

NO. A08-321

State of Minnesota
 In Supreme Court

GENERAL CASUALTY COMPANY OF WISCONSIN,
Plaintiff,

vs.

WOZNIAK TRAVEL, INC. d/b/a HOBBIT TRAVEL and
 THE SAUL ZAENTZ COMPANY d/b/a TOLKIEN ENTERPRISES,
Defendants.

**BRIEF OF AMICI CURIAE LAND O'LAKES, INC.,
 3M COMPANY AND APOGEE ENTERPRISES, INC.**

COOK & FRANKE S.C.
 Jeffrey A. Evans (W.S.B. #1059025)
 660 East Mason Street
 Milwaukee, Wisconsin 53202
 (414) 271-5900

COUSINEAU McGUIRE CHARTERED
 James L. Haigh (MN #39469)
 Trina R. Alvero (MN #0350667)
 Andrea E. Reisbord (MN #22411X)
 1550 Utica Avenue South, Suite 600
 Minneapolis, Minnesota 55416-5318
 (952) 546-8400

*Attorneys for Plaintiff General Casualty
 Company of Wisconsin*

MASLON EDELMAN BORMAN
 & BRAND, LLP

Gary J. Haugen (MN #42328)
 Mary R. Vasaly (MN #152523)
 Margo S. Brownell (MN #307324)
 3300 Wells Fargo Center
 90 South Seventh Street
 Minneapolis, Minnesota 55402
 (612) 672-8200

*Attorneys for Amici Curiae Land O'Lakes, Inc.,
 3M Company and Apogee Enterprises, Inc.*

(Additional Counsel listed on following page)

WINTHROP & WEINSTINE, P.A.
Tiffany A. Blofield (MN #0237379)
Robert R. Weinstein (MN #0115435)
225 South Sixth Street, Suite 3500
Minneapolis, Minnesota 55402-4629
(612) 604-6400

HOWARD RICE NEMEROVSKI
CANADY FALK & RABKIN
Jeffrey E. Faucette (Cal. SBN 193066)
Sarah J. Givan, Esquire (Cal. SBN 238301)
3 Embarcadero Center, Seventh Floor
San Francisco, California 94111-4024
(415) 434-1600

*Attorneys for Defendant The Saul Zaentz
Company, d/b/a Tolkien Enterprises*

LINDQUIST & VENNUM P.L.L.P.
Thomas C. Mielenhausen (MN #160325)
Christopher L. Lynch (MN #0284154)
4200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 371-3211

*Attorneys for Defendant Wozniak Travel
d/b/a Hobbit Travel*

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF LEGAL ISSUES 1

INTEREST OF *AMICI CURIAE*2

ARGUMENT.....3

I. Trademark Infringement is Covered under the “Advertising Injury”
Provisions of the General Casualty CGL Policy.3

 A. The Minnesota Rules of Construction for Insurance Policies Favor a
 Broad Reading of the Advertising Injury Coverage Provision.4

 B. Trademark Infringement is “Misappropriation of Advertising Ideas
 or Style of Doing Business.”7

 C. Trademark Infringement Should Be Covered Under The Advertising
 Injury Category “Infringement Of Copyright, Title Or Slogan.” 10

II. This Court Should Not Adopt the Reasoning of Decisions that have Denied
Coverage For Trademark Infringement Because It is Inconsistent with
Minnesota Law. 12

III. A Trademark Is An “Advertising Idea” and Trademark Infringement May
Constitute “Infringing Upon Another’s Copyright, Trade Dress Or Slogan”
Under the General Casualty CUL Policy. 16

CONCLUSION..... 19

TABLE OF AUTHORITIES

FEDERAL CASES

Adolfo House Distributing Corp. v. Travelers Prop. & Casualty Insurance Co., 165 F. Supp. 2d 1332 (S.D. Fla. 2001).....7,13,14,16

Advance Watch Co. v. Kemper National Insurance Co., 99 F.3d 795 (6th Cir. 1996)..... 13,14,15

American Employers' Insurance Co. v. Delorme Public Co., Inc., 39 F. Supp. 2d 64 (D. Me. 1999)..... 1,2,14

Bay Electric Supply, Inc. v. Travelers Lloyds Insurance Co., 61 F. Supp. 2d 611 (S.D. Tex. 1999).....8,9,14

Callas Enterprises, Inc. v. The Travelers Indemnity Co., 193 F.3d 952 (8th Cir. 1999) 13,14,15

Cat Internet Serv., Inc. v. Providence Wash. Insurance Co., 333 F.3d 138 (3d Cir. 2003)..... 7

Charter Oak Fire Insurance Co. v. Hedeem & Cos., 280 F.3d 730 (7th Cir. 2002)..... 1,10,11,12,13

Cin. Insurance Cos. v. Pestco, Inc., 374 F. Supp. 2d 451 (W.D. Pa. 2004)..... 7

Hyman v. Nationwide Mutual Fire Insurance Co., 304 F.3d 1179 (11th Cir. 2002).....7,8,9,13,17

