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

THE HANOVER INSURANCE COMPANY

v.

Civil Action No. 2:12-cv-03961-TON

URBAN OUTFITTERS, INC., U.O.COM, LLC, URBAN OUTFITTERS WHOLESALE, INC., ANTHROPOLOGIE, INC., ANTHROPOLOGIE.COM, LP, FREE PEOPLE OF PA, LLC, and FREEPEOPLE.COM, LLC,

Defendants,

and

ONEBEACON AMERICA INSURANCE COMPANY,

Third-Party Defendant

ORDER

AND NOW, this _____ day of _____, 2013, it is hereby ordered that the Plaintiff's Motion for Judgment on the Pleadings is granted, and that a declaratory judgment is hereby entered in favor of the plaintiff, declaring that The Hanover Insurance Company has no duty to provide a continued defense or indemnification to the original defendants in connection with the underlying suit captioned, The Navajo Nation, *et al.* v. Urban Outfitters, Inc., *et al.*, U.S. District Court, District of New Mexico, No. 1:12-cv-00195.

BY THE COURT :

_____

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Defendants,

and

ONEBEACON AMERICA INSURANCE COMPANY,
Third-Party Defendant

MOTION FOR JUDGMENT ON THE PLEADINGS OF PLAINTIFF, THE HANOVER INSURANCE COMPANY

1. As outlined in its Complaint for Declaratory Judgment [**Exhibit "1"**] the plaintiff, Hanover Insurance Company ("Hanover") filed this declaratory judgment action seeking a judicial declaration that the insurer has no duty to provide a continued defense or indemnification to its insureds (defendants Urban Outfitters, Inc., U.O.com, LLC, Urban Outfitters Wholesale, Inc., Anthropologie, Inc., Anthropologie.com, LP, and Free People of PA, LLC) in connection with an underlying civil action pending in the U.S. District Court for the District of New Mexico captioned, The Navajo Nation, *et al.* v. Urban Outfitters, Inc., *et al.*, Civil Action No. 1:12-cv-00195-LH-WDS.

2. As set forth in the Amended Complaint from that underlying action, The Navajo Nation and other owned or related organizations or instrumentalities of that entity have asserted

claims for both injunctive relief and damages against the Hanover's insureds for alleged Trademark Infringement and Dilution under the Lanham Act, Unfair Competition and False Advertising under that statute, violations of the Indian Arts and Crafts Act, violations of the New Mexico Unfair Practices Act, and violations of the New Mexico Trademark Act, premised upon the defendants' actions in connection with the sale or advertising of various products using the "Navajo" or "Navaho" names and/or Indian styles or motifs. An undisputedly authentic red-lined version of the Amended Complaint from the underlying suit accompanied the Complaint for Declaratory Judgment and now accompanies this motion as **Exhibit "1-A"**. [A date-stamped copy of that pleading is also before the Court as Exhibit "A" to the defendants' Third-Party Complaint, Exhibit "3" to this motion].

3. Hanover has retained defense counsel in the underlying action to represent its insureds (hereinafter referred to as the "Urban Outfitters defendants") jointly with their prior liability insurer, OneBeacon America Insurance Company, under the "Personal and Advertising Injury" coverages of its insurance policies subject to a reservation of rights, as set forth in the reservation of rights letters issued by Hanover on April 26 and June 5, 2012, expressly reserving the right to withdraw from the defense of the underlying action and the right to seek a declaratory judgment relating to its coverage obligations. Copies of those reservation of rights letters accompanied the Complaint for Declaratory Judgment and now accompany this motion as **Exhibit "1-B"**.

4. One Beacon America Insurance Company issued a *"fronting policy"* to the Urban Outfitters defendants providing both commercial general liability and umbrella liability coverage for a policy period extending from July 7, 2010 to July 7, 2011, for which the plaintiff Hanover is the responsible insurer pursuant to an agreement between those two companies. A certified true and correct copy of that policy accompanied the Complaint for Declaratory Judgment and now accompanies this motion as **Exhibit "1-C"**.

5. Hanover thereafter directly issued separate commercial general liability and commercial umbrella policies to the defendants for the subsequent policy period of July 7, 2011

to July 7, 2012, copies of which accompanied the Complaint for Declaratory Judgment and accompany this motion as **Exhibits "1-D"** and **"1-E"**, respectively.

6. It is alleged in the Amended Complaint in the underlying action that the offending advertising materials have been published "since at least March 16, 2009" (*See, e.g.*, Paras. 2, 37, 41 and 78) which would have been more than one year *before* the July 7, 2010 inception date of the One Beacon/Hanover "fronting policy," and more than two years prior to the inception date of the Hanover policies which went into effect on July 7, 2011.

