No. S019556

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BANK OF THE WEST, as successor in interest to CENTRAL BANK, a California banking corporation,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA,

Respondent.

INDUSTRIAL INDEMNITY COMPANY and INDUSTRIAL INSURANCE COMPANY OF HAWAII, LTD.,

Real Parties in Interest.

AMICUS CURIAE BRIEF OF TRUCK INSURANCE EXCHANGE IN SUPPORT OF REAL PARTIES IN INTEREST, INDUSTRIAL INDEMNITY COMPANY AND INDUSTRIAL INDEMNITY COMPANY OF HAWAII, LTD.

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INTRODUCTION

In an old anecdote, a man wants to know what two plus two equals and decides to get the answer from a lawyer. Ushered in to see the lawyer, he explains the problem. The lawyer thinks about it a minute, then puts his arm around the man's shoulders and asks, "What would you like it to be?" (See M. Rafferty, Skid Marks (1988), p. 47.) In

the present case, the Bank and the Court of Appeal, in a sense, play the role of that lawyer, defining the scope of the subject insurance coverage purely in terms of what the insured would like it to be, not in terms of what the policy--reasonably read--says and what the contracting parties mutually intended. (See AIU Ins. Co. v. Superior Court (1990) 51 Cal.3d 807, 821-822.)

As a result, the Court of Appeal's remarkable decision holds that standard comprehensive general liability (CGL) insurance policy language expressly providing coverage only for specific types of injury "arising out of an offense . . . occurring in the course of the named insured's advertising activities" instead expansively affords "coverage for all unlawful and unfair business practice committed against either a business rival and/or the general public." (Slip opn., pp. 2, 4.) This shocking construction comes from ignoring wholesale a core concept, namely, that the subject coverage is for "advertising injury." Since the coverage is limited to offenses occurring in the course of advertising activities, it cannot possibly apply to every conceivable type of tort a business might commit.

The "advertising" limitation appears quite clearly in the policy. The pertinent language expressly provides coverage for "all sums which the insured shall become legally obligated to pay as damages because of . . . advertising injury" (Slip opn., p. 4), and it then defines "advertising injury" as:

> "injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of the right of

privacy, unfair competition, or infringement of copyright, title or slogan." (Ibid.)

There is no mistaking the import of this language: Common sense, as well as the words themselves, dictate that coverage under these provisions must be tied intrinsically to the insured's advertising activities. Yet the Court of Appeal, fixating on the notion that insurance contracts are to be construed in favor of extending coverage whenever possible, managed to find coverage for the Bank[1/] even though the injuries allegedly caused by the Bank did not occur because of any advertising activity.

Straining to preserve what must have been a surprise bounty, the Bank now defends the appellate court's construction by dissecting the relevant policy language and interpreting each word or phrase in isolation, in the hope of contorting the language to read as it would like it to read. As a result, it comes up with a reading entirely divorced from the provision's fundamental intent to cover only advertising injury.

For example, the Bank takes the phrase "in the course of the . . . insured's advertising activities" and transmutes it into a completely different species, saying it means "occurring while the insured is engaged in any activity or communication intended to advance its business." Next, having effectively ignored the core "advertising" requirement, the Bank, like the Court of Appeal, shifts the focus of its discussion from advertising to the torts specifically designated in the definition of "advertising injury." Seizing upon the term "unfair competition," the Bank espouses the expansive definition

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1/ As in the Court of Appeal's opinion and in the parties' briefs before this Court, Petitioner is referred to as "the Bank," and Real Parties in Interest will be collectively referred to as "Industrial."

applied by the Court of Appeal and, in doing so, completely loses sight of the "advertising" framework within which the term must be read. The problem, however, is that no matter how unfair competition is defined--be it broadly or narrowly--the threshold criterion for coverage is still an injury connected with advertising.