Pizza Magia International, LLC v. Assur. Co. of America, 447 F. Supp. 2d 766 (W.D. Ky. 2006)..... 7,14

ShoLodge, Inc. v. Travelers Indemnity Co. of Illinois, 168 F.3d 256 (6th Cir. 1999) 13,14,15

St. Paul Fire & Marine Insurance Co. v. MetPath, Inc., 38 F. Supp. 2d 1087 (D. Minn. 1998).....6

State Automobile Property & Casualty Insurance Co. v. Travelers Indemnity Co. of America, 343 F.3d 249 (4th Cir. 2003) 1,7,8,9,16,17

STATE CASES

<i>Acuity v. Bagadia</i> , 734 N.W.2d 464 (Wis. Ct. App. 2007)	10
<i>Atwater Creamery Co. v. Western National Mutual Insurance Co.</i> , 366 N.W.2d 271 (Minn. 1985).....	4,6
<i>Canadian Universal Insurance Co. v. Fire Watch, Inc.</i> , 258 N.W.2d 570 (Minn. 1977)	4
<i>Capitol Indemnity Corp. v. Elston Self Service Wholesale Groceries, Inc.</i> , 2008 WL 696919 (N.D. Ill. 2008)	3,10
<i>Champagne v. Thurston County</i> , 178 P.3d 936 (Wash. 2008)	6
<i>Columbia Heights Motors, Inc. v. Allstate Insurance Co.</i> , 275 N.W.2d 32 (Minn.1979)	5
<i>Crum v. Anchor Casualty Co.</i> , 264 Minn. 378, 119 N.W.2d 703 (1963).....	6
<i>Fidelity and Guaranty Insurance Co. v. Kocolene Marketing Corp.</i> , 2002 WL 977855 (S.D. Ind. 2002)	3,10,11,12,13,14
<i>Flodine v. State Farm Insurance Co.</i> , 2001 WL 204786 (N.D. Ill. 2001)	13
<i>Garvis v. Employers Mutual Casualty Co.</i> , 497 N.W.2d 254 (Minn. 1993).....	6
<i>General Mills, Inc. v. Gold Medal Insurance Co.</i> , 622 N.W.2d 147 (Minn. Ct. App. 2001).....	5,6
<i>Haarstad v. Graff</i> , 517 N.W.2d 582 (Minn. 1994).....	6
<i>International Insurance Co. v. Rollprint Packaging Prod., Inc.</i> , 728 N.E.2d 680 (Ill. Ct. App. 2000).....	6
<i>Lebas Fashion Imports of USA, Inc.</i> , 50 Cal. App. 4th 548 (Cal. App. 1996).....	7,8,9,16,17,18
<i>Nathe Brothers v. America National Fire Insurance Co.</i> , 615 N.W.2d 341 (Minn.2000)	6
<i>Nordby v. Atlantic Mutual Insurance Co.</i> , 329 N.W.2d 820 (Minn. 1983)	5

<i>Northwest Airlines, Inc. v. Globe Indemnity Co.</i> , 303 Minn. 16, 225 N.W.2d 831 (1975)	6
<i>Progressive Casualty Insurance Co. v. Kraayenbrink</i> , 370 N.W.2d 455 (Minn. Ct. App.1985).....	5
<i>SCSC Corp. v. Allied Mutual Insurance Co.</i> , 536 N.W.2d 305 (Minn. 1995).....	6
<i>Soo Line R. Co. v. Brown’s Crew Car of Wyoming</i> , 694 N.W.2d 109 (Minn. Ct. App. 2005).....	5
<i>Stewart v. Ill. Farmers Insurance Co.</i> , 727 N.W.2d 679 (Minn. Ct. App. 2007).....	4
<i>Thommes v. Milwaukee Insurance Co.</i> , 641 N.W.2d 877 (Minn. 2002).....	4,6
<i>Vopak USA, Inc. v. Hallett Dock Co.</i> , 2002 WL. 832578 (D. Minn. 2002).....	5
<i>Western Wis. Water, Inc. v. Quality Beverages of Wis., Inc.</i> , 738 N.W.2d 114 (Wis. Ct. App. 2007).....	10,11,14
<i>Westfield Insurance Co. v. Factfinder Marketing Resources, Inc.</i> , 168 Ohio App. 3d 391 (Ohio Ct. App. 2006).....	8,17
<i>Williamson v. N. Star Cos.</i> , No. C3-96-1139, 1997 WL. 53029 (Minn. Ct. App., Feb. 11, 1997).....	1,10,12,15

STATUTES

Minn. R. Civ. App. P. 129.03	2
15 U.S.C. § 1127.....	17

SECONDARY AUTHORITIES

<i>Black’s Law Dictionary</i>	11
Jeffrey W. Stempel, <i>Stempel on Insurance Contracts</i> , § 4.06 (3d ed. 2006)	5,6
Jennifer S. Janik, <i>Trademark Law & the CGL: The Race Between Infringement Liability and its Reluctant Insurance Coverage</i> , 10 Conn. Ins. L.J. 171, 173 (2003)	3,4

