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Existing . . . "to promote the free exchange of knowledge . . . to make its members more effective managers . . . and to establish a working association with others in a highly specialized field of insurance."

The Expanding Scope of Advertising Injury Coverage

By Michael J. McCormack and Stephen D. Rosenberg

Advertising injury[1] coverage is a part of many CGL policies issued to businesses, and has been available as part of the standard broad form endorsement since 1973. The purpose of advertising injury coverage has always been to provide a limited degree of coverage to protect the insured from claims that the insured's advertising injured another party.[2] Policies providing advertising injury coverage have always required that the claim involve one of a limited number of offenses for the coverage to apply.

Advertising injury coverage does not contain the requirement, applicable to bodily injury and property damage coverages, that the claimant's injury must be caused by an occurrence. Since there is no occurrence requirement, policies limit advertising injury coverage to claims involving both advertising by the insured and a specified offense to preclude insuring the policyholder against a broad range of intentional business torts, such as fraud, that insurers never believed were either insurable or, in fact, covered by their policies.

In the past several years, however, policyholders have sought advertising injury coverage for a broad range of business misconduct, including antitrust violations,[3] schemes to defraud investors,[4] and misrepresentations in financial prospectuses.[5] Such misconduct is not the type of offense for which advertising injury coverage was intended to apply. Insureds have even sought coverage in cases where the insured never even engaged in advertising.[6] Policyholders have pressed litigation across the country seeking judicial expansion of advertising injury coverage. Insureds have had several recent successes with this approach, and they are now aggressively pursuing an even greater expansion in advertising injury coverage.

ADVERTISING INJURY COVERAGE ONLY APPLIES TO ENUMERATED OFFENSES

The standard advertising injury policy language only provides coverage for injury arising out of certain enumerated offenses listed in the definition of advertising injury. The advertising injury definition contained in the pre-1986 ISO policy, provides coverage for the enumerated offenses of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, and infringement of copyright, title or slogan. The 1986 ISO policy's definition of advertising injury provides coverage for the enumerated offenses of 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; oral or written publication of material that violates a person's right of privacy; misappropriation of advertising ideas or style of doing business; and infringement of copyright, title or slogan.

During the 1980s, numerous cases established that an insured was only entitled to coverage under the advertising injury portion of a policy if the claimant in the underlying action specifically sought recovery for an offense enumerated in the advertising injury definition.[7] Federal and state courts routinely rejected insureds' arguments that they were entitled to advertising injury coverage in cases where the underlying complaint did not specifically seek recovery for an enumerated offense.[8]

For example, in *Nationwide Mutual Insurance Co. v. Dynasty Solar, Inc.,*[9] the underlying claim was a class action brought against the insured alleging fraudulent and unfair sales practices, violations of sales-related statutes and other causes of action arising out of the insured's sales of solar heating systems. The insured had purchased policies containing advertising injury coverage; the policies contained the standard pre-1986 definition of advertising injury, with slight variations. Following an exhaustive analysis and review of applicable precedent, the federal district court rejected the insured's claim that the class action complaint was covered by the advertising injury portion of the policies at issue. The court found that the complaint did not seek recovery for an enumerated offense, and thus the underlying claim was not covered by the policies.[10]

Moreover, throughout the 1980s courts narrowly defined the enumerated offenses listed in the advertising injury definition when applying the rule that advertising injury coverage only exists for complaints specifically alleging an enumerated offense. Courts routinely held that a claim for an enumerated offense existed only if the claim arose from the enumerated offense, as traditionally defined.[11] For example, in *Pine Top Insurance Co. v. Public Utility District No. 1,*[12] a federal trial court concluded that advertising injury coverage for the enumerated offense of unfair competition only applies to claims alleging the common law tort of unfair competition against a competitor, and that the advertising injury coverage does not apply to other, arguably unfair, business conduct. The court held that "in the context of these policies, 'unfair competition' is a term of art which must be taken as set forth under the narrow but well-settled common law definition".[13]

Needless to say, insureds, used to the ever expanding scope of coverage they have managed to impose, to a

certain degree, on general liability coverage, were not satisfied with this fairly limited scope of advertising injury coverage. In the last few years, policyholders have made inroads into expanding advertising injury coverage, and within the past year insureds have placed themselves on the brink of a major breakthrough in expanding advertising injury coverage.

