STATE OF MICHIGAN

COURT OF APPEALS

VETERANS OF FOREIGN WARS,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 25, 1999

No. 202664
Ingham Circuit Court
LC No. 96-083881 CK

Before: Gage, P.J., and MacKenzie and White, JJ.

WHITE, J. (concurring in part, dissenting in part).

I agree that the underlying complaints did not contain allegations, and plaintiff submitted no evidence below, from which a reasonable factfinder could infer that the injuries alleged arose out of "oral or written publication of material that . . . disparages a person's or organization's goods, products or services." I thus agree with the majority's determination that no "personal injury" arguably existed, and that no "advertising injury" arising out of such publication arguably existed.

I respectfully dissent, however, from the majority's determination that there was no basis for coverage under the "advertising injury" provision.

An insurer's duty to defend does not depend solely on the terminology used in a plaintiff's pleadings. Rather, it is necessary to focus on the basis for the injury in order to determine whether coverage exists. *Allstate Ins Co v Freeman*, 432 Mich 656, 662-663; 443 NW2d 734 (1989). The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible. *Detroit Edison v Michigan Mutual Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980). Where there is doubt whether the complaint alleges a liability covered under the policy, the doubt must be resolved in the insured's favor. *Id.*

Plaintiff Veterans of Foreign Wars (VFW) provides services to veterans. Funds for these services come from solicited donations and fundraising. The VFW contracts with private companies for the provision of solicitation and fundraising services on its behalf. At times pertinent to this case, the VFW entered into an exclusive solicitation agreement with Veteran's Services, Inc. (VSI), then with Veterans Corporation of America (VCA), and later with Veterans Benefits, Inc. (VBI).

VSI's first amended complaint in the first underlying case stated in pertinent part:

COMMON ALLEGATIONS

* * *

10. Plaintiff Veteran Services, Inc. [VSI] is engaged in the business of providing fund raising services throughout the State of Michigan. . . . .

11. Fundamental to [VSI] is certain confidential competitive information, some of which is maintained in documents, including but not limited [sic] donor lists, donor contacts, financial information, and operational procedures;

* * *

13. Defendant[Kahlon's] duties and responsibilities for Plaintiff included but not [sic] limited to control of Plaintiff's inventory and payroll, overseeing Plaintiff's telemarketers . . . and making regular contacts with Defendant Veterans of Foreign Wars [VFW]. . .

14. On August 31, 1992 . . . an exclusive solicitation agreement became effective with the Plaintiff [VSI] whereby [VFW] granted plaintiff the exclusive right to solicit contributions on behalf of [VFW]. . . and further extended by addendum in June of 1993 . . .

* * *

16. Than on or about August 1, 1994, Mr. Gul Jaisinghani, on behalf of Plaintiff, was negotiating with Defendant Buck to change the length of the contract from one year to three years . . . by telephone conference, present with [Buck was plaintiff's employee at the time, defendant Kahlon.]

17. [Buck and Jaisinghani] mutually agreed that they would meet on August 22, 1994 at the Las Vegas Hilton Hotel, which was the site of the National Convention of the [VFW], at 4:00 p.m. to extend the length of the contract, although the contract itself was in full force and effect;

18. That Defendant [Buck] proceeded to enter into a contract between Defendant [VFW] and Veterans Corporation of America [VCA] on August 2, 1994;

19. Defendant [VCA] was formed by Defendants [Kahlon, Ranganatha and Miller] while they were still in the service of Plaintiff;

* * *

24. That Defendant [Kahlon], in collaboration with Defendant[s Ranganatha, Miller, and VCA] has maintained control [of plaintiff's offices] and denied Plaintiff [VSI]

access to Plaintiff's furniture, telephones, inventory, and donor lists that were located at the offices . . .

25. That Plaintiff's donor list is confidential proprietary information, that Plaintiff believes, Defendant [Kahlon], in collaboration with Defendant[s Ranganatha, Miller, and VCA], are using to compete against plaintiff.

COUNT I. BREACH OF FIDUCIARY DUTY
[KAHLON, RANGANATHA, MILLER & VCA]

26. That Plaintiff hereby incorporates by reference paragraphs 1 through 25 of the Common Allegations . . .

27. That during his employment with Plaintiff [VSI], Defendant [Kahlon] owed to Plaintiff a duty of loyalty and service, and a duty not to misappropriate Plaintiff's donor lists and other confidential business information, or to engage in business activities in competition with Plaintiff;

[The same language is used as to the other two individual defendants formerly employed by VSI.]

* * *

33. That as a direct and proximate result of the actions of [Kahlon, Ranganatha, and Miller], Plaintiff has suffered damages which include but are not limited to lost profit, goodwill, and a total dissolution of Plaintiff's operations in the state of Michigan, additionally continued use of Plaintiff's confidential donor list;

WHEREFORE, Plaintiff [VSI] requests that the Court:

* * *

B. Issue a temporary restraining order enjoining Defendants [Singh, Ranganatha, Miller, or VCA] from engaging in any business fund raising business [sic] for the benefit of Defendant [VFW] . . .

COUNT II CONVERSION
[KAHLON, RANGANATHA, MILLER & VCA]

34. Plaintiff hereby incorporates by reference the allegations set forth in paragraphs 1 through 33 as if fully set forth herein;

* * *

36. That the donor lists are confidential and constitute trade secrets of Plaintiff;

* * *

41. That Defendants' acts in refusing to return said property are intentional;

* * *

44. That Plaintiff believes that Defendants are currently using Plaintiff's donor list to solicit donations for Defendant [VFW] and are profiting from such use;

* * *

COUNT III

TORTIOUS INTERFERENCE WITH A CONTRACTAND A BUSINESS EXPECTANCY

ALL DEFENDANTS

45. Plaintiff hereby incorporates by reference the allegations set forth in paragraphs 1 through 44 as if fully set forth herein.

