MARYLAND: "Advertising Injury" Coverage For "Blast Faxes" Under New Policy Language

In *Richard J. Walk v. Hartford Casualty Insurance Company*, 382 Md. 1; 852 A.2d 98 (Filed, June 16, 2004), Maryland's highest court interpreted the scope of "advertising injury" coverage language similar to that found in the 1998 and 2001 revisions of the so-called "Coverage B" portion of standard ISO CGL forms. Almost as important in discerning the scope of a duty to defend under Maryland law, the Court clarified the weight that it would give to extrinsic evidence where the bare allegations of the complaint did not trigger a defense. It appears that Maryland's high court will find the scope of "advertising injury" coverage is now considerably narrower than it may have been under prior editions of the standard ISO CGL forms. Moreover, the Court also made clear that it would not find extrinsic evidence demonstrating an "abstract possibility" of a covered claim sufficient to show a potentiality of coverage triggering a defense duty, unless the evidence relates to a cause of action actually alleged, and also demonstrates a reasonable potential that the issue triggering coverage would have been generated at trial.

The underlying insured, Richard Walk, was employed by Victor O. Schinnerer ("VOS") for approximately 28 years, leaving in June of 1999 to become CEO of a competitor, IBSC East. At the time of his departure, he was bound by non–solicitation and confidentiality agreements. In 2000, VOS filed suit against Walk, alleging that he had solicited VOS's clients for his new employer using VOS's confidential proprietary information, including business and marketing plans. The complaint alleged claims for breach of contract, violation of the Maryland Uniform Trade Secrets Act, breach of fiduciary duty, and fraud in connection with the exercise of stock options prior to departing VOS. The complaint did not allege or infer that Walk copied any "advertising idea" belonging to VOS into a publication with widespread public distribution.

Walk tendered the defense of this claim to Hartford, contending that extrinsic evidence demonstrated it fell within the "advertising injury" coverage of his business liability policy. In particular, Walk pointed to his deposition testimony that he had his secretary send several hundred "blast faxes" to brokers in several states announcing the availability of IBSC's real estate E&O program. He also testified that he rewrote a press release for his new employer that announced the same thing, and was sent to several insurance publications.

The policy defined "advertising injury" as "injury arising out of one or more of the following offenses," including, *inter alia*, "Copying, in your 'advertisement', a person's or organization's 'advertising idea' or style of 'advertisement.'" Advertisement, in turn, was defined as "a dissemination of information or images that has the purpose of inducing the sale of goods, products or services through: a. (1) radio; (2) television; (3) billboard; (4) magazine; (5) newspaper; or b. Any other publication that is given widespread public distribution." The policy also defined "advertising idea," as "any idea for an 'advertisement.'"

The Court found that Walk could not establish the potentiality of coverage under either the complaint or the extrinsic evidence proffered. Critically, the Court noted that the plaintiff never alleged that Walk copied any of its advertising ideas or styles in an advertisement. Moreover, it found that a business or marketing plan was not an "idea for an advertisement," and dismissed as absurd the notion that a marketing plan could, or would, be copied in an advertisement.