Merriam-Webster's Collegiate Dictionary 1174 (11th ed. 2003) 18

Louis J. Speltz and Ann S. Grayson, *Is That Your Final Answer?: Are Insureds Entitled to Insurance Coverage for Trademark Infringement?*, 23 *Hamline L. Rev.* 348 (2000) 4

STATEMENT OF LEGAL ISSUES

1. Does trademark infringement fall within the scope of 'misappropriation of advertising ideas or style of doing business' or constitute 'infringement of copyright, title or slogan' as set forth in the [Commercial General Liability] policy?
2. Is a trademark an 'advertising idea' or does trademark infringement constitute 'infringing upon another's copyright, trade dress or slogan' as set forth in the [Commercial Umbrella Liability] Policy?

The U.S. District Court for the District of Minnesota certified these questions to the Minnesota Supreme Court.

Apposite cases:

American Employers' Ins. Co. v. Delorme Pub. Co., Inc., 39 F. Supp. 2d 64, 73 (D. Me. 1999);

Charter Oak Fire Ins. Co. v. Hedeem & Cos., 280 F.3d 730, 736 (7th Cir. 2002);

Lebas Fashion Imports of USA, Inc., 50 Cal. App. 4th 548, 557 (Cal. App. 1996);

State Auto Property & Cas. Ins. Co. v. Travelers Indem. Co. of Am., 343 F.3d 249, 257 (4th Cir. 2003);

Williamson v. North Star Cos., No. C3-96-1139, 1997 WL 53029, *4 (Minn. Ct. App., Feb. 11, 1997);

INTEREST OF AMICI CURIAE

This *amici curiae* brief is submitted by Land O' Lakes, Inc., 3M Company, and Apogee Enterprises, Inc.¹ Each of these companies is a large Minnesota-based manufacturer that engages in worldwide product marketing, advertising, branding and sales activities. To protect their businesses and minimize the risk of financial loss in connection with these sales activities, *Amici* purchase Commercial General Liability ("CGL") and Commercial Umbrella Liability ("CUL") insurance policies that contain Advertising Injury coverage. They purchase this coverage with the expectation that trademark infringement liability will fall within the scope of coverage for "misappropriation of advertising ideas or style of doing business," "infringement of copyright, title or slogan," and "infring[ement] upon another's copyright, trade dress or slogan."

Thus, the resolution of the two certified questions in this case may have a direct impact on *Amicis'* business operations, which will in turn affect *Amicis'* shareholders, directors, officers and employees, as well as consumers of *Amicis'* products. Indeed, because so many other Minnesota businesses also engage in sales and marketing activities, and purchase Advertising Injury coverage, the result in this case has the potential to impact a large segment of the business community in this State.

¹ In accordance with Minn. R. Civ. App. P. 129.03, *Amici* hereby certify that this brief was written by *Amicis'* counsel, and no party or counsel for a party authored the brief in whole or part. No person other than *Amici* or their counsel made any monetary contribution to the preparation or submission of this brief.

The issue in this case is also vitally important to Minnesota policyholders as it affords the Court an opportunity to reiterate and reinforce long-standing rules of insurance contract interpretation. A decision in favor of Defendant Wozniak Travel will anchor Minnesota law to the longstanding rules of construction that protect policyholders from the vagaries of policy language drafted by insurers. Courts around the country have construed the same Advertising Injury coverage provisions at issue in this case broadly and in favor of coverage, and *Amici Curiae* urge this Court to do the same.

ARGUMENT

I. Trademark Infringement is Covered under the “Advertising Injury” Provisions of the General Casualty CGL Policy.

The majority of courts that have considered the question have held that the “advertising injury” provisions of the CGL policy cover trademark infringement liability. *See American Employers’ Ins. Co. v. DeLorme Pub. Co., Inc.* 39 F. Supp. 2d 64 (D. Me. 1999); *Fidelity and Guar. Ins. Co. v. Kocolene Marketing Corp.*, 2002 WL 977855, *10 (S.D. Ind. 2002); and *Capitol Indem. Corp. v. Elston Self Service Wholesale Groceries, Inc.*, 2008 WL 696919, * 4 (N.D. Ill. 2008); *see also* Jennifer S. Janik, *Trademark Law & the CGL: The Race Between Infringement Liability and its Reluctant Insurance Coverage*, 10 Conn. Ins. L.J. 171, 173 (2003) (The majority of courts interpret the Advertising Injury provisions in CGL policies to cover “trademark infringement claims, and thus giv[e] the insured trademark and trade dress insurance defense coverage.”) These courts have found coverage under the “advertising injury” categories of “misappropriation of advertising ideas or style of doing business,” “infringement of

copyright, title or slogan,” and in some instances under both categories. *See id.*; *see also* Louis J. Speltz and Ann S. Grayson, *Is That Your Final Answer?: Are Insureds Entitled to Insurance Coverage for Trademark Infringement?*, 23 Hamline L. Rev. 348 (2000) (general discussion of the relationship between trademark law and insurance coverage).