7. The Insuring Agreements with respect to the "Personal and Advertising Injury" coverage under both the Commercial General Liability Coverage Form and the Commercial Umbrella Liability Coverage Form to the One Beacon/Hanover "fronting policy" in force from July 7, 2010 to July 7, 2011 both stated that such coverage was afforded only for a covered *"personal and advertising injury"* offense that is committed *"during the policy period."*

8. Both the Commercial General Liability and the Commercial Umbrella Liability Coverage Forms to that policy also contained what are known as *"prior publication"* or *"first publication"* exclusions, the intended effect of which is to bar coverage in situations such as this, in which the same or substantially similar publications began before the insurer's policy period and continued thereafter, by confining coverage to the policy period in which those publications were first made.

9. Specifically, the Commercial General Liability Coverage Form to the OneBeacon/Hanover "fronting policy" with an inception date of July 7, 2010 contained the following exclusion, stating that the insurance does not apply to:

> **c. Material Published Prior To Policy Period**
>
> "Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

10. The Commercial Umbrella Liability Coverage Form to that same policy similarly

stated that the insurance does not apply to:

a. "Personal and Advertising Injury":

* * * *

(2) Material Published Prior To Policy Period

Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

11. The subsequent Hanover Commercial Lines policy with an effective date of July 7, 2011 contained the same Commercial General Liability Coverage Form, and thus, the same exclusion set forth in Paragraph 15, above.

12. The subsequent Hanover Commercial Umbrella Policy effective that same date also contained such an exclusion in its Commercial Liability Umbrella Coverage Form, stating that the insurance does not apply to :

a. "Personal and advertising injury":

* * * *

(3) Material Published Prior To Policy Period

Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

13. Because the offending publications, or the defendants' publication of substantially similar material, allegedly began by at least March, 2009, prior to the July 10, 2010 inception date of the One Beacon/Hanover "fronting policy" and thus also prior to the July 10, 2011 inception date of the Hanover policies which followed, Hanover has no potential duty to indemnify, and thus no duty to defend the Urban Outfitters defendants in the underlying suit.

14. In answering the Complaint for Declaratory Judgment, Hanover's insureds have admitted to the authenticity of the Amended Complaint in the underlying action (Para. 6); to the fact that Hanover is defending the underlying action subject to the reservations of rights set forth in

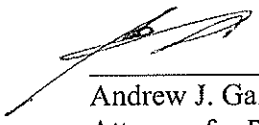
the attached letters (Paras. 8-9); and that the certified insurance policy materials which accompanied the Complaint are at least partial copies of the policies at in question (Paras. 10-11, 13-18). A true and correct copy of the Answer to the Complaint for Declaratory Judgment of the Urban Outfitters defendants (Document 14) accompanies this motion as **Exhibit "2"**.

15. The insured Urban Outfitters defendants filed a Third-Party Complaint joining their prior insurer, OneBeacon America Insurance Company, as a third-party defendant in this coverage litigation on October 9, 2012 (Document 16) acknowledging that Hanover and OneBeacon have thus far been sharing the costs of jointly defending the underlying suit, and seeking a declaration that OneBeacon is fully responsible for defending that case under its 2008 and 2009 policies if Hanover is successful with its claim for declaratory relief. A copy of the Third-Party Complaint (Document 16) accompanies this motion as **Exhibit "3".**

16. On January 31, 2013, OneBeacon filed an Answer to the Third-Party Complaint in which it acknowledged its participation with Hanover in defending the underlying suit, its issuance of the two prior liability policies for periods of July 7, 2008 - 2009 and July 7, 2009-2010, and its issuance of the "fronting policy" for which Hanover is responsible for the following period of July 7, 2010-2011 [Answer to Third-Party Complaint, Paras. 7-11, **Exhibit "4"**].

17. The pleadings are now closed.

WHEREFORE, because Hanover has no potential duty to indemnify and thus no duty to defend its insureds under the OneBeacon/Hanover "fronting policy" effective July 7, 2010, or under its subsequent policies effective July 7, 2011 as a matter of law pursuant to the "prior publication" exclusions, it is respectfully requested that the Court enter judgment in favor of the plaintiff, declaring that The Hanover Insurance Company has no duty to provide a continued defense or indemnification to the Urban Outfitters defendants in the underlying suit.



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Civil Action No. 2:12-cv-03961-TON

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Defendants,

and

ONEBEACON AMERICA INSURANCE COMPANY,
Third-Party Defendant

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OF PLAINTIFF, THE HANOVER INSURANCE COMPANY

I. STATEMENT OF THE CASE

As outlined in the foregoing motion, this declaratory judgment action is concerned with the legal issue of whether the plaintiff, Hanover Insurance Company, has a duty to provide a continued defense and indemnification to its insureds (the Urban Outfitters defendants) in connection with an underlying lawsuit now pending in the U.S. District Court for the District of New Mexico captioned The Navajo Nation, *et al.* v. Urban Outfitters, Inc., *et al.*, Civil Action No. 1:12-cv-00195-LH-WDS.

