Advertising Liability: Broad Policy Wordings Means Duty to Defend Likely

Blue Mountain Sales Ltd. v Lloyd's Underwriters

Blue Mountain Log Sales Ltd. v Lloyd's Underwriters, 2017 BCSC 1872 (*"Blue Mountain"*), is a judgment of Justice Walker of the Supreme Court of British Columbia released on October 20, 2017. Two entities (the "Petitioners") insured by Lloyd's under their comprehensive general liability ("CGL") policies sought a declaration from the Court that Lloyd's was required to defend and indemnify them for defense costs in an action brought in the Superior Court of Washington State. The Petitioners argued that the duty to defend and indemnify was triggered by the advertising liability coverage contained in the CGL policies, one of which included the following policy wording:

> Advertising Liability as used in this endorsement means:
>
> (a) Libel, slander or defamation
>
> (b) Any infringement of copyright or of title or of slogan;
>
> (c) Piracy or unfair competition or idea misappropriation under an implied contract;
>
> (d) Any invasion of right of privacy;
>
> (e) Any of the foregoing alleged by any other name,
>
> Committed or alleged to have been committed during the Policy Period in any advertisement, publicity article, broadcast or telecast by or on behalf of the Insured and arising out of the named Insured's advertising activities.
>
> Occurrence as used in this endorsement means any advertisement, publicity article, broad or telecast or any combination thereof involving the same injurious material or act, regardless of the frequency of repetition thereof or the number of kind of media used...

The underlying action in Washington (the "Washington Action") concerned a claim for unfair competition made by a group of related companies referred to collectively as "GBS." GBS alleged that the Petitioners misappropriated trade secrets, namely involving a secret proprietary product used to treat roofing wood products referred to as "Thermex." The allegations made in the Washington Action were laid out in the pleadings as follows:

- The Petitioners gained proprietary Thermex information from a former owner and officer of GBS;

- The Petitioners utilized this information to develop a new product called "CPX";
- The Petitioners misled government regulators to obtain approval to market and sell CPX;
- The Petitioners marketed and sold CPX, passing it off as their own under a different trade name; and
- The Petitioners marketed CPX to certain trades in the industry and to the public on a website and otherwise, representing through advertising that CPX was identical to Thermex, which caused them damages.

Initially, when the Washington Action was filed, Lloyd's acknowledged a duty to defend. It was not until the Petitioners amended their pleadings by narrowing them to remove some advertising related content in the Washington Action that Lloyd's advised that they no longer held the position that they owed a duty to defend. This prompted the Petitioners to bring an application in the British Columbia Supreme Court for coverage.

Lloyd's argument justifying their change of position was technical in nature. In particular, the revised pleadings in the Washington Action claimed under Washington's *Uniform Trade Secrets Act* ("UTSA") for misappropriation of a trade secret, which included "disclosure or use of a trade secret of another without express or implied consent." Lloyd's employed the use of a foreign law expert at the application, whose opinion it was that 1) advertising was not a constituent element of a misappropriation claim under the UTSA, and 2) that the UTSA pre-empted other claims for unfair competition based in the common law or otherwise. As advertising was not a component of the statutory claim, Lloyd's argued, the facts as pleaded relating to advertising could not ground a claim and therefore could not invoke coverage.

Lloyd's relied heavily on the well-known Supreme Court of Canada case *Lloyd's of London v Scalera,* 2000 SCC 24 ("*Scalera*"). Lloyd's presented the argument that *Scalera* held that, for the purpose of determining whether coverage is possible, and hence whether the duty to defend is engaged, it is the specific elements of the pleaded cause of action that determine the outcome.

Scalera had involved an underlying claim alleging sexual battery by a bus driver upon a passenger, pleaded both in negligence (in relation to seeking consent for the battery) and as an intentional tort (in relation to the battery itself). The relevant insurance provided coverage for negligence, but excluded coverage for intentional acts. The Supreme Court of Canada found that a claim for battery always involved an intent to injure and could not be grounded in negligence, and as such the exclusion applied and the duty to defend was not triggered. The attempt to claim

in negligence was entirely derivative in nature and had no effect on the determination of whether the exclusion applied. Lloyd's argued that the same reasoning applied in regards to advertising and the UTSA claim.

The Court in *Blue Mountain* disagreed with Lloyd's characterization, citing that *Scalera* merely required the "substance" and "true nature" of the claim as pleaded to be considered when determining whether the duty to defend is invoked given the ease in which pleadings can be manipulated for this purpose. The relevant inquiry is to compare the policy wordings and the substance and true nature of the claim.

In making this inquiry, there must only be a mere possibility that a claim falls within the insurance policy. In *Blue Mountain*, the relevant policy wordings covered a broad array of advertising based losses, and the advertising which occurred was central to GBS' alleged damages. Furthermore, employing the "pleadings rule" required a plain reading of the amended Washington Action pleading, and the intentions behind why the Petitioners amended their claim could not be utilized as a basis for determining coverage. Lloyd's was stuck with the wording contained in the amended pleadings, which outlined various advertising activities and connected same with unfair competition and resulting damages.

In the context of an advertising liability case, the *Blue Mountain* case is significant in that it reiterates that the same interpretive principles will apply in determining whether a duty to defend exists regardless of the form of CGL coverage implicated. Policies and pleadings will be interpreted expansively in favour of an insured. Absent an obvious attempt to manipulate pleadings to invoke coverage, the decision in *Scalera* will not readily be applied. However, it is worth noting that many forms of advertising and personal liability coverage are framed in policies with reference to legal causes of action, such as slander or libel. When coverage is defined less broadly and references only a legal cause of action without more, then the argument advanced by Lloyd's in *Blue Mountain* may well have a possibility of success.

Please contact us should you wish to discuss the implications of this decision in more detail.