# No Harm, No Coverage—Personal and Advertising Injury Liability Coverage in the CGL (Part 2)

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**Part 1 of this article examined the nature of Coverage B—Personal and Advertising Injury Liability Insurance as found in the December 2004 edition of the Insurance Services Office, Inc. (ISO), commercial general liability (CGL) policy. Part 2 deals with the exclusions to Coverage B.**

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In Part 1, we noted that several sections of the CGL policy applied to Coverage B in the same manner as they apply to Coverage A (Bodily Injury and Property Damage), such as the Duty to Defend, Who Is an Insured, and Supplementary Payments. But we also noted that Coverage B is not triggered by physical harm. Instead, it requires that an insured commit a listed "offense" for coverage to apply. In general, an "offense" involves a violation or infringement of the rights of others. Further an "offense" is often the result of an intentional act. The concept of an "occurrence" is irrelevant to Coverage B, which does not require personal or advertising injury be caused by an "occurrence."

That is not to suggest that intentional injury will be covered by Coverage B. However, eliminating coverage for intentional injury is accomplished by exclusions to coverage, not by limitations found in the Coverage B insuring agreement.

## List of Offenses

By way of review, the covered "offenses" are specifically listed and are found in the definition of "personal and advertising injury":

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 material 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"; or

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

## Exclusions—Coverage B

As noted in Part 1, not only are the offenses legalistic terms, the exclusions to coverage also tend to be legalistic and therefore difficult to understand. In view of this, the explanations in this article of the 14 exclusions to Coverage B will include an illustration as to when the exclusion might apply. Of course, the illustration is not the only situation in which the exclusion might apply, but is intended to assist in understanding the general meaning of the exclusion when read together with the Coverage B insuring agreement and the definition of personal and advertising injury.

### a. Knowing Violation of Rights of Another

This restriction to coverage is one of the prime exclusions intended to eliminate coverage for claims involving intentional injury. For the exclusion to apply, the insured must know their actions would violate the rights of another, and that violation would inflict personal or advertising injury. The exclusion applies whether the infliction was caused by the insured or caused by others under the direction of the insured.

**Illustration**

After a rancorous public debate at last week's town meeting, I am seething at one person who dared to question my motivations. When that person walked into my store, I immediately ordered him detained by my security personnel, accusing him of shoplifting, even though I knew that he had done no such thing. He later sues me for wrongful detention. Once I recover from my anger, and before an answer to the complaint is due, I admit that the only reason I detained him is because I was insulted by his comments at the town meeting debate. As I knew full well that I was violating his rights by detaining him, and that directing my security personnel to detain him would inflict injury upon him, my insurer has no obligation to defend or pay damages on my behalf. In this illustration, I intentionally inflicted injury on the store patron.

### b. Material Published with Knowledge of Falsity

As above, this exclusion is intended to eliminate coverage for intentional injury, but specific types of intentional injury—usually intentional libel or slander. If the insured knows the information being distributed is false, this exclusion eliminates coverage. As in the prior exclusion, there is no coverage here if the insured directly publishes or directs others to publish information the insured knows to be false.

It is worth pointing out that the exclusion only applies if the insured actually knows the injurious information is false. That the insured could have or should have known the injurious information was false probably does not rise to the level of knowledge by the insured. In short, as demonstrating actual knowledge is a factual matter, an insurer may well have to defend allegations of libel or slander until a finding of fact is made as to whether the insured did have actual knowledge.

**Illustration**

In a hotly contested bid situation for the Acme Manufacturing account, I am so frantic about writing this account that, against my better judgment, I include in my proposal to Acme that the competitor's insurer's A.M. Best rating is B-, even though I admit that I did check the ratings the day I wrote the proposal and found the competitor's insurer's rating had been upgraded 6 months earlier to A-. If the insurer brings legal action against me for libel, in this illustration, my insurer would not have to defend or pay any damages awarded to the plaintiff insurer against me as I knew the material that I published was false.

### c. Material Published Prior to Policy Period

As publications, for example an advertising campaign, may span over months or years, the intent of this exclusion is to limit the coverage to the policy in which the publication and thus the offense was first committed. If no prior coverage existed at the time of the first publication, then the intent is to avoid the policyholder obtaining retroactive insurance by purchasing coverage after suspecting they might have trampled on someone else's rights.