The unifying element in these courts’ opinions is their application of the doctrine of *contra proferentum*, which requires the court to construe ambiguities in insurance policies in favor of the insured. As shown below, the doctrine of *contra proferentum* has long been applied by this Court and accordingly, should lead the Court to adopt the majority rule in the case of Advertising Injury coverage, particularly where, as here, the policy terms are undefined and subject to multiple interpretations.

A. The Minnesota Rules of Construction for Insurance Policies Favor a Broad Reading of the Advertising Injury Coverage Provision.

The interpretation of insurance contracts is governed by general principles of contract law. *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 879 (Minn. 2002). If an insurance policy is unambiguous, “the language used must be given its usual and accepted meaning.” *Stewart v. Ill. Farmers Ins. Co.*, 727 N.W.2d 679, 684 (Minn. Ct. App. 2007) (quotation omitted).

A court construes an insurance policy according to the plain and ordinary meaning of the text with the purpose of effectuating the parties’ intent. *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977). But the policy is “construed according to what a reasonable person in the position of the insured would have understood the words to mean.” *Canadian*, 258 N.W.2d at 572; *see also Atwater*

Creamery Co. v. Western Nat'l Mut. Ins. Co., 366 N.W.2d 271, 278 (Minn. 1985) (stating that insured's reasonable expectations will be honored even though careful review of policy would have negated such expectations).

If a policyholder articulates a reasonable interpretation of a policy provision that is at odds with that of the insurer, the court should find that the provision is ambiguous. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 34 (Minn.1979) (citations omitted) ("Ambiguity exists if the language of the policy is reasonably subject to more than one interpretation."). Where an insurance contract is ambiguous, the court applies the doctrine of *contra proferentum*, by which ambiguities in the policy are to be construed against the drafter. *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 151 (Minn. Ct. App. 2001); *Soo Line R. Co. v. Brown's Crew Car of Wyoming*, 694 N.W.2d 109, 113 (Minn. Ct. App. 2005) ("any reasonable doubt as to the meaning of the policy is resolved in favor of the insured"); *Progressive Cas. Ins. Co. v. Kraayenbrink*, 370 N.W.2d 455, 460 (Minn. Ct. App.1985) ("[the insurer] wrote the policy, and it must bear the consequences of placing ambiguous or misleading language in it"). Put another way, an ambiguity is construed in favor of finding coverage. *Nordby v. Atl. Mut. Ins. Co.*, 329 N.W.2d 820, 822 (Minn. 1983).

This doctrine is more than just a legal maxim; it is a bedrock rule of construction designed to protect policyholders from the adhesive nature of insurance contracts. 1 Jeffrey W. Stempel, *Stempel on Insurance Contracts*, § 4.06 (3d ed. 2006); *Vopak USA, Inc. v. Hallett Dock Co.*, 2002 WL 832578, *5 (D. Minn. 2002) ("the doctrine is primarily applied to contracts of adhesion or insurance contracts."). The doctrine is

applied in interpreting insurance policies because such contracts are completely standardized, replete with non-negotiable terms drafted by the insurer, and often are not even available to the policyholder for review prior to negotiation and/or purchase. *Stempel* at § 4.06; *see also Thommes*, 641 N.W.2d at 880; *Nathe Bros. v. Am. Nat'l Fire Ins. Co.*, 615 N.W.2d 341, 344 (Minn.2000) (“Because most insurance policies are presented as preprinted forms, which a potential insured must usually accept or reject as a whole, ambiguities in a policy are generally resolved in favor of the insured.”); *Atwater Creamery*, 366 N.W.2d at 277. Even if the insured is a Fortune 500 company, and has some negotiating clout with the insurer, most courts still apply *contra proferentum* where there is an ambiguity, in recognition of the policy’s one-sided drafting history. *See, e.g., General Mills*, 622 N.W.2d at 151 (“[R]elatively equal bargaining power does not preclude application of the doctrine of *contra proferentem*”); *St. Paul Fire & Marine Ins. Co. v. MetPath, Inc.*, 38 F.Supp.2d 1087, 1092 (D. Minn. 1998); *Northwest Airlines, Inc. v. Globe Indem. Co.*, 303 Minn. 16, 26, n. 2, 225 N.W.2d 831, 837 n. 2 (1975).²

² Of course, it is not the policy alone that determines the insurer’s obligation to defend and/or indemnify. Rather, the court must also look to the allegations of the complaint, as well as to facts that are brought to the insurer’s attention or are known to it. *See Haarstad v. Graff*, 517 N.W.2d 582, 584 (Minn. 1994) (“a court may consider ‘facts outside the complaint to determine whether coverage exists.’”); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn. 1995); *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993). Indeed, Minnesota courts have long declined to follow the “four corners” of the complaint rule. *See Crum v. Anchor Cas. Co.*, 264 Minn. 378, 119 N.W.2d 703, 712 (1963). As other courts have recognized, “[t]he question of coverage should not hinge on the draftsmanship skills or whims of the plaintiff in the underlying action” *International Ins. Co. v. Rollprint Packaging Prod., Inc.*, 728 N.E.2d 680 (Ill. Ct. App. 2000); *see also Champagne v. Thurston County*, 178 P.3d 936, 946 (Wash. 2008) (“the pleader’s intention when drafting the complaint does not control the court’s scope of review.”)

