

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.

PLAINTIFF GENERAL CASUALTY COMPANY OF WISCONSIN'S
 BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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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 General Casualty’s 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 General Casualty’s umbrella policy?

Apposite Cases:

Fluoroware, Inc. v. Chubb Group of Ins. Cos., 545 N.W.2d 678 (Minn.App. 1996)

Ross v. Briggs & Morgan, 540 N.W.2d 843 (Minn. 1995)

Callas Enterprises, Inc. v. Travelers Indem. Co. of America, 193 F.3d 952 (8th Cir. 1999)

Sport Supply Group, Inc. v. Columbia Cas. Co., 335 F.3d 453 (5th Cir. 2003)

STATEMENT OF THE CASE

This is a reference from the United States District Court for the District of Minnesota by questions certified to this Court. The District Court action is one for declaratory relief between Appellant General Casualty Company of Wisconsin (“General Casualty”) and Respondents Wozniak Travel, Inc. d/b/a Hobbit Travel (“Wozniak”) and The Saul Zaentz Company d/b/a Tolkien Enterprises (“Tolkien Enterprises”). Tolkien Enterprises filed an action for trademark infringement against Wozniak, and General Casualty has been providing a defense, subject to reservation of rights. The declaratory

relief action seeks a determination of whether General Casualty is obligated to provide defense and indemnity to Wozniak.

The proper question before this Court is whether the allegations of trademark infringement *as alleged in the complaint filed by Tolkien Enterprises against Wozniak Travel* fall within the scope of “advertising injury” in the subject policies. In accordance with the holdings of several federal appellate courts, the type of trademark allegations made against Wozniak do not fall within advertising injury liability (“AIL”) coverage for several reasons. First, a claim for trademark infringement is not one for “misappropriation.” Second, a trademarked word like “Hobbit” is not an “advertising idea” or “style of doing business.” Third, trademark infringement does not fall within “infringement of copyright, title or slogan.” General Casualty requests that this Court adopt the reasoning in the cases set forth below, and answer the District Court’s questions in the negative.

STATEMENT OF FACTS

A. The Underlying Action

1. Respondent Tolkien Enterprises filed an action against Respondent Wozniak in the United States District Court for the Northern District of California, Case No. C 06 5421 MHP (hereinafter “the Underlying Complaint”). Underlying Complaint, Appendix (“App”) 1.

2. In the Underlying Complaint, Tolkien Enterprises asserts causes of action against Wozniak for Trademark Infringement (15 U.S.C. § 1114), Unfair Competition and False Designation of Origin (15 U.S.C. § 1125(a)), Trademark Dilution (15 U.S.C.

§ 1125(c)), Trademark Dilution (Cal. Bus. & Prof. Code § 14330) and Unfair Competition (Cal. Bus. & Prof. Code § 17200). Underlying Complaint, App. 1.

3. In support of its trademark infringement claim, Tolkien Enterprises alleges that the term “HOBBIT” was created by Professor Tolkien in the early 1930s and describes the fanciful, three-foot tall characters featured in his novels, *The Hobbit* and *The Lord of the Rings* trilogy (the “Tolkien Works”). Underlying Complaint at ¶ 13, App. 4.

4. Tolkien Enterprises alleges the theme of travel, particularly travel by HOBBIT characters, provides the narrative background for the Tolkien Works. Underlying Complaint at ¶ 13, App. 4.

5. Tolkien Enterprises further alleges Wozniak has used the mark HOBBIT TRAVEL in connection with the travel agency in Minnesota since 1976. Underlying Complaint at ¶ 34, App. 12.

6. Tolkien Enterprises sent Wozniak a cease and desist letter. In response, Wozniak filed a trademark application to register the HOBBIT TRAVEL mark for use in connection with travel agency services. Underlying Complaint at ¶ 34-35, App. 12.

7. Tolkien Enterprises alleges that Wozniak makes an unauthorized use of the HOBBIT mark in Wozniak’s internet domain name www.hobbittravel.com. Tolkien Enterprises further alleges Wozniak offers an email update service on its website and the use of the HOBBIT TRAVEL mark also occurs in its communications with suppliers of travel services. Underlying Complaint at ¶ 37, App. 13.

8. Tolkien Enterprises alleges Wozniak attempts to capitalize on the mythos of the Tolkien Works by using the mark and acquiring federal trademark registration for it, and further claims Wozniak's proposed mark is "an obvious misappropriation of the goodwill developed by Tolkien Enterprises and its predecessors-in-interest in the HOBBIT marks and Professor Tolkien's original HOBBIT characters." Underlying Complaint at ¶ 39, App. 13.

