

# Selective Owed No Defense For E-Candle IP Row: 8th Circ.

By **Jeff Sistrunk**

Law360, Los Angeles (March 26, 2015, 6:24 PM ET) -- Selective Insurance Co. had no duty to defend an electronic candle maker in a suit claiming the policyholder infringed on another company's trademark, the Eighth Circuit affirmed Thursday, holding that the underlying complaint didn't allege an advertising injury that was potentially covered under the policy.

Smart Candle LLC had argued that it was entitled to a defense under the Selective policy because its company name functions as a slogan, and the policy covers injuries resulting from the infringement of another company's slogan in an advertisement. A three-judge panel of the appeals court was unconvinced by Smart Candle's reasoning.

"Because there are no allegations in the complaint — in either substance or form — regarding misuse of a slogan, Selective properly concluded that its duty to defend had not been triggered," Circuit Judge Jane Louise Kelly wrote for the panel.

Smart Candle sells LED-based flameless candles and commercial lighting systems internationally. In October 2011, Excell Consumer Products sued Smart Candle, alleging that the company's use of the "Smart Candle" trade name and trademark infringed its intellectual property rights.

Smart Candle requested a defense from Selective, which insured the company between October 2010 and October 2012, but the insurer denied coverage, according to court papers. The policy's "personal and advertising injury" section provided coverage for injuries resulting from the policyholder "infringing upon another's copyright, trade dress or slogan in [its] advertisement," and none of Excell's allegations fell into those categories, Selective contended.

Selective filed suit against Smart Candle in Minnesota federal court in April 2013, seeking a declaration that it had no duty to defend or indemnify the electronic candle maker in the underlying litigation. Excell prevailed on its claims against Smart Candle several months later.

Smart Candle counterclaimed against Selective for breach of contract, saying the insurer hadn't undertaken a reasonable investigation of Excell's claims. According to Smart Candle, the "Smart Candle" name functions as a slogan because it educates customers about the company's goal "to promote a line of battery-operated candles as a safe, economical alternative to a real wax candle."

The district court found that no reasonable jury could conclude that Excell had sued for slogan infringement, and further held that Selective had no duty to investigate beyond the allegations in Excell's complaint to determine if its duties to defend and indemnify had been triggered.

In affirming the lower court's decision, the Eighth Circuit panel rejected Smart Candle's assertion that the company name functions as a slogan. "Smart Candle" conveys no information about the company's products, the panel said.

"The words simply are the trademarked name of the company, used for product recognition," Judge Kelly wrote.

The panel unfavorably compared Smart Candle's posture to that of [Nike](#).

"The trade name of this multinational corporation is recognizable, and another company using that name easily could be confused with the purveyor of athletic apparel," Judge Kelly wrote. "Nike also has a slogan — 'Just Do It' — which serves as an 'attention-getting' catchphrase that generates product recognition beyond the trade name."

While a trademark can also be a slogan under certain circumstances, that isn't true in the instant case, according to the panel. Excell specifically claimed trademark and trade name infringement, and made no allegations that could be construed as accusing Smart Candle of slogan infringement, the panel said.

Judges Raymond W. Gruender, Bobby E. Shepherd and Jane Louise Kelly sat on the Eighth Circuit panel.

Smart Candle is represented by Thomas H. Boyd and Bradley J. Walz of [Winthrop & Weinstine PA](#).

Selective is represented by William A. LeMire and Christina E. Vonderhaar of [Arthur Chapman Kettering Smetak & Pikala PA](#).

The case is Selective Insurance Co. of America v. Smart Candle LLC, case number [14-1356](#), in the U.S. Court of Appeals for the Eighth Circuit.

--Editing by Emily Kokoll.