Fields Howell

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Underwriters Win Appeal on Cyber Claim

On August 15, 2014, in the case *Liberty Corporate Capital, Ltd. v. Security Safe Outlet, Inc.*, the United States Court of Appeals for the Sixth Circuit in Cincinnati, Ohio found no coverage for the theft and use of a competitor's client database. The ruling is significant in two ways. First, it clarified an open question regarding the ongoing efforts of insureds to find personal and advertising injury coverage for cyber risks under commercial general liability policies, and second, the Court rejected the argument that one ambiguity within an exclusion renders the entire provision unenforceable.

In an eleven count complaint, BudsGunShop.com, LLC ("BGS") sued Underwriters' insured, Security Safe Outlet, Inc. ("SSO"), alleging the theft and improper use of BGS's customer database and tradename. BGS and SSO are both in the business of selling firearms. BGS alleged that SSO used the stolen database to solicit business from BGS customers. The United States District Court for the Eastern District of Kentucky granted summary judgment to Underwriters and SSO appealed. On March 12, 2014, the Sixth Circuit held oral argument.

In its unanimous decision, the Sixth Circuit rejected SSO's assertion that use of the database and emailing all of BGS's customers was an "advertising idea" within the meaning of the policy. The Court explained that an advertising idea must "encompass a company's plan, scheme, or design for calling its products or services to the attention of the public," and emailing

customers is not such an idea. SSO's argument was heavily reliant on the Ninth Circuit decision in *Sentex Systems, Inc. v. Hartford Accident & Indemnity Co.*, 93 F.3d 578 (9th Cir. 1996), which had found an "advertising idea" existed in another stolen database case. The Court, however, noted that *Sentex* involved allegations regarding the copying of business methods, such as bidding, billing, and marketing, in distinguishing that decision. Ultimately, the Court adopted Underwriters' argument the existence of a database and the sending of the emails is not an "idea" independent of the advertisement itself.

With regard to the trademark claims, SSO argued that the relevant exclusion was ambiguous because, in part, it directly contradicted the grant of coverage. The policy's grant of coverage included injuries arising out of "[i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement," but excluded coverage for "copyright, patent, trademark..." SSO argued that the inclusion of copyright as both a covered and uncovered cause of action rendered the exclusion ambiguous as a whole, such that the exclusion for trademark infringement should not be enforced. The Sixth Circuit rejected this argument, finding that the potential ambiguity does not affect the remainder of the exclusion, even though the language is contained in the same sentence.

Overall, this decision reverses the modern trend of broadly construing the phrase "advertising idea" and likely will be frequently cited as the debate over cyber coverage in commercial general liability policies continues.

The case is *Liberty Corporate Capital Limited v. Security Safe Outlet, Inc., et al.*, Case No. 13-5539 (6th Cir. August 15, 2014). Underwriters were represented in the case by Paul L. Fields, Jr., Gregory L. Mast, and Caitlin M. Crist. Oral argument was handled by Gregory L. Mast.