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**1998 COVERAGE B--PERSONAL AND  
ADVERTISING INJURY LIABILITY**

**Michael Sean Quinn  
SHEINFELD, MALEY & KAY, P.C.  
301 Congress Ave., Suite 1400  
Austin, Texas 78701  
(512) 474-8881 or (512) 469-5423  
(512) 474-2337 (Fax)  
E-mail: [mquinn@smklaw.com](mailto:mquinn@smklaw.com)**

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# 1998 COVERAGE B--PERSONAL AND ADVERTISING INJURY LIABILITY

In 1998, the Insurance Services Office promulgated and made available for use a new version of Coverage B in the Commercial General Liability Policy.<sup>1</sup> Coverage counsel are starting to see claims arising in connection with this version. Perhaps it is time to begin discussing it seriously and in some detail.<sup>2</sup>

It is necessary to begin with the actual text of the "new" coverage. There are both striking and subtle differences between the language of the old coverage and the language of the new. Mostly, they make little obvious difference. There are important distinctions, however, and more may come up as time passes.

## I. 1998 COVERAGE B: VERBATIM

Not all of the language of Coverage B is set forth here. Provisions pertaining to limits on coverage hence the fact that exhaustion limits the duty to defend are omitted. They are seldom controversial outside rather unusual circumstances.<sup>3</sup> It is convenient to think about the emboldened material in this section as expressing the insuring agreement, the definitions, and the exclusions.

The insuring agreements and the exclusions are contained in a section entitled "COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY." This title is used not only in the 1998 form but in the pre-1998 form as well. The relevant definitions are contained in a separate section entitled, whimsically enough, "DEFINITIONS."

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<sup>1</sup>CG 00 01 07 98 (aka CG 001). Of course, this coverage can be excluded. There is a standard ISO endorsement for this purpose, CG 21 38, EXCLUSION--PERSONAL ADVERTISING INJURY.

<sup>2</sup>Of course, this process has already begun, see Jack P. Gibson, Maureen McLendon, W. Jeffrey Woodward, COMMERCIAL LIABILITY INSURANCE § V.E.1 (International Risk Management Institute, Inc., 2000). See Beth D. Bradley, *Coverage Issues in Advertising Injury/Intellectual Property Claims*, TEXAS INSURANCE LAW SYMPOSIUM § F (South Texas College of Law, November 9 & 10, 2000). A revised, updated, and elaborated version of this insightful paper was presented at the American Bar Association, Section of Litigation, Annual Committee Meeting for Insurance Coverage (March 8-10, 2001).

<sup>3</sup>Fireman's Fund Ins. Co. v. TIG Ins. Co., 14 S.W.3d 230 (Mo. App. 2000). This was not a Coverage B case. It involved a primary policy which was a fronting policy, an excess policy, and a broker's E&O policy subrogating against the excess carrier. It was unclear when the duty of the excess carrier to pay defense fees commenced because the primary policy was a fronting policy. Still, it illustrates how exhaustion can become an issue.

The insuring agreements are short and to the point?

**Insuring Agreement.**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. . . .
- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.<sup>4</sup>

The structure--indeed formula--of the insuring agreement for Coverage B closely resembles the formula for Coverage A.

**Definitions.** Two significant definitions apply. One is the revisionary definition of the key phrase, "personal and advertising injury," and the other is the entirely new definition of the term "advertisement." The former, Definition #14, is as follows:

**"Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:**

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

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<sup>4</sup>There is also a claims-made form (CG 00 02). There actually are cases involving issues of coverage territory. *Indus. Indem. Co. v. Apple Computer, Inc.*, 95 Cal. Rptr.2d 528, 538 (Cal. App. 1999).

- e. **Oral or written publication 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".**

The latter, Definition #1, is as follows:

**"Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.**

Almost every substantive word in Definition #14 has been litigated. No doubt the same thing is true with respect to the new Definition #1.<sup>5</sup>

**Exclusions.** This coverage is subject to some exclusions. The insuring agreement was labeled #1, and the exclusions are labeled #2. They are:

**This insurance does not apply to:**

- a. **"Personal and advertising injury":**
  - (1) **Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury;"**
  - (2) **Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;**
  - (3) **Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;**

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<sup>5</sup>For a policyholder perspective on these matters, see Peter J. Kalis, Thomas M. Reiter, and James R. Segerdahl, *POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE* 8-1 (1997). For another, see Eugene R. Anderson, Jordan S. Stanzler, and Lorelies S. Masters, *INSURANCE COVERAGE LITIGATION* 16.1 (1997). Perhaps the most comprehensive discussion of Coverage B is to be found in David A. Gauntlett, *INSURANCE COVERAGE FOR INTELLECTUAL PROPERTY ASSETS* (2001). To say that Gauntlett's volume is written from a policyholder perspective would not be the whole truth.

- (4) Arising out of a criminal act committed by or at the direction of any insured;
  - (5) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;
  - (6) Arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement";
  - (7) Arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement";
  - (8) Arising out of the wrong description of the price of goods, products or services stated in your "advertisement";
  - (9) Committed by an insured whose business is advertising, broadcasting, publishing or telecasting. However, this exclusion does not apply to Paragraphs 14.a. b. and c. of "personal and advertising injury" under the Definitions Section;
  - (10) Arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.
- b. Any loss, cost or expense arising out of any:
- (1) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or
  - (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of "pollutants".

Much of the rest of this paper is a commentary on Coverage B. We start with the insuring agreement, turn to the definitions, take up the exclusions, and then discuss the duty to defend.

