

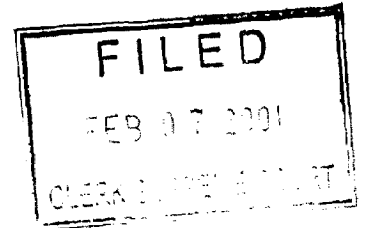
IN THE COURT OF APPEALS OF IOWA

No. 0-663 / 00-373
Filed February 7, 2001

IMT INSURANCE COMPANY,
Plaintiff-Appellee,

vs.

PAPER SYSTEMS, INC.,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

Paper Systems, Inc. (PSI) appeals from a declaratory judgment ruling in
favor in IMT Insurance Company. **AFFIRMED.**

Jaki K. Samuelson and Danette L. Kennedy of Whitfield & Eddy, P.L.C.,
Des Moines, for appellant.

Karl T. Olson of Bradshaw, Fowler, Proctor & Fairgrave P.C., Des Moines,
for appellee.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

Paper Systems, Inc. ("PSI") appeals a declaratory judgment ruling concluding IMT Insurance Co. had no legal obligation to defend or indemnify PSI in a patent infringement lawsuit. We affirm.

I. Background Facts and Proceedings

PSI manufactures disposable liquid packaging systems. The company had a commercial general liability insurance policy and a commercial umbrella policy with IMT.

In 1998, PSI was sued by Longview Fibre Company. Longview alleged PSI violated United States patent laws when it "made, used, offered to sell and sold" its containers.¹ After receiving the complaint, a representative of PSI immediately sought a determination from IMT as to whether the insurer would defend and indemnify PSI in the lawsuit.

IMT, through its home office claims manager David Snodgrass, considered PSI's request. On April 8, 1998, Snodgrass sent a letter to PSI advising the company its policies did cover the Longview action but IMT would still have to resolve certain fact issues relating to the period of coverage before it made a final decision on defending the Longview action. Later that day,

¹ Longview's petition cites to those laws, set forth at 35 U.S.C. sections 1-376. 35 U.S.C. § 271 states:

§ 271. Infringement of patent

(a) Except as otherwise provided in this title, whoever without authority *makes, uses, offers to sell, or sells any patented invention*, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

(Emphasis added).

Snodgrass telephoned Larry Chase, president of PSI, and advised him the letter was incorrect and in fact neither policy covered the defense of the Longview action. Snodgrass subsequently transmitted two letters to Chase confirming this conversation.

Unable to resolve the coverage dispute informally, IMT filed a petition for declaratory judgment seeking a ruling it had no duty to defend or indemnify PSI in the Longview action. The district court ruled in favor of IMT.

On appeal, PSI contends (1) the language of both policies affords coverage for the Longview lawsuit and (2) IMT waived its right to deny coverage. As this action was tried at law, our review is on error. *Plymouth Farmers Mutual Ins. Ass'n v. Armour*, 584 N.W.2d 289, 291 (Iowa 1998).

II. Policy Coverage

IMT's policies do not expressly cover patent infringement claims nor do they expressly exclude such claims. The policies do, however, cover an "advertising injury caused by an offense committed in the course of advertising."² The IMT policies define "advertising injury" in pertinent part as an "injury arising

² The policies state:

**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 injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" or "offense" and settle any claim or "suit" that may result

out of one or more of the following offenses d. Infringement of copyright, title or slogan." PSI maintains: (1) the patent infringement lawsuit is an "infringement of title" within the meaning of the policies; (2) an "offer to sell" as alleged by Longview constitutes an "advertising injury"; and (3) patent infringement is an act "committed in the course of advertising."

