

## The Wisconsin Court Of Appeals Holds That Infringing Packaging May Trigger Advertising Injury Liability Coverage

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In *Acuity v. Ross Glove Company, et al.*, 2012 WL 1109035 (Wis. Ct. App. April 4, 2012), the Wisconsin Court of Appeals held that trade dress allegations that an insured manufactured an infringing product, including similar looking packaging, were sufficient to trigger a duty to defend under advertising injury liability ("ALL") coverage. Acuity's insured, Ross Glove Company, manufactures cold weather neck and face protectors. Ross Glove sells to Cabela's, who in turn advertises and sells the merchandise to the public. In 2009, Serius Innovative Accessories, Inc. filed suit against Ross Glove and Cabela's for trade dress infringement. The CGL policy issued by Acuity to Ross Glove provided ALL coverage; the policy's definition of "advertising injury" included "infringing upon another's copyright, trade dress or slogan in your *advertisement*." (Emphasis in the original). Acuity denied any obligation to defend or indemnify Ross Glove and filed an action for declaratory judgment. The trial court found that Acuity did not have a duty to defend but the appellate court reversed.

As the Court of Appeals observed, citing *Fireman's Fund Ins. Co. v. Bradley Corp.*, 2003 WI 33, 261 Wis. 2d 4, 660 N.W.2d 666, the question of whether the underlying complaint triggers ALL coverage requires an affirmative answer to three questions. First, did Serius allege an offense included within the definition of "advertising injury"? Second, did Serius allege that Ross Glove engaged in advertising activities? Third, did Serius allege a causal connection between its alleged injury and Ross Glove's advertising activities?

There does not appear to be much dispute that Serius alleged trade dress infringement. More specifically, Serius alleged that it produces a line of face protectors and that the "shape, form and appearance in use of its packaging ... has acquired secondary meaning in the market for cold-weather headgear." Serius also alleged that Ross Glove and Cabela's created and packaged infringing products that imitated the trade dress of Serius's products. Because trade dress infringement is one of the enumerated offenses within the policy's definition of "advertising injury," the court concluded that the first element had been met.

The court also found the second element – did Serius allege that Ross Glove engaged in advertising activities? – had been met. As the court explained, the policy defined "advertisement" to include "a notice that is broadcast or published to the general public or a specific market segment about your goods, products or services for the purpose of attracting customers or supporters." Although Serius specifically alleged only that Ross Glove *manufactured* the allegedly infringing products, the court nonetheless concluded that a reasonable insured would understand that the word "notice" would include a product's packaging. Thus, the court reasoned, Ross Glove's "distinctive shape, form and appearance" of its packaging – alleged to be similar to Serius's packaging – was a form of advertising activity. The court also concluded that Ross Glove "published" its allegedly infringing packaging to the general public, even though it was alleged that Ross Glove sold its products to Cabela's, who then advertised and sold the products to the public. The court explained that there is no requirement in the policy that Ross Glove be the publisher; the policy merely requires that *someone* publish Ross Glove's allegedly infringing packaging.

Finally, the court opined that the third element – did Serius allege a causal link between Ross Glove's alleged trade dress infringement and injury to Serius? – had also been satisfied. More specifically, the court noted that the alleged infringement by Ross Glove needs only to be a cause of injury, and not the only cause. Because Serius contended that the allegedly infringing packaging misled customers about the source of the products, "it is reasonable to infer that the insured's advertising injury contributed to the alleged injury of customer confusion [and thus] the causal connection is met."

The court dismissed Acuity's argument based on allegations of intentional conduct that the policy's "knowing violation" exclusion applied. As the court noted, Serius does not need to establish intent by Ross Glove in order to prevail on its trade dress infringement claim. Therefore, although evidence of intentional or knowing conduct by Ross Glove may affect Acuity's duty to indemnify any judgment against Ross Glove, the exclusion did not apply to Acuity's duty to defend. The court also rejected application of the intellectual property exclusion because that exclusion has a specific exception for allegations of trade dress infringement.

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