IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ACME UNITED CORPORATION,

OPINION AND ORDER

Plaintiff,

05-C-384-C

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant.

- -

In this civil action for declaratory and monetary relief, plaintiff Acme United Corporation contends that defendant St. Paul Fire and Marine Insurance Company breached its duty to defend plaintiff in a previous lawsuit. In 2004, when Fiskars Brands, Inc., sued plaintiff alleging false advertising, defendant refused to defend plaintiff, arguing that it did not have a duty to defend plaintiff under the terms of the insurance policy it had sold to plaintiff. Jurisdiction is present under 28 U.S.C. § 1332.

This case is before the court on cross motions for summary judgment. Summary judgment will be granted in defendant's favor because it is clear from the plain language of the insurance policy that defendant did not have the duty to defend plaintiff in the underlying Fiskars lawsuit.

The facts in this case are straightforward and largely undisputed. Nonetheless, I have disregarded those proposed findings of fact and responses that constituted legal conclusions, were argumentive or irrelevant, were not supported by the cited evidence or were not supported by citations specific enough to alert the court to the source for the proposal. From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Acme United Corporation is incorporated in Connecticut and has its principal place of business in Fairfield, Connecticut. Plaintiff is one of the largest manufacturers of scissors and paper trimming products in the world. Defendant St. Paul Fire and Marine Insurance Company is incorporated in Minnesota and has its principal place of business in St. Paul, Minnesota. Defendant is licensed to write insurance in various states, including Connecticut and Wisconsin.

B. Insurance Policy

Plaintiff purchased commercial general liability insurance from defendant beginning in January 2000 and renewed its policy annually through December 31, 2004. The policy contained Connecticut endorsements to conform the policy to the laws of the state of Connecticut. The policy contained the following provisions pertaining to advertising injury coverage:

> **Advertising injury liability.** We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that:
>
> results from the advertising of your products, your work, or your completed work;
> and is caused by an advertising injury offense committed while this agreement is in effect.
>
> *Advertising injury* means any injury, other than bodily injury or personal injury, that's caused by an advertising injury offense.
>
> *Advertising injury offense* means any of the following offenses:
>
> Libel, or slander, in or with covered material.
> Making known to any person or organization covered material that disparages the business, premises, products, services, work, or completed work of others.
>
> **Right and duty to defend a protected person.** We'll have the right and duty to defend any protected person against a claim or suit for injury or damage covered by the agreement. We'll have such right and duty even if all of the allegations of the claim or suit are groundless, false or fraudulent.

C. The Underlying Fiskars Lawsuit

On or about June 14, 2004, Fiskars Brands, Inc., one of plaintiff's primary competitors in the scissors industry, filed a lawsuit against plaintiff in federal court in this District. Fiskars asserted two causes of action against plaintiff. The first cause of action was for false advertising in interstate commerce in violation of the Lanham Act and the second cause of action was for false advertising in violation of Wis. Stat. § 100.18. Fiskars's complaint against plaintiff contained the following allegations:

> 7. Acme has caused certain of its scissors for adults and children to enter commerce with false or misleading descriptions and representations in that Acme advertises on certain scissors and product packaging for certain scissors that they are "Titanium" or "Titanium Bonded," have a titanium cutting edge, that they are "3 times harder than stainless steel," that they "stays (sic) sharper longer" are "non-corrosive" . . . that the "blades stay sharp, longer" . . . and that "Acme uses a process that bonds titanium to a stainless steel core to produce a sharper, more durable and longer lasting cutting edge."
>
> 8. Acme has caused certain of its paper trimmers to enter commerce with false or misleading descriptions and representations in that Acme advertises on certain paper trimmers and the product packaging for certain paper trimmers that they are "Titanium" or "Titanium Bonded," that they are "Titanium bonded 3X harder than stainless steel . . . so blades stay sharper, longer," have a titanium cutting edge, that they have "Titanium bonded blades stay sharper, longer" and have "Trimmer Blades Feature Titanium . . . bonded to a stainless steel core, resulting in a surface that is sharper, more durable and 3 times harder than stainless steel!" and that "Titanium-bonded blades are non-corrosive and resistant to adhesive."
>
> 9. The advertisements described in Paragraphs 7 and 8 are false and misleading descriptions of fact and false and misleading representations in violation of 15 U.S.C. 1125 [the Lanham Act]. The scissors and paper

trimmers blades have only a negligible and immaterial amount of titanium, which is not on the cutting edge, and does not make the scissors harder, sharper, more durable, or longer lasting.

