GAUNTLETT & ASSOCIATES

ATTORNEYS AT LAW

18400 Von Karman Ave., Suite 300 • Irvine, California 92612 • (949) 553-1010 • fax (949) 553-2050
www.gauntlettlaw.com – info@gauntlettlaw.com

THE POLICYHOLDER ADVOCATE/IP COUNSELOR

NEWSLETTER

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JUDGE POSNER AND THE INTERNET
A Tale Of Two Cases Analyzing Coverage for Claims Asserted in Antitrust Lawsuits Under Indiana Law

In two published insurance coverage decisions, Judge Posner, writing for unanimous panels, applying Indiana law, relied upon extrinsic evidence not provided by any party and concluded that the applicable "personal and advertising injury" offense asserted could not be satisfied based on selective reference to facts that were not legally relevant to the issues posed.

Careful analysis of the coverage issues in light of the extrinsic evidence properly before the court, under applicable Indiana law, clarifies why potential coverage arose that the court's Internet-based analysis avoided. While the internet may be a legitimate resource when used, much like a dictionary to elucidate the commonly understood meaning of language, it should not be a vehicle to introduce extrinsic evidence never addressed by either party to support an opinion, especially once that is published and precedential, at least within the federal courts.

A proper use of the internet is illustrated by *Fire Ins. Exch. v. Oltmanns*, 285 P.3d 802 (2012). The appellate court in reversing the trial court found that the policy exclusion for use of a "jet ski" based on Wikipedia showed that use of the term "jet ski" was imprecise and thus ambiguous as a matter of law, as it was the name of a personal watercraft manufactured and trademarked by Kawasai and did extend to sit down as opposed to stand-up personal watercraft. *Id*. at 806.

Neither decision should, therefore, be viewed as accurately predicting how the Indiana Supreme Court would address the coverage issues analyzed by the Seventh Circuit.

ALSO IN THIS ISSUE

The Two Indiana Coverage Cases Sought Potential Coverage For Claims Beyond The Antitrust Allegations Asserted

Rose Acre Farms, Inc. v. Columbia Cas. Co., 662 F.3d 765 (7th Cir. (Ind.) 2011)

At issue was the scope and applicability of offense (f) – "use of another's advertising idea in your 'advertisement'" to claims that Rose Acre had made allegedly misleading statements regarding the reasons that pricing of its more generously caged egg producer chickens had increased. The class action suit alleged that the purported explanations for higher egg pricing due to animal husbandry techniques that called for greater space, rather than higher prices due to a price fixing conspiracy urged by the class action claimants.

Judge Posner, writing for a unanimous panel, including Judges Cudahy & Wood, attached an 11/1/11 website advertisement from Rose Acre Farms for cage-free eggs, which noted, "free-roaming cage-free eggs, so fresh, the hens don't miss them." In so ruling, the court relied on evidence not presented by either party, gleaned from the court's own perusal of the internet as it confessed in its order, which was legally irrelevant to the issues posed for **five** distinct reasons:

First, the class representatives had not sued Rose Acre for statements regarding eggs produced by cage-free chicken, but rather those in more aptly accommodated cages, thus the first premise of the court's analysis was wrong.

Second, the court disregarded Indiana's requirement that the interpretation of insurance "policy terms [be] 'from the perspective of an ordinary policyholder as average intelligence[,]'" *Bradshaw v. Chandler*, 916 N.E.2d 163, 166 (Ind. 2009), concluding that offense (f) must be understood to flow within the singular category of wrongdoing for "misappropriation" despite the fact that that term was only used in the predecessor Insurance Service Offices (ISO) offense that (f) replaced with broader language accompanying "used," which "does not have the same technical, defined meaning in the law as 'misappropriation[.]'" *Ohio Cas. Ins. Co. v. Albers Med., Inc.*, No. 03-1037-CV-W-ODS, 2005 WL 2319820, at *4 (W.D. Mo. Sept. 22, 2005).

Third, the content of the 9/26/11 Rose Acre website is not identical to the content of the relevant web pages as they existed in early 2000 when the United Egg Producers ("UEP") "advertising" at issue was posted within CNA's policy period – the contents CNA evaluated when denying a defense. This reference misperceives a critical issue of *when* Rose Acre became a member of UEP.

