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THE OTHER "PERSONAL INJURY": COVERAGE B OF THE CGL POLICY

BY JEFFREY W. STEMPEL, ESQ.



Almost all laypersons and probably most lawyers think of all torts as personal injury actions. But in matters of insurance coverage, common tort actions emerging from an automobile collision, a slip-and-fall, a product liability claim or a defective construction suit are matters of bodily injury and fall under Coverage A of the standard commercial general liability (CGL) policy purchased by most businesses.

Because the vast bulk of tort and insurance coverage litigation concerns Coverage A bodily injury, the CGL policy's Coverage B—personal and advertising injury liability—tends to be overlooked. Although obtaining insurance under Coverage B requires more threading of the needle by policyholder defendants seeking coverage, it can, where apt, provide important protection, including a defense against a plaintiff's entire lawsuit, because the general rule is that if even one claim in a complaint is potentially covered, the CGL insurer must defend the entire case (at least until the potential for coverage is eliminated).

It was this aspect of insurance law that enabled Los Angeles Lakers owner Dr. Jerry Buss to obtain an entire defense of what was largely a business/contract dispute (26 of the claims

in the complaint), something ordinarily not covered under a standard form CGL policy. But a 27th claim for defamation implicated the personal injury provisions of the policy, and Buss received a complete defense to the suit (which eventually settled) that involved more than \$1 million in counsel fees.

The insurer sought reimbursement for the defense costs that did not involve the defamation claim. In *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997), the California Supreme Court stated that insurers had this right, provided they could adequately differentiate what was spent defending the respective claims, a position dividing the jurisdictions and rejected by the Supreme Courts of Illinois and Pennsylvania.¹

Even if Nevada should eventually follow the *Buss* approach,² a policyholder can benefit in this type of situation by at least obtaining an insurer-provided defense and delay its ultimate payment of some portion of counsel fees. In addition, in many cases, it will be difficult to sufficiently separate counsel fees spent on a potentially covered claim versus one that has no potential for coverage, which even under the California approach requires the defending insurer to pay for the entire defense.

For that reason, a defendant facing what may look like a commercial dispute with no bodily injury or tangible, physical property damage (and hence no potential CGL policy coverage under the bodily injury/property damage provisions) should be alert to the prospect that the face of the complaint contains one or more allegations trespassing, defamation or misleading advertising claims that could fall within Coverage B. It states that the CGL insurer will pay those sums that the insured

becomes legally obligated to pay as damages, because of “personal and advertising injury” to which this applies ... [and which is defined as including]: Injury, including consequential “bodily injury,” arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of materials that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person’s right of privacy;
- f. The use of another’s advertising idea in your “advertisement” [defined as set forth below]; or
- g. Infringing upon another’s copyright, trade dress or slogan in your advertisement.

An “advertisement” is defined 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.” It includes notices published on the internet “or on similar electronic means of communication,” but as regards websites, “only that part of a website” that involves the policyholder’s “goods, products or services for the purpose of attracting customers or supporters” is considered an advertisement.

The long list of things that count as personal or advertising injury is offset by a longer list of 16 exclusions stating that Coverage B “does not apply to:”

1. Knowing Violation of the Rights of Another
2. Material Published With Knowledge of Falsity
3. Material Published Prior to the Policy Period
4. Criminal Acts
5. Contractual Liability
6. Breach of Contract
7. Quality Or Performance of Goods—Failure to Conform to Statements
8. Wrong Description of Prices
9. Infringement of Copyright, Patent, Trademark or Trade Secret
10. Insureds in Media and Internet Type Business
11. Electronic Chatrooms or Bulletin Boards
12. Unauthorized Use of Another’s Name Or Product
13. Pollution

14. Pollution-Related [Matters]
15. War
16. Distribution of Material in Violation of Statutes

Because these provisions are exclusions removing otherwise applicable coverage, the exclusions are construed narrowly and strictly against the insurer, with the insurer bearing the burden of persuasion to show the applicability of the exclusion. Where exclusionary text is unclear and cannot be clarified by surrounding circumstances, it is resolved against the drafter of the policy, which of course is almost always the insurer. However, most of these exclusions have been deemed by courts to be sufficiently clear most of the time and thus make for a situation in which personal and advertising injury coverage has relatively limited scope and use for policyholders when compared to the more prevalent bodily injury coverage.

