Case No. 24-1678

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SINGH RX, PLLC d/b/a SRX SPECIALTY CARE PHARMACY and AMAN DEEP SINGH,

Plaintiffs-Appellants,

v.

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Defendants-Appellees,

and

JANSSEN SCIENCES IRELAND UNLIMITED COMPANY, JANSSEN PRODUCTS, LP, and JOHNSON & JOHNSON, an interested party,

Defendants.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 2:22-cv-12732-GAD-KGA

REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENT

A. American Casualty Owes Plaintiffs a Duty to Defend and Indemnify as the Janssen lawsuit Alleges Personal and Advertising Injury Claims.

1. The Policy's Definition of a "Personal Injury Claim" Controls.

According to American Casualty, a policy endorsement redefined a "claim" under the Personal Injury coverage form to require bodily injury or damage, and to require personal injury claims be brought by a natural person. However, because the general definition of a "claim" in the policy endorsement conflicts with the definition appearing in the more specific "Personal Injury" coverage form, the provisions in the "Personal Injury" coverage form control pursuant to *generalia specialibus non derogan*.[1] Likewise, the policy provides "if any provision in the Common Policy Conditions is inconsistent or in conflict with the terms and conditions of any Coverage Part, the terms and conditions of such Coverage Part shall control for purposes of that Coverage Part. American Policy, R. 1-3, PageID # 249.

Specifically, here, the policy endorsement defines a "claim" to mean a demand for money or services alleging "injury" or "damage." American Policy, R. 1-3, PageID # 275. While the more specific Personal Injury coverage form defines

[1] If there is a conflict between a general provision and a specific provision, the specific provision prevails. *A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 252 (2012).*

a "Personal Injury Claim" to mean a "claim arising out of personal injury." American Policy, R. 1-3, PageID # 258. "Personal injury" is in turn defined, to include a number of the claims in the Janssen lawsuit, including:

> injury arising out of one or more of the following offenses committed in the conduct of your professional services:
>
> . . .
>
> 4. libel, slander or other disparaging materials;
>
> . . .
>
> 7. misappropriation of advertising ideas, trade secrets, or style of doing business; or
> 8. infringement of patent, copyright, trademark, trade name, trade dress, service mark, service name, logo, title or slogan. [American Policy, R. 1-3, PageID # 253.]

Accordingly, because general policy language that conflicts with specific policy provisions must be resolved in favor of the specific policy provisions, the definition of a "Personal Injury Claim" in the "Personal Injury" coverage form controls.

2. Personal Injury is not Bodily Injury or Damage.

While American Casualty posits the definition of an "injury" remains the same throughout the policy, this is simply untrue. Rather, the policy defines an "injury" as "the meaning set forth in each individual coverage part." American Policy, R. 1-3, PageID # 258. The policy then defines the term "injury" in the personal injury context, as detailed above, which includes a number of the claims in the Jannssen lawsuit, including the injuries of misappropriation of advertising ideas, trade secrets, style of doing business, infringement of patent, copyright, trademark,

trade name, trade dress, service mark, service name, logo, title or slogan. American Policy, R. 1-3, PageID # 253; Janssen Complaint, R. 1-5, PageID ## 475-478, 480-483. There is no requirement that a personal injury claim include bodily injury or property damage. American Policy, R. 1-3, PageID # 253.

American Casualty's argument conflates professional liability with personal injury, the latter of which does not involve bodily injury or property damage. This is evident by the definition "medical incident," which is the underlying basis of a "professional liability" claim, which does not include “personal injury.” American Policy, R. 1-3, PageID # 258. A "medical incident" results in "injury” or “damage," but does not include "personal injury," which is distinct and has an entirely different meaning that does not involve "bodily injury." American Policy, R. 1-3, PageID # 258. American Casualty confuses the meaning of personal injury with “bodily injury” and ignores the express policy language distinguishing the terms in its definition of “medical incident."

3. The Policy Does Not Require a Natural Person to Bring a Personal Injury Claim.

Again, the Coverage Agreements clearly distinguish between a professional liability claim and a personal injury claim. One key difference being that personal injury claims do not need to arise from a "medical incident”; and a "medical incident," which is a prerequisite for a professional liability claim, expressly excludes “personal injury claims.” See American Policy, R. 1-3, PageID # 258.