The key battleground has been the advertising injury definition's list of enumerated offenses; insureds have attempted to expand advertising injury coverage by trying to convince courts that the list of enumerated offenses should be broadly construed to include any claim which arguably fits within the rubric of an enumerated offense.[14]

Insureds secured a minor, though important, victory in their attempt to expand advertising injury coverage in 1988 in *John Deere Insurance Co. v. Shamrock Industries Inc.*[15] Some of the insurance policies at issue in *Deere* contained the pre-1986 advertising injury definition, while other policies involved in the case contained the 1986 ISO advertising injury definition. Ruling on the issue of the insurer's duty to defend, the court in *Deere* determined, with minimal discussion or reasoning, that the insurer was obligated to defend a misappropriation of trade secrets claim because the claim arguably fell within the advertising injury coverage provided by the policies. The court did not decide whether the advertising injury definitions actually provided coverage for the claim; the *Deere* opinion nonetheless suggests that advertising injury coverage is not limited to offenses specifically enumerated in the definition.

In 1989, a federal district court in California in *National Union Fire Insurance Co. v. Siliconix, Inc.,*[16] broadly construed an enumerated offense to include, as a covered claim, a complaint that did not explicitly allege an enumerated offense. *Siliconix* involved the pre-1986 advertising injury definition. Interpreting the scope of the enumerated offense of piracy, the court stated:

> The Court holds that the term "piracy" is ambiguous and is capable of at least two definitions. Read in its ordinary sense, it must be found to include patent infringement. Four of the eight dictionaries cited by the parties define it as such. Because this term is susceptible to two reasonable interpretations, one encompassing patent infringement and one not, the Court must construe it in favor of coverage for the insured. Therefore, the Court finds that "piracy" encompasses patent infringement.[17]

Other courts have also broadly interpreted enumerated offenses to include within advertising injury coverage claims that are not listed as enumerated offenses in either the pre-1986 or 1986 advertising injury definitions. In *Keating v. National Union Fire Insurance Co.,*[18] for example, the insured was sued for "perpetrat[ing] a scheme whereby corporate bonds were fraudulently sold to customers".[19] The court in *Keating* concluded that the insured's conduct constituted unfair competition, an enumerated offense under the pre-1986 advertising injury definition.[20]

From the insureds' perspective, however, the significant breakthrough took place in 1991 in California in *Bank of the West v. Superior Court.*[21] In *Bank of the West,* a California appeals court gave an extremely broad interpretation of the enumerated offense of unfair competition. The California First District Court of Appeals ruled "that the phrase 'unfair competition' as used in standard form CGL must be given the broad statutory meaning"[22] that exists under California's unfair competition statute and that therefore the enumerated offense of unfair competition encompasses "all unlawful and unfair business practices committed against either a business rival and/or the general public".[23] The court in *Bank of the West* concluded that under California law and applicable principles of insurance policy interpretation,[24] unfair competition consists of more than simply common law unfair competition torts and instead encompasses any unlawful, unfair or deceptive act committed against a business competitor or the public.

A different division of the California First District Court of Appeals reached the same conclusion in *Demonet Industries v. Transamerica Insurance Co.*[25] The court in *Demonet* ruled that advertising injury coverage for "injury arising out of . . . unfair competition"[26] provided coverage for an underlying lawsuit in which it was alleged that the insureds "had breached their contractual and fiduciary obligations under the contracts of sale and management agreement [of a commercial office building], committed fraud, and 'interfered with [the plaintiff in the underlying litigation's] prospective economic advantage".[27] The court held that the phrase unfair competition should be read broadly in accordance with *Bank of the West.*

After *Bank of the West* and *Demonet,* policyholders stand at the edge of a major breakthrough. The California Supreme Court, however, has granted review of both the *Bank of the West* and *Demonet* cases. The advertising injury breakthrough long sought by policyholders will disappear, at least for the present, if the California Supreme Court rules against the insureds and overturns the lower court decisions.[28]

If, however, the California Supreme Court affirms *Bank of the West* and Demonet, the dam may burst. The 1986 ISO policy deleted unfair competition as an enumerated offense.[29] Nonetheless, many policies still include unfair competition as an enumerated offense. Although other states have narrowly construed unfair competition coverage, affirmance of *Bank of the West* and *Demonet* by the California Supreme Court would lend strong support to policyholders' claims that advertising injury coverage for unfair competition provides coverage for any claim alleging unlawful and unfair business practices.[30]

