UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,

Plaintiff/Defendant,

-vs- **Case Nos. 13-C-877, 13-C-931**

CANNON & DUNPHY, S.C.,

Defendant/Plaintiff.

DECISION AND ORDER

In a state court lawsuit between rival personal injury law firms, the principals of Habush Habush & Rottier alleged that Cannon & Dunphy violated their statutory right to privacy by bidding on the electronic keywords "habush" and "rottier" on internet search engines, thus assuring that links to Cannon & Dunphy's website would appear as a "sponsored link" when internet users search for those terms. Travelers Property Casualty Company of America refused to defend Cannon & Dunphy pursuant to a Commercial General Liability Policy.

Now before the Court are cross-motions for summary judgment on the duty to defend. Summary judgment should be granted if "the movant shows that there is no genuine dispute as to any material fact and the

movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law that are particularly appropriate for summary disposition. *West Suburban Bank of Darien v. Badger Mut. Ins. Co.*, 141 F.3d 720, 723-24 (7th Cir. 1998).

Insurers must defend their insureds when the facts alleged in the four corners of the complaint, if proven, would constitute a covered claim. *West Bend Mut. Ins. Co.*, 821 N.W. 2d 250, 255 (Wis. Ct. App. 2012).[1] The duty to defend is necessarily broader than the duty to indemnify because the former is triggered by "arguable, as opposed to actual, coverage." *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.*, 660 N.W. 2d 666, 674 (Wis. 2003). "If there is any doubt about the duty to defend, it must be resolved in favor of the insured. An insurer who declines to defend the insured does so at its own peril. However, the insurer should not be required to defend an insured in a suit in which the insurer has no economic interest." *Sch. Dist. of Shorewood v. Wausau Ins. Co.*, 488 N.W. 2d 82, 87 (Wis. 1992).

In the underlying state court lawsuit, Robert Habush and Daniel

[1] This is a diversity action, and the parties agree that Wisconsin law governs. *Mut. Serv. Cas. Ins. Co. v. Elizabeth State Bank*, 265 F.3d 601, 612 (7th Cir. 2001).

Rottier alleged that by bidding upon the keywords "habush" and "rottier," Cannon & Dunphy was attempting to "distract consumers of legal services who are seeking information on the names 'Habush' or 'Rottier', or the Law Firm that bears their names, and to divert those consumers to Defendants' Internet site." This, according to the complaint, was a violation of Wis. Stat. § 995.50(2)(b), which provides that the "use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person" constitutes an "invasion of privacy."

Habush and Rottier alleged that the harm caused to them could not be "readily compensated for in damages." Thus, the Habush plaintiffs sought temporary and permanent injunctive relief requiring Cannon & Dunphy to immediately take all necessary steps to remove their advertisements from all Internet sites in response to the entry of key words "Habush" or "Rottier," and enjoining Cannon & Dunphy from using the names "Habush," "Rottier," or any combination or variation of these names on the Internet in any manner for purposes of advertising or trade. The Habush plaintiffs requested attorneys' fees, but did not pursue compensatory damages. §§ 995.50(1)(a)-(c), Wis. Stats. ("One whose privacy is unreasonably invaded" is entitled to equitable relief "to prevent and

restrain such invasion," compensatory damages "based either on plaintiff's loss or defendant's unjust enrichment," and a "reasonable amount for attorney fees").

The trial court granted Cannon & Dunphy's motion for summary judgment, and the court of appeals affirmed. "Although the question is a close one, we think the strategy used by Cannon & Dunphy here is akin to locating a new Cannon & Dunphy branch next to an established Habush Habush & Rottier office when the readily apparent purpose . . . is to take advantage of the flow of people seeking out Habush Habush & Rottier because of the value associated with the names Habush and Rottier." *Habush v. Cannon*, 828 N.W.2d 876, 883-84 (Wis. Ct. App. 2013). Thus, the court found that § 995.50(2)(b) did not apply to this type of "non-visible use." *Id.* at 881 ("In every case brought to our attention by the parties and discovered in the course of our own research, the 'use' of the name or image at issue was a visible part of some sort of promotion or product"). The Wisconsin Supreme Court denied a petition for review.