As set forth in the Amended Complaint from that underlying action **[Exhibit "1-A"]** the Navajo Nation (along with various affiliated organizations) have asserted claims for both injunctive relief and damages against Hanover's insureds for alleged Trademark Infringement and

Dilution under the Lanham Act, Unfair Competition and False Advertising under that statute, violations of the Indian Arts and Crafts Act, violations of the New Mexico Unfair Practices Act, and violations of the New Mexico Trademark Act.

Those underlying claims are premised upon the defendants' actions in connection with the sale or advertising of various products using the "Navajo" or "Navaho" names, or Indian styles or motifs through various advertisements spanning a period of several years, *"since at least March, 2009,"* and allegedly continuing to the present time [**Exhibit "1-A"**].

Hanover, which first insured the Urban Outfitters defendants under a fronting policy issued on OneBeacon paper effective in July, 2010, more than a year after those publications began, has jointly retained defense counsel in the underlying suit with their prior liability insurer, OneBeacon America Insurance Company, which previously issued policies to Urban Outfitters for periods extending from July 7, 2008 to July 7, 2009, and from July 7, 2009 to July 7, 2010 [*See,* Third-Party Complaint, Paras. 7-8, **Exhibit "3"**].

As outlined in Hanover's letters of April 26 and June 5, 2012 that defense is being provided under the "Personal and Advertising Injury" coverages of its insurance policies subject to a full reservation of rights, as set forth in the reservation of rights letters issued by Hanover on April 26 and June 5, 2012, including the right to withdraw that defense as well as the right to seek a declaratory judgment relating to its coverage obligations. [**Exhibit "1-B"**].

While not the subject of this declaratory judgment action, it should be noted that, in addition to expressly reserving the right to deny coverage under the prior publication exclusions at issue in this case, Hanover raised a number of alternative coverage defenses. Among them, the insurer reserved the right to disclaim coverage to the extent that the plaintiffs' claims did not involve covered *"personal and advertising injury"* offenses, and insofar as the claims did not relate to an offense occurring in the insureds' *"advertisements"* (defined as notices "broadcast or published to the general public or specific marke segments about your goods, products or services for the purpose of attracting customers," as distinguished from any claim premised upon the actual sale, or the display of goods in their retail stores.

Although not the subject of the present motion, Hanover stated in those letters its position that most, if not all of the underlying claims did not involve covered *"personal and advertising*

injury" offenses at all, including the Navajo Nation's claims for trademark infringement and dilution and unfair competition, their claims under the Indian Arts and Crafts Act and the New Mexico Unfair Practices Act, and during the second Hanover policy period (following the "fronting policy" issued by OneBeacon) any claim for "trade dress" infringement as well.

Following the expiration of OneBeacon's 2008 and 2009 policies, that insurer issued a *"fronting policy"* to the Urban Outfitters defendants providing both commercial general liability and umbrella liability coverage for a policy period extending from July 7, 2010 to July 7, 2011, for which the plaintiff Hanover is admittedly the responsible insurer pursuant to an agreement between those two companies. [**Exhibit "1-C"**]. Hanover itself later issued two separate commercial general liability and commercial umbrella policies to the defendants for the following policy period of July 7, 2011 to July 7, 2012 [**Exhibits "1-D"** and **"1-E"**, respectively].

The Complaint for Declaratory Judgment raises a single coverage issue, namely, whether the claims asserted in the underlying suit based upon publications allegedly made by the insureds "since at least March 16, 2009," [Amended Complaint, Paras. 2, 37, 41 and 78, Exhibit "1-A"] fall within the scope of the "prior publication" exclusions appearing in the Hanover policies issued more than a year later in July, 2010 and July, 2011.

The Insuring Agreements with respect to the "Personal and Advertising Injury" coverage under both the Commercial General Liability Coverage Form and the Commercial Umbrella Liability Coverage Form to the One Beacon/Hanover "fronting policy" in force from July 7, 2010 to July 7, 2011 [**Exhibit "1-C"**] both stated that such coverage was afforded only for a covered *"personal and advertising injury"* offense that is committed *"during the policy period."*

Both the Commercial General Liability and the Commercial Umbrella Liability Coverage Forms to that policy also contained what are known as *"prior publication"* or *"first publication"* exclusions, the intended effect of which is to bar coverage in situations such as this, in which the same or substantially similar publications on which the claim is based began before the insurer's policy period and continued thereafter, by confining coverage to the policy period in which those publications were first made.

Specifically, the Commercial General Liability Coverage Form to the OneBeacon/Hanover "fronting policy" with an inception date of July 7, 2010 contained the following exclusion, stating

that the insurance does not apply to:

> **c. Material Published Prior To Policy Period**
>
> "Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

Similarly, the Commercial Umbrella Liability Coverage Form to that same policy stated that the insurance does not apply to:

> **a.** "Personal and Advertising Injury":
>
> * * * *
>
> **(2) Material Published Prior To Policy Period**
>
> Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

The subsequent Hanover Commercial Lines policy with an effective date of July 7, 2011 contained the same Commercial General Liability Coverage Form, and thus, the same Exclusion **c.** as that set forth above.

