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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SOUTHERN CALIFORNIA GOLD PRODUCTS, INC., Plaintiff and Appellant, v. ZURICH-AMERICAN INSURANCE GROUP et al., Defendants and Respondents.	2d Civil No. B234720 (Super. Ct. No. 56-2009-00353066-CU-IC-VTA) (Ventura County)

Southern California Gold Products, Inc. (SCGP) purchased liability insurance from Northern Insurance Company of New York (Northern) and Maryland Casualty Company (Maryland), both affiliates of Zurich-American Insurance Group (Zurich).[1] The policies covered, among other things, the defense of suits based on "advertising injury." American Defense Systems, Inc. (ADSI) sued SCGP for misappropriation of trade secrets and confidential information. The complaint alleged SCGP falsely represented on its internet website that it had an affiliation with the United States military and that its armor solution products had been tested and approved by the military. The complaint also alleged

[1] An additional insurer, Sequoia Insurance Company, which also issued a policy to SCGP during the coverage period, is not a party to this appeal.

that the website contained pictures of ADSI's products which SCGP claimed were its own and that SCGP falsely asserted it had an ongoing affiliation with ADSI.

SCGP tendered defense of the suit to Northern and Maryland. They denied coverage and SCGP sued the insurers. The trial court determined on summary judgment that the insurers did not owe SCGP a duty to defend against the ADSI suit. SCGP appealed. We affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

SCGP filed a first amended complaint (FAC) against respondents, Zurich, Northern, and Maryland (collectively insurers) for declaratory relief, breach of contract, negligence and breach of the covenant of good faith and fair dealing arising from the insurers' denial of a defense to SCGP in a lawsuit filed against it in federal court by ADSI (the underlying complaint).

The underlying complaint sought damages and an injunction for (1) misappropriation of trade secrets and confidential information in violation of the Uniform Trade Secrets Act (Civ. Code, § 3426 et seq.); (2) breach of contract; (3) unfair competition in violation of Business and Professions Code section 17500 et seq.; (4) conversion; (5) violation of the Lanham Act (15 U.S.C. § 1125); and (6) interference with prospective economic advantage.

In March or April 2008, SCGP was served with the underlying complaint. On April 21, 2008, SCGP tendered the underlying complaint to Northern requesting defense and indemnity. Northern did not respond to SCGP's request. On July 28, 2008, Maryland informed SCGP in writing that it was denying its request for defense and indemnity of the underlying complaint. (The FAC does not allege when SCGP tendered its defense to Maryland.)

The Maryland policy provided coverage for certain advertising injuries. "Advertising injury" was defined in the policy to include: "Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services," and "Misappropriation of advertising ideas or

style of doing business" and "Infringing upon another's copyright, trade dress or slogan in your 'advertisement.'"[2] The policy excluded "advertising injury" "[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury'" and "[a]rising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity."

The denial of defense was based on the insurer's review of the underlying complaint and the terms of the relevant policy. In its letters denying defense and indemnity, the insurer requested that it be provided with any additional information known to the insured in connection with the claim.[3] SCGP did not comply with the insurer's request to provide additional information before tender was denied three or four months later.

SCGP filed a motion for summary judgment or summary adjudication. Responsive pleadings were filed by the insurers. After hearing, the trial court denied the motion finding that SCGP had not met its burden of showing that the underlying claims had a potential for coverage under the insurance policies. The court stated: "The coverage at issue here is 'advertising injury.' Here, that is stated to be 'an oral or written publication of material that slanders or libels a person or organization or disparages a person's organization, goods, products or services.' The term 'disparagement' has been held to include statements about a competitor's goods that are untrue or misleading and are made to influence potential purchases not to buy. [Citation.]

"Here the underlying complaint does not allege that SCGP was disparaging [ADSI's] products, but that SCGP was wrongfully using [ADSI's] products, patents and contracts to promote its own products, and that SCGP had been an [*sic*] affiliation with [ADSI]. There was no criticism of [ADSI's] products so much as the claim that SCGP was

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[2] At oral argument, appellant's counsel asserted that the Maryland policy upon which denial of coverage was based did not include coverage for "misappropriation of style of doing business." Our review of the record leads us to conclude otherwise.

