COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP909 **Cir. Ct. No. 2016CV1414**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WEST BEND MUTUAL INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

IXTHUS MEDICAL SUPPLY, INC. AND KARL KUNSTMAN,

DEFENDANTS-APPELLANTS,

ABBOTT LABORATORIES, ABBOTT DIABETES CARE INC. AND ABBOTT DIABETES CARE SALES CORP.,

DEFENDANTS-CO-APPELLANTS.

APPEAL from a judgment of the circuit court for Racine County: DAVID W. PAULSON, Judge. *Reversed and cause remanded with directions*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. West Bend Mutual Insurance Company insured Ixthus Medical Supply, Inc. and Karl Kunstman, Ixthus' principal (collectively, Ixthus) under a commercial general liability (CGL) policy and a commercial umbrella policy. The sole question on appeal is whether the policies' "knowing violation" exclusion applies and relieves West Bend of its duty to defend Ixthus in connection with a trademark/trade dress infringement case Abbott Laboratories and two of its affiliates (collectively, Abbott) filed against Ixthus[1] in federal court in New York. Concluding that the exclusion applied because the New York complaint includes allegations of willful misconduct, the circuit court granted summary judgment in favor of West Bend and declared that West Bend had no duty to defend or indemnify Ixthus. We disagree and conclude Abbott's complaint alleges facts sufficient to trigger the duty to defend. We therefore reverse the judgment and remand for further proceedings.

¶2 Abbott is a health care company. Ixthus is a medical supply company. One of Abbott's products for diabetics is FreeStyle® blood glucose test strips ("FreeStyle"). FreeStyle test strips are sold worldwide. While the test strips are functionally the same regardless of their intended market, those for international markets are not approved for domestic sale because the labeling and instructional inserts do not meet FDA requirements and do not bear a National Drug Code number. As an NDC number is necessary for reimbursement, diverted

[1] Ixthus is one of over one hundred defendants in the underlying lawsuit. Only Ixthus and Abbott were named as defendants in this coverage action. West Bend joined Abbott solely as a potential interested party.

test strips are not eligible. Due to differences between United States and foreign insurance, reimbursement, and rebate practices, Abbott sells test strips outside the United States at a markedly lower cost.

¶3 Abbott contended that Ixthus and the defendant wholesalers and pharmacies diverted FreeStyle test strips packaged for international markets and advertised to consumers through websites and other media, their ability and willingness to sell FreeStyle test strips. The diverted test strips were passed off as domestic FreeStyle test strips, as only domestic ones are eligible for reimbursement, and fraudulent insurance, Medicaid, or Medicare reimbursement claims were submitted. Abbott paid insurers rebates on what it thought were legitimate reimbursement claims.

¶4 The New York lawsuit against Ixthus and the other defendants alleged thirteen claims, ten of which remain:[2] Federal Trademark Infringement, Federal Unfair Competition, Common Law Unfair Competition; Federal Trademark Dilution, State Law Trademark Dilution, State Law Deceptive Business Practices, Importation of Goods Bearing Infringing Marks, Fraud and Fraudulent Inducement, Aiding and Abetting Fraud, and Contributory Trademark Infringement. The state law claims are under New York law.

¶5 The West Bend policies provide that West Bend has a duty to defend for "personal and advertising injury." The policies *exclude* coverage for personal and advertising injury, however, under their "Knowing Violation of Rights of Another" provisions for injury "caused by or at the direction of the insured with

[2] The New York court dismissed two federal RICO violations claims and an unjust enrichment claim.

the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'"

¶6 Ixthus tendered the defense to West Bend. West Bend denied coverage. Abbott counterclaimed for a declaratory judgment that West Bend had a duty to defend and indemnify Ixthus. West Bend moved for summary judgment, seeking a declaration that it had no duty to defend or indemnify Ixthus. It contended that the underlying complaint failed to allege a causal connection between Ixthus's advertising activity and Abbott's injury and that the policies' "knowing violation" exclusion barred coverage.

¶7 The circuit court rejected West Bend's causation argument but found that the complaint alleges or allows for a reasonable inference that Ixthus's acts were intentional and an advertising injury was caused at Ixthus's direction with the knowledge the act would violate the rights of another. Concluding that the knowing violation exclusion applies, the court denied Abbott's motion and granted West Bend's. Ixthus and Abbott appeal.

¶8 We review summary judgment decisions independently, applying the standards set forth in WIS. STAT. § 802.08(2) (2015-16)[3] in the same manner as the circuit court. ***Smaxwell v. Bayard***, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sec. 802.08(2). A declaratory judgment determining insurance coverage involves the interpretation of an insurance policy; that, too, is a question of law that we

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

review de novo. ***Air Eng'g, Inc. v. Industrial Air Power, LLC***, 2013 WI App 18, ¶9, 346 Wis. 2d 9, 828 N.W.2d 565.

¶9 We determine an insurer's duty to defend "by comparing the allegations of the complaint to the terms of the insurance policy." ***Fireman's Fund Ins. Co. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. "The duty to defend is based solely on the allegations 'contained within the four corners of the complaint.'" ***Id.*** (citation omitted). "The insurer has a duty to defend when the allegations, if prove[d], give rise to the possibility of recovery under the terms of the policy." ***Air Eng'g***, 346 Wis. 2d 9, ¶10. "If even one covered offense is alleged in the underlying complaint, the insurance company has a duty to defend." ***Acuity v. Ross Glove Co.***, 2012 WI App 70, ¶19, 344 Wis. 2d 29, 817 N.W.2d 455.

