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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SCOTTSDALE INSURANCE COMPANY, Plaintiff and Appellant, v. MV TRANSPORTATION, INC., et al., Defendants and Respondents.	B150991 (Los Angeles County Super. Ct. No. BC231352)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory C. O'Brien, Jr., Judge. Affirmed.

Selman · Breitman, Neil H. Selman, Jan L. Pocaterra, Lynette Klawon for Plaintiff and Appellant.

Heller Ehrman White & McAuliffe, Richard DeNatale, Peter F. McAweeney Deanna M. Wilcox; John Andrew Biard for Defendants and Respondents.

This appeal concerns an insurance coverage dispute and the meaning of the phrase "advertising injury," as used in the commercial general liability (CGL) policies issued by appellant Scottsdale Insurance Company (Scottsdale) to respondent MV Transportation, Inc. (MV). In our prior opinion (filed May 6, 2002), we interpreted "advertising injury" as not limited to injury only from widespread promotional activities directed to the public at large. Rather, we concluded that advertising injury, as defined in the CGL policies, included MV's one-on-one business solicitations that used a common style and promotional information disseminated to more than one customer. We thus held that MV's complaint potentially sought damages covered by the policies, even though MV's promotional solicitations were in the nature of tailored bid proposals sent to customers in targeted markets.

Thereafter, our Supreme Court granted review and on November 19, 2003, transferred the matter back to this court "for reconsideration in light of *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16 [*Hameid*]." We conclude now, contrary to our prior opinion, that MV should not have tendered to Scottsdale its defense in the underlying action filed by MV's competitor, Laidlaw Transit Services, Inc. (Laidlaw), alleging MV misappropriated information constituting advertising ideas and a style of doing business, including Laidlaw's bidding formula and customer lists.

Nonetheless, Scottsdale elected to defend MV, with a largely favorable outcome for MV and no indemnity exposure for Scottsdale. Electing to defend MV and not to exercise its exit option, under prevailing case law Scottsdale cannot terminate its defense duty retroactively and claim reimbursement of defense fees. Accordingly, after Scottsdale filed its declaratory relief action in the present case seeking a declaration that it owed no defense obligations and seeking reimbursement of its defense fees, the trial court properly denied summary judgment and ruled in favor of MV and its employees (who are also respondents).

FACTUAL AND PROCEDURAL SUMMARY

The underlying lawsuit by Laidlaw

In January of 2000, Laidlaw filed an action against MV and several of MV's employees who had previously worked for Laidlaw, including MV's new President and Chief Operating Officer (Jon Monson). Laidlaw's complaint against MV and several of its employees alleged causes of action for breach of fiduciary duty, tortious inducement to breach the duty of loyalty and fiduciary duty, intentional interference with contractual relations and with prospective business advantage, misappropriation of trade secrets, and unlawful, unfair and fraudulent business practices.

In essence, Laidlaw's suit alleged certain contractual breaches, unlawful business practices, and misappropriation of trade secrets by using confidential, proprietary information to compete unfairly in bidding for and obtaining new busing contracts in urban public transportation services markets. The complaint specified two markets in particular, Lawrence, Kansas and Indianapolis, Indiana, and noted other unspecified cities as well. The confidential, proprietary information included bidding models, bidding formulas, and other nonpublic information used in developing Laidlaw's bids, such as Laidlaw's overhead costs and financial objectives allocated to each project. As alleged in the complaint, MV used such information, as well as Laidlaw's customer list and other trade secrets, to "significantly impede Laidlaw's ability to market itself as a unique provider" of its services.

Soon after Laidlaw filed its complaint, MV's legal counsel tendered the defense to its insurer, Scottsdale. Scottsdale asserted that although one Ninth Circuit case had "concluded that certain trade secret misappropriation claims fall within the scope of the advertising injury liability coverage of a general liability policy," the underlying facts in that case (*Sentex Systems, Inc. v. Hartford Acc. & Indem. Co.*(C.D. Cal. 1995) 882 F.Supp. 930, affd. (9th Cir. 1996) 93 F.3d 578 (*Sentex*)) are distinguishable, and Scottsdale's defense obligations were not triggered by the *Laidlaw* suit. Nonetheless, Scottsdale agreed to provide a defense to MV with a reservation of rights. Specifically, Scottsdale agreed to provide a defense to MV and the individuals named in the *Laidlaw*

suit under a reservation of certain rights, including the right to seek a declaration of its rights and duties under the policy and "[t]he right to seek reimbursement of defense fees paid toward defending causes of action which raise no potential for coverage, as authorized by the California Supreme Court in *Buss v. Superior Court (Transamerica Ins. Co.)* (1997) 16 Cal.4th 35 [*Buss*]."

