SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2165-20

SELECTIVE INSURANCE COMPANY OF AMERICA, SELECTIVE WAY INSURANCE COMPANY, SELECTIVE INSURANCE COMPANY OF NEW ENGLAND, SELECTIVE CASUALTY INSURANCE COMPANY, SELECTIVE FIRE & CASUALTY INSURANCE COMPANY, SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, and FOREMOST SIGNATURE INSURANCE COMPANY,

Plaintiffs-Respondents,

v.

SCOTT SINGER, TODD SINGER, D.D.S., REGNIS MANAGEMENT LLC, f/k/a BDC MANAGEMENT LLC, BRIGHTER DENTAL CARE (ROBBINSVILLE) PA, MONTGOMERY DENTAL & SPECIALTY GROUP, LLC, BRANCHBURG DENTAL & SPECIALTY GROUP, LLC,

FLEMINGTON GROUP DENTAL, LLC, CLEMENTON DENTAL & SPECIALTY GROUP, LLC, BRIGHTER LIVING DENTAL CARE OF NEW JERSEY, PA, SPRINGFIELD DENTAL & SPECIALTY GROUP, LLC, MARLBORO DENTAL & SPECIALTY GROUP, LLC, FREEHOLD DENTAL & SPECIALTY GROUP, LLC, WARREN DENTAL & SPECIALTY GROUP, LLC, NORTH BRUNSWICK DENTAL & SPECIALTY GROUP, LLC, EAST BRUNSWICK DENTAL & SPECIALTY GROUP, LLC, DELRAN DENTAL & SPECIALTY GROUP, LLC, BEDMINSTER DENTAL & SPECIALTY GROUP, LLC, BDC MANAGEMENT SERVICES, LLC, and BRIGHTER DENTAL CARE OF PRINCETON,

Defendants-Appellants,

and

SCOTT SINGER, TODD SINGER, D.D.S., and REGNIS MANAGEMENT LLC, f/k/a BDC MANAGEMENT LLC,

Third-Party Plaintiffs-Appellants,

v.

UNITED STATES LIABILITY INSURANCE COMPANY,

Third-Party Defendant-Respondent,

and

UNITED STATES LIABILITY INSURANCE COMPANY,

Third-Party Defendant/ Fourth-Party Plaintiff-Respondent,

v.

SCOTT SINGER, TODD SINGER, D.D.S., REGNIS MANAGEMENT LLC, f/k/a BDC MANAGEMENT LLC, SELECTIVE INSURANCE COMPANY OF AMERICA, SELECTIVE WAY INSURANCE COMPANY, SELECTIVE INSURANCE COMPANY OF NEW ENGLAND, SELECTIVE CASUALTY INSURANCE COMPANY, SELECTIVE FIRE & CASUALTY INSURANCE COMPANY, SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, and FOREMOST SIGNATURE INSURANCE COMPANY,

Fourth-Party Defendants-
Appellants.

Argued December 15, 2022 – Decided June 19, 2023

Before Judges Accurso, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0464-16.

Thomas B. Alleman (Dykema Gossett PLLC) of the Texas and Missouri bars, admitted pro hac vice, argued the cause for appellants (Goldman Davis Krumholz & Dillon PC, and Thomas B. Alleman, attorneys; Evan L. Goldman and Thomas B. Alleman, on the briefs).

Richard J. Williams, Jr. argued the cause for respondents Selective Insurance Company of America, Selective Way Insurance Company, Selective Insurance Company of New England, Selective Casualty Insurance Company, Selective Fire & Casualty Insurance Company, and Selective Insurance Company of South Carolina (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Kevin MacGillivray and Richard J. Williams, Jr., on the brief).

Robert W. Muilenburg argued the cause for respondent United States Liability Insurance Company (Coughlin Midlige & Garland, attorneys; Robert W. Muilenburg, of counsel and on the brief; Rachael M. Segal, on the brief).

Eric D. Suben, (Traub Lieberman Straus & Shrewsberry LLP) of the New York bar, admitted pro hac vice, argued the cause for respondent Foremost

Signature Insurance Company (Traub Lieberman Straus & Shrewsberry LLP, attorneys; Eric D. Suben, of counsel; Aileen F. Droughton, on the brief).

PER CURIAM

In this insurance coverage action, defendants, fourteen dental practices along with brothers Scott Singer[1] and Dr. Todd Singer and Regnis Management, LLC (Regnis), formerly BDC Management, LLC (BDC), all insured under policies issued by plaintiffs, appeal from three Law Division orders granting summary judgment to each of the plaintiff insurers and declaring they had no duty to defend or indemnify defendants in two underlying lawsuits, one in New Jersey federal court (the New Jersey action) and the other in New York state court (the New York action).

Before us, defendants contend plaintiffs were obligated to defend and indemnify them in the underlying actions under the plain language of their respective policies.[2] Based on our review of the record against the parties'

[1] We refer to Scott Singer as Scott to distinguish him from Dr. Todd Singer, as the brothers share a last name, and intend no disrespect by that designation.