These longstanding rules of construction should be applied in determining whether the trademark infringement claims against Wozniak Travel are covered under its General Casualty CGL policy.

B. Trademark Infringement is “Misappropriation of Advertising Ideas or Style of Doing Business.”

Most courts that have considered the issue hold that trademark infringement claims constitute “advertising injury” under the “misappropriation of advertising ideas or style of doing business” provision contained in the CGL policy. *See Adolfo House Distrib. Corp. v. Travelers Prop. & Cas. Ins. Co.*, 165 F. Supp. 2d 1332, 1339 (S.D. Fla. 2001) (coverage awarded for infringement of a consumer product company’s trademark and trade dress in connection with hair care products and hand lotions); *Cat Internet Serv., Inc. v. Providence Wash. Ins. Co.*, 333 F.3d 138, 142 (3d Cir. 2003) (coverage awarded for infringement of MAGAZINE.COM trademark); *State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249 (4th Cir. 2003) (coverage awarded for infringement of car manufacturer’s NISSAN trademark); *Hyman v. Nationwide Mutual Fire Ins. Co.*, 304 F.3d 1179, 1189 (11th Cir. 2002) (coverage awarded for infringement of manufacturer’s trade dress); *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group*, 50 Cal. App. 4th 548, 553 (Cal. Dist. Ct. App. 1996) (coverage awarded for infringement of the trademark “DRAKKAR”); *Pizza Magia Int’l, LLC v. Assur. Co. of Am.*, 447 F. Supp. 2d 766, 772 (W.D. Ky. 2006) (coverage awarded for infringement of a pizza restaurant chain’s trade dress); *Cin. Ins. Cos. v. Pestco, Inc.*, 374 F. Supp. 2d 451 (W.D. Pa. 2004) (coverage awarded for infringement of an air freshener

manufacturer's trade dress); *Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, 61 F. Supp. 2d 611, 616 617 (S.D. Tex. 1999) (coverage awarded for infringement of a electrical products company's trademark and trade dress); and *Westfield Ins. Co. v. Factfinder Marketing Res., Inc.*, 168 Ohio App. 3d 391 (Ohio Ct. App. 2006) (coverage awarded for infringement of a market-research company's trademark and trade dress).

These courts have reached this conclusion based on a determination that the terms "misappropriation," "advertising ideas" or "style of doing business" are ambiguous and should be construed in favor of coverage. *See, e.g., State Auto*, 343 F.3d at 257; *Lebas Fashion*, 50 Cal. App. 4th at 553; *Bay Elec. Supply*, 61 F. Supp. 2d at 617; and *Hyman*, 304 F.3d at 1189.

For example, *State Auto* involved a dispute between two insurance companies over whether Travelers was required to provide coverage for the underlying trademark infringement claims against a computer company, NCC, that used the NISSAN trademark in its domain name, "www.nissan.com." *State Auto* had agreed to defend for the period when it provided coverage to NCC, but Travelers refused to provide a defense for the years it provided coverage. This led the court to the inescapable conclusion that the term "misappropriation" was "necessarily ambiguous." *See State Auto*, 343 F.3d at 257. Travelers argued that the term "misappropriation" referred only to the common law tort of misappropriation, and not to trademark infringement. The court analyzed the term "misappropriation" in "the insurance context," and determined that the term was not confined to the tort of misappropriation but instead referred to "wrongful acquisition generally." *Id.* at 256. The court also considered that the majority of cases interpreting

the term “misappropriation” had found coverage. *Id.* However, the court explained, most compelling was the fact that the insurance companies themselves disagreed on the interpretation of policies that defined “‘advertising injury’ identically.” *Id.*

Other courts have also concluded that these same policy terms were ambiguous, and must be construed in favor the insured to meet the insured’s reasonable expectations of coverage. *See Lebas*, 50 Cal. App. 4th at 553. In *Lebas*, the court found the policy terms “misappropriation,” “advertising injury,” and “style of doing business” were all ambiguous. *Id.* at 553. Rejecting the insurer’s narrow and technical reading of the terms, the court “examine[d] these phrases through the eyes of a layman rather than an attorney or insurance expert.” *Id.* at 561. Having reviewed these terms “in the context of the entire policy and all of the relevant circumstances,” the court determined that the insured “had an objectively reasonable expectation of coverage.” *Id.* at 553. *Accord Bay Elec. Supply*, 61 F. Supp. 2d at 617 (holding that “[i]n light of the disagreement among courts and scholars as to the meaning of [‘advertising ideas’ and ‘style of doing business’] terms, they can only be said to be ambiguous ...the Court is required to adopt the objectively reasonable interpretation most favorable to the insured.”); *Hyman*, 304 F.3d at 1184 (holding that the policy covered trade dress infringement claims based on the “ordinary meaning” of the policy terms).