Similarly, the American Policy's duty to defend distinguishes between professional liability claims and personal injury claims. See American Policy, R. 1-3, PageID ## 257-258. This distinction is of import because the endorsement that American Casualty relies upon in making its argument that a "natural person" must bring a personal injury claim, does not include the term "Personal Injury" anywhere in the endorsement. See American Policy, R. 1-3, PageID # 275. Rather, it mentions only the "Professional Liability coverage form." American Policy, R. 1-3, PageID # 275. Thus, in reading the policy as a whole and using the provisions found within the more specific Personal Injury coverage form, there is no requirement that a natural person bring a personal injury claim for there to be coverage. Nevertheless, as detailed below, just a requirement would render the policy's coverage illusory.

4. A "Personal Injury Claim" Does Not Need to be Brought by Someone Who Received Professional Services From the Plaintiffs.

American Casualty claims coverage for "personal injury" only extends to claims brought by a natural person *who received the insured's professional services*, i.e., the insureds' patients, based on the policy endorsement. American Denial Letter, R. 61, PageID ## 2063-2065; Opinion and Order, R. 77, PageID ## 2293-2294. However, again, the policy endorsement conflicts with the specific Personal Injury Coverage form. "Personal injury" in the Personal Injury Coverage Form means "injury arising out of one or more of the following offenses committed in the conduct of your professional services . . .." American Policy, R. 1-3, PageID # 253

(emphasis added). Thus, per the plain language of the specific coverage form applicable here, coverage for "personal injury" claims is not limited to individuals who receive the insureds' "professional services" - it broadly covers all offenses committed while performing "professional services." As detailed in Plaintiffs' principal brief, "professional services" are those "within the scope of practice recognized by the regulatory agency responsible for maintaining the standards" of the pharmacy profession. American Policy, R. 1-3, PageID # 253.

The Michigan Public Health Code, MCL 333.17707(8), defines the scope of pharmacy practice:

> "Practice of pharmacy" means a health service, the clinical application of which includes the encouragement of safety and efficacy in the prescribing, dispensing, administering, and use of drugs and related articles for the prevention of illness, and the maintenance and management of health.
>
> Practice of pharmacy includes the direct or indirect provision of professional functions and services associated with the practice of pharmacy.
>
> Professional functions associated with the practice of pharmacy include the following:
>
> (a) The interpretation and evaluation of the prescription.
>
> (b) Drug product selection.
>
> (c) The compounding, dispensing, safe storage, and distribution of drugs and devices.
>
> (d) The maintenance of legally required records.

> (e) Advising the prescriber and the patient as required as to contents, therapeutic action, utilization, and possible adverse reactions or interactions of drugs. [Emphasis added.]

Thus, the regulatory agency responsible for maintaining the standards of its profession includes services identified in the Janssen lawsuit (purchasing and dispensing medication) as giving rise to Personal Injury claims (Trademark Infringement, False Description and Designation of Origin in Commerce, False Advertising, Dilution of Trademark, Injury to Business Reputation, Deceptive Business Practices, and Unfair Competition). Janssen Complaint, R. 1-5, PageID # 451.

5. Accepting American Casualty's Faulty Position Would Render Coverage Illusory.

American Casualty claims there are multiple types of actions which could potentially trigger the duty to defend under the Policy; however, American Casualty focuses solely on examples involving irrelevant *non-business tort claims*, i.e., assault, battery, mental anguish. Instead, the focus should be whether coverage for business tort claims is illusory.

American Casualty maintains that personal injury claims are not covered unless they are brought by a "natural person" and allege bodily injury or property damage. American Policy, R. 1-3, PageID ## 2063-2065. This interpretation of the policy is nonsensical as it would require *patients* to bring *business tort* claims, i.e., trademark infringement, misappropriation of advertising ideas, or copyright

violations, against their *pharmacist* alleging *bodily injury or property damage*. Since no factual scenario could ever give rise to such a claim, and none are proffered by American Casualty, American Casualty's interpretation of the policy would render the personal injury coverage entirely illusory.

In sum, while the American Casualty policy provides coverage for "personal injury" claims that include trademark infringement, patent infringement, trade name infringement, etc., the policy ultimately furnishes no tangible coverage that would ever apply for these claims. Thus, coverage for these claims could never be triggered.

B. Selective Owes Plaintiffs a Duty to Defend and Indemnify as the Janssen Lawsuit Alleges Personal and Advertising Injury Claims. [2]

While Selective claims the underlying lawsuit does not allege a "personal and advertising injury," this is simply untrue.[3] Section II.F.14 of Selective's policy defines an "advertising injury" as

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[2] Plaintiffs-Appellants object to Selective's inclusion of numerous exhibits that were not submitted or considered by the district court, and have no relevance whatsoever to the coverage determination at issue.