In December of 2000, Laidlaw and MV agreed to settle the suit by Laidlaw. Pursuant to the settlement agreement, MV and the individual defendants agreed to return to Laidlaw documents containing allegedly misappropriated bid models, bid formulas and other trade secrets, and to refrain from using such material in developing MV's bids or proposals to customers in the public transportation market. However, the settlement agreement did not require that MV pay any money to Laidlaw. Attorney fees and costs incurred in defending the *Laidlaw* suit were approximately $340,000.

The coverage dispute between Scottsdale and MV

Scottsdale issued two CGL insurance policies to MV, one effective from December 1, 1998, to December 1, 1999 (hereinafter, the first CGL policy), and the other from December 1, 1999, to December 1, 2000 (hereinafter, the second CGL policy). The first CGL policy contained an agreement by which Scottsdale agreed to defend MV against any suit and to pay any damages due to "'advertising injury' caused by an offense committed in the course of advertising [MV's] goods, products or services." The policy defined the term "advertising injury" as including the "[m]isappropriation of advertising ideas or style of doing business."

The second CGL policy also obligated Scottsdale to pay MV's damages and costs of suit for any advertising injury. The policy language, however, was somewhat different from that in the first CGL policy. Specifically, the second CGL policy defined advertising injury as, in pertinent part, "[t]he use of another's advertising idea in [the insured's] 'advertisement.'" And the policy defined "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about [the insured's] goods, products or services for the purpose of attracting customers or supporters."

During the course of the underlying *Laidlaw* litigation, in June of 2000, Scottsdale filed the present declaratory relief action against MV and other defendants named in the *Laidlaw* action. After settlement in the underlying action, Scottsdale moved for summary judgment seeking a determination that it owed no legal defense obligations, and seeking reimbursement of the full amount paid for defense costs and fees and a declaration that it owed no further costs and fees. The trial court denied Scottsdale's motion for summary judgment and ruled that it had a duty to defend. The court observed that Laidlaw "alleged a broader audience than simply" the two cities noted in the complaint where MV sought business (i.e., Lawrence, Kansas and Indianapolis, Indiana), and concluded that "[b]roadly construed, the . . . [c]omplaint alleged misappropriation of Laidlaw's 'advertising ideas,' for which there is at the very least the potential of coverage, and therefore Scottsdale's duty to defend is established as a matter of law."

DISCUSSION

Standard Of Review

We review the record and determine this appeal in accordance with the customary rules of appellate review following a summary judgment ruling. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843-857.) The general rule is, of course, that summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).)

"'The trial court must decide if a triable issue of fact exists. If none does, and the sole remaining issue is one of law, it is the duty of the trial court to determine the issue of law.' [Citation.] [¶] On appeal, this court must conduct de novo review to determine whether there are any triable factual issues. [Citation.] Likewise, because the 'interpretation of an insurance policy is a question of law, [we must] make an independent determination of the meaning of the language used in the contract under consideration.' [Citation.]" (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481; see also *Milazo v. Gulf Ins. Co.* (1990) 224 Cal.App.3d 1528, 1534.)

The Broad Duty To Defend

A CGL insurance policy, as here, typically obligates the insurer to defend its insured, or to pay its insured's defense costs, in a lawsuit or claim that is potentially covered. The duty to defend is "broad," and "California courts have been consistently solicitous of insureds' expectations" regarding a defense. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295, 296 (*Montrose*).) "Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor." (*Id.* at pp. 299-300.)

An insurer thus must defend a lawsuit which *potentially* seeks damages covered under the policy, even if coverage is in doubt and ultimately does not develop. (*Id.* at p. 295.) The defense "obligation can be excused only when the third party complaint '"*can by no conceivable theory raise a single issue which could bring it within the policy coverage*."'" (*Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group* (1996) 50 Cal.App.4th 548, 556, quoting *Montrose, supra*, 6 Cal.4th at p. 300.)

The general rule is that "[t]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy." (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081; see also *Montrose, supra*, 6 Cal.4th at p. 295.)

In considering whether the allegations give rise to a duty to defend, "it is not the form or title of a cause of action that determines the carrier's duty to defend, but the potential liability suggested by the facts alleged or otherwise available to the insurer." (*CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal.App.3d 598, 609.) Because current pleading rules liberally allow amendment, the insurer must defend if there is any possibility that the complaint could still be amended to state a covered claim. (*Id.* at pp. 610-612; see also *Montrose, supra*, 6 Cal.4th at p. 296.)