When UEP launched the "animal husbandry" campaign, targeted by the claimants, Rose Acre was not a member of the UEP. Nor, critically, was Rose Acre a member of the UEP when it launched the advertisements on its website provided to CNA, which triggered false advertising assertions based on Rose Acre's press releases, claiming higher costs of "green" egg production to humanely foster happy chickens leading to higher retail egg prices.

Fourth, in ruling that "use" must mean "misappropriation" (i.e., "use" without permission), the Panel presumed that at all times alleged Rose Acre was a member of the UEP. Under that presumption, any potential coverage was barred because vis-à-vis Rose Acre, could not be "another." The facts as pled and made known to CNA established a portion of the time Rose Acre was advertising its compliance with UEP guidelines (during CNA's policy period), but Rose Acre was not a member of the UEP. Nor does the Panel's Opinion address, much less distinguish, three seminal opinions finding false advertising coverage in analogous circumstances under offense (f).

- *Ohio Cas. Ins. Co. v. Cloud Nine, LLC*, 464 F. Supp. 2d 1161, 1167-68 (D. Utah 2006) ("Edizone has alleged 'use' of those advertising ideas in the Cloud Nine Defendants' advertisements. . . . Edizone alleges a claim under the Utah Truth in Advertising Act, which specifically requires allegations of deceptive trade practices occurring in advertising. . . . Clearly, the crux of a cause of action for violation of the Utah Truth in Advertising Act is advertising.");
- *General Cas Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 580 (Minn. 2009) (Travel company's use of term "Hobbit" to describe its travel agency capitalized on good will surrounding author Tolkien's works in its moniker "Hobbit Travel" so that alleged false advertising using that phrase fell within policy.);
- *Ohio Cas. Ins. Co. v. Albers Medical, Inc.*, No. 03-1037-CV-W-ODS, 2005 WL 2319820, at *4 (W.D. Mo. Sept. 22, 2005) (Pharmaceutical company's use of term "Lipitor" to describe its cholesterol-reducing drug alleged to unfairly compete with the legitimate producer of same, Pfizer, triggered coverage for false advertising.).

Fifth, the Panel's "what if the advertising idea was created by Rose Acre's advertising agency" hypothetical is specious, as the agency would be Rose Acre's agent and thus indistinguishable from Rose Acre. But the facts are otherwise. So Rose Acre's use of the accused "advertising idea" without the UEP's permission for a period of time meets the Panel's test as articulated.

The Panel grudgingly acknowledges as much that there is at least a "faint implication" in the underlying fact allegations that Rose Acre's eggs are more expensive "than they would be if [Rose Acre] did not give more weight to its chickens' mobility and social opportunities than to the cost of their eggs." *Carolina Cas. Ins. Co. v. Estate of Studer*, 555 F. Supp. 2d 972, 978 (S.D. Ind. 2008) (If the complaint alleges facts bringing the claim "within the potential indemnity coverage of the policy," the insurer must defend.). But the Panel fails to acknowledge that this "faint implication" suffices to trigger potential coverage under Indiana law.

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Co. LLC, 735 F.3d 539 (7th Cir. (Ind.) 2013)

Analyzing offense (f) "oral or written publication, in any manner, material that . . . disparages a person's or organization's goods, products or services," the court concluded that no disparagement coverage was implicated. False advertising claims emphasized that consumers were induced to buy Enfamil in preference

to cheaper brands of infant formula by false representations that the competitor's products lacked two key factors that promoted brain and eye development. Mothers who chose formula other than Enfamil would presumably lead their babies to suffer relative deprivation in healthy brain growth.

The panel's explanation focused on why disparagement could not arise from the extrinsic evidence culled from the internet does not withstand scrutiny for **ten** distinct reasons:

First, the court characterized the conduct as singular in character by identifying only one possible basis for indemnity from the alleged facts. Without clarification as to why it chose to do so, asserting that "this is a claim of consumer fraud rather than a product disparagement." *Nat'l Union Fire Ins. Co.*, 735 F.3d at 547.

Second, in so finding, the court overlooks a plethora of thoughtful coverage decisions have found false advertising claims may implicate coverage for disparagement.