[3] At oral argument, appellant's counsel stated that the insurer did not make a request for additional information relating to the claim. The record is to the contrary.

bootstrapping its own product line onto that of [ADSI]. These allegations are similar to those in *Aetna [Cas. & Sur. Co.] v. Centennial [Ins. Co.* (9th Cir. 1988)] 838 F.2d 346, and *Microtec Research v. Nationwide [Mut. Ins. Co.* (9th Cir. 1994)] 40 F.3d 968.

"The extrinsic evidence offered by plaintiff does not change this analysis."

Subsequently, Northern and Maryland brought a motion for summary judgment. In opposition, SCGP submitted the declaration of David Peterson, an expert who opined that the insurers' investigation of the claim fell below the standard of care, and the declaration of ASDI's president Tony Piscitelli stating that SCGP's published statements disparaged ADSI and misappropriated ADSI's style of doing business. The trial court granted the insurers' motion for summary judgment. The order states in part: "The court has already determined in its ruling of September 28, 2010 that there was no disparagement claim alleged in the underlying complaint filed by [ADSI]. There is nothing submitted in this motion which compels a change in that finding.

"The court finds here that there is no misappropriation of advertising ideas or misappropriation of style of doing business alleged in the underlying complaint. An insurer has a duty to timely investigate to determine if there are extrinsic facts which would trigger a duty to defend, but this is not a continuous duty. If it has made an informed decision on the basis of the complaint and extrinsic facts known at the time of the tender, it may refuse a defense. [Citation.]

"The declaration of David Peterson is irrelevant because coverage is a question of law for the court to decide. Mr. Peterson has extensive qualifications, but his opinions are better suited to a bad faith case. The opinions of Tony Piscitelli are both speculative and late received with regard to Maryland's and Northern's knowledge at the time they were evaluating coverage."

On appeal from the order granting summary judgment to the insurers, SCGP contends that the trial court erred in granting summary judgment to the insurers because the underlying complaint contains facts which give rise to a potential for coverage under the theories of disparagement, indirect disparagement, and misappropriation of style of doing

business. SCGP also contends the insurers failed to conduct a proper investigation before they denied coverage; had they done so, they would have uncovered extrinsic facts which demonstrated a potential for coverage.

DISCUSSION

Standard of Review

A trial court's ruling on a motion for summary judgment is subject to de novo review. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) A trial court's interpretation of an insurance contract is also subject to de novo review unless the interpretation requires an assessment of the credibility of conflicting extrinsic evidence. (*Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 802.)

An Insurer's Duty to Defend

A liability insurer owes a broad duty to defend its insured against lawsuits that generate a potential for indemnity. (*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 276.) The duty to defend is broader than the duty to indemnify, and an insurer may owe a duty to defend its insured in an action in which no damages are ultimately awarded. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295; *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.) Whether an insurer owes a duty to defend depends on the allegations in the underlying complaint, the policy, and the facts known to the insurer. (*Montrose*, at pp. 295-296, 300.) With respect to the complaint, an insurer must defend when the lawsuit "potentially seeks damages within the coverage of the policy." (*Gray*, at p. 275, italics omitted; see also *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 510 ["the duty to defend arises when the facts alleged in the underlying complaint give rise to a potentially covered claim regardless of the technical legal cause of action pleaded by the third party"].)

However, if """. . . there is no possibility of coverage, there is no duty to defend . . . ."" (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19; see also *Scottsdale Ins. Co. v. MV Transp.* (2005) 36 Cal.4th 643, 655 ["if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the

duty to defend does not arise in the first instance"].) While the duty to defend is broad, "[a]n insurer . . . will not be compelled to defend its insured when the potential for liability is so 'tenuous and farfetched.'" (*Lassen Canyon Nursery v. Royal Ins. Co. of America* (9th Cir. 1983) 720 F.2d 1016, 1018.) In other words, the duty to defend does not require an insurer to undertake a defense as to claims that are factually and legally untethered from the underlying complaint. (E.g., *Storek v. Fidelity & Guar. Ins. Underwriters, Inc.* (N.D. Cal. 2007) 504 F.Supp.2d 803, 807; *The Upper Deck Co., LLC v. Federal Ins. Co.* (9th Cir. 2004) 358 F.3d 608, 615-616.)

