

STATE OF MINNESOTA  
IN SUPREME COURT  
CASE NO. A08-321

AUG 26 2008

FILED

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GENERAL CASUALTY COMPANY  
OF WISCONSIN,

Plaintiff,

**PLAINTIFF GENERAL CASUALTY  
COMPANY OF WISCONSIN'S  
SUPPLEMENTAL BRIEF**

v.

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

Defendants.

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**INTRODUCTION**

The Court has requested supplemental briefs addressing whether dismissal in favor of Wozniak Travel in the Underlying Action renders moot the questions certified to the Court. As discussed below, the questions are not moot.

**SUMMARY OF SUPPLEMENTAL FACTS**

By Memorandum and Order filed and entered on July 29, 2008, the United States District Court for the Northern District of California granted summary judgment in favor of Wozniak, and ordered dismissal of the entire Underlying Action. The court granted the motion on the basis of laches and found among other things, that Wozniak has not used its mark in a "significantly different way" over the course of its use. As of the date of this

Supplemental Brief, the time has not yet expired for appellate review of the Memorandum and Order.

### DISCUSSION

It should be noted that General Casualty has opposed certification of the questions before this Court on the basis that an affirmative answer to either question does not dispose of the Coverage Action. Instead, should the Court answer either question in the affirmative, the United States District Court must then consider whether one or more exclusions in the applicable policy preclude any duty by General Casualty to defend or indemnify Wozniak. Among other things, the applicable policy bars coverage where an insured first publishes the allegedly infringing material prior to inception of the policy. The findings in the Memorandum & Order issued in the Underlying Action establish that Wozniak published the allegedly infringing material prior to the inception of the first General Casualty policy issued to Wozniak, and that Wozniak did not change its use of that material in any “significantly different way” since it first used the mark.

Although the findings in the Memorandum and Order may establish the lack of coverage, the fact of the dismissal - in and of itself - does not render moot the certified questions until that dismissal is “final.” *Meadowbrook v. Tower Ins. Co.*, 559 N.W.2d 411 (Minn. 1997). In *Meadowbrook*, this Court held that an insurer “who undertakes an insured’s defense under a reservation of rights can withdraw its defense once all arguably covered claims have been dismissed with finality.” *Id.* at 416. This Court further

explained that “finality” means that point in time when “*as a matter of law* [ ] there can be no basis on which the insurer may be obligated to indemnify the insured.” *Id.*, citing *Woida v. North Star Mut. Ins. Co.*, 306 N.W.2d 570, 574 (Minn. 1984) (emphasis in the original).

In this case, the parties to the Underlying Action have 30 days from the date of the final judgment or order to seek appellate review at the Ninth Circuit. *See* 28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1). Once the dismissal is final as to Wozniak, there cannot be any basis on which General Casualty may be obligated to indemnify Wozniak as a matter of law.<sup>1</sup> Until the decision is final, however, there remains a coverage issue and consequently, the certified questions are not yet moot.

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<sup>1</sup> General Casualty contends in the Coverage Action that there is no obligation to indemnify Wozniak as a matter of law because the monetary relief sought by Tolkien Enterprises does not constitute “damages” under the applicable policy, but that issue has not yet been determined by the District Court.

CONCLUSION

In accordance with *Meadowbrook*, the Memorandum and Order dismissing the Underlying Action against Wozniak has not yet rendered moot the questions certified to this Court.

Dated: August 26, 2008.

Respectfully submitted,

General Casualty Company of Wisconsin



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Jeffrey A. Evans (W.S.B. No. 1059025)  
COOK & FRANKE S.C.  
660 East Mason Street  
Milwaukee, Wisconsin 53202  
PH: (414) 271-5900

James L. Haigh (MN No. 39469)  
Andrea E. Reisbord (MN No. 22411X)  
Trina R. Alvero (MN No. 0350667)  
COUSINEAU MCGUIRE  
1550 Utica Avenue South, #600  
Minneapolis, MN 55416-5318  
PH: (952) 525-6943  
FAX: (952) 546-0628

**Attorneys for Plaintiff General Casualty  
Company of Wisconsin**