[2] The parties have sought declaratory relief as to the insurers' obligation to defend and indemnify defendants in the New Jersey and New York actions. As detailed below, however, the New Jersey action was dismissed without prejudice on forum non conveniens grounds and the record is devoid of any evidence that action has been reinstated. In light of that dismissal, and the absence of any

arguments and the applicable law, we reject defendants' arguments. Simply put, based on the clear and unambiguous exclusionary language in the policies, plaintiffs were not obligated to defend or indemnify defendants in either of the underlying actions. We accordingly affirm.

I.

In light of the complexity of the parties' commercial relationships and the import of specific provisions within the subject insurance policies to our disposition of the issues on appeal, we present the facts with a greater degree of granularity than ordinary. We then separately discuss the applicability of exclusions within the relevant general liability policies as they apply to the allegations in the New Jersey and New York actions. Finally, we address exclusions within a directors and officers (D&O) liability policy with respect to the New York action.

A.

Between 2002 and 2011, the Singers formed BDC and seven dental practices. Scott was responsible for the practices' non-clinical operations while

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proof in the record defendants paid any sum in settlement, it does not appear an outstanding indemnification claim exists related to that action. The parties' reference to plaintiffs' indemnification obligations is inconsequential to our decision, however, as we conclude various policy exclusions preclude coverage.

Dr. Singer, a dentist, was responsible for the clinical operations. Seeking to expand the practices, the Singers agreed with Topspin Partners LBO (Topspin), a private equity investment firm, to cede control of the non-clinical operations, but not the practices themselves, in return for expansion financing. Toward that end, Topspin formed BDC Management Services, LLC (BDCMS), to provide dental practice support and administrative services to the dental practices and appointed the Singers to top executive positions pursuant to three-year employment agreements. Dr. Singer was appointed president and chief clinical officer with Scott serving as chief executive officer.

Topspin also formed BDIP, LLC (BDIP), as an "investment vehicle for ownership of BDC[MS]" and BDIP Holdings, Inc. (BDIP Holdings). BDIP owned 59.14% of BDCMS's voting shares, BDIP Holdings owned all of BDIP's shares, and Topspin owned 60.67% of BDIP Holdings.

In March 2012, BDCMS entered into an acquisition agreement with BDC, the Singers, and the original dental practices whereby BDCMS acquired essentially all the non-clinical assets of BDC, including its intellectual property rights. Specifically, pursuant to an attached trademark assignment, BDCMS purchased all right, title and interest to "the trademarks and trade names BRIGHTER DENTAL, BRIGHTERLIVING, BRIGHTER SOLUTIONS[,] any

formatives or similar trademarks, and all common law and other rights worldwide, in and to such trademarks, together with the goodwill of the business associated therewith . . . ." In addition, each original practice agreed, unless "expressly permitted under a separate management services agreement[,] . . . not to use (and to terminate and discontinue all use of) the terms contained in the Trademarks and any terms similar thereto in any domain name registration . . . and any other indicator of origin[.]"

BDCMS also entered into management service agreements (MSAs) with each of the original dental practices, in which they agreed to pay BDCMS an annual $275,000 management fee per practice. BDCMS also licensed its intellectual property rights to the original practices.

In addition, the MSAs contained a "non-solicitation [and] non-interference" covenant, whereby defendants agreed not to induce or attempt to influence any person who had a contractual relationship with BDCMS to terminate that relationship. Further, defendants agreed that upon termination of the MSAs, they were to "immediately cease use of all Licensed" intellectual property and return "such Licensed [intellectual property] in whatever form or medium maintained."

B.

Throughout their operation of the dental practices, defendants purchased general liability policies from plaintiffs Selective Insurance Company of America (Selective) and Foremost Signature Insurance Company (Foremost), as well as a D&O liability policy from plaintiff United States Liability Insurance Company (USLI). More specifically, Selective issued policies to thirteen dental practices and BDC for various policy periods between 2012 and 2016, Foremost issued a general commercial liability policy to Brighter Dental of Princeton from 2013 to 2016, and USLI issued its D&O policy to BDCMS for May 2015 to May 2016.

In the business liability portion of Selective's policy, it agreed to "pay those sums that insured becomes legally obligated to pay as damages because of . . . 'personal and advertising injury' to which the insurance applies." In pertinent part, that coverage applied to claims arising out of: (1) "[o]ral or written publication, in any manner, of material that slanders or libels a person, or organization or disparages a person's or organization or disparages a person's organization's goods, products or services;" (2) "[t]he use of another's advertising idea in your 'advertisement';" and (3) "[i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.'" Foremost's policy

covered "damages because of 'personal and advertising injury'" under similar terms.

Both Selective's and Foremost's coverage obligations for personal and advertising injury were limited by three, pertinent exclusionary provisions. In this regard, the policies excluded coverage for injury arising out of: (1) a breach of contract; (2) infringement of trademark or other intellectual property rights; and (3) unauthorized use of another's domain name. Notably, each policy's trademark infringement exclusion did not apply to infringement of copyright, trade dress, or slogan in an advertisement.