The absence of a duty to defend is established when the insurer shows that the underlying claim could not come within the policy coverage by virtue of the scope of the insuring clause or the breadth of an exclusion. (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at p. 301.)

Product Disparagement

SCGP alleges that the underlying complaint contains facts showing a potential for coverage for direct and/or indirect product disparagement. "The term 'disparagement' has been held to include statements about a competitor's goods that are untrue or misleading and are made to influence potential purchasers not to buy." (*Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1035.) Where the statements are merely about the insured's own products, no disparagement claim will lie. (See, e.g., *Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 168-171 [allegedly false statements not expressly mentioning competitor or referring to competitor by reasonable implication does not constitute disparagement].)

The Underlying Complaint Does Not Contain Facts Constituting Direct or Indirect Disparagement

All causes of action in the underlying complaint were based on the following allegations:

(1) ADSI designs, manufactures, and installs glass armor and armor kits. Its customers include the United States armed forces, prison correction facilities, court

buildings, and multiple locations involving national security. ADSI also designs, manufactures, and installs armor crew protection kits for military vehicles and construction equipment.

(2) ADSI developed proprietary intellectual property and trade secrets involving armor plate lamination design and methods; welding processes; attachment methods, including an encapsulated fastener attachment method; transparent armor; glass windows and armored door locks.

(3) Prior to 2005, SCGP had contracts with the United States government to provide accessories, such as grill and bush racks, for the Humvee.

(4) In 2005, representatives of ADSI and SCGP met at a trade show. Subsequently, ADSI invited SCGP to be a subcontractor on a project involving armor kits. The work was to be performed at Fort Lewis, Washington (the Fort Lewis Project).

(5) After the Fort Lewis Project, ADSI won bids on two additional military contracts with the U.S. Army Tank-Automotive and Armaments Command (the TACOM Project). ADSI again hired SCGP to fabricate armor kits based on ADSI's proprietary designs and methods. Testing for the TACOM Project was conducted at the Aberdeen Test Center in Baltimore, Maryland.

(6) Before the TACOM Project was begun, ADSI and SCGP entered into a mutual confidentiality and nondisclosure agreement.

(7) SCGP's role on both the Fort Lewis and TACOM Projects was limited to fabrication, i.e., putting pieces together using ADSI trade secrets and confidential and proprietary information in accordance with the designs and specifications provided by ADSI.

(8) SCGP did not interact or communicate with any TACOM personnel throughout the course of the project and has never worked directly with TACOM, whether in conjunction with ASDI or otherwise.

(9) SCGP did not participate in the testing of any of the products on either project. SCGP could not participate in those tests and did not learn the results of those tests because SCGP did not have the requisite U.S. military security clearance.

(10) After the TACOM Project ended, SCGP began openly representing to the general public and to various government agencies that SCGP had an affiliation with TACOM including (a) representing on its website that "SCGP has worked closely with TACOM for the development of Crew Protection Armor Kits for various construction equipment;" (b) representing that SCGP's armor solutions had undergone testing and approval at the Aberdeen Test Center in Baltimore, Maryland; and (c) representing that SCGP had an ongoing affiliation with ADSI even though that was not the case.

(11) SCGP used photographs of ADSI products and misrepresented that the products depicted in the photographs were SCGP products.

(12) As a result of these misrepresentations, SCGP was able to secure contracts with the U.S. government to install armor solutions.

(13) To fulfill these contracts, SCGP misappropriated ADSI trade secrets and proprietary and confidential information it had obtained during the course of the TACOM Project, including key design elements and specifications. SCGP continued to misappropriate subsequent modifications that ADSI made to its armor solutions.

