FIRST DIVISION
February 9, 2015

No. 1-14-0152

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SELECTIVE INSURANCE COMPANY OF THE SOUTHEAST,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant and Cross-Appellee,	)	
v.	)	No. 12 CH 24438
CREATION SUPPLY, INC.,	)	Honorable Peter Flynn,
Defendant-Appellee and Cross-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court properly granted partial summary judgment in favor of the defendant insured. The plaintiff insurance company has a duty to defend the insured in the underlying case. We affirm the trial court and dismiss the cross-appeal.

¶ 2 Plaintiff Selective Insurance Company of the Southeast (Selective) appeals from a partial summary judgment finding in favor of defendant Creation Supply, Inc. (Creation Supply). The trial court concluded that Selective was obligated to defend Creation Supply in an Oregon lawsuit brought by Too Marker Products, Inc. (Too Marker) and Imagination International, Inc.

(Imagination International). The underlying lawsuit alleges numerous claims of intellectual property infringement involving the import and sale of square-shaped markers. We affirm the decision of the trial court.

¶ 3 BACKGROUND

¶ 4 In this declaratory judgment action, Selective disputes coverage for Creation Supply in an underlying intellectual property infringement case. On April 25, 2012, Too Marker and Imagination International (collectively, the underlying plaintiffs) filed a complaint against Creation Supply and its sole proprietor, John Gragg, in the United States District Court for the District of Oregon.[1] *Too Marker Products, Inc. v. Creation Supply Inc.*, No. 3:12 CV 00735 (D. Ore.). The underlying plaintiffs alleged trademark infringement, violation of trade dress, and unfair competition against their line of "COPIC" double-ended, alcohol-based colored markers. According to the underlying complaint, Creation Supply and Gragg imported and sold a competing line of "MEPXY" markers having the same squarish bodies and end-caps as the COPIC markers. The underlying plaintiffs sought a permanent nationwide injunction enjoining Creation Supply from, among other things, "using any other false description or representation or any other thing calculated or likely to cause confusion, deception, or mistake in the marketplace with regard to [the underlying plaintiffs'] squarish marker body configuration or squarish marker end-cap configuration." The underlying plaintiffs also sought an order directing Creation Supply "to undertake corrective advertising in a form, manner, and frequency that is acceptable" to the underlying plaintiffs and the trial court.

¶ 5 Pertinent here is that the underlying plaintiffs' third claim alleged a violation of § 43 of the Lanham Act (15 U.S.C.A § 1125(a)). The underlying plaintiffs alleged that they

[1] Gragg was later dismissed as a defendant from the underlying case. At oral argument, we were advised that the underlying case has been settled.

manufacture, import, advertise, and sell marker products having a squarish body configuration and squarish cap-end configuration throughout the United States, including in Oregon. They alleged that consumers had come to associate their squarish marker body configuration and squarish marker cap-end configuration exclusively with their products. The underlying plaintiffs alleged that, notwithstanding their preexisting and enforceable rights in the squarish shape of their marker and cap-end configuration, Creation Supply, "without permission or approval, advertised and sold (or caused to be sold) products using a squarish marker body configuration and squarish marker cap-end configuration in the United States, including in Oregon." According to the underlying plaintiffs, Creation Supply's unauthorized use this squarish marker shape and cap-end configuration in connection with marker products "is likely to cause confusion and mistake, and to deceive consumers as to the source or origin of [Creation Supply's] products." Specifically, Creation Supply's "unauthorized use of [the underlying plaintiffs'] squarish marker body configuration and squarish marker cap-end configuration in connection with marker products in retail store displays in Oregon and the rest of the United States, and on the websites of Creation Supply and its other online retailers, is causing confusion among potential purchasers of [the underlying plaintiffs'] products."

¶ 6 Selective issued a business owners' policy to Creation Supply, effective August 19, 2011, that included coverage for business liability. The policy excludes:

> " 'Personal and advertising injury':
>
> > (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury';
>
> * * *

> (3) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.
>
> * * *
>
> (12) Arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your 'advertisement.'
>
> *However, this exclusion does not apply to infringement, in your 'advertisement,' of copyright, trade dress or slogan*." (Emphasis added.)