¶10 Ixthus and Abbott argue that West Bend has a duty to defend under the policies' advertising injury provision. To determine if the allegations in the complaint give rise to a possibility of coverage under that provision, we examine whether the complaint alleges: (1) a covered offense under the advertising injury provision, (2) that Ixthus engaged in advertising activity, and (3) a causal connection between Ixthus's advertising activity and Abbott's claimed injury.

¶11 As is relevant here, West Bend's CGL and umbrella policies afford identical coverage. They provide:

> **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY**
>
> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to

> defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply….
>
> ….
>
> b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business ….
>
> **2. Exclusions**
>
> This insurance does not apply to:
>
> a. **Knowing Violation Of Rights Of Another**
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."
>
> **….**
>
> **SECTION V—DEFINITIONS**
>
> **1.** "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your [Ixthus's] goods, products or services for the purpose of attracting customers or supporters.[4] For the purposes of this definition:
>
> a. Notices that are published include material placed on the internet or on similar electronic means of communication ….

[4] "Notice" includes packaging. ***Acuity v. Ross Glove Co.***, 2012 WI App 70, ¶13, 344 Wis. 2d 29, 817 N.W.2d 455. "Publish" means to "bring to the public attention; announce" and "to place before the public (as through a mass medium) disseminate." ***Id.***, ¶14 (citations omitted).

¶12 We conclude that the complaint alleges a covered offense because it alleges that Abbott suffered an advertising injury caused by an offense arising out of Ixthus's business.

¶13 As to the second query, we conclude that Ixthus engaged in advertising activity. The complaint alleges that the test strips are functionally the same whether for domestic or international sale but that the diverted ones are not labeled to comply with FDA requirements and that there are numerous material differences between packaging intended for international and domestic markets. Packaging itself is an advertisement. *See* ***Ross Glove***, 344 Wis. 2d 29, ¶¶13-16.

¶14 The complaint also alleges a causal connection between Abbott's claimed injury and Ixthus's advertising activity. It alleges that Ixthus's unauthorized importation, advertisement, and distribution of diverted test strips causes "consumer confusion, mistake, and deception to the detriment of Abbott, as well as to … consumers, insurance companies, third-party payors, and Medicaid and Medicare." The complaint also alleges that, as a result of Abbott's extensive branding, marketing, sales, and quality control efforts at home and abroad, patients in the United States expect from Abbott a certain quality, packaging, and overall image for FreeStyle test strips. The diverted international FreeStyle test strips packages bear certain of Abbott's trademarks but are materially different from what United States patients expect, causing "great damage to Abbott and the goodwill of Abbott's valuable trademarks." The third prong, a causal connection, also is satisfied. We therefore conclude that West Bend has a duty to defend Ixthus in the underlying lawsuit brought by Abbott.

¶15 Having found that there is an initial grant of coverage, we next must consider whether any of the policy's exclusions preclude coverage. ***Water Well***

Sols. Serv. Grp. v. Consolidated Ins. Co., 2016 WI 54, ¶16, 369 Wis. 2d 607, 881 N.W.2d 285.

¶16 As noted, the "knowing violation" exclusion in West Bend's policies excludes coverage for advertising injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict personal and advertising injury." Some of the ten surviving claims expressly allege a knowing violation of another's rights; others do not.

¶17 Regardless if a complaint alleges that the insured knew it was committing a wrongful act or not, however, an insurer has a duty to defend if the policyholder still could be liable without a showing of intentional conduct. ***Air Eng'g***, 346 Wis. 2d 9, ¶24. We are not persuaded by West Bend's argument that all of the claims are pulled within the ambit of the "knowing violation" exclusion by virtue of the incorporation clause at the beginning of each claim for relief: "Abbott incorporates each paragraph of this Complaint as if fully set forth herein." Simply because the complaint alleges intent does not necessarily mean each underlying claim requires proof of intent.

¶18 As examples, Abbott asserts claims for trademark dilution under Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c)(1) and New York law. The Lanham Act is a strict liability statute—there need not be an allegation of willfulness to succeed on the issue of liability. ***Ross Glove***, 344 Wis. 2d 29, ¶19. To state a claim for trademark dilution under New York General Business Law § 360-1, "a plaintiff must show that (1) its trademark 'is of truly distinctive quality or has acquired secondary meaning' and (2) 'there is a likelihood of dilution.'" ***Johnson & Johnson v. The Am. Nat'l Red Cross***, 552 F. Supp. 2d 434, 447 (S.D.N.Y. 2008) (citation omitted). Intent is not required.

¶19 To prove deceptive business practices, a violation of New York General Business Law § 349, it is not necessary to establish an intent to defraud or mislead. ***Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.***, 647 N.E.2d 741, 744-45 (N.Y. 1995). Proof of scienter simply permits the court to treble damages up to $1000. ***Id.***

¶20 As there are claims set forth in the complaint that survive the "knowing violation" exclusion, the inclusion of allegations of intentional conduct does not relieve the insurer of its duty to defend. *See* ***Air Eng'g***, 346 Wis. 2d 9, ¶25. We therefore reverse the circuit court's grant of summary judgment and its order declaring that West Bend has no duty to defend or indemnify Ixthus. We remand with directions that declaratory relief be entered in Ixthus's and Abbott's favor, such that West Bend must defend the suit and indemnify Ixthus against any damages awarded to Abbott as compensation for its advertising injury on claims that do not require proof of a knowing violation.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.