

bad-faith denial of coverage against the defendant-insurer. The Court will, therefore, grant the defendant's motion for summary judgment and deny the plaintiff's motion for summary judgment.

I. FACTS AND PROCEDURAL HISTORY

On June 2, 1995, defendant, Zurich, as successor to the Maryland Commercial Insurance Group and Valiant Insurance Company, issued a Commercial General Liability Insurance Policy to plaintiff, GMC. The policy granted coverage from July 20, 1995 to July 20, 1996. Plf. Ex. A.¹

In July of 1995, Edward Chiuminatta, Allen Chiuminatta, and Chiuminatta Concrete Concepts, Inc., a California Corporation ("CHI") filed suit in United States District Court for the Central District of California against Cardinal Industries, and GMC, two Pennsylvania corporations sharing the same principal place of business, and engaged in the business of manufacturing concrete cutting saws. Def. Ex. A, Plf. Ex. B.

CHI's complaint alleged that Edward and Allen Chiuminatta were given the following five patents licensed exclusively to CHI along with rights to sue for any infringement of the patents:

¹ All citations refer to exhibits in the defendant's motion for summary judgment or to exhibits in the plaintiff's cross-motion for summary judgment, unless otherwise specified.

1. patent no. 201, issued for the method of cutting grooves in concrete with a soft concrete saw;
2. patent no. 675, issued for the method of cutting unhardened concrete with a soft concrete saw;
3. patent no. 622, issued for a skid plate for cutting unhardened concrete;
4. patent no. 201, issued for a saw for cutting uncured concrete; and
5. patent no. 499, issued for a concrete cutting device.

The complaint alleged patent infringement of all five patents and inducement of patent infringement with regard to Patent Nos. 201 and 675.

CHI filed a motion for a preliminary injunction restraining GMC and Cardinal from making or selling their saws, or any other product that infringed upon two of the five patents -- No. 499 and No. 675. Patents 499 and 675, respectively relate to an apparatus and method for cutting concrete before it has completely cured to a hardened condition.

The District Court of the Central District of California granted the preliminary injunction on July 3, 1996. On September 30, 1996, CHI filed a motion for partial summary judgment with respect to patents No. 499 and No. 675. On November 7, 1996, the district court granted CHI's motion. On

May 14, 1998, the United States Circuit Court for the Federal Circuit entered an order affirming the district court's finding that GMC and Cardinal Industries' sale and manufacture of the accused devices induced infringement of method patent No. 675. The Circuit Court, however, reversed the district court's determination that apparatus patent No. 479 had been infringed. Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus. Inc., No. C.V. 95-4995 (C.D. Cal. Nov. 7, 1996); 145 F.3d 1303 (Fed. Cir. 1998).

Prior to the Federal Circuit Court's ruling, on July 18, 1997, GMC requested Zurich to defend and indemnify GMC in the CHI litigation. Zurich's duty to defend and indemnify is contained in § I(B) of the Commercial General Liability Policy, entitled "Personal and Advertising Injury Liability." Section I(B) provides the following:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury or "advertising injury" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" or offense and settle any claim or "suit" that may result.

Def. Ex. A; Plf. Ex. A.

Zurich denied coverage to GMC on August 7, 1999, based on the fact that the allegations of the underlying action did not pertain to the type of actions covered by the insurance policy.

Zurich contended that the claims made in CHI's complaint did not constitute the type of "advertising injury" covered by the policy. The relevant provisions state:

This insurance applies to . . . "Advertising injury" caused by an offense committed in the course of advertising your goods, products, or services; but only if the offense was committed in the "coverage territory" during the policy period. . . .

"Advertising injury" means injury arising out of one or more of the following offenses:

- (a) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- (b) Oral or written publication of material that violates a person's right of privacy
- (c) Misappropriation of advertising ideas or style of doing business
- (d) Infringement of copyright, title, or slogan.

Zurich also denied coverage on the basis that Zurich received late notice of the claims against GMC. Def. Ex. A, I; Plf. Ex. A, K.

On May 7, 1999, GMC filed suit against Zurich with the Court of Common Pleas of Montgomery County, Pennsylvania. The case was removed to the District Court for the Eastern District of Pennsylvania on June 16, 1999. GMC seeks a declaratory judgment that Zurich is obligated to provide coverage for the CHI lawsuit, as well as reimbursement for attorneys' fees, costs, and monies paid to satisfy the judgment entered against them by the

District Court for the Central District of California.