- *Safety Dynamics, Inc. v. Gen. Star Ind. Co.*, 475 F. App'x 213, 214 (9th Cir. (Az.) 2012) ("Disparagement is '[a] derogatory comparison of one thing with another,' or '[a] false and injurious statement that discredits or detracts from the reputation of another's ... product.' Black's Law Dictionary 538 (9th ed.2009). **The complaint alleges that Safety Dynamics's false claims about its own product had the result of misleading consumers because it made Safety Dynamics's product look better versus ShotSpotter's**. This is sufficient to state a covered claim for product disparagement, at least in the context of the duty to defend. . . . Rather, [product disparagement] is a competitive injury. This exception [in the failure to conform exclusion] 'is directed to the failure of goods, not the failure of advertising.' 4 Jeffrey E. Thomas, New Appleman on Insurance Law Library Edition § 30.08[2][a] (2009)." (emphasis added)).

Third, the court adopts reasoning traceable to *BASF AG v. Great Am. Assur. Co.*, 522 F.3d 813, 822 (7th Cir. (Ill.) 2008). That opinion expressed concern that there was no direct injury flowing to the class action claimants from the defendant's alleged false advertising statements that showed the class action claimants were disparaged. This is of no moment, as the statutory scheme at issue included specific provisions of the pertinent Deceptive Practices Act claims allegedly violated that make disparaging conduct directly actionable by a class action claimant, in effect, permitting recovery for indirect disparagement.

A Petition for Rehearing in *BASF* raised the same point to no avail. It revealed that, as was true here, a count in the class action complaint was based on the Illinois Deceptive Trade Practices Act, 85 ILCS 510/2 which is related to, but separate from, the Consumer Fraud Act discussed in the Panel's Opinion. The Deceptive Trade Practices Act *does* "expand a common-law disparagement plaintiff's avenues for legal relief" and explicitly permits consumers to recover for the "disparagement injury of a third party." Put differently, the DPTA expands both (a) the type of claimants who can assert disparagement-related claims, *and* (b) damages that they can recover.

While this point was raised before the district court and in appellate briefing, no argument on this point was directly raised before the panel at oral argument. This, despite the thoughtful inquiring of Judge Hamilton at oral argument who suggested his willingness to find potential coverage for indirect liability should there be a basis to show a proper causal link to same.

Fourth, the court mischaracterized Mead Johnson's arguments claiming that it asserted only that "any tortious injury that can be *traced to* product disparagement, rather than covering just *claims*," the product disparagement suffices. *Nat'l Union*, 735 F.3d at 547. Not so. Its primary argument was as noted that indirect liability was permitted by the very statutory scheme purportedly violated and that such a linkage had been held sufficient by the court in *Del Monte Fresh Produce N.A., Inc. v. Transportation Ins. Co.*, No. Civ.A. 06 C 1658, 2006 WL 2331144 (N.D. Ill. Aug. 8, 2006), *aff'd,* 500 F.3d 640 (7th Cir. 2007) in a ruling not disturbed on appeal where the decision parted company with the district court by affirming the denial of coverage on narrower grounds premised on the knowledge of falsity exclusion's applicability.

Following the denial of review, that court decision was subsequently held to not be in accord with Illinois law by an Illinois district court, citing intervening Illinois appellate authority.

- *Axiom Ins. Managers, LLC v. Capitol Spec. Ins. Corp.*, 876 F. Supp. 2d 1005, 1013 (N.D. Ill. (E.D.) 2012) ("Subsequent to *Del Monte,* the Illinois Appellate Court, *Am. Hardware,* 325 Ill.Dec. 483, 898 N.E.2d at 240, stated: "[s]gnificantly, alleged deliberate misconduct does not always bring a claim within an intentional conduct exclusion," and then quoted from *Cincinnati,* 260 F.3d at 746. ['Proof of deliberateness would merely be icing on the cake.']).

Fifth, paraphrasing language whose careful articulation would cause problems for Judge Posner's

analysis, he opines, "[t]he policy says that the damages must arise out of the 'offense,' in this case the offense of product disparagement." *Nat'l Union*, 735 F.3d at 547. Not so. The policy requires that there be "damages because of" "personal and advertising injury" which defined term means "injury arising out of" an enumerated offense here, disparagement offense (d).

Damages thus need only be a remedy for a claim for relief that asserts liability where injury arises out of one of the enumerated offenses. That injury need not be articulated in a lawsuit where the claimant is directly injured by the statements made. Indirect injury is equally a plausible basis for meeting the "injury arising out of" language.