USLI's D&O policy insured BDCMS's directors, officers, trustees, committee members and managing members. That policy provided USLI would "pay, on behalf of an Individual Insured, Loss resulting from a [covered] Claim first made against an Individual Insured during the Policy Period." (emphasis omitted).

USLI's coverage obligations were limited by two relevant exclusionary provisions. First, under the insured versus insured exclusion, USLI was not liable "to make payment for Loss in connection with" any claims made "by, at the behest of or on behalf of Insured." (emphasis omitted). Second, pursuant to the percentage shareholder exclusion, USLI was not "liable to make payment for

Loss in connection with any Claim made against any Insured that is brought, maintained or asserted by or on behalf of any person or entity which owns or did own directly or beneficially more than [ten percent] of the Organization's voting securities." (emphasis omitted).

C.

Following the parties' execution of the acquisition agreement, and contrary to its provisions, Dr. Singer formed eight additional dental practices (the new practices) using the same intellectual property as the original practices but did not execute MSAs with BDCMS. The new practices, however, otherwise complied with the terms of MSAs, including paying management fees.

By early 2015, the parties' relationship soured and BDCMS discovered the Singers did not execute MSAs with the new practices. In addition, the Singers' employment agreements were coming to an end. In May 2015, defendants terminated all agreements between themselves and BDCMS and stopped paying required fees while continuing to use its trademarks and domain names to promote and advertise their dental services.

BDCMS initiated both the New Jersey and New York actions. In the underlying New Jersey lawsuit, BDCMS sued all the practices and Scott, claiming they had committed federal and state statutory and common law

trademark infringement, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and tortious interference with contract.

BDCMS also alleged defendants had repudiated their contractual obligations under the acquisition agreement and the MSAs by failing to pay management fees and by their continued use of BDCMS's intellectual property in commerce without a license. With respect to the new practices specifically, BDCMS claimed they paid a fee to "use the Company's Trademarks and Domain Names pursuant to either an oral agreement to license [that intellectual property] or an implied agreement evidenced by the fact that until recently they were paying the Company for administrative and business support services." Defendants alleged in a counterclaim that the agreements, in particular the MSAs, violated N.J.S.A. 45:6-1 to 6-73 because the "arrangement" between BDCMS and Todd Singer was "illegal."

The practices tendered the New Jersey lawsuit to Foremost and Selective and requested a defense and to be indemnified for any settlement or judgment. While Foremost initially agreed to provide a defense subject to a partial denial of coverage and a general reservation of rights, Selective disclaimed coverage outright. The New Jersey federal action was ultimately dismissed on forum non

conveniens grounds because the acquisition agreement's forum selection clause required all disputes arising from it be resolved in New York.

In the New York action, BDCMS, BDIP Holdings., BDIP, and Topspin filed a first amended complaint against the Singers, Regnis, and the original practices claiming breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, conversion, and fraud in the inducement. Additionally, they sought a declaratory judgment that the equity transfer restriction agreements were valid and enforceable. The underlying plaintiffs in the New York action claimed the Singers and Regnis never intended to cede control of their dental services businesses, and that the Singers had disparaged plaintiffs in order to create a wedge between BDCMS and the dentists and employees in the dental practices. The parties settled the New York action for an undisclosed sum.

Both Foremost and Selective disclaimed coverage for the New York action. USLI, however, agreed to provide a defense in the New York action against the claims by BDIP Holdings and BDIP, subject to a reservation of rights, but denied coverage for the claims by BDCMS based on the insured versus insured exclusion. Specifically, it relied on the fact that BDCMS was the named plaintiff and the named insured under the USLI policy, and the Singers

were named defendants and qualified as individual insureds under the policy. USLI also denied coverage for the claims by Topspin based on the percentage shareholder exclusion and requested documentation with respect to "the percentage of BDC[MS]'s voting securities owned, directedly or beneficially, by Topspin, BDIP Holdings and BDIP" to aid in the determination of whether claims by BDIP Holdings and BDIP were also barred by that exclusion.

Selective filed a lawsuit in the Law Division and sought declaratory relief that it was not obligated to defend or indemnify defendants in either the New Jersey or New York actions. Foremost was later added as a plaintiff.

Defendants answered the amended complaint, denied plaintiffs' allegations, and asserted a counterclaim for declaratory relief that they were entitled to coverage under Selective's and Foremost's policies with respect to the New Jersey and New York actions, as well as a third-party complaint against USLI for defense and indemnification with respect to the New York action. USLI filed an answer to the third-party complaint as well as a fourth-party complaint against Selective and Foremost. In its answer, USLI asserted the insured versus insured and percentage shareholder exclusions precluded coverage of all the underlying plaintiffs' claims against the Singers.

After a period of discovery, Selective and Foremost moved for summary judgment and contended they had no duty to defend or indemnify defendants. USLI moved for summary judgment and argued it had no duty to defend defendants in the New Jersey action and no duty to indemnify defendants in the New York action. Defendants opposed the motions and cross-moved for declaratory relief, arguing Selective, Foremost, and USLI owed them a defense and indemnification with respect to the underlying actions.