The policy defines the term "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." "Personal and advertising injury" under the policy is defined as "injury, including consequential 'bodily injury,' arising out of one or more of the following offenses: *** Infringing upon another's copyright, trade dress or slogan in your 'advertisement'."

¶ 7 On July 2, 2012, Selective filed this declaratory judgment complaint against Creation Supply, Gragg, and the underlying plaintiffs alleging, among other things, that the underlying case did not claim a "personal and advertising injury" as defined in the policy. Selective alleged that Gragg did not qualify as an insured under the policy. Selective also alleged that the "trademark exclusion" applied to bar coverage for the underlying case. In addition, Selective claimed that the "knowing violation of rights of another" and "prior publication" exclusions also applied to bar coverage. Selective pled in the alternative that to the extent Creation Supply and Gragg were made aware of the underlying plaintiffs' claims at any point before the inception of

the policy, the underlying case would constitute an uninsurable known risk for purposes of the policy. Selective also pled in the alternative that the complained-of conduct occurred outside the effective period of the policy. Finally, Selective pled in the alternative that no coverage is available for the underlying claims for injunctive relief, attorney fees and costs, and for punitive and treble damages.

¶ 8 On August 13, 2012, Creation Supply and Gragg answered the complaint and asserted counterclaims against Selective. In count I of the counterclaim, Creation Supply sought a declaratory judgment finding that Selective owed it a defense in the underlying case. Count II alleged a breach of contract. The third count alleged bad faith against Selective under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)).

¶ 9 Selective moved to dismiss Creation Supply's counterclaims on September 5, 2012. Selective asserted, among other things, that Creation Supply commingled its claims in each of the three counts in violation of section 2-603 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-603 (West 2012)), therefore requiring dismissal under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)).

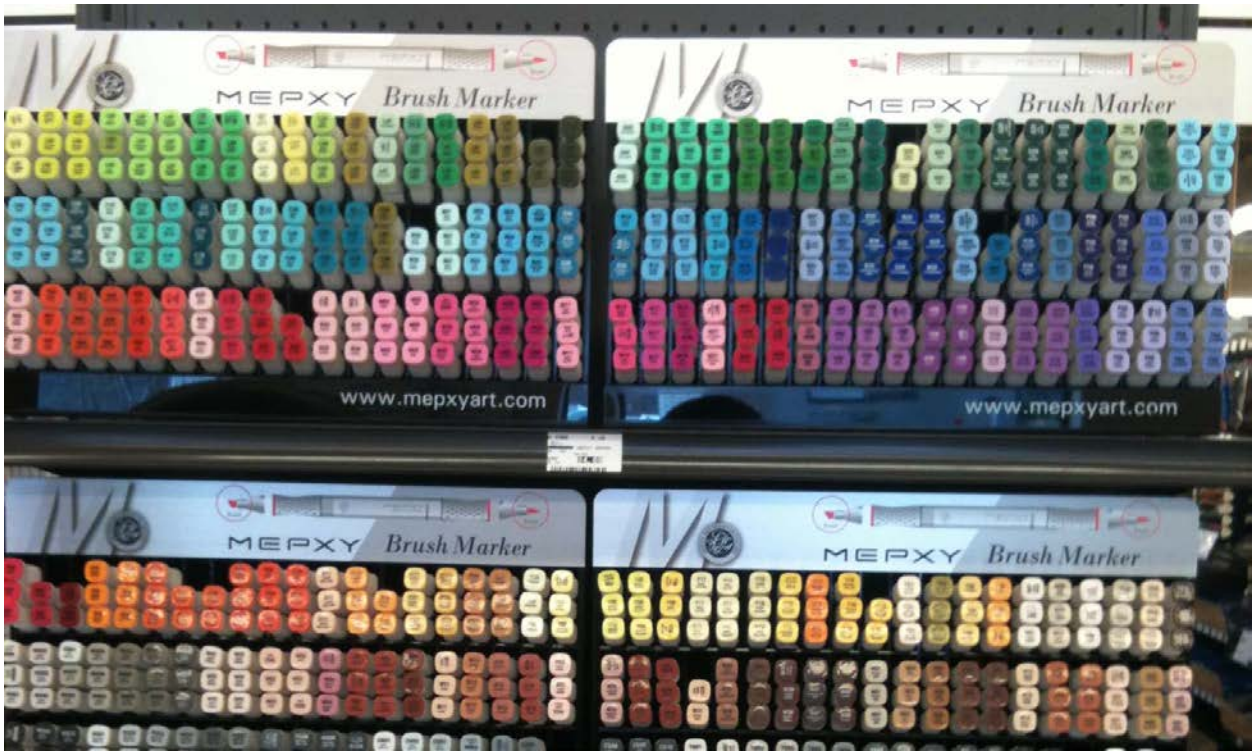
¶ 10 On October 12, 2012, Creation Supply filed an amended counterclaim, which alleged the same claims as in the original counterclaim. Creation Supply also moved for sanctions pursuant to Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)). Selective answered the declaratory judgment action, but moved to dismiss the counts for breach of contract and bad faith. On January 29, 2013, the trial court heard argument on Selective's motion and dismissed Creation Supply's bad faith claim. The court denied Selective's motion on count II, the breach of contract claim, and ordered Selective to answer that count. The court continued Creation Supply's motion for Rule 137 sanctions.