By defining "unfair competition" to mean "coverage for all unlawful and unfair business practice committed against either a business rival and/or the general public" (Slip opn., p. 4), and then making this the centerpiece of their analysis, the Bank and the Court of Appeal effectively eliminate the advertising boundaries of the coverage. The entire coverage is thus turned on its head, and "advertising injury coverage" is transmuted into coverage for virtually every type of injury that may be characterized as resulting from an "unlawful act" or "unfair business practice." This is insurance-coverage interpretation run amok.

Fortunately, this Court--in AIU--imposed rules of interpretation requiring that the policy language be given reasonable meaning, so that the notion of affording coverage for everything (no matter what the policy language says) is clearly unacceptable. According to the practical guidelines established in AIU, the purpose of insurance policy interpretation is not to afford coverage at all costs, but rather to determine "the mutual intention of the parties at the time the contract is formed. . . ." (Id. at p. 821.) As the Court recognized, that can be determined only by reviewing the position of the parties when the insurance was purchased in order to see objectively what the parties reasonably intended to be covered.

Examining the subject contractual language in proper light, as intended by AIU, there can be no doubt that the appellate court's and the Bank's handiwork twists the policy language beyond recognition, extending advertising coverage far beyond what any

reasonable reading of the language would suggest and certainly beyond what Industrial thought it was providing and what the Bank reasonably could have believed it was buying.

Common sense must prevail. The Court of Appeal's and Bank's skewed analysis should be supplanted with a sensible reading of the policy's language, in order to assure that the coverage afforded comports with the contracting parties' plain intentions to protect against advertising injury occurring in the course of the insured's advertising activities.

LEGAL DISCUSSION

THE APPROPRIATE STANDARD OF INTERPRETATION MANDATES THAT "ADVERTISING INJURY" COVERAGE BE INTRINSICALLY LINKED WITH THE INSURED'S ADVERTISING ACTIVITIES.

This case asks the Court to interpret language providing coverage for "advertising injury." It is not difficult to lose sight of that important fact when assessing the multiple issues skillfully presented and dissected by the parties' briefs.

When the "advertising" context is kept firmly in mind, it becomes immediately apparent what a stunning degree of violence the appellate court's and the Bank's interpretation does to the pertinent policy language. Under the guise of interpreting the policy words "in their ordinary sense" and "according to the plain meaning which a layman would ordinarily attach to them" (Slip opn., p. 7), the Court of Appeal ironically

forgets the "advertising" context and thus transmutes "advertising injury" coverage into "whole-earth" coverage for all unfair or unlawful business practices.

The appellate court and the Bank eviscerate the connection between "advertising injury" coverage and advertising by divorcing policy terms from their proper context. So doing, they discover an assortment of supposed "ambiguities" engendered precisely because they read the terms in unintended isolation; these illusory ambiguities are then used to supply the dubious foundation for the newfound, seemingly unbounded scope of the advertising coverage.

When the overall purpose of affording coverage for "advertising injury" is forthrightly assessed and the policy terms are considered in proper context in accordance with settled principles of contract interpretation, the error of the blanket interpretation advanced by the Bank and accepted by the Court of Appeal becomes plain. Industrial contracted with the Bank to provide coverage for injuries stemming from torts committed in connection with the Bank's advertising. That is precisely the coverage it should receive; nothing more, nothing less.

A. Insurance Policy Language Must Be Interpreted In Accordance With The Parties' Mutual Intention At The Time The Contract Was Formed.

This Court made clear in AIU Ins. Co. v. Superior Court, supra, 51 Cal.3d 807, that the prime consideration in interpreting an insurance contract is determining the parties' mutual intention at the time they entered into the contract. (Id. at p. 821; see Civ. Code, § 1636.) Moreover, "[s]uch intent is to be inferred, if possible, solely from the

written provisions of the contract. (Id.; § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (id., § 1644), controls judicial interpretation. (Id., § 1638.) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (Id. at pp. 821-822; see, e.g., Reserve Insurance Co. v. Pisciotta (1982) 30 Cal.3d 800, 807; Crane v. State Farm Fire & Cas. Co. (1971) 5 Cal.3d 112, 115; see also Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal.3d 903, 916-917 ["'An insurance policy, like any other contract, must be construed in its entirety, with each clause lending meaning to the other'" (quoting Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal.3d 45, 56)].)