## II.

### COVERAGE B: THE INSURING AGREEMENT AND THE DEFINITIONS—SOME COMMENTARY

In many ways, the "new," 1998 Coverage B is little other than a continuation of the already existing Coverage B, subject to some refinements and clarifications. Certainly, except for consolidating the defined phrases "personal injury" and "advertising injury" into the single compound defined phrase, "personal injury and advertising injury" the insuring agreement is substantially the same. The new insuring agreement does eliminate any use of the term "occurrence," but the presence of that term was a stray dog anyway. No one was really confused by this obvious, inelegant drafting error.

There is one new sentence. It states that the insurer "will have no duty to defend the insured after any 'suit' seeking damages for 'personal and advertising injury' to which this insurance does not apply". This is a rather puzzling sentence. On the one hand, it might mean nothing more than an insurer has no duty to defend any lawsuit which does not contain allegations which would be covered if true. Given generally existing understandings about the duty to defend, the new sentence, thusly understood, would be otiose. Perhaps the sentence means that there is no duty to defend a lawsuit which alleges offenses to be found on the list of offenses defining the phrase "personal and advertising injury," if the substance of those allegations is actually defeated by the true facts. In other words, if the defense within the definition of "personal and advertising injury" is alleged, but the true facts render the conduct not covered, either because it does not meet the definition or because of an exclusion, then there is no duty to defend. If the new sentence is construed in this manner, it destroys the foundation of the Complaint-Allegation (a/k/a Eight Corners) Rule, also sometimes called the "comparison test."<sup>6</sup> Of course, if that rule is undermined, that fact will tend to support insurer arguments furthering the proposition that defending insurers are entitled to reimbursement when there is no coverage or where there is only partial coverage.<sup>1</sup>

The 1998 definition of the conjunctive phrase "personal and advertising injury" involves only technical changes. They are these:

- Two defined phrases have been consolidated into one. Both of the formerly used phrases and the new compound phrase are defined in terms of a list of offenses.

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<sup>6</sup>Foundation for Blood Research v. St. Paul Marine and Fire Ins. Co., 780 A.2d 175 (Me. 1999).

<sup>1</sup>See Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510, 516 (Wyo. 2000) (Wyoming will not permit allocation of defense expenses as between covered and non-covered claims unless specifically provided for in the policy).

These offenses are causes of action, for the most part, or generic names for several causes of action.<sup>2</sup>

- The offense of wrongful eviction is similarly restricted in both the old and the new definition. The new definition, however, inserts the word "committed," thereby making it clear that the only torts of wrongful eviction which are covered by insurance are those committed somehow by the owner, landlord, or lessor. Under earlier versions of Coverage B, there has been some confusion as to whether the insured offense was a tort that had to be committed by the owner, the landlord, or the lessor.<sup>3</sup>
- The old definition of "advertising injury" made a covered offense the "[m]isappropriation of advertising ideas or style of doing business[.]"<sup>4</sup> The new compound definition makes an offense "[t]he use of another's advertising idea in your 'advertisement[.]'" Notice that the word "misappropriation" has disappeared; the phrase "style of doing business" has disappeared; and the defined term "advertisement" has appeared.<sup>5</sup>
- Formerly, the definition of "advertisement injury" referred to a covered offense by means of the phrase "infringement of copyright, title or slogan." Now the new compound definition, "personal and advertising injury," insures against an offense described as "infringing upon another's copyright, trade dress or slogan in your

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<sup>2</sup>There may be exceptions. *McCormack Baron Management Services, Inc. v. Am. Guar. & Liability Ins. Co.*, 989 S.W.2d 168 (Mo. 1999).

<sup>3</sup>*Wachenhut Services, Inc. v. Nat'l Union Fire Ins. Co. of Pgh., Pa.*, 15 F. Supp.2d 1314 (S.D. Fla. 1998). See *New Castle County, Delaware v Nat'l Union Fire Ins. Co. of Pgh. Pa.*, 174 F.3d 338 (3d Cir. 1999) (noting the ambiguity and differing interpretations of "by or on behalf of its owner, landlord, or lessor"). The new version of Coverage B has resolved (or foreclosed further exploitation of) that confusion. There are other unclarities, of course, as there inevitably are in any contract, especially standardized contracts that are used in a variety of contexts. Firing a fellow, and throwing him out of his office may constitute wrongful eviction, for the purposes of the duty to defend. *Int'l Ins. Co. v. Rollprint Packaging Products, Inc.*, 728 N.E.2d 680, 688-89 (Ill. App. 2000).

<sup>4</sup>The term misappropriation has caused some trouble from time to time, and it is unnecessary. *Heritage Mut. Ins. Co., v Advanced Polymer Technology, Inc.*, 97 F. Supp. 2d 913 ( S.D. Ind. 2000) (noting the ongoing debate concerning the definition of "misappropriation"). One should be glad to see it go. See *Associated Aviation Underwriters Inc. v Vegas Jet L.L.C.*, 106 F. Supp. 2d 1051, 1055-56 (D. Nev. 2000) (misappropriation of trade secrets even if an 'advertising injury' is not necessarily misappropriation of advertising ideas not occurring in the course of advertising anyway). For a case construing the various "style of doing business" see *Elcom Technologies, Inc. v. Hartford Ins. Co. of the Midwest*, 991 F.Supp. 1294, 1297 (D. Utah 1997), and the cases there cited.

