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Court Rules Insured Has Duty To Read Insurance Policy Sooner Rather Than Later

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In a recent case involving claims against an insurance broker, Judge Graham Mullen firmly put the burden of reviewing an insurance policy and understanding coverage exclusions on the insured. Granting summary judgment for the broker on the insured's negligence and breach of fiduciary duty claims, the Court declared that the insured's claims were time-barred because it had a duty to check its coverage when it first received the policy – not years later when a claim arose.

The coverage dispute in *Catlin Specialty Ins. Co. v. Tegal, Inc.*, No. 3:14-cv-00607-GCM-DCK (W.D.N.C.), arose from a lawsuit alleging trademark infringement filed in a California federal court in 2014. Helmet Venture, Inc. claimed that Jafrum International, Inc. ("Jafrum") had been infringing its trademark on motorcycle helmets and apparel since 2009. Jafrum looked to its insurance carriers, Catlin Specialty Insurance Company ("Catlin") and Sentinel Insurance Company ("Sentinel"), for a defense and coverage. Both carriers refused, citing exclusions in their respective policies for trademark infringement. Catlin filed a declaratory judgment action against Jafrum on October 30, 2014, in the federal district court for the Western District of North Carolina. Jafrum counterclaimed, seeking a coverage declaration in its favor. Jafrum also filed a third-party complaint against Sentinel, seeking a declaration of coverage in its favor and for unfair trade practices. Judge Mullen granted summary judgment for both carriers, finding that exclusions in both policies precluded coverage for the underlying trademark infringement claims.

On December 12, 2014, Jafrum also named its insurance broker, Consolidated Marketing Group, Inc. d/b/a/ Charlotte Insurance ("Broker") as a third-party defendant in the lawsuit. Jafrum claimed that it had specifically asked Broker to procure coverage for trademark infringement and other intellectual property claims. Jafrum initially pled a claim for negligence. Later, on September 15, 2015, Jafrum added a cause of action for breach of fiduciary duty against Broker. Jafrum alleged that when Broker first obtained a policy for Jafrum with Catlin in 2009, Jafrum requested a list of the coverage exclusions contained in that policy. Broker provided a list of exclusions, but it did not identify any exclusions for trademark or copyright infringement, when in fact, the policy did have such exclusions. That policy remained in effect until February, 2011, when Catlin declined to renew.

Jafrum asked Broker to obtain another policy that provided the same coverage as the original policy. Jafrum wrote to Broker: "Please keep the current policy without any changes and please find from Hartford clearly that whether [sic] they will insure Products-Completed Operations, Copyright, Patents, Trademarks, Advertising injuries, etc."

Broker procured a policy for Jafrum with Sentinel. The policy excluded coverage for trademark infringement claims. When Broker delivered the initial Sentinel policy to Jafrum in March, 2011, Broker sent a letter stating that Jafrum should "become aware of the coverages afforded by your policy." In 2012, Sentinel renewed the policy, and it still contained the trademark and copyright exclusions. That policy was delivered to Jafrum on January 30, 2012. In 2014, Jafrum was sued for trademark infringement that allegedly began in 2009.

Initially, the Court had to address Broker's motion for judgment on the pleadings. Broker argued that Jafrum's claims were barred by the statute of limitations. The Court granted Broker's motion as to the Catlin policy and the first Sentinel policy because those policies were procured more than three years before Jafrum sued Broker. However, the Court let stand Jafrum's claims as to the second Sentinel policy (delivered in 2012) because it found there were issues of fact on when Jafrum's claim accrued. Specifically, the Court noted that the accrual date is when Jafrum "discovered, or ought to have discovered, through reasonable diligence that its insurance policies did not include coverage for trademark infringement. This question is fact bound, and thus inappropriate for resolution on a motion for judgment on the pleadings."