¶ 11 On April 12, 2013, Creation Supply moved for partial summary judgment as to the declaratory judgment action. Creation Supply argued that the Selective policy includes coverage for allegations of infringement upon another's trade dress in Creation Supply's advertising. According to Creation Supply, the underlying complaint alleged claims for trade dress infringement in an advertisement. Creation Supply asserted that no policy exclusions eliminated the potential for coverage.

¶ 12 Selective responded to Creation Supply's motion for partial summary judgment and, on June 11, 2013, filed its own summary judgment motion. Selective argued that the underlying complaint did not allege damages arising from an advertising activity. Selective asserted that the intellectual property, prior publication, and knowing violation exclusions each negated coverage.

¶ 13 The trial court heard argument on the parties' motions. During the hearing, the court indicated that the Selective policy provides coverage for "advertising injury." The court stated that in view of the policy's intellectual property exclusion, a product by itself cannot be an "advertisement" under a fair reading of the policy. Instead, there must be an advertisement featuring the trade dress complained of involved in the underlying litigation. Following argument, the trial court denied both parties' motions without prejudice.

¶ 14 On September 23, 2013, Creation Supply filed a renewed motion for partial summary judgment. Creation Supply argued that it was entitled to coverage on the basis that certain retail store displays of the MEPXY markers constituted advertisements and that a photograph of the display satisfied the causal nexus requirement by connecting the complained of advertising to the damages asserted. Creation Supply included the following photograph of the display in its motion:



¶ 15 Following oral argument, the trial court granted Creation Supply's renewed motion for partial summary judgment. The court denied Creation Supply's motion for Rule 137 sanctions. The written order provided the required Illinois Supreme Court Rule 304(a) language (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)). The court did not issue a written opinion explaining the reasons for granting the motion. Selective appeals from this decision. Creation Supply filed a cross-appeal arguing that the December 19, 2013 order was adverse to the August 8, 2013 order denying Creation Supply's motion for partial summary judgment. However, Creation Supply requested that this Court dismiss its cross-appeal. We dismiss Creation Supply's cross-appeal and address Selective's appeal.

¶ 16 ANALYSIS

¶ 17 Selective argues the trial court erred in concluding that Selective owes Creation Supply a duty to defend in the underlying case. Selective asserts there is no causal connection between the damages alleged and the contents of Creation Supply's advertisements. Selective also

contends that coverage is precluded by the prior publication, intellectual property, and knowing violation exclusions. Selective seeks reversal of the court's order granting Creation Supply's motion for partial summary judgment with direction that summary judgment be entered in Selective's favor.