Moreover, affirmance of *Bank of the West* and *Demonet* would lend support to policyholders' claims that the advertising injury definition as a whole should be broadly construed, and that other enumerated offenses should also be broadly interpreted. One recently published article authored by policyholder attorneys asserts that advertising injury coverage, properly interpreted, provides coverage for

patent infringement and other intellectual property claims.[31] One need only scan the advertising injury definitions to note that "patent infringement" is not included in the list of enumerated offenses; however, policyholder attorneys apparently feel that, in light of *Bank of the West,* this is irrelevant.[32]

THE REQUIREMENT OF ADVERTISING

Of course, the mere fact that an underlying action involves an enumerated offense is neither the end of the inquiry nor is it sufficient, in and of itself, to invoke coverage under the advertising injury portion of a policy. Advertising injury coverage is called advertising injury coverage for a reason. Both the pre-1986 and 1986 ISO advertising injury policies require a relationship between the claimant's injury and the insured's advertising activities for advertising injury coverage to apply.

The pre-1986 policy states that advertising injury is "injury . . . occurring in the course of the named insured's advertising activities, if such injury arises out of" an enumerated offense. The 1986 policy language provides that the advertising injury coverage applies if the injury is "caused by an offense committed . . . in the course of advertising".

Insurance policies providing advertising injury coverage often use variants of this language. Instead of using the "occurring in the course of" language, many policies instead require either that the damages or the enumerated offense "arise out of" the insured's advertising activity.[33]

All versions of the policy establish two prerequisites to advertising injury coverage. First, the underlying claim must involve "advertising" by the insured; second, there must be a connection between the insured's advertising and the claim. Insurers and policyholders have litigated both of these requirements; the disputes have centered on what type of activity constitutes "advertising", and on the type of relationship that must exist between the advertising and the underlying claim. As one would expect, the case law is divided on both of these issues.

Some courts have held that the term advertising means the widespread public dissemination of information, while other courts have held that almost any sales related activity constitutes advertising. Similarly, some courts have held that there must be a close, causal relationship between the insured's advertising and the enumerated offenses, while other courts have not required a strict causal relationship for advertising injury coverage to apply.

An Illinois appeals court analyzed the scope of advertising injury coverage and reached a firmly pro-insurer conclusion in *International Insurance Co. v. Florists' Mutual Insurance Co.*[34] In International Insurance, the insured, Florists' Transworld Delivery Association (FTD), was sued by a competitor for antitrust violations. The underlying lawsuit alleged that Rule 18(bq), which required FTD member florists to utilize FTD facilities in transacting business, was anti-competitive. FTD was insured by Florists' Mutual for advertisring injury, including unfair competition "which arises out of your advertising activities".

The parties dissputed the causal relationship required by the "arising out of" language. International, which had obtained an assignment of rights from the insured, alleged that the underlying lawsuit was covered by the advertising injury coverage in the Florists' Mutual policy. International argued that the language requires "a mere causal connection" between advertising and the injury, and that this requirement was satisfied because FTD woulvd not have promulgated Rule 18(b) if FTD did not have an investment in advertising to protect. Florists' Mutual argued that the causal connection cannot be remote but rather the injury must be caused by or directly involve advertising by the insured.

The court held that the underlying complaint did not allege an injury arising from advertising activity. The court stated: It is undisputed that FTD's Rule 18(b) was an internal organization rule that was not reproduced or broadcast to the public. The term "advertising" has been held to refer to the widespread distribution of promotional material to the public at large. Letters sent to advertisers from a magazine publisher disparaging another publisher's circulation guarantees are not related to advertising activities. Neither are 400 pamphlets circulated to a company's distributors to aid them in educating the salespersons to solicit purchase orders for the company's product. Similarly, an in-house rule prescribing conditions for processing floral arrangements that have been advertised in a particular way is not related to advertising activity such that an injury attributable to the rule can be considered an advertising injury. The fact that the purpose of FTD's Rule 18(b) was to protect its advertising investment is of no consequence when the injury is alleged to have been caused, not by the advertising, but by the rule. Even under the broad interpretation of "arising out of" that International advances, we do not believe that the allegations of the underlying complaint support a conclusion that there is a causal connection between FTD advertising activity and the injury alleged in the Federal suit.[35]

This case stands for two propositions. First, that advertising means "the widespread distribution of promotional material to the public at large" and does not include business information "not reproduced or broadcast to the public". Second, that the damages alleged in the underlying litigation must be causally related to the insured's advertising activities; it is not sufficient that the challenged conduct merely impacts, in some obscure manner, the insured's advertising.