The separate Hanover Commercial Umbrella Policy effective that same date also contained such an exclusion in its Commercial Liability Umbrella Coverage Form, stating in substantially the same terms that the insurance does not apply to :

> **a.** "Personal and advertising injury":
>
> * * * *
>
> **(3) Material Published Prior To Policy Period**
>
> Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

Because the offending publications, or the defendants' publication of substantially similar material, allegedly began at least as early as March, 2009, more than a year before the July 10, 2010 inception date of the One Beacon/Hanover "fronting policy" and over two years before the July 10, 2011 inception date of the two Hanover policies which followed, Hanover has no potential duty to indemnify, and thus no duty to defend the Urban Outfitters defendants in the underlying suit.

The facts material to this motion, namely, the terms of the insurance policies and the allegations set forth in the Amended Complaint in the underlying suit, are not in dispute. In

answering the Complaint for Declaratory Judgment, Hanover's insureds have admitted to the authenticity of the Amended Complaint in the underlying action (Para. 6); to the fact that Hanover is defending the underlying action subject to the reservations of rights as set forth in the attached letters (Paras. 8-9); and that the certified insurance policy materials which accompanied the Complaint, including the exclusions cited previously, are at least partial copies of the policies at in question (Paras. 10-11, 13-18). [**Exhibit "2"**].

The insured Urban Outfitters defendants filed a Third-Party Complaint [**Exhibit '3"**] joining their prior insurer, OneBeacon America Insurance Company, as a third-party defendant in this coverage litigation on October 9, 2012 (Document 16) acknowledging that Hanover and OneBeacon have thus far been sharing the costs of jointly defending the underlying suit, and seeking a declaration that OneBeacon is fully responsible for defending that case under its earlier 2008 and 2009 policies if Hanover is successful with its claim for declaratory relief. [That pleading also attached as Exhibit "A" a date-stamped copy of the Amended Complaint filed May 21, 2012 in the underlying action, which is more clearly readable than the court-approved red-lined version which accompanied the Complaint for Declaratory Judgment in this case.]

On January 31, 2013, following two approved extensions, OneBeacon filed and Answer to the Third-Party Complaint in which it acknowledged its joint participation in defending the underlying suit with Hanover, its issuance of the two prior liability insurance policies to Urban Outfitters covering periods extending from July 7, 2008 to July 7, 2009 and from July 7, 2009 to July 7, 2010, and its issuance of the "fronting policy" for which Hanover is admittedly the responsible insurer for the period of July 7, 2010 to July 7, 2011. [Answer to Third-Party Complaint, Paras. 7-11, **Exhibit "4"**].

The pleadings are now closed.

II. STATEMENT OF THE ISSUE INVOLVED :

Is coverage barred by the *"prior publication"* exclusions of the Hanover policies where it is alleged in the underlying lawsuit that the offending publications began at least as early as March 16, 2009, more than a year before the initial Hanover policy period began ?

III. ARGUMENT :

A. AN INSURER'S DUTY TO DEFEND INVOLVES A QUESTION OF LAW APPROPRIATE FOR SUMMARY DISPOSITION BY THE COURT

It is well established that the determination of a liability insurer's duty to defend involves a question of law for the court, and is, therefore, an appropriate subject for resolution through a motion for summary judgment or judgment on the pleadings. Vale Chemical Co. v. Hartford Accident & Indemnity Co., 430 Pa.Super. 510, 490 A.2d 896 (1985) (motion for summary judgment); Consulting Engineers v. INA, 710 A.2d 82 (Pa.Super. 1998), (motion for judgment on the pleadings); CGU Ins. Co. v. Tyson Associates, 140 F.Supp.2d 415 (E.D.Pa. 2001), (summary judgment); Reliance Ins. Co. v. Moessner, 121 F.3d 895 (3d Cir. 1997).

Because, as outlined in the following section of this Brief, the Court's determination of Hanover's duty to defend must be based upon a comparison of the insurance policy language to the factual allegations set forth in the complaint against the insureds in the underlying case, without consideration of extrinsic evidence or the truth or falsity of the allegations, this is an issue appropriate for resolution through a motion for judgment on the pleadings, which is *"designed to provide a means for disposing of cases when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice."* The Scranton Times, LP v. Wilkes-Barre Publishing Co., 2009 WL 3100963 (M.D.Pa. 2008), citing Wright and Miller, FEDERAL PRACTICE AND PROCEDURE §1367.