10. The Scissors False Advertisements and the Trimmers False Advertisements were intended to and did deceive a substantial segment of the target audience to incorrectly believe that they were purchasing scissors and paper trimmers made from or incorporating a non-negligible amount of titanium, with cutting surfaces made from titanium and/or blades made from a non-negligible amount of titanium which were three times stronger than blades made from stainless steel and that because of the titanium, the scissor blades and paper trimmer blades were harder, sharper and/or more durable or long lasting. The false advertisements were calculated and likely to influence purchasers' decision on whether to purchase scissors and paper trimmers manufactured by Fiskars, or scissors and paper trimmers manufactured by Acme.

11. Acme knew or by the exercise of reasonable care should have known that the False Advertisements were untrue at the time they were made because the presence or bonding of titanium has a negligible, if any, effect on the performance of the scissors and the paper trimmer blades.

12. Acme made the Scissors False Advertisement and Trimmer False Advertisements intending to divert trade away from Fiskars, which has occurred.

13. Because of the Scissors False Advertisements and Trimmer False Advertisements, Fiskars has suffered and will continue to suffer a loss of sales and profits that it would have otherwise made.

17. The Scissors False Advertisements and Trimmer False Advertisements contain statements and representations as to the condition of the scissors and paper trimmers which are untrue, deceptive and misleading [in violation of Wis. Stat. § 100.18].

The Fiskars complaint does not allege that plaintiff's advertisements made any referrence to Fiskars.

D. Insurance Dispute

The insurance policy plaintiff purchased from defendant was in effect when Fiskars filed the lawsuit against plaintiff in June 2004. Plaintiff tendered the Fiskars lawsuit to defendant around June 25, 2004. Defendant denied plaintiff's tender of defense in a letter dated July 16, 2004, stating in part: "While Fiskars alleges false advertising, those allegations do not involve an advertising injury offense." Plaintiff retained and paid counsel to defend it against Fiskars's lawsuit but objected to defendant's refusal to defend the Fiskars lawsuit. In a letter to defendant dated September 21, 2004, plaintiff stated:

> Given the status of the litigation filed by Fiskars Brand, Inc., the counsel representing Acme United Corp. in that case has had no choice but to immediately proceed to engage in extensive pretrial discovery and to engage expert witnesses to support the position of Acme United Corp. There is no question that [St. Paul] has a duty to defend this action. If this duty is not undertaken immediately, Acme United Corp. will consider its legal recourse against your firm.

Defendant responded in a letter dated December 1, 2004, in which it further denied its duty to defend plaintiff and stated in part:

> Acme must prove that there are allegations of advertising injury caused by an advertising injury offense, in this case "making known to any person or organization written or spoken material that disparages the products, work,

or completed work of others." Acme must show that:

> there is written or spoken material made known to any person or organization that disparages Fiskars's product.
>
> . . . Fiskars does not allege that Acme's advertising published disparaging statements regarding Fiskars.

Defendant did not seek judicial resolution of the coverage dispute. Plaintiff incurred legal expenses in excess of $180,000 in the Fiskars lawsuit, which eventually settled.

OPINION

A. Choice of Law

The first issue to be decided is the law to be applied in this case. In a federal lawsuit based upon diversity of citizenship, the court will apply the choice of law principles of the jurisdiction in which it sits to determine the substantive law that will apply. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941). Therefore, Wisconsin's choice of law principles apply.

"An insurance policy is a contract. A claim against the insurance company for [ ] coverage is 'an action on the policy and sounds in contract'." State Farm Mutual Auto Insurance Co. v. Gillette, 251 Wis. 2d 561, 577, 641 N.W.2d 662, 670 (2002) (citing Sahloff v. Western Casualty & Surety Co., 45 Wis. 2d 60, 70, 171 N.W.2d 914, 918 (1969)). In contractual disputes, Wisconsin courts apply the 'grouping of contacts' rule,

which means "that contract rights must be 'determined by the law of the [jurisdiction] with which the contract has its most significant relationship.'" Gillette, 251 Wis. 2d at 577, 641 N.W.2d at 671 (quotations and citations omitted).

