

No Harm, No Coverage—Personal and Advertising Injury Liability Coverage in the CGL (Part 1)

January 2007

Most of our experience with the commercial general liability (CGL) policy is with bodily injury or property damage claims. It is relatively easy to understand why liability may be imposed when someone receives an unexpected bump on the head or when their property is ruined by our actions.

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In other words, most claims involve physical harm to a person or their property. But what of allegations by a person or organization that certain legally protected rights have been violated which do not involve bodily harm or physical injury to tangible property? No coverage? Enter Coverage B—Personal and Advertising Injury Liability Insurance.

Coverage B—Personal and Advertising Injury Liability Insurance

For quite some time now, the standard Insurance Services Office, Inc. (ISO), CGL policy has included under Section I of the policy an entirely *independent* insuring agreement—Coverage B—Personal and Advertising Injury Liability. Not only does the Coverage B insuring agreement stand alone, 14 exclusions apply only to personal and advertising injury claims.

Not Completely Separate

But before we allow personal and advertising injury liability coverage to overpower the rest of the CGL, it is important to recognize that most other sections of the policy apply equally to Coverage B and Coverage A—bodily injury and property damage liability. For example, supplementary payments apply to both coverages, which is apparent from the supplementary payments title. Those persons or organizations with the status of insured under Section II—Who Is an Insured are also protected for personal and advertising injury liability claims covered by the CGL. Section III—Limits of Insurance addresses Coverage B: the CGL has a *separate* limit for personal and advertising injury claims (the limit applies to any one person or organization), but any claim paid under Coverage B will result in a reduction of the policy's general aggregate limit. Finally, Section IV—Commercial General Liability Conditions also applies to Coverage B.

Similarities to Coverage A—Bodily Injury and Property Damage

While Coverage B is independent and stands alone within the CGL policy, it is helpful to understand the promise of coverage is arranged in a manner similar to Coverage A.

The insurer promises to pay sums the insured is legally obligated to pay as damages because of personal and advertising injury. Similar to Coverage A, the insurer has the duty to defend (and right to defend) a suit seeking damages under this coverage; but there is no duty to defend when the insurance does not apply or when the applicable limit has been exhausted due to payment of judgments or settlements.

Of course, the insurer expressly reserves the right, at its discretion, to investigate and settle any Coverage B claim or suit—even if the policyholder does not agree to the settlement.

In an "occurrence" CGL policy, the offense (that is the alleged act that caused the injury resulting in the damages being claimed—such as false arrest) must be committed during the policy period; in a "claims-made" CGL policy, the claim for damages resulting from the offense must be made during the policy period, provided the offense itself was committed after the claims-made policy's retroactive date (if any).

To summarize, as long as the claim is for a covered personal or advertising injury offense, Coverage B responds much the same as Coverage A.

Personal and Advertising Injury—The Nature of a Claim

The intangible and legalistic nature of claims involving personal or advertising injury leaves many struggling to grasp what Coverage B is about. The difficulty in understanding the nature of a personal injury claim is further exacerbated by the legal community's use of the term "personal injury" to describe what the insurance industry has elected to call "bodily injury." Nonetheless, as explained in more detail below, an act that somehow violates or infringes on the rights of others, referred to in the policy as an offense, is the subject of personal and advertising injury liability coverage.

No Accident

For the most part, Coverage B claims involve intentional acts. That is, a person or organization alleged to have committed a personal or advertising injury offense usually intended their actions (but not necessarily the result of their actions). This concept is central to understanding personal and advertising injury claims—and is thus a factor that distinguishes it from Coverage A—Bodily Injury or Property Damage Liability claims. For Coverage A to apply, bodily injury and property damage must be caused by an "occurrence," which means, at minimum, an accident.

The term "occurrence" is irrelevant to Coverage B—it does not appear in the Coverage B insuring agreement or in the application of Coverage B limits. In other words, whether the claim is considered an "occurrence" or accident is not to be considered when determining whether an offense falls within the personal and advertising injury liability insuring agreement. That is not to say that the knowing violation of the rights of others will always be covered. But it is the Coverage B exclusions and not the insuring agreement that address the scope of coverage for intentional acts. Part 2 of this article will discuss the exclusions applicable to Coverage B—Personal and Advertising Injury Liability Coverage.

Personal and Advertising Injury—Definition

Possibly the easiest way to think, at least in the abstract, about personal and advertising injury claims is to remember that persons and organizations have legally protected rights that, if violated or infringed, may result in loss to them. The law often provides a remedy to those who suffer such loss—they may seek damages as compensation in a court of law from the person or organization alleged to have caused the loss.