In ruling upon a motion for judgment on the pleadings pursuant to F.R.C.P. 12(c), the Court can consider not only the pleadings, but also the attached exhibits, matters of public record, and any other undisputedly authentic documents that are integral to the claim, or on which the claim is based. Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192 (3d Cir. 1993); General Motors Corp. v. Schneider Logistics, Inc., 2008 WL 2785861 (E.D.Pa. 2008). In the present case, this would obviously include the Amended Complaint from the underlying

lawsuit and the insurance contracts, and the Court need look no further than that.

B. AN INSURER'S DUTY TO DEFEND IS DETERMINED SOLELY BY THE TERMS OF THE INSURANCE POLICY AND THE FACTUAL ALLEGATIONS OF THE COMPLAINT

It is also well established that an insurer's duty to defend is controlled by the factual allegations of the plaintiff's complaint against the insured, the question being whether the facts alleged, on their face, state a claim which potentially falls within the scope of the coverage provided, thereby creating a potential duty to indemnify the insured. Scopel v. Donegal Mut. Ins. Co., 698 A.2d 602 (Pa.Super. 1997); Erie Ins. Exchange v. Fidler, 808 A.2d 587, 590 (Pa.Super. 2002), (holding that insurer's duty to defend *"is fixed solely by the allegations of the underlying complaint."*); D'Auria v. Zurich Ins. Co., 507 A.2d 857, 859 (Pa.Super. 1986), (*"It is the face of the complaint and not the truth of the facts alleged therein which determines whether there is a duty to defend."*); The Frog, Switch & Mfg. Co., Inc. v. The Travelers Ins. Co., 193 F.3d 742, 746 (3d Cir. 1999), (noting that *"the factual allegations of the underlying complaint against the insured are taken to be true and liberally construed in favor of the insured."*).

Extrinsic evidence, such as affidavits, deposition testimony, or facts developed through discovery, cannot properly be considered. Nor can an insured create coverage by denying the complaint allegations in the underlying suit, which must be accepted as true, and in that sense are binding upon both the insurer and its insured for this purpose. I.C.D. Industries v. Federal Ins. Co., 879 F.Supp. 480, 487 (E.D.Pa. 1995); Scopel, *supra* ; Mutual Benefit Ins. Co. v. Haver, 725 A.2d 732 (Pa. 1999).

Because an insurer's duty to defend is broader than its duty to indemnify an insured and is dependent upon the question of whether the underlying suit allegations create a potential duty to indemnify, a judicial determination that an insurer has no duty to defend will also preclude any duty to indemnify as a matter of law. Scopel, *supra*, 698 A.2d at 605; Erie Ins. Exchange v. Claypoole, 673 A.2d 348, 356 (Pa.Super. 1996); Allstate Ins. Co. v. McClymonds, 2007 WL 2254563 (W.D.Pa. 2007).

C. THE COURT MUST GIVE EFFECT TO THE PLAIN LANGUAGE OF THE INSURANCE POLICIES

In construing an insurance policy, a court must adopt the interpretation which, under all of the circumstances, ascribes the most reasonable, probable and natural intention of the parties, bearing in mind the objects manifestly to be accomplished. Galvin v. Occidental Life Ins. Co. of Calif., 211 A.2d 120 (Pa.Super. 1965). The intent which is to be ascertained when interpreting an insurance contract is that which is manifested by the language of the policy itself. Mohn v. American Casualty Co. of Reading, 458 Pa. 576, 326 A.2d 346, 351 (1974).

The terms of an insurance policy must be contrued in accordance with the plain and ordinary meaning of the words used. Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 469 A.2d 563 (1983). A court has no license to rewrite the terms of a policy, to bestow upon the words a construction which is belied by the plain meaning of the language used, or to require that an insurer expand coverage beyond that provided by its policy. Loomer v. M.R.T. Flying Service, Inc., 558 A.2d 103, 105 (Pa.Super. 1989); Adelman v. State Farm Mut. Ins. Co., 386 A.2d 535 (Pa.Super. 1979).

Where policy language is clear and unambiguous, a court is required to give effect to that language, Madison Construction Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100, 107 (1999), and although the parties' intentions are the focal point in interpreting policy language, an insured may not complain that his or her expectations of coverage are frustrated by policy limitations which are clear and unambiguous. St. Paul Mercury Ins. Co. v. Corbett, 630 A.2d 28, 30 (Pa.Super. 1993). Nor can an insured avoid the consequences of clearly worded policy limitations by proof that he did not read, or did not understand them. Standard Venetian Blind, *supra.*

A court should not create ambiguities where none exist. Lebanon Coach Co. v. Carolina Casualty Co., 670 A.2d 160 (Pa.Super. 1996), *appeal denied*, 546 Pa. 695, 687 A.2d 378 (1996).

