

Candy Maker Coverage Bid Sours In Bitter Trade Secrets Suit

By Jeff Sistrunk

Law360 (December 12, 2019, 7:21 PM EST) -- An Illinois state appeals court has affirmed that two Liberty Mutual units have no duty to defend Ferrara Candy Co. in a suit accusing it of stealing a former business partner's formulas for Welch's Fruit Snacks and Sour Jacks candies to make competing products, while also finding that the insurer can recover defense costs it previously paid on Ferrara's behalf.

In an opinion filed Wednesday, a panel of the Illinois Appellate Court's First District upheld a trial court's ruling granting judgment on the pleadings to Liberty Mutual Fire Insurance Co. and Liberty Insurance Corp. in their dispute with Ferrara over coverage for the underlying suit filed by Promotion in Motion Inc., or PIM.

The appellate panel agreed with the lower court that Liberty's coverage obligations were not triggered because PIM's claims of misappropriation of trade secrets, trade dress infringement and unfair competition concerned actions that Ferrara allegedly committed after its policies with Liberty had already been cancelled.

The underlying action stemmed from PIM's long-running business relationship with Ferrara's predecessor, Ferrara Pan Candy Co. Inc. According to court documents, between 1990 and late 2014, Ferrara Pan and its successor manufactured PIM's popular Welch's Fruit Snacks and Sour Jacks candies.

In 2012, Ferrara Pan merged with Farley's & Sathers Candy Co. Inc. to form the current iteration of Ferrara. In connection with the merger, Ferrara cancelled its primary and umbrella general liability policies with Liberty in June 2012, according to the appellate opinion.

In November 2012, the post-merger Ferrara signed a new confidentiality agreement with PIM to protect PIM's trade secrets regarding the formulas and manufacturing processes for Welch's and Sour Jacks, the opinion said.

But in a suit filed in April 2015 in Delaware federal court, PIM claimed that Ferrara had later stolen those trade secrets to produce and market several competing products: Market Pantry and Black Forest fruit snacks and Sour Buddies candy. PIM further claimed that Ferrara had copied the packaging design of Sour Jacks for its Sour Buddies, thereby engaging in trade dress infringement.

At Ferrara's request, Liberty initially agreed to defend Ferrara in the PIM litigation, while reserving its rights to later challenge coverage. After PIM had filed a second amended complaint and discovery had

closed in the case, Liberty in March 2017 withdrew from paying for Ferrara's defense after concluding that none of PIM's claims triggered coverage under its policies.

At the same time, Liberty sued Ferrara in Illinois state court, seeking a ruling that it had no duty to defend or indemnify and also looking to force the candy maker to repay all the defense costs the insurer had paid on its behalf to that point.

In May 2018, Judge Neil H. Cohen granted Liberty's motion for judgment on the pleadings, agreeing with the insurer that coverage was never triggered because PIM's claims concerned conduct by the post-merger Ferrara, after the policies had been cancelled. The judge also found that Liberty was entitled to reimbursement of the previously-paid defense costs.

The appellate panel said Judge Cohen had made the right call. PIM's claim for trade dress infringement was the only one that could potentially have triggered Liberty's coverage duties, but the underlying suit made clear that PIM was accusing only the post-merger Ferrara of engaging in that conduct, the panel found.

"Examining the underlying complaint in its entirety, we find that it does not leave open the possibility that the claimed violations or injuries stemmed from the conduct of Ferrara Pan, the entity that existed during the time the policies were in effect," Justice Cynthia Cobbs wrote for the panel.

The panel also agreed with the trial judge that Liberty can recoup the defense costs previously paid on Ferrara's behalf, saying the insurer had established its right to do so when it sent Ferrara a letter in June 2015 agreeing to fund the candy company's defense under a reservation of rights.

A Liberty spokesman declined to comment on Thursday, while a Ferrara representative did not immediately respond to a request for comment.

Justices Cynthia Cobbs, Nathaniel Howse and Margaret S. McBride sat on the panel for the First District.

Ferrara is represented by Christopher Lynch, Adam Hollander and Denise Lazar of Barnes & Thornburg LLP.

Liberty is represented by Matthew Sitzler and Matt Wolfe of Shook Hardy & Bacon LLP.

The case is Liberty Mutual Fire Insurance Co. et al. v. Ferrara Candy Co., case number 1-18-1385, in the Appellate Court of Illinois, First District.

--Editing by Adam LoBelia.