<sup>5</sup>It was probably a good idea to get rid of the term "misappropriation." That is an accordion-like concept rife with ambiguity. *Heritage Mut. Ins. Co.*, 97 F. Supp. 2d at 928-29.

'advertisement.'" The word "title" has disappeared. The phrase "trade dress" has appeared.

The "in your 'advertisement'" restrictions found in the last two components of the definition--#14.f and #14.g--are not as dramatic as a simple reading of the definition would suggest. The old advertising liability coverage was restricted to "advertising injury" caused by offenses committed "in the course of advertising your goods, products, or services[.]"<sup>6</sup> That language has disappeared from the new Coverage B.<sup>7</sup>

There has been substantial confusion about the meaning of the word "title" as it occurred in the old Coverage B. Some argued that it referred to various types of property interest. Others have argued that it referred to names of books and such, as well as honorific appellation of people and some dumber animals. (I once heard of a feline entity confusingly named, "MagnifiCat, Queen of the Night," by her owner Johanna Wolfe Bazart. Perhaps the last four words in quotes were a title).<sup>8</sup>

This confusion has been hugely significant. The presence of the word "title" in the definition of "advertising injury" in the old Coverage B provided the platform for arguing that Coverage B covered some types of patent infringement.<sup>9</sup> The property interest view of the word "title" has also been used as a platform for arguing that slandering of title constituted a component of personal injury coverage.<sup>10</sup> The formulation of new Coverage B makes those arguments much more difficult, if it is now possible at all.

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<sup>6</sup>See *Novell, Inc. v. Federal Ins. Co.*, 141 F.3d 983 (10th Cir. 1998). See also *Robert Bowden, Inc. v. Aetna Cas. & Sur. of Connecticut*, 977 F.Supp. 1475 (N.D. Ga. 1997). Some policies restricted "advertising injury" to offenses committed *solely* "in the course of advertising your goods, products, or services[.]" *Winkelvoss Consultants, Inc. v. Federal Ins. Co.*, 991 F. Supp. 1024, 1030 (N.D. Ill. 1998).

<sup>7</sup>Some courts are inclined to see trade dress infringement as necessarily involving advertising. *Am. Employers' Ins. Co. v. DeLorme Publishing Co., Inc.*, 39 F.Supp.2d 64 (D. Me. 1999) (same for trademark infringement).

<sup>8</sup>For a case summarizing this controversy, see *Heritage Mut. Ins. Co. v. Advanced Polymer Technology, Inc.*, 97 F. Supp. 2d at 921-925.

<sup>9</sup>For some history of this matter, see *Mez Industries, Inc. v. Pacific Nat'l Ins. Co.*, 90 Cal. Rptr.2d 721 (Cal. App. 1999).

<sup>10</sup>*Bank One, Milwaukee, N.A. v. Breakers Development, Inc.*, 559 N.W.2d 911, 912 (Wis. App. 1997).

The appearance of the phrase "trade dress" is potentially significant. Some courts have thought that trade dress infringement was not included in the old definition of "advertising injury."<sup>11</sup> Others have rejected this view.<sup>12</sup> That matter has now been resolved.

There is one way in which the new definition of "personal and advertising injury" is broader than the old definitions of "personal injury" and "advertising injury." Thus, directly caused financial-only injuries might be covered under Coverage B, as was pure mental anguish.<sup>13</sup> One of the old definitions, the phrase "personal injury" could never apply to a "bodily injury," although the phrase "advertising injury," at least in theory, could. Under the new definition of "personal and advertising injury" a directly caused bodily injury cannot be covered as either a personal injury or as an advertising injury. However if the bodily injury is caused consequentially—if it is caused indirectly as a consequence of some other kind of injury—then there could be coverage. Thus, there would still be no coverage for a slap, a hit, or a shove administered and sustained in the process of being falsely detained. However, if someone were falsely detained and developed headaches as a result of the anxiety and humiliation he felt, there would be coverage. Of course, this fact should make no difference in the duty to defend, but it might make some difference in calculating the amount of indemnity owed.

The new definition of "advertisement" is an important feature of the newly formulated Coverage B. In the past, courts have had difficulty determining what counted as advertising.<sup>14</sup> Now, words or pictures constitute an advertisement if, and only if, they constitute:

- [1] a notice
- [2] if broadcast or published,
- [3] to the general public, or
- [4] to specific market segments, and
- [5] the notice concerns the insured's goods, products, or services, and
- [6] the purpose of the notice is to attract customers or to attract supporters.

This definition is a reasonable one. It clearly excludes one-on-one marketing. It is not clear whether it would include boisterous, natural-voiced announcements made on street corners and the like. Moreover, the definition literally requires that there be a broadcast or a publication to more than one market segment before a notice constitutes an "advertisement." The definition says

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<sup>11</sup>Advance Watch Co. Ltd. v Kemper Nat'l Ins. Co., 99 F.3d 795, 800-01 (6th Cir.1986).

<sup>12</sup>Am. Employers' Ins. Co. v. DeLorme Publishing Co., 39 F.Supp.2d 64, 76 (D. Me. 1999).

<sup>13</sup>Kite v. Gus Kaplan, Inc., 747 S.2d 503, 513-14 (La. 1999) (holding that tenant's mental anguish was a non-physical "personal injury" under Coverage B).

<sup>14</sup>Zurich Ins. Co. v Sunclipse, Inc., 85 F. Supp.2d 842,853 (N.D. Ill. 2000) (holding that under some circumstances personal solicitations might constitute advertising as well as marketing). See John Deere Ins. Co. v. Shamrock Indus., Inc., 696 F.Supp. 434 (D. Minn. 1988), *aff'd* 929 F.2d 413 (8th Cir. 1988) (controversial case).