¶ 18 Creation Supply responds that the underlying complaint alleges a causal connection between Creation Supply's advertising activity and the underlying plaintiffs' trade dress infringement claims. Creation Supply argues that the policy covers trade dress infringement claims as a matter of law. In addition, Creation Supply argues that the trial court properly found that the policy exclusions claimed by Selective did not apply here.

¶ 19 Standard of Review

¶ 20 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied." *Id.* We review a trial court's entry of summary judgment *de novo*. *Id.*

¶ 21 In construing an insurance policy, the court determines the intent of the parties to the contract by construing the policy as a whole, with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract. *Id.* at 108. Where the words in the policy are clear and unambiguous, "a court must afford them their *plain, ordinary, and popular meaning*." (Emphasis in original.) *Id*. However, if the words in the policy are susceptible to

more than one reasonable interpretation, they will be considered ambiguous and will be strictly construed in favor of the insured and against the insurer that drafted the policy. *Id*. Nonetheless, courts will not strain to find an ambiguity where none exists. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law ***." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002).

¶ 22 Under Illinois law, an insured contracts for and has a right to expect two separate and distinct duties from an insurer: (1) the duty to defend if a claim is made against the insured; and (2) the duty to indemnify if the insured is found legally liable for the occurrence of a covered risk. *Chandler v. Doherty*, 299 Ill. App. 3d 797, 801 (1998). While an insurer's duty to indemnify arises only if the facts alleged actually fall within coverage, the duty to defend is much broader. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 398 (1993). "To determine whether the insurer has a duty to defend the insured, the court must look to the allegations in the underlying complaint and compare these allegations to the relevant provisions of the insurance policy." *Outboard Marine Corp.*, 154 Ill. 2d at 107-08. If the underlying complaint alleges facts that fall "within or *potentially* within" the coverage of the policy, the insurer is obligated to defend its insured even if the allegations are "groundless, false, or fraudulent." (Emphasis in original.) *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). "An insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." (Emphasis in original.) *Id*. "Moreover, if the underlying complaints allege several theories of recovery against the insured, the duty to defend arises even if only one such theory is

within the potential coverage of the policy." *Id*. The threshold requirement that the complaint must satisfy to present a claim of potential coverage is minimal; the complaint need present only a possibility, not a probability, of recovery. *Bituminous Casualty Corp. v. Gust K. Newberg Construction Co.*, 218 Ill. App. 3d 956, 960 (1991).

¶ 23 In determining whether the allegations in the underlying complaint meet that threshold requirement, both the underlying complaint and the insurance policy must be liberally construed in favor of the insured. *Wilkin Insulation Co.*, 144 Ill. 2d at 73. "[T]he duty to defend does not require that the complaint allege or use language affirmatively bringing the claims within the scope of the policy." *International Insurance Co. v. Rollprint Packaging Products, Inc.*, 312 Ill. App. 3d 998, 1007 (2000). Illinois courts have long established that the insured bears the burden of proving its claim falls within the coverage of an insurance policy. *Addison Insurance v. Fay*, 232 Ill. 2d 446, 453 (2009). "Once the insured has demonstrated coverage, the burden then shifts to the insurer to prove that a limitation or exclusion applies." *Id*. at 453-54; see also *Johnson Press of America, Inc. v. Northern Insurance Co. of New York*, 339 Ill. App. 3d 864, 871-72 (2003) (burden rests with insurer to demonstrate applicability of exclusion; courts will liberally construe any doubt as to coverage in favor of insured and against insurance company, especially when insurer seeks to avoid coverage based on an alleged exclusion). Finally, all doubts are resolved in the insured's favor. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 154 (1999) (citing *Wilkin Insulation Co.*, 144 Ill. 2d at 74). We turn to the questions presented with these principles in mind.