9. Tolkien Enterprises alleges the HOBBIT TRAVEL mark is confusingly similar to Tolkien Enterprises' HOBBIT mark and that Wozniak's registration and use of the HOBBIT TRAVEL Mark irreparably damages Tolkien Enterprises' exclusive right to use, promote, and license the term HOBBIT as a mark for goods and services. Underlying Complaint, ¶ 43, App. 14.

10. Tolkien Enterprises requests that Wozniak be preliminary and permanently enjoined and restrained from using the HOBBIT TRAVEL mark in connection with the advertising, offering for sale, distribution or sale of travel related services or any other goods or services that are not authorized by Tolkien Enterprises, and be restrained from doing anything to cause others to believe Wozniak's goods or services are associated with Tolkien Enterprises' services. Underlying Complaint at Prayer for Relief, App. 20.

11. Tolkien Enterprises requests Wozniak be ordered to deliver to Tolkien Enterprises all materials that infringe and/or dilute Tolkien Enterprises' marks. Tolkien Enterprises seeks an award of all profits realized by Wozniak during its use of the infringing marks pursuant to 15 U.S.C. § 1117, and for an award of three times the amount of Wozniak's profits and for Tolkien Enterprises' reasonable attorneys fees

pursuant to 15 U.S.C. §1117(b), for an award of costs, and for all other relief the court deems just and proper. Underlying Complaint at Prayer for Relief, App. 20-21.

B. The General Casualty Policies Issued to Wozniak

12. General Casualty issued Policy No. CCS 0181357 to Wozniak commencing on August 21, 1993 (hereinafter “the Primary Policy”). App. 60.

13. The Primary Policy provides, in pertinent part:

COMMERCIAL MARKETPLACE POLICY

COMMERCIAL MARKETPLACE LIABILITY COVERAGE FORM

A. COVERAGES

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury”, “property damage”, “personal injury” or “advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury”, “property damage”, “personal injury” or “advertising injury” to which this insurance does not apply. . .

* * *

**F. LIABILITY AND MEDICAL EXPENSES
DEFINITIONS**

1. "Advertising Injury" means injury arising out of one or more of the following offenses:

* * *

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of copyright, title or slogan.¹ App. 45, 56.

14. General Casualty also issued Policy No. CCU 0181357 to Wozniak (hereinafter "the Umbrella Policy"). App. 82.

15. The Umbrella Policy provides, in pertinent part:

COMMERCIAL UMBRELLA POLICY

COMMERCIAL UMBRELLA LIABILITY COVERAGE FORM

SECTION I – COVERAGES

* * *

1. Insuring Agreements

* * *

Coverage B. – Personal and Advertising Injury Liability

a. 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.

* * *

¹ Although General Casualty issued policies over several years, the relevant language is the same in all periods.

SECTION V – DEFINITIONS

* * *

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

* * *

- 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”. App. 67, 80.

C. Procedural History

General Casualty filed this action for declaratory relief in the United States District Court for the District of Minnesota. App. 82. The parties filed cross-motions for summary judgment on October 19, 2007. Following the hearing on January 15, 2008, the District Court entered an order submitting the certified questions to this Court. App.93.

ARGUMENT

A. General Principles of Insurance Policy Construction

It is axiomatic that an insurer’s duty to defend is determined by comparing the allegations of the underlying complaint against the relevant insurance policy language. *Ross v. Briggs & Morgan*, 540 N.W.2d 843, 847 (Minn. 1995). Moreover, insurance policies are generally interpreted according to the same principles that govern the interpretation of contracts. *Lobeck v. State Farm Mut. Auto. Ins. Co.*, 582 N.W.2d 246, 249 (Minn. 1998). Courts are to give unambiguous terms “their plain, ordinary, and popular meaning, so as to effect the intent of the parties” as it appears from the terms used

in the contract. *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 179 (Minn. 1990). In addition, a court must not “read an ambiguity into the plain language of a policy in order to create coverage where none otherwise exists.” *Fluoroware, Inc. v. Chubb Group of Ins. Cos.*, 545 N.W.2d 678, 681 (Minn. Ct. App. 1996).

B. Advertising Injury Liability Coverage Requires A Claim Against The Insured For An Enumerated Offense

In accordance with the general rules for policy construction, the only way to give meaning to “advertising injury” coverage in a liability policy – as distinguished from coverage for “bodily injury” and “property damage” -- is to look to the nature of the claim asserted against the insured. Indeed, as this Court has already recognized, advertising injury coverage is triggered only when the gravamen of a claim against the insured is an enumerated offense. *Briggs & Morgan, supra*, 540 N.W.2d at 848.