Similarly in this case, the Court should adopt the sound reasoning contained in the above-cited authority and find that claims for trademark infringement are covered under the ambiguous provision “misappropriation of advertising ideas or style of doing business.”

C. Trademark Infringement Should Be Covered Under The Advertising Injury Category “Infringement Of Copyright, Title Or Slogan.”

The majority of courts have also held that trademark infringement claims constitute “advertising injury” under the “infringement of copyright, title or slogan” provision contained in the CGL policy. *See, e.g., Charter Oak Fire Ins. Co. v. Hedeem & Cos.*, 280 F.3d 730, 736 (7th Cir. 2002) (coverage awarded for infringement of toy manufacturer’s MICRO MACHINE and MICRO MACHINE LOGO trademarks); *Kocolene*, 2002 WL 977855 at *10 (coverage awarded for infringement of tobacco manufacturer’s MARLBORO trademarks); *Elston*, 2008 WL 696919 at *11 (coverage awarded for infringement of tobacco manufacturer’s NEWPORT trademarks); *DeLorme*, 39 F. Supp. 2d at 64 (coverage awarded for infringement of map manufacturer’s TRIPMAKER trademark); *Western Wis. Water, Inc. v. Quality Beverages of Wis., Inc.*, 738 N.W.2d 114 (Wis. Ct. App. 2007) (coverage awarded for infringement of water distributor’s LA CROSSE PREMIUM WATER trademark); and *Acuity v. Bagadia*, 734 N.W.2d 464, 470 (Wis. Ct. App. 2007) (coverage awarded for infringement of computer software manufacturer’s NORTON-related trademarks).

These courts’ decisions have been based on the determination that the term “title” in the phrase “infringement of copyright, title or slogan” was “broad enough to encompass claims of trademark infringement.” *See e.g. Charter Oak*, 280 F.3d at 736; *Western Wis. Water*, 738 N.W.2d at 121-122; *Williamson v. N. Star Cos.*, 1997 WL 53029, *4 (Minn. Ct. App. 1997), *Kocolene*, 2002 WL 977855 at *10 .

For example, the court in *Charter Oak* provided two possible interpretations of the language in this provision, either one of which would result in a finding of coverage. One interpretation was that “infringement of title ‘presumably’ involves titles ‘of books, songs, products, services, and so forth’ and is not clearly limited . . . to the infringement of a noncopyrightable title of a creative work.” *See Charter Oak*, 280 F.3d at 736 (internal citation omitted). Under the second possible interpretation, “[r]eading these words together implies that ‘infringement’ means using someone else’s words, so that ‘title’ refers to names and related trademarks, following the phrase ‘copyright infringement.’” *Id.* (internal citation omitted).

Charter Oak has been cited by several courts for its analysis and determination that coverage exists under infringement of “title.” *See e.g. Western Wis. Water*, 738 N.W.2d at 121-122; *Kocolene*, 2002 WL 977855 at *10. In *Western Wis. Water*, the Wisconsin Court of Appeals reasoned that the “policy references infringement of copyright, which is a distinct cause of action, along with infringement of title or slogan, which are not,” and concluded that “the drafters of the policy language were not articulating recognized causes of action, but rather categories into which certain conduct might fall.” *See Western Wis. Water*, 738 N.W.2d at 121-122.

In *Kocolene*, the federal court used a plain language approach and said that the “plain, ordinary meaning of the word ‘title,’” as defined in *Black’s Law Dictionary*, is a “mark, style or designation; a distinctive appellation; the name by which anything is known.” *See Kocolene*, 2002 WL 977855 at *10 (citation omitted). The court reasoned

that the inclusion of the word “mark” in the definition meant that “a trademark may be covered” under this provision. *Id.*

Consistent with these cases, the Minnesota Court of Appeals in *Williamson* reached the same result, providing yet another basis for coverage under this provision. The court analyzed the language from an intellectual property perspective and held:

[B]ecause the word ‘title’ appears in the same clause with ‘copyright,’ we conclude that the policy means ‘title’ in the intellectual property sense [and] [a] ‘title’ becomes a trademark through extended usage or by compliance with statutory registration. Black’s Law Dictionary 1485 (6th ed.1990).

Williamson, 1997 WL 53029 at *4. Albeit unpublished, the rationale of the ruling is compelling and the case is in line with the majority trend.

As with “misappropriation of advertising idea,” the numerous interpretations of “infringement of copyright title or slogan” highlight the fact that the provision is broad and certainly ambiguous. Whether this Court is most persuaded by the rationale in *Charter Oak*, *Williamson* or any of the many other cases finding coverage under this provision, clearly the best reasoned result is that “infringement of copyright, title or slogan” is construed in favor of the insured and held to encompass trademark infringement.

II. This Court Should Not Adopt the Reasoning of Decisions that have Denied Coverage For Trademark Infringement Because It is Inconsistent with Minnesota Law.

