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Expert Analysis

The Next Insurance 'Big Top': Emerging Issues in 'Personal and Advertising Injury' Coverage

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Personal and advertising injury coverage is standard in commercial general liability insurance policies. While individual policy language varies, typical personal and advertising coverage extends to a variety of offenses, including:

- Publication of material that disparages a person or organization or violates privacy rights.
- Advertising that violates copyright, trade dress or slogan.

Recent case law in the area reveals several trending topics as courts continue their struggle to define the scope of insurer responsibility. One of the clearest trends to emerge is that, with greater frequency, courts broadly interpret personal and advertising injury provisions in CGL policies in order to trigger the insurer's duty to defend.

For insurers, this direction means they are more likely to find themselves part of the litigation show, whether or not they are actually part of the finale.

SCOPE OF DISPARAGEMENT COVERAGE: AN UNSETTLED QUESTION

Typical disparagement policy language obligates an insurer to cover any "oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." Courts interpreting this — or similar — policy language have reached divergent decisions regarding the scope of the insurer's liability.

For example, a 2011 decision from a California federal court held that an insurer had a duty to defend a furniture retailer under personal and advertising injury disparagement coverage.[1] The underlying action accused Michael Taylor Designs Inc. of using photos of a supplier's furniture in its brochure, but then allegedly "steering" customers toward "cheap imitation knockoffs" of the furniture once the customers came to the insured's showroom.[2]

"The very essence of the [alleged] injury ... was damage to the reputation of products that would result from consumers encountering 'cheap synthetic knock-offs' and believing them to be products manufactured and marketed by the [supplier]," U.S. District Judge Richard J. Seeborg of the Northern District of California noted.[3]

Therefore, he found that the insured's "steering" of customers toward the lesser goods implied oral publication, raising an allegation of disparagement and triggering the insurer's duty to defend.

Earlier, another California federal judge from the same district reached a similar conclusion in *National Union Insurance Co. v. Seagate Technology Inc.*[4]

Convolve Inc. sued Seagate for theft of proprietary technology, breach of confidentiality and nondisclosure agreements, fraud, and patent infringement.

Convolve had alleged that it had disclosed its proprietary technology for disk drives to Seagate during licensing discussions. Rather than bring those discussions to fruition, Seagate allegedly used the disclosure to create a similar, but inferior, disk drive technology.

Seagate then issued press releases announcing this new technology as its own. While none of the developer's assertions matched the claims covered in Seagate's insurance policy, the court considered whether any of the facts alleged could support a claim for product disparagement.

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Although none of the policyholder's press releases submitted in the insurance coverage litigation even referenced the developer or its technology, the court looked further. It dug into an interrogatory answer alleging that the policyholder falsely disparaged the developer. In light of the allegation that the developer's technology was superior to that used by the policyholder, the court found this sufficient to trigger the insurer's duty to defend.

The judge said the duty to defend is "so broad that it includes groundless, false and fraudulent claims."[5]

Decisions from other jurisdictions contradict these broad interpretations of the insurer's duty to defend for possible disparagement.

Zurich Insurance Co. v. Sunclipse[6] involved facts somewhat analogous to those in the Michael Taylor Designs case. The insured advertised a product it licensed from another party, but then substituted its own product to fill customer orders. An Illinois federal judge found the insurer had no duty to defend its policyholder because substituting products did not disparage the product that was replaced.

In *BASF AG v. Great American Assurance Co.*[7] the insured pharmaceutical company allegedly disparaged the author of a study that found that its drug was not "superior," as advertised.

After the trial court found a duty to defend and the primary insurer settled, the 7th U.S. Circuit Court of Appeals found no coverage under the applicable umbrella policies and strongly suggested that no coverage existed under the primary policy's disparagement coverage either.

And, when there is a clear exclusion from coverage for disparagement, at least one state court has been willing to enforce it.

In *Harleysville Mutual Insurance Co. v. Buzz Off Insect Shield LLC*,[8] an insect repellent manufacturer faced claims for false advertising from a competitor and sought coverage under its personal and advertising injury coverage. Both the North Carolina trial court and an appeals court found this triggered its insurer's duty to defend.

The state Supreme Court reversed, however, enforcing the policy's exclusion for injuries arising from the failure of the policyholder's products to perform as advertised.

The state high court concluded that the competitor asserted it suffered injuries because Buzz Off's product allegedly did not perform well. Buzz Off's statement that its product was equivalent or superior to others effectively disparaged those other products, and this type of disparagement fell squarely within the exclusion.

EMERGING EXPLANATIONS OF UNDEFINED TERMS

Courts also are dealing with a number of undefined terms in personal and advertising injury coverage, including trademark, trade dress, slogan, publish and privacy.