¶ 24 The Triggering of Personal and Advertising Injury Coverage

¶ 25 Selective initially asserts that Creation Supply is not entitled to coverage because there is no causal connection between its advertising activity and the damages alleged in the underlying

case. According to Selective, the underlying plaintiffs complained about Creation Supply's distribution and sale of MEPXY markers that had a confusingly similar appearance to their COPIC markers. Selective argues that the damages claimed in the underlying case resulted not from the advertising of the markers, but from Alpha's alleged theft of the COPIC design and Creation Supply's later distribution of the MEPXY markers. Selective contends the underlying complaint does not allege that the contents of Creation Supply's advertisements, whether from on-line or through retailers' displays of the markers, caused damages. Instead, the damages were caused by Creation Supply's infringement of the shape of the markers. Selective argues that, absent any allegations or evidence that the content of Creation Supply's advertisements beyond the depiction of the MEPXY markers caused the underlying plaintiffs' injuries, the causal connection requirement is not met and Selective is entitled to summary judgment.

¶ 26 Creation Supply responds that the policy specifically includes coverage for trade dress infringement claims in the definition of "personal and advertising injury." Creation Supply contends that this court should consider the markers themselves an "advertisement" as defined in the policy. Creation Supply asserts the trial court correctly found that the in-store retail displays constituted advertisements, which triggered coverage under the policy.

¶ 27 To trigger insurance coverage for an advertising injury, three elements must be established: (1) the insured must have been engaged in advertising activity during the policy period when the alleged injury occurred; (2) the allegations in the underlying complaint must raise a potential for liability under one of the offenses listed in the policy; and (3) there must be a causal connection between the alleged injury and the advertising activity. *Lexmark International, Inc. v. Transportation Insurance Co.*, 327 Ill. App. 3d 128, 137 (2001). In its opening brief, Selective focuses its argument on the third element, but then in its reply brief, in

response to Creation Supply's arguments, Selective also challenges whether a retail product display of the MEPXY markers constitutes an advertisement under the definition of the policy. As we have no written decision or transcript from the trial court explaining what constituted the allegedly offending advertisement, we can only surmise from the record and the parties' arguments that the court below found the retail display constituted an advertisement under the policy definition. Creation Supply argues that the product configuration embodied in the MEPXY marker itself "is clearly a notice or publication to the consumer about the product and the source of the product." In other words, Creation Supply argues the marker itself and the product display of those markers constitutes an advertisement that triggers coverage under the policy. According to Creation Supply, in the retail product display, "not only are the marker configurations prominently displayed, but also the marker configuration/shape is depicted in the printed advertisement above the actual MEPXY marker products."

¶ 28 Whether Creation Supply was Engaged in Advertising Activity

¶ 29 The Selective policy defines "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." The Selective policy does not define the terms "notice," "broadcast," or "published" as those terms are used in the definition of "advertisement" and, therefore, we look to the dictionary to ascertain the words' plain, ordinary, and popular meanings. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 366 (2006). The dictionary defines "notice" as "formal or informal warning or intimation of something: ANNOUNCEMENT." Webster's Third New International Dictionary 1544 (1981). The term "broadcast" means "to make widely known: disseminate or distribute widely or at random." Webster's Third New International Dictionary 280 (1981). To "publish" means "to

declare publicly: make generally known: disclose, circulate." Webster's Third New International Dictionary 1837 (1981).

¶ 30 In this case, the photograph of the retail product display includes placards exhibited above the markers with an enlarged picture of the MEPXY marker. These placards serve as an announcement disseminating the product to the public, which fits within the definition of "advertisement" under the Selective policy. The retail product displays appeared in stores throughout Oregon (where the underlying litigation was filed) and the United States. "Actions taken 'in the course of advertising' must involve actual, affirmative self-promotion of the actor's goods or services." *Erie Insurance Group v. Sear Corp.*, 102 F.3d 889, 894 (7th Cir. 1996). The placards are more than the mere display of the product itself and affirmatively serve to attract customers. The shape and design of the marker is prominently displayed in the placard, which is the source of the underlying trade dress claim. If, for example, the retail product display merely included a large bin containing the markers and nothing more, then Selective would have a valid argument that the retail product display did not constitute advertising as contemplated under the policy. That is not the case here. We find that the retail product display of the MEPXY markers constitutes an "advertisement" which satisfies the first element required to trigger coverage. Our conclusion does not mean that all retail product displays constitute advertising activity for purposes of triggering the duty to defend. We specifically limit our finding to the factual circumstances of this case and the particular display configuration at issue here.