Once triggered, the duty to defend continues "until the underlying lawsuit is concluded [citation], or until it has been shown that there is *no* potential for coverage."

(*Montrose, supra*, 6 Cal.4th at p. 295.) And an insurer seeking to terminate its duty to defend must "establish *the absence of any such potential*" with facts that "eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage." (*Id.* at p. 300.)

"If the parties dispute whether the insured's alleged misconduct is potentially within the policy coverage, and if the evidence submitted does not permit the court to eliminate either party's view, then factual issues exist precluding summary judgment in the insurer's favor." (*American Cyanamid Co. v. American Home Assurance Co.* (1994) 30 Cal.App.4th 969, 975.) If the insurer cannot prevail on summary judgment, "'the duty to defend is then *established*, absent additional evidence bearing on the issue.'" (*Ibid*., citing *Horace Mann Ins. Co. v. Barbara B., supra*, 4 Cal.4th at p. 1085; see also *Montrose, supra*, 6 Cal.4th at p. 301.)

If and when an insurer establishes that no claim can possibly be covered, then its duty to defend is "extinguished only prospectively and not retroactively: Before, the insurer had a duty to defend; after, it does not have a duty to defend further." (*Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 58.)

Accordingly, in determining whether the insurer has a duty to defend, we compare the allegations of the complaint with the terms of the policy (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 276) and interpret the meaning of the policy's critical term "advertising" in light of the discussion in *Hameid*, *supra*, 31 Cal.4th 16.

The Allegations In The Complaint And The Terms Of The Policy In Light Of The* Hameid *Case

The present case involves two insurance policies. The first CGL policy contained language identical to that in the *Hameid* case. As properly urged by Scottsdale, the *Laidlaw* complaint alleged no activities covered by the policy. The underlying complaint focused on MV's use of Laidlaw's proprietary information to underbid Laidlaw in busing contracts and to compete unfairly, and the CGL policy covered advertising injuries that were not at issue in the complaint.

As explained by our Supreme Court in *Hameid*, "the term 'advertising injury' as used in the CGL policy requires widespread promotion to the public such that one-on-one solicitation of a few customers does not give rise to the insurer's duty to defend the underlying lawsuit." (*Hameid, supra,* 31 Cal.4th at p. 19.) The court interpreted "the term 'advertising' as used in CGL policies to mean widespread promotional activities usually directed to the public at large." (*Id*. at p. 24.) The court specifically "exclud[ed] personal solicitations from the definition of 'advertising' in the CGL insurance policy." (*Id*. at p. 29.) It is thus apparent that under *Hameid*, the activity at issue here of soliciting customers in two large cities and unspecified other cities through a one-on-one competitive bidding procedure with a product specifically designed for each customer is not within the scope of that policy.

The second CGL policy was worded somewhat differently. It defined "advertising injury" as including the "use of another's advertising idea in [the insured's] 'advertisement,'" with the term "advertisement" defined, in pertinent part, as "a notice that is . . . broadcast or published to . . . specific market segments about [the insured's] . . . services for the purpose of attracting customers." Although the second policy's use of the term "advertisement" includes use of another's ideas by disseminating information in "specific market segments" with the intention "of attracting customers," the dissemination of information must be, according to the terms of the policy, by way of a broadcast or publication. In the present case, the dissemination was narrowly targeted and not by way of bids that were "broadcast or published."

We acknowledge the complaint also alleged that MV used confidential, proprietary information, including "customer lists," to "significantly impede Laidlaw's ability to market itself as a unique provider" of its services. To the extent this implied more than a single, isolated incident and signaled MV's broad move into the market for Laidlaw's services, even beyond the two cities specified in the complaint, MV's seriatim bid solicitations and promotional material nonetheless did not constitute the requisite broadcast or publication, within the meaning of the term "advertisement."

Accordingly, the language in the above two policies was not broad enough to encompass MV's focused and sequential contacts to its several customers.

Reimbursement Of Defense Costs

Finally, our reconsideration of the matter in light of *Hameid, supra,* 31 Cal.4th 16, highlights a significant difference regarding the procedural posture of the present case. Unlike the insurer in *Hameid,* which refused to defend its insured at all (*id*. at p. 20), Scottsdale agreed to defend MV in the underlying action under a reservation of rights and then later sought a ruling that it had no defense obligation and was entitled to reimbursement of all past defense costs. Scottsdale thus, in effect, seeks to terminate retroactively its defense duty and obtain reimbursement of all defense costs.