In determining whether the terms of an insurance contract are ambiguous, an objective standard must be employed, the test being whether reasonably intelligent people could honestly differ as to its meaning upon considering it in the context of the policy. City of Erie v. Guaranty National Ins. Co., 935 F.Supp. 610 (W.D.Pa. 1996); Loomer, *supra.*

Policy language is not ambiguous merely because the parties (or their lawyers) disagree as to its meaning. Weisman v. Green Tree Ins. Co., 670 A.2d 160 (Pa.Super. 1996).

Nor can the question of whether policy language is ambiguous properly be considered in the abstract - the question is whether the policy language is ambiguous when it is applied to the particular set of facts before the court which, in this case, would consist of the underlying suit allegations. Madison Construction, *supra* ; CSX Corp. v. Adriatic Ins. Co., 99 F.Supp.2d 593 (W.D.Pa. 2000). As this concept was aptly explained by a California court, a policy provision may *"shift between clarity and ambiguity with changes in the event at hand."* O'Doan v. INA, 52 Calif.Rptr. 184 (Cal.App. 1966).

D. THE "PRIOR PUBLICATION" EXCLUSION BARS COVERAGE WITH RESPECT TO CLAIMS PREMISED UPON AN INSURED'S PUBLICATION OF THE SAME OR SUBSTANTIALLY SIMILAR MATERIALS PRIOR TO THE POLICY PERIOD

As previously outlined, all of the Hanover policies contained what are commonly known as *"prior publication"* or *"first publication"* exclusions, each of them appearing beneath the heading **"Material Published Prior To Policy Period."** Although there are some minor variations with regard to the numbering of the exclusions, each of the policies barred coverage using identical language with respect to "personal and advertising injury" claims ***"arising out of oral or written publication of material whose first publication took place before the beginning of the policy period."***

In the underlying suit, the Navajo Nation and its fellow plaintiffs have asserted a variety of claims against Urban Outfitters and its fellow insured defendants, all of which are premised upon their alleged advertising (through web sites, catalogs, etc.) or sale of products improperly bearing the names "Navajo" or "Navaho", or which used Indian styles or motifs, allegedly resulting in trademark infringement or dilution or unfair competition under the Lanham Act, violating the Indian Arts and Crafts Act, and violating the New Mexico Unfair Practices Act or the New Mexico Trademark Act.

It is repeatedly alleged in the Amended Complaint that the defendants' offending

advertising activities had been ongoing since at least March, 2009, and were still ongoing when the Amended Complaint was filed on May 21, 2012. Specifically, referring to all defendants collectively as "Urban Outfitters," the complaint in the underlying action contains the following allegations :

> 2. **Since at least March 16, 2009**, Urban Outfitters has advertised, promoted, and sold its goods under the "Navaho" and "Navajo" names and marks. Urban Outfitters offers these goods on the Internet and in stores across the United States, and they compete directly with the Navajo Nation's goods.
> * * * *
> 37. **At least as early as March 16, 2009**, Urban Outfitters started using the "Navajo" and "Navaho" names in its product line, or in connection with the sale of its goods online, in its catalogs, and in its physical stores. Defendant's use has included, and includes (but is not limited to): clothing, jewelry, footwear, handbags, caps, scarves, gloves, undergarments and flasks. Defendant's items sold under the "Navajo" and "Navaho" names and marks evoke the Navajo Nation's tribal patterns, including geometric prints and designs fashioned to mimic and resemble Navajo Indian-made pattered clothing, jewelry and accessories. Urban Outfitters has sold and is selling over 20 products using the "Navajo" and "Navaho" trademarks in its retail stores, its catalogs, and its online stores.
> * * * *
> 41. Urban Outfitters began offering retail clothing and accessories **as early as March 2009** with the "Navajo" and "Navaho" as trademarks to label and describe its products....
> * * * *
> 78. **At least since March 16, 2009, and possibly earlier as discovery will confirm, and continuously thereafter to the present date**, Defendant has advertised, marketed, offered, displayed for sale, and sold goods in manners that falsely suggested that they are Indian-made, an Indian product, a product of an Indian Tribe, or the product of an Indian arts and crafts organization resident within the United States, including Indian products consisting of jewelry and clothing in a traditional Indian style, printed design or medium.
> * * * *

Distilled to its essence, it is claimed that the insured defendants have been improperly marketing their products both using the "Navajo" and "Navaho" names, and in styles which misleadingly mimic authentic Indian-made products, falsely suggesting that their products are of Indian origin, since March 16, 2009, if not earlier, and that they have done the same thing continuously thereafter to the present date.

While those allegations would undoubtedly fall within the scope of OneBeacon's policy

covering the period of July 7, 2008 to July 7, 2009 to the extent that an otherwise covered claim is set forth in the complaint, without triggering that policy's prior publication exclusion, they would plainly trigger such an exclusion in OneBeacon's second policy for the period of July 7, 2009 to July 7, 2010 (were OneBeacon to raise that issue) as well as triggering the prior publication exclusions appearing in both the OneBeacon/Hanover "fronting policy" effective July 7, 2010 (over a year after the materials were first published) and the subsequent Hanover primary and umbrella liability policies effective July 7, 2011.