While giving lip service to some of these rules, the Court of Appeal essentially ignored them, instead adopting an approach which stressed that "the general provisions of the policy are to be interpreted broadly so as to provide the greatest possible coverage for the insured. . . ." (Slip opn., pp. 7-8.) Since the facts underlying the Bank's coverage claim had no connection whatever to advertising and revealed no injury arising out of an offense committed in the course of the Bank's advertising activities, the appellate court's zeal to find "the greatest possible coverage for the insured" led it to excise pertinent terms from their context and then endow them with abstracted meanings that could not conceivably have been commensurate with the Bank's reasonable expectations in procuring coverage for "advertising injury."

B. The Policy Language Plainly Mandates That "Advertising Injury" Coverage Be Available Only For Specified Offenses Occurring In The Course Of The Insured's Advertising Activities.

In seeking to find "the greatest possible coverage for the insured," the Court of Appeal stretched the meaning of the phrase "in the course of advertising activities" far beyond what the contracting parties reasonably could have had in mind. The Court first broadened the term "advertising" to extend to any business activities intended to induce a purchase, whether or not directed to public attention; then, it effectively eliminated the "in the course of" requirement. "Advertising"--the core of the coverage--was thus deftly eliminated as a requirement of the policy.

As we now explain, these interpretations conflict with the policy's plain language, with any reasonable reading of that language, and with any conceivably-reasonable expectations which the insured could have had in purchasing the coverage.

1. "Advertising" Entails Bringing A Matter To Public Attention.

Under the policy, the Bank could not avail itself of advertising injury coverage unless there was an "injury arising out of an offense . . . occurring in the course of [its] advertising activities." (Slip. opn., p. 4, emphasis added.) That limitation should have proved an insurmountable barrier to coverage under the facts of this case, because the Bank never advertised its loan program to any purchaser of insurance. (See Industrial's opening brief, pp. 4, 32.) Rather, the Bank paid fees and directed solicitations to

intermediary agents and brokers, who then induced purchasers to finance their automobile insurance through the Bank's program. (Slip opn., p. 25.)

The Court of Appeal, however, endeavoring to find "the greatest possible coverage," took the view that advertising "includes any activities designed to bring a seller's goods or services to the attention of potential buyers or to induce them to buy." (Slip opn., pp. 23-24.) Though acknowledging in passing that the term entails "call[ing] to the public attention" (quoting Black's Law Dict. (5th ed. 1979) p. 50, court's emphasis deleted), the court concluded that "advertising" is an open-ended term, encompassing "even one-on-one oral representations." (Id. at p. 24.) Taking the Court of Appeal's cue, the Bank also promotes an open-ended construction, contending that "the term includes anything a seller does to bring its goods or services to the favorable attention of potential buyers." (Bank's Brief on the Merits, p. 32.)

Under these views, virtually every aspect of conducting a business could qualify as advertising--the design of the product, the decor in the reception area, the listing in the white pages. This potentially limitless interpretation contradicts common usage, common sense and case law alike.

While there are diverse views as to precisely how widely a communication must be disseminated to constitute "advertising," the theme--disseminating a promotional message directly to the targeted segment of the public--remains constant in all the pertinent authorities.

Leading dictionaries reflect this theme. For example, Webster's defines the term "advertising" as follows: "The action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public, especially by means of printed or broadcast paid announcements." (Webster's Third New International Dict.

(unabridged, 1986) p. 31.) Random House offers a similar description: "The act or practice of calling public attention to one's product, service, need, etc., especially by paid announcements in newspapers and magazines, over radio or television, on billboards, etc." (Random House Dictionary of the English Language (2d unabridged ed., 1987), p. 29.)

