

Media Special Perils Policies Inapplicable to Trade Secret Litigation

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An Illinois state appellate court recently affirmed a lower court's summary judgment award in favor of several media special perils insurers, finding that the insurers were not required to indemnify their policyholder, McDonald's Corporation ("McDonald's"), in the settlement of an underlying suit alleging, inter alia, trade secret claims. *McDonald's Corp. v. American Motorists Ins. Co., et al.*, Case No. 2-00-0566, 2001 Ill. App. LEXIS 322 (Ill. App. May 2, 2001).

McDonald's was a named insured under the advertiser's coverage part of several "Media Special Perils" ("MSP") policies. The MSP policies insured McDonald's against the costs of defending certain lawsuits arising out of its advertising, publicity or promotional activities and to indemnify McDonald's for adverse judgments that may result from any such lawsuits.

McDonald's claimed that its MSP insurers were required to indemnify it for the settlement of a suit filed by Thermodyne Food Service Products, Inc. ("Thermodyne"). The Thermodyne litigation stemmed from the development of a product known as the "Thermodyne" oven. Thermodyne claimed that McDonald's and others misappropriated their trade secrets to develop a competing oven and that the defendants' promotional activities concerning the competing oven exposed plaintiffs' trade secrets to the market place. McDonald's tendered the Thermodyne litigation to its MSP insurers. The insurers denied coverage on the grounds that there was no causal connection between any enumerated offense covered by the MSP policies and the content of McDonald's promotional materials.

In the coverage action, McDonald's argued that a look behind the labels of the causes of action asserted in the operative complaint revealed that the Thermodyne plaintiffs' most significant claim against McDonald's was a claim for "cloud on title." McDonald's further argued that the "cloud on title" theory arose directly out of McDonald's alleged promotion of the competing oven in that McDonald's had "misled the market into believing that [Thermodyne] was not the rightful owner of the technology in the Thermodyne oven by promoting the [competing] oven as incorporating technology that was owned exclusively by McDonald's." The insureds asserted that the "cloud on title" claim was tantamount to the enumerated offenses of "unfair competition" and "slander of title." The insurers responded that an examination of the causes of action actually asserted by the Thermodyne plaintiffs revealed that there was no causal connection between the acquisition and use of technological trade secrets and McDonald's promotion of the competing oven, so there

was no connection between an enumerated offense and the publication of covered material.

In its analysis, the court first noted that, based on the applicable policy language, the insurers had a duty to indemnify McDonald's if (1) the Thermodyne plaintiffs were pursuing one of the offenses enumerated in the policy; (2) the enumerated offense was committed in the content of advertising, publicity or promotion; and (3) the enumerated offense arose out of the publication of advertising, publicity, or promotional material. Based upon the facts and legal arguments presented, the appellate court concluded that the insurers were entitled to summary judgment because none of Thermodyne plaintiffs' allegations constituted an enumerated offense. Even assuming that the allegations of misappropriation of trade secrets constituted an enumerated offense, the court further noted that McDonald's was unable to demonstrate that the misappropriation of trade secrets was caused by its promotional activities. Finally, the court noted that McDonald's "cloud on title" theory had never been recognized as a cause of action in Illinois in any event.