



Don't Be Left Naked When It Comes To Insurance Coverage

By Steven Brower, Esq., Jeffrey H. Kapor, Esq., and Jason E. Goldstein, Esq.

Most businesses, including apparel manufacturers and retailers, pay premiums for insurance. When a claim that is potentially covered arises: do not let your insurance company leave you naked. Insurers and insurance brokers may tell you that a claim is not covered when there really is coverage under one or more policies. Accordingly, when there is an unusual claim, you should not rely on the advice of your insurance broker and you should definitely not rely on the advice of your insurer. Instead, consult with insurance coverage counsel who can assist you with obtaining the coverage to which you are entitled under your policies.

A case in point is a July 13, 2012 opinion from the California Court of Appeal that potentially benefits the entire apparel industry: Travelers Property Casualty Company of America v. Charlotte Russe Holding, Inc., et al. ("Charlotte Russe"). The Charlotte Russe opinion *reaffirmed* the broad coverage of a duty to defend under an insurance policy. In most cases, the costs of defense are going to exceed the costs of a settlement by an "innocent" apparel manufacturer or retailer.

In the Charlotte Russe case, an apparel manufacturer entered into an agreement with the retailer whereby the retailer became the exclusive sales outlet for the manufacturer's so-called "premium" or "high end" brand of apparel. When the retailer began to sell the manufacturer's apparel at "fire sale" prices, the manufacturer claimed, among other things, that the retailer was disparaging the manufacturer's goods. The logic employed by the manufacturer was that, by selling the manufacturer's apparel at low prices, the retailer was implying that the subject apparel was not of a "premium" or "high end" quality. Multiple lawsuits soon followed.

The retailer tendered the lawsuits to its insurer and the insurer declined to defend or indemnify the retailer, citing to certain exclusions in the policy and the insurer's interpretation of certain case law. Adding insult to injury,

the insurer then sued its own insured seeking a Court declaration that the insurer had no obligation to satisfy any of its duties under the policy. The insurer won in the Trial Court, but the Court of Appeal reversed that decision.

The Court of Appeal held, among other things, that the manufacturer's allegations of price discounts "may" result in a loss that "might" be covered under the "personal injury" coverage provided under a Commercial General Liability Insurance Policy (probably the most common policy for a business). The Court of Appeal then reaffirmed that a "liability insurer's duty to defend arises when a suit against its insured seeks damages that are potentially within the policy's coverage . . . [a]n insurer has no duty to defend its insured only if the claim against it cannot, by any conceivable theory, raise an issue that would bring it within policy's coverage."

An insurer, to avoid its duty to defend, must show that there is no possibility that a covered loss may result from the tendered claim. In stark contrast, an insured must only show that there might be a covered loss to make the insurer obligated to defend a claim. Of course, litigation may be necessary to make the insurer comply with its obligations to its insured.

In Charlotte Russe, the underlying lawsuits settled before the appellate court opinion issued. However, although not discussed in Charlotte Russe, the Court of Appeal's reversal was not a mere pyrrhic victory. When an insured prevails against the insurer for breaching its duty to defend, the insurer becomes liable for the attorneys' fees incurred by the insured in its defense. The insurer may also be liable for the attorney's fees incurred by the insured in the coverage lawsuit if the insurer's denial was unreasonable. The insurer also becomes potentially liable to its insured for additional damages, including punitive damages.



The lesson learned from the Charlotte Russe case is that when an insurer says “no,” you should not take “no” for an answer. Instead, you should consult with insurance coverage counsel to determine your rights under the policy. Preferably, insurance coverage counsel should be consulted at the outset, since the assistance of experienced insurance coverage counsel from the beginning may make a difference with respect to whether the insurer accepts coverage at the tender stage of the claim.



Steven Brower is a Shareholder and Administrative Chair of the firm's Litigation Practice Group. He can be reached at (714) 549-5150 or sbrower@buchalter.com.



Jeffrey H. Kapur is a Shareholder and Chair of the Firm's Apparel Practice Group. He can be reached at (213) 891-5003 or jkapur@buchalter.com



Jason Goldstein is Senior Counsel in the Firm's Litigation Practice Group. He can be reached at (949) 224-6235 or jgoldstein@buchalter.com.