After considering the parties' oral arguments and written submissions, defendants requested the court appoint a Special Master, which the court granted. In a thorough report, the Special Master recommended the court grant summary judgment to plaintiffs in all respects. We detail the Special Master's findings, as the court in large part adopted his recommendations.

The Special Master concluded Selective and Foremost had no coverage obligations in the New Jersey action. Although he found the allegations "unmistakably plead an advertising injury as defined in the policies," he concluded coverage was barred by the exclusions for claims arising from trademark infringement and an insured's use of another's domain name.

In doing do, the Special Master acknowledged an "exception to the exclusion" for infringement of trade dress in an advertisement, but determined

that exception did not apply because "[i]t is clear from the allegations in the [c]omplaint that the only way in which the definition of 'advertisement' is met is through the Singer defendants use of the internet and the websites . . . ." Alternatively, he determined the policies' respective exclusion for personal and advertising injury arising out of a breach of contract barred coverage for claims against the Singers, Regnis, and the original practices.

The Special Master also concluded the insurers did not owe coverage in the New York action. With respect to Selective and Foremost, he observed the non-disparagement provision in their policies would afford coverage to the underlying defendants on BDCMS's disparagement claim but for the exclusion for claims of personal and advertising injury "arising out of a breach of contract." Relying on Liberty Ins. Corp. v. Tinplate Purchasing Corp., 743 F.Supp.2d 406 (D. N.J. 2010), he concluded that exclusion applied because the disparagement cause of action "was pled by the underling plaintiffs as a breach of contract" and "[t]he contract was where the right to bring the claim originated."

As to USLI, the Special Master rejected defendants' argument that USLI was estopped from disclaiming coverage because it failed to assert timely its coverage denial and concluded the insured versus insured exclusion barred

coverage. On this point, he reasoned "Topspin, BDIP Holdings and BDIP derive their standing from their interest in BDC[MS]. The non-insured entities asserted no independent causes of action against [defendants]." Additionally, he noted, "the insured company ([BDCMS]) is suing its officers for their wrongful acts that resulted in damages. The reason for the exclusion and its enforceability should not change when the suit is brought by parties who control the insured company and whose claims are solely derivative of the insured company."

For similar reasons, the Special Master determined the percentage shareholder exclusion also barred coverage. In light of the corporate ownership structure in which Topspin effectively controlled BDCMS through its ownership stake in BDIP Holdings and BDIP, he found each of the plaintiffs owned more than ten percent of BDCMS's voting securities directly or beneficially and explained:

> The Topspin entities invested significant money in BDC[MS] with the expectations of receiving a financial benefit. One of the things they bargained for and received in the [acquisition agreement] and operating contracts was to exercise control of the Board of Directors by being able to exercise their significant voting rights which were far more than [ten percent] of the voting securities of BDC[MS] . . . . It is not a stretch of the word [beneficial] in the context of the exclusion and its recognized legal purpose to conclude that BDIP Holdings and Topspin beneficially owned more than [ten percent] of the voting securities of BDC[MS].

After hearing argument on defendants' objections to the Special Master's recommendations, the court entered an order affirming the Special Master's report and recommendations and three orders granting summary judgment to Selective, Foremost, and USLI. In its statement of reasons, the court explained it agreed with the Special Master that the claims in the New Jersey action for trademark infringement were barred by the exclusions in Selective's and Foremost's policies related to trademark infringement and unauthorized use of another's domain names. The court also agreed with the Special Master's conclusion that the underlying advertising injury turned on proving a breach of contract and therefore arose from it.

The court further concurred with the Special Master that defendants were not entitled to coverage in the New York action. With respect to Selective and Foremost, the court concluded the disparagement claim could not be maintained without proving a breach of contract. As to USLI, the court determined it was not estopped from asserting coverage exclusions because its reservation of rights letter specifically referenced both the insured versus insured and percentage shareholder exclusions. It also agreed with the Special Master that both the insured versus insured and percentage shareholder exclusions in the D&O policy

barred coverage for claims by the underlying plaintiffs in the New York action. This appeal followed.

II.

We apply the same standard as the trial court when reviewing a grant of summary judgment. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). Pursuant to Rule 4:46-2(c), a court is required to grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." If there are no genuine and material factual questions, we then determine whether the trial court made a correct ruling on the law. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987). Further, the interpretation and construction of an insurance contract is a matter of law that we review de novo. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004).

When interpreting the language of an insurance policy, the words used should be given their ordinary meaning. Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165, 175 (1992). If the language of a particular provision is clear and unambiguous, the inquiry is concluded; however, where there are ambiguities,

they are to be resolved in favor of the insured. Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 272-73 (2001). Clearly worded exclusionary clauses in an insurance policy must be enforced so long as they are unambiguous and not contrary to public policy. Ohio Cas. Ins. Co. v. Island Pool & Spa, Inc., 418 N.J. Super. 162, 169 (App. Div. 2011). While the insured bears the burden of bringing their claims within the policy's coverage provisions, Borough of Sayreville v. Bellefonte Ins. Co., 320 N.J. Super. 598, 602 (App. Div. 1998), the insurer bears the burden of bringing the case within the policy's exclusion provisions, Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95 (1997). When there is no coverage, there is no duty to defend. Iorio v. Simone, 340 N.J. Super. 19, 25 (App. Div. 2001).