How courts have interpreted this exclusion is decidedly mixed, however. The issue is that while the intent appears to be to eliminate coverage for material published before the policy period, even if a subsequent publication of the same or similar material is published during the policy period, some courts find this interpretation less than compelling.

For example, in *P.J. Noyes Co. v. American Motorists Ins.*, 855 F. Supp. 492, 495–97 (D.N.H. 1994), the court denied an insurer's demand for summary judgment (applying New Hampshire law):

- … even though the alleged infringing term was first published prior to the policy inception—a material issue of fact existed because the alleged infringing term was also published after the inception of the policy and it was unclear which material the advertising injury arose out of.[1]

Other courts have interpreted this exclusion to apply regardless of which publication, the publication prior to or the publication during the policy, is alleged to have caused the injury—the determining factor is whether any of the injurious material was published prior to the policy. In the case of *Sam Z. Scandaliato & Assoc., Inc. v. First Eastern Bank & Trust*, 589 So. 2d 1196 (La. App. 1991), the court found:

- … prior publication exclusion applies and thus no duty to defend defamation claim where the plaintiff in the underlying suit alleged defamatory publications by insured were continuous over a number of years and covered several policies, but where first injurious publication was made prior to the effective date of each of the policies….[2]

Exactly how this exclusion will be interpreted depends to a large extent on the circumstances.

**Illustration**

In starting my new restaurant business, I began with an advertising campaign that included the slogan "Where's the beef?" As my business started to grow, I decided I should purchase CGL insurance, including Coverage B. Six months into the policy, I am served with a complaint that my "Where's the beef?" slogan has been misappropriated from Wendy's and that damages have been demanded for infringing on Wendy's slogan. Upon tender to my CGL insurer, the insurer discovered that the advertising campaign, including the infringing wording, was first published before I purchased coverage. Based on the "prior publication" exclusion, my insurer denies both defense and any payment of damages on my behalf because of the Wendy's complaint.

### d. Criminal Acts

As some offenses can also constitute criminal acts, coverage expressly eliminates coverage for such criminal acts. As with prior exclusions, this exclusion applies to criminal acts committed by the insured or committed at the direction of the insured. This exclusion has been scaled back a bit from past editions of the CGL, which eliminated coverage for criminal acts of *any insured*. The difference is that this exclusion does not reach those insureds not involved in the criminal acts, but who may still be held liable (such as by vicarious liability—an employer for an employee) for a criminal act.

**Illustration**

As an owner of an apartment complex, I lease several apartments to various local professors. I hear a rumor that one of my tenants has filed for a medical patent on a process that may significantly slow the aging process. As I see riches in my future, I hire an unsavory associate to burglarize the professor's apartment to search for her patent information. The tenant learns about my actions the next day and, in addition to going to the police to file a criminal complaint, brings a civil action against me for, among other things, wrongful entry into her premises. When arrested and questioned by the police, I confess immediately to my actions, hoping for lenient treatment. My insurer, who has received the civil complaint for wrongful entry, refuses to defend or pay any of my damages when they receive my confession from the police, as I have directed others to commit a criminal act.

### e. Contractual Liability

Simply put, Coverage B does not provide coverage for liability that the insured assumes in a contract or agreement. In other words, if my liability for a personal or advertising injury offense is based *solely* on my agreement to assume the liability of others via a hold harmless or indemnity agreement, no coverage exists under the CGL. However, if I would have been liable if the hold harmless or indemnity agreement did not exist, then the exclusion does not apply.

The contractual exclusion can be very problematic for several reasons. First, hold harmless and indemnity agreements often employ the term personal injury when they mean bodily injury. Second, it is not uncommon in a hold harmless and indemnity agreement to be so broad as to demand indemnity for "any and all liability." This might include personal and advertising injury offenses. Finally, some indemnity agreements expressly require indemnity for personal injury or advertising injury offenses.