"market segments." It is difficult to imagine that this result was intended. The pluralized "s" could create problems, however, and they are more than a bare conceivability.<sup>15</sup>

Consider the following semi-hypothetical situation. The Wonder Compute Corporation makes computer software for automated manufacturing processes. It is used in factory equipment to monitor, adjust, and control a variety of manufacturing machines. It does this from a single computer that displays by graphic means all necessary information. This software operates only in computers which have been properly and interactively connected to various manufacturing systems.

Wonder Compute hires CyberLogique to develop software for it. CyberLogique does so. The buyer was to own the copyright. Subsequently, CyberLogique adapts a software for Intellection, Inc., also a manufacturer and purveyor of automation software for sophisticated industrial use.

Wonder Compute brought a lawsuit against CyberLogique accusing it of infringing upon Wonder Compute's rights, including its copyright, in the software CyberLogique provided it. CyberLogique requested a defense from its insurance company, CyberSure. Wonder Compute alleged that part of CyberLogique's copyright violations was the distribution of samples of the software for temporary, experimental use. In particular, CyberLogique was accused of distributing it to one of Wonder Compute's principal competitors. The disk upon which the sample was contained self-destructed after a short period of time--six hours or so. (Obviously, the self-destruct feature was crucial to the marketing gimmick.)

The issue in this hypo is whether the distribution of the disk constituted advertising. In thinking about roughly this problem under the pre-1998 Coverage B the court held that it did not constitute advertising. Even when the term "advertising" is broadly conceived, an advertisement requires that a statement be made about the product or service which is to be sold. "The product itself cannot meet this requirement. It does not convey an independent message about the product; it simply is the product."<sup>16</sup> Second, the general trend is for courts to find coverage for "advertising injury" only when the definition of that term is met: (1) the activity must be in the course of advertising; (2) there is proof of a causal relationship between the activity which takes place in the course of advertising; and (3) the injury constitutes an "advertising injury" as that term

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<sup>15</sup>For an amazingly current discussion of the nature of advertising, see *Amway Distributors Benefits Ass'n. v. Federal Ins. Co.*, 990 F.Supp. 936 (W.D. Mich. 1997).

<sup>16</sup>*Farmington Casualty Co. v. Cyberlogic Technologies, Inc.*, 996 F.Supp. 695, 703 (E.D. Mich. 1998).

is defined in the policy.<sup>17</sup> For reasons which are obscure, courts have some doubt as to whether cases resembling the above-hypo can meet the requirement of causation.<sup>18</sup>

Would the hypothetical case be decided in the same way as the real case was under the pre-1998 policy? It seems to me that the real case was poorly decided. The thing can be an advertisement for itself. In one case, Coverage B-issues arose when a manufacturer took novel Christmas tree stand to a trade show, and certain identities were noticed by a competitor.<sup>19</sup> Why anyone would ever think that a thing cannot be an advertisement for itself is a mystery. What are shop windows for? Why do good companies spend so much time trying to get their wares displayed right in, for example, grocery stores? The line between marketing and advertising is simply not all that clear. Besides, a self-destruct disk (the marketing gimmick) is not the same one which does not self-destruct.

If the actual case was litigated now, under the 1998 Coverage B, the outcome would be the same as it was before. The 1998 definition of the term "advertisement" requires that there either be a broadcast or a publication. The distribution of a free sample is neither.

The other term in the definition which might cause problems is the term "publish." Almost all lawyers and virtually everybody in the liability insurance business thinks that the word "publish" is used here the way the term is used in the law of defamation, where "to publish" means to utter or to write down a proposition (or a significant fragment of a proposition) and to share it with at least one other human being.<sup>20</sup> This idea is certainly supported by the way the term "publication" occurs within the specification of the offenses listed in the definition of "personal and advertising injury." However, when the term stands alone in the definition of "advertisement," one could argue that statements are published only when they are *in publications*. This conclusion would mean that naturally carried speech would not constitute a publication. This inference is also a straightforward application of the contra-insurer ambiguity rule, which is employed in all jurisdictions. This worrisome result is also supported by the way the word "publish" is used in Exclusion (9) in the new Coverage B and its predecessor exclusion. There, "publish" clearly means what it means in the publishing industry, i.e. something other than natural-voice speaking.<sup>21</sup> Perhaps most courts would construe the word "publish" so that it means the same in the definition of "advertisement" that it means in two subsections of the definition of

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<sup>17</sup>*Id.* at 699.

<sup>18</sup>*Id.* at 704. See *Simply Fresh Fruit, Inc. v. Continental Ins. Co.*, 94 F.3d 1219 (9th Cir. 1996).

<sup>19</sup>*Industrial Molding, Inc. v. Am. Mfg. Mut. Ins. Co.*, 17 F.Supp. 633 (N.D. Tex. 1998).

<sup>20</sup>*Ringler Associates, Inc. v. Maryland Cas. Co.*, 96 Cal. Rptr. 2d 136 (Cal. App. 2000).

<sup>21</sup>For a discussion of these matters and a holding focused on *What is a publisher?* see *Am. Employers' Ins. Co. v. DeLorme Publishing Co., Inc.*, 39 F.Supp.2d 64, 80-84 (D. Me. 1999).

"personal and advertising injury." There is nothing about the contra-insurer ambiguity rule that requires this result.