The statute of limitations issue was revisited after discovery concluded, and the parties filed cross-motions for summary judgment. Jafrum contended that Broker was negligent as a matter of law by not advising Jafrum that Broker did not procure the requested intellectual property coverage. Jafrum argued that it could not have known that Broker breached its fiduciary duty until Jafrum was sued for trademark infringement in 2014 and submitted the claim to the insurance carriers. Broker's response was that it did not breach any duties because Jafrum had ample opportunity to review the policies and determine what coverage it had. Jafrum's CEO admitted that he skimmed the Sentinel policy, but he did not read the entire document. He did not become aware that the policy excluded coverage for trademark and copyright infringement until after Jafrum was sued. Further, the evidence showed that Jafrum never made a specific request for Broker to procure trademark infringement coverage in connection with the 2012 renewal. Broker also disclaimed any implied duty to advise Jafrum on coverage because no "special relationship" existed between them.

Magistrate Judge Keesler recommended that Jafrum's motion for summary judgment on the breach of fiduciary duty claim be denied. He found there were issues of fact on whether Jafrum had acted with "reasonable diligence" or "reasonable prudence." In addition, he found contradictory factual evidence on whether Jafrum had requested Broker to procure policies that covered trademark infringement. However, Judge Keesler recommended granting Broker's motion for summary judgment on Jafrum's negligence claim. The Court found that the evidence showed that Jafrum did not request trademark infringement insurance during the applicable statute of limitations period; consequently, Jafrum's claim for negligence was time-barred. The Court denied Broker's motion for summary judgment on the fiduciary duty claim, finding that there were issues of disputed fact that a jury should determine.

Broker filed objections. Judge Mullen affirmed the magistrate judge's ruling granting summary judgment for

Broker on Jafrum's negligence claim, but rejected the ruling on the fiduciary duty claim. Finding that Jafrum's breach of fiduciary duty claim arose when it received the policy from Broker in March 2011, Judge Mullen ruled that Jafrum's claim was barred by the statute of limitations and granted summary judgment for Broker. Judge Mullen relied on the North Carolina Court of Appeals' recent decision in *Holmes v. Sheppard*, 805 S.E.2d 371 (N.C. App. 2017), which held that an insured who had a policy in his possession could not rely on a representation by the agent about coverage. Instead, the insured had a duty to read the policy and ascertain the nature and extent of the coverage provided. Likewise, in this case, Judge Mullen found that "a reasonably diligent entity would have discovered the alleged breach" when it received the policy. Jafrum failed to exercise reasonable diligence by not reading the policy in March 2011. Thus, the lawsuit filed in December 2014 was time-barred.

The Court expressly rejected Jafrum's argument that Broker's list of exclusions provided two years earlier deterred it from reading the policy. Relying on *Holmes* again, the Court held that an insured's "failure to read the policy constituted a lack of reasonable diligence as a matter of law." The Court also rebuffed Jafrum's contention that the "byzantine nature of the policy" prevented it from reading it. Citing to testimony from Jafrum's CEO that trademark and copyright infringement was of "main concern" to the company, the Court found that the exercise of reasonable diligence "requires a company to confirm that the policy contains any bargained for provisions." The Court concluded that any reasonable jury would find that Jafrum's claim for breach of fiduciary duty accrued in March 2011, when the CEO received the policy and could have seen that it had an exclusion for trademark infringement. Because more than three years had elapsed between the receipt of the policy and the filing of the lawsuit against the Broker, the claim was time-barred, and Broker was entitled to summary judgment.

Although this case was decided on a statute of limitations defense, the Court was clear in its directive that an insured has an affirmative duty to read and understand its insurance coverage, despite any representations by its broker. Here, it appears that the insured inquired about trademark infringement coverage (among other types of coverage), but failed to read the policy to determine if such coverage was provided or to follow up with the broker to seek an explanation of coverages. The insured's reliance on a list of exclusions it got two years earlier from the broker relating to another policy was not enough to create an issue of fact about the broker's responsibility. This case sends a stark message to insureds: "Read your policy upon receipt." According to this Court, the statute of limitations is running on claims against your broker if the requested coverage has not been procured.

Steven DeGeorge and Matthew Gambale of Robinson, Bradshaw & Hinson represented Jafrum. Daniel Peterson and Jason Benton of Parker Poe Adams & Bernstein represented Broker.

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