A couple of solutions may be used, albeit with limited success as many insurers will not change this wording. One such solution is to have this exclusion eliminated entirely. This may not, however, completely solve the problem as some insurers attempt to restrict the phrase "legally obligated to pay" as meaning only an insured's tort liability and not liability that may arise out of contract.

A second solution, also limited, is to use the ISO endorsement Limited Contractual Liability for Personal and Advertising Injury (CG 22 74). Although the endorsement requires designating the contract or agreement to be covered, it does provide an affirmative grant of contractual liability coverage for personal and advertising offenses, *but only for the offenses of false arrest, detention, or imprisonment*. No other offenses assumed by contract are covered by this endorsement. Yet, it may be valuable if, as a security firm, you are required to indemnify the building owner and its tenants for such offenses. Insurers also have proprietary endorsements that may provide a better solution to this coverage issue.

| Illustration |
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| In agreeing to speak for an organization at their convention, I enter a hold harmless and indemnity agreement in which I agree to indemnify the organization for "all civil and administrative liability, including the costs and expense of a lawsuit, defense and settlement…."<br><br>A comment is made during the convention, which an attendee finds offensive and brings suit against the organization, alleging slanderous comments directed to the attendee. Even though there were several speakers at the convention, the attendee did not bother to identify the speaker, instead alleging the organization as liable. The organization turns the suit over to each speaker, demanding defense of the slander allegation. My insurer denies both defense and payment of any damages that may result as they deem this to be liability assumed in a contract and, since the complaint did not name me, point out there is no evidence that I would have liability to the attendee absent the indemnity agreement. |

### f. Breach of Contract

Aimed at advertising injury, the exclusion eliminates coverage (with one exception) for an insured that does not honor the terms of a contract, even if the contract involves advertising activities. The exception is that a breach of an *implied* contract is not excluded provided the alleged offense was the use of another's advertising ideas in your advertisement.

**Illustration**

After long negotiations with a competitor, we expressly agree that I am allowed to use their advertising idea—specifically, crossword puzzle mailers that, when solved, promote in a novel way my business to prospective customers. However, the contract spells out a specific geographical area in which I may send the mailers, and clearly prohibits using this mailer in other geographical areas. The mailers are so successful that my sales department begins sending them outside the agreed upon area—resulting in the competitor bringing suit against me for breach of contract. My insurer denies coverage for both defense and any obligation to pay damages for the competitor's suit as the complaint refers to breach of the written contract, drawing attention to the agreed upon prohibition to venture into other areas. The insurer has concluded the complaint is for breach of contract, and therefore excluded.

**Exception:** If the competitor simply gave me permission to use their advertising idea, but with no mention of restrictions to any territory, the complaint by the competitor may state that it was understood (implied) that I would not go into other territories. The complaint by the competitor would likely be that I have breached an *implied contract* as respects limits on the use of their advertising idea, and thus this exclusion would not apply.

### g. Quality or Performance of Goods—Failure To Conform to Statements

Again targeting advertising injury type claims, this exclusion is intended to eliminate coverage for claims that your goods, products, or services do not perform or are not of the quality advertised. While it is difficult to identify a specific offense that would trigger coverage for this type of situation, the exclusion is more to reinforce that advertising injury will not provide coverage for such claims, even if they do involve advertisements as defined in the CGL.

**Illustration**

In a television commercial for an auto dealership, the owner states that all his used cars are previously owned by only one person. After buying a used car, I find that the car I purchased was used by a rental car company. I bring a suit against the dealership for, among other things, the car I purchased to be of lesser quality than advertised by the auto dealership. The insurer for the auto dealership denies both defense and any obligation to pay damages as this claim is derived from the dealership's product’s failure to conform to statements of quality.

### h. Wrong Description of Prices

Also related primarily to advertising injury, this exclusion clarifies that the CGL will not respond to claims made for mistakes made in prices.

**Illustration**

In the Sunday newspaper's advertising circular, I purchased advertising space to promote my sale of the latest, high definition flat screen plasma televisions, for this week only, for $290 each. When I am flooded with customers who demand to see the $290 televisions, I discover that I provided the newspaper with the wrong price—I gave them $290 instead of the actual sales price of $2,900. Several claims are made against me by irate customers alleging that I engaged in bait-and-switch tactics. Based on this exclusion, my insurer does not defend and refuses to pay any damages, including losses I may absorb having to sell televisions at the lower incorrect price.

