

Breach of Contract Exclusion Bars Coverage under Media Policy for Copyright Infringement Claim

June 2001

A federal court in Illinois recently awarded summary judgment to several media special perils insurers, finding that coverage for a copyright infringement claim against a policyholder was barred by the policies' exclusions for claims arising out of a breach of contract. *Goodheart-Willcox Co. v. First Nat'l Ins. Co. of Am., et al.*, Case No. 00 C 0411, 2001 U.S. Dist. LEXIS 6284 (N.D. Ill. May 8, 2001).

The policyholder, the Goodheart-Willcox Company ("GWC"), is an educational textbook publisher that entered into a licensing agreement with Engineering Software Associates ("ESA"). Pursuant to the licensing agreement, ESA created software from test questions GWC provided, and GWC incorporated the software into its textbooks. ESA filed suit against GWC alleging that (1) GWC breached the license agreement by sublicensing and/or selling for a fee the testing products without first negotiating with ESA to do so, and (2) GWC infringed on ESA's copyrights by distributing its software for a fee without a license. GWC tendered the defense of the litigation to its media special perils insurers, but the insurers denied coverage. GWC then undertook its own defense of the suit and ultimately was successful in securing a dismissal of the copyright claims and then settling the balance of the litigation.

GWC filed a declaratory judgment action against the insurers. In analyzing the coverage issues, the court first determined that the applicable policies covered claims that arise out of certain enumerated offenses, including copyright infringement. In so holding, the court rejected the insurers' argument that the policies' language required a causal link between ESA's claims and GWC's advertising of its covered "works." Rather, the court concluded that alleged copyright infringement merely must have been committed in the utterance or dissemination of the content of GWC's works to be covered under the policies. The court further held that the applicable policies impose on the insurers a duty to indemnify attorney's fees and costs incurred in the defense of a covered claim but do not impose a duty to defend.

The court then considered whether an exclusion in the policies that bars coverage for claims arising out of any breach of contract applied to ESA's copyright infringement claim. The court held that the exclusion applied: "It is evident the copyright claim arises out of, has its origin in and grows from the breach of the license agreement. But for the breach of the license agreement, there would not be a copyright claim at all." In

support of its holding, the court noted that GWC was successful in having the copyright infringement claim dismissed in the underlying action, in part, because ESA's copyright claim was based on the same facts as the breach of contract claim. Thus, the court held that GWC was not entitled to indemnification for its attorneys fees or costs in defending itself against ESA.