

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 02-1851

Cir. Ct. No. 01-CV-1993

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

INDIANA INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

v.

SUPER NATURAL DISTRIBUTORS, INC.,

DEFENDANT-APPELLANT,

CYTODYNE TECHNOLOGIES, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Reversed and cause remanded.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 ANDERSON, P.J. This is a declaratory judgment action presenting an insurance coverage dispute. Indiana Insurance Company denied coverage to Super Natural Distributors, Inc., its insured. Indiana Insurance sought a

declaratory judgment relieving it of responsibility to its insured. Indiana Insurance and Super Natural filed cross-motions for summary judgment. The circuit court granted summary judgment in favor of Indiana Insurance and denied Super Natural's cross-motion. Super Natural appeals.

¶2 Our decision in *Fireman's Fund Insurance Co. of Wisconsin v. Bradley Corp.*, 2002 WI App 179, 256 Wis. 2d 643, 649 N.W.2d 685 (*Fireman's Fund I*), and the case at bar address the question of whether an insurance company has a duty to defend under the advertising injury provisions of its insurance policies. The underlying facts and the trial court's holding in the case at bar are significantly similar to the facts of and to our holding in *Fireman's Fund I*.

¶3 Therefore, the first time this case came before us, we certified it to the Wisconsin Supreme Court, which had before it the recently accepted petition for review of our decision in *Fireman's Fund I*. The supreme court reversed our decision in *Fireman's Fund I*, see *Fireman's Fund Insurance Co. of Wisconsin v. Bradley Corp.*, 2003 WI 33, ¶¶5-6, 261 Wis. 2d 4, 660 N.W.2d 666 (*Fireman's Fund II*), and denied our certification of the case at bar.

¶4 In its holding in *Fireman's Fund II*, the supreme court concluded that the insurance company had the duty to defend its insured under the advertising injury provisions of the company's insurance policies. *Id.*, ¶5. In adherence to the supreme court's reasoning in *Fireman's Fund II*, we reverse the circuit court.

Facts

¶5 On September 1, 2000, Indiana Insurance issued a commercial general liability insurance policy and an umbrella policy (together, “the Policies”) to Super Natural. Each policy contained an “advertising injury” clause. Those clauses insured Super Natural against (among other things) liability and costs of defense arising from claims of “infringement of copyright,” “infringement of ... title,” “[m]isappropriation of advertising ideas or style of doing business,” “use of another’s advertising idea in your ‘advertisement,’” and “[i]nfringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’”

¶6 On March 22, 2001, Cytodyne Technologies, Inc., filed a lawsuit in the United States District Court for the District of New Jersey against a large number of defendants, eventually including Super Natural (the Cytodyne Litigation). The Cytodyne Litigation arose out of alleged sales of a counterfeit version of Cytodyne’s trademarked diet aid Xenadrine.® Cytodyne alleged the following counts against Super Natural:

- I. Federal trademark infringement and counterfeiting (Violation of 15 U.S.C. § 1114(1))
- II. False Designation of Origin and False Representation (Violation of 15 U.S.C. § 1125(a)(1))
- III. Copyright Infringement (Violation of 17 U.S.C. § 106)
- IV. Common Law Trademark and Trade Name Infringement, and Unfair Competition
- V. Violation of New Jersey state false designation of origin statute (Violation of N.J.S.A. 56:3-13, 16)
- VI. Deceptive Trade Practices and Consumer Fraud (State) (Violation of N.J.S.A. 56:8-2)

- VII. Trademark Infringement (State)
- VIII. Unfair Competition (State)
- IX. Breach of Contract
- X. Breach of Implied Covenant of Good Faith and Fair Dealing
- XI. Unjust Enrichment

¶7 Super Natural tendered defense of the Cytodyne Litigation to Indiana Insurance under the Policies and asserted coverage of the threatened liability. Indiana Insurance rejected that tender and denied coverage. Indiana Insurance sought a declaratory judgment relieving it of responsibility to its insured. Cytodyne disclaimed any interest in the case and did not participate. Indiana Insurance and Super Natural filed cross-motions for summary judgment.

¶8 On June 20, 2002, the circuit court determined that, in the underlying controversy, “Cytodyne is claiming that Super Natural sold a similar product and represented that it was Xenadrine.® Any advertising which may have occurred in relation to this activity is not causally related to the wrong committed.” Based on this determination, the court granted Indiana Insurance’s summary judgment motion and denied Super Natural’s cross-motion. Judgment was entered accordingly. Super Natural appealed from the judgment on July 15, 2002.

¶9 In its appellate brief, Super Natural relies on our opinion in *Fireman’s Fund I* to support its position that it should be covered for the injuries alleged by Cytodyne under the “advertising injury” provisions of its Indiana Insurance policies. It asserts:

[I]n the context of trade mark, copyright, and trade dress infringement claims [the distinction between harm arising from the nature of the product itself and harm arising from

advertising of or representations about that product] is a false alternative. The harm alleged in such cases does not and cannot come from sales of the offending product in isolation, but only from such sales in combination with what the seller says about that product in order to sell it.

¶10 Indiana Insurance also relies on *Fireman's Fund I* to support its opposing position that “[t]he advertising injury coverage provisions in the policies provide no coverage for the claims against Super Natural.” Indiana Insurance states:

Courts interpreting Wisconsin law have consistently held that, for advertising injury coverage to apply, “there must be some nexus—some causal connection—between the ground of asserted liability and the insured’s advertising activities before there is coverage or a duty to defend.” *Tri-Clover, Inc.*, 2000 U.S. Dist. LEXIS 9981, at *26, citing Wisconsin law.

Indiana Insurance points out that “[t]his causal requirement was very recently reiterated in *Fireman's Fund I*.”¹

¶11 The issue that was before this court in *Fireman's Fund I* and the issue here require clarification of coverage under the “advertising injury” provisions of Wisconsin insurance policies. The supreme court has now made that

¹ In *Fireman's Fund I*, we held:

Two fundamental prongs must be satisfied before we may find coverage under an advertising injury clause: (1) the injury must fall within one of the categories covered under the insurance policy, *e.g.*, the injury qualifies as either the misappropriation of advertising ideas or the misappropriation of the style of doing business; and (2) there is a causal connection between the advertising and the injury.

Fireman's Fund Ins. Co. of Wis. v. Bradley Corp., 2002 WI App 179, ¶14, 256 Wis. 2d 643, 649 N.W.2d 685 (*Fireman's Fund I*).

clarification in *Fireman's Fund II*, and we track its decision for our reasoning in the case at bar.

¶12 First, we summarize the facts in *Fireman's Fund II*. The insurance company issued four comprehensive general liability insurance policies to Bradley Corporation effective from February 1, 1996, to February 1, 2000. The insurance policies provided that the insurance company would pay those sums that Bradley became obligated to pay as damages because of bodily injury, property damage, personal injury, or advertising injury. The insurance policies defined each of these terms.

¶13 On December 3, 1998, Lawler filed a lawsuit against the defendants in the United States District Court for the Southern District of Indiana. The original complaint set forth eight counts, including breach of fiduciary duty, trade secret misappropriation, unjust enrichment, diversion of corporate opportunities, conversion, negligence, federal unfair competition, and common law unfair competition. Lawler's supplemental complaint further asserted a claim for patent infringement.

¶14 Bradley and Lawler were competitors in the development and sale of thermostatic mixing systems intended for emergency applications. The lawsuit resulted from alleged corporate/industrial espionage by a former Lawler employee, Kevin Kline. Lawler designed and patented thermostatic mixing valves capable of regulating the inflow of hot and cold water into emergency showers and eyewash systems so as to consistently and immediately produce tempered water. The complaint alleged that Kline stole Lawler's "ideas, concepts, and designs" for its thermostatic mixing valves, and that Bradley then hired Kline and used the stolen

information to create its own thermostatic mixing valves for emergency showers and eyewash systems.

¶15 Bradley did not notify the insurance company of the Lawler lawsuit until March 2, 2000, nearly fifteen months after the initial complaint and just two weeks before a hearing on a preliminary injunction had been scheduled. At that time, the insurance company denied coverage for the lawsuit.

¶16 On August 18, 2000, the insurance company sought a declaratory judgment in Milwaukee county circuit court that it had no obligation under its insurance policies to defend or indemnify Bradley in the Lawler lawsuit. On July 25, 2001, the circuit court denied the insurance company's motion for summary judgment and granted summary judgment to Bradley. The circuit court held that the insurance company had a duty to defend Bradley in the underlying Lawler lawsuit because count II of the Lawler complaint, alleging "trade secret misappropriation," constituted an "advertising injury" covered by the general liability insurance policies. In addition, the circuit court held that although the notice provided by Bradley was untimely, the insurance company was not prejudiced by the delay and therefore the lack of timely notice did not result in the loss of coverage. The circuit court ordered the insurance company to pay Bradley \$2,887,594.24 for defense and indemnification costs. The insurance company appealed.

¶17 On appeal, we reversed the judgment of the circuit court. *Fireman's Fund I*, 256 Wis. 2d 643, ¶27. We held that neither count II (alleging "trade secret misappropriation") nor count VII (alleging "federal unfair competition") of Lawler's complaint triggered the insurance company's duty to defend. *Id.*, ¶¶16, 25.

¶18 Then, in *Fireman’s Fund II*, the supreme court reversed our decision, holding that the insurance company had a duty to defend Bradley under the “advertising injury” provisions of its general liability insurance policies.

¶19 Specifically, the supreme court stated that the allegations in count VII of the Lawler complaint, alleging unfair competition in violation of the federal Lanham Act, gave rise to the possibility of coverage. *Fireman’s Fund II*, 261 Wis. 2d 4, ¶6. It held that count VII of the Lawler complaint arguably made a claim for trade dress infringement that falls within the advertising injury’s “infringement of trademark” provision. *Id.* It concluded that the complaint alleged the injury of consumer confusion, that Bradley’s promotion of Lawler’s misappropriated designs was advertising, and that it was reasonable to infer that Bradley’s advertising activities contributed to the injury alleged.² *Id.*

¶20 Accordingly, the supreme court held, as a matter of law, that the insurance company had a duty to defend Bradley in the Lawler lawsuit and reversed our decision in *Fireman’s Fund I*. *Fireman’s Fund II*, 261 Wis. 2d 4, ¶8.

¶21 Thereafter, we called for supplemental briefs in light of the newly released *Fireman’s Fund II*. In supplemental briefs, each party asserts that the supreme court’s decision supports its position. Super Natural makes the stronger case.

² Though unrelated to the case at bar, we note that the supreme court additionally held that although Bradley did not provide timely notice to the insurance company of the Lawler lawsuit, Bradley carried the burden of persuasion that the late notice did not prejudice the insurance company. *Fireman’s Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶7, 261 Wis. 2d 4, 660 N.W.2d 666 (*Fireman’s Fund II*).

Standards of Review

¶22 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). Summary judgment is appropriate when a court is satisfied that the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2001-02).

¶23 This declaratory judgment action also involves the interpretation of insurance policies. The rules of interpretation applicable in the case at hand are as follows: Words and phrases in insurance contracts are subject to the same rules of construction that apply to contracts generally; the primary objective in interpreting and construing a contract is to ascertain and carry out the true intent of the parties. *Fireman's Fund II*, 261 Wis. 2d 4, ¶16. When no extrinsic evidence is introduced, the interpretation of an insurance policy is a question of law that we determine independently of the circuit court. *Id.*, ¶17. No extrinsic evidence was introduced in the present case.

¶24 The relevant legal analysis for determining when an insurer has a duty to defend an insured is well established in Wisconsin. An insurer's duty to defend an insured is determined by comparing the allegations of the complaint to the terms of the insurance policy. *Id.*, ¶19. "An insurer's duty to defend the insured in a third-party suit is predicated on allegations in a complaint which, if proven, would give rise to the possibility of recovery that falls under the terms and conditions of the insurance policy." *Id.* (citation omitted). The duty to defend is

based solely on the allegations “contained within the four corners of the complaint,” without resort to extrinsic facts or evidence. *Id.* (citation omitted).

¶25 When comparing the allegations of a complaint to the terms of an insurance policy, the allegations in the complaint are construed liberally. *Id.*, ¶20. The duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage. *Id.* We therefore “assume all reasonable inferences” in the allegations of a complaint and resolve any doubt regarding the duty to defend in favor of the insured. *Id.* (citation omitted).

¶26 In addition, a duty to defend is based upon the nature of the claim and not on the merits of the claim. *Id.*, ¶21. “It is the nature of the claim alleged against the insured which is controlling even though the suit may be groundless, false or fraudulent.” *Id.* (citation omitted). Consequently, “an insurer may have a clear duty to defend a claim that is utterly specious because, if it were meritorious, it would be covered.” *Id.* (citation omitted). Finally, when an insurance policy provides coverage for even one claim made in a lawsuit, the insurer is obligated to defend the entire suit. *Id.*

Discussion

¶27 To determine Indiana Insurance’s duty to defend, we first examine the “advertising injury” provision of the general liability insurance policy and the umbrella policy, and then turn to the allegations in the Cytodyne complaint.

¶28 Like the general liability policies in *Fireman’s Fund II*, the policies here provide that the insurance company will have the right and duty to defend its insured against any suit alleging advertising injury. *See id.*, ¶23. “Advertising

injury” provisions have been part of the standard form general liability insurance policy for many years, and a growing body of case law has developed around claims that “advertising injury” provisions provide coverage for intellectual property lawsuits, including trademark and trade dress, patent, copyright, and trade secret cases. *Id.*

¶29 The policies in *Fireman’s Fund II* relating to “Personal and Advertising Injury Liability” provided coverage for an “advertising injury” caused by an offense committed in the course of advertising the insured’s goods, products, or services. *Id.*, ¶24. Similarly, the policies here relating to “Personal and Advertising Injury” provide coverage for an “advertising injury” caused by “an offense arising out of your business.”

¶30 In *Fireman’s Fund II*, the insurance policies defined “advertising injury” as an injury “arising out of one or more of” four distinct offenses, including “infringement of trademark.” *Id.* Specifically, the policies read in relevant part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of **personal injury** or **advertising injury**....

....

... This insurance applies to:

....

... **Advertising injury** caused by an offense committed in the course of advertising your goods, products or services.

....

Advertising injury means injury arising out of one or more of the following offenses:

- a. Oral, written, televised or videotaped publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- b. Oral, written, televised or videotaped publication of material that violates a person's right of privacy;
- c. Misappropriation of advertising ideas or style of doing business; or
- d. Infringement of trademark, copyright, title or slogan.

Id., ¶25 (footnote omitted).

¶31 Likewise, the insurance policies here define “advertising injury” as an injury arising out of the “use of another’s advertising idea in your ‘advertisement,’” or “[i]nfringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’” Specifically, the Indiana Insurance policies provide in relevant part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and *advertising injury*” to which this insurance applies.

....

This insurance applies to “personal and *advertising injury*” caused by an offense arising out of your business

....

“Personal and *advertising injury*” means injury, including consequential “bodily injury,” arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

- d. 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;
- e. Oral or written publication of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement." (Emphasis added.)

¶32 The four offenses listed in the definition of "advertising injury" in *Fireman's Fund II* and the last four offenses listed in the definition of "advertising injury" in the case at bar are substantively the same. If even one covered offense is alleged in the underlying complaint, the insurance company has a duty to defend.

¶33 In *Fireman's Fund II*, the supreme court looked to the allegations in the underlying complaint to determine whether they gave rise to the possibility of coverage under the general liability insurance policies' "advertising injury" provision relating to "infringement of trademark." *Id.*, ¶26. The meaning of "infringement of trademark" is substantively the same as the meaning of "infringement of copyright, trade dress or slogan," *see id.*, ¶28 n.26 ("The term 'trademark' can be used in a broad and generic sense to denote the entire field of trademarks, service marks, trade names, and trade dress.") (citation omitted). Here, we look to the allegations in the Cytodyne complaint to determine whether they give rise to the possibility of coverage under the Policies' "advertising injury" provision (subsec. g) relating to infringement of copyright, trade dress³ or slogan.

³ Trade dress is defined as:

(continued)

¶34 In order to make the possibility-of-coverage determination, we must answer three questions: (a) Does the Cytodyne complaint state an offense covered under the “advertising injury” provisions of the insurance policies? (b) Does the Cytodyne complaint allege that Super Natural engaged in advertising activity? (c) Does the Cytodyne complaint allege a causal connection between the injury alleged and Super Natural’s advertising activity? *See id.*, ¶26.

¶35 *Does the complaint allege advertising injury?* The touchstone for determining whether a complaint has alleged an advertising injury is the enumerated offenses in the insurance policy. *See id.*, ¶27. Only those risks are insured. *Id.*

¶36 The Cytodyne complaint alleges that the defendants committed eleven separate offenses. Our inquiry focuses on count II titled, “FALSE DESIGNATION OF ORIGIN AND FALSE REPRESENTATION,” alleging that “All Defendants” including Super Natural violated § 43 of the federal Lanham Act (15 U.S.C. § 1125) (2003).⁴

[A] product’s “total image” and “refers to the total image of a product, including features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.” Moreover, it includes not only the packaging or “dressing” of a product but can also encompass the “*design* of a product.” The purpose of both trade dress and trademark is to enable a business to identify itself as the source of a given product through the adoption of some distinctive mark.

Fireman’s Fund II, 261 Wis. 2d 4, ¶28 (citations and footnotes omitted).

⁴ 15 U.S.C. § 1125 (2003) reads, in relevant part:

(a) Civil action.

(continued)

¶37 In *Fireman’s Fund II*, 261 Wis. 2d 4, ¶32, the supreme court concluded that the following allegation of a Lanham Act violation “arguably fit within trade dress infringement”:

Bradley’s misappropriation of Lawler’s Trade Secrets, technologies and designs relating to thermostatic mixing valves and the use thereof in connection with the accused products is a false designation of origin, or a false description or representation, and wrongfully and falsely designates the origin of Lawler’s thermostatic mixing valve technology as originating from or being connected with Bradley, and amounts to using a false description or representation in commerce.

... Bradley’s said acts are in violation of the federal Lanham Act (15 U.S.C. § 1125).

Fireman’s Fund II, 261 Wis. 2d 4, ¶31. The court found it reasonable to infer that the complaint’s allegation of misappropriated “designs” referred to “something apart from both trade secrets and misappropriated technologies and possibly reaches distinguishing, non-functional items” in the product. *Id.*, ¶32. Because the complaint in *Fireman’s Fund II* further asserted that the insured had displayed the product at trade shows and mentioned that the insured had prepared

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

“materials promoting” the product, the court held that advertising injury was sufficiently alleged. *Id.*, ¶¶44-46.

¶38 We note that while the *Fireman’s Fund II* complaint and the complaint before us contain several similar claims, the complaint before us, unlike *Fireman’s Fund II*, expressly accuses Super Natural of causing injury to Cytodyne by trademark and trade dress infringement. Thus, we need not rely on inference to determine that the complaint alleges advertising injury because it specifically alleges “use of Cytodyne’s trademark Xenadrine ... and the trade dress of Xenadrine.” Count II of the Cytodyne complaint alleges a Lanham Act violation based on Super Natural’s

distribution, sale, advertising, offering for sale or other use of Cytodyne’s trademark Xenadrine ... and [Cytodyne’s] trade dress of Xenadrine constitute false designations of origin, false descriptions and representations, and false advertising in commerce, which are likely to cause confusion, or to cause mistake, mislead the trade and public into believing that Defendants’ products originate from, are affiliated or connected with, or are licensed, sponsored, authorized, approved or sanctioned by Cytodyne.

Defendants’ activities constitute the use of a false designation of origin and a false representation in commerce in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1).

Thus, like the complaint in *Fireman’s Fund II*, the complaint before us sufficiently alleges advertising injury.

¶39 *Does the complaint allege that Super Natural engaged in advertising?* The second question we must answer to determine whether Indiana Insurance owed a duty to defend is whether the Cytodyne complaint alleges that Super Natural engaged in advertising. *Fireman’s Fund II*, 261 Wis. 2d 4, ¶41.

¶40 Wisconsin case law has concluded that the word “advertising” is a nontechnical word in an insurance policy that should be given its ordinary meaning. *Id.*, ¶42. In general, advertising refers to “calling the public’s attention to a product or business by proclaiming its qualities or advantages in order to increase sales or arouse a desire to buy or patronize.” *Id.* (footnote omitted).

¶41 In the context of trademark and trade dress infringement cases, courts are divided regarding how broadly to interpret the word “advertising,” even understood in this ordinary and popular sense. *Id.*, ¶43. Courts adopting a narrow definition of advertising require that advertising include the widespread announcement or distribution of promotional materials. *Id.* Courts adopting a broader definition of advertising, however, hold that “any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business” is sufficient. *Id.* In many cases, the specific context, including the product and the business, will dictate a particular interpretation. *Id.*

¶42 The supreme court determined in *Fireman’s Fund II* that it did not need to adopt a definition for advertising. It determined that the underlying complaint did not require it to parse the word “advertising” by adopting either the narrow or the broad interpretation to decide the case because the alleged activities satisfied both definitions. *Id.*, ¶44. There, the complaint alleged that Bradley had created “materials promoting” its thermostatic mixing valves. It alleged that Bradley displayed its shower systems, including the thermostatic mixing valves, to “existing and potential customers” at a trade show. *Id.*

¶43 In the case at bar, the injury alleged does not depend on implicit representations in nonfunctional aspects of a product’s appearance and design; it depends on what Super Natural, “an authorized distributor,” allegedly conveyed

on labels, promotional materials, and in statements to the trade regarding the source and origin of the allegedly counterfeit Xenadrine. *Cf. id.*, ¶32 (where the supreme court found it reasonable to infer that the underlying complaint’s allegation of misappropriated “designs” referred to “something apart from both trade secrets and misappropriated technologies and possibly reaches distinguishing, non-functional items” in the product). Cytodyne alleges that Super Natural, its “authorized distributor,” engaged in “distribution, sale, advertising, offering for sale or other use of Cytodyne’s trademark Xenadrine” while using a counterfeit version of Xenadrine and thus, in so doing, was likely to cause confusion or mistake or to mislead the trade and public.

¶44 Indiana Insurance counters that the injury complained of by Cytodyne arose from the allegedly counterfeit nature of Xenadrine that Super Natural was selling rather than from the advertisement of that product as Xenadrine. This type of argument was not persuasive to the supreme court in *Fireman’s Fund II*; it remains unpersuasive in the case at bar.

¶45 *Fireman’s Fund II* established that simply presenting a product to the trade under circumstances that allegedly create a mistaken impression about the origin of the product is enough to determine that the presenter of the product engaged in advertising. Thus, Super Natural engaged in advertising.

¶46 *Does the complaint allege that Super Natural’s advertising activities caused the advertising injury?* Having determined that count II alleges an offense covered under the “advertising injury” provisions of the Indiana Insurance policies and that Super Natural engaged in advertising, we now turn to whether the Cytodyne complaint alleges that Super Natural’s advertising activities caused the

advertising injury. We conclude that a causal connection is alleged and that the Cytodyne complaint therefore triggers Indiana Insurance's duty to defend.

¶47 In *Fireman's Fund II*, the supreme court emphasized that the question is not whether the injury could have taken place without the advertising, but whether the advertising *contributed* to the injury alleged. *Id.*, ¶¶25-26. There, the underlying complaint alleged that Lawler was injured by the consumer confusion caused by the thermostatic mixing valves that Bradley produced with misappropriated designs. *Id.*, ¶51. The supreme court concluded that it was reasonable to infer—based upon the allegations that Bradley created materials promoting the misappropriated designs and displayed those designs at a trade show—that these advertising activities contributed to the alleged injury of consumer confusion. *Id.*, ¶53. The court held that the insurance company had a duty to defend.

¶48 Here, the complaint alleges that Super Natural, “an authorized distributor,” presented Xenidrine® to the trade under circumstances that allegedly created a mistaken impression about the origin of the product and that this presentation was likely to “cause confusion, or to cause mistake, mislead the trade and public.”

¶49 We conclude that it is reasonable to infer—based upon the allegations that Super Natural presented Xenidrine® to the trade under circumstances that allegedly created a mistaken impression about the origin of the product—that these advertising activities contributed to the alleged injuries of confusion, mistake and a misleading of the trade and public. *See id.*

¶50 In light of the supreme court's decision in *Fireman's Fund II*, Indiana Insurance cannot escape its duty to defend Super Natural in the lawsuit

brought by Cytodyne against Super Natural.⁵ The Cytodyne complaint states an offense covered under the Indiana Insurance Company Policies, the complaint alleges that Super Natural engaged in advertising, and the complaint alleges a causal connection between the injury alleged and Super Natural's advertising. We hold that Indiana Insurance owes Super Natural the duty to defend. We reverse the grant of summary judgment to Indiana Insurance and remand for further proceedings.

¶51 As a final note, we address Super Natural's motion to strike page twelve of Indiana Insurance's supplemental brief. Super Natural contends that page twelve of Indiana Insurance's brief is an improper response to this court's order to submit supplemental briefs addressing the impact of the supreme court's opinion in *Fireman's Fund II*. Super Natural points out that page twelve of Indiana Insurance's brief includes an argument that providing insurance coverage in this case would be contrary to public policy. Super Natural contends that this argument not only has nothing to do with the supreme court's decision in *Fireman's Fund II*, but it was also never raised by Indiana Insurance in the circuit court.

¶52 We held this motion in abeyance until our disposition of the issue on appeal. Upon review, we conclude that Super Natural's motion has merit. The motion to strike is granted. The issues on summary judgment are those raised by

⁵ The circuit court in the case at bar relied heavily upon *Advance Watch Co. v. Kemper National Insurance Co.*, 99 F.3d 795 (6th Cir. 1996), a decision which is inconsistent with the supreme court's analysis in *Fireman's Fund II*. *Advance Watch* rejected the concept that a product's shape or appearance constitutes a representation about the origin of that product and could therefore cause advertising injury by misleading potential buyers. Conversely, *Fireman's Fund II* approves of this very concept.

the pleadings and other evidence offered in support of the motion. *Richman v. Sec. Sav. & Loan Ass'n*, 57 Wis. 2d 358, 361, 204 N.W.2d 511 (1973). The primary question for the circuit court to resolve is whether there is a triable issue of fact. *Id.* Indiana Insurance cannot attack the determination of the circuit court that there is no triable issue of fact by attempting to amend its complaint on appeal. *See id.*

By the Court.—Judgment reversed and cause remanded.

Recommended for publication in the official reports.