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## 2011 MIDWEST IP INSTITUTE PRESENTATION

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# II. BEST CHOICES FOR COMMERCIAL GENERAL LIABILITY COVERAGE

## A. Broader ISO Policy Provisions

- Offer a limited but broader coverage than Chubb & St. Paul
- Insured can maintain Chubb, Travelers or St. Paul primary program
- But Must Consider a Commercial Umbrella Policy with ISO-based form
- Reputable Insurers Providing Broad Coverage with standard ISO:

  - ACE Group (www.aceusa.com)
  - Admiral Insurance Co. (www.admiralins.com)
  - CNA Financial Corp. (www.cna.com)
  - First Mercury Insurance Co. (www.firstmercury.com)
  - Golden Eagle Insurance (www.goldeneagle-ins.com)
  - Great Am. Ins. Group (www.gamcustom.com)
  - Liberty Mutual Group (www.libertymutualgroup.com)
  - Mid-Continent Group (www.mcg-ins.com)
  - OneBeacon Insurance (www.onebeacon.com)
  - Zurich North America (www.zurichna.com)

## B. Preferred ISO Policy Language

- **2007 ISO CGL Policy** Form CG 00 01 12 07

**Coverage B Personal and Advertising Injury Liability**

**1. Insurance Agreement:**

**a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury ....

**1.** "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.

. . . .

**14.** "Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:

. . . .

**b.** Malicious prosecution;

. . . .

**d.** Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, product or services;

. . . .

**f.** The use of another's advertising idea in your "advertisement" . . . .

**g.** Infringement of copyright trade dress or slogan in your "advertisement"

## C. Non-ISO Policies to Avoid

- **Chubb** (Coverage B limited to "D. electronic, oral, written or other publication of material that: 1. libels or slanders a person or organization which does not include disparagement of goods, products or services.")

> **Advertising injury** or **personal injury** arising out of, giving rise to or in any way related to any actual or alleged:
>
> assertion; or infringement or violation . . . of any intellectual property law or right
>
> This exclusion applies, unless injury . . . does not arise out of, give rise to or in any way relate to any actual or alleged assertion, infringement or violation of any **intellectual property law or right . . .**

- IP Exclusion
  - Two versions held invalid because illusory:
    - ***Aurafin-OroAmerica, LLC v. Federal Ins. Co.***, 188 Fed. Appx. 565, 567 (9th Cir. (Cal.) 2006) ("It is unclear what the exclusion meant when it excluded statements made in 'defense of' intellectual property rights.")

- ***Align Tech., Inc. v. Federal Ins. Co.***, 673 F. Supp. 2d 957, 969 (N.D. Cal. 2009) ("Federal's language does not put an insured reasonably on notice that Federal will not cover claims in a lawsuit whenever that lawsuit also includes a claim for intellectual property. Thus, the 'regardless' clause does not conclusively eliminate coverage for all of the claims in the Cross-Complaint.")

- **Hartford** ("f. copying, in your 'advertisement,' a person's or organization's 'advertising idea' or style of 'advertisement' ")
  - ***Hartford Cas. Ins. Co. v. EEE Business***, No. C 09-01888 JSW, 2009 WL 3809817, at *6 (N.D. Cal. Nov. 10, 2009) **(No)** ("Here, the EEE Defendants' alleged copyright infringement did not have any causal relationship with its . . . 'advertising injury.' . . . [T]he judgment . . . concern merely the fact that the EEE Defendants infringed Microsoft's software copyrights by importing and selling the software in the United States when it was only licensed for sale abroad and to educational institutions.").

- **Travelers** – Web Xtend Liability (CG D2 34 01 05) eliminates coverage for "f. the use of another's advertising idea in your 'advertisement' " and "g. infringement of . . . trade dress in your 'advertisement.' "

  - ***Premier Pet Products, LLC v. Travelers Property & Cas. Co. of America***, 678 F. Supp. 2d 409, 417 (E.D. (Va.) 2010) **(Yes)** ("An 'endorsement is not a complete contract in itself.' *Id.* Certainly a five-page endorsement that purports to change sections of the original sixteen-page policy cannot be read to replace entirely the underlying policy. **The Court will consider, to the extent necessary, the entirety of the contract before it."** (emphasis added)).