Persons or organizations have numerous legally protected rights that arise from countless sources—including common law, statute, state constitutions, and the U.S. Constitution. Coverage B of the CGL policy does not attempt to protect an insured from violating *all the rights* of another; coverage is limited to *specifically listed acts of an insured*.

The Definition

For an act to be considered a personal and advertising injury offense, the act must fall within the policy definition of personal and advertising injury. Put another way, if the allegations do not fall within the definition of personal and advertising liability, they are not covered by Coverage B of the CGL. Some have described this as analogous to a "named peril" approach to coverage: the burden of demonstrating the possibility that an allegation falls within the definition of personal and advertising injury falls on the insured demanding protection. If the insured cannot meet this burden, the insurer generally has no obligation to respond.

Here is where Coverage B becomes difficult to understand—the definition of personal and advertising injury includes terminology that is quite legalistic. To determine whether an act committed by an insured falls within the seven listed offenses requires at least a basic understanding of rights being protected and what constitutes infringement or violation of such rights. The Coverage B exclusions applicable to the listed offenses, which will be discussed in Part 2 of this article, also have some of the same characteristics—the exclusions contain terms that have legal definitions (such as copyright, trademark, etc.) not included within the policy.

For Coverage B to apply, the offense must arise out of the business of the named insured. Further, if the claimant alleges bodily injury as a *consequence* of a covered offense, Coverage B will pay damages arising out of the consequential bodily injury. For example, while being wrongly detained for shoplifting, a customer of a department store suffers a heart attack. Personal and advertising injury coverage will respond to the damages for not only the wrongful detention but also the resulting physical harm (heart attack).

Personal and Advertising Injury—Covered Offenses

Providing the precise legal elements that are necessary for each offense is beyond what is intended by this article. Instead, what follows is a generic description to help promote a basic understanding of Coverage B. The descriptions of the offenses listed are summaries taken in part from certain definitions found in *Black's Law Dictionary* (8th ed.).

a. False arrest, detention or imprisonment;

Here the offense involves unjustified forcible restraint (arrest) or keeping a person against their will (detention). Imprisonment usually implies the detention is in prison. The offense is based largely on the deprivation of a person's right to liberty.

The actual range of this offense is considerable—it has been found in circumstances where a gas station attendant drained the water from the radiator of a person's car with the intent of keeping the person from leaving. Another case involved a practical joke in which an athlete's clothing was taken when he was in the shower, depriving him of the opportunity to leave the premises.

b. Malicious prosecution;

This offense involves the instituting of legal proceedings, either criminal or civil, against another without probable cause or proper cause. Malice is required (ill will is the motivation) and the proceeding must end favorably for the defendant. The successful defendant has this cause of action against the person or organization that wrongfully started the legal proceeding; the person or organization that brought the action (who now is a defendant in the malicious prosecution case) is covered by their CGL, subject to exclusions.

c. 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;

Wrongly expelling a person from their premises, wrongly entering their premises, or otherwise invading or preventing the private right to occupy their premises (including a room or dwelling) is the essence of this offense. Insurers generally take the position that these offenses are covered only if the eviction, entry, or invasion of the right of private occupancy is committed by the owner, landlord, or lessor. Exactly what is "wrongful" or an "invasion" is a matter of both fact and law that has to be considered in any claim scenario.

Invasion of the right of private occupancy was found when a hotel provided entry into a hotel room for a male business traveler that was already occupied by a female business traveler, who met the startled new occupant as she exited her shower. The hotel was found to have invaded the female business traveler's right to private occupancy.

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

The issue that is central to this offense is defamation: harm to a person's reputation resulting from a false statement. Slander is defamation by speech; libel is defamation in written or visual form. Disparagement is similar to defamation, but involves a comparison that detracts or discredits the goods, products, or services of another because of false statements.

Publication is a critical element to defamation or disparagement, and simply means that the false statements (either by speech, written or visual) have been made to third parties other than the person or organization whose reputation, goods, products, or services are allegedly harmed.

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

The concern of privacy continues to grow. Keeping secure medical records, financial information, and social security numbers, to name but a few, are major duties and concerns for both public and private organizations nationwide. The right of privacy (and the invasion of that right) is well established in common law. The following are four well recognized categories as respects invasion of privacy.