### III. COVERAGE B EXCLUSIONS: MORE SPECULATIVE COMMENTARY

There are a considerable number of problems in the Exclusions, but only some of them are new.

One of the new exclusions is:

[This Insurance does not apply to "personal and advertising injury"  
caused by or at the direction of the insured with the knowledge that  
the act would violate the rights of another and would inflict  
"personal and advertising injury [.]"]

This is a fortuity exclusion.<sup>22</sup> The old Coverage B lacked one. Many found this odd, since Coverage A has two: 1) it restricts coverage to injuries caused by accidents and 2) bars coverage for injuries which are expected or intended from the standpoint of the insured, i.e. injuries which the insured either expects or intends or would expect or intend if you were a reasonable person. Occasionally, insurers have suggested that Coverage B has its own implied fortuity exclusion. They haven't gotten very far, however. Perhaps these insurers have picked the wrong cases to litigate.<sup>23</sup> Perhaps the courts have tended to apply fortuity requirement from the standpoint of the tort victim, rather than the insured.

New Ex. (1) is the analog to fortuity requirements in Coverage A. In a way, it is more favorable to the policyholder. In Coverage A the requirement of an accident and the requirement that the injury be neither expected nor intended applies disjunctively. In Ex. (1) in Coverage B, two things must both be true before the exclusion applies. First, the insured must have knowledge that the act in question would violate the rights of someone (although not necessarily the tort

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<sup>22</sup>Virtually all jurisdictions acknowledge the importance of fortuity requirements, although the precise contours of this requirement vary from state to state. *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 7 P.3d 825 (Wash. App. 2000) (malicious prosecution not necessarily a criminal matter but can be civil).

<sup>23</sup>*Titan Indem. Co. v. Riley*, 679 So. 2d 701 (Ala. 1986) (In the context of the policy holders seeking insurance for malicious prosecution under Coverage B, the court observed that the insurer "has not cited a case in which this Court has held that an insurer who, as in this case, agrees—in exchange for the receipt of premiums—to pay for the harm or loss suffered by a third party arising out of the intentional acts of the insured, may, nevertheless, avoid the contract on the ground of public policy." *Id.* at 706.)

victim), and second, the insured must have knowledge that the act would inflict its own component of the "personal and advertising injury" slate.

There are two important things to notice about Ex. (1). First, the insured must actually know that the act he performs or directs to be performed will violate someone's rights, and he must know that the act will inflict "personal and advertising injury." Knowledge is not the same as expectation, nor is it the same as mere belief. At the least, one knows something when one knows a proposition is true, and one knows a proposition is true only if one believes it; the proposition is true, and one believes the proposition on the basis of adequate evidence. As Plato put it, knowledge is justified true belief.<sup>24</sup> Notice that the exclusion does not talk about knowledge which might be possessed by someone in the position of the insured, and it does not say anything about conceiving the problem "from the standpoint of the insured." Thus, the contrast between the expected-or-intended exclusion in Coverage A and Ex. (1) in Coverage B suggests that the insured must actually have the knowledge in order for the exclusion to be triggered. In other words, the mere fact that a reasonable person in the situation of the insured would know something which, if known, would trigger the exclusion, is irrelevant.

Second, the exclusion is poorly worded in an important respect. As defined in the policy, every "personal and advertising injury" is really an offense, not a common-language or common-law injury. Of course, the offense may cause injury, and it usually does, but that is a contingent matter and not necessarily true. This means that the term "injury" in the phrase "personal and advertising injury" is a technical term, defined at variance with common usage. In Ex. (1) the word "injury" is used in its more normal sense, because it is used in conjunction with the word "inflict." Injuries are inflicted. Offenses are not. Offenses are committed, although they may—predictably—inflict injuries. Unfortunately, this linguistic infelicity could lead to problems. Suppose an insured has someone wrongfully detained but knows that the detainee does not have anything else to do, will not suffer anxiety, and will—by the end of the day—regard the whole thing as a joke. If the word "injury" in Ex. (1) means *injury*, then Exclusion (1) is satisfied. If "injury" in Ex. (1) means *offense*, then Exclusion (1) is not satisfied.

Third, the proposition, the knowing of which triggers the first conjunct of the exclusion, is one of the form, *This act will violate the rights of someone else*. That someone else need not be the person who makes a tort claim against the insured. If the insured knows that an act he is about to perform will violate the rights of Ted, but the same act also violates the rights of Victoria, and the insured tortfeasor does not know that, there will be no insurance for the violation of the rights of Victoria, precisely because the insured knew that he would violate the rights of *someone*, to wit: Ted. This observation is true no matter how the rights of Victoria are violated. They might be violated directly by whatever it is that the insured does, or they might be violated

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<sup>24</sup>THEAETETUS 202c. See Alvin Plantinga, WARRANT: THE CURRENT DEBATE (1993) and also see his, WARRANT AND PROPER FUNCTION (1993).

consequentially. In either case, so long as the insured knows that *someone's* rights are being—or about to be—violated, there will be no coverage for injuries caused to anyone else by the same act.

Exclusion (2) suffers from some of the same problems, namely, problems having to do with the nature of knowledge. Ex. (2) states as follows:

[This insurance does not apply to "personal and advertising injury"]  
arising out of oral or written publication and material, if done by or  
at the direction of the insured with knowledge of its falsity[.]

In some ways Ex. (2) is quite clear. Pleadings of fraud without any pleading of negligence will not generate even a duty-to-defend under Coverage B.<sup>25</sup> In other ways it is rather unclear.