The decisions of the minority of courts that have denied coverage for infringement under the CGL policy should not be followed by this Court because they violate the

principles of insurance contract interpretation that have been long established in Minnesota jurisprudence and elsewhere.

For example, the Sixth Circuit decisions in *Advance Watch Co. v. Kemper Nat'l Ins. Co.*, 99 F.3d 795 (6th Cir. 1996) and *ShoLodge, Inc. v. Travelers Indem. Co. of Illinois*, 168 F.3d 256 (6th Cir. 1999), on which General Casualty heavily relies to deny coverage to Wozniak Travel, failed to apply the well-established rules for interpreting undefined or ambiguous terms contained within insurance agreements. Both *Advance Watch* and *ShoLodge* construed undefined, and arguably ambiguous, policy terms narrowly so as to deny coverage.

As a result other courts have refused to follow these decisions. *See Hyman*, 304 F.3d at 1189 (noting that the majority of courts outside the Sixth and Eighth Circuits have rejected the reasoning of *Advance Watch*); *Charter Oak*, 280 F.3d at 736 (“we find that the term ‘infringement of ... title’ as used in the contract is broad enough to encompass claims of trademark infringement as alleged in the amended [] complaint, and reject the contrary holdings of *ShoLodge* and *Callas*”); *Kocolene*, 2002 WL 977855 at *10 (“Decisions such as *Advance Watch* and *ShoLodge* are not persuasive when viewed against the authority of *Charter Oak*, which in this court’s view is better reasoned, consonant with the way in which insurance policies are construed . . . as well as in accord with the majority of cases considering the issue.”); *Adolfo House*, 165 F. Supp. 2d at 1339 (*Advance Watch* ‘s “restrictive gloss on the concept of ‘misappropriation’ conflicts with the basic rules of insurance contract interpretation followed ... in multiple jurisdictions.”); *Flodine v. State Farm Ins. Co.*, 2001 WL 204786 (N.D. Ill. 2001)

(“[T]his court agrees with decisions of other courts concluding that *Advance Watch*’ s approach conflicts with the rule of contract interpretation followed by many state courts . . . that the ordinary meaning of policy terms controls.”); *Western Wis. Water*, 738 N.W.2d at 114; *Pizza Magia*, 447 F. Supp. 2d at 772.

Similarly, the Eighth Circuit’s decision in *Callas Enterprises, Inc. v. The Travelers Indemnity Co.*, 193 F.3d 952 (8th Cir. 1999), is not persuasive for several fundamental reasons. First, the decision was based on the Sixth Circuit’s decisions in *Advance Watch* and *ShoLodge*, which have now been widely discredited. Furthermore, neither *Advance Watch* nor *ShoLodge* were decided under Minnesota law and the Court offered no substantive analysis of why those holdings should be adopted.³ Indeed, the *Callas* opinion cited *Advance Watch* and *ShoLodge* for the proposition that “if the [insurer] had intended to provide coverage for such liability, [it] would have referred to it by name in the policy.” *See Callas*, 193 F.3d at 956-957. However, this argument has been rejected by most courts as “untenable” and directly contrary to the well-established rules for the interpretation of insurance agreements in favor of insureds. *See, e.g., DeLorme*, 39 F.Supp.2d 64, 78 (D. Me. 1999); *Kocolene*, 2002 WL 977855 at *10. If an insurer wishes to exclude a specific type of coverage, it must provide for an exclusion in the policy. *See Adolfo House*, 165 F. Supp. 2d 1332, 1340 (S.D. Fla. 2001); *Bay Elec. Supply*, 61 F.Supp.2d at 617 (S.D. Tex. 1999).

³ *Advance Watch* applied Michigan law and *ShoLodge* applied Tennessee law.

Finally, the *Callas* decision failed to even mention the Minnesota Court of Appeals' decision in *Williamson*, which was the only Minnesota state court decision addressing the issue of insurance coverage for trademark infringement. *Id.*⁴

The decisions in the *Advance Watch*, *ShoLodge* and *Callas* fail to follow Minnesota's well-established rules of construction for insurance agreements. Thus, these decisions, which represent the minority perspective on the question of insurance coverage for trademark and trade dress infringement, should not be followed.

Instead, this Court should follow *Williamson* and the majority of courts that have held that claims for trademark and trade dress infringement are covered by the CGL policy. In doing so, this Court will be applying longstanding principles of Minnesota law that require construction of ambiguous terms of the CGL policy in favor of the insured. Such a result will satisfy the reasonable expectations of Minnesota businesses such as *Amici* who purchased liability coverage with the belief that such claims were covered by the policy.

⁴ As the U.S. District Court for the District of Minnesota stated in its opinion certifying these coverage questions: "When Minnesota law applies in a diversity case, the Eighth Circuit has previously stated that it is 'bound by decisions of the Minnesota Supreme Court, and if that court has not considered [the] issue, [the Eighth Circuit] must follow decisions of the Minnesota Court of Appeals if they are the best evidence of Minnesota law.' Yet, the Eighth Circuit in *Callas* did not mention *Williamson* in its decision." (Internal citation omitted.) See APP. 103-104.

