PLUNKETT COONEY

Coverage B, Occurrence Coverage Update

June 15, 2023

Coverage B – Sixth Circuit (Michigan Law)

L&K Coffee LLC v. LM Ins. Corp.
No. 22-1727, 2023 WL 3756145 (6th Cir. June 1, 2023)

The U.S. Court of Appeals for the Sixth Circuit upheld summary judgment in favor of three insurers of a Michigan-based coffee manufacturer, finding that there was no coverage under Coverage B of the insurers' respective policies for an underlying action alleging that the coffee manufacturer had improperly advertised its coffee products as being "Kona" coffee.

L&K Coffee LLC d/b/a Magnum Roastery (L&K) manufactured and distributed coffee products, including a "Kona blend" coffee, throughout the United States at supermarkets, big-box stores and other outlets. A group of coffee bean farmers in Kona, Hawaii sued L&K and other coffee manufacturers, as well as their distribution partners, alleging that the defendants violated the Lanham Act's prohibition of false designation of origin of products, and that defendants' use over many years of the word "Kona" in their products was misleading because the defendants' products were merely "commodity coffee" instead of the much rarer and more expensive products sold by the plaintiff Kona coffee farmers, whose products constituted 100% Kona beans. In the underlying lawsuit, the Kona coffee farmers sought damages, as well as injunctive relief, to prevent the defendants from using the word "Kona" or otherwise mislead customers into believing their products were the same as the Kona coffee farmers' products.

L&K sought a defense from Liberty Mutual under a general liability policy issued by that entity, and from two other insurers who issued general liability policies to L&K for earlier policy periods, claiming that the allegations in the underlying lawsuit triggered coverage under Coverage B of the respective policies for personal and advertising injury. Specifically, L&K argued that the underlying lawsuit alleged covered publications that "disparage[] a person's or organization's goods, products or services," or that "[infringes] upon another's ... slogan in your advertisement." Liberty Mutual, as well as the other insurers, denied coverage under their respective policies, stating that the allegations in the underlying lawsuit did not meet the definition of personal and advertising injury and were otherwise excluded. Coverage litigation ensued.

The U.S. District Court for the Western District of Michigan granted the insurers' motion for summary judgment and denied L&K's cross-motion for summary judgment. The trial court found that there was no genuine issue of material fact that the allegations in the underlying complaint did not constitute

either disparagement or slogan infringement and, thus, that the insurers did not have a duty to defend L&K in the underlying action.

On appeal, the appellate court affirmed the decision of the trial court and agreed that the insurers did not have a duty to defend L&K. The appellate court found that the underlying complaint never used the term disparagement, and that the allegations in the complaint cited by L&K as triggering a duty to defend did not constitute disparagement under Michigan law and thus under the policies. L&K argued that because the underlying plaintiffs claimed L&K's inferior coffee would cause the plaintiffs to lose sales of their coffee products, this was sufficient to show there were claims of disparagement. Instead, the appellate court found this connection to be too remote, citing previous law in the circuit that there is no duty to defend claims alleging the insured "'made false statements about its own products while not also making any comparison to another's products.'"

The appellate court further held that discovery responses by the underlying plaintiffs that "answered 'yes' when asked whether they contended L&K Coffee 'disparaged' their products" but then went on to merely parrot the allegations in the underlying complaint also did not trigger a duty to defend.

The appellate court similarly held that the underlying complaint did not allege slogan infringement. The word "Kona" was allegedly used as a source identifier, not as a distinct catchword. Nor did the complaint allege that the underlying plaintiffs asserted ownership over the term "Kona" to support an allegation slogan infringement.

Finally, the appellate court rejected L&K's argument that a settlement demand letter from the underlying plaintiffs triggered the insurers' duty to defend, holding that L&K did not cite a case where a post-complaint settlement demand constituted a basis for the insurer to defend an underlying lawsuit. Such a letter was "merely one attorney's attempt to broadly construe his claims in order to gain settlement leverage." In holding that such a letter could not trigger the duty to defend, the appellate court found that L&K "would force us to look not merely behind the allegations in the complaint, but way beyond to settlement tactics—an arena that is rife with puffery."

Plunkett Cooney represented Liberty Mutual in the above litigation.

Occurrence – Third Circuit (Pennsylvania Law)

American Home Assurance Co. v. Superior Well Servs., Inc.
No. 22-1498, 2023 WL 3732541 (3rd Cir. May 31, 2023)

The U.S. Court of Appeals for the Third Circuit reversed the federal district court's decision granting summary judgment in favor of Superior Well Services, Inc. (Superior Well) and against American Home Assurance Company (American Home) in a case in which Superior Well sought insurance coverage

arising out of a lawsuit filed against it by U.S. Energy Development Corporation (U.S. Energy). The appellate court concluded that American Home's policy did not indemnify Superior Well for property damage caused by its own faulty workmanship.

In 2005, U.S. Energy contracted with Superior Well for hydraulic fracking services to extract natural gas from wells owned by U.S. Energy. In 2007, U.S. Energy notified Superior Well that the operations had damaged some of the wells during the fracking process. Superior Well notified American Home about the potential claim, and the insurer agreed to defend in a letter reserving its right to contest insurance coverage. In September 2010, U.S. Energy filed a lawsuit against Superior Well alleging that it had damaged 97 of U.S. Energy's wells. The lawsuit resulted in a jury verdict that totaled, after interest, more than $13 million. The jury determined that Superior Well failed to perform its contract with U.S. Energy in a workmanlike manner, which resulted in damage to 53 of the 97 wells.

In July 2016, American Home filed a declaratory judgment action against Superior Well and alleged that the commercial general liability policy (policy) issued to Superior Well did not indemnify it for any damages that might be awarded to U.S. Energy and which were caused by a breach of contract. The policy also included an "underground resources and equipment coverage" (UREC) endorsement that provided additional coverage against risks associated with well-servicing operations. American Home argued that the property damage caused by a failure to perform in a workmanlike manner is not an occurrence under the policy and that the UREC endorsement did not displace the policy's occurrence requirement. Furthermore, American Home argued that at most the claim involved a single occurrence under Pennsylvania law as opposed to 53 separate occurrences.

The appellate court concluded that the damage to the wells was not caused by an occurrence under the policy. The appellate court held that the jury determined that the damage was caused by Superior Well's faulty workmanship, which did not constitute an occurrence when the policy defined occurrence as an "accident." Lastly, the appellate court held that the USEC endorsement did not eliminate the policy's occurrence requirement.

By: Joshua LaBar