"[T]o ascertain whether there is a duty to defend, '[t]he complaint should be laid alongside the policy and a determination made as to whether, if the allegations are sustained, the insurer will be required to pay the resulting judgment,' with any doubts 'resolved in favor of the insured.'" Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549-50 (2022) (quoting Abouzaid v. Mansard Gardens Assocs., LLC, 207 N.J. 67, 79-80 (2011)). It is the nature of the claim asserted rather than the specific details or the litigation's possible outcome that governs the insurer's obligation. Flomerfelt v. Cardiello, 202 N.J. 432, 444

(2010). Doubts are resolved in favor of reading claims that are ambiguously pleaded, but potentially covered, in a manner that obligates the insured to provide a defense. Ibid. If a complaint includes multiple or alternative causes of action, the duty to defend will attach so long as any of them would be a covered claim. Ibid. The potential merit of the claim is immaterial even if the asserted claims are poorly developed and almost sure to fail. Abouzaid, 207 N.J. at 81.

III.

Defendants contend the court erred in granting summary judgment to Selective and Foremost because the allegations in the New Jersey complaint when compared to the language of their policies obligated them to defend defendants. They argue the underlying plaintiffs pled covered claims of personal and advertising injury and the insurers failed to establish coverage was barred by an exclusion within their respective policies.

We have carefully compared the allegations set forth in the complaint and the language of each policy, see Norman Int'l, Inc., 251 N.J. at 549-50, and conclude coverage was excluded under the policies. Although only one exclusion need apply to preclude coverage, for the purpose of completeness we

address both exclusions relied upon by the Special Master and the trial court and agree both barred coverage with respect to the New Jersey action.

A.

Defendants disagree with the court that coverage for potential advertising injury was precluded by the exclusions in each of the respective general liability policies for trademark infringement and use of another's domain name. They specifically assert the Special Master and the court erroneously concluded the only covered advertising injury alleged was the unauthorized use of BDCMS's domain names and websites. In doing so, defendants rely on the following language in the underlying complaint: the new practices "continue to use the Company's [intellectual property] to identify their dental services in commerce, including to promote and advertise their dental services on websites that Dr. Singer and the New Practices[] control." (emphasis added).

According to defendants, "[t]he use of 'including' plainly shows that website use was a part but not all of the injury alleged by [p]laintiff in the New Jersey lawsuit. The allegations of non-website injury make it impossible to say that the only injuries being alleged are within" the domain name exclusion. They contend the underlying plaintiffs implicitly alleged non-website injury because it would be nonsensical to attack the defendants' "use of websites while allowing

them to continue to use signage, TV and radio ads, and all other forms of IP[.]" We are unpersuaded.

Even if we accept defendants' argument that the pleadings alluded to advertising injury beyond the unauthorized use of BDCMS's websites, we are satisfied any such injury falls within the scope of the policies' exclusions for injury arising out of trademark infringement and use of another's domain names. The underlying plaintiffs alleged defendants used without a license the "BRIGHTER DENTAL, BRIGHTERLIVING and, BRIGHTER SOLUTIONS marks and trade names, and the Internet domain names www.brighterdentalcare.com and www.brighterdenal.com for dental management services and for their dental practices."

We conclude the allegations with respect to unlicensed use of protected marks and trade names clearly fall within the trademark infringement exclusion and those claiming unlicensed use of internet domain names clearly fall within the domain names exclusion. As noted, defendants rely on the exception for allegations of infringement of another's trade dress. They fail, however, to identify any allegations in the underlying complaint that can reasonably be interpreted as asserting a claim for trade dress infringement.

"Trade dress" has been defined as "the total image or overall appearance" of a product or business. Fair Wind Sailing, Inc. v. H. Scott Dempster, 764 F.3d 303, 308 (3d Cir. 2014). It has also "been described by the Supreme Court as the 'design or packaging of a product' which has acquired a 'secondary meaning' sufficient 'to identify the product with its manufacturer or source.'" Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP, 423 F.3d 539, 547 (6th Cir. 2005) (quoting TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23, 28 (2001)). To recover for trade dress infringement, a party must prove "(1) the trade dress is not functional; (2) the trade dress is distinctive in the marketplace and has acquired 'secondary meaning,' thereby indicating the source of the goods; and (3) the trade dress of the accused product is confusingly similar." Gen. Motors Corp. v. Lanard Toys, Inc., 468 F.3d 405, 414 (6th Cir. 2006).

The complaint in the New Jersey action does not describe any intellectual property rights allegedly violated as trade dress or plead any of the elements required to prove a prima facie case of trade dress infringement. In sum, defendants fail to identify any alleged advertising injury beyond the unlicensed use of the underlying plaintiffs' trademarks and domain names, which are unambiguously excluded under each of the policies. Defendants are therefore

not entitled to coverage in the New Jersey action under the general liability policies.