SCGP contends that the following allegations in the underlying complaint constitute disparagement: (1) SCGP worked closely with TACOM for the development of its armor solutions, (2) SCGP's armor solutions were tested and approved by the United States military, (3) SCGP used photographs of ADSI products on its website and misrepresented that the products depicted in those photographs were SCGP products, (4) SCGP obtained contracts for its products through the advertisements, (5) the armor solutions that SCGP used to fulfill its contract obligations incorporated key designs and specifications misappropriated from ADSI, and (6) SCGP misrepresented the values, qualities, characteristics and origin of SCGP's goods, services, and commercial activities.

The above statements do not allege the elements of disparagement as that offense is used in the definition of "advertising injury" in the policies. The FAC does not allege that SCGP made any derogatory comments about the quality of ADSI's products, nor does it allege that it advertised that its products were "better" than ADSI. Instead, the FAC alleges that SCGP misrepresented its own expertise and experience, misrepresented that it worked closely with the United States military, and misrepresented that its armor solutions had undergone testing and approval by the military. While these claims may represent false advertising as to SCGP's own abilities, these claims do not constitute a disparagement of the quality of ADSI's goods, products or services. (*Total Call Internat., Inc. v. Peerless Ins. Co.*, *supra*, 181 Cal.App.4th at p. 168; see also *Microtec Research v. Nationwide Mut. Ins. Co.*, *supra*, 40 F.3d at pp. 972-973 [no disparagement where underlying complaint does not allege that insured made derogatory statements about competitor's products].)

Indirect or implied disparagement may occur where a publication does not expressly identify a product, but the product is clearly implied. (See *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1044 [specific reference to a competitor or its product in a publication is not necessary if the injurious falsehood identifies the competitor or product by clear implication].) SCGP relies on *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.* (N.D. Cal. 2008) 590 F.Supp.2d 1244, to support a claim of indirect or implied disparagement. *E.piphany* is factually inapposite. In that case, the court found a complaint stated a potential claim for disparagement by implication where the advertisement stated that the insured falsely stated that it was the "only" company to provide a certain product. (*Id.* at p. 1253.) Here, the advertisement did not contain representations that SCGP was the "only" company that had worked closely with the United States military, or the "only" company whose armor solutions had undergone testing and approval by the military. Rather, the underlying complaint alleged that SCGP used photographs of ADSI products and misrepresented that they were SCGP products. At most, this constitutes a claim that SCGP "palmed off" ADSI products as its own, not that SCGP made a false or injurious statement about the quality of ADSI's products. (See *Microtec Research v. Nationwide Mut.*

Ins. Co., supra, 40 F.3d at p. 972 ["palming off" competitor's products does not state a claim for product disparagement].)

The First Amended Complaint Does not Contain Facts Constituting Misappropriation of Style of Doing Business

"The term 'style of doing business' refers to a company's comprehensive manner of operating." (*Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16, 22, fn. 2.) SCGP contends the underlying complaint contains facts potentially giving rise to a claim for misappropriation of style of doing business because the complaint describes ADSI's business and the TACOM Project and alleges that SCGP advertised that it had the military experience and testing that only ADSI possessed. SCGP concludes that "being tested and approved by the military was ADSI's business model."

SCGP cites no authority supporting its contention that product testing and approval by the United States military, or any other narrow component of a business's operation, constitutes a "comprehensive manner of operating." Cases which have found an overall style of doing business demonstrate the difference. In a restaurant setting, for example, such things as use of a type of furniture, a certain physical setup, an exposed cooking area, a type of music and a limited menu constituted a comprehensive manner of operating. (*Shakey's Inc. v. Martin* (Idaho 1967) 430 P.2d 504.) In a retail operation, style of doing business included a "uniform plan of retailing the ice milk product in prototype buildings that are distinctive from other stores dealing in similar products." (*Medd v. Boyd Wagner* (D.C. Ohio 1955) 132 F.Supp. 399, 409.) In contrast, the underlying complaint in this case contains no allegation that SCGP appropriated any element of ADSI's style of doing business but only that it made false claims concerning its own products and its own affiliations.