### i. Infringement of Copyright, Patent, or Trade Secret

Infringement of the intellectual property rights of others is not covered by the CGL unless those intellectual property rights are your advertisement and then only for the infringement of specifically listed intellectual property rights: copyright, trade dress, or slogan. The extent of coverage for intellectual property has been the subject of a significant amount of litigation, much of which revolves around what, exactly, is meant by advertising in relation to intellectual property rights.

In some cases, the question litigated is what is meant by copyright, trade dress, or slogan. For example, policyholders have urged courts to consider patent infringement as a misappropriation of trade dress and thus a covered offense.

Exclusion i. first appears in the October 2001 edition of the CGL and is intended to make clear that coverage provided by Coverage B applies only if the advertising material or broadcast *itself* is a copyright violation, trade dress infringement, or misappropriation of trade dress (a style of doing business).

| Illustration |
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| In writing the users' manual for the company's software, an employee of the software company takes verbatim significant portions of a competitor's users' manual. The competitor brings legal action against the software company, alleging infringement of copyright. As the user manual was not the software company's advertisement, the insurer for the software company cites this exclusion and denies both defense and any obligation to pay damages on behalf of the software company. |

**j. Insureds in Media and Internet Type Business**

Because certain businesses or organizations present an elevated exposure to most offenses, Coverage B excludes all but three offenses for these businesses or organizations. Excluded from coverage (subject to three exceptions) are offenses committed by an insured whose business is:

- Advertising, broadcasting, publishing, or telecasting
- Designing or determining the content or Web site for others
- An Internet search engine, access, or content or service provider

Certain Internet activities are not considered advertising, broadcasting, publishing, or telecasting businesses. For example, an insured who develops its own Web site, including links to the Web sites of others, would not be considered an insured whose business is advertising, broadcasting, publishing, or telecasting for the purposes of applying this exclusion. The three exceptions to this exclusion and for which Coverage B would apply is for the offenses of:

- False arrest, detention, or imprisonment
- Malicious prosecution
- 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

Coverage for any other offenses is flatly excluded. Coverage is usually available for these exposures by either separate endorsement or separate policies. For example, media liability coverage is available for publishers and usually includes coverage for numerous professional liability type offenses, including copyright infringement and libel.

| Illustration |
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| The local cable television broadcast infuriates a political candidate in the next town, who brings a libel claim against the television station. As the television station is in the business of broadcasting, its insurer will not provide defense or pay any damages for which the television station is liable. |

### k. Electronic Chatroom or Bulletin Boards

This exclusion, introduced in the October 2001 edition of the ISO CGL policy, recognizes (as does exclusion l. below) the potential liability for certain uses of the Internet. An insured who owns, hosts, or otherwise controls electronic chatrooms or bulletin boards also presents an elevated exposure to certain types of Coverage B offenses. This exclusion eliminates coverage for liability arising out of the electronic chatroom or bulletin board activities. This exclusion may be contrasted to the media and Internet type exclusion as the exclusion does not apply to all of the insured's activities, only those arising out of the activities related to operating or owning an electronic bulletin board or similar electronic message board.

A recent Associated Press news article recounted the difficulties companies who operate message boards are experiencing. In some cases, because the electronic discussions are so fraught with mean-spiritedness and potential damage to persons' reputations, the message boards have been restricted or shut down entirely. While the article states that site operators are not generally liable for offensive postings, insurers wish to avoid the potential litigation entirely by excluding all liability for such message boards by the use of this exclusion.

**Illustration**

The operator of an electronic message board allows postings of messages about a local bank with which several customers have had a poor experience. Several of the postings suggest that the bank is ready to fail, causing other customers to withdraw their deposits, creating a "run on the bank" and its failure. The FDIC brings a suit against the operator of the electronic message board, alleging gross negligence in not screening such libelous postings. The CGL insurer for the operator of the electronic denies both defense and the obligation to pay any damages as the allegation of libel arose out of an electronic bulletin board over which the insured exercised control.