¶ 31 Selective argues that Creation Supply began advertising MEPXY markers before the inception of the policy and, therefore, coverage is precluded by the "prior publication" exclusion. Selective urges us to consider the deposition testimony of Gragg to consider whether the prior

publication exclusion applies. Selective submitted Gragg's testimony as an exhibit to its summary judgment motion.

¶ 32 In Illinois, " 'it is only the allegations in the underlying complaint, considered in the context of the relevant policy provisions, which should determine whether an insurer owes a duty to defend an action brought against an insured.' " *Lexmark International*, 327 Ill. App. 3d at 136 (quoting *Bituminous Casualty Corp. v. Fulkerson*, 212 Ill. App. 3d 556, 562 (1991)); see also *Atlantic Mutual Insurance Co. v. American Academy of Orthopaedic Surgeons & Scoliosis Research Society*, 315 Ill. App. 3d 552, 567 (2000) ("where summary judgment is sought in the context of a declaratory judgment action to determine whether an insured has a duty to defend, the use of extrinsic evidence is inappropriate"). As this action does not involve a third-party complaint, we need not consider evidence beyond the underlying complaint and policy language. See *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 1032 (2008) (finding reviewing courts have latitude to consider third-party complaints in the interest of "settling and fixing the rights of parties" (Internal quotation marks omitted.)). In this case, although not included in the underlying complaint, we considered the photograph of the retail product display intrinsic because the underlying complaint specifically alleged an advertising injury stemming from the retail product display. Without the photograph, we would not have been able to determine whether the retail product display constituted an advertisement under the policy language. We conclude that the retail product display constituted an advertising activity.

¶ 33 Whether the Allegations in the Underlying Complaint Raise a Potential for Liability Under "Personal and Advertising Injury"

¶ 34 Trade dress infringement is a covered "advertising injury" under the terms of Selective's policy. The definition of "advertising injury" in Selective's policy includes the offense of "[i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.' " "The

trade dress of a product is essentially 'its total image and overall appearance.' " *Lexmark International*, 327 Ill. App. 3d at 139 (quoting *Blue Bell Bio-Medical v. Cin-Bad, Inc.*, 864 F.2d 1253, 1256 (5th Cir. 1989)). A product's total image " 'may include features such as size, shape, color or other combinations, texture, graphics, or even particular sales techniques.' " *Id.* (quoting *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983)). "The design or packaging of a product may acquire a distinctiveness which serves to identify the product with its manufacturer or source; and a design or package which acquires this secondary meaning, assuming other requisites are met, is a trade dress which may not be used in a manner likely to cause confusion as to the origin, sponsorship, or approval of the goods." *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 28 (2001).

¶ 35 In the third claim of the underlying complaint, the plaintiffs allege trade dress infringement by Creation Supply in violation of the federal Lanham Act (15 U.S.C.A § 1125(a)). Trade dress infringement, as alleged by the underlying plaintiffs, is addressed by § 43 of the Lanham Act, codified at 15 U.S.C.A § 1125, which provides in pertinent part:

> "(a) Civil action
>
> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person

* * *

> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." 15 U.S.C.A. § 1125(a).

"[T]he purpose of the Lanham Act is to prevent 'unfair competition' in the form of 'palming off,' or the practice where one competitor tries to fool the consuming public into thinking that his product is really the product of another." *Pampered Chef, Ltd. v. Magic Kitchen, Inc.*, 12 F. Supp. 2d 785, 794 (N.D. Ill. 1998).

