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# Traub Lieberman Partner Eric D. Suben Obtains Appellate Affirmance Enforcing Breach of Contract Exclusion

Related Attorneys: Eric D. Suben

The underlying claim was a commercial dispute in which a dental management company (“DMC”) sued the insured dental practice in two lawsuits based on breach of the acquisition agreement and management services agreement between them. In those agreements, the DMC licensed certain trademarks and domain names to the dental practice. In the first lawsuit, filed in New Jersey, the DMC alleged infringement. In the second lawsuit, filed in New York, the DMC alleged violation of the contractual non-disparagement clause in the acquisition agreement.

The insurer acknowledged a duty to defend the New Jersey lawsuit, reserving its rights to deny coverage under exclusions applicable to intellectual property (“IP”) infringement and breach of contract. The insurer denied coverage for the New York lawsuit, because although defamation was an enumerated “personal and advertising injury” offense in the policy, the sole defamation allegation was a breach of the contractual non-disparagement clause.

In the subsequent coverage litigation, the New Jersey Superior Court judge granted Traub Lieberman's motion for summary judgment on behalf of the insurer, finding that the sole allegations in the New Jersey lawsuit were infringement of trademarks and domain names, which were specifically excluded. In any event, the breach of contract exclusion applied, based on the existence of a contractual license of IP rights to the insured dental practice. He further concluded that the breach of contract exclusion applied to bar coverage for the New York lawsuit.

In opposing the dental practice's subsequent appeal to the New Jersey Appellate Division, Traub Lieberman argued that the motion court was correct because the underlying infringement allegations were limited to excluded trademarks and domain names, and any infringement constituted a breach of contract (the licensing agreements). Traub Lieberman further argued that disparagement, as alleged, was excluded from coverage as a breach of contract.

The Appellate Division agreed with Traub Lieberman's arguments and affirmed summary judgment in the insurer's favor.

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