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Recent Decision Determines Retail Displays May Qualify As 'Advertisements' Under CGL Insurance Policies

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A recent decision interpreting insurance coverage for "advertising injury" under commercial general liability (CGL) insurance policies ruled that claims of allegedly infringing product displays can trigger the duty to defend. Most businesses purchase CGL insurance as a key part of their liability insurance programs. The current version of the typical form used by insurers in connection with CGL policies provides coverage for "advertising injury" caused by an offense committed in the course of "advertising" the insured's goods, products or services. That form typically defines "advertisement" as notice published to the general public at large or specific market segments for purposes of attracting customers or supporters. A recent Illinois appellate court decision, however, has recognized that advertising injury coverage extends to certain product displays. Specifically, the First Judicial District of the Appellate Court of Illinois determined that retail store displays may constitute "advertisements" for purposes of meeting the requirements for advertising injury coverage under CGL policies to the extent such displays constitute advertisements in and of themselves and do not merely serve to display the products at issue. In *Selective Insurance Company of the Southeast v. Creation Supply, Inc.*, 2015 IL App (1st) 140152-U (February 9, 2015), the insured Creation Supply had been sued in an underlying lawsuit alleging trademark infringement, trade dress, and unfair competition based on Creation Supply's import and sale of double-ended, square shaped colored markers. The underlying complaint alleged, among other things, that Creation Supply's "unauthorized use of [the underlying plaintiffs'] squarish marker body configuration and squarish marker cap-end configuration in connection with marker products in retail store displays in Oregon and the rest of the United States, and on the websites of Creation Supply and its other online retailers, is causing confusion among potential purchasers of [the underlying plaintiffs'] products." Creation Supply sought a defense from the underlying lawsuit from its CGL insurer, Selective, under the "advertising injury" provisions of the policy at issue. Selective thereafter brought a declaratory judgment suit seeking a judicial determination that it owed no defense obligation under the policy. In connection with cross-motions for summary judgment filed by the parties, the trial court determined that Selective had a duty to defend Creation Supply from the underlying suit. Selective appealed. On appeal, the Illinois appellate court addressed the issue, among others, of whether the retail product displays themselves constituted an "advertisement" for purposes of advertising injury coverage. The court determined that the retail product displays—which included placards above the markers themselves with an enlarged picture of such

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markers and which had appeared in stores throughout Oregon (where the underlying litigation was filed)—“serve[d] as an announcement disseminating the product to the public” and therefore met the definition of an “advertisement” under the policy language. The court found it significant that “[t]he placards are more than the mere display of the product itself and affirmatively serve to attract customers.” The court noted, however, that if “the retail product display merely included a large bin containing the markers and nothing more, then Selective would have a valid argument that the retail product display did not constitute advertising as contemplated under the policy.” Accordingly, if your business gets sued and there is a potential connection between the alleged wrongdoing and “advertising” your goods, products or services, it makes sense to consider coverage under your CGL policy and tendering the complaint to your insurer with the goal of obtaining a defense.