B.

Defendants also argue the exclusion relating to advertising injury "arising out of a breach of contract" does not apply because the new practices "never entered into contracts of any kind with BDCMS" and neither of the Singers "ever executed a contract with BDCMS regarding intellectual property." Similarly, they contend the new practices "advertised allegedly using BDCMS's [intellectual property] without entering into a contract. That is advertising injury and not a breach of contract." Defendants further assert the "arising out of a breach of contract" exception should be read as applying "only when an insured breaches a contract that it made." (emphasis in original). Finally, they contend the underlying agreements were illegal and plaintiffs were therefore required to raise that defense "as part of the defense they wrongly denied to the [defendants]." We are, again, unpersuaded by these arguments.

As our Supreme Court has explained, the phrase "arising out of" in insurance policy exclusions "has been read expansively to define the link between the conduct and the covered activity as 'originating from,' 'growing out of' or having a 'substantial nexus.'" Flomerfelt, 202 N.J. at 452 (quoting Am.

Motorist Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 35 (1998)); see also Tinplate Purchasing Corp., 743 F.Supp.2d at 412 ("The 'substantial nexus' test has become the standard test for interpreting the phrase 'arising out of' as it is used in New Jersey insurance policies.").

Here, BDC transferred all of its intellectual property rights to BDCMS, which then licensed the use of that intellectual property to the original practices. The trademark assignment attached to the acquisition agreement expressly precluded BDC, later Regnis, from using the intellectual property in connection with any entity it owned or controlled absent express permission under an MSA. Additionally, the MSAs provided that, upon termination, defendants "shall . . . immediately cease use of all Licensed [intellectual property]," and defendants agreed to use the licensed intellectual property "in accordance with the terms of this Agreement."

We reject defendants' argument that the court improperly construed the "arising out of a breach of contract" exclusion broadly because neither the Singers nor the new practices executed a contract with BDCMS regarding intellectual property. Although the new practices were not parties to the acquisition agreement and did not execute MSAs with BDCMS, their use of BDCMS's intellectual property was at all times governed by the acquisition

agreement and the MSA's, and the alleged personal and advertising injury arose from breaches of those agreements. Furthermore, the underlying plaintiffs alleged the new practices used the intellectual property pursuant to either an oral agreement or an implicit contract, as those practices paid the fees necessary to license the intellectual property.

We are therefore satisfied, under the facts presented, there was a substantial nexus between defendants' unlicensed use of BDCMS's intellectual property and the parties' contracts. Simply put, all of defendants' unlicensed use of BDCMS's intellectual property directly violated the acquisition agreement and the MSAs. Additionally, we observe it would be an anomalous result to allow a breach of contract—the Singers' failure to execute MSAs for the new practices—to preclude application of the "arising out of a breach of contract" exclusion.

To the extent defendants contend they are entitled to coverage because the contracts were illegal and void, it does not appear they raised that argument before the Special Master or the court. We generally decline to consider questions or issues not presented below when an opportunity for such a presentation is available unless the questions raised on appeal concern jurisdiction or matters of great public interest. Nieder v. Royal Indem. Ins. Co.,

62 N.J. 229, 234 (1973). We are satisfied neither exception applies here. In any event, defendants do not specify how the contracts were illegal, merely alleging that the legality of the contracts was contested in the underlying actions, and that they were thereby entitled to coverage as a result. Their contentions are also undermined by section 6.4 of the MSA's, which required modification of those agreements to comply with applicable law in the event any terms therein were deemed to be illegal.

IV.

Defendants also claim the court erred in granting summary judgment to Selective and Foremost with respect to the New York action. They specifically contend the underlying complaint contained claims of personal and advertising injury by way of disparagement, which is a tort under New York law independent of breach of contract. According to defendants, the claims were therefore covered and not subject to the "arising out of a breach of contract" exclusion.

Defendants further argue the holding in Tinplate Purchasing Corp., 743 F.Supp.2d at 415, relied upon by the Special Master and the court, "has never been accepted in any published opinion in New Jersey" and the fundamental reasoning of that opinion is incorrect. Additionally, they maintain "the

allegations in the New York case do not establish the required nexus under [Tinplate Purchasing Corp.], even if it is assumed that the standard applies." We disagree.

In Tinplate Purchasing Corp., the insurer sought a "declaratory judgment that it had no duty under general liability policies to defend or indemnify insureds" in an underlying action in which the plaintiffs alleged the insureds had breached licensing agreements and engaged in defamation and interference with prospective economic advantage. Id. at 406, 408-09. Specifically, the "cause of action for defamation . . . allege[d] that the . . . allegations of breach of contract also constitute[d] libel and slander." Ibid.

The insurance policy in that case provided coverage for "personal and advertising injury" but excluded coverage for those injuries "arising out of a breach of contract." Id. at 411. Applying the "substantial nexus" test under New Jersey insurance law, see American Motorists Ins. Co., 155 N.J. at 35, the court determined the exclusion applied and rejected the insureds' contention "that the tort claims [were] 'separate and distinct' from the breach of contract claims." Tinplate Purchasing Corp., 743 F.Supp.2d at 411, 414.

