

The Knowing Violation and Criminal Acts Exclusions did not Preclude a Duty to Defend Under the "Personal and Advertising Injury" Provisions

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West Bend Mut. Ins. Co. v. Ixthus Med. Supply, Inc., 2019 WI 19

Ixthus arose out of a federal lawsuit filed in New York by Abbott Laboratories against *Ixthus* and over 100 other defendants asserting thirteen federal statutory and common law claims for relief. *Ixthus* is a medical supply company operating in Wisconsin. Abbott is a health care company that manufactures and sells blood glucose test strips in both domestic and international markets. Abbott's strips are functionally identical regardless of the intended market, but the labeling and instructional inserts as well as price and available rebates are substantially different between the domestic and international packaged boxes. For a variety of reasons, Abbott sells test strips for use in international markets at a much lower cost. The underlying suit was based on Abbott's belief that the defendants were importing, advertising, and subsequently distributing boxes of Abbott's international test strips in the United States.

Ixthus was insured under a commercial general liability insurance policy with West Bend, which provided coverage for "personal and advertising injury." *Ixthus* tendered the defense of the underlying suit to West Bend, who disclaimed coverage, and ultimately filed a declaratory judgment action in the circuit court. On summary judgment, the circuit court granted West Bend's motion concluding that although the allegations in Abbott's complaint fell within the initial grant of coverage, the knowing violation exclusion applied, thereby eliminating any duty to defend. The court of appeals reversed concluding that the knowing violation did not apply because several of the claims alleged in the complaint could be established without having to prove *Ixthus*'s actions were intentional.

The Wisconsin Supreme Court concluded that there was an initial grant of coverage since it was undisputed that the underlying complaint sufficiently alleged both a covered offense and that *Ixthus* was engaged in advertising activity. In addition, the court concluded that the complaint alleged a causal connection between Abbott's alleged injury and *Ixthus*'s advertising activity, thus, meeting the three-question test unique to advertising injury cases.

The supreme court also determined that the knowing violation exclusion did not apply because the complaint contained multiple claims that fell within West Bend's "personal and advertising injury" coverage provision and did not require proof that *Ixthus* acted with knowledge or with intent to violate Abbott's rights and inflict injury.

Lastly, the court also held that the criminal acts exclusion did not preclude coverage and relieve West Bend from its duty to defend because, despite some of the underlying claims alleging criminal violations, the complaint also alleged some claims that were not dependent on a showing of criminal conduct. "When an insurance policy provides coverage for even one claim made in a lawsuit, the insurer is obligated to defend the entire suit."

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