III. A Trademark Is An “Advertising Idea” and Trademark Infringement May Constitute “Infringing Upon Another’s Copyright, Trade Dress Or Slogan” Under the General Casualty CUL Policy.

In response to the second certified question, the Court should find that a trademark may be an “advertising idea,” and trademark infringement may constitute “infringing upon another’s copyright, trade dress or slogan,” as set forth in the CUL policy.

The CUL policy before the Court defines “advertising injury” as including:

- 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.’

See Plaintiff’s Appendix (“APP.”) 080.

The CUL policy defines “advertisement” in relevant part as follows:

‘Advertisement’ means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. . . .

See APP. 078.

The CUL policy does not define the term “advertising idea.” However, multiple courts have found that a trademark is capable of being an “advertising idea.” *See e.g. State Auto*, 343 F.3d at 257; *Adolfo House*, 165 F.Supp.2d at 1339; and *Lebas*, 50 Cal. App. 4th at 553.

In *State Auto*, the court analyzed whether the NISSAN trademark could be construed as an “advertising idea” or “style of doing business.” *See State Auto*, 343 F.3d at 257. The court reasoned that “a trademark plays an important role in advertising a company’s products,” and found that the NISSAN trademark was a “*quintessential*

example” of a “trademark functioning to advertise a company’s products.” *Id.* at 258 (emphasis added). This finding was based on Nissan’s having “vigorously advertised, promoted and developed its NISSAN trademark” and consequently, according to the court, “the mark has become instantly recognizable throughout the United States and the world as a symbol of high-quality automobiles.” *Id.*

Likewise, “infring[ement] upon another’s copyright, trade dress or slogan” could also encompass trademark infringement. Significantly, the CUL does not define the terms “trade dress” and “slogan.” The term “trade dress” has been defined as “the total image of a product and may include features such as size, shape, color or color combinations, textures, graphics, or even particular sales techniques.” *See Hyman*, 304 F.3d at 1189. By comparison, a trademark is defined as “any word, name, symbol or device or any combination thereof . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” *See* 15 U.S.C. § 1127. As with trade dress, the basic function of a trademark is to advertise the product or services of the trademark owner. *See Lebas*, 50 Cal. App. 4th at 562. The definitions of “trademark” and “trade dress” therefore demonstrate that these terms serve the same basic function of differentiating one product from another. Moreover, “[t]he protection of trade dress and trademarks serves to ‘secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.’” *See Westfield*, 168 Ohio App. 3d at 151.

Similarly, the word “slogan” has been defined as “a word or phrase used to express a characteristic position or stand or goal to be achieved [or] a brief attention-getting phrase used in advertising or promotion.” See *Merriam-Webster’s Collegiate Dictionary* 1174 (11th ed. 2003). The definitions of a “slogan” and “trademark” illustrate their overlapping function in advertising. Moreover, the court in *Lebas* found that “[m]any trademarks embody advertising ideas.” As examples, the court cited the “GOT MILK?,” “KEEPS ON GOING,” and “JUST DO IT!” trademarks, which are clearly slogans, to support this finding. See *Lebas*, 50 Cal. App. 4th at 563.

On one hand, the CUL policy seeks to exclude coverage for trademark infringement, while on the other hand it contains an exception to the exclusion for “your ‘advertisement,’ of . . . trade dress or slogan.” See APP. 070. Again where neither “trade dress” nor “slogan” are defined in the CUL policy, but are broad terms that are in effect synonymous with “trademark,” this exclusion and its exception are the model of ambiguity, and coverage may be found to exist by applying the well-established canons of construction set forth above.⁵

⁵ It should also be noted that General Casualty’s effort to explicitly exclude trademark infringement coverage in the CUL policy clearly establishes that where such an exclusion is *absent* from a CGL policy, the policy should not be construed as in effect containing one.

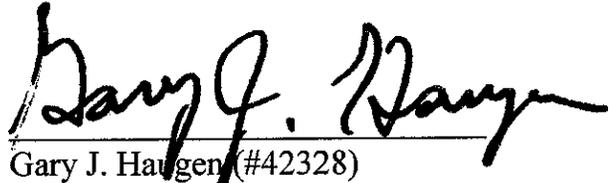
CONCLUSION

For all the reasons outlined above, *Amicus Curiae* Land O'Lakes Inc., 3M and Apogee Enterprises respectfully urge this Court to find that trademark infringement is covered under the Advertising Injury provisions of the CGL and CUL policies at issue in this case.

Dated: May 7, 2008

**MASLON EDELMAN BORMAN &
BRAND, LLP**

By:



Gary J. Haugen (#42328)

Mary R. Vasaly (#152523)

Margo S. Brownell (#307324)

3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 672-8200

**ATTORNEYS FOR LAND O' LAKES, INC.,
3M COMPANY AND APOGEE
ENTERPRISES, INC.**