- Misappropriation of a person's likeness or name, usually for the commercial benefit of another

- Intrusion upon a person's right of seclusion or solitude, or intrusion into private affairs
- Use of publicity to place another in a false light, if a reasonable person would find it objectionable (the depiction does not have to be defamatory)
- Public disclosure of private facts, even if the information is true and not defamatory, if the revelation is embarrassing or otherwise reasonably objectionable

Found to be an invasion of privacy, specifically intrusion into private affairs, was unauthorized wiretapping and eavesdropping conducted by a large corporation against a critic and author who was preparing to release a book severely critical of the corporation's products.

To be covered, the last two offenses must be contained within the named insured's "advertisement," a term defined in the CGL policy. Advertisement is a notice broadcast or published to the general public (or specific target markets within the general public) about the named insured's goods, products, or services.

The purpose of the broadcast or publication must be for the purpose of attracting customers or supporters. Included in the definition of "advertisement" is material placed on the Internet as well as Web sites (but only that part of the Web site that is about the named insured's goods, products, or services).

f. The use of another's advertising idea in your "advertisement"; or

This is straightforward. If another person or organization alleges your organization is using their advertising ideas in your advertisements, Coverage B is triggered as this is a covered offense, further subject to the coverage exclusions.

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

Similar to the above, if the named insured is alleged to have, in their advertising campaign, infringed on the copyright, trade dress, or slogan of another, coverage exists under Coverage B, further subject to the coverage exclusions. Trade dress is a business style or image that is unique or distinctive. For example, a hamburger store with golden arches would probably be alleged to have infringed on the trade dress of another.

Real-Life Examples

The following are a couple of real-life examples that might bring to life some of the legal wrangling that often triggers the offenses included within the definition of personal and advertising injury liability coverage. This is not to suggest that the described actions are covered by Coverage B of the CGL policy, but are simply actions that fall within the rather abstract realm of violation of the rights of others.

***Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973)**

A freelance photographer, Donald Galella, who specialized in photographing well-known persons, was involved in a lawsuit with Jacqueline Kennedy Onassis, widow of the late President John F. Kennedy, and at the time wife of Aristotle Onassis. Mr. Galella was a self-described "paparazzo" (singular for paparazzi—literally, an annoying insect) who aggressively pursued photographs of the two Kennedy children, John and Caroline. His conduct included jumping into the path of John Kennedy riding his bicycle, interrupting Caroline at tennis, and invading their private schools.

U.S. Secret Service agents, assigned to protect Ms. Onassis and children, fearing for the physical safety of the children, ultimately arrested and interrogated Mr. Galella, who in turn brought an action against Ms. Onassis for false arrest and malicious prosecution, contending that Ms. Onassis ordered the arrest and prosecution, which included interference with his trade (a temporary restraining order was issued against Mr. Galella). After trial, the court dismissed Mr. Galella's claim and granted relief to Ms. Onassis, finding Mr. Galella to have engaged in, among other things, harassment, intentional infliction of emotional distress, and invasion of privacy. While Ms. Onassis was found to be a public figure, the court commented:

- Galella's action went far beyond reasonable bounds of newsgathering. When weighed against the de minimis public importance of the daily activities of the defendant [Onassis], Galella's constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable. If there was any doubt in our minds, Galella's inexcusable conduct toward the defendant's minor children would resolve it.

***Bennett v. Norban*, 151 A.2d 476 (1959)**

The plaintiff was shopping in a busy self-service department store, when she picked out a purse but could not find a cashier to wrap the purse for her. She moved to another aisle within the store, carrying the purse with her. In hurry to leave, she put the purse back and left the store without making a purchase. Outside the store, an angry store assistant manager caught up with her, blocked her path, and ordered her to take off her coat. After removing her coat, the assistant store manager asked her about the pockets on her dress, actually reaching into her pockets. Not finding anything, he then took her purse (one she had with her, not the one from the store) and emptied it out, searching through her personal items. Again not finding anything, he placed the items back into her purse, then went back into the store. People on the street had stopped to watch, much to the embarrassment of the women. The plaintiff brought the suit against the store, alleging, among other things, slander.

The court found in favor of the plaintiff in the matter of slander. The judge stated:

- The direction to remove her coat, the questions about her pockets, the action of feeling in them and then searching her purse: these events formed a dramatic pantomime suggested to the assembled crowd that the appellant [women] was a thief. We are satisfied to hold that the meaning of the entire incident suffered by the plaintiff, taken in the round, was slanderous.

Conclusion

While the above incidents may be adjudicated differently today, they do give some insight into the types of behavior that might result in litigation which makes Coverage B—Personal and Advertising Injury Liability important.

Stay tuned for Part 2 of this article.

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