The policy at issue provides that Travelers will provide coverage for "those sums that [Cannon & Dunphy] becomes legally obligated to pay *as damages* because of 'personal injury' or 'advertising injury' to which this insurance applies," and that Travelers has the "right and duty to defend

[Cannon & Dunphy] against any 'suit' seeking those damages . . ." In *Shorewood*, *supra*, the Wisconsin Supreme Court considered identical language in a series of policies and held that "'damages' . . . unambiguously means legal damages. It is legal compensation for past wrongs or injuries and is generally pecuniary in nature." 488 N.W.2d at 89. Thus, as here, the insurer did not have a duty to defend against an action seeking injunctive relief.

In *Shorewood*, the Court asserted that the term "'damages' does not encompass the cost of complying with an injunctive decree." *Id.* The Court continued: "An injunction looks to the future conduct of the parties and is preventive in nature. Damages, on the other hand, are remedial in nature, not preventive. The remedy of injunction is only available if the plaintiff can establish that a continuing or anticipated injurious act is not adequately compensable in damages." *Id.* at 90. In a later case which presented the question of whether "response costs" for violation of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") are damages under a CGL policy (i.e., "sums which the insured shall become legally obligated to pay as damages"), the Court found that the "rationale for the *Shorewood* decision was too broadly stated." *Johnson Controls, Inc. v. Empl. Ins. Of Wausau*, 665 N.W.2d 257,

272 (Wis. 2003). Thus, the Court rejected *Shorewood*'s "overly restrictive definition of damages." *Id.* Still, *Shorewood*'s distinction between injunctive relief and damages is sound so long as the requested injunction is "designed to prevent injury, *not to compensate for past wrongs*, . . ." *Id.* (quoting *Shorewood* at 90) (emphasis added by *Johnson Controls*); *see also id.* at 273, quoting *Pure Milk Products Cooperative v. Nat'l Farmers Org.*, 280 N.W.2d 691, 700 (Wis. 1979) ("To invoke the remedy of injunction the plaintiff must moreover establish that the injury is irreparable, *i.e. not adequately compensable in damages*") (emphasis added by *Johnson Controls*).

Cannon & Dunphy does not argue that the injunction pursued by the Habush plaintiffs is distinguishable from a "typical injunction." *Johnson Controls* at 273 ("if an equitable action is providing compensation for past wrongs – if it is 'remedial in nature' – it cannot be lumped indiscriminately with a typical injunction, because it is serving a different purpose from a typical injunction"). Instead, Cannon & Dunphy argues that Travelers was required to defend because the claim for attorneys' fees transforms the Habush litigation into a suit seeking damages. This is incorrect for many of the reasons already stated.

In *Shorewood*, the plaintiffs in the underlying action sought

declaratory and injunctive relief to desegregate the Milwaukee area school system, and they also sought "an order pursuant to 42 U.S.C. sec. 1988 allowing plaintiffs their costs and reasonable attorneys' fees." 488 N.W.2d at 92. The Court found that such a claim did not constitute damages because Section 1988 "expressly treats an award of attorney fees 'as part of the costs.'" *Id.* at 93 (distinguishing *City of Ypsilanti v. Appalachian Ins. Co.*, 547 F. Supp. 823 (E.D. Mich. 1982)). The Seventh Circuit, relying on *Shorewood*, found that an award of attorneys' fees under the Fair Housing Act was not "damages" for purposes of a CGL policy, reasoning as follows:

> [W]e agree with the district court's conclusion that since attorneys' fees 'are not given to aggrieved parties as compensation for past injuries,' these fees cannot be viewed as 'damages.' Where the obtaining of attorneys' fees is expressly provided for by statute, a request for attorneys' fees is not a request for 'damages.' It is true that [*Shorewood*] involved an action brought under 42 U.S.C. § 1988, and that § 1988 allows an award of attorneys' fees 'as part of the costs.' It is also true that the Fair Housing Act classifies attorneys' fees as separate from costs. 42 U.S.C. § 3613(c)(2). This does not mean, however, that where attorneys' fees are not costs they must constitute damages. Rather, under the Fair Housing Act, attorneys' fees and costs are separate classes of statutory remedies, in addition to – and thereby separate from – an aggrieved party's right to damages.