¶ 36 The third claim of the underlying complaint specifically alleges a violation of § 43 of the Lanham Act. Paragraph 38 alleges that "[p]rior to Defendants' conduct that forms the basis for this Complaint, consumers had come to associate Plaintiffs' squarish marker body configuration and squarish marker cap-end configuration exclusively with Plaintiffs' products." In paragraph 41, underlying plaintiffs allege, "[n]otwithstanding Plaintiffs' preexisting valid and enforceable rights in Plaintiffs' squarish marker body configuration and squarish marker cap-end configuration, Defendants, without permission or approval, *advertised* and sold (or caused to be sold) products using a squarish marker body configuration and squarish marker cap-end configuration in the United States, including Oregon." (Emphasis added.) Paragraph 45 alleges that "Defendants' unauthorized use of Plaintiffs' squarish marker body configuration and squarish marker cap-end configuration in connection with marker products is not authorized by Plaintiffs and is likely to cause confusion and mistake, and to deceive consumers as to the source or origin of Defendants' products." Finally, paragraph 48 alleges that "[t]he acts by Defendants described above constitute an infringement of Plaintiffs' rights in and to the use of their squarish marker body configuration and squarish marker cap-end configuration, with consequent damages to Plaintiffs and the business and goodwill associated with and symbolized by Plaintiffs'

squarish marker body configuration and squarish marker cap-end configuration and, specifically, give rise to this claim under 15 U.S.C..[*sic*] § 1125."

¶ 37 Based on the above allegations, the underlying complaint alleges trade dress infringement in Creation Supply's advertisement of the MEPXY markers. Therefore, we find that the second element triggering coverage for an advertising injury is satisfied.

¶ 38 Whether a Causal Nexus Existed Between the Alleged Injury and Advertisement

¶ 39 We now consider whether the underlying complaint alleges a causal connection between the alleged injury and Creation Supply's advertising activity. This inquiry is limited to whether, based on the allegations in the underlying complaint, Creation Supply's advertising of the MEPXY markers in its retail product display contributed to the alleged injury of consumer confusion suffered by the underlying plaintiffs.

¶ 40 Paragraph 41 of the underlying complaint alleges "[n]otwithstanding Plaintiffs' preexisting and enforceable rights in Plaintiffs' squarish marker body configuration and squarish marker cap-end configuration, Defendants, without permission or approval, *advertised* and sold (or caused to be sold) products using a squarish marker body configuration and squarish marker cap-end configuration in the United States, including in Oregon." (Emphasis added.) Paragraph 45 of the complaint alleges that "Defendants' unauthorized use of Plaintiffs' squarish marker body configuration and squarish marker cap-end configuration in connection with marker products is not authorized by Plaintiffs and is likely to cause confusion and mistake, and to deceive consumers as to the source or origin of Defendants' products." Finally, paragraph 47 alleges that "the unauthorized use of Plaintiffs' squarish marker body configuration and squarish marker cap-end configuration in connection with marker products in retail store displays in

Oregon and the rest of the United States *** is causing confusion among potential purchasers of Plaintiffs' products."

¶ 41 Selective's policy provides coverage for injury arising out of trade dress infringement in Creation Supply's advertisement. The underlying plaintiffs alleged that Creation Supply advertised MEPXY markers, which misled and confused the public as to the source or origin of those markers. In other words, the underlying plaintiffs complained the injury, trade dress infringement, is alleged to have been caused by advertising. As we have found that the retail product display constitutes an "advertisement" under the definition of the policy, it is reasonable to infer that Creation Supply's advertising activity contributed to the alleged injury of consumer confusion, thereby meeting the causal connection requirement. See *International Insurance Co. v. Florists' Mutual Insurance Co.*, 201 Ill. App. 3d 428, 433 (1990) (holding that there must be a causal connection between the advertising activity and the injury alleged in the underlying complaint). In liberally construing the underlying complaint and drawing reasonable inferences therefrom, we conclude that the complaint alleges a causal connection exists between Creation Supply's advertising activity and the alleged underlying injuries.

