

The Wisconsin Court Of Appeals Finds A Duty To Defend Misappropriation Of Internet Advertising System

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In *Air Engineering, Inc. v. Industrial Air Power, LLC, et. al*, 2013 WL 28271 (Wis. Ct. App. Jan. 3, 2013), the Wisconsin Court of Appeals found a duty to defend allegations of trade secret misappropriation of an internet advertising system. Plaintiff Air Engineering, Inc. alleged that it purchases replacement parts for air compressors and sells them to end users. As part of its overall marketing, Air Engineering allegedly developed a number of computer systems, including an "Internet Advertising System." The Internet Advertising System allowed Air Engineering to design and place ads based on Google searches by people looking for air compressor replacement parts. Two Air Engineering employees allegedly misappropriated plaintiff's computer systems, including the Internet Advertising System, for their own company, Industrial Air Power, LLC. Air Engineering filed a complaint against Industrial and the two employees for trade secret misappropriation. The defendants tendered defense to Acuity, Industrial's insurer. Acuity intervened and sought declaratory judgment that it did not have a duty to defend. The trial court granted Acuity's motion, but the Court of Appeals reversed.

Citing *Acuity v Ross Glove Co.*, 2012 WI App 70, 344 Wis. 2d 29, 817 N.W.2d 455, the court stated that the question of whether the underlying complaint triggers advertising injury liability coverage requires an affirmative answer to three questions. First, did Air Engineering allege an offense included within the policy's definition of "advertising injury"? Second, did Air Engineering allege that Industrial engaged in advertising activities? Third, did Air Engineering allege a causal connection between its alleged injury and Industrial's advertising activities?

First, Acuity's policy defined "personal and advertising injury" to include injury arising out of "[t]he use of another's advertising idea in your [Industrial's] advertisement." The court held that the Internet Advertising System was an "advertising idea" because it was specifically developed to help Air Engineering market its products. Second, Industrial engaged in advertising activity because it allegedly used information from the Internet Advertising System to market its own products and to solicit business, including business from Air Engineering customers. Lastly, Air Engineering alleged harm by loss of customers as a result of Industrial's use of information from the Internet Advertising System.

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