  - ***Michael Taylor Designs, Inc. v. Travelers Property Casualty Company of America***, 761 F. Supp. 2d 904, 914, n.9 (N.D. Cal. Jan. 20, 2011) **(No)** ("The apparent practice of providing policy holders with pages and pages of provisions that may or may not be in force, depending on what endorsements apply, is not to be commended. **Given current technology, there would appear to be little practical impediment to** preparing customized policy documents for each policy holder that either omit deleted verbiage entirely or **plainly identify it as having been removed by endorsement**." (emphasis added)).

- **St. Paul** – New limited definitions.
  - "Unauthorized use of any advertising material, or any slogan or title of others in your advertising";
  - "Slogan" means 'a phrase that others use and intend to attract attention in their advertising;
  - "Title" means "a name of a literary or artistic work."
- IP Exclusion (2002): "Nor will we cover any injury or damage or medical expenses alleged in a claim or suit that also alleges any such infringement or violation."
  - Not "conspicuous, plain and clear."
  - Exclusion may only limit indemnity by resolving the issue of how to allocate damages in a "mixed action" of covered and uncovered claims.
    - ***Lockwood Int'l, B.V. v. Volm Bag Co.***, 273 F.3d 741, 743 (7th Cir. (Wis.) 2001) ("[I]ts duty of indemnifying Volm for any damages that it was determined through judgment or settlement to owe Lockwood would have been limited to so much of the judgment or settlement as was fairly allocable to the claims in Lockwood's suit that were covered by the policy.")

# III. OTHER FORMS OF INSURANCE COVERING INTELLECTUAL PROPERTY RISKS

## A. Media Liability Vendors

ACE (www.ACEusa.com)
AIG netAdvantage (www.AIG.com)
Chubb (www.Chubb.com)
Media Pro (www.MediaProf.com)
OneBeacon (www.OneBeacon.com)
NetSecure (Marsh) (www.Marsh.com)

## B. Cyberspace/Multimedia Policies/Representative Policy Form (ACE Digitech ® Digital Technology and Professional Liability Insurance Policy PF-26996(5)/09)

I. INSURING AGREEMENTS

Coverage is afforded pursuant to only those Insuring Agreements purchased . . .

. . . .

B. **Electronic Media Activities** Liability
The **Insurer** will pay D**amages** and **Claim Expenses** by reason of a **Claim** first made against the **Insured** during the P**olicy Period** and reported to the **Insurer** pursuant to Section VIII, Notice, for any **Wrongful Acts** taking place after the **Retroactive Date** and prior to the end of the **Policy Period**

II. DEFINITIONS

. . .

A. **Advertising** means promotional material (including branding, co-branding, sponsorships and endorsements), publically disseminated on any **Internet Website** on behalf of the **Insured.**

B. **Advertising Services** means promotional material (including branding, co-branding, sponsorships and endorsements), publically disseminated by the **Insured** on the **Insured's Internet Website** on behalf of others.

. . . .

M. **Electronic Media Activities** means the electronic publishing, dissemination, releasing, gathering, transmission, production, webcasting, or other distribution of **Electronic Content** on the **Internet** on behalf of the **Insured** or by the **Insureds** for others

. . . .

AA. **Personal Injury** means injury arising out of one or more of the following offenses:

. . . .

2. malicious prosecution;
3. libel, slander or other defamatory or disparaging material;

4. publication or an utterance in violation of an individual's right to privacy . . .

. . . .

OO. **Wrongful Act** means error, misstatement, misleading statement, act, omission, neglect, breach of duty, or **Personal Injury** offense actually or allegedly committed or attempted by any **Insured** in their capacity as such:

. . . .

2. With respect to only to Insuring Agreement B, in the course of the provision of **Electronic Media Activities**, which gives rise to any of the following **Claims** against an **Insured**:
   a. product disparagement, trade libel, infliction of emotional distress, mental anguish, outrage or outrageous conduct;
   b. false light, public disclosure of private facts, or the intrusion and commercial appropriation of a name, persona, or likeness;
   c. plagiarism, piracy (excluding patent infringement), or the misappropriation or unauthorized use of advertising ideas, advertising material, titles, literary or artistic formats, styles or performances;

d. infringement of copyright, domain name, trademark, trade name, trade dress, title or slogan, service mark, or service name; or

e. negligence with respect to the **Insured's** creation or dissemination of **Electronic Content**.

. . . .

