

## Policyholder Not Entitled To Coverage For Trademark Infringement, Says Idaho Supreme Court

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The Idaho Supreme Court ruled that an insurer is not obligated to defend a trademark infringement suit, rejecting assertions that a “prior publication” exclusion was ambiguous or inapplicable. *Scout, LLC v. Truck Ins. Exchange*, 2019 WL 347471 (Idaho Jan. 29, 2019).

Gone Rogue Pub was sued for trademark infringement based on its use of the logo “ROGUE.” Truck Insurance refused to defend on the basis of a prior publication exclusion, which barred coverage for advertising injuries “[a]rising out of oral or written publication of material whose first publication took place before the beginning of the policy period.” In support of its denial, Truck Insurance relied on the fact that the underlying complaint alleged that Gone Rogue Pub published its ROGUE logo on Facebook approximately one month before the policy commenced. An Idaho trial court agreed and granted the insurer’s summary judgment motion.

The Idaho Supreme Court affirmed, rejecting three arguments asserted by the policyholder on appeal. First, the policyholder argued that Truck Insurance could not deny coverage based solely on the allegations in the complaint and was obligated to consider extrinsic facts known to it. Gone Rogue Pub claimed that Truck Insurance was obligated to defend because it knew that Gone Rogue Pub did not open for business until after the coverage period began, notwithstanding the complaint’s allegation of trademark infringement prior to the coverage period. The court rejected this assertion, holding that Idaho law does not require an insurer to look beyond the four corners of the complaint in denying a defense.

Second, the court rejected the contention that the prior publication exclusion was ambiguous. Gone Rogue Pub claimed ambiguity based on a split in legal authority as to whether a prior publication must be independently “injurious” and actionable in its own right, or whether the exclusion applies so long as the prior publication involves material sufficiently similar to later publications. The court deemed the exclusion unambiguous, finding that “the relevant question for the exclusion . . . is not when the claim first became actionable, but when the material giving rise to the claims was first published.”

Finally, the court dismissed the assertion that the exclusion did not apply because advertisements published after policy inception constituted “fresh wrongs” that triggered coverage. The policyholder argued that certain allegations in the complaint, such as cybersquatting under the Lanham Act and infringement for retail merchandise, separate and apart from restaurant advertising, constituted “distinct, fresh wrongs” that

were not excluded by the prior publication provision. The court disagreed, emphasizing that all alleged trademark infringements arose from a common theme and that no allegations of “new content” constituted fresh wrongs. As the court noted, the Third Circuit rejected a similar “fresh wrongs” argument in *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761 (3d Cir. 2015) (discussed in our [November 2015 Alert](#)).

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