A. Infringement of Title Offense. PSI contends the policy language covering advertising injuries for "infringement of title" encompasses Longview's patent infringement lawsuit. While appealing at first blush, a host of jurisdictions have concluded otherwise, noting (1) the absence of the word "patent" in the list of offenses; (2) the absence of anything in the term "advertising injury" that would imply coverage of patent infringement claims; and (3) the fact "title" as used in other portions of commercial policies refers to names as opposed to property. See, e.g., *Owens-Brockway Glass Container, Inc. v. International Ins. Co.*, 884 F. Supp. 363, 367-369 (E.D. Cal. 1995); *Gencor Industries, Inc. v. Wausau Underwriters, Ins. Co.*, 857 F. Supp. 1560, 1564 (M.D. Fla. 1994); *Atlantic Mutual Ins. Co. v. Brotech Corp.*, 857 F. Supp. 423, 429 (E.D. Pa. 1994).

PSI nevertheless contends our rules of construction mandate a broad reading of the term "title" in favor of coverage, given the absence of an express exclusion for patent infringement claims. We agree with PSI that an insurance policy should generally be interpreted from the viewpoint of an ordinary person. *West Bend Mut. Ins. Co. v. Iowa Iron Works, Inc.*, 503 N.W.2d 596, 599 (Iowa 1993). We also agree that, viewed alone, the ordinary meaning of "title" as the right to own or use something would encompass patent infringement. See

Webster's II New College Dictionary, 1157 (2d Ed. 1999). However, our rules of construction also require us to read policies as a whole, avoiding strained or unnatural interpretations. See *Coulter v. CIGNA Property & Cas. Co.*, 934 F. Supp. 1101, 1114 (N.D. Iowa 1996); *Continental Ins. Co. v. Bones*, 596 N.W.2d 552, 555-556 (Iowa 1999).

Like other courts facing this issue, we are persuaded that the absence of any reference to patent infringement in any portion of IMT's policies and the inclusion of other specific legal wrongs such as libel, slander and infringement of copyright mean the parties did not contemplate coverage for patent infringement. See *Herman Miller, Inc. v. Travelers Indem. Co.*, 162 F.3d 454, 455 (6th Cir. 1998); *Brotech Corp.*, 857 F. Supp. at 429. As stated in *Brotech*:

Under defendant's proffered reading, the insurance companies could be liable under this provision for an insured's theft, misappropriation or conversion of any personal property of another if such were then advertised for sale. The term "infringement of title" as used in the pertinent policies cannot reasonably be perceived to mean patent infringement.

Id. Accordingly, we agree with the district court's conclusion that the "infringement of title" offense specified in IMT's policies does not encompass Longview's patent infringement claim. Cf. *St. Paul Fire and Marine Ins. Co. v. Advanced Interventional Systems, Inc.*, 824 F. Supp. 583, 586 (E.D. Va. 1993) (noting party unable to establish existence of predicate offense could not obtain coverage for defense of patent infringement claim).³

B. Advertising Injury. PSI next maintains Longview's allegation that PSI "offered to sell" its containers was essentially an allegation that PSI advertised its

³ While our conclusion that PSI failed to establish the existence of the predicate "infringement of title" offense is dispositive of the appeal, we will nevertheless address PSI's remaining arguments in support of coverage.

product and, accordingly, this language created a covered "advertising injury." We disagree. "Offer to sell" as used in patent infringement claims is a term of art, defined as "that in which the sale will occur before the expiration of the term of the patent." 35 U.S.C. § 271(i) (2000). This definition is far different from the general definition of advertising.⁴ The technical definition contemplates an actual sale rather than general words of praise about the product to members of the public. Therefore, we conclude Longview's reference to an "offer to sell" does not create an advertising injury. *Cf. Tradesoft Technologies v. Franklin Mutual Ins. Co., Inc.*, 746 A.2d 1078, 1085-1086 (N.J. 2000) (noting consensus that post-1996 federal law regarding "offers to sell" patents still did not allow patent infringement claims to be construed as copyright/trademark infringement).