GMC alleges that the CHI action is a lawsuit for "advertising injury" as defined by the insurance policy. Although GMC challenges Zurich's denial of coverage as to all claims asserted by CHI, GMC focuses on the claims of inducement to infringe CHI's method patents. GMC contends that the method patents constitute a style of doing business and that the claims of inducement of method patent infringement were committed in the course of GMC's advertising. GMC also asserts breach of contract and bad faith claims.

II. STANDARD OF REVIEW

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). In deciding a motion for summary judgment, the Court must view the facts and "any inference to be drawn from the facts contained in depositions and

exhibits" in the light most favorable to the non-moving party. Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993).

III. DISCUSSION

A. General Principles

The parties agree that the insurance contract is governed by Pennsylvania law. The insurance policy was issued by one of Zurich's Pennsylvania agents and accepted by GMC at its principal place of business in Pennsylvania. Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F.Supp. 423, 427 n. 4 (E.D. Pa. 1994) (Pennsylvania conflict laws prescribe that the interpretation of insurance contracts or policies is governed by the law of the state where the policy is issued and delivered), aff'd without opinion, 60 F.3d 813 (3d Cir. 1995).

Pennsylvania law requires that a court read an insurance policy as a whole and construe it according to the plain and ordinary meaning of its terms. Pacific Indem. Co. v. Nationwide Mut. Fire Ins., 766 F.2d 754, 760-61 (3d Cir. 1985). Where a provision is ambiguous, it should be construed against the insurer as drafter of the agreement. Id.; Atlantic, 857 F.Supp. at 427 (citing C.H. Heist Caribe Corp. v. American Home Ass. Co., 640 F.2d 479, 481 (3d Cir. 1981)); Standard Venetian

Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 305, 469 A.2d 563, 566 (Pa. 1983). “[A] provision is ambiguous only if reasonable people could, in the context of the entire policy, fairly ascribe differing meanings to it.” Frog, Switch & Mfr. Co. v. Travelers Ins. Co., 193 F.3d 742, 746 (3d Cir. 1999).

An insurer’s duty to defend an insured in litigation is broader than the duty to indemnify. An insurer is obligated to defend an insured whenever the underlying complaint filed by the injured party may potentially fall under the policy’s coverage. Pacific, 766 F.2d at 760 (citing Gedeon v. State Farm Mut. Auto. Ins. Co., 410 Pa. 55, 58, 188 A.2d 320, 321-22 (Pa. 1963)). The obligation to defend is determined solely by the allegations of the complaint which are accepted as true and liberally construed in favor of the insured. See id.; Frog Switch, 193 F.3d at 746 (citing Biborosch v. Transamerica Ins. Co., 412 Pa. Super 505, 603 A.2d 1050, 1052 (Pa. Super. 1992)). If there is no duty to defend, there is no duty to indemnify.

B. Analysis

The policy covers “advertising injury” caused by an offense committed in the course of advertising. Advertising injury is defined as injury arising out of four separate offenses: (1) oral or written publication of material that slanders or libels a person or organization or disparages a

person's or organization's goods; (2) oral or written publication of material that violates a person's right to privacy; (3) misappropriation of advertising ideas or style of doing business; and (4) infringement of copyright, title, or slogan. GMC claims that CHI's allegations come within category 3. Because the Court holds that GMC's alleged conduct does not fall within a reasonable insured's understanding of "misappropriation of advertising ideas or style of doing business," the Court does not reach the question of causation.

In Frog Switch & Mfr. Co. v. Travelers Ins. Co., 193 F.3d 742 (3d Cir. 1999), the Court of Appeals for the Third Circuit predicted how Pennsylvania courts would interpret a definition of advertising injury identical to the one at issue here. The insurance claim was made by Frog, the insured, for an underlying suit filed against Frog by ESCO Corp.(ESCO). ESCO asserted that Frog used trade secrets and confidential information it wrongfully acquired from an ESCO employee to enter into the market for dipper buckets in competition with ESCO. ESCO filed a complaint alleging six claims related to unfair competition and two claims of false advertising under the Lanham Act. Id. at 744-45.

