

ALERT

No Irreparable Harm Where Insurer Declined to Advance Defense Costs

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The United States District Court for the Western District of Kentucky, applying Kentucky law, has held that insureds were not entitled to a preliminary injunction to have their defense costs advanced in connection with two lawsuits for which they were seeking coverage. *C.A. Jones Mgmt. Grp., LLC v. Scottsdale Indem. Co.*, 2014 WL 811654 (W.D. Ky. Feb. 28, 2014). The court held that the insureds failed to demonstrate a substantial likelihood of success on the merits of the coverage questions at issue and that the insureds would not suffer irreparable harm because their potential injury was purely monetary.

A management consulting company and several of its affiliates, officers, and directors were insureds under a business and management indemnity policy. The policy was renewed for a second term, but cancelled after approximately five months for non-payment of premium. An investor had filed suit against the insureds, alleging mismanagement that rendered some of the affiliated companies nearly insolvent. The investor stipulated to the voluntary dismissal of the suit upon the appointment of a receiver to assume control over the companies' operations. The insureds did not request coverage for their defense costs during the pendency of the lawsuit, and purportedly did not report the suit to the insurer until after its dismissal, approximately three months after the expiration of the original policy period.

The investor subsequently filed a second lawsuit, alleging that the insured companies had resold international versions of textbooks in the U.S. in violation of copyright and trademark law. Thereafter, several months after the renewal policy was cancelled, a third lawsuit was filed against certain insureds similarly alleging the improper marketing of international textbooks. The insureds sought coverage

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under the policy for the second and third lawsuits and filed a declaratory judgment action. The insureds also sought a preliminary injunction that the insurer was required to advance their defense costs incurred in the two underlying actions.

In determining whether to issue a preliminary injunction, the court first considered whether the insureds had a substantial likelihood of prevailing on the merits of the coverage questions at issue. The court found that all three lawsuits were related because they shared a common nexus of facts, circumstances, and events, and consequently constituted a single claim that arose at the time of the first lawsuit. The court observed that, even though the first lawsuit was not reported until after the required notice period for the first policy year, under Kentucky law, the renewed policy provided seamless coverage. The court therefore held that all three lawsuits fell within the insuring agreement of the policy.

However, upon considering the potential limitations and exclusions to coverage, the court concluded that the insureds were unlikely to succeed on the merits of their claims. The court specifically evaluated whether the insureds had made material misrepresentations on their policy application, whether the insured v. insured exclusion barred coverage, whether the fraudulent and criminal acts exclusion barred coverage, whether two exclusions barring claims alleging copyright violations applied, whether a securities fraud exclusion applied, and whether certain individuals and entities qualified as insureds. Because several of the exclusions likely precluded coverage, and the policy only required the insurer to advance defense costs as to claims for which coverage existed, the court determined that the insureds were unlikely to succeed on the merits of their claim.

The court then considered whether the insureds would suffer irreparable injury in the absence of their requested injunctive relief. The court rejected the insureds' argument that financial pressure, the potential for adverse rulings, and the stress of litigation were an immediate and direct injury sufficient to warrant an injunction, finding that these stresses accompany virtually every lawsuit. The court concluded that any potential remaining injury was purely monetary and therefore did not constitute irreparable harm. Finally, the court observed that issuance of the injunction would cause harm to the insurer and that the public interest would be unaffected by denying the insureds' motion for an injunction. The court therefore declined to issue a preliminary injunction requiring the advancement of defense costs.