IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TECH ENTERPRISES, INC.,
a Wisconsin Corporation,

Plaintiff,

v.

RICHARD T. WIEST, d/b/a
WS&S, INC., and WIEST SALES
AND SERVICE, INC.,

Defendants,

and

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,
a Wisconsin mutual company,

Intervener Defendant.

OPINION AND
ORDER

06-C-0042-C

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In this civil action for declaratory and monetary relief, plaintiff Tech Enterprises, Inc., contends that defendants Richard T. Wiest, d/b/a WS&S, Inc., and Wiest Sales and Service, Inc. engaged in trademark infringement, false advertising and unfair competition, in violation of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). In addition, plaintiff asserts

claims of trademark infringement and unfair competition in violation of state common law and Wis. Stat. § 132, fraudulent representations under Wis. Stat. § 100.18 and conspiracy to injure another in his or her reputation, trade, business or profession under Wis. Stat. § 134.01.

On April 4, 2006, I granted American Family Mutual Insurance Company's motion to intervene pursuant to Fed. R. Civ. P. 24 to obtain a declaratory judgment regarding its obligation to defend or indemnify the defendants. Presently before the court is American Family's motion for judgment declaring that it has no obligation to defend or indemnify defendants Richard Wiest and Wiest Sales and Service. I conclude that (1) defendant Wiest Sales and Service is not insured by American Family and (2) the allegations in the complaint do not allege an "occurrence," as defined in the insurance policies. I will grant American Family's motion for declaratory judgment that it has no obligation to defend or indemnify either defendant. These conclusions make it unnecessary to discuss American Family's argument that the business exclusion in the umbrella policy issued to defendant Richard Wiest bars coverage of the claims against him.

For the sole purpose of deciding this motion, I draw the following facts from the allegations of the complaint and the affidavits submitted in support of and in opposition to the motion.

FACTS

A. Parties

Plaintiff Tech Enterprises is a corporation organized in Wisconsin, with its principal place of business in Madison, Wisconsin. Plaintiff is in the business of developing, manufacturing, marketing, distributing and selling household cleaning products. Defendant Wiest Sales and Service, Inc. is a Wisconsin corporation that distributes consumer products; it buys products from companies such as plaintiff and sells them to dealers and retail outlets. Defendant Richard T. Wiest is the owner of Wiest Sales and Service and a citizen of Wisconsin. Intervener defendant American Family Mutual Insurance Company is a Wisconsin insurance company with its principal place of business in Madison, Wisconsin.

B. Insurance Policies

Defendant Richard Wiest purchased two insurance policies from American Family: a homeowner's policy and a personal liability umbrella policy. Both policies list Richard Wiest as an insured, but neither lists defendant Wiest Sales and Service, Inc. The policies were in force when the events leading to this litigation transpired. (Because defendants do not argue that American Family has a duty to defend or indemnify them pursuant to the homeowner's policy, I will set forth and discuss facts pertaining only to the personal liability umbrella policy.)

The personal liability umbrella policy contains the following provisions:

Personal liability coverage. We will pay, up to our limit, compensatory damages for which an insured becomes legally liable for injury caused by an occurrence covered by this policy. This coverage applies only to damages in excess of the primary limit.
Defense provision. If a suit is brought against an insured for damages because of injury caused by an occurrence to which this policy applies, we will provide a defense at our expense by counsel of our choice.

Insured means:
a. The named insured;
b. Your relatives.

Injury means **bodily injury, personal injury** or **property damage.**

Occurrence means:
a. Under Personal Liability Coverage, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in personal injury and/or property damage.

Personal injury means:
a. Bodily injury;
b. False arrest, detention or imprisonment;
c. Malicious prosecution;
d. Libel, slander, humiliation or defamation of character;
e. Invasion of privacy, wrongful eviction or wrongful entry.

Business. We will not cover **business** pursuits or **business property** of an **insured** other than **farming/ranching.**

Business means any profit motivated full or part-time employment, trade, profession or occupation, except **farming/ranching**, and including the use of any part of any premises for such purposes.

C. Allegations in the Complaint

Plaintiff has marketed, distributed and sold products under the trademark "TECH" since 1976, including TECH Final Answer Carpet Care and TECH Stain Remover. Plaintiff sells its products to distributors and to major retail chains and outlets throughout the United States. Plaintiff enjoys a strong reputation in the trade and its TECH products enjoy substantial consumer recognition and goodwill. In April 2002, plaintiff applied to register the trademark TECH with the United States Patent and Trademark Office; the application is still pending.

For a number of years, defendant Wiest Sales and Service purchased TECH products from plaintiff. In July 2003, defendant Richard Wiest asked plaintiff for a greater share of the profit on his sales. Plaintiff instructed defendant Richard Wiest to submit his request in writing. Over the next eighteen months, defendant Richard Wiest made false statements about plaintiff. For example, in May 2004, defendant Richard Wiest told one of plaintiff's employees that he had information that plaintiff was on the verge of bankruptcy.

On January 31, 2005, defendant Richard Wiest announced that he was severing his business relationship with plaintiff. On February 21, 2005, defendant Richard Wiest sent plaintiff a letter stating

> [U]pon advice of Counsel I am informing Tech Enterprises that Wiest Sales & Service, Inc., is retaining the right to sell all forms of Tech Stain Remover by whomever made to all accounts which were established by Wiest Sales over

> the past 23 years . . . .

In the same letter, defendant Richard Wiest included an order for plaintiff's TECH products and stated:

> If I do not hear from you concerning the enclosed order by Friday noon on February 25, 2005 I will consider you no longer want to do business with me and will place an order with the other company.