A fairly accurate summary is that Coverage B applies where a policyholder is accused of negligently or recklessly disparaging a plaintiff or injuring a plaintiff through statements (e.g., defamation that does not fall within an exclusion)

or misleading advertising (e.g., creating consumer confusion, disparaging a competitor) in ways that do not involve copyright or patent infringement. In addition to defamation coverage that may be valuable to commercial defendants, the trespass coverage of the CGL policy can be valuable in suits

regarding property rights of land or commercial facilities, so long as there was no criminal conduct or specific intent to inflict injury (e.g., the alleged trespasser assumed it had the right to expand the warehouse, etc.).

As previously noted, Nevada Supreme Court law on Coverage B is scarce. Only one insurance coverage case even mentions “advertising injury,” and that is only in passing while quoting the policy.³ Only a dozen District of Nevada federal court opinions mention the term, also usually only in passing.

The substantive local precedent that exists has tended to support insurer efforts to keep coverage confined.⁴ Mention of personal injury in caselaw is much more extensive, but in these decisions, the court is almost always referring to bodily injury rather than the insurance policy concept of personal injury coverage.

Anything resembling a full discussion of the nuanced world of Coverage B is beyond the scope and space limitations of this article.⁵ In addition, umbrella liability insurance policies may provide coverage of some personal and advertising injury matters excluded under the CGL policy, which provides primary coverage. Most umbrella policies do not require the insurer to defend the case, but include reimbursement of the policyholder’s defense costs as well as payment of judgments or settlements (up to policy limits) as part of the “ultimate net loss” covered by the umbrella policy.

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When defending litigation, particularly business litigation, counsel should always review all the defendant's liability insurance policies and consider the prospects for coverage under the less well-known concept of personal injury. **NL**

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1. See RANDY J. MANILOFF & JEFFREY W. STEMPEL, *GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE* Ch. 7 (3rd ed. 2015) (noting division of states on the issue and no Nevada Supreme Court precedent but some federal caselaw exists supporting recoupment).
2. A mistaken one in my view, see JEFFREY W. STEMPEL & ERIK S. KNUSTEN, *STEMPEL AND KNUSTEN ON INSURANCE COVERAGE* §9.03 (4th ed. 2016) (criticizing recoupment as inconsistent with CGL policy's commitment to defend entire case against policyholder), and that of the American Law Institute (see *RESTATEMENT OF THE LAW OF LIABILITY INSURANCE* §21(Tent. Draft No. 1, April 11, 2016) (rejecting recoupment unless specifically provided for in the policy).
3. See *Century Surety Ins. v. Casino West, Inc.*, 329 P.3d 614 (Nev. 2014) (finding claim against hotel for carbon monoxide poisoning of guest not barred by pollution exclusion in Coverage A (Bodily Injury) of CGL policy).
4. See, e.g., *American Family Mutual Ins. Co. v. Beasley*, 2012 U.S. Dist. LEXIS 14245 (D. Nev. Feb. 6, 2012) (allegations that former employee misappropriated customer lists not within advertising injury coverage; such lists involve an excluded trade secret claim and not advertising; matters such as violation of a non-compete clause do not involve misappropriation of advertising ideas or a style of doing business and fall outside Coverage B).

5. Counsel will find useful guidance in the specialized treatises DAVID A. GAUNTLETT, *INSURANCE COVERAGE OF INTELLECTUAL PROPERTY ASSETS* (2d ed. 2016) and IP ATTORNEY'S HANDBOOK FOR INSURANCE COVERAGE IN INTELLECTUAL PROPERTY DISPUTES (2d ed. 2015) (also by Gauntlett) as well as the multi-volume *Appleman* and *Couch* treatises and shorter general insurance treatises such as STEMPEL & KNUSTEN, *supra* §§14.05, 14.01; BARRY R.

OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* (17th ed. 2014); EUGENE R. ANDERSON, ET AL., *INSURANCE COVERAGE LITIGATION* Chs. 16, 18 (2d ed. and Supp. 2016); PETER R. KALIS, ET AL., *POLICYHOLDER'S GUIDE TO INSURANCE COVERAGE* Ch. 8 (2d ed. & Supp. 2016), and ALAN D. WINDT, *INSURANCE CLAIMS AND DISPUTES* (5th ed. 2007). See also RANDY J. MANILOFF & JEFFREY W. STEMPEL, *GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE* Ch. 19 (3d ed. 2015) ("Coverage for Privacy Claims and Cyber Risks"); Robert D. Anderson, *Viruses, Trojans, and Spyware, Oh My! The Yellow Brick Road to Coverage in the Land of Internet Oz*, 49 TORT & INS. L.J. 529 (2014) (but note that the road will be bumpy for policyholders in light of the internet-specific exclusions and definitional limitations found in Coverage B).

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