The court explained the tort and contract claims in that case were "inextricably linked because the tort claims against defendants ar[o]se from the

same essential facts and circumstances as those which underlie the breach of contract claims." Id. at 414. The court reasoned "[i]n the absence of the license agreements and their alleged breach, there would be no defamation or tortious interference claims." Ibid. Similarly, the court explained, all of the underlying "claims, had they been proven, would have been engendered by conduct in violation of the explicit terms of the [l]icense [a]greements." Ibid.

Here, the parties agree that the New York action implicated only the policy provision covering "[o]ral or written publication, in any manner, or material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." In that action's amended complaint, the underlying plaintiffs alleged, "contrary to their obligations under the Acquisition Agreement, the Singers disparaged [p]laintiffs in an effort to create a wedge between the Company and the dentists and the Company's other employees so as to prevent [p]laintiffs from succeeding if they sought to continue the Company operations without the Singers."

The complaint relied on a provision of the acquisition agreement that included a non-disparagement clause. Additionally, as part of the first cause of action set forth in the complaint, the underlying plaintiffs alleged, "[t]he Singers

and R[egnis] have breached the Acquisition Agreement by . . . disparaging the Company and its members and affiliates."

As in Tinplate Purchasing Corp., the underlying contract and tort claims in the New York action were "inextricably linked" and "ar[o]se from the same essential facts and circumstances." Id. at 414. In other words, plaintiffs could not have pled a tort cause of action for disparagement without alleging facts that also gave rise to a cause of action for breach of contract.

We are persuaded by the logic of Tinplate Purchasing Corp. and are therefore satisfied the significant nexus between the claims allows the disparagement claim to be attributed to the breach of contract claim for purposes of the "arising out of breach of contract" exclusion. Accordingly, as in Tinplate Purchasing Corp., defendants are not entitled to coverage for the disparagement claim in the New York action.

V.

Finally, defendants argue the court erred by granting USLI summary judgment with respect to the New York action. They contend USLI's policy covered the "wrongful acts" alleged against the Singers, specifically breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty. Defendants further maintain the court erroneously applied the

insured versus insured and percentage shareholder exclusions to preclude coverage. We address both exclusions and conclude they both apply to preclude coverage in the New York action.

A.

Defendants argue the percentage shareholder exclusion did not apply because two of the plaintiffs in the underlying action, BDIP Holdings and Topspin, did not own, beneficially or otherwise, any of BDCMS's voting stock. They contend USLI failed to present evidence that either of these entities "received even a dollar of return on their investment or that any lower level of corporate ownership was obligated to pass such benefits to more distant levels of corporate affiliates." Further, according to defendants, it is contrary to their objectively reasonable expectations to impute ownership to corporate entities "removed by two levels or more from shares in the insured organization." Finally, they argue they are entitled to coverage because USLI failed to provide a definition for the term "beneficially" and that term is so vague that it should be construed against application of the exclusion. We reject all of these arguments.

When interpreting an insurance policy, courts should generally give the policy's words their "plain, ordinary meaning." Wear v. Selective Ins. Co., 455

N.J. Super. 440, 453 (App. Div. 2018). A genuine ambiguity in an insurance policy exists "where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Lee v. Gen. Accident Ins. Co., 337 N.J. Super. 509, 513 (App. Div. 2001). However, there is no ambiguity merely because two conflicting interpretations of a provision are advanced by the parties. Rosario v. Haywood, 351 N.J. Super. 521, 531 (App. Div. 2002).

"Beneficially" is not defined in USLI's policy. "Beneficial," however, is defined in Black's Law Dictionary (11th ed. 2019), as "[f]avorable; producing benefits; having a helpful, useful, or advantageous effect," and "consisting in a right that derives from something other than legal title." Additionally, "beneficial owner" is defined as a "corporate shareholder who has the power to buy or sell the shares, but who is not registered on the corporate books as the owner," and someone "recognized in equity as the owner of something because use and title belong to that person, even though legal title may belong to someone else." Black's Law Dictionary (11th Ed. 2019).

Applying the "plain, ordinary meaning" of the terms "beneficial" and "beneficial owner," see Wear, 455 N.J. Super. at 453, we are satisfied BDIP Holdings and Topspin were both beneficial owners of more than ten percent of

BDCMS's voting securities for the purposes of the percentage shareholder exclusion. As described above, Topspin formed BDIP and BDIP Holdings as an "investment vehicle for ownership of BDC[MS]." The corporate structure granted 59.1% ownership of BDCMS to BDIP, 100% ownership of BDIP to BDIP Holdings, and 60.7% ownership of BDIP Holdings to Topspin. It is clear through that structure Topspin and BDIP Holdings have the ability to exercise significant control over BDCMS through BDIP's direct ownership of BDCMS's voting securities.