A similar and, from an insurer's perspective, helpful decision was reached by the Seventh Circuit Court of Appeals in *Playboy Enterprises v. St. Paul Fire & Marine Ins. Co.*[36] The court in *Playboy* interpreted an exclusion for "publications or utterances in the course of or related to advertising, broadcasting or telecasting activities" by the

insured. In *Playboy,* Penthouse International, Ltd. sued the insured, Playboy Enterprises, Inc. ("Playboy"), for libel "based on a letter that John Kabler, one of Playboy's regional advertising managers had sent to eleven advertisers", which "erroneously stated that Penthouse had failed to meet its circulation guarantees by not selling the number of magazines it claimed to be selling".[37] In a holding relevant to advertising injury coverage, the court determined "that the term 'advertising' [refers] to the widespread distribution of promotional material to the public at large".[38] The court held that Playboy's conduct did not constitute advertising "because the dissemination of eleven letters would not constitute the widespread distribution of promotional materials to the public at large".[39]

Another leading - and pro-insurer - case on the meaning of the word "advertising" is the Minnesota Supreme Court's decision in *Fox Chemical Co. v. Great American Insurance Co.*[40] Both the *International Insurance* and *Playboy* courts relied on *Fox* in holding that advertising requires the widespread distribution of promotional material.[41]

In *Fox,* the Minnesota Supreme Court addressed an advertising activity exclusion. The policy at issue in *Fox* insured Fox Chemical Co. ("Fox Chemical") for libel or slander "except publications or utterances in the course of or related to advertising, broadcasting or telecasting activities" by the insured. Fox Chemical distributed 74 pamphlets to distributors to be used to educate salespersons. The pamphlet was never distributed to the public. The court concluded that "the term 'advertising'" requires "public or widespread distribution of the alleged defamatory material".[42] The *Fox* court relied on the exclusion's use of the companion words broadcasting and telecasting as evidence that the exclusion in the policy required widespread distribution of material for the exclusion to apply.

These cases are hardly unique.[43] Other cases have also involved conduct by the insured designed to promote sales, which was nonetheless deemed by courts not to constitute advertising. In *First Bank & Trust Co. v. N.H. Insurance Group,*[44] the New Hampshire Supreme Court concluded that "the mere explanation of bank services to a couple in a private office cannot be considered 'advertising'", and that the bank's failure to properly provide an advertised service "does not result in an 'advertising injury' within the meaning of the policy".[45] Similarly, in *Meyers & Sons Corp. v. Zurich American Insurance Group,*[46] the New York Court of Appeals concluded that there was no advertising activity involved in a patent infringement case even though the insured circulated a price list to its customers.

Several courts have also held that the damages suffered by the claimants must have been substantially related to or caused by the insured's advertising activity for advertising injury coverage to apply. These courts have held that advertising injury coverage does not apply if advertising is only tangentially related to the damages suffered by the claimant. For example, in *Lazzara Oil Co. v. Columbia Casualty Co.,*[47] the insured was sued by operators of service stations who alleged that the insured "illegally sought to fix the retail prices at which the [underlying] plaintiffs may sell gasoline to the public".[48] The plaintiffs in the underlying action alleged that the price fixing was enforced through financial penalties, regular visitations of their service stations and threats of lease terminations.

The insured in *Lazzara* argued that the allegation in the underlying complaint that the insured compelled the claimants "to post certain prices should be considered advertising which constitutes unfair competition and therefore it is an advertising injury".[49] The court, however, held that the alleged injury was not caused by the insured's advertising, and that therefore the policy's advertising injury coverage did not apply. The court stated that any advertising that occurred was undertaken by the plaintiffs in the underlying action and not by the insureds.

Similarly, in *Jerry Madison Enterprises, Inc. v. Grasant Manufacturing Co.,*[50] the court held that a copyright infringement claim was not covered by the insured's advertising injury coverage, even though the infringing product was sold through advertisements. The court held that the advertisements were peripheral to the copyright infringement claim, and that the injury actually arose from the copyright infringement. The court stated that the insured's sale of the infringing product through advertising was not sufficient to trigger advertising injury coverage because the complaint did not allege that the advertising infringed the copyright. Instead, the complaint established that the sale and manufacture of the product, and not the advertising, was the infringing act.[51]

In contrast, several courts have construed these issues in favor of the insured. In the leading pro-insured opinion, *Bank of the West,* the insured bank was sued for "unfair competition in financing automobile insurance premiums through Coast Program, a subsidiary of the bank".[52] The bank had allegedly induced insurance agents and brokers to refer business to the bank by paying them a fee.