Trade dress and slogan covered; trademarks excluded

Policies usually define "personal and advertising injury" as including "infringing upon another's copyright, trade dress or slogan in the insured's advertisement," but then also usually exclude coverage for trademark infringement.

One California federal judge relied on an interrogatory answer alleging disparagement to trigger coverage and said the duty to defend is "so broad that it includes groundless, false and fraudulent claims."

Discerning the difference between covered slogans and excluded trademarks can be difficult. For example, in *Hudson Insurance Co. v. Colony Insurance Co.*,[9] the 9th Circuit found that the Pittsburgh Steelers' "Steel Curtain" trademark also served as a slogan.

In the case, both Hudson Insurance Co. v. Colony Insurance Co. insured All Authentic Corp. when it was sued by NFL Properties LLC for allegedly selling counterfeit NFL jerseys bearing the term "Steel Curtain."

Hudson defended All Authentic in the underlying action. but Colony denied that the claims fell within its policy's coverage. Hudson then sought equitable contribution from Colony for over $900,000 in defense costs it incurred.

The lower court agreed with Hudson and the 9th Circuit affirmed. Specifically, the appellate panel found that NFL Properties' allegations against All Authentic stated a claim for slogan infringement — and triggered the duty to defend — because, in addition to being trademark-protected, "Steel Curtain" met a common definition of a slogan as a "brief attention-getting phrase used in advertising or promotion."

A New York federal court also stretched its reading of a fundamental intellectual property term to initiate an insurer's duty to defend. In *Bridge Metal Industries v. Travelers Indemnity Co.*,[10] the policyholder sued its insurer to recover the costs it incurred defending against a trade dress infringement lawsuit.

The relevant policy defined advertising injury to include an "injury arising out of ... infringement of copyright, title or slogan."

Originally, the policy included "trade dress" in the definition, but it replaced "title" for "trade dress" through an endorsement. The policy never defined "title" or "trade dress."

The policyholder relied on a definition of "title" in the 1990 edition Black's Law Dictionary, but more recent editions of the book narrowed that definition, the court said, before concluding that none of the current definitions included trade dress.

Nonetheless, it found a duty to defend by relying on precedent from the 2nd Circuit, *Hugo Boss Fashions v. Federal Insurance Co.*,[11] which said the duty exists where there is uncertainty in the case law about whether a key term is ambiguous.

But, in *Interstate Bakeries Corp. v. OneBeacon Insurance Co.*,[12] a Missouri federal court found that an insurer had no duty to defend its policyholder in a trademark infringement action over the policyholder's promotional use of the phrases "Nature's Pride" and "Nature's Choice," its competitor's trademarks.

Policyholder Interstate Bakeries argued that these phrases also constituted slogans and triggered coverage, but the court refused to view a trademark-protected name as a slogan, finding that characterizing trademarks as slogans would render the policy's trademark exclusion meaningless.

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Defining publication and privacy

Personal and advertising injury policy language may cover "oral or written publication, in any manner, of material that violates a person's right or privacy." Courts have broadened the definition of what constitutes "publication" to find that the coverage applies.

For example, in *Norfolk & Dedham Mutual Fire Insurance Co. v. Cleary Consultants,*[13] a supervisor working for policyholder Cleary Consultants made sexually suggestive and inappropriate remarks to one of its employees. The employee sued Cleary, which then tendered its defense to its insurer. The insurer filed a declaratory judgment action seeking a ruling that it had no duty to defend Cleary.

Reversing a trial court's ruling in favor of the insurer, the Massachusetts Appeals Court ruled that the remarks invaded the employee's privacy and that the supervisor's speculation in front of others about the employee and her sex life constituted publication.

The court relied on a Massachusetts privacy statute to determine the scope of coverage for violation of the right of privacy.

Perhaps most interesting was the court's refusal to apply the policy's exclusion for privacy violations caused by the insured with knowledge that it would inflict personal injury. Although the employee had complained to the company president about her supervisor's unwanted sexual remarks, the court ruled that the president's knowledge could not be attributed to the company.

As a result, the court said the insurer had a duty to defend the corporation against a sexual harassment suit brought by the employee subjected to the harassing remarks.

NEW TECHNOLOGIES, PUBLICATION AND BREACH-OF-PRIVACY COVERAGE

Is there coverage when a computer hacker obtains personal information about an insured's customers? Does the hacking itself constitute "publication"? If not, would subsequent publication of the information by the hacker be sufficient to trigger coverage?

Insurers are about to see how the court system will answer these questions in a coverage dispute connected to a high-profile hacking incident.