Cases from around the country confirm that the ordinary understanding of the term "advertising" connotes promotional communication directly to a targeted segment of the public. Consider the following examples:

a. Marcyan v. Nissen Corp. (N.D. Ind. 1982) 578 F.Supp. 485, affd 725 F.2d 687. The court rejected a claim of patent infringement and false advertising under the Lanham Act, where the defendant allegedly made a statement in an endorsement manual that its device was the "best exercising machine of [its] type." Although the manual had been seen at trade shows, plaintiffs provided no proof that the endorsement was ever made available to the general purchasing public or in sufficient quantities to constitute an advertisement.

b. First Bank and Trust Co. v. N.H. Ins. Group (1983) 469 A.2d 1367. A bank petitioned the court for declaratory relief to determine coverage under a policy insuring against "personal injury or advertising injury . . . arising out of the conduct of the named insured's business." (Id. at p. 1368.) The New Hampshire Supreme Court held the policy did not cover damages allegedly resulting from the bank's conduct in explaining its services in a private office. The court stated that such acts did not constitute "advertising": "[T]he mere explanation of bank services to a couple in a private office, cannot be considered 'advertising' and . . . an alleged failure on the part of

a bank properly to provide an advertised service does not result in an 'advertising injury' within the meaning of the policy." (Ibid.)

c. Playboy Enterprises, Inc. v. St. Paul Fire & Marine Insurance Co. (1985) 769 F.2d 425. The Seventh Circuit held that distribution of eleven letters did not constitute advertising. Adopting the Webster's definition quoted earlier, the court stated that advertising requires that "the presentation of the item to be sold or approved be made in a medium directed to the public at large." (Id. at p. 428.)

d. Fox Chemical Co., Inc. v. Great Am. Ins. Co. (1978) 264 N.W.2d 385. The Minnesota Supreme Court held that the distribution of 400 copies of a publication "printed for the stated purpose of limited distribution to master distributors for informational background to aid them in educating the salespersons employed to solicit purchase orders for the product" did not constitute "advertising." (Id. at p. 386.) The court reasoned that "advertising" must be "public" or "widespread." (Ibid.)

These authorities jibe with the ordinary and popular sense in which advertising is and should be defined. They undermine the Court of Appeal's conclusion and the Bank's contention that "advertising" should somehow encompass the universe of anything a seller might do to induce a sale. Instead, they confirm that the term's meaning implies a dissemination to a targeted segment of the public. As Industrial correctly notes in its brief, prior to the Court of Appeal's decision in this matter, "the cases were in agreement that advertising necessitates direct entreaty to prospective purchasers." (Industrial's brief on the merits, p. 32.) This Court should adhere to that view.[2/]

2/ The three cases the Bank cites to dispute this proposition are readily distinguishable. All the cited decisions concerned claims brought under consumer protection legislation, under Business and Professions Code sections 17200 and 17500 or (continued...)

We also concur in Industrial's assessment that, "[i]n a market economy, it is difficult to conceive of any activity not within the Court of Appeal's definition of 'advertising.'" (Industrial's brief on the merits, p. 33.) Just about everything a business does is meant "to bring its goods or services to the favorable attention of potential buyers"; that, indeed, is the reason why every business exists. (Bank's Brief on the merits, p. 32.) Under the Bank's construction, "advertising" and "business" become virtual synonyms. Everything from listing the company name on a building directory, to validating a parking stub, to deciding the details of product design, including size, shape and color, would be lumped under the "advertising" heading.

The Bank's approach confounds common sense. Dictionaries as well as uniform decisional law squarely confirm that "advertising" connotes dissemination of product information directly to a targeted segment of the public. That is the term's ordinary and popular meaning; that is the meaning that affords common sense definition to the type of coverage that was intended to be offered. That meaning should control judicial

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2/(...continued)
similar statutes. (See Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197 [consumer protection claim based on false advertising of children's breakfast cereals]; Kociemba v. G.D. Searle & Co. (D.Minn. 1988) 680 F.Supp. 1293 [advertising of IUD to physician constituted advertising to consumers within meaning of consumer protection statute]; Jones v. Sportelli (1979) 166 N.J. Super 383 [same].) Unlike insurance policy terms, which must be read in their ordinary sense consistent with the contracting parties' mutual intent and reasonable expectations, statutory measures (like those involved in the cases cited) are construed to effectuate their goal of protecting the public. (Cf., People v. Hacker Emporium, Inc. (1971) 15 Cal.App.3d 474 [objective sought to be achieved by a statute as well as the evil to be prevented is a prime consideration in its interpretation; accordingly, words of the statute must be read in a manner to effectuate the statute's purposes, even if their ordinary meaning is thereby enlarged or restricted]; Southland Mechanical Constructors Corp. v. Nixen (1981) 119 Cal.App.3d 417 [same].) We submit that decisions interpreting "advertising" in connection with consumer protection claims are not helpful in determining the ordinary meaning of the term for purposes of ascertaining coverage.

interpretation of the term's usage under the "advertising injury coverage" appearing in the CGL policy.

2. The Court of Appeal And The Bank Improperly Seek To Eliminate The Requirement That The Injury Occur "In The Course Of" Advertising.

There is much more to resolving the Bank's advertising coverage claim than simply determining whether the solicitations to intermediary agents and brokers could, by some stretch, have amounted to "advertising." Even if they could have, the Bank faced another insurmountable barrier to coverage in the policy's requirement that the subject injury "occur[] in the course of the [Bank's] advertising activities." (See Slip opn., p. 4, emphasis added.) The consumer injuries at issue in the Fallat action were far attenuated from any of the Bank's supposed advertising. Indeed, regardless how the Bank's activities are characterized, the injury simply did not occur "in the course of" the Bank's advertising activities in any ordinary or natural sense of the phrase.

The Court of Appeal attempted to avoid this obstacle by holding that any attenuated connection between the solicitations and the consumer injuries would suffice to satisfy the "in the course of" requirement. (Slip opn., pp. 24-25.) However, past decisions such as National Union Fire Ins. Co. v. Siliconix, Inc. (N.D. Cal. 1989) 729 F.Supp. 77, discussed at length in Industrial's brief (pp. 34-35), demonstrate that such an approach "reads the requirement that the [injury] occur in the course of advertising out of the policy. Taken to its extreme, this argument would lead to the conclusion that any harmful act, if it were advertised in some way, would fall under the grant of coverage

merely because it was advertised." (National Union Fire Ins. Co. v. Siliconix, Inc., supra, 729 F.Supp. at p. 80.)

Recognizing that the phrase must retain some meaning in the policy, the Bank now contends that "[o]f all the undefined terms in Industrial's policy, 'in the course of' is the only one which has a single settled meaning." Says the Bank, the term unambiguously means "during" and the only connection between injury and advertising required by the term "during" is one of time. (Bank's brief on the merits, p. 35.) Thus, the Bank contends that, so long as consumers were injured at a time when the Bank was advertising in some way, the injury necessarily occurred "in the course of" advertising. (Ibid.)

This position is absurd. It strays about as far afield as one can get from the obvious purpose of advertising injury coverage--namely, to protect the insured against the torts it may commit in connection with its advertising. When the Bank's "during" theory is combined with its hypothesis equating "advertising" with "business," the resultant scope of this coverage becomes truly staggering. In effect, the Bank argues that, so long as it advertises, it has coverage under the "advertising injury" language for every offense that occurs while it is conducting business; coverage for advertising torts becomes universal coverage for anything and everything.

Aside from the fact that the Bank's position utterly disregards any reasonable conception of the proper scope and purpose of advertising injury coverage, there are multiple analytical problems with its position. First, in the abstract, "in the course of" has two meanings. Only one of them is synonymous with "during" (e.g., Nat. Charity League, Inc. v. County of Los Angeles (1958) 164 Cal.App.2d 241, 247); the other establishes a connection other than time.