First, it's unclear who must know that the published rights-violating material is false. Is it the insured or is it the person who actually publishes? I would hypothesize that it has to be the insured. But that leaves open the following possibility: *A* is an insured. *A* instructs *B* to publish *p*. *A* does not know that *p* is false, but *B* does. Presumably, if *B* is *A's* agent, *B's* knowledge will be imputed to *A*. But suppose *B* is an independent contractor. Under these circumstances, *B* will be publishing material he knows to be false; it will be defamatory or disparaging with respect to *C*; *B* is acting at the behest of *A*; and so long as *A* does not have knowledge of the falsity of *p*, *A* will be insured. This would be true even if *A* knew that, more often than not, *B* prevaricated on this very topic and *B* assured *A* that *p* was true.

Second, *A* need not be entirely ignorant with respect to the truth of *p*. Suppose *A* (the insured) *believes* that *p* is true but does *not know* it, although *B* believes *p* based upon good evidence and *p* is true. Under these circumstances, there would still be coverage for *A*. The real problem here is not the intricacies of a fanciful problem. The real problem here is proving precisely that the insured knew that a defamatory proposition he caused to be published was false. That is no easy matter in the fast-moving, work-a-day world.

Exclusion (3)—a "Prior Acts Exclusion"—presents different problems. It states as follows:

[This insurance does not apply to "personal and advertising injury"]  
arising out of oral or written publication of material whose first  
publication took place before the beginning of the policy period[.]

If the term "to publish," and its cognates, means *to utter or write and then share with* another and if the word "material" means *one or more propositions*, then Ex. (3) presents a real problem.

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<sup>25</sup>Wackenhut Services, Inc. v. Nat'l Union Fire Ins. Co. of Pgh, Pa., 15 F.Supp.2d 1314 (S.D. Fla. 1998).  
(Fraud necessarily involves asserting known falsity.)

Suppose the offending publication is a national television ad defaming the character of a business leader and disparaging the products of the business. Let us further suppose that the TV ad does not begin to run until Yr-2, but the tortfeasor explains it to his ad agency, and some others, in Yr-1. Literally, this would make the first publication of *p* during Yr-1, so coverage would be excluded under Yr-2. This does not strike one as an attractive result, and yet it appears to be dictated by the literal language.

Moreover, if one of the ads ran on the last day of Yr-1, and all the others ran in Yr-2, or thereafter, then it appears as though there would be coverage under the policy applicable to Yr-1 for that publication, and that there would be no coverage for any other publication. Remember, § 1.B restricts coverage to offenses committed during the policy period. Thus, all publications after the close of Yr-1 would not be covered under the first policy, and because of Ex. (3) none of the rest would be covered under any other policy. This is an extremely unattractive result.

Another problem has come up in connection with the word "material" and the prior acts' exclusion. Sometimes, policyholders argue that a prior publication is a publication of the same material only if it is absolutely identical in its content. Quite rightly, the courts have rejected this view in favor of a more pragmatic and practical standard. If material is substantially the same, then subsequent utterances are republications.<sup>26</sup> This is not only sensible insurance law, it is sensible tort law.

Exclusion (4) is a criminal acts exclusion. Its text is as follows:

[This insurance does not apply to "personal and advertising injury"]  
arising out of a criminal act committed by or at the direction of any  
insured[.]

It is puzzling that several of the exclusions turn on what *the* insured has or has not done, whereas Ex. (4) turns on what *any* insured has done. It is impossible to know the implications of that fact. Independently, one should keep in mind that Ex. (4) does not require that some insured realize that a criminal statute is being violated. All that is necessary is that some insured or another perform a criminal act or direct that one be performed. Presumably, one can direct that a criminal act be performed without knowing that it is criminal. Presumably, one does not need to know that an act is criminal in order to direct that a criminal act be performed. All that is necessary is that the act directed actually be criminal. Also notice that the offense must *arise out of* a criminal act in order to be excluded.<sup>27</sup> The mere fact that a criminal act is committed *along with* an

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<sup>26</sup>Ringler Associates, Inc. v. Maryland Cas. Co., 96 Cal. Rptr. 2d 136, 149 (Cal. App. 2000).

<sup>27</sup>There is substantial case law on the concept of *arising out of* in the context of Coverage B. See Am. Guarantee Liab. Ins. Co. v. The 1906 Co., 129 F.3d 802 (5th Cir. 1997) (another in a long line of cases concerning hidden cameras trained on undressed women); 12th Street Gym, Inc. v. Gen. Star. Indem. Co., 980 F. Supp. 796, 798-99 (E.D. Pa. 1997) (discussing "arising out of" in a suit for indemnification by a club owner who excluded a

insured-against offense is insufficient. No doubt, the *arise out of/occur along with* distinction will lead to problems down the road. That fact is probably unavoidable.

Moreover, the mere fact that an insured offense occurs after the performance of a criminal act is not sufficient to guarantee that the insured-against offense *arises out of* the criminal act. Thus, there may be a distinction between *arising out of* and *arising from*. In some sense, every act which comes after and is related to a previous act, arises from it. Surely, if *A* slanders someone in the context of criminally violating the Sherman Antitrust Act, it is not intended that coverage be excluded. On the other hand, if I slander someone in order to cover up my own criminality—say the fact that I’ve murdered a law clerk for saying that I have the attention span of a gnat—I would have no coverage. One wonders if this is what the carrier intended.