The applicable rules in such a situation are well established. An insurer's "duty to defend is broader than the duty to indemnify." (*Montrose , supra,* 6 Cal.4th at p. 295.) An insurer who agrees to defend but has doubts about whether it owes a defense obligation may seek to terminate its defense obligation by showing that there is no potential for coverage. (*Ibid.*) If and when an insurer establishes that no claim can possibly be covered, then its duty to defend is "extinguished only prospectively and not retroactively." (*Aerojet-General Corp. v. Transport Indemnity Co., supra,* 17 Cal.4th at p. 58.)

Therefore, even though Scottsdale can now, with the benefit of the Supreme Court's opinion in *Hameid*, establish the absence of any potential for coverage, it is not entitled to reimbursement of defense costs. It is not entitled to reimbursement because the duty to defend continues "until the underlying lawsuit is concluded [citation], or until it has been shown that there is *no* potential for coverage." (*Montrose, supra,* 6 Cal.4th at p. 295.)

Moreover, Scottsdale waited until after the underlying *Laidlaw* action was concluded in MV's favor before it attempted by motion for summary judgment to extinguish its defense obligation. Scottsdale could have opted for a risky strategy and declined at the outset to defend its insured, as did the insurer in *Hameid*, who then had to defend a bad faith action by the insured. (*Hameid, supra,* 31 Cal.4th at p. 20.) Or,

Scottsdale could have moved to terminate its defense obligation while the *Laidlaw* action was pending by attempting to show that there was "*no* potential for coverage." (*Montrose, supra,* 6 Cal.4th at p. 295.) Indeed, Scottsdale had reserved "the right to withdraw from the funding of the defense of the Insureds, or any of them, should no potential for coverage remain." However, Scottsdale failed to bring a motion seeking to show there was no potential for coverage until after the *Laidlaw* action was concluded. Having so waited, it cannot terminate its defense duty "retroactively." (*Aerojet-General Corp. v. Transport Indemnity Co., supra*, 17 Cal.4th at p. 58.)

Scottsdale's reliance on *Buss, supra,* 16 Cal.4th 35, to support a contrary conclusion is misplaced. Scottsdale's reservation of rights included a statement reserving its right to "seek reimbursement of defense fees paid toward defending causes of action which raise no potential for coverage, as authorized by the California Supreme Court in *Buss* . . . ." However, the reimbursement right recognized in *Buss* is an equitable right that arises only in the context of a "'mixed' action"; i.e., an action which includes both potentially covered and noncovered claims. (*Id.* at p. 48.)

Under *Buss,* an insurer who defends a mixed action has a right, implied in law, to seek partial reimbursement of only those defense costs which the insurer proves can be allocated solely to claims that are not even potentially covered. (*Id.* at pp. 51, 53.) But "[a]s to the claims that are at least potentially covered, the insurer may not seek reimbursement for defense costs." (*Id.* at p. 49.) In essence, the right to seek reimbursement under *Buss* compensates for the fact that an insurer defending a mixed action does not have the exit option available under *Montrose,* in that it cannot seek to terminate its defense duty while the underlying action is pending.[1]

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[1] Scottsdale previously argued to this court that it delayed bringing its motion to terminate its defense obligation, thereby choosing not to pursue its exit option, in deference to MV's complaints of prejudice. This characterization of events, however, is mere argument unsupported by the record. In any event, the situation was still not one covered under *Buss*.

After the underlying *Laidlaw* action was over, Scottsdale did not bring a motion under *Buss* to allocate defense costs between potentially covered and noncovered claims. Rather, Scottsdale sought to recover all the costs of MV's defense, based on the notion that no part of the *Laidlaw* action was ever even potentially covered. Therefore, by definition, Scottsdale's claim does not fall within the ambit of *Buss*, and its reimbursement claim must be denied.

Conclusion

The pertinent allegations in the complaint did not potentially seek damages within the coverage of the CGL policies issued by Scottsdale. The trial court erred in its reasoning in ruling on Scottsdale's motion for summary judgment on its complaint seeking a declaratory judgment to the extent it found MV's complaint potentially sought damages covered by the two CGL policies. Nonetheless, it properly denied summary judgment, as Scottsdale was not entitled to reimbursement of defense costs.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

NOTT, J. ASHMANN-GERST, J.