The parties disagree about what law should apply; plaintiff argues for Wisconsin law and defendant argues for Connecticut law. The insurance policy at issue had more significant contacts with Connecticut than with Wisconsin because plaintiff is incorporated and has its principal place of business in Connecticut and the policy's objective was to insure a Connecticut-based corporation and was issued with Connecticut endorsements. See, e.g., Bradley Corp. v. Zurich Ins. Co., 984 F. Supp. 1193, 1198 (E.D. Wis. 1997) ("The location of the insured risk — meaning the principal location of the policyholder's insured activity — is given greater weight than any other contact.") (citing Utica Mutual Insurance Co. v. Klein & Son, Inc., 157 Wis. 2d 552, 559, 460 N.W.2d 763, 766 (Ct. App. 1990). However, because the laws governing the resolution of this case are identical in Connecticut and Wisconsin, the laws of Wisconsin apply. Deminsky v. Arlington Plastics Machinery, 259 Wis. 2d 587, 604, 657 N.W.2d 411, 420 (2003) (citing Sharp v. Case Corp., 227 Wis. 2d 1, 9, 595 N.W.2d 380, 384 (1999) ("If the laws of the two states are the same, we apply Wisconsin law.")).

As in Wisconsin, the insurer's duty to defend in Connecticut is measured by the allegations of the underlying complaint. See, e.g., Springdale Donuts, Inc. v. Aetna Casualty

& Surety Company of Illinois, 247 Conn. 801, 805-06, 724 A.2d 1117, 1120-21 (Conn. 1999). Moreover, Connecticut recognizes, as does Wisconsin, that an insurance policy is a contract and therefore its construction entails a determination of the intent of the parties, with ambiguities resolved in favor of the insured. Id. (citations omitted).

B. Allegations in Underlying Lawsuit

An insurer's duty to defend is determined by comparing the allegations within the four corners of the complaint to the terms of the insurance policy. Smith v. Katz, 226 Wis. 2d 798, 806, 595 N.W.2d 345, 350 (1999). The first part in the duty to defend analysis is to determine precisely what the Fiskars complaint accused plaintiff of doing.

As another district court has observed correctly, "the Court looks to the four corners of the complaint to decide whether the facts alleged therein raise the possibility of coverage under the insurance policy." Bradley Corp., 984 F. Supp. at 1198 (citing School District of Shorewood v. Wausau Ins. Cos., 170 Wis. 2d 347, 364-65, 488 N.W.2d 82 (1992)). The legal labels that the underlying complaint attaches to the insured's actions are not determinative of the duty to defend. "The question instead is 'whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers.'" Bradley Corp., 984 F. Supp. at 1198 (internal quotations and citations omitted); Strid v. Converse, 111 Wis. 2d 418, 422-23, 331 N.W.2d

350, 353 (1983) ("It is the sufficiency of the facts alleged that control. . . . What they are called is immaterial.") (internal quotations and citations omitted).

In the duty to defend analysis, the allegations of a complaint must be construed liberally and the court must "'assume all reasonable inferences' in the allegations of a complaint." Fireman's Fund Insurance. Co. v. Bradley Corp., 261 Wis. 2d 4, 19, 660 N.W.2d 666, 674 (2003) (internal quotations and citations omitted); Menasha Corp. v. Lumbermens Mutual Casualty Co., 361 F. Supp. 2d 887, 890 (E.D. Wis. 2005) (citations omitted).

Fiskars alleged in its complaint that plaintiff's advertisements stated that, because plaintiff's scissors and trimmers contained titanium, they were "sharper, more durable and 3 times harder than stainless steel." Although Fiskars labeled the legal issue as "false advertising," the court must look beyond Fiskars's legal theory to the actual allegations of Fiskars's complaint to determine whether the complaint alleges facts that, if proven, would show plaintiff had committed an offense covered by the insurance policy. Fiskars alleged in its complaint not only that plaintiff made false statements about the contents of plaintiff's products ("the scissors and paper trimmer blades have only a negligible and immaterial amount of titanium, which is not on the cutting edge"), but also that plaintiff falsely portrayed its products are being better than stainless steel products (". . . does not make the scissors harder, sharper, more durable or longer lasting"). In effect, the latter statement is

an allegation that plaintiff's advertisements discredited stainless steel scissors and cutters.