The court concluded in Bank of the West that this conduct constituted unfair competition;[53] the court then considered whether or not the unfair competition "occurred in the course of the insured's advertising activities", as required by the policy for advertising injury coverage to apply. The court noted that the term "advertising" is broadly construed under California law to include a broad range of solicitation activities; the court stated that the "term is not limited to paid announcements in print and broadcast media" and includes "even one-on-one oral representations".[54]

The court then held that the bank had engaged in advertising "and that the advertising injury (i.e., unfair competition) occurred during such advertising".[55] The court based its ruling on two factors. First, the underlying complaint alleged that the bank had induced "insurance agents and brokers throughout California to . . . refer business to the bank by offering a fee."[56] Second, the court stated that:

The Bank advertised to insurance agents and brokers inducing them to recommend to their insureds the Bank's Coast Program instead of Pacific Bank's rival Commonwealth Program, and that ads were placed in an insurance trade journal. The fact that the Bank used third parties (i.e., insurance agents and brokers) to carry its advertising message to the consumers . . . is no less an advertising activity than a grocer using a youth to distribute his flyers in the neighborhood.[57]

Accordingly, the court found the insured had engaged in advertising activity even though the insured did not directly solicit or advertise to the public at large, the actual consumers of its financial services. Moreover, the court in Bank of the West did not find that the advertising must directly cause the advertising injury. Rather, the court found coverage even though advertising was merely tangentially involved in the alleged wrongful conduct.

Similarly, in *John Deere Insurance Co. v. Shamrock Industries, Inc.,*[58] the court rejected the insurer's argument that "advertising" requires the public or widespread distribution of advertising material. The court explicitly declined to follow *Fox,*[59] stating that *Fox* is only applicable to insurance policies that link advertising activity to broadcasting and telecasting. Noting that dictionaries provide very broad definitions of advertising, the court in *Deere* held that since the insurer had failed to clearly "limit covered advertising activity to 'wide dissemination of materials'" the policy was therefore "ambiguous and must be construed against the insurer".[60] The court held that three letters sent to a single potential buyer satisfied the advertising activity requirement.

The court in *Deere* also rejected the insurer's argument that the injury had to arise from the three letters for advertising injury coverage to apply. Instead, the court agreed with the defendant that the policy did not require "proximate cause between the advertising activity and the injury"[61] but only required that advertising be involved in the offense.[62]

IMPLICATIONS FOR INSURANCE CARRIERS

It is troubling that after many years during which insurers have successfully defended the limited scope of advertising injury coverage, insureds have managed to begin expanding the scope of coverage, at least in some jurisdictions. Insureds hope that *Bank of the West* and *Demonet* will be precursors of a trend toward expanding advertising injury coverage to encompass intentional business related wrongs which insurers never contemplated could be insurable.

Nonetheless, even if the California Supreme Court affirms *Bank of the West* and *Demonet,* there is no reason why other states should adopt a broad interpretation of the enumerated offenses, rather than the narrow construction established in numerous other cases.[63] The opinions in both *Bank of the West* and *Demonet* were greatly influenced by statutory and decisional law unique to California; both courts relied extensively on California cases interpreting California statutes. These two opinions are clearly state specific, and should not be particularly persuasive precedent in other states.

More importantly, it has been clearly established in other jurisdictions that the enumerated offenses are terms of art which each have a narrow and unambiguous meaning.[64] In fact, shortly after the California Appeals Court decided *Bank of the West,* a federal court' in California held in *Tigera Group, Inc. v. Commerce and Industry Insurance Co.* that the term unfair competition, when used in insurance policies, has a long-settled and narrow definition; the court expressly rejected and refused to follow Bank of the West, stating that it was "not inclined *sua sponte* to modify deeply rooted and well established common law".[65]

Both insurers and insureds have long known the meaning of the enumerated offenses. The mere fact that a term is undefined in the policy does not make the term ambiguous.[66] As numerous courts have recognized in a variety of factual settings, a term in an insurance policy is not ambiguous if it has a well-settled meaning understood by all parties.[67] As the Washington Court of Appeals recently stated:

An insurance policy is a contract, and the rules regarding its construction are basically the same as those covering other contracts. A court must look first to the contract to determine the parties' intent. Clear language must be given effect according to its plain meaning, and a court may not construe such language.[68]

Nor should insurers concede the advertising activity argument to policyholders. The insureds certainly can - and obviously will[69] - cite cases holding that the policy requirement of advertising by the insured is satisfied by any activity related to sales or promotion. Insureds like to argue that the pro- insurer interpretations of the word advertising occurred in cases interpreting exclusions and which are therefore distinguishable from and not applicable to cases involving coverage for advertising injury.[70] This argument ignores *International Insurance,*[71] a well-reasoned decision that supports the insurer's position that advertising refers "to the widespread distribution of promotional material to the public at large".[72]

In interpreting the scope of advertising injury coverage, the court in *International Insurance* forcefully rejected the proposition that minimal sales-related activity unaccompanied by widely disseminated promotion can constitute advertising. The court relied on pro-insurer decisions construing exclusions to reach its holding, thus rejecting the argument often advanced by insureds that the exclusion cases are not relevant to the advertising injury coverage inquiry.