Additionally, Topspin maintained rights to control BDCMS and supermajority voting power on its board of directors. Even defendants conceded below that BDCMS was effectively dominated by Topspin and Topspin controlled a majority of the votes on BDCMS's board of directors. Thus, we agree with the Special Master and the court that Topspin and BDIP Holdings exercised controlled over, and beneficially owned, more than ten percent of BDCMS's voting securities, such that USLI was not liable for loss arising from claims by those entities.

B.

Defendants also argue that the insured versus insured exclusion, although applicable to BDCMS, was not applicable to BDIP, BDIP Holdings and Topspin.

As a procedural matter, defendants claim USLI's initial reservation of rights letter only stated the exclusion barred coverage with regard to the claims brought by BDCMS and it was not until USLI filed its summary judgment motion that it sought to apply that exclusion to the claims brought by all the underlying plaintiffs.

Although defendants are correct that an affirmative defense that is not pled or raised in a timely manner is deemed waived, Rule 4:5-4, their contention USLI failed to timely assert the insured versus insured exclusion as to all of the claims in the New York action is contrary to the record. USLI first raised the exclusion with respect to BDCMS's claims in its initial reservation of rights letter. USLI then raised the exclusion as a defense to the Singers' third-party complaint, extending the exclusion to preclude coverage for all of the underlying claims. Moreover, Matt Rubin, a USLI coverage specialist, stated at his deposition that it was USLI's position that the insured versus insured exclusion barred coverage of the claims made by all the underlying plaintiffs.

Additionally, defendants do not allege they were prejudiced by USLI's failure to extend the exclusion to the non-insured plaintiffs sooner. See Reliance Ins. Co. v. Armstrong World Indus., Inc., 292 N.J. Super. 365, (App. Div. 1996) (To determine whether an insurer should be estopped from asserting coverage

exclusions "because of prejudice to the insured, the test is whether the insurer's acts or omissions 'constitute[d] a material encroachment upon the rights of an insured to protect itself by handling the claim directly and independently of the insurer.'") (quoting Griggs v. Bertram, 88 N.J. 347, 359 (1982)). We therefore reject defendants' procedural argument.

Substantively, defendants argue Topspin, BDIP, and BDIP Holdings were not named insureds under the USLI policy or acting at the behest of BDCMS. According to defendants, those entities are "remote investors," and their claims are independent of BDCMS's claims and "do not depend on the existence of BDCMS." They contend "BDI[P] Holdings and Topspin could not bring an action on behalf of BDC[MS] because they were not shareholders in BDC[MS]." We disagree.

The purpose of the insured versus insured exclusion "is to exclude both of collusive suits . . . and of suits arising out of those particularly bitter disputes that erupt when members of a corporate, as of a personal, family have a falling out and fall to quarreling." Level 3 Commc'ns, Inc. v. Fed. Ins. Co., 168 F.3d 956, 958 (7th Cir. 1999) (citations omitted). As we have explained:

> The insured [versus] insured exclusion was, reportedly, the insurance industry's "reaction to several lawsuits in the mid-1980s in which insured corporations sued their own directors to recoup operational losses caused by

> improvident or unauthorized actions." [Biltmore Assocs., LLC v. Twin City Fire Ins. Co., 572 F.3d 663, 668 (9th Cir. 2009); New Applemann Law of Liability Insurance § 22.06(2)(c) (2017)]. These suits thus extended liability coverage to intra-company claims and transformed the nature of the insurance; specifically, they "turned liability insurance into casualty insurance, because the company would be able to collect from the insurance company for its own mistakes, since it acts through its directors and officers." [Biltmore Assocs., 572 F.3d at 669].
>
> [Abboud v. National Union Fire Insurance Co. of Pittsburgh, 450 N.J. Super. 400, 411-12 (App. Div. 2017).]

Here, we reject defendants' contentions Topspin, BDIP, and BDIP Holdings are "remote investors" and that their claims are independent of BDCMS's. All of the causes of action in the first amended complaint allege either violations of agreements—specifically the acquisition agreement, operating agreement, and MSAs—executed between defendants and BDCMS or injury directly suffered by BDCMS. We therefore agree with the Special Master that the non-insured plaintiffs' claims are derivative of BDCMS's.

Additionally, we are satisfied the circumstances presented here constitute the type of corporate family dispute for which the exclusion is intended to apply. See Level 3 Commc'ns, Inc., 168 F.3d at 958. As noted, the underlying suit alleges injuries suffered by BDCMS due to the actions of its officers and

directors—the Singers. See Abboud, 450 N.J. Super. at 411-12. The fact that Topspin, BDIP, and BDIP Holdings, all of which exert substantial control over BDCMS, are not named plaintiffs in the New York action does not change the nature of the parties' dispute.

Accordingly, under the circumstances presented here where non-insured plaintiffs' claims are derivative of the insured plaintiff's claims, the non-insured plaintiffs effectively control the insured plaintiff, and applying the insured versus insured exclusion aligns with that exclusion's historical purpose, we conclude the exclusion applies notwithstanding the inclusion of the non-insured plaintiffs on the complaint.

To the extent we have not specifically addressed or referenced any of defendants' remaining arguments, it is because we have concluded they are without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.