Although the Fiskars complaint does not state so explicitly (and plaintiff has not introduced independent facts to prove it), it is reasonable to infer that Fiskars sells stainless steel scissors and trimmers. Fiskars made allegations such as "[t]he false advertisements were calculated and likely to influence purchasers' decision on whether to purchase scissors and paper trimmers manufactured by Fiskars, or scissors and paper trimmers manufactured by Acme" and "Acme made the Scissors False Advertisement and Trimmer False Advertisements intending to divert trade away from Fiskars, which has occurred." Reading these allegations in context, and giving the benefit of the doubt to the insured, as I must, the logical inference is that Fiskars sells stainless steel scissors and trimmers. Accordingly, the next question is whether defendant had a duty to defend plaintiff against a complaint that alleged that plaintiff's advertisements discredited stainless steel products such as the one Friskars sold. "The allegations in the complaint must state a claim or cause of action for the liability insured against; otherwise there is no duty to defend." Atlantic Mutual Insurance Co. v. Badger Medical Supply Co., 191 Wis. 2d 229, 242, 528 N.W.2d 486, 491 (Ct. App. 1995) (citing Grieb v. Citizens Casualty Co., 33 Wis. 2d 552, 557-58, 148 N.W.2d 103, 106 (1967)). I now turn to the language of the policy to determine the precise liability it insured against.

C. Interpreting the Policy

An insurer's duty to defend is determined by comparing the allegations in the complaint to the terms of the insurance policy. Smith, 226 Wis. 2d at 806, 595 N.W.2d at 350. The inquiry is whether the activity alleged in the complaint falls within the terms of the policy; the merits of the claim are irrelevant in making this determination. Radke v. Fireman's Fund Insurance Co., 217 Wis. 2d 39, 43, 577 N.W.2d 366, 369 (Ct. App. 1998).

Under Wisconsin law, the interpretation of an insurance policy is determined by application of the same rules of construction that apply to contracts generally. Wisconsin Label Corp. v. Northbrook Property & Casualty Insurance Co., 233 Wis. 2d 314, 327-28, 607 N.W.2d 276, 282 (2000). The first determination in construing an insurance policy is whether ambiguity exists regarding the disputed coverage issue. Folkman v. Quamme, 264 Wis. 2d 617, 631, 665 N.W.2d 857, 864 (2003).

If there is no ambiguity in the language of an insurance policy, it is enforced as written, without resort to rules of construction or applicable principles of case law. Id. (citing Danbeck v. American Family Mutual Insurance Co., 245 Wis. 2d 186, 193, 629 N.W.2d 150 (2001); Hull v. State Farm Mutual Automobile Ins. Co., 222 Wis. 2d 627, 637, 586 N.W.2d 863 (1998)). Insurance policy language is ambiguous if "it is susceptible to more than one reasonable interpretation." Folkman, 264 Wis. 2d at 631, 665 N.W.2d at 864 (citing Danbeck, 245 Wis. 2d 186, 193, 629 N.W.2d 150 (2001)). The fact that

parties to a lawsuit dispute the meaning of certain contract language does not necessarily mean that the language is ambiguous. "A mere assertion on the one hand and denial on the other must not be understood as creating doubt. Contention without reason does not spell ambiguity." American National Bank v. Service Life Insurance Co., 120 F.2d 579, 582 (7th Cir. 1941).

If there is ambiguity, ambiguous terms are to be narrowly construed against the insurer. Peace v. Northwestern National Insurance Co., 228 Wis. 2d 106, 121, 596 N.W.2d 429, 436 (1999). Courts are to "construe an insurance policy as it would be understood by a reasonable person in the position of the insured, and it is to be given its common and ordinary meaning." Midway Motor Lodge v. Hartford Insurance Group, 226 Wis. 2d 23, 31 (Ct. App. 1999) (citations omitted).

The disputed contract language is the definition of "advertising injury offense":

> Making known to any person or organization covered material that disparages the business, premises, products, services, work, or completed work of others.

In particular, the dispute is whether a disparaging advertisement must identify a specific product brand or name a specific manufacturer in order to constitute an advertising injury offense.

It is evident that plaintiff's advertisements disparaged stainless steel scissors and trimmers. Although the insurance policy does not define the term "disparage," the plain and

ordinary meaning of the term is clear. To disparage means to make comparisons that dishonor another product: this is precisely what plaintiff's advertisements did. Skylink Technologies, Inc. v. Assurance Company of America, 400 F.3d 982 (7th Cir. 2005); Zurich Insurance Company v. Sunclipse, Inc., 85 F. Supp. 2d 842, 856 (N.D. Ill. 2000); Heritage Mutual Insurance Company v. Advanced Polymer Technology, Inc., 97 F. Supp. 2d 913, 932 (S.D. Ind. 2000).