### l. Unauthorized Use of Another's Name or Product

An insured who uses, without permission, the product or name of another in their e-mail address, domain name, or metatag to mislead potential customers will not be covered under Coverage B for any liability that may result. The key here is using the Internet, including e-mail and Web sites, to mislead potential customers.

**Illustration**

To target potential customers using Internet search engines, I include in my e-mail address, my Web site domain name, and throughout the text of my Web site, the name of a well-known competitor, which has the effect of diverting potential customers to my Web site when they are actually searching for my competitor's Web site. The competitor brings claim against me for use of its name. My insurer, when served with the complaint, points to this exclusion and refuses to respond in any way.

### m. Pollution

As policyholders were able, with limited success, to characterize pollution claims as wrongful entry or other type of covered offense, the policy now excludes coverage for the release of any pollutants.

### n. Pollution Related

Similar to the above, Coverage B excludes not only claims for the release of pollutants but also any claims for cleaning up pollutants or responding to a government authority's demand to cleanup or treat pollutants.

| Illustration |
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| As a landlord of an apartment building, I have used a 40-year-old bare steel 9,000-gallon underground heating oil tank to fuel my oil-fired boilers. One morning it was found that the tank developed a hole and that almost all of the oil has been released into the ground on the premises. Public safety officials required evacuation of the entire apartment for an indefinite period. The tenants sued me as their landlord for wrongful eviction. No coverage is afforded for this claim as it arose out of the actual escape of pollutants. |

**o. War**

To the extent that a covered offense arises out of war, Coverage B does not provide coverage.

| Illustration |
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| In the above example, the landlord's apartment is damaged when the National Guard is called in to put down an attempt to overthrow the state's governor. The tenants sue the landlord for wrongful eviction, as they cannot occupy their apartments due to the extensive damage. While it is unlikely the landlord would have liability for such an event, there is no coverage even for defense of the landlord due to the war exclusion. |

## Other Exclusions—Added by Endorsement

While not included in the December 2004 edition of the ISO CGL, it is likely that at least two other exclusions will be added to the policy that will affect Coverage B.

### Employment Related Practices Exclusion—CG 21 47

Coverage B does include coverage for "oral or written publication, in any manner, of material that violates a person's right of privacy." The CGL policy, absent the above exclusion, does not exclude coverage for claims made by employees against the named insured, for employment-related invasion of privacy. The Employment Related Practices Exclusion endorsement unequivocally eliminates coverage for personal and advertising injury claims arising out of employment related practices, policies, acts, or omissions.

### Exclusion—Violation of Statutes that Govern E-mails, Fax, Phone Calls, or other Methods of Sending Material or Information—CG 00 67

This endorsement, which is a mandatory ISO exclusion, is intended to eliminate coverage for claims made under the:

- Telephone Consumer Protection Act
- CAN-SPAM Act of 2003
- And any statute, ordinance, or regulation that prohibits or limits the sending, transmitting, communicating, or distribution of material or information

In short, in the wake of several federal and state "do not call" type laws, businesses and organizations have been sued over the violation of such statutes, which allow for civil damages against businesses. Whether an unsolicited phone call, fax, or e-mail that violates such laws is to be considered an invasion of the right of privacy and thus a covered offense under Coverage B has been litigated, with mixed results, and is far from a settled issue.

ISO has mandated this exclusionary endorsement to remove coverage entirely and to avoid future litigation as to whether such acts constitute a covered offense under Coverage B—all coverage is now excluded.

## Conclusion

Personal and advertising injury coverage is undoubtedly complex and often difficult to understand, in part because such claims are relatively uncommon. Nonetheless, a basic understanding of the concept of a covered "offense," recognizing that only specifically listed offenses are covered, and that coverage for such offenses may be excluded under given circumstances, is necessary to properly advise clients of the coverage they have—and do not have—in the commercial general liability policy.

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[1]Peter J. Kalis, Thomas M. Reiter, and James R. Segerdahl, *Policyholders Guide to the Law of Insurance Coverage*, § 8.03[C] Aspen Law & Business, New York, 2002 Supplement, pp. 8–37

[2]*Ibid*.

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