The insurer denied coverage for the lawsuit. Frog filed a declaratory judgment action, claiming that the allegations in the ESCO complaint amounted to a "misappropriation

of advertising ideas or style of doing business." The district court disagreed, granting summary judgment in favor of the defendant. On appeal, the Third Circuit affirmed, holding that the insurer had no duty to defend Frog in the suit by ESCO. The Court of Appeals concluded that "Frog's alleged conduct does not fall within a reasonable insured's understanding of 'misappropriation of advertising ideas or style of doing business.'" Id. at 747. The Court's analysis dictates the same result here.

In analyzing the term "misappropriation of advertising ideas," the Third Circuit in Frog Switch cited with approval an Illinois District Court's definition of the term. "As one court put it, 'the broadest reading of misappropriating advertising ideas is that the insured wrongfully take an idea about the solicitation of business.'" Id. at 748 (quoting Winkelvoss Consultants, Inc. v. Federal Ins. Co., 991 F.Supp. 1024, 1038 (N.D.Ill. 1998)). The Court of Appeals concluded that "to be covered by the [insurance] policy, allegations of unfair competition or misappropriation have to involve an advertising idea, not just a nonadvertising idea that is made the subject of advertising." Id.

There is no allegation in the underlying action filed by CHI that GMC took any of CHI's marketing, promotional, or advertising materials or ideas. CHI argued that GMC engaged in

patent infringement by creating similar products or copying certain patented methods and later advertising those products and methods to others. Patent infringement that is made the subject of advertising is not in and of itself an advertising idea. See Frog Switch, 193 F.3d at 748.

Nor does the fact that advertising exposed the alleged misappropriation place CHI's claims into the category of "misappropriation of an advertising idea." See, e.g., Microtec Research, Inc. v. Nationwide Mut. Ins. Co., 40 F.3d 968, 971 (9th Cir. 1994); Winkelvoss, 991 F.Supp. at 1034-35; Bank of the West v. Superior Court, 2 Cal.4th 1254, 1274-75, 10 Cal.Rptr.2d 538, 551-52, 833 P.2d 545, 558-59 (Cal. 1992); Polaris Industries v. Continental Ins. Co., 539 N.W.2d 619, 622 (Minn. Ct. App. 1995).

GMC's alleged patent infringement and inducement of patent infringement also fail to qualify as a "misappropriation of style of doing business." In Frog Switch, the Third Circuit defined a style of doing business as "a plan for interacting with consumers and getting their business." Frog Switch, 193 F.3d at 749-750. See Applied Bolting Tech. Prod. v. United States Fid. & Guar. Co., 942 F.Supp. 1029, 1033 (E.D. Pa. 1996)("[t]he phrase 'style of doing business' refers to a company's 'comprehensive manner of operating its business.'"), aff'd without opinion, 118 F.3d 1574 (3d Cir. 1997).

GMC argues that because CHI's style of doing business

includes its patented methods of cutting concrete, any infringement of those method patents constitutes a misappropriation. The Court disagrees. CHI's patented methods of cutting concrete do not serve as a method for interacting with consumers and soliciting their business. CHI's complaint did not allege that the method patents represented a style of doing business. CHI's patented methods of cutting soft concrete using CHI's patented saws constitute a patented product line and a patented manner in which to use those products. The method patents do not comprise CHI's overall manner of conducting its business.

This Court's conclusion that CHI's claims do not constitute an "advertising injury" is consistent with most cases analyzing the term "advertising injury" in the context of patent infringement. See generally Owens-Brockway Glass Container, Inc. v. International Ins. Co., 884 F.Supp. 363, 369 (E.D. Cal. 1995), aff'd without opinion, 94 F.3d 652 (9th Cir. 1996); Atlantic, 857 F.Supp. at 429; St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc., 824 F.Supp. 583, 585-87 (E.D. Va. 1993), aff'd without opinion, 21 F.3d 424 (4th Cir. 1994); Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc., 97 F.Supp.2d 913, 925-31 (S.D. Ind. 2000); Gencor Indus., Inc. v. Wasau Underwriters Ins. Co., 857 F.Supp. 1560, 1564 (M.D. Fla. 1994); Mez Indus., Inc. v. Pacific Nat'l Ins. Co., 76 Cal.App.4th

856, 865-72, 90 Cal.Rptr.2d 721, 727-33 (Cal. Ct. App. 1999).

In the factually similar Mez Indus., Inc. v. Pacific Nat'l Ins. Co., Ductmate Industries filed suit against Mez alleging that Mez directly infringed certain patents as well as induced its customers to infringe at least four of Ductmate's patents. Mez sought a declaratory judgment of indemnity against its insurer. The insurer attacked the complaint by demurrer and the trial court sustained the demurrer without leave to amend and dismissed the action. Mez appealed with regard to the inducement claim. The appeals court affirmed the denial of coverage, holding that neither direct patent infringement nor inducement of infringement could be reasonably considered a misappropriation of advertising ideas or style of doing business. Id., 76 Cal.App.4th at 871-72, 90 Cal.Rptr.2d at 732-33.

GMC seeks to distinguish Mez and other cases on the ground that their interpretations of misappropriation of advertising ideas and style of doing business relate only to product patents. Because the CHI complaint also alleges induced infringement of a method patent, GMC asserts that reliance on the cited cases is unfounded. The Court disagrees for two reasons. First, some court decisions have considered claims involving method or process patents in addition to product patents. See e.g., Simply Fresh Fruit, Inc. v. Continental Ins. Co., 94 F.3d 1219, 1220-21 (9th Cir. 1996), cert. denied, 519 U.S. 965, 117

S.Ct. 388 (1996); Owens-Brockway, 884 F.Supp. at 364; Atlantic, 857 F.Supp. at 426; Gencor, 857 F.Supp. at 1564. These courts employed the same reasoning and relied upon the same case law when analyzing infringement claims dealing with both method and product patents. Second, whether a patent infringement claim involves a method or product patent does not change the question of whether that claim constitutes a misappropriation of an advertising idea or a style of doing business. There is no analytical reason to distinguish between product and method patents.

Lastly, GMC offers the expert report of Mr. William Warfel, a professor of insurance and risk management at Indiana University, who opines that the provision of the insurance contract at issue is ambiguous. The Court will not consider this expert report. Whether a contract provision is ambiguous is a question of law for the court. Standard, 503 Pa. at 566, 469 A.2d at 304. Expert testimony that expresses a legal conclusion is improper. See Hygh v. Jacobs, 961 F.2d 359, 363 (2d Cir. 1992); Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 510-12 (2d Cir.), cert. denied, 434 U.S. 861, 98 S.Ct. 188 (1977); Breezy Point Coop. v. Cigna Prop. & Cas. Co., 868 F.Supp. 33, 36 (E.D.N.Y. 1994); Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan & Trust Agreement, 812 F. Supp. 1376, 1378 (E.D. Pa. 1992). Thus, an expert is prohibited from offering his opinion

as to the legal obligations of parties under a contract. See id.

Although the Court does not reach the second coverage issue - whether there is a causal connection between GMC's advertising activities and CHI's alleged injuries, it does note that courts have generally held that patent infringement cannot occur in the course of advertising activities. See Atlantic, 857 F.Supp. at 429; Gencor, 857 F.Supp. at 1564; Mez, 76 Cal.App.4th at 865-66, 90 Cal.Rptr.2d at 727-28. Inducement of patent infringement, on the other hand, has been held to occur in the course of advertising activities. See Mez, 76 Cal.App.4th at 867-72, 90 Cal.Rptr.2d at 728-33.

C. Bad Faith Claims

The Court will also grant summary judgment with respect to the bad faith claims. Under Pennsylvania law, "bad faith claims cannot survive a determination that there was no duty to defend, because the court's determination that there was no potential coverage means that the insurer had good cause to refuse to defend." Frog Switch, 193 F.3d at 751 n.9. Because this Court has determined that there was no coverage, a bad faith claim cannot survive summary judgment.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GREEN MACHINE CORP.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
V.	:	
	:	
ZURICH AMERICAN INSURANCE	:	
GROUP	:	
Defendant.	:	No. 99-3048

ORDER

AND NOW, this day of August, 2001, upon consideration of the Defendant's Motion for Summary Judgment (Docket # 8), the Plaintiff's Cross-Motion for Summary Judgment (Docket # 9), the responses and replies thereto, IT IS HEREBY ORDERED that the defendant's motion is GRANTED and the plaintiff's motion is DENIED for the reasons stated in a memorandum of today's date. Judgment is hereby entered in favor of the defendant and against the plaintiff.

BY THE COURT:

Mary A. McLaughlin, J.