III. EXCLUSIONS

The **Insurer** shall not be liable for **Damages, Claims Expenses**, **Data Breach Expenses**, or **Extortion Expense** on account of any **Claim**:

A. alleging, based upon, arising out of or attributable to any dishonest, fraudulent, criminal, malicious or intentional act, error or omission, or any intentional or knowing violation of the law by any **Insured**. . . .

. . . .

G. alleging, based upon, or arising out of or attributable to any price fixing, restraint of trade, monopolization, unfair trade practices or other violation of the Federal Trade Commission Act, the Sherman Anti-Trust Act, the Clayton Act, or any other federal statutory provision involving antitrust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities, and any amendments thereto or any rules or

regulations promulgated thereunder or in connection with such statutes, or any similar provision of any federal, state, or local statutory law or common law anywhere in the world. . . .

. . . .

X. alleging, based upon, arising out of or attributable to false or deceptive advertising. However, this exclusion shall not apply to **Claims Expenses** to defend any such **Claim** unless there is a judgment against, binding arbitration against, adverse admission by, finding a fact against, or plea of *nolo contendere* or no contest by the **Insured,** at which time the **Insured** shall reimburse the **Insurer** for any **Claims Expenses** paid by the **Insurer**

Y. alleging, based upon, arising out of or attributable to false, deceptive or unfair business practices or any violation of consumer protection laws. . . .

Z. alleging, based upon, arising out of or attributable any validity, invalidity, infringement, violation or misappropriation of any patent or **Trade Secret** by or on behalf of the **Insured**.

## C. Directors and Officers (IP)

- ***Acacia Research Corp. v. National Union Fire Ins. Co. of Pittsburgh***, *PA*, No. SACV 05-501 PSG (MLGx), 2008 WL 4179206, at *10 (C.D. Cal. Feb. 8, 2008) **(Yes)** (The court awarded plaintiff $31,070,981.62 plus $310,492.99, the present value of future royalty payments, under a D&O policy issued from January 22, 1999 to January 22, 2002 where coverage was implicated on a claims-made basis with $10 million policy limits and a SIR of $150,000.

  "Wrongful acts" were implicated because "the underlying Nanogen action centered on Nanogen's accusations that Montgomery stole Nanogen's technology and brought it to Combimatrix."

- ***American Century Servs. Corp. v. American Int'l Specialty Lines Ins. Co.***, No. 01 Civ. 8847 (GEL), 2002 WL 1879947 (S.D.N.Y. Aug. 14, 2002) **(No)** ( "As amended, 'Wrongful Act' means any breach of duty, neglect, error, misstatement, misleading statement, omission or other act wrongfully done or attempted by the Insured or *so alleged* by any claimant." *Id.* at *5. "Patent infringement is a wrongful act, and the infringements alleged by Katz and Stambler were committed (if they occurred at all) in the ordinary course of conducting – that is, managing and operating – American Century's investment funds." *Id.* at *7.

  However, exclusions for "any actual or alleged gaining of profit or advantage to which any Insured is not legally entitled" and reimbursement of any settlement for "past or future use of a valuable technology in the course of its business" barred coverage.)

## D. Errors and Omissions (IP)

- ***Research Corp. v. Westport Insurance Co.***, 289 Fed. Appx. 989, 993 (9th Cir. (Ariz.) 2008) **(Yes)** ("[A]llegations of conversion, fraudulent concealment, and breach of fiduciary duties . . . were 'wrongful acts' within the meaning of the policy where 'wrongful acts' means 'any actual or alleged error or omission, negligent act, misleading act, or breach of duty committed by an "insured." ' ").

- ***Transcore, LP v. Caliber One Indem. Co.***, 972 A.2d 1205, 1209 (Pa. Super. Ct. 2009) **(No)** ("Inducement of patent infringement is a specific violation of the Patent Act found at 35 U.S.C. § 271(b), which simply states: 'whoever actively induces infringement of a patent shall be liable as an infringer.' As the word 'induces' implies and the federal courts confirm, a violation of section 271(b) is an intentional act. . . . [T]o be liable for *inducing* another to violate the patent the act has to be intentional . . . an inducement to patent infringement must be intentional and therefore is specifically excluded from coverage.").