C. In Course of Advertising. PSI next maintains Longview's lawsuit alleges the offense occurred "in the course of advertising." The "in the course of advertising" requirement is essentially a causation requirement. *See Iolab Corp. v. Seaboard Surety Co.*, 15 F.3d 1500, 1507 (9th Cir. 1994). Some jurisdictions have held as a matter of law that an insured cannot prove causation between advertising and a patent infringement claim. *See, e.g., Gencor Industries, Inc.*, 857 F. Supp. at 1564; *Brotech*, 857 F. Supp. at 429; *Aetna Casualty and Surety Co. v. Superior Court*, 23 Cal. Rptr. 2d 442, 446 (Cal. Ct. App. 1994). The rationale is that, "[s]ince the gravamen of patent infringement is the unauthorized production, use or sale of a patented product and not its advertisement, it could not arise out of or occur in the course of advertising activities." *Brotech*, 857 F.

⁴ "Advertising" is commonly defined as "to call public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize." Webster's II New College Dictionary 17 (2d Ed. 1999).

Supp. at 429. Other jurisdictions have rejected such claims for failure to factually establish a causal link. See, e.g., *Heil Co. v. Hartford Acc. and Indem. Co.*, 937 F. Supp. 1355, 1366-67 (E.D. Wis. 1996); *Fluoroware v. Chubb Group*, 545 N.W.2d 678, 681 (Minn. App. 1981). We need not adopt a rule that patent infringement claims can never be "committed in the course of advertising" because, as a factual matter, the record here contains no evidence of a direct causal link between the asserted patent infringement and advertising. Therefore, we reject PSI's assertion that Longview's complaint asserts an offense that was committed "in the course of advertising."

We conclude the district court was correct in ruling IMT's policies afford no coverage for Longview's patent infringement claim.

III. Waiver

PSI next contends IMT waived its right to deny coverage by affirmatively representing such coverage existed. IMT responds (1) waiver cannot be used to create coverage where none previously existed and (2) PSI has not established the elements of a valid waiver.

Waiver is the "voluntary or intentional relinquishment of a known right." See *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982). A party asserting waiver must prove: (1) the existence of a right; (2) actual or constructive knowledge of the right, and (3) an intention to relinquish the right. *Id.*

We recognize many jurisdictions have refused to apply the waiver doctrine to authorize substantive coverage where none previously existed. See *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 497 (4th Cir. 1998); *Sellers v. Allstate*

Ins. Co., 82 F.3d 350, 353 (10th Cir. 1996); *Gilley v. Protective Life Ins. Co.*, 17 F.3d 775, 781 (5th Cir. 1994); *Western Ins. Co. v. Cimmaron Pipe Line Construction-Co.*, 748 F.2d 1397, 1399 (10th Cir. 1984); *Federated Mut. Ins. Co. v. Davis*, 919 F. Supp. 1001, 1006 (S.D. Miss. 1995); *Design Data Corp. v. Maryland Cas. Co.*, 503 N.W.2d 552, 559 (Neb. 1993). We need not paint with such a broad stroke because, under the facts of this case, we conclude PSI failed to prove the existence of a valid waiver.

Although IMT notified PSI the policies covered Longview's patent infringement claim, IMT retracted that representation of coverage several hours later, asserting it was made in error. Therefore, IMT did not evince an intention to forgo a right it knew to exist and PSI's waiver claim must fail. *Cf. Scheetz*, 324 N.W. 2d at 304 (finding waiver where insurance company knew of its policy's limitation period yet continued to negotiate with the insured until the end of that period); *Briney v. Tri-State Mut. Grain Dealers Fire Ins. Co.*, 254 Iowa 673, 680, 117 N.W.2d 889, 893 (1962) (finding waiver where insurance company covered an earlier claim, did not cancel the policy, and retained a premium).

We agree with the district court's conclusion that IMT's policies did not require the company to defend and/or indemnify PSI in connection with the Longview action. In light of our conclusion, we need not address PSI's counterclaim.

AFFIRMED.