Case Alert

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Massachusetts Court Expansively Interprets Coverage for "Advertising Injury"

On September 12, 2018, the Massachusetts Supreme Judicial Court held that sponsorship is an advertising idea, the misappropriation of which gives rise to a duty to defend under the personal and advertising injury coverage of a commercial general liability policy.[1] In a way, the Court recognized what everyone knows: celebrity has economic value.

Vibram USA, Inc. ("Vibram") produces minimalistic shoes that simulate walking and running barefoot. To advertise their shoes, Vibram allegedly misappropriated the name of the late Abebe Bikila. Abebe Bikila won the 1960 Olympic marathon while running barefoot after his shoe sponsor was unable to fit him with a pair of running shoes. He remains the only marathon runner to win Olympic gold while running barefoot.

In 2015, the family and heirs of Abebe Bikila sued Vibram for using his name to advertise running shoes. The Bikila family alleged in their complaint against Vibram that they were the owners of Abebe Bikila's name and that they had used it to promote the family's commercial ventures. These ventures included operation of a sporting goods store named "Abebe Bikila," publication of a book about Abebe Bikila, the use of the Bikila name in a Japanese commercial and a feature film portraying the last years of Abebe Bikila's life.

Vibram tendered the suit to its liability insurer, Holyoke Mutual Insurance Company in Salem ("Holyoke"). Holyoke defended under reservation and brought a Massachusetts declaratory judgment action against Vibram. Holyoke claimed that the Bikila family's lawsuit against Vibram did not allege "personal and advertising injury liability" and did not seek damages for "[t]he use of another's advertising idea in your 'advertisement.'" Vibram lost and appealed.

The Massachusetts Supreme Judicial Court held on appeal that the complaint contained straightforward allegations of the use of another's advertising idea. The complaint alleged that the Bikila family had used the "Bikila" name to draw the public's attention to its commercial ventures. Since the Bikila family tried to make money off the name and "intentionally created" a connection between their family name and Abebe Bikila's legacy for purposes of attracting customers, the insurer owed a duty to defend the lawsuit alleging the use of the family's advertising idea.

The decision in the coverage litigation recognizes the expansive boundaries of an "advertising idea." It effectively rejects any definition of "advertising idea" that requires objective success. Instead, it adopts a subjective definition of an "advertising idea" -- if the advertiser wished to draw the public's attention to a commercial venture or product, it's an advertising idea. This is good news for policyholders.

There are, however, unique coverage problems posed by a case involving sponsorship. A normal advertising idea will involve something distinctively associated with a company that makes the public think of the company itself, like a trademark or trade dress. For example, "Google" is synonymous with the search engine and the company that offers it. The name of the search engine makes you think of the company behind it. But the celebrity name behind the sponsorship and the advertising idea of the sponsorship are two different things. This distinction spawned the litigation in this case.

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[1] *Holyoke Mut. Ins. Co. in Salem v. Vibram USA, Inc.*, 480 Mass. 480, 106 N.E.3d 572 (2018)

The separation between a celebrity's personality rights to his or her name and the advertising idea of a sponsorship may produce more litigation. If a celebrity were to sponsor a local car dealership and then turn around and sponsor a rival, *Vibram* may apply. Were the spurned dealership to sue its rival for tortious interference, despite not owning the celebrity's name, its use of the celebrity's name to *promote* cars may be its advertising idea – or it might be the celebrity's. *Vibram* suggests that the rival's insurer might have to defend the lawsuit even where the original dealership did not own the celebrity's personality rights.

Vibram will be challenged in circumstances where the company advertising with a celebrity does not own the sponsorship. *Vibram's* largely subjective concept of advertising idea may also play a role in litigation where a celebrity has never sought to make money off of his or her name, but intended or planned to do so in the future. In either of those events, it remains to be seen whether policyholders may be entitled to a defense from their insurer.

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