Consider the following. Suppose I run over a child because I am drunk, but do not realize I have done so. I am then asked whether I hit anybody with my car. I deny that I did, and suggest that someone else who regularly drives my car committed the act. The second remark would be slanderous; I would not know that it was false; it would arise from a criminal act; so it would not be covered. But shouldn’t it be? The old, pre-1998 version of this exclusion referred to the “willful violation of a penal statute by or with the consent of the insured.” The old definition was problematic because the concept of *willfulness* is obscure, even in the criminal law. Nevertheless, the new exclusion creates troubling problems of its own.

One wonders about the tried-and-true legal cliché that most everyone is presumed to know the law, so ignorance of the law is no excuse in the context of most criminal cases (except where double knowledge is required, i.e., where knowledge is required not only the criminal law but some other civil law in order to violate the criminal law).<sup>28</sup> Now let us suppose that I direct someone else to violate a law which is in fact criminal, though I do not know that it is. Presumably, that would be conspiracy, or something like it. If it is a conspiracy, then I am guilty of a crime, and—presumably—I am irrefutably presumed to know the law. Does this really make sense? Would we wink at reality like this in the context of insurance? If that policyholder really does not know that a law is criminal and either breaks it or directs someone else to break it, should he not have coverage?

Exclusion (5) is really the same as the old exclusion. Here is what it says:

[This insurance does not apply to “personal or advertising injury”  
for which the insured has assumed liability in a contract or

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patron because he had AIDS); *Am. Indem. Co. v. Foy Trailer Rentals, Inc.*, 2000 WL 1839131, \*4 (Tenn. App. 2000) (discussing “arising out of” in a suit concerning human rights violations by a company against a pregnant employee).

<sup>28</sup>*Johnston v. Del Mar Distributing Co., Inc.*, 776 S.W.2d 768, 771 (Tex. App.—Corpus Christi 1989) (ignorance of the law is no defense to criminal prosecution).

agreement. This exclusion does to apply to liability for damages that the insured would have in the absence of the contract or agreement[.]

What is odd about this exclusion is that some assumptions of liability are covered by Coverage A. The typical situation is where one entity has indemnified another before anything bad happens. Under Ex. (5) if a store hired a security agency to provide monitoring for store shoplifters, and the security agency falsely detained someone, and the store had indemnified the security agency against some instances of false imprisonment, wrongful detention, and the like, there would be no coverage. Assuming the security agency was genuinely an independent contractor and there was no negligence on the part of the store with respect to the conduct of the security agency.

As it happens, there is a limited contractual liability endorsement for personal and advertising injury.<sup>29</sup> This endorsement is available for a price. The size of the price depends upon the claims history of the security agency, the precautions it takes (*e.g.*, training), and the precautions taken by the store. Moreover, some insurers will agree to delete this exclusion entirely from some policies. There is no standard endorsement to accomplish this end, however, so that some sort of manuscript endorsement is necessary if an insured wants to get ride of it. Agents, risk managers, and insurers alike need to careful about this exclusion in the underwriting phase.

Exclusion (6) applies to breaches of contract. Here is what it says:

[This insurance does not apply to "personal and advertising injury"] arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement[.]"

As is well known, insurers are leery about coverage for breach of contract and indeed, many are loath to admit there is any coverage for it at all under Coverage A. There is substantial controversy in the courts about this matter.<sup>30</sup> One wonders how far to push (or restrict) the locution *arising out of*. If *A* breaches a contract and then slanders *B* to cover up the fact that he has breached his contract, has the slander (and therefore the "personal and advertising injury") arisen from a breach of contract? Literally, the answer is obviously yes. Judging from the function of liability insurance, one would expect the opposite answer. Perhaps a slippery-minded cohort might say that the defamation was too remote from the breach of contract to *arise out of* it. This might be a pragmatically defensible answer, but it is not very satisfying and it is intellectually disreputable.

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<sup>29</sup>(CG 22 74).

<sup>30</sup>For a review of the cases, see Patrick J. Wielinski, *INSURANCE FOR DEFECTIVE CONSTRUCTION: BEYOND BROAD FORM PROPERTY DAMAGE COVERAGE 19-34* (2000). (This chapter is actually entitled "CGL Coverage for Breach of Contract.")

The exception to the exclusion is far from clear. If *A* has an implied contract with *B* to use *B*'s advertising ideas in *A*'s advertising, and *A* fails to do so, it is difficult to see how that omission could possibly constitute an insured offense. It certainly does not constitute an instance of § 14.f, since that requires the actual use of another's advertising ideas in advertising, whereas the very terms of the exception to the exclusion suppose that those ideas are not being used. Moreover, it is difficult to see how *not* using the ideas of another could infringe upon copyright, trade dress or slogan.

Perhaps the exception to the exclusion really contemplates an implied contract not "to use" but "about the use of" another's advertising ideas. That change in wording would alter the exception to the exclusion substantially and would mean that there might be coverage when *A* used the advertising ideas of *B* in his own advertising and thereby committed a tort, but also breached his contract with *B*. (Of course, the exception would apply only to an implied contract not to use advertising ideas. This alteration may improve Ex. (6), but it also drastically alters its meaning.)

The next two exclusions—Ex. (7) and (8)—are designed to prevent CGL coverage from becoming warranty insurance or insurance against deceptive trade practices.<sup>31</sup> Exclusion (9) is designed to require advertising, broadcasting, telecasting, and publishing concerns to buy their own special insurance.<sup>32</sup> All three of these exclusions are old hat.