In a response to this letter, plaintiff wrote that it

> accepts the fact that you will place an order with another company [and] [b]ased on this and other factors, Dick Wiest/Wiest Sales and Services, Inc. will no longer be representing Tech Enterprises, Inc. effective immediately.

In the spring of 2005, defendants Richard Wiest and Wiest Sales and Service began marketing a stain remover using plaintiff's TECH trademark; they informed their clients that these products were the "new improved" TECH, that they were the replacement for TECH products and that the TECH Stain Remover and TECH Final Answer Carpet Care were no longer being manufactured, were no longer available or had been discontinued. Defendants obtained a new product to replace plaintiff's and sold it in packaging that included the word TECH. They prepared advertisements and flyers with pictures of the ersatz Tech products and statements such as, "The Old Tech Can't Equal <u>Tech</u> <u>Away</u>."

Plaintiff received a copy of an advertisement, along with a handwritten note stating

> Greetings: Too bad you couldn't afford to have a professional artist do the flyer you sent out. This is just one of various designs we are sending out. The dealers are getting a good laugh again but at your expense.

Defendant Wiest Sales and Service filed for recording in the Office of the Secretary of State a statement of adoption of the mark TECH AWAY STAIN REMOVER. On January 19, 2006, plaintiff learned that defendants intended to introduce another product using plaintiff's TECH trademark, to be called "TECH CLARIX."

OPINION

Defendant Richard Wiest does not dispute American Family's assertion that it has no duty to defend Wiest Sales and Service, Inc. This leaves as the threshold question whether American Family has a duty to defend Richard Wiest under the umbrella policy, which purports to insure Richard Wiest and his relatives. American Family argues that Richard Wiest in his individual capacity is not a party to this lawsuit, but it mistakes the description, "Richard T. Wiest, d/b/a WS&S, Inc." for a separate entity. The defendant is Richard Wiest in his individual capacity. Binon v. Great Northern Insurance Co., 218 Wis. 2d 26, 35, 580 N.W.2d 370, 374 (Ct. App. 1998) (quoting Jacob v. West Bend Mutual Insurance Co., 203 Wis. 2d 524, 537 n.7, 553 N.W.2d 800, 805 (Ct. App. 1996)) ("the designation, 'd/b/a' means 'doing business as' and is merely descriptive of the person or corporation who does business under some other name; it does not create or constitute an entity distinct from the person operating the business'"). If the umbrella policy covers the

actions alleged in the complaint, American Family has the duty to defend Richard Wiest.

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). As another district court has observed correctly, courts look "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. v. Zurich Insurance Co., 984 F. Supp. 1193, 1198 (E.D. Wis. 1997) (citing School District of Shorewood v. Wausau Insurance Cos., 170 Wis. 2d 347, 364-65, 488 N.W.2d 82 (1992)), and decide "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." Id. 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). 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). "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)).

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).

Defendants argue that American Family has a duty to defend Richard Wiest for one reason only: the complaint alleges "personal injury," which is defined in the umbrella policy to include "libel, slander, humiliation or defamation of character." Defendants' argument fails, however, because the policy insures only against injury "caused by an occurrence," which is defined as "an accident."

Although the umbrella policy does not define the term "accident," the plain and ordinary meaning of the term is clear. An accident is an "'event or condition occurring by chance or arising from unknown or remote causes.'" American Family Mutual Insurance Company v. American Girl, Inc., 268 Wis. 2d 16, 38, 673 N.W.2d 65, 76 (2004) (quoting Webster's Third New International Dictionary of the English Language 11 (2002)) (interpreting term "accident" in policy provision identical to provision at issue in present case).

"The word 'accident,' in accident policies, means an event which takes place

> without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental."

Id., (quoting Black's Law Dictionary 15 (7th ed. 1999)). The term "accident" is not ambiguous. Moreover, no reasonable person would conclude that making allegedly false statements regarding a business or product is an "occurrence," that is, something that could occur "without one's foresight or expectation," so as to fall under the definition of "accident."

Defendants cite three cases in support of their argument that "an accident has been found to occur even in cases of alleged intentional actions." Dfts.' Br., dkt. #32, at 12. These cases do hold that the term "accident" can include intentional actions, but the holdings are limited to claims arising under the Workers Compensation Act. See, e.g., Jenson v. Employers Mutual Casualty Co., 161 Wis. 2d 253, 264, 468 N.W.2d 1, 5 (1991) ("'This court has previously defined "accident" in terms of the workmen's compensation statute as a fortuitous event unexpected or unforeseen by the injured person, even though the injury is intentionally inflicted by another.'") (quoting School District No. 1, Village of Brown Deer v. Department of Industry, Labor and Human Relations, 62 Wis. 2d 370, 375, 215 N.W.2d 373 (1974)). Defendants have offered no compelling reason, and I see none, to apply this broader definition of "accident" to cases not involving the Workers Compensation Act.

Plaintiffs have not alleged any conduct by defendants constituting an "occurrence"

under the umbrella policy. It is clear that the umbrella policy does not cover the tortious acts alleged by plaintiff. Therefore, it is unnecessary to reach American Family's argument that the umbrella policy did not cover defendant Richard Wiest's business activities as a distributor of household products. American Family's motion for declaratory judgment that it has no duty to defend or indemnify either defendant will be granted.

ORDER

IT IS ORDERED that American Family Mutual Insurance Company's motion for declaratory judgment that it has no obligation to defend or indemnify defendants Richard Wiest, d/b/a WS&S, Inc. and Wiest Sales and Service, Inc. is GRANTED.

Entered this 18th day of July, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge