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Recent Case Involving Minnesota Business Highlights The Need To Understand Insurance Coverage

On March 26, 2015, the U.S. Court of Appeals for the Eighth Circuit handed down a decision affirming a grant of summary judgment from the U.S. District Court for the District of Minnesota in favor of an insurer in a case involving the definitions and limits of insurance coverage for injury involving intellectual property. [*Selective Insurance Co. of America v. Smart Candle. LLC. No. 14-1356*]

Excell Consumer Products sued Smart Candle, a Minnesota LLC, under the federal Lanham Act alleging that Smart Candle's use of the trade name and trademark "Smart Candle" infringed intellectual property rights that Excell had over both the name and mark.

Smart Candle approached Selective Insurance Company for defense under an insurance policy that covered "personal and advertising injury." Selective disclaimed coverage under the policy noting that the policy explicitly excluded from the definition of advertising injury and injury "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights." Selective filed an action in federal district court to obtain a declaration that it had no duty to defend or indemnify Smart Candle; and Smart Candle counterclaimed for breach of contract arguing, among other things, that the term "Smart Candle" was a "slogan" covered under the policy and thus requiring Selective to defend against Excell's suit.

In granting summary judgment to Selective, the district court noted that Excell's complaint was clearly based on the use of "Smart Candle" as a mark, trademark, trade name, and name and no reasonable jury would conclude that Excell was suing for slogan infringement. To interpret "trademark" to also mean "slogan" the court continued, would render meaningless the policy's differentiation of the two terms.

In its decision on appeal the Eighth Circuit noted that it had previously addressed the issue of the definition of "slogan" using the dictionary definition of "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." In this case, the court continued, the words "Smart Candle" neither expressed a position or stand or goal nor served as an attention getting phrase that generated product recognition beyond the product's name. Because the language of Excell's complaint made no mention of misuse of a slogan "Selective properly considered that its duty to defend had not been triggered. And without a duty to defend, Selective also [had] no duty to indemnify Smart Candle for the defense costs.

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The district court's grant of summary judgment in favor of Selective was affirmed.

The take-away is that a business should be certain of the definitions and operation in its insurance coverage and should purchase coverage which clearly covers any and all

Small Businesses Survive But Do they Prosper? The SBA's 2015 Small Business Profile for Minnesota

In March the U.S. Small Business Administration (SBA) released its most recent small business profile for Minnesota. Those numbers (from U.S. Bureau of Economic Analysis data) showed that Minnesota has 503,055 small businesses (defined as businesses with fewer than 500 employees). Of these, 114,500 were small businesses with employees and 388,555 were small businesses without employees. Other data from the Minnesota Office of Management and Budget indicate that 55 percent of new small business starts are still in business after five years (ranking Minnesota 8th in the nation in five year survivability).

It is significant, however, that the number of employer businesses has remained fairly constant over the last ten years at around 115,000 businesses (using the BEA data) even in years where the number of new business starts is in excess of ten thousand. This raises questions of the relationship between new business starts and longer term survival and conversion from non-employers to employers: in short, where do all the new start ups go such that the number of employer firms remains level?

We do know, and the SBA report notes, that these new firms do not generally disappear in bankruptcy. Minnesota historically over the last ten years has somewhere between 600 and 750 business bankruptcies a year with the rate declining between 2010 and 2014. Likewise merger and acquisition activity is almost exclusively in the area of larger, established firms.

It appears, instead, that many new starts remain "aspirational" businesses which never really get beyond the development stage to substantial revenue generation. This can be a function of traditional barriers like lack of financing, poor management, or the presence of powerful market incumbents. The experience of the Minnesota Small Business Assistance Office, however, is that an equally substantial factor is lack of market knowledge on the part of the business founders and operators. Businesses that would operate in retail sales, for example, are often surprised by the stocking and shelf charges charged by vendors, or by the volume of product which must be guaranteed. Businesses that would operate in light manufacturing, for example, are often unaware of what it means to operate in a price taker market where the business has little flexibility in price up or down. (Raise the price and the market goes away; lower the price below costs and the business goes away.)

This is a challenge for those who counsel and assist small businesses to ensure that clients have comprehensive knowledge of market structure and operations and the dynamics of costs and pricing.

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Department of Employment and Economic Development

1st National Bank Building ■ 332 Minnesota, Suite E-200 ■ Saint Paul, MN 55101-1351 USA
651-259-7114 | Toll Free: 800-657-3858 | Fax: 651-296-5287 | TTY/TDD: 651-282-5909 | <http://mn.gov/deed/>

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