Perhaps the insurers' strongest argument in many advertising injury cases involves the requirement of a causal relationship between the enumerated offense and the insured's advertising activity. Insureds typically claim that

advertising injury coverage applies if the advertising is related in some manner to the covered offense, even if the relationship is highly attenuated.[73] However, a long line of cases has held that there must be, at the least, a causal relationship between the insured's advertising and the enumerated offense.[74] These cases demonstrate that it is not sufficient if the offense merely has a tangential relationship to advertising.[75]

While insureds can, of course, cite cases to the contrary,[76] the pro-insurer decisions represent the weight of authority and are, in fact, the better reasoned decisions by far. Despite what policyholders might like courts to believe, even insurance policies must be read in context.[77] Policies must be construed as a whole[78] and a meaning must be given to all language contained in the policy.[79] The causal relationship requirement is the only way that advertising injury coverage can be interpreted that is reasonable or, in fact, makes any sense. As the courts in *Lazarra,*[80] *International Insurance*,[81] *Meyers,*[82] and *Madison*[83] established, there must be a causal relationship of some type between the advertising and the offense. Otherwise, there would be no purpose for the advertising injury policy language requiring that the damages or the enumerated offense either occur in or arise out of the insured's advertising activity. This policy language would be mere surplusage if a causal relationship is not required.

Insurers have strong arguments available to them when opposing attempts by insureds to expand advertising injury coverage. An aggressive response is needed to prevent insureds from turning advertising injury coverage into a type of general liability coverage for intentional business related misconduct.

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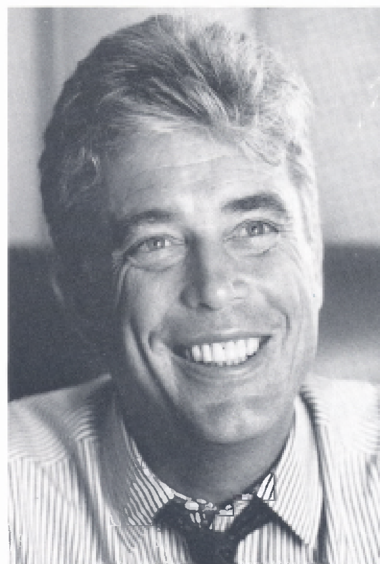

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[1]Some policies call this coverage advertising liability rather than advertising injury. This article will refer to the coverage as advertising injury coverage. Prior to 1986, the ISO broad form endorsement provided coverage for advertising injury, which was defined as "injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition or infringement of copyright, title or slogan" (hereinafter "pre-1986" policy). The 1986 ISO broad form endorsement provides that "advertising injury means injury arising out of one or more of the following offenses:

(1) 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;

(2) oral or written publication of material that violates a person's right of privacy;

(3) misappropriation of advertising ideas or style of doing business; or

(4) infringement of copyright, title or slogan.

The 1986 policy requires that the injury be "caused by an offense committed . . . in the course of advertising". In practice, insurers often use a variation of the ISO language.

[2]E.g., Lazzara Oil Co. v. Columbia Casualty Co., 683 F.Supp. 777, 780 (M.D.Fla. 1988), aff'd 868 F.2d 1274 (11th Cir. 1989).

[3]Id.

[4]Globe Indemnity Co. v. First American State Bank, 720 F.Supp. 853 (W.D.Wash. 1989), aff'd 904 F.2d 710 (9th Cir. 1990).

[5]Pine Top Insurance Co. v. Public Utility District No. 1, 676 F.Supp. 212 (E.D.Wash. 1987).

[6]Lazzara Oil, 683 F.Supp. 777.

[7]See e.g., Aetna Casualty & Surety Co. v. Trans World Assurance Co., 745 F.Supp. 1524 (N.D.Cal. 1990); Boggs v. Whitaker, 784 P.2d 1273 (Wash.App. 1990); Liberty Mutual Insurance Co. v. Consolidated Capital Equities Corp., 878 F.2d 386 (9th Cir. 1989) (table, text in Westlaw).