46 That Plaintiff had a valid employment agreement with Defendants [Kahlon and Miller];

47. That Plaintiff had a valid solicitation contract with Defendant [VFW];

48 That Defendant [Buck] and defendant [VFW] knew of the existence of Defendants [Kahlon and Miller's] employment relationship with Plaintiff;

49. That Defendants [Kahlon, Miller and Ranganatha] knew of the existence of Plaintiff's contract with Defendant [VFW];

50. That Defendants [Buck and VFW], intentionally induced Defendants [Kahlon and Miller] to breach their contract with Plaintiff;

51. That Defendants [Kahlon, Miller and Ranganatha] intentionally induced Defendant [VFW] to breach its contract with Plaintiff;

* * *

55. By reason of Defendants [sic] actions, Plaintiff has sustained damages including loss [sic] profits and revenue generated by the conduct specified in the Complaint;

* * *

[Counts IV, V, VI and VII relating to the other defendants]

The insurance policy at issue here provides coverage for " '[a]dvertising injury' caused by an offense committed in the course of advertising your goods, products, or services." "Advertising injury" is defined as "an injury arising out of one or more of the following offenses." The offenses include "[m]isappropriation of advertising ideas or style of doing business." Fairly read, the underlying complaint includes allegations of injury arising out of the misappropriation of VSI's advertising ideas or style of doing business. Further, the complaint can fairly be read to seek recovery for injury arising from "'advertising injury' caused by an offense committed in the course of advertising [the VFW's] goods, products or services."

The insurance policy at issue does not define the term "advertising." The question how to define "advertising" when that term is not defined in the insurance policy was addressed in a case decided after the circuit court entered its opinion and order. In *GAF Sales v Hastings Mut Ins Co*, 224 Mich App 259, 264; 568 NW2d 165 (1997), this Court declined to decide whether the narrow or broad definitions advanced by the parties applied to the term, but noted "the existence of Michigan precedent adopting a very broad definition of advertising, *People v Montague*, 280 Mich 610; 274 NW 347 (1937),[1] as well as the ability of insurance companies to provide a clear definition of the term in their policies." *Id.* The issue was addressed after *GAF*, in *Farmington Casualty Co v Cyberlogic Technologies*, 996 F Supp 695, 701-702 (ED Mich, 1998). *Cyberlogic* involved an alleged "advertising injury" under an insurance policy that did not define "advertising" and had pertinent language identical to that in the instant case. The district court concluded that the term "advertising" is ambiguous, citing numerous state and federal cases that arrived at disparate definitions. Applying Michigan law, the district court concluded that Michigan courts would adopt the "broad" definition of advertising advanced by the plaintiff in *GAF, supra*, "any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business," *Cyberlogic, supra* at 703, quoting *GAF, supra* at 263-264, and Black's Law Dictionary (5th ed 1979). In the instant case, I conclude that the dissemination of information regarding the VFW to prospective donors through the solicitation process[2] falls within the definition of advertising.

While the only count of the original underlying complaint addressed to plaintiff is the tortious interference count, that count incorporates the preceding allegations, which describe the misappropriation of confidential competitive information, including donor lists and operational procedures, and the use of that information by the other individual defendants, whom the VFW is alleged to have wrongfully induced to breach their employment contracts, to solicit funds for the VFW to the detriment of VSI. The damages sought are described by reference to "the conduct specified in the complaint." Thus, looking at the substance, rather than the form of the complaint, the complaint can be seen to include a claim for damages for the loss incurred by VSI when the VFW wrongfully induced the other defendants to breach their employment contracts with VSI, which contracts included, according to the complaint, "a duty of loyalty and service, and a duty not to misappropriate [VSI's] donor lists and other confidential business information, or to engage in business activities in competition with [VSI]," and the other defendants in fact breached their employment contracts by misappropriating advertising ideas or style of doing business and using them in the course of advertising the VFW's services.

Lastly, the nature of the VFW's fundraising efforts (direct solicitation of donors) and the nature of VSI's product (solicitation services) distinguish this case from *GAF* and *Cyberlogic*, where the courts found that the requirement of a causal connection between the advertising and the injury was not met. The question is whether the VFW's course of advertising is alleged to have caused the alleged injury. In *GAF* and *Cyberlogic*, the courts held that the injuries were not caused by advertising activity, but, rather, by the purchase and resale of copyrighted software, *GAF*, and the sale of the infringing product, *Cyberlogic*. Here the product at issue is solicitation services, which activity is included in the broad definition of advertising. Thus, the injury complained of by VSI does arise out of the VFW's advertising because it is the actual promotion of the VFW to prospective donors that is alleged to cause the injury, and not the sale of some other product. Stated differently, the advertising or solicitation itself is alleged to be wrongful, as distinguished from the lawful advertising of an infringing product.

I conclude that when the underlying complaints are viewed as required by case law, *Freeman*, *supra*, they arguably allege some injuries caused by offenses committed in the course of advertising and arising from the "misappropriation of advertising ideas or style of doing business." I would reverse and remand.

/s/ Helene N. White

[1] *Montague*, *supra*, cited the definition of "advertising" of 2 CJS 890:

> [t]o advise, to announce, to apprise, to command, to give notice of, to inform, to make known, to notify, to publish . . . now the [term "advertising"] means 'public intimation or announcement of anything,' whether by publication in newspapers, or handbills, or by oral proclamation.

[2] The VFW's contract with VSI contemplated the provision of "gifts" to donors, including promotional items such as trash bags, flags, first aid kits and fire extinguishers. It is unclear from the record whether any such items were used by the defendants in the underlying case. I conclude that the provision of such items is also fairly within the term "advertising."