s Emerging Insurance Disputes, Vol. 3, Iss. 18 (9/17/88) at p. 21, and Mealey’s Litigation Report:

THE INSURANCE COVERAGE/IP COUNSELOR

Intellectual Property, Vol. 7, Iss. 1 (10/5/98) at p. 28.

Aspen Law & Business Panel Publishers is publishing Mr. Gauntlett's new book, *Insurance Coverage for Intellectual Property Assets*, which will be released soon.

Mr. Gauntlett has recently completed two projects for publisher Matthew Bender:

The first is an update for his existing Chapter 29 entitled "Insurance Coverage for Intellectual Property Lawsuits," found in Matthew Bender's *Intellectual Property Counseling and Litigation* volumes.

His second project is a new chapter on Y2K to be included in the next release of *Intellectual Property Counseling and Litigation*. Mr. Gauntlett's chapter discusses "Insurance Coverage for Y2K Risks Utilizing New As Well As Old Policy Provisions."

Mr. Gauntlett is currently working on a booklet for CCH, Inc., entitled *Managing Risk: Intellectual Property, Antitrust, Business Litigation*.

Mr. Gauntlett is Editor of the ABA Tort and Insurance Practice Section Intellectual Property Committee Newsletter.

We invite you to visit our web site at www.gauntlettlaw.com

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