Tenth Circuit Continues the Ambiguity of "Advertising Injury"

The Tenth Circuit handed down a message in a recent case brought by **DISH Network against its Commercial General Liability (CGL) carriers,** where DISH had been sued on patents claiming call center technology. Although unlikely, some CGL policies *may* still be interpreted to have some coverage for patent infringement claims *if* the patent is claimed to be on a way of advertising a product. In ***DISH Network Corp. v. Arch Specialty Ins. Co., F.3d No. 10-1445 (10th Cir. Oct. 17, 2011),*** **D**ISH argued that the **CGL coverage for "advertising injury" was potentially triggered by the asserted patents' claims which purportedly included advertising or product promotion.**

Although "numerous cases do, indeed, categorically rule out 'advertising injury' coverage for patent infringement," DISH, slip op. at 12, "where an advertising technique itself is patented, its infringement may constitute advertising injury." Id. at 14. The court noted that allegations of patent infringement by a product are consistently held to not be within advertising injury coverage, regardless of how that product might be advertised. Only when both the accused activity and the patent's claims are within the scope of advertising does the potential for coverage attach. The insurers continued to assert various intellectual property (IP) exclusions and causation arguments, and the case will return to its trial court for further litigation.

Obtaining CGL coverage for patent litigation continues to be a difficult and unpredictable endeavor. When cases like DISH continue to be litigated in the courts, you can be sure that carriers will attempt to further limit any plausible type of IP exposure under their commercial insurance policies. It is essential that companies not rely on the unpredictability of the courts to determine if they have coverage under their CGL policies.

Companies are well advised to proactively obtain insurance coverage specifically tailored to address their most valuable asset, intellectual property rights. Instead of taking the chance on CGL coverage, a company can obtain a dedicated policy where patent infringement allegations can be explicitly insured without the need to litigate coverage through trial and appeals courts. These dedicated IP policies can even cover the cost of pursuing a CGL carrier in those exceptional cases where it should provide coverage. Despite the established availability of IP insurance policies, most companies have not been made aware of the existence of IP insurance, as well as the number of companies who think they will be covered for IP risk under their CGL policy.

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Mr. Fletcher is the President and CEO of Intellectual Property Insurance Services Corporation (IPISC). Under Mr. Fletcher's direction, IPISC serves as the Managing General Agent and Program Manager for intellectual property risks.

In addition to founding IPISC 20 years ago, Mr. Fletcher is a patent attorney with more than 40 years of experience in

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