NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EPOCH PHARMACEUTICALS, INC., a Delaware corporation fka MicroProbe, Plaintiff-Appellant, v. FEDERAL INSURANCE COMPANY, an Indiana corporation, Defendant-Appellee.	No. 98-35667 D.C. No. CV-97-02001-WD MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted October 8, 1999
Seattle, Washington

Before: REAVLEY,** LEAVY and TROTT, Circuit Judges.

Appellant seeks reversal of summary judgment on the basis that the underlying patent infringement lawsuit triggers a duty to defend under the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

advertising injury provision. Neither the underlying complaint nor the extrinsic evidence in the record support the contention that the injury arose in the course of advertising. Furthermore, none of the enumerated offenses in the advertising injury provision can be construed to include patent infringement. We affirm.

As a preliminary matter, appellant has requested the court to take judicial notice of several matters for the determination of this appeal. The request for judicial notice is denied. The court has reviewed the materials submitted by appellant. The documents submitted for judicial notice do not appear to assist the court in its determination of this appeal. If the request for judicial notice had been granted, the decision of this case would not have been affected.

The underlying complaint makes no mention of appellant's advertising activities. The court only considers extrinsic evidence concerning the nature of the underlying allegations if the complaint is ambiguous or inadequate. E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 726 P.2d 439, 444 (Wash. 1986). The underlying complaint unambiguously alleges patent infringement and inducement of patent infringement. There is nothing about the complaint that suggests that it is inadequate. Appellant claims that the complaint is inadequate and requires the court to consider extrinsic evidence to determine the nature of the claim. Appellant articulates a theory of liability which, if pursued by the underlying

complainant, would involve evidence of advertising as part of the sale of kits which utilize the patented process.

On its face the complaint appears to be quite adequate and does not include anything remotely resembling the theory suggested by appellant. Appellant would have the court determine the inadequacy of the complaint by virtue of extrinsic evidence, which reverses the inquiry because such evidence may only be considered if the complaint is inadequate. The second problem is that this theory of liability only appears in appellant's motions and briefing. Assuming, arguendo, that inadequacy of the complaint required consideration of extrinsic evidence, the evidence cited by appellant does not create a question of fact with regard to whether the underlying complainant sought to employ the appellant's theory. The affidavits cited by appellant do not appear to address any facts which support the theory of liability under which appellant claims coverage is triggered. This does not seem to provide any basis for a duty of appellee to defend or to investigate further.

The foregoing is not the most serious problem in appellant's arguments for coverage. Assuming, again arguendo, that the complaint is inadequate and that the extrinsic evidence creates a question of fact with regard to whether advertising may have provided a basis for some of the underlying claim, none of the offenses

covered by the advertising injury provision can be reasonably construed to include patent infringement, either direct or by inducement.

An insurance policy should not be given a strained or forced construction which would lead to an extension or restriction of the policy beyond what is fairly within its terms, and a policy provision is ambiguous only when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable. E-Z Loader, 726 P.2d at 443. Appellant seeks coverage under three different enumerated offenses in the advertising injury provision: 1) misappropriation of advertising ideas, 2) misappropriation of style of doing business, and 3) infringement of title.

Misappropriation of advertising ideas

Appellant cites case law holding this language to be ambiguous and argues that the court must look to extrinsic material, including the ISO drafting history, to interpret the policy. Appellant invokes ISO policy drafting history to argue that this provision includes liability for common law "piracy" which in turn encompasses patent infringement.

The existence of an ambiguity with regard to a particular case does not mean that the terms are ambiguous with regard to all contexts. Regardless of whether this policy language is ambiguous under certain circumstances, only a

facially unreasonable construction could encompass patent infringement within "misappropriation of advertising ideas".

The claim that this language encompasses any act of piracy regardless of the object being pirated is not a reasonable interpretation. Perhaps the language could be construed to include piracy of advertising ideas, but to say that it would include piracy of patent is not creditable.

Another problem is that this is not an ISO standard form policy. Apparently the ISO policy does, or did at some point, contain these particular words. However, appellee's policy varies substantially from the ISO coverage provision. Under these circumstances, ISO drafting history does not appear relevant to the construction of the provision.

Misappropriation of style of doing business

Appellant argues that the sale and advertising of the test kit was substantially similar to the methods employed by the underlying complainant. Regardless of a possible similarity or lack thereof, nothing in the underlying complaint remotely relates to the a misappropriation of style of doing business. The underlying complainant did not sue for any of the conduct for which appellant seeks to establish coverage. Appellant appears to be manufacturing offenses for which it was not sued in an effort to trigger coverage for the allegations in the

complaint.

This policy provision is not ambiguous in the context of the complaint for patent infringement. To claim that "misappropriation of style of doing business" encompasses a claim of patent infringement places a strained or impossible interpretation on the language which would extend coverage beyond what is fairly within the policy terms.

Infringement of titles

Appellant argues that the policy covers infringement of title, that the patent is an intangible property right, which is a title, therefore a claim for patent infringement is covered under the policy. The actual policy provision is: "Infringement of copyrighted advertising materials, titles or slogans." Appellant's interpretation takes the term "titles" completely out of context. The contention that the term "titles" in this context includes all titles to all tangible and intangible property rights is a strained and unreasonable construction.

The complaint unambiguously asserts a claim for patent infringement and inducement to infringe. The enumerated offenses in the advertising injury provision of the policy cannot be reasonably construed to cover patent infringement or inducement.

AFFIRMED