Although research has disclosed no controlling Pennsylvania state court authority on the subject, most courts have held that prior publication exclusions unambiguously bar coverage where the offending advertising materials published before the policy period were either the same, or "substantially similar" those published afterward, regardless of whether different or additional injuries occurred before and after the effective date of coverage, and regardless of whether the publications made after the inception of coverage appeared in different advertisements, or in different media than those published earlier.

This Court had occasion to consider the subject in the leading case of Applied Bolting Technology Products, Inc. v. U.S.F.&G. Co., 942 F.Supp. 1029 (E.D.Pa. 1996), *affirmed without opinion*, 118 F.3d 1574 (3d Cir. 1997), which involved claims of false advertising and unfair competition premised upon an insured's allegedly misleading representations relating to the compliance of its products with industry standards. It was claimed in the underlying complaint in that case that the offending advertising began on or before December 1, 1994, more than a month before the defendant insurer's policy inception date of January 18, 1995.

Judge VanArtsdalen held that any covered claim in the underlying suit was clearly and unambiguously barred by the very same prior publication exclusion as those appearing in the Hanover policies, rejecting the insured's contention that the exclusion was not controlling because the suit claimed a *"continuing tort,"* and reasoning that, under the plain terms of the exclusion, the first publication date is a *"landmark"*, and if the injurious advertisement was "first published" before the policy period began, coverage is excluded. 942 F.Supp. at 1036.

In ruling in favor of the insurer, this Court held that it was irrelevant that later publications occurring after the policy began caused additional injury, or increased the plaintiff's damages. *Id.*

The Court also rejected the insured's contention that the claimant suffered a different injury each time that the insured published the offending representations in the form of additional lost sales, holding that such an argument ignored the plain language of the exclusion, and that it was irrelevant that the injurious publications caused a variety of different injuries before and during the policy period. *Id.*

It has also been recognized that such exclusions will bar coverage even if the publications prior to and following the inception of the insurer's policy period are not identical, provided they are of a "substantially similar" nature.

Thus, in Ringler Associates, Inc. v. Maryland Cas. Co., 80 Cal.App.4th 1165 (Cal.App. 2000), it was held that the first publication exclusion *"is intended to and in fact bars coverage of an insured's continuous or repeated publication of* ***substantially the same offending material previously published*** *at a point in time before a policy incepts, while not barring coverage of offensive publications made during the policy period which* ***differ in substance*** *from those published before commencement of coverage."* 80 Cal.App.4th at 1182.

In arriving at that construction, the court observed that the insured's interpretation of the policy language as applying only where precisely the same material was published before and after the policy period began was *"strained and creates an ambiguity where none exists,"* reasoning that limiting the scope of such exclusions to *"verbatim replications"* would render the exclusion meaningless. *Id.*

Although Ringler involved defamation claims, the more recent California case of Kim Seng Co. v. Great American Ins. Co., 179 Cal.App.4th 186 (Cal.App. 2009) applied the same reasoning to a more analogous context in which the claimant averred that the insured had improperly used the term "Que Hong" (meaning hometown or fatherland in Vietnamese) infringing upon its trademark, which it used for the marketing of Vietnamese-style frozen meats. The insured's allegedly improper use of that term began nearly a decade before the inception of Great American's liability policies, and although the insured had begun using the term before, its usage differed somewhat after the policies took effect, including the addition of a water buffalo design mark and some Vietnamese words which translated to "fresh vermicelli Que Hong Brand."

In upholding the entry of summary judgment for the insurer based upon the prior

publication exclusions of its policies, the Court of Appeals first rejected the argument that the exclusions were ambiguous, citing a number of cases to the contrary, including this Court's prior decision in Allied Bolting.

The court then reviewed past legal authorities on the subject including Ringler, and concluded that such exclusions will apply where the materials published before the policy period and those which followed are *"substantially similar."*

Because the claim was based solely upon the insured's use of the term "Que Hong", the post-policy inception additions of a logo and additional language which were not themselves the basis for a claim did not give rise to any *"fresh wrongs."* Because the claim was premised upon the use of the term "Que Hong", the offending words both before and after the policy periods began were not only substantially similar, but identical, just like the defendants' alleged pre- and post-policy use of the terms "Navajo" and "Navaho," and their alleged pre- and post-policy advertisements of products using a Navajo or Indian style motif in this case.

The concept that an insured's publication of substantially similar material before the inception of coverage is sufficient to trigger such exclusions, even where the offending material is later published in different advertisements, or using different media was also recognized in the unpublished decision of the New Hampshire federal court in Interlocken International Camp v. Markel Ins. Co., 2003 WL 881002 (D.N.H. 2003). In that case, it was claimed by the owner of the "Interlochen" name that the insured had misused the confusingly similar name "Interlocken" in various advertising media including its internet domain name. In rejecting the insured's contention that the exclusion should not apply because it did not start using the claimant's trademark as part of its internet domain name until after the policy went into force, the court held that such a narrow reading of the exclusion was not warranted by the policy language and would render such exclusions virtually meaningless.