In April 2011 the Sony PlayStation Network, Sony Entertainment On-line and Sony Pictures experienced a data security breach. Hackers accessed private information and account data for more than 100 million users of the Sony systems.[14]

In response to the class actions filed by consumers affected by the hacking, Sony's CGL insurers brought an action in New York state court, seeking a declaration that their policies did not cover the data breach.[15] Sony responded with a suit of its own in California, seeking a declaration of coverage.[16] Preliminary motions in both cases are still pending.

Wherever either case ultimately lands, any coverage decision reached will play an important role in examining the extent to which personal and advertising injury coverage extends into data breach claims.

Because of personal and advertising injury coverage's usual protections against publications that violate privacy, the Sony case will certainly contribute to the emerging definition of publication in the cyber arena — and the role an insured's intent regarding publication has to play.

While no one can yet say how the coverage questions at issue in the Sony hacking incident will be resolved, the applicable policy exclusions may ultimately shape the final decision. If any of the insurers excluded coverage for injuries arising from violation of statutes that regulate the transmission of personal information — an increasingly common exclusion — the illegal nature of the hacking may relieve the insurers of their duty to indemnify or defend.

Alternatively, if the victims have express or implied contracts with Sony, an exclusion for injuries arising from breach of contract could prove determinative.

Certainly, insurers and policyholders will continue to define their individual exposures for data breaches and associated cyber-related policy violations.

CONCLUSION

Insurers, policyholders and the courts have all struggled to find the outer boundaries of personal and advertising injury coverage. In many of the cases discussed above, the trial courts disagreed with the appellate courts, or the appellate courts disagreed with higher appellate courts.

If other jurisdictions adopt the 2nd Circuit's view in *Hugo Boss* that uncertainty in the case law — about the scope of coverage related to "trademark" or "slogan" or what constitutes "publication" — is sufficient to trigger a duty to defend, it will be very difficult for insurers to ever define the scope of their intended coverage.

While all courts agree that the duty to defend is broad, it still must have established parameters or else insurers and insureds will be forced into expensive and extensive coverage litigation.

Insurers are trying to be more precise in their policy language. For example, some provide coverage for infringement of a "trademarked slogan" rather than simply a "slogan." Others have drafted broad exclusions for injuries arising from any type of intellectual property infringement or for any lawsuits that contain a claim of patent infringement.

The same is true with respect to coverage for privacy violations, where multiple exclusions have been inserted for injuries "arising directly or indirectly out of any action or omission that violates or is alleged to violate" privacy-related statutes or regulations.

Ultimately, the development of intellectual property, defamation and personal privacy laws will influence personal and advertising injury coverage. As long as those areas of the law remain in flux, so will the scope of personal and advertising injury coverage.

NOTES

1 *Michael Taylor Designs Inc. v. Travelers Property Cas. Co. of Am.*, 761 F. Supp. 2d 904 (N.D. Cal., S.F. Div. Jan. 20, 2011).

2 *Id.*

3 *Id.*

4 *Nat'l Union Fire Ins. Co. et al. v. Seagate Tech.*, 2005 WL 756599 (N.D. Cal. Apr. 4, 2005).

5 *Id.* at * 8. But, in response to the insured's bad-faith claim, the court later said that the insured declination to defend was reasonable as a matter of law given the vagueness of the claim and the little evidence that existed regarding the alleged the disparagement. *Id.* at * 4.

6 *Zurich Ins. Co. v. Sunclipse Inc.*, 85 F. Supp. 2d 842 (N.D. Ill. 2000).

7 *BASF AG v. Great Am. Assurance Co.*, No. 04 C 6969, 2006 WL 1235943 (N.D. Ill. May 8, 2006), *rev'd*, 522 F.3d 813 (7th Cir. 2008).

8 *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield LLC*, 692 S.E.2d 605 (N.C. Apr. 15, 2010).

9 *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264 (9th Cir. 2010).

10 *Bridge Metal Indus. v. Travelers Indem. Co.*, 812 F. Supp. 2d 527 (S.D.N.Y. 2011).

11 *Hugo Boss Fashions Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 619-23 (2d. Cir. 2001).

12 *Interstate Bakeries Corp. v. OneBeacon Ins. Co.*, 773 F. Supp. 2d 799 (W.D. Mo. 2011).

13 *Norfolk & Dedham Mut. Fire Ins. Co. v. Cleary Consultants*, 958 N.E.2d 853 (Mass. App. Ct., Norfolk 2011).

14 About 60 consumer complaints have been consolidated in California federal court.

15 *Zurich Am. Ins. Co. v. Sony Corp. of Am.*, No. 651982/2011, *summons filed* (N.Y. Sup. Ct. July 20, 2011).

16 *Sony Comp. Entm't Am. v. Zurich Am. Ins. Co.*, No. 37-2011-00095115-CU-IC-CTL, *complaint filed* (Cal. Super. Ct., San Diego County July 27, 2011).

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