## 1. Representative Policy Forms

### a. Intellectual Property Endorsement

We shall reimburse the Insured for those sums which the insured becomes legally obligated to pay and shall be paid "damages" resulting from any "claim" or "claims" ["a demand for damages"] made against the Insured for any "wrongful act" ["any violation of a legal right or rights associated with patents"] caused by [the] manufacture, use, development, distribution, advertising or sale of a "covered product" ["any product . . . sold or any process used . . . by the insured"] committed by the Insured . . . occurring within the term of this policy.

## E. Intellectual Property (IP)

- ***Indian Harbor Ins. Co. v. Hartford Cas. Ins. Co.***, No. B192829, 2007 WL 2955564 (Cal. Ct. App. Oct. 11, 2007)

  Hartford owed Skechers a duty to defend the Adidas action under the terms of the Hartford policy. The Indian Harbor policy, in contrast, contains no provision imposing a duty to defend and expressly disclaims such a duty. It imposes only a duty to reimburse Skechers for defense costs paid to a third party arising out of covered litigation and exceeding the $500,000 self-insured retention. . . .

. . . .

. . . Because Hartford was primarily liable for Skechers's defense costs, Indian Harbor is entitled to equitable indemnity for the amounts it paid.

Id. at *10-11.

- ***Carlson Marketing Group, Inc. v. Royal Indemnity Co.,*** 517 F. Supp. 2d 1089 (D. Minn. 2007) (Coverage for $15.4 million in monies expended in both defending and settling a patent infringement lawsuit over a seven year period were recoverable under the terms of an express intellectual property endorsement. With losses aggregated into a single policy period when the first infringing act occurred. No allocation arose for the seven one-year policy periods. The insured was only, therefore, responsible for one deductible under its primary policy with the excess insurers required to pay the remainder of the loss. Defense costs did not erode policy limits. A defense endorsement provision in an excess policy provided that defense costs were payable by the insurer in addition to policy limits. The coverage-granting clause obligated the excess insurers to pay defense costs for covered losses.)

# IV. SUMMARY OF COMMERCIAL GENERAL LIABILITY COVERAGE OPPORTUNITIES FOR DISCRETE CLAIMS

- **Patent Infringement** (**Business Method**) where the method is an advertising technique ("misappropriation of advertising ideas" **1986 ISO CGL**); ("use of another's advertising idea in your 'advertisement' " **1998/2001/2004/2007 ISO CGL**).

- **Copyright Infringement** accompanied by Internet dissemination or widespread emails ("infringement in your 'advertisement,' " "invasion of a person's right to privacy").

- **False Advertising Claims** nested within various statutory claims, including fraud allegations ("misappropriation of advertising ideas" **1986 ISO CGL)** "use of another's advertising idea in your 'advertisement' " **1998/2001/2004/2007 ISO CGL)**.

- **False Patent Marking Claims** – "use of another's advertising idea in your 'advertisement'" or "infringement of title in your 'advertisement'" **1976/1986 ISO CGL** or **Travelers' Web Xtend Endorsement (2002)** based on advertising a patented product whose patent expired.

- **Malicious Prosecution/Abuse of Process** by construction (California); by endorsement. Some umbrella policies may cover Rule 11 sanction motions. Trigger of coverage is the date underlying suit filed by its maliciously prosecuted. **(1986/1998/2001/2004/2007 CGL)**

- **Patent Infringement/ Patent Infringement Plus**. Defendants assert "freedom to operate" based on attacking the patent validity or their non-infringement of the asserted patents, which assertions are "published to a targeted market segment" or the "public." **(1986/1998/2001/2004/2007 CGL ISO)** Patent infringement conjoined with potentially covered tortious interference, false advertising, trademark infringement or unfair competition in response to a patent infringement claim. Beware of **St. Paul (2002) IP exclusion** "nor will we cover any injury or damage . . . alleged in a claim or suit that also alleges any such infringement or violation."

- **TCPA Violations** based on fax-blasting or unsolicited email advertisements ("invasion of a person's right of privacy").

- **Trademark Infringement/ Slogan Infringement**. Although not articulated as a discrete cause of action, fact allegations in trademark infringement, and unfair competition lawsuits resting on "an attention-getting statement or device" may be an "infringement of slogan in your 'advertisement.' " **(1998/2001/2004/2007 ISO CGL)** Where a moniker, statement or device is used to promote products or services which are likewise used by the claimant ("infringement of title") (**1986 ISO CGL or Travelers Web Xtend Endosrement**).