In holding that the exclusion barred coverage even where an insured's advertising publications appeared in different advertisements or different media following the inception of coverage than those used before, the District Court stated the following :

> First, the language of the exclusion simply does not support IIC's narrow reading which would limit the exclusion's application to cases in which an infringing trade name was previously used in precisely the same way as the use that provoked the coverage claim.

> Second, its interpretation is inconsistent with the exclusion's obvious purpose which is "to prevent an individual who has caused an injury from buying insurance so that he can continue the injurious behavior." *Maddox v. St. Paul Fire & Marine Ins.*, 179 F.Supp.2d 527, 530 (W.D.Pa. 2001). If as IIC's interpretation would permit, a corporation could misappropriate a trade name in a particular advertisement published in one medium and then purchase insurance to cover future infringements using the same name in different advertisements, or different media, the exclusion would be of such limited utility that it would be virtually meaningless. **Thus, because IIC used the allegedly infringing name "Interlocken" in advertisements to market its business and services before it purchased insurance from Markel, the first publication exclusion bars it from obtaining coverage for claims that arise from its subsequent use of the same name, even though those acts were in other advertisements that appeared in different media.**

Similarly, an argument that such an exclusion did not apply to a trademark infringement suit because the insured's post-policy period advertisements were *"unique and distinct"* from those which preceded it was rejected by a Virginia court as ignoring the plain meaning of the unambiguous policy language in Superformance International, Inc. v. Hartford Cas. Ins. Co., 203 F.Supp.2d 587, 594, fn 2 (E.D.Va. 2002).

Consistent with those authorities, the following principles emerge :

- Regardless of whether the underlying suit allegations describe what amounts to a "continuing tort" involving conduct occurring both before, and after the inception of coverage, there is no coverage if the offending publications were first made before the policy period.

- It is irrelevant that continuing publications of material after policy inception might have caused the claimant to suffer additional damages, or that the insured's publications resulted in a variety of different injuries before and after the policy period began.

- It is irrelevant that the publications before and after the effective date of coverage may have appeared in different advertisements, or in different media.

> • An insured's publications following the inception of coverage need not be identical, or verbatim repetitions of the material first published before the policy period for a prior publication exclusion to apply. Nor is it necessary that an insured's post-policy publications present the offending material in precisely the same way. It is sufficient to trigger the prior publication exclusion if the subsequent publications are *"substantially similar"* to those which preceded the policy.

To the extent that the underlying suit advances claims against the insureds for covered "advertising injury" offenses occurring both before and after the inception of Hanover's first policy on July 7, 2010, it is clear from the Amended Complaint that *all* of the offending publications shared a common substance or theme.

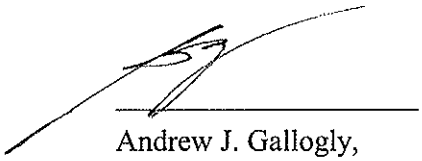
According to the complaint, the defendants advertised their goods improperly both by using the "Navajo" or "Navaho" names, and in a manner which falsely suggested that they were genuine Indian-made products starting *"At least as early as March 16, 2009,"* and *"continuously thereafter to the present date."* In short, the substance of the offending advertising was the same in March, 2009 as it was more than a year later in July, 2010, when the OneBeacon/Hanover fronting policy period began, and in July, 2011 when Hanover issued two additional policies to the defendants.

Accordingly, it is respectfully submitted that Hanover has no duty to provide a continued defense or indemnification to its insureds, and to the extent that the suit otherwise states a potentially covered "personal and advertising injury" claim, those responsibilities rest solely with the prior insurer, OneBeacon, under the policy in force when the publications began.

IV. CONCLUSION :

Because there are no material issues of fact and Hanover is entitled to the entry of judgment in its favor as a matter of law, the plaintiff requests that judgment be entered in its favor, declaring that the plaintiff has no duty to defend or indemnify the Urban Outfitters defendants in the underlying suit.

Respectfully submitted,



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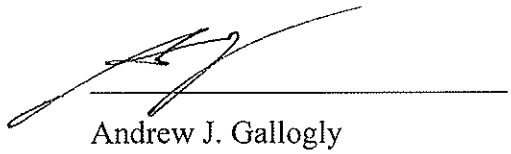
CERTIFICATE OF SERVICE

I, Andrew J. Gallogly, hereby certify that true and correct copies of the Motion for Judgment on the Pleadings of Plaintiff, The Hanover Insurance Company, supporting Brief, proposed Order and supporting exhibits were served upon all parties to this action through the electronic case filing system on February 11, 2013.



Andrew J. Gallogly