

Travelers Ordered To Cover Standard's Charney Suit Defense

By **Jeff Sistrunk**

Law360, Los Angeles (August 18, 2017, 9:08 PM EDT) -- Travelers Indemnity Co. must cover hedge fund Standard General LP's costs to defend a defamation lawsuit brought by American Apparel's ousted CEO Dov Charney, a New York federal judge ruled Friday, finding that a policy exclusion for employment-related claims doesn't bar coverage.

Travelers had argued the suit by Charney falls under an exclusion for employment suits because he wouldn't have sued if he was not ousted as CEO at the clothing giant, and that attempting to characterize Standard's statements to the press about Charney as "advertising" to claim advertising injury coverage strained the definition of the word.

U.S. District Judge William H. Pauley III agreed with the insurer that Standard can't tap into the policy's advertising injury coverage, but found that the "employment-related practices," or ERP, exclusion doesn't apply to preclude coverage for Standard under the policy's personal injury prong. The judge found that, because the hedge fund has reasonably argued that the exclusion applies only where there is a "former, current or prospective employment relationship" between the insured and the injured party — which wasn't the case here — the exclusion is ambiguous and must be construed in Standard's favor.

"Thus, Travelers has not shown that the ERP exclusion is 'subject to no other reasonable interpretation,'" Judge Pauley wrote. "On the other hand, Standard General has articulated a reasonable interpretation that there must be a former, current or prospective employment relationship between Standard General and Charney for the ERP exclusion to apply."

The hedge fund sued Travelers in January after the insurer refused to defend it against Charney's 2015 defamation lawsuit in California, which accused Standard of helping to oust Charney as American Apparel's CEO by participating in a smear campaign that painted him as financially irresponsible and sexually deviant. Standard supported the ouster in a December 2014 press release.

Charney, a lightning rod for sexual harassment allegations, was fired as the retailer's CEO in 2014 following a third-party investigation that looked into many of those allegations and questioned his business leadership.

Standard has asserted that the allegations in the defamation suit, which was defeated in a California appeals court in March, fall squarely within the realm of false advertising for purposes of coverage under the Travelers policy, not only because Charney's complaint specifically included that claim but also because Standard's statements were aimed at soliciting and reassuring investors. The hedge fund also sought coverage under the policy's personal injury section.

Travelers, meanwhile, has argued that no advertising injury coverage is available because the policy defines an advertisement as something that promotes the policyholder's goods, products or services, none of which are mentioned in the statements cited by Charney in his complaint. Moreover, the insurer has said, any applicable coverage for personal injury claims is barred by the ERP exclusion because each of the allegations in the underlying suit "could not exist but for Charney's employment and his discharge by American Apparel."

In Friday's opinion, Judge Pauley agreed with Travelers that Standard's statements don't fit within the policy's definition of an advertisement.

"The factual averments in the Charney action do not support a finding that the December 2014 statement concerned Standard General's 'goods, products, and services,' or that it was 'made for the purpose of attracting customers,'" the judge wrote. "The mere fact that the underlying action contains a claim for false advertising does not allow Standard General to circumvent the policies' unambiguous definition of 'advertisement.'"

However, Judge Pauley found that Travelers' duty to defend Standard in the Charney action was still triggered under the policy's personal injury prong, refusing the insurer's invitation to apply the ERP exclusion.

The parties' dispute centered on language indicating the exclusion bars coverage for personal injury to "[a] person" arising out of any employment-related practices by the policyholder. Travelers contended that the term "person" could literally refer to any person, regardless of whether they have an employment relationship with the policyholder. Standard countered that the exclusion only applies to claims brought by former, current or potential employees.

Judge Pauley concluded that Standard's reading of the exclusion is reasonable, rendering it ambiguous and therefore inapplicable to bar coverage for the Charney suit.

"The fact that other courts have also construed identical ERP exclusions to apply only to claims by former, current or prospective employees of the insured is persuasive in finding that Standard General's interpretation is reasonable," the judge wrote.

Attorneys for Standard and Travelers did not immediately respond to requests for comment late Friday.

Standard General is represented by Robin L. Cohen, Adam S. Ziffer, Kenneth H. Frenchman and Jillian

Raines of McKool Smith PC.

Travelers is represented by Thomas A. Martin and Philip H. Kalban of Putney Twombly Hall & Hirson LLP.

The case is Standard General LP v. The Travelers Indemnity Co. of Connecticut, case number 1:17-cv-00548, in the U.S. District Court for the Southern District of New York.

--Editing by Pamela Wilkinson.

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