- **Trade Secret Misappropriation** where proprietary information was made public in a manner harmful to claimant ("invasion of a person's right of privacy" **1976/1986 ISO CGL)** or distribution of proprietary information was accomplished by dissemination of material, "use of another's advertising idea in your 'advertisement'" via "publication to . . . a targeted market segment" or "the public."

- **Unfair Competition Claims/Unfair Competition Plus**. **1976/1986 ISO CGL** or "oral or written publication" of **Travelers' Web Xtend Endorsement (2002)** "infringement of title." The same mark that underlies claims for trademark infringement underlies unfair competition misappropriation of "advertising ideas" **(1986 ISO CGL)**; "Use of another's advertising idea in your 'advertisement'" **(1998/2001/2004/2007 ISO CGL)**

# V. BASIC THEORY OF "PERSONAL AND ADVERTISING INJURY" COVERAGE

## A. The Three-Part Test

(1) a claim that falls within one or more enumerated "advertising injury" offenses;
(2) an advertising activity by the insured; and
(3) a causal nexus between one of the advertising injury" Offenses and the "advertising activity."

## B. Applying the Three-Part Test

### 1. The "Offense" Element

- "Misappropriation of Advertising Ideas" (1986 ISO)
- "Use of Another's Advertising in Your 'Advertisement'" (1998/2001/2003/2007 ISO)
- "Infringing Upon Another's Copyright, Trade Dress or Slogan In Your 'Advertisement'" (1998/2001/2003/2007 ISO)

## 2. The Advertising Element

- **Narrow:** "widespread distribution of promotional materials usually directed to the public at large"
- **Intermediate:** "notice that is broadcast or published to the general public or specific market segments for the purpose of attracting customers or supporters"
- **Broad:** "any activities designed to advertise, publicize or promote a particular good, product or service"

## 3. The Causal Nexus Element

- Causal Nexus between "offense" and "advertising activity," not "injury" and "advertising activities."
- Injury need only "arise out of" (be connected with) an "advertising injury" offense evidencing a causal relationship, but not one of proximate causation.
- The trigger of coverage is based on whether the "wrongful acts" alleged or available to the insurer potentially fall within an enumerated "advertising injury" offense not whether the insured's advertisement caused injury or damage.

# VI. ESCAPING THE APPLICATION OF IP EXCLUSIONS

## A. First Publication Exclusion

*This insurance does not apply to: (1) advertising injury: (b) arising out of oral or written publication of material if the first publication took place before the beginning of the policy.*

- ***Santa's Best Craft v. St. Paul Fire & Marine Ins.***, No. 04 C 1342, 2004 WL 1730332, *8-10 (N.D. Ill. July 30, 2004) **(Yes)** *aff'd* 611 F.3d 339, 348 (7th Cir. (Ill.) 2010) (Slogans, allegedly copied, "patent-pending 'Stay-On' feature keeps bulbs lit" [and] "String Stays Lit even if a bulb is loose or missing," fall within "infringement of slogan" offense even if they create liability for excluded trade dress or unauthorized use of [J&L's] slogan.).
- ***Kim Seng Co. v. Great American Ins. Co. of New York***, 179 Cal. App. 4th 1030, 1073 (2009) **(No)** ("At some point a difference between the republished version of an unlawful work and the original version would be so slight as to be immaterial. But that observation cannot save the insurer when the republication contains **new matter** that the plaintiff in the liability suit against the insured alleges as **fresh wrongs**." (emphasis added)).

## B. Knowledge of Falsity

*This insurance does not apply to: a. "Personal injury" or "advertising injury": (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.*

- ***Western Wisconsin Water, Inc. v. Quality Beverages of Wisconsin, Inc.***, 738 N.W.2d 114, 124 (Wis. Ct. App. 2007) **(Yes)** ("There is no requirement that the proponent prove intent to deceive [to prove trademark infringement]. . . . [T]he fact that the jury awarded punitive damages . . . is not the equivalent of an intent to deceive and cannot be invoked to demonstrate knowledge of falsity.")
- ***Del Monte Fresh Produce N.A., Inc. v. Transportation Ins. Co.***, 500 F.3d 640, 645 (7th Cir. (Ill.) 2007) **(No)** ("Del Monte does not point to a single factual allegation that is not a part of a specific allegation of fraud . . . . Therefore, the complaints . . . fall squarely within the exclusion . . . for . . . statements made by the insured . . . with knowledge of falsity.")