Exclusion (10) and § 2.B are designed to exclude pollution caused problems from Coverage B. Some reported cases have found problems.<sup>33</sup> Some of these cases have, in effect, held that policyholder-plaintiffs could not circumvent the pollution exclusion as it applied to Coverage A by alleging physical trespass under Coverage B. Some of the courts have held that this is too clever by about half.<sup>34</sup> Other courts have held that with a policyholder is not trying to circumvent Coverage A but is trying to export the pollution exclusion from Coverage A to

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<sup>31</sup>*Elcom Technologies, Inc. v. Hartford Ins. Co. of the Midwest*, 991 F.Supp. 1294, 1298 (D. Utah 1997).

<sup>32</sup>See *Am. Employers' Ins. Co. v. DeLorme Publishing Co.*, 39 F.Supp.2d 64 (D.Me. 1999) (trademark dispute among cartography publishers involving computerized travel maps). There are all kinds of economic insurance that specialized entities may purchase over and above CGL coverage. Banks, for example, can buy stop loss liability insurance, and it may involve a duty to defend. *Provident Bank of Maryland v. Travelers Property & Cas. Corp.*, 236 F.3d 138, 142 (4th Cir. 2000).

<sup>33</sup>*Titan Holdings Syndicate v. City of Keene*, 898 F.2d 265, 268 (1st Cir. 1990) (pollution exclusion clause did not bar coverage for bodily injury or property damage arising from loud and disturbing noises and bright light emanating from sewage treatment plant). See *Ill. Toolworks, Inc. v. Home Indem. Co.*, 998 F. Supp. 868, 871-73 (N.D. Ill. 1998) (pollution contaminating groundwater under property adjacent to insured was "wrongful entry" and "personal injury" covered by CGL policy). See also *Hirschberg v. Lumbermans Mutual Ins. Co.*, 798 F. Supp. 600, 603 (N.D. Cal. 1992) (insurer had duty to defend insured in action brought by real property owner for dumping of hazardous waste).

<sup>34</sup>*Lakeside Non-Ferrous v. Hanover Ins. Co.*, 172 F.3d 702, 705-06 (9th Cir. 1999).

Coverage B, the gambit will not succeed.<sup>35</sup> Upon reflection, of course, the substance of this distinction is not exactly clear. Also, why is it a *circumvention* to allege a physical trespass as the results of pollution under Coverage B. After all, the contra-insurer ambiguity rule suggests that if the term "trespass" is ambiguous, it should be construed in favor of the insured, not the insurer. Besides, if insurance companies wanted the pollution exclusion to extend to Coverage B, as well as Coverage A, they could have easily written the policy so that it obviously did.

In one very interesting case which was not reported, gas began leaking out of pipes and into the ground and thence into apartments. The landlord, who was also the owner of the land, was responsible for the repair of the pipes. The city ordered everyone out of the apartments. An enterprising plaintiff's lawyer pitched a circus tent across the street from the apartment building, gave away balloons, soft drinks, popcorn, and the like, signed up a large group, and brought a class action. The landlord/owner/lessor tendered the defense to its insurance company. It refused the defense on the grounds of the pollution exclusion. Counsel for the insurer pointed out that the pollution exclusion covered only Coverage A.<sup>36</sup> The insurer was convinced that the physical placement of an exclusion as important as the pollution exclusion was irrelevant. The insurer was advised vigorously to the contrary, and it was pointed out that if the insurer had wanted the pollution exclusion to cover Coverage B, it could have easily added an endorsement. Nevertheless, the insurer persisted.

After the insurer refused coverage, the insured cooperated with the plaintiffs' attorneys. The class was certified; liability was established; and a gargantuan judgment was entered after a trial which, if it involved an actual contest, barely did so. Of course, the class action plaintiffs had demanded that there be a settlement within policy limits, and the policyholder had forwarded it on to the insurance company, but nothing was done. Naturally, the policyholder's rights against the insurance company were conveyed to the plaintiff class, and another law suit was filed.

Fortunately, along the way the insurer came to its senses and settled the case. Perhaps the insurer was rational in the end, even in its ostensible error. There were sufficient mistakes made by the plaintiffs' lawyer along the way, and the ultimate value of the case may have been reduced somewhat. These are matters which are difficult to determine.

In any case, when Ex. (10) and § 2.B are combined, it looks like Coverage B is subject to an absolute pollution exclusion which extends to suits for damages brought by private individuals and suits for cleanup brought by governmental entities.

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<sup>35</sup>Royal Ins. Co. of Am. v. Kirksville College of Osteopathic, 191 F.3d 959 (8th Cir. 1999).

<sup>36</sup>Other exclusions are like this too. Employee exclusion in the employment-related practices exclusion may not apply to false arrest and false imprisonment. Zurich Ins. Co. v. Smart & Final, Inc., 996 F. Supp. 979, 987-88 (C.D. Cal. 1998). See also State Farm & Cas. Co. v. Burkhardt, 96 F. Supp.2d 1343, 1350 (M.D. Ala. 2000) (business pursuits exclusion in an umbrella policy's personal injury coverage not applied to an invasion of privacy claim).

#### IV.

## PLEADING PROBLEMS: YET A FURTHER SPECULATION

The relationship between pleading rules and the principles of determining coverage have always been somewhat obscure.<sup>37</sup> The Federal Rules of Civil Procedure, and consequently most state rules, do not require fact pleading. In contrast, insurance law does require at least sketchy fact pleading. Unless facts are pleaded, the insurer will never have a duty to defend. It is the pleading of facts which triggers the Complaint-Allegation Rule. Hitherto, courts have, for the most part, held that the fact pleading requirement applies to