Specifically, the phrase can also mean in the "customary manner of procedure," or in the "regular or natural order of events." (Random House Dictionary of the English Language (2d unabridged ed. 1987), p. 608 ["as a matter of course; the course of a disease"].) In this usage, the phrase connotes a substantive connection, not merely a temporal one. Thus, when the policy language requires, as it does here, that the injury must arise out of an offense committed "in the course of the named insured's advertising activities," that means--under the second definition--that the injury must arise in the regular, natural or customary order of advertising.

We anticipate the Bank's response to this identification of another meaning for the phrase "in the course of" would be something like this: If the term has multiple meanings, it is ambiguous; if it is ambiguous, it must be construed in favor of coverage; since it must be construed in favor of coverage, the Court must accept the Bank's proffered meaning of "during," since that is the one that would secure the Bank coverage in the Fallat action. Such reasoning, however, would overlook the core requirement that policy terms be construed consistent with the mutual intent of the parties, in accordance with their ordinary meaning, and in context. (See AIU Ins. Co. v. Superior Court, supra, 51 Cal.3d 807, 821-822.)

Most English words have multiple meanings, but we understand them according to their context. We usually can tell from the rest of the sentence which meaning is meant to apply. For example, if we write "The sun is a star," it is clear enough that what we mean by the word "star" is a self-luminous gaseous celestial body of great mass (Webster's Third New International Dict. (unabridged, 1986), p. 2225), and not the leading actor in Gone With The Wind. Likewise, when this brief refers to "the Bank,"

the Court knows we do not mean the shore of the Mississippi River, nor the Bank of America, nor a ceramic pig with a slot in the top.

In the same manner, the phrase "in the course of . . . advertising activities" arguably may be afforded differing meanings if examined in the abstract, but its intended meaning in the context of Industrial's advertising injury coverage is unambiguous. In that context, the parties could not reasonably have intended coverage to be available for the listed offenses, so long as they occurred while the Bank was advertising. Since that type of coverage would make no sense, the parties must have intended that the injury occur in the regular, natural or customary order of advertising. That is why one normally would buy "advertising injury" coverage.

For these reasons, it is inherently improbable that "advertising injury" coverage--expressly designed to cover an offense committed "in the course of the named insured's advertising activities"--would not require a substantive connection with advertising. Further, the Bank's interpretation would effectively read the phrase out of the policy for most insureds. Large commercial entities like the Bank engage in some form of advertising virtually every day; under the Bank's reading, it could obtain full coverage for virtually every conceivable business tort simply by purchasing some round-the-clock billboard or bus stop advertisements. This, of course, is nonsense. The Bank's reading would render the phrase "occurring in the course of . . . advertising activities" meaningless.[3/]

3/ Ironically, the Bank's own reasoning further compels the conclusion that "in the course of" cannot mean "during." The Bank argues that the policy's drafters carefully tailored their phraseology so that each degree of causal link reflected in the policy was represented by different words. (See the Bank's brief on the merits, p. 35.) "Advertising injury" is defined as "injury arising out of an offense committed during the policy period (continued...)

The Court of Appeal and the Bank have expanded "advertising injury" coverage beyond reasonable recognition. The policy language clearly contemplates the coverage would apply to injuries related to the insured's advertising activities; that is why it is called "advertising injury" coverage; that is why the coverage requires that the injury occur in the course of the insured's advertising activities. Such coverage is simply not available under the facts of this case, since the Bank's so-called "advertising" was not directed to the consumer victims nor was there any apparent connection between the Bank's unconscionable interest charges and the advertising. The Court of Appeal's misguided analysis must be substituted with a sensible reading of the policy's plain language.

C. In Context, The Term "Unfair Competition" Cannot Possibly Be Read To Subsume The Requirement Limiting The Availability Of "Advertising Injury" Coverage To Particular Offenses Committed In The Course Of Advertising.