¶ 42 Alleged Judicial Admissions

¶ 43 Selective argues that Creation Supply repeatedly and unequivocally asserted in its pleadings below that there is no causal connection between the advertising activity and the injury alleged in the underlying case. Selective asserts that Creation Supply made statements of fact that constitute judicial admissions that should preclude Creation Supply from arguing any causal connection. For example, in Creation Supply's reply in support of its motion for partial summary judgment, it argued, "the Oregon Complaint alleges that the import and sale of markers constitutes infringement, not [Creation Supply's] advertising."

¶ 44 Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010). For a statement to constitute a judicial admission, it must be clear, unequivocal, and uniquely within the party's personal knowledge. *Williams Nationalease, Ltd. v. Motter*, 271 Ill. App. 3d 594, 597 (1995). The statement also must be an intentional statement which relates to concrete facts and not an inference or unclear summary. *Poelker v. Warrensburg-Latham Community Unit School District No. 11*, 251 Ill. App. 3d 270, 286 (1993).

¶ 45 Creation Supply's characterization of the underlying complaint in its pleadings below do not relate to the concrete facts of this case. In addition, Creation Supply cannot claim that the allegations contained in the underlying complaint are within its personal knowledge. Moreover, Creation Supply's attempts to characterize the underlying complaint do not have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact. Accordingly, we find Creation Supply's characterizations in its pleadings below are not judicial admissions.

¶ 46 Whether Coverage is Precluded by the Intellectual Property Exclusion

¶ 47 Selective next argues that coverage is precluded by the policy's intellectual property exclusion, which states that coverage is only available for damages arising out of infringement of the underlying plaintiffs' trade dress in Creation Supply's "advertisements." Essentially, Selective asserts that the underlying complaint does not assert a trade dress infringement claim and instead asserts trademark infringement and unfair competition claims.

¶ 48 The underlying complaint does not specifically use the term "trade dress infringement" to describe the infringing offenses. The complaint states that "[t]his is an action for trademark

infringement and unfair competition." However, the third claim of the complaint and, specifically, paragraph 48, allege violations under § 43 of the Lanham Act, which codified a civil action for trade dress infringement. The policy excludes "personal and advertising injury" "[a]rising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your 'advertisement.' " Immediately thereafter, the policy states, "However, this exclusion does not apply to infringement, in your 'advertisement,' of copyright, trade dress or slogan." In other words, if the underlying complaint alleges trade dress infringement in the insured's "advertisement," the intellectual property exclusion does not apply.

¶ 49 We have previously found that the underlying complaint alleges trade dress infringement in Creation Supply's advertisement. Considering the policy language, "this exclusion does not apply to infringement, in your 'advertisement,' of copyright, trade dress or slogan," we find that this exception to the exclusion applies. Therefore, the intellectual property exclusion in Selective's policy is not applicable here.

¶ 50 Whether the Knowing Violation Exclusion Precludes Coverage

¶ 51 Finally, Selective argues that the "knowing violation" exclusion bars coverage. This excludes "personal and advertising injury" "[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.' " Selective again urges us to consider Gragg's deposition testimony to show that Creation Supply had knowledge of impending intellectual property litigation against Alpha Art Materials, the manufacturer of MEPXY markers.

¶ 52 Our consideration of the duty to defend is limited to the allegations of the underlying complaint and the relevant policy provisions. *Lexmark International*, 327 Ill. App. 3d at 136. We need not consider extrinsic evidence beyond these parameters. The allegations in the underlying complaint do not assert that Creation Supply had knowledge prior to the inception date of the policy that its actions would violate the rights of another and inflict "personal and advertising injury." Indeed, the underlying complaint alleges Creation Supply had constructive notice of infringement "at least as early as January 3, 2012," when the underlying plaintiffs registered their right to use the marker end-cap configuration, which is after the August 19, 2011 policy inception. Accordingly, the "knowing violation" exclusion is not applicable here.

¶ 53 CONCLUSION

¶ 54 We find that the allegations in the underlying complaint, the photograph of the retail product display, and the relevant policy language triggered Selective's duty to defend Creation Supply in the underlying case. We affirm the trial court's decision to grant Creation Supply's motion for partial summary judgment. The cross-appeal is dismissed.

¶ 55 Affirmed.
Cross-appeal dismissed.