[8]E.g., Nationwide Mutual Insurance Co. v. Dynasty Solar, Inc., 753 F.Supp. 853 (N.D.Cal. 1990); Boggs v. Whitaker, 784 P.2d 1273 (Wash.App. 1990); Globe Indemnity Co. v. First American State Bank, 720 F.Supp. 853 (W.D.Wash. 1989) aff'd 904 F.2d 710 (9th Cir. 1990); Liberty Mutual Insurance Co. v. Consolidated Capital Equities Corp., 878 F.2d 386 (9th Cir. 1989) (table, text in Westlaw); Westfield Insurance Co. v. TWT, Inc., 723 F.Supp. 492 (N.D.Cal. 1989); Pine Top Insurance Co. v. Public Utility District No. 1, 676 F.Supp. 212 (E.D.Wash. 1987).

[9]753 F.Supp. 853 (N.D.Cal. 1990).

[10]The insured argued that the enumerated offense of unfair competition covered the claim; the court concluded that, properly understood, the underlying complaint did not seek recovery for unfair competition "as used in [the] policies".

[11]E.g., Pine Top Insurance Co. v. Public Utility District No. 1, 676 F.Supp. 212 (E.D.Wash. 1987); Liberty Mutual Insurance Co. v. Consolidated Capital Equities Corp., 878 F.2d 386 (9th Cir. 1986) (table, text in Westlaw).

[12]676 F.Supp. 212 (E.D.Wash. 1987).

[13]Id. at 217.

[14]Such cases are numerous, but Pine Top Insurance Co. v. Public Utility District No. 1, 676 F.Supp. 212 (E.D.Wash. 1987) is representative. The insured argued, unsuccessfully, that the enumerated offense of unfair competition covered, in addition to

accepted common law unfair competition torts, "misrepresentations and omissions in various official statements or prospectuses".

[15]696 F.Supp. 434 (D.Minn. 1988), aff'd 929 F.2d 413 (8th Cir. 1991). Attorneys representing policyholders routinely cite this opinion in support of their arguments for an expansive interpretation of advertising injury coverage. See J. Restivo & C. Kernick, "Rejoinder: Insurance Coverage for Patent Infringement and Intellectual Property Claims is Provided by the Advertising Injury Endorsement of CGL Policies", Mealey's Litigation Reports: Insurance (February 18, 1992) (citing John Deere regarding the coverage requirement that the offense involve advertising).

[16]729 F.Supp. 77 (N.D.Cal. 1989).

[17]Id. at 79.

[18]754 F.Supp. 1431 (C.D.Cal. 1990).

[19]Id. at 1433.

[20]See also, Intex Plastics Sales Co. v. United Nat'l Insurance Co., 1990 W.L. 279505 (C.D.Cal. 1990).

[21]277 Cal.Rptr. 219 (Cal.App. 1991), rev. granted 279 Cal.Rptr. 777 (Cal. 1991).

[22]Id. at 220.

[23]Id.

[24]The court relied on principles concerning ambiguity in policies and the requirement that phrases in an insurance policy must be read in context to reach its holding.

[25]278 Cal.Rptr. 178 (Cal.App. 1991), rev. granted 281 Cal.Rptr. 765 (Cal. 1991).

[26]Id. at 182.

[27]Id. at 180.

[28]A strong pro-insurer decision by the California Supreme Court may also cast other expansive, pro-insured California state and federal decisions on advertising injury into doubt. Siliconix, Keating and Intex Plastics all gave broad interpretations to enumerated offenses; such reasoning may be suspect if the California Supreme Court rules that the Bank of the West and Demonet courts were wrong to broadly construe the enumerated offense of unfair competition.

[29]See generally, Globe Indemnity Co. v. First American State Bank, 720 F.Supp. 853, 857 (W.D.Wash. 19189), aff'd 904 F.2d 710 (9th Cir. 1990).

[30]As discussed later in this article, a strong argument can be made that such a rule cannot be extended to states other than California.

[31]Restivo & Kernick, supra n.15.

[32]See id.