The Insurer Did not Fail to Investigate the Claim

SCGP contends that the insurer had a duty to investigate facts and evidence outside the four corners of the underlying complaint to discover any extrinsic evidence which shows a potential for coverage. In other words, SCGP contends that failure to

investigate alone is a violation of the duty to defend despite a lack of coverage under the policy. SCGP's contention is not supported by applicable legal principles.

An insurer has a duty to investigate "possible bases that might support the insured's claim." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819.) "Possible" bases for coverage are those which are possible on the basis of the facts underlying the claim as it was presented and any other facts known to the insurer at that time. (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at p. 295.) If the facts presented to the insurer do not make it clear that the claim is covered, it may have a duty to investigate further, to determine whether there are extrinsic facts which will either demonstrate the potential for coverage or establish that there is no potential for coverage. (*Ibid.; Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 195.)

An insurer's duty is to conduct a *reasonable* investigation. (*American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1571.) What constitutes a reasonable investigation depends upon the particular circumstances. If the insurer is not aware of any extrinsic facts which affect the issue of coverage, it discharges its duty by examining the facts presented to it and the terms of the policy to determine the potential for coverage. (*Ibid*.) The key issue in determining whether the insurer conducted a reasonable investigation is the nature of the facts known to it. (*Mitroff v. United States Automobile Assn.* (1999) 72 Cal.App.4th 1230, 1238, fn. 4.) If there is nothing in those facts which suggests a potential liability under the policy, there is no duty to investigate further. (*American Internat. Bank,* at p. 1571.)

At the time of SCGP's tender, the insurer had no facts other than those contained in the underlying complaint on which to base its coverage decision. Its request to SCGP to provide it with additional facts relevant to its coverage decision went unanswered. When the lawsuit itself raises no potential for coverage, an insurer does not have a continuing duty to investigate whether there is a potential for coverage. (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114.) At that point, it is the insured's burden to bring additional extrinsic facts to the attention of the insurer. (*Id.* at p. 1117.)

SCGP asserts that evidence it presented several years after it tendered its defense to the insurers in opposition to the insurers' motion for summary judgment--the declarations of David Peterson and Tony Piscitelli--demonstrates that the insurers' investigation was inadequate. The flaw in this argument, as the trial court pointed out, is that there is no evidence in the record that these facts were made known to the insurers at the time they denied coverage. SCGP was asked to provide additional information by the insurer before it made its coverage decision. SCGP chose not to do so. SCGP has cited no authority to support its contention that an insurer has a duty to make an independent investigation where, as here, the underlying complaint contains no facts which could be construed as potentially stating a cause of action and the insured fails to respond to a request for additional facts. Because the insurers' duty to determine whether there was a potential for coverage was determined on the basis of facts which were known at the time the claim was made (*Montrose Chemical Corp. v. Superior Court*, *supra*, 6 Cal.4th at p. 295), the untimely production of evidence does not establish that the insurers had a duty to defend SCGP at the time SCGP tendered its defense to the insurers.

SCGP has not met its burden of showing that the ADSI lawsuit alleged potential "disparagement" or "misappropriation of style of doing business" within the definition of "advertising injury" contained in the Northern and Maryland policies. Neither has SCGP shown there were any extrinsic facts available to Northern and Maryland at the time of denial which created a potential disparagement or misappropriation of style of doing business claim in the underlying complaint. We conclude as a matter of law that the insurers had no duty to investigate facts and evidence outside the four corners of the policy and the underlying complaint under the circumstances presented by the evidence. (*Gunderson v. Fire Ins. Exchange*, *supra*, 37 Cal.App.4th at pp. 1113-1114.) Rather, the trial court properly found that no extrinsic information was presented that would or should

have alerted the insurers of a further need to investigate coverage.

The judgment is affirmed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Henry J. Walsh, Judge

Superior Court County of Ventura

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