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11th Circ. Says Chicken Eatery Trade Dress Row Is Covered

By **Joe Van Acker**

Law360, Los Angeles (May 29, 2015, 2:46 PM ET) -- The Eleventh Circuit affirmed Thursday that Maiden Specialty Insurance Co. can't duck coverage for a Miami grilled chicken restaurant accused of creating a "replica" of a rival, finding the insurer shot itself in the foot by admitting its policy covered the underlying trade dress case.

The ruling upheld a previous decision denying Maiden's bid to amend its complaint after missing the deadline to do so, and leaves the insurer on the hook for policyholder Three Chefs & A Chicken Inc.'s attorneys' fees.

Alejandro Brito of Zarco Einhorn Salkowski & Brito PA represents Chicken Kitchen USA LLC, which settled its allegations against Three Chefs after Maiden filed its suit in July 2012. He told Law360 on Friday that the insurer had blundered by continuing to claim that its policy didn't cover the claims against Three Chefs even after Maiden acknowledged several times that the commercial general liability policy did cover trade dress infringement claims.

"It really surprised us that Maiden continued to go down the path of arguing that there was no coverage," Brito said. "We knew what the policy stated, and we knew what the law was."

Chicken Kitchen is now pursuing claims against Maiden, accusing the insurer of denying, in bad faith, coverage for the restaurants' settlement.

That case was stayed pending the Eleventh Circuit's decision, and Brito said Friday that he is moving forward with a motion to lift that stay.

The underlying dispute dates back to 2002, when Chicken Kitchen entered into a franchise agreement with The McDonnough's Investment Group Inc.

Chicken Kitchen terminated the agreement five years later, prompting the McDonnoughs to open a competing restaurant down the street from their former franchise.

The McDonnoughs' new restaurant, Three Chefs, ripped off Chicken Kitchen's secret marinade, menu items and color scheme, according to Chicken Kitchen's 2012 complaint, which asserted claims for trade dress infringement and breach of contract, among others.

The restaurants reached a consent agreement later that year, with Chicken Kitchen agreeing to drop its other claims in exchange for Three Chefs' accepting that it had infringed its rival's intellectual property.

Eric Berger of Koppel & Associates PA represents Three Chefs and told Law360 that he notified Maiden in November 2012 that the competing restaurants had reached a consent agreement, but Maiden made only a belated effort to amend its complaint to reflect its new position that

Three Chefs had breached its contract with the insurer by entering into the settlement.

U.S. District Judge Joan A. Lenard said Maiden didn't show good cause for its failure to meet the Dec. 7, 2012, deadline and denied its motion while granting summary judgment to Three Chefs.

On appeal, Maiden argued that **it needed more time** after being notified of the settlement to assess the agreement and determine whether it gave rise to other coverage defenses, but the Eleventh Circuit disagreed Thursday.

Aside from the fact that Maiden had said during discovery that its policy does cover trade dress infringement claims, Judge Lenard had not abused her discretion by denying Maiden's motion to amend, the circuit court said.

However, the appeals court also denied Three Chefs' cross-appeal seeking more attorneys' fees.

Representatives for Maiden did not respond to requests for comment Friday.

U.S. Circuit Judges Stanley Marcus and Charles R. Wilson and U.S. District Judge Harvey E. Schlesinger sat on the panel for the Eleventh Circuit.

Maiden is represented by Billy Richard Young, Adam Duke, Megan M. Hall, Katina M. Hardee and Courtney F. Smith of Young Bill Roubos & Boles PA.

The appellees are represented by the Law Office of Richard S. Ross, Eric Lowell Berger of Koppel & Associates PA, and Alejandro Brito, Gabriel E. Estadella and Alaina B. Siminovsky of Zarco Einhorn Salkowski & Brito PA.

The case is Maiden Specialty Insurance Co. v. Three Chefs & A Chicken Inc. et al., case number 14-11574, in the U.S. Court of Appeals for the Eleventh Circuit.

--Additional reporting by Carolina Bolado. Editing by Edrienne Su.

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