[3] Selective's reference to documents extraneous to the complaint is inappropriate because the insurer denied the insured a defense. By denying a defense, an insurer becomes subject to the broad duty-to-defend standard (as opposed to the duty to indemnify). "In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." (emphasis added) *American Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 452 Mich. 440, 450, 550 N.W.2d 475 (1996). Insurers must look at the allegations in the third party's complaint to determine whether coverage is possible. (emphasis added) *Id*. Considering documents that were not attached to the complaint

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

. . .

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, produces or services;

. . .

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

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement." [Selective Policy, R. 1-2, PageID ## 111-112.]

"Advertisement" is further defined in Section II.F(1) as follows:

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. For the purposes of this definition:
   a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
   b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement. [Section II.F(1), BP 00 03 07 13, p 47.] [Selective Policy, R. 1-2, PageID # 109.]

Here, the underlying Janssen lawsuit alleges that Plaintiffs infringed upon the Janssen plaintiffs' trademark or slogan by selling allegedly "counterfeit"

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is violative of the principle that the duty to defend is broader than the duty to indemnify and is properly invoked when claims are even arguably within coverage. *Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136, 142; 301 NW2d 832 (1980). By asking Court to consider extraneous information, Selective improperly expands the scope of the Court's inquiry. Under Michigan law, "all insurers [are] obligated to defend an action when a complaint alleges conduct that could arguably be covered by its policy." *Auto-Owners Ins. Co. v. Redland Ins. Co.*, 522 F. Supp. 2d 891, 899 (W.D. Mich. 2007) (*citing Polkow v. Citizens Ins. Co. of Am.*, 476 N.W.2d 382, 384 (Mich. 1991)).

medications using labels containing the trademark and slogan of the Janssen plaintiffs. Janssen Complaint, R. 1-5, PageID ## 475-478, 480-48. The Janssen lawsuit further alleges that Plaintiffs engaged in "false description and designation of origin of commerce" of Janssen products in Count III of their complaint. Janssen Complaint, R. 1-5, PageID # 477. These allegations undoubtedly satisfy Section II.F.14.d. above.

The Janssen lawsuit further alleges false advertising in Plaintiffs' sale to the public of "counterfeit" medications using Janssen's labels. Janssen Complaint, R. 1-5, PageID #476. This allegation of widespread selling of medications using Janssen's bottles and labels satisfies Section II.F.14.g. above, as it constitutes an infringement on another's trade dress or slogan in an "advertisement." Cf. *Citizens Ins. Co. v. Pro-Seal Serv. Group,* 477 Mich. 75, 730 N.W.2d 682, 687-688 (Mich. 2007) (in order to "advertise," the insured must publicly disseminate information about its goods and services; a single transaction involving a product sent to a specific customer in that case did not constitute "advertisement'). These allegations are, at a minimum, "arguably covered" under Selective's policy coverage for "personal and advertising injury."

Selective, nevertheless, claims no coverage exists pursuant to a policy exclusion for "professional services," which states that this insurance does not apply to "personal and advertising injury" caused by the rendering or failure to render any

"professional service," which "includes but is not limited to…services in the practice of pharmacy." Selective Denial Letter, R. 57, PageID ## 1810-1812. Selective claims the "distribution or sale of pharmaceutical products" constitutes a "primary enterprise of a pharmacy business." Selective Denial Letter, R. 57, PageID ## 1810-1812. However, the allegations in the underlying Janssen lawsuit involve the purchase and retail sale of medications from wholesalers using incorrect labels or trade dress, and arguably do not involve the "rendering" of a "professional service," i.e. the "practice of pharmacy." See *Kuznar v. Raksha Corp.*, 481 Mich. 169; 750 N.W.2d 121 (Mich. 2008). While the underlying lawsuit alleges Singh, a pharmacist, was involved in these activities, there is no allegation that Singh was the sole person who was involved. Moreover, if this Court holds that the acts of purchasing allegedly "counterfeit" medications with false labels from a wholesaler and selling them to the public do not fall within the definition of "practice of pharmacy" in MCL 333.17707(8) for purposes of the American Casualty policy, then this exclusion should not apply.

CONCLUSION AND RELIEF REQUESTED

Accordingly, Plaintiffs request this Honorable Court reverse the decisions of the District Court and grant summary judgment in Plaintiffs favor as to both American Casualty and Selective.

Respectfully Submitted,

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February 4, 2025

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 2,648 words, as determined by the word-count function of Microsoft Word, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

/s/ Pratheep Sevanthinathan
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Dated: February 4, 2025

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2025, a copy of the foregoing document was filed electronically with the Clerk of the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/EFC system. I certify service will be accomplished by the appellate CM/ECF system to the following parties:

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