However, the advertisements do not constitute an advertising injury offense because, although they disparaged a product (stainless steel scissors and cutters), they did not disparage the "business, premises, products, services, work, or completed work of others." Although the parties dispute whether, to constitute an advertising injury offense, a disparaging advertisement must name another brand, the parties' disagreement does not render the clause "business, premises, products, services, work, or completed work of others" ambiguous. There is only one reasonable reading of the policy's definition of advertising injury offense and it is that the disparaging advertisements must name another brand. For an advertisement to disparage the product of another entity, that product must be identified as a product of the other entity. The words "of others" included at the end of the phrase "business, premises, products, services, work, or completed work of others" make it clear that the policy's prohibition is against disparaging another entity's products, not against disparaging other types, or classes, of products. Although plaintiff's advertisements

disparaged stainless steel scissors and trimmers as a class of products, they did not disparage *Fiskars's* stainless steel scissors and trimmers.

Plaintiff has offered no reason why the court should abandon this common sense reading of the phrase "business, premises, products, services, work, or completed work of others." It does not advance its argument by relying on Home Insurance Co. v. Waycrosse, Inc., 990 F. Supp. 720 (D. Minn. 1996), to persuade the court that the policy language does not require the naming of an "other." In Home Insurance, the court was not concerned with interpreting the meaning of insurance policy language; it was concerned with discerning the allegations in the underlying complaint regarding the advertisement at issue. Home Insurance involved an insurance dispute between Waycrosse, Inc. and its insurance company. Waycrosse had been previously sued by Life Point Systems, Inc., over the marketing of a radio frequency device. When the court examined the underlying complaint in the lawsuit between Life Point and Waycrosse it inferred that when Life Point used the term "the Device" in the complaint, to allege that Waycrosse had fraudulently misrepresented "'the Device and the technology related to the Device,'" Life Point was referring to Life Point's device. When the court made the statement on which plaintiff relies, that "at least one tenable reading of this language is that the fraudulent misrepresentations were about Life Point's Device and technology the Life Point Plaintiffs

developed," it was referring to a "tenable reading" of the complaint; not a tenable reading of the advertisement or of the insurance policy language.

Plaintiff is not persuasive when it argues that the policy language at issue is ambiguous. Plaintiff cites Vector Products, Inc. v. Hartford Fire Insurance Co., 397 F.3d 1316 (11th Cir.) in support of its ambiguity argument. The definition of "advertising injury" in the insurance policy discussed in Vector was effectively identical to the one at issue in the present case: "arising out of [the] publication of material that . . . disparages a person's or organization's goods, products or services." The Court of Appeals for the Eleventh Circuit held that "[b]ecause the [policy is] ambiguous as to whether the insured must mention a plaintiff's name in order to give rise to a duty to defend a false advertising claim, we resolve the ambiguity in favor of the insured and hold that the claims in the . . . complaint do give rise to the duty to defend." Vector, 397 F.3d at 1319. However, there was a significant difference in the advertisement at issue in Vector and the ones at issue here. The advertisement in Vector stated that "Vector's product is superior to the 'leading brand.'" What the court in Vector had to decide, then, was whether it was sufficient to identify a specific competitor by naming it as the 'leading brand,' or whether it was necessary to spell out the name of the competitor. Given the difference in facts, I am not persuaded that it would be proper to rely on the holding of the Court of Appeals for the Eleventh Circuit. In Vector, the insured came close to identifying the specific competitor by referring to it as the

'leading brand.' In the present case, however, plaintiff did not come close to identifying Fiskars in its advertisement; its comparisons to stainless steel products come no closer to identifying Fiskars than any other manufacturer of stainless steel scissors and trimmers. Plaintiff's advertisements identified only a category of products. Fiskars's identity was not ascertainable from the advertisements.

Because plaintiff's advertisements did not disparage Fiskars's products, defendant did not have a duty to defend plaintiff in the Fiskars lawsuit. Therefore, defendant's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant St. Paul Fire and Marine Insurance Company is GRANTED and the motion for summary judgment filed by plaintiff Acme United Corporation is DENIED.

The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 7th day of February, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge