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INFRINGEMENT OF "SLOGAN" TRIGGERS THE DUTY TO DEFEND

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In recent years, insurers have modified the coverage for "personal and advertising injury" in the standard form used in commercial general liability coverage to exclude claims for trademark infringement. However, the coverage form continues to include "Infringing upon another's copyright, trade dress or slogan in your 'advertisement'" within the definition of "personal and advertising injury." In lawsuits involving trademark infringement and related claims, policyholders should carefully examine the complaint to determine if the potential for infringement of "slogan" exists, thereby triggering a duty to defend the case notwithstanding any exclusion for trademark infringement. The term "slogan" itself is not defined in the personal and advertising injury coverage form. Thus, courts will look to the term's ordinary and common usage, and in that context, "slogan" has been broadly defined. One court observed: "A slogan is a 'brief attention-getting *phrase* used in advertising or promotion' . . . or 'a *phrase* used repeatedly, as in promotion.'" *Palmer v. Truck Ins. Exchange*, 21 Cal.4th 1109 (1999). The case of *The Cincinnati Insurance Co. v. Zen Design Group, Ltd.*, 329 F.3d 546 (6th Cir. 2003), is instructive. In that case, Zen Design was sued for trademark and trade dress infringement for the use of the words "The Wearable Light" on its flashlight products, which were sold under the trademark "SAPPHIRE." Zen Design contended that the allegations in the complaint against it triggered the insurer's duty to defend for slogan infringement in its commercial general liability policy. The Court of Appeals for the Sixth Circuit agreed even though the complaint contained no cause of action for slogan infringement: "Relying on other common definitions of slogan, 'The Wearable Light as used in the [] advertisement also can be considered '[a] brief attention-getting phrase used in advertising or promotion.' . . . When a potential claim for slogan infringement is derived from the allegations in [the] complaint the duty to defend arises because 'there are . . . theories of recovery that fall within the policy.'" 329 F.3d at 556. In summary, policyholders facing complaints alleging trademark infringement should not assume that coverage is unavailable under their commercial general liability policies even if those policies contain exclusions for trademark infringement claims. Rather, the allegations of such complaints should be carefully analyzed to determine whether the potential for slogan infringement exists and thus triggers the duty to defend under personal and advertising injury coverage.

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