Under Industrial's policy, "advertising injury" coverage requires not only that there be an injury arising out of the named insured's advertising activities, but also that "such injury arise[] out of libel, slander, defamation, violation of the right of privacy, unfair competition, or infringement of copyright, title or slogan." (Slip opn., p. 4.)

3/(...continued)
occurring in the course of the named insured's advertising activities, etc." (Slip opn., p. 4.) Accordingly, even under the Bank's hypothesis, these two terms cannot be synonymous.

The Bank contends it was entitled to advertising coverage in the underlying consumer actions because its fraudulent loan program fell within the ambit of "unfair competition." The Court of Appeal agreed, giving the phrase the extremely broad definition provided in Business & Professions Code section 17200, a statute which pertains--as noted earlier--to consumer protection actions. (See Slip opn., p. 9 [definition "encompasses any unlawful, unfair or deceptive act committed against both a business competitor or the public"]; see discussion in footnote 2, supra.)

In so holding, the Court of Appeal essentially grasped onto a broad definition of "unfair competition" and applied it to extend coverage, even though the facts showed no link with advertising. Thus, with a wave of the wand, the court transmuted advertising injury coverage into unfair competition coverage--policy language be damned. The court completely lost sight of the straightforward purpose of the coverage--that is, to cover advertising injury resulting from specified offenses, including unfair competition, committed in the course of advertising activities. In transmuting advertising coverage into unfair competition coverage, the crucial advertising foundation simply disappeared.

Industrial's briefs thoroughly examine the myriad flaws in the appellate court's reasoning and conclusion. (Industrial's brief on the merits, pp. 12-31, 35-38; Industrial's reply brief, pp. 1-4, 6-9.) We endorse the substance of those arguments.

We agree with Industrial's analysis leading to the conclusion that the term "unfair competition," as used in the policy, was meant to refer to the tort cause of action of unfair competition--namely, one business competing against a rival through unfair means in its advertising. However, we also urge that, no matter which definition of "unfair competition" the Court employs, it still must acknowledge and give real teeth to the "advertising" limitation.

Under the policy, advertising injury must "arise out of libel, slander, defamation, violation of the right of privacy, unfair competition, or infringement of copyright, title or slogan." (Slip opn., p. 4.) Each of these offenses, no matter how defined, whether by statute or otherwise, can occur either in or outside the course of advertising. However, these offenses can lead to "advertising injury" coverage only when they occur in the pertinent advertising context.

The Bank's claim to coverage hinges on excising pertinent terms from the policy, examining them in isolation, urging that they have statutory and common law formulations, and abstracting their meaning beyond what rational interpretation in an advertising context could ever permit: "In the course of" means "during"; "advertising" means "anything a seller does to bring its goods or services to the favorable attention of buyers"; "unfair competition" means "any unfair or unlawful business act or practice harming either a competitor or the public." This reasoning may be acceptable in a Humpty Dumpty environment, but not in the real world. (L. Carroll, The Annotated Alice (1960 ed.), p. 269 ["'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean--neither more nor less'"].)

We respectfully implore the Court to keep in mind what the Bank would like it to forget, namely, that the subject coverage is for "advertising injury" and that, in interpreting its scope, the word "advertising" must not be ignored.

CONCLUSION

This case illustrates that context is crucial to proper insurance contract interpretation. The language at issue in this case is clear in context; it only becomes murky when dissected and divorced from the insurance policy. The Court of Appeal went astray in interpreting Industrial's advertising injury coverage in a thoroughly abstracted and contorted manner which ignored the "advertising" prerequisite. As a result, "advertising injury coverage" became blanket protection for any and all unfair business practices.

It is time for common sense to prevail. For all the reasons stated, this Court should reverse the decision of the Court of Appeal and confirm, once and for all, that advertising injury coverage must truly relate to injuries caused by torts committed in the course of advertising activities.

Dated: September 13, 1991

Respectfully submitted,

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