[33]E.g., International Insurance Co. v. Florists' Mutual Insurance Co., 559 N.E.2d 7 (Ill.App. 1990) (policy stating that "advertising injury means the following: [list of enumerated offenses]; which arise out of your advertising activities"); Nationwide Mutual Insurance Co. v. Dynasty Solar, Inc., 753 F.Supp. 853 (N.D.Cal. 1990) (umbrella policies provided that "advertising offense means liability for damages which occur during the policy period arising out of the named insured's advertising activities"); Liberty Life Insurance Co. v. Commercial Union Insurance Co., 857 F.2d 945 (4th Cir. 1988) (one of the policies at issue defined advertising liability as one of a number of enumerated offenses "committed in any advertisement . . . and arising out of the named insured's advertising activities").

[34]559 N.E.2d 7 (Ill.App. 1990).

[35]Id. at 10.

[36]769 F.2d 425 (7th Cir. 1985).

[37]Id. at 427.

[38]Id. at 429.

[39]Id. On a separate and distinct issue, the court concluded that the exclusion was ambiguous, since it applied to any publication "related to advertising". The court held that the exclusion was ambiguous because it did not specify what constituted "related to advertising".

[40]264 N.W.2d 385 (Minn. 1978).

[41]See International Insurance, 559 N.E.2d at 10; Playboy, 769 F.2d at 429.

[42]264 N.W.2d at 386.

[43]Policyholder attorneys, however, prefer to assert that these cases are unique. See Restivo & Kernick, supra n.15, at part III.C.(2).

[44]469 A.2d 1367 (N.H. 1983).

[45]Id. at 1368.

[46]546 N.Y.S.2d 818 (N.Y. 1989).

[47]683 F.Supp. 777 (M.D.Fla. 1988), aff'd 868 F.2d 1274 (11th Cir. 1989).

[48]Id. at 779.

[49]Id.

[50]1990 W.L. 13290 (S.D.N.Y. 1990).

[51]See also, e.g., Meyers, 546 N.Y.S.2d 818 (advertising injury coverage did not apply to claim for patent infringement, even though insured circulated a price list; the claim arose from the patent infringement, not from the price list).

[52]277 Cal.Rptr. at 221.

[53]See text at n.21-24.

[54]277 Cal.Rptr. at 229I.

[55]Id.

[56]Id.

[57]Id. at 230.

[58]696 F.Supp. 434 (D.Minn. 1988), aff'd 929 F.2d 413 (8th Cir. 1991).

[59]264 N.W.2d 385. See text at n.40-42.

[60]696 F.Supp. at 44L.

[61]Id.

[62]Other courts have also broadly construed the term advertising and refused to impose the requirement of a strict causal relationship. E.g., Demonet, 278 Cal.Rptr. 178.

[63]E.g., Pine Top Insurance Co. v. Public Utility District No. 1, 676 F.Supp. 212 (E.D.Wash. 1987); see also, notes and text at n.7-13.

[64]See e.g., Pine Top, 676 F.Supp. 212.

[65]Tigera Group, Inc. v. Commerce & Industry Insurance Co., 753 F.Supp. 858, 860 (N.D.Cal. 1991)

[66]See e.g., Nationwide Mutual Insurance Co. v. Dynasty Solar, Inc., 753 F.Supp. 853 (N.D.Cal. R1990).

[67]E.g. id.; Pine Top, 676 F.Supp. 212; Globe Indemnity Co. v. First American State Bank, 720 F.Supp. 853 (W.D.Wash. 1989), aff'd 904 F.2d 710 (9th Cir. 1990)

[68]Boggs v. Whitaker,T 784 P.2d 1273 (Wash.App. 1990).

[69]See Restivo & Kernick, supra n.15.

[70]Id

[71]559 N.E.2d 7 (Ill.App. 1990); see text at n.34-35.

[72]559 N.E.2d at 10.

[73]See Restivo & Kernick, supra n.15; Bank of the West v. Superior Court, 277 Cal.Rptr. 219.

[74]E.g., International Insurance, 559 N.E.2d 7 (Ill.App. 1990); Jerry Madison Enterprises v. Grasant Manufacturing Co., 1990 W.L. 13290 (S.D.N.Y. 1990).

[75]E.g., Jerry Madison, 1990 W.L. 13290.

[76]See Restivo & Kernick, supra n.15.

[77]E.g., Nationwide Mutual Insurance Co. v. Dynasty Solar, Inc., 753 F.Supp. 853 (N.D.Cal. 1990).

[78]Id.

[79]Id.

[80]683 F.Supp. 777 (M.D.Fla. 1988), aff'd 868 F.2d 1274 (11th Cir. 1989).

[81]559 N.E.2d 7 (Ill.App. 1990).

[82]546 N.Y.S.2d 818 (N.Y. 1989).

[83]190 W.L. 13290 (S.D.N.Y. 1990).