United States v. Sec. Mgmt. Co., Inc., 96 F.3d 260, 270 (7th Cir. 1996).

Cannon & Dunphy cites a series of non-Wisconsin cases holding that

a claim for attorneys' fees falls within an insurer's promise to pay damages, thus triggering the duty to defend. *See, e.g., Ypsilanti*, 547 F. Supp. at 828. To the extent that *Ypsilanti* or any of the other out-of-jurisdiction cases cited by Cannon & Dunphy are inconsistent with *Shorewood,* they are irrelevant because the task of a federal court sitting in diversity is to "ascertain the substantive content of state law as it either has been determined by the highest court of the state or as it would be by that court if the present case were before it now." *Woidtke v. St. Clair Cnty., Ill.*, 335 F.3d 558, 562 (7th Cir. 2003).

Cannon & Dunphy also argues that *Johnson Controls* undermined *Shorewood* in a way that is relevant to this case. But *Johnson Controls* simply recognized that certain types of equitable or injunctive relief could be considered remedial, not forward-looking. In so doing, the Court emphasized that it was "not rendering the 'as damages' phrase a mere surplusage. On the contrary, the language of these CGL policies still precludes coverage for costs that the insured would pay *in order to comply with general government regulations or prospective conduct*." *Johnson Controls* at 280 (emphasis added). Once again, Cannon & Dunphy does not dispute that the relief requested by the Habush plaintiffs was a typical, forward-looking injunction. Cannon & Dunphy further argues that a

reasonable insured would understand that an award of attorneys' fees under § 995.50 is monetary compensation imposed for an already-sustained injury. This may be true in some cases, but not here. The Habush plaintiffs incurred legal fees, but only in an effort to stop Cannon & Dunphy from doing what it was doing.[2] Thus, the claim for fees must be considered part of the costs of "conforming [Cannon & Dunphy's] future conduct," not "legal recompense for injuries sustained." *Johnson Controls* at 274.

Even if the underlying complaint could be considered a suit for damages because of an advertising injury,[3] Travelers did not breach its duty to defend because the complaint falls within the "Knowing Violation" exclusion.[4] This exclusion provides that there is no coverage for an advertising injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict

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[2] If Habush pursued compensatory damages in addition to injunctive relief, Travelers would have been obliged to defend, assuming that there was a covered injury. *U.S. Fire Ins. Co. v. Green Bay Packaging*, 66 F. Supp. 2d 987, 997 (E.D. Wis. 1999) ("Under Wisconsin law when a suit involves some matters that are within the scope of coverage and some that are not, the insurer is obligated to defend the entire suit").

[3] Both parties devote a great deal of space in their briefs to the "advertising injury" aspect of coverage. The Court expresses no opinion on the merits of those arguments.

[4] Cannon & Dunphy argues that Travelers is estopped from asserting an exclusion as a coverage defense, but "when addressing whether there is a duty to defend, Wisconsin courts frequently consider exclusions" because "if a suit asserts only a claim falling within an exclusion, it does not arguably assert liability covered by the policy." *Menasha Corp. v. Lumbermens Mut. Cas. Co.*, 361 F. Supp. 2d 887, 892-93 (E.D. Wis. 2005).

'personal injury' or 'advertising injury.'" The underlying complaint alleges that Cannon & Dunphy's actions were intentional, with the specific purpose of using the names Habush and Rottier for Cannon & Dunphy's "benefit and commercial gain." Thus, the exclusion applies because Cannon & Dunphy was attempting to lure potential customers from Habush Habush and Rottier. *Liebovich v. Minn. Ins. Co.*, 751 N.W.2d 764, 783 (Wis. 2008) ("the intentional act exclusions preclude coverage where some alleged harm or injury, in addition to the act causing injury, was intended by or should have been anticipated by the insured").

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT Travelers' motion for summary judgment [ECF No. 32] is **GRANTED**, and Cannon & Dunphy's motion for summary judgment [ECF No. 29] is **DENIED**. The Clerk of Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this **14th** day of November, 2014.

BY THE COURT:

HON. RUDOLPH T. RANDA
U.S. District Judge