More specifically, an insurer’s duty to defend a suit alleging an advertising injury is triggered if the advertising injury occurs during the course of the insured’s advertising activities, if the injury arguably falls within the insurance policy’s defined scope of advertising injury coverage, and if none of the policy’s exclusions negates coverage. See, *Fluoroware, supra*, 545 N.W.2d 678, 681; *Polaris Indus., L.P. v. Continental Ins. Co.*, 539 N.W.2d 619, 621 (Minn. App. 1995). If the claim is “arguably” within the scope of coverage, the insurer must defend.” *Id.*

Thus, Minnesota’s approach for AIL coverage determination is to review the allegations of the complaint and compare them to AIL coverage, giving effect

to the parties intention. In *Ross v. Briggs & Morgan, supra*, the insured was sued for his use of his former employer's business name to solicit clients. 540 N.W.2d at 846. The insured allegedly used the name in letters and in newspaper advertisements. *Id.* at 845-846. The lawsuit against the insured included claims for breach of an employment contract between the insured and his former employer, tortious interference with business relations, misappropriation of trade secrets and deceptive trade practices. *Id.* at 846. The insured settled the underlying action, and then sued his lawyers for failure to tender the underlying action to his insurer. *Id.* The trial court determined that the insured could not establish causation against his lawyers because the claims in the underlying action were not arguably covered by the insurance policy, which, as in this case, included coverage for advertising injury. *Id.* at 847. The Court of Appeals reversed the trial court's ruling, and this Court reviewed the appellate decision.

Noting that insurance coverage is determined by comparing the underlying complaint with the relevant policy language, this Court observed that AIL coverage is triggered only "if the injury is caused by one of five enumerated offenses." *Id.* at 847. This Court then rejected the appellate panel's conclusion that "deceptive trade practices and unfair competition were 'arguably' covered by the policy clause 'unauthorized taking of advertising ideas or style of doing business.'" *Id.* at 848. Notably, the allegations in the underlying complaint related to the use of the insured's employer's name were not sufficient to trigger coverage.

Based on this Court's holding in *Briggs & Morgan, General Casualty* requests that the Court adopt the reasoning expressed in a number of cases from the Second, Fifth, Sixth and Eighth Circuits to similarly find that the trademark infringement claim asserted against Wozniak does not fall within AIL coverage.

**1. Trademark Infringement Does Not Constitute
"Misappropriation"**

First, in *Advance Watch Company, Ltd. v. Kemper National Ins. Co.*, 99 F.3d 795 (6th Cir. 1996), the Sixth Circuit held that a claim for trademark infringement does not constitute "misappropriation" within the meaning of AIL coverage. In that case, the claim against the insured arose from the insured's sale of pens that allegedly infringed on trademark and trade dress rights of Cross Pens. The policy provided the same definition of "advertising injury," i.e., the enumerated offenses included "misappropriation of advertising ideas or style of doing business" and "infringement of copyright, title or slogan." Just like Wozniak in this case, the insured argued that even though the underlying plaintiff sued for trademark and trade dress infringement, those claims could also be considered as claims for "misappropriation."

As the court framed the issue, there is no coverage unless "at least one of Cross' theories of recovery must be categorized as 'misappropriation of advertising ideas or style of doing business'" 99 F.2d at 800. The Sixth Circuit then examined the term "misappropriation" at length and concluded that it was not ambiguous and that it must be considered to be distinct from trademark and trade dress infringement. 99 F.3d at 800-805.

The court explained that the coverage determination looks to the nature of the actual claim asserted, rather than a word or two taken out of context:

In the Cross action, Cross' allegations, read fairly, all stated one or more causes of action for trademark and/or trade dress infringement. The gravamen of Cross' complaint is that Advance's Pierre Cardin writing instruments so closely resembled Cross' writing instrument, which is protected under the law of trademarks. **While Cross used the word "misappropriation" in its complaint, it did so in a context which indicated clearly that the substance of Cross' claims was not misappropriation in the legal sense, but trademark or trade dress infringement;** it is common practice, but not legally precise, to refer to "misappropriation" of a trademark or trade dress. *Id.* at 805-806 (emphasis added).

The court also opined that the absence of any express reference to trademark infringement in the policy supported its conclusion. Because trademark infringement law is so well established, the court reasoned, the insurer would have expressly referred to it, just as it is done for "infringement of copyright, title or slogan." 99 F.3d at 803.

In *Callas Enterprises, Inc. v. Travelers Indem. Co. of America*, 193 F.3d 952 (8th Cir. 1999), the Eighth Circuit adopted the rationale expressed by the *Advance Watch* court. Notably, in *Callas*, the insured tendered defense of a trademark infringement case to its insurer. The central allegation of the underlying complaint was that the insured engaged in a "bait and switch" scheme; the insured allegedly showed customers a sample of a competitor's product and then obtained orders for different products. 193 F.3d at 954. The competitor sued the insured for several claims, including trademark infringement. *Id.* The relevant insurance policy included the same AIL definition with "misappropriation of advertising ideas or style of doing business." *Id.* at 955. The Eighth Circuit adopted the reasoning in *Advance Watch* that "misappropriation" could not be read so broadly to

include trademark infringement, and that trademark infringement would have been specifically included within the policy if it was intended to be covered. *Id.* at 956.

The holding in *Advance Watch* that “misappropriation” does not include trademark infringement has been criticized, including by a Michigan trial court judge who opined that no Michigan appellate panel would adopt *Advance Watch*’s holding. *American States Ins. Co. v. Hayes Specialties, Inc.*, 1998 WL 1740968 (Mich. Cir. Ct. 1998). That case is readily distinguishable, however. In *American States*, the insured allegedly copied trademark for a “sinuous seam in a game footbag” or the “unique physical appearance” of a product commonly known as a “Hacky Sack.” *Id.* at *1. The insurer declined to defend the insured, and the insured filed an action for declaratory relief and breach of contract. *Id.* The trial court found that the trademark at issue was one that inherently advertised the product because of its shape and appearance were specifically designed “so that its exhibition or display acts as advertising,” i.e., trade dress. *Id.* at *3.

The trial court opined that *Advance Watch* compelled a finding of no coverage for any trademark or trade dress infringement claim. *Id.* Based on that belief, the trial court sharply criticized *Advance Watch* as being “alone in a sea of case law” with respect to misappropriation, although the court declined to cite to any of those cases.² *Id.* Notably, the trial judge in *American States* did not offer any reasoning for a different holding as to

² Despite Judge Crane’s dismal view of how *Advance Watch* would be regarded by Michigan appellate panels, time has not borne out his pessimism. In fact, an appellate panel in 2004 commented without taking up or deciding the question of whether trademark infringement constituted a claim for “misappropriation.” *Varilease Technology Group, Inc. v. Michigan Mut. Ins. Co.*, 2004 WL 2913661, *5 (Mich. Ct. App. 2004).

“misappropriation.” Most significantly, however, the court stated that there is no AIL coverage for trade dress where “there mere exhibition or display of [the] product [carries] no communicative function.” *Id.* In other words, the court in *American States* recognized that even with a broad reading of “misappropriation,” there must still be an “advertising idea.” *Id.*

2. A Trademark Word Like “Hobbit” Is Not An “Advertising Idea”

Second, as set forth in *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453 (5th Cir. 2003), even if “misappropriation” is read broadly enough to include an “infringement,” there is still no coverage because a trademark is not an “advertising idea.” In that case, the insured was sued for its alleged misuse of the trademark word “Macgregor” in the sale of products on the internet. 335 F.3d at 456. In the subsequent coverage case, the insured argued that the insurer had a duty to defend under AIL coverage because the trademark infringement claim fell within “misappropriation of an advertising idea or style of doing business” or “infringement of copyright, title or slogan.” *Id.* at 457-458. The Fifth Circuit disagreed, specifically holding that the trademark at issue was not an “advertising idea.” *Id.* at 465.

The Fifth Circuit reached its conclusion by looking at the fundamental nature of a trademark, finding that its “primary function ... is to serve as a label – a mark that identifies and distinguishes a particular product.” *Id.* at 461. Notably, the court looked to federal and Texas trademark standards, which it found to be essentially identical. *Id.* at 460-461. Recognizing that some courts have held that trademarks are inherently

“advertising ideas,” the court rejected what it described as an “abstract” approach, and instead reasoned that “advertising” is somewhat more limited as a “device for the solicitation of business.” *Id.* at 462-463, citing *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 748 (3rd Cir. 1999); *Ekco Group, Inc. v. Travelers Indem. Co. of Ill.*, 273 F.3d 409, 413 (1st Cir. 2001). And as the Second Circuit recently observed:

It would be odd indeed to say that the trademarked *name* of a brand, product, or company constitutes a trademarked slogan merely because it remind[s] the consumer of the brand.

Hugo Boss Fashions, Inc. v. Fed. Ins. Co., 252 F.3d 608, 618-619 (2nd Cir. 2001) (emphasis in original).

Trademark cases in Minnesota have similarly recognized that the purpose of trademark protection is to distinguish goods or services in the marketplace, to prevent confusion. See, e.g., *Davis v. Walt Disney Co.*, 430 F.3d 901, 903 (8th Cir. 2005), *Shade’s Landing, Inc. v. Williams*, 76 F.Supp.2d 983, 987 (D. Minn. 1999).

3. Trademark Infringement Does Not Constitute Infringement of Copyright, Title or Slogan

Lastly, in *ShoLodge, Inc. v Travelers Indem. Co. of Illinois*, 168 F.3d 256 (6th Cir. 1999), Sixth Circuit held that trademark infringement does not fall within the AIL definition of “infringement of copyright, title or slogan.” In that case, the insured was sued for service mark infringement over the insured’s use of the name “Sumner Suites.” 168 F.3d at 258. The insurers denied coverage. *Id.* The insured argued that the claim fell within either “misappropriation” or “infringement of copyright, title or slogan.” *Id.* at 258-259. Acknowledging its

earlier holding in *Advance Watch* that service mark infringement does not constitute “misappropriation,” the Sixth Circuit went further and held that service mark infringement is not included within “infringement of copyright, title or slogan.” As the court opined, the “ordinary use [of] the word ‘title’ generally refers to the non-copyrightable title of a book, film, or other literary or artistic work.” *Id.* at 259. Moreover, the court stated, this “ordinary use” of “title” makes sense given its placement in the context of copyright, “which protects the artistic work itself.” *Id.* at 260. To give “title” a broader reading, including any name, “would be to improperly expand the subject matter of the clause.” *Id.* Lastly, the Court noted that if the insurers had intended to provide coverage for trademark or service infringement, they could have done so specifically. *Id.*

The Second and Sixth Circuits have further explained that a trademark word, like “Hobbit,” does not constitute a “slogan.” See, *Hugo Boss, supra*; *Cincinnati Ins. Co. v. Zen Design Group, Ltd.*, 329 F.3d 546 (6th Cir. 2003).

4. The Allegations in the Underlying Complaint Do Not Constitute “Misappropriation” of an “Advertising Idea” or Infringement of Copyright, Title or Slogan

The reasoning in *Ross*, as well as that in *Advance Watch*, *Sport Supply* and *ShoLodge*, applies equally to this case. More specifically, Tolkien Enterprises’ claim in the Underlying Claim arises from Wozniak’s infringement of the term “Hobbit”:

- The term “HOBBIT” was created by Professor Tolkien to describe the fanciful three-foot tall characters first featured in his novel *The*

Hobbit and later in The Lord of the Rings trilogy Underlying Complaint, ¶ 13.

- Bilbo, Frodo, and the other leading HOBBIT characters in the Tolkien Works engage in extensive travels across [a] mythical setting *Id.*
- the fanciful term “HOBBIT” has become widely known among the consuming public to indicate the distinctive fantasy characters created by Professor Tolkien Underlying Complaint, ¶ 14
- Substantial goodwill has developed in the term “HOBBIT” as referring to the characters developed by Professor Tolkien *Id.*
- Thus, THE HOBBIT or HOBBIT, alone or in combination with other words (collectively, the “HOBBIT marks”), have acquired substantial secondary meaning and are inextricably connected to the Tolkien Works and to the goods and services offered by Tolkien Enterprises and/or its licensees *Id.*

Tolkien Enterprises further asserts the Tolkien Marks include the names and visual representations of the characters, places, objects, and events described in the Tolkien Works. Underlying Complaint, ¶ 15. Tolkien Enterprises lists the specific marks: HOBBIT, HOBBITON, FRODO, FRODO BAGGINS, BILBO, BILBO BAGGINS and THE LORD OF THE RINGS. *Id.*

Just as in *Advance Watch*, Tolkien Enterprises uses the word “misappropriation” in its complaint, but as in *Advance Watch*, the word refers to the substance of the trademark claim:

WTI seeks to capitalize on the mythos of the Tolkien Works by using this mark WTI’s proposed mark is an obvious misappropriation of the goodwill developed by Tolkien Enterprises ... in the HOBBIT Marks and Professor Tolkien’s original HOBBIT characters. WTI continues to use this mark ... in spite of Tolkien Enterprises’ long and continuous use of the HOBBIT Marks and other Tolkien Marks Underlying Complaint, ¶ 39.

Even if the allegation could be read as “misappropriation,” there is no allegation of any advertising idea in the term “Hobbit.” Indeed, as alleged in the Underlying Complaint, the word was created by Professor Tolkien to describe characters in his novels. And, just as in *Sport Supply* and *Hugo Boss*, the one-word trademark is not an advertising idea; standing alone, it is not a “device to for the solicitation of business.” Instead, the claim against Wozniak is based on Tolkien Enterprises’ alleged claim for sole right to identify its goods and products by the trademark.

Lastly, as in *ShoLodge*, *Hugo Boss* and *Zen Design*, the trademark claim against Wozniak is not one for infringement of “copyright, title or slogan.”

In sum, the trademark infringement asserted against Wozniak is not an enumerated offense under AIL coverage, and accordingly, the General Casualty policies do not provide any duty to defend or indemnify the claim against Wozniak.

**C. Minnesota Should Not Follow The cursory Analysis Adopted
By The Appellate Court In Williamson**

Wozniak has relied principally on the Court of Appeals decision in *Williamson v. North Star Cos.*, 1997 WL 53029 (Minn. Ct. App. 1997), review denied (April 15, 1997). In that case, the underlying plaintiff manufactured vacuum cleaners that it sold only through authorized dealers. *Id.* at *1. The insured was not an authorized dealer, but he obtained the vacuum cleaners for sale anyway. *Id.* The insured advertised the vacuum cleaners, and that he was certified to repair them. *Id.* After the insured was sued for trademark infringement, he tendered defense of the lawsuit. *Id.* The insurer initially provided a defense, but later withdrew. *Id.* The insured then filed an action for breach of the insurance contract. *Id.* at *2.

As in this case, the policy's AIL definition included "misappropriation of advertising ideas or style of doing business" and "infringement of copyright, title or slogan." By contrast to the thorough treatment by the Sixth Circuit in *Advance Watch* over the course of six pages with reference to numerous authorities with respect to the policy language and its relation to the allegations of trademark infringement, the *Williamson* court resolved AIL coverage in one brief paragraph:

Because the word "title" appears in the same clause as "copyright," we conclude that the policy means "title" in the intellectual property sense. A "title" becomes a trademark through extended usage or by compliance with statutory registration. Black's Law Dictionary 1465 (6th ed. 1990). Moreover, in *P.J. Noyes Co. v. Am. Motorist Ins. Co.*, 855 F.Supp. 492 (D.N.H. 1994), a federal court construed a definition of "advertising injury" identical with that here and held that trademark infringement arguably fell within the scope of "misappropriation of advertising ideas ... or infringement of title or slogan. *Id.* at 494-495. Accordingly, the policy arguably covers the alleged trademark infringement.

Id. at *4.

Nothing in *Williamson* provides any reason to depart from the principles expressed by this Court in *Briggs & Morgan* or the reasoning expressed in the federal appellate decisions cited above. Among other things, *Williamson*'s brief treatment of trademark infringement coverage does not include any discussion of advertising injury coverage, the enumerated offenses within the definition of advertising injury, and the need to read the policy as a whole in order to give meaning to the parties' intentions. There is no discussion – or acknowledgement – of the distinction of a claim for “misappropriation.” *Williamson* does not provide any guidance as to whether a trademarked word like “Hobbit” constitutes an “advertising idea.” Lastly, the *Williamson* court concluded that “title” should be given meaning as a term of intellectual property, but it did not consider the term in its “plain, ordinary and popular” meaning as a literary title. Accordingly, *Williamson* should be limited to its facts, and is not persuasive or relevant to the certified questions in this case.

CONCLUSION

AIL coverage does not include claims for trademark infringement. As thoroughly explained in *Advance Watch*, trademark infringement does not constitute “misappropriation” and accordingly, it does not fall within that definition of “advertising injury.” Similarly, as the Fifth Circuit reasoned in *Sport Supply*, a trademark word such as “Hobbit” does not constitute an “advertising idea.” Lastly, as in *ShoLodge*, trademark

infringement does not fall within coverage for “infringement of copyright, title or slogan.”

Accordingly, General Casualty requests that this Court adopt the reasoning expressed in *Callas*, *Advance Watch*, *Sport Supply* and *ShoLodge*, and answer the District Court’s questions in the negative.

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