## C. Knowledge of Advertising/Personal Injury

*This insurance does not apply to "personal or advertising injury" that was 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."*

- ***AMCO Ins. Co. v. Inspired Techs., Inc.***, --- F.3d ----, 2011 WL 3477188 (C.A.8 (Minn. 2011) **(Yes)** ("To prevail on an unfair-competition claim, under the Lanham Act, plaintiff need not prove that defendant knew that its advertisements were false. . . . [B]ecause AMCO failed to satisfy its burden of demonstrating as a matter of law that all of 3M's claims against ITI **clearly fell outside** of the Policy's coverage . . .")
- ***Educational Training Sys., Inc. v. Monroe Guar. Ins. Co.***, 129 S.W.3d 850, 853 (Ky. Ct. App. 2003) **(No)** ("It is in the knowledge that the intended act will cause harm that the exclusion is triggered . . . . [T]he act itself must also be done with knowledge that it will violate the rights of another." As the deliberate use of Weikel's name was decided against Weikel on summary judgment, the intent element was plainly satisfied. No intent to cause harm need be proved.)

## D. Intellectual Property Exclusions

### 1. Travelers – IP Exclusion

*This insurance does not apply to . . . "advertising injury" arising out of . . . infringement, violation or defense of any of the following rights or laws: . . . . 2. Patent . . . .*

- ***KLA-Tencor Corp. v. Travelers Indem. Co. of Ill.***, No. C-02-05641 RMW, 2003 WL 21655097 (N.D. Cal. April 11, 2003) **(Yes)** (The third party had alleged that the insured "made untrue statements regarding its financial condition, future viability, and its having lost large orders. . . . [T]hese disparaging statements make no mention of any of plaintiff's patents. . . . [P]laintiff's . . . statements . . . could conceivably form the basis of Therma Wave's claims for interference with contractual relations and prospective economic advantage. As such, the statements gave rise to a potential liability covered under the policy." *Id.* at *6.).

## 2. St. Paul Ins. Co. – IP Exclusion

*We won't cover injury or damage . . . that result from . . . infringement or violation of any of the following rights or laws . . .: There is no coverage for "any other injury or damage that's alleged in any claim or suit which also alleges any such infringement or violation."*

- ***S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co.***, 186 Cal. App. 4th 383, 396, 397 (2010) **(No)** ("South Bay emphasizes that only one of SJC's claims was for trade secrets violation, and not all of the information taken from SJC was a 'work of the mind.' . . . [T]here is no coverage for '*any other injury or damage that's alleged in any claim or suit which also alleges any such infringement or violation.*' . . . Here St. Paul has demonstrated, 'by reference to undisputed facts, that the claim cannot be covered.' ").

## 3. Federal Ins. Policy – Exception to an Intellectual Property Exclusion

The policy excludes coverage of any advertising injury:

> *"Arising out of breach of contract," or "an infringement, violation or defense of any . . . trademark or service mark or certification mark or collective mark or trade name,* ***other than trademarked or service marked titles or slogans.***"

- ***Houbigant, Inc. v. Fed. Ins. Co.,*** 374 F.3d 192, 198-99 (3d Cir. (N.J.) 2004) **(Yes)** ("Title" includes "any name … appellation, … epithet [or] … word by which a product or service is known …. Houbigant's house mark and product mark (e.g., 'Chantilly') falls within this definition.").

## 4. National Union Fire Ins. Co. Exclusion

National's General Policy does not apply to:

*"advertising injury" arising out of, or directly or indirectly related to, . . . any oral or written statement . . . which is claimed as . . . [a] violation of legal rights relating to . . .: [p]atent[ ] [or] [t]rade secrets.*

- ***National Union Fire Ins. Co. of Pittsburgh, PA v. Seagate Technology***, *Inc.*, 233 Fed. Appx. 614, 616 (9th Cir. (Cal.) 2007) **(Yes)** ("While Convolve's claims that Seagate misappropriated its technology would be excluded by [the intellectual property exclusion], such misappropriation claims are not necessary for Convolve to maintain trade libel claims against Seagate. A trade libel claim by Convolve against Seagate could proceed and succeed even if, as Seagate maintains, it never misappropriated Convolve's technology.").").


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