Sixth, this is especially the case when the breadth of the terms "arising out of" as interpreted by the Indiana Supreme Court, is taken into consideration. *See*, *Bagley v. Monticello Ins. Co.,* 430 Mass. 454, 720 N.E.2d 813, 816 (1999), cited by the Court. Neither decision cited by this opinion supports the view that "arising out of" has the narrower construction he urges. Indeed, "arising out of" simply means "connected with." As a perusal of the cases the Panel cites *Indiana Lumbermens Mutual Ins. Co. v. Statesman Ins. Co.*, 260 Ind. 32, 291 N.E.2d 897, 898–99 (1973) and *Westfield Ins. Co. v. Herbert*, 110 F.3d 24, 26–27 (7th Cir.1997) (Indiana law) confirms it at 548.

Seventh, the false dichotomy between covered product disparagement and non-covered fraud, eschews close attention to the policy language and prior construction of its provisions, grasping on buzz words that are divorced from the consideration of the pertinent issues, which the court's opinion needed to address. It leaves little useful precedent for subsequent cases that must struggle with these issues and cannot anticipate how the Indiana Supreme Court will address these issues consistent with its own prior precedent.

Eighth, Judge Posner's emotional distress hypothetical is divorced from any consideration of the pertinent policy language that such a claim must address. Emotional distress claims could only be covered if that implicated "bodily injury" coverage, which would typically require a physical manifestation of injury or the risk of injury. *See*, *Medmarc Cas. Ins. Co. v. Avent Am., Inc.*, 612 F.3d 607, 615-16 (7th Cir. 2010); Lara Langeneckert, LESSONS FROM *AVENT*: JUDICIAL ESTOPPEL AND DUTY TO DEFEND IN NO-INJURY PRODUCT LIABILITY LITIGATION, Ind. Law Review, 27 (2011). It would also require an "occurrence" precluding intentional acts such as knowing false advertising sufficient to evidence fraud. This fact pattern would therefore fall outside of coverage.

The advertising idea used would be that of *Mead Johnson*, not that of any competitor since it uniquely would have adopted the strategy of emphasizing *vis-à-vis*, its visual-acuity ad, the benefits of its formula, vis-à-vis competitors. That particular advertising idea was not the focus of the asserted liability but rather its impact on negative consumer attitudes towards store brand competitors of Enfamil's formula.

Ninth, the emotional distress claim would not be related to a harm to reputation by a competitor that caused indirect injury to the claimant in any direct or visceral sense. Rather to the extent that a purchase decision was made because of the perception that the competitor's product was inferior than that lost sale to the competitor improperly caused by purported false advertising would be an injury arising out of "disparagement" of another's product. Damages would arise under the statutory scheme asserted in one of the provisions which the panel neither analyzes nor distinguishes.

Tenth, paraphrasing inaccurately coverage provisions, substituting extrinsic evidence gleaned from the internet that neither party had occasion to address, and ignoring the actual claims for relief asserted that could implicate coverage, the court's opinion is not entitled to deference in other pending cases that may address similar issues.

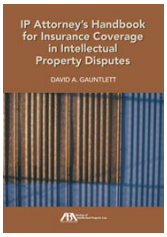
Conclusion

The Internet is a slippery slope. Gleaning facts that are purportedly undisputed from its pages, even if they can purport to offer authentic and evidentiary competent information, itself a problematic issue, addressing challenging fact issues may represent from the court's perspective, "an inconvenient truth."

Before relying on such extrinsic evidence, which the parties have had no opportunity to address, courts should offer the party the opportunity to brief proposed proprietary of the "internet" evidence adduced as support the court's substantive analysis. Especially as the instant coverage cases purported to apply a *de novo* review standard limited to those facts presented before the district court.

PUBLICATIONS BY DAVID A. GAUNTLETT

David A. Gauntlett is the author of ***Insurance Coverage of Intellectual Property Assets, Second Edition*** (April 25, 2013), published by Aspen Publishers. The book and supplements are available for $321.00 plus tax where applicable; shipping and handling are free when full payment is enclosed with the order. To order, call Aspen Publishers at **1-800-638-8437**, or visit their website at www.aspenpublishers.com.



David is also the author of ***IP Attorney's Handbook for Insurance Coverage in Intellectual Property Disputes*** published by the American Bar Association. (**$110.95**–ABA Member; **$103.95**–Section of Intellectual Property Law) To order, visit the American Bar Association Online Store at www.ababooks.org. [***Second Edition*** coming soon]

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For more information, contact:

Denise J. Remick
Director of Business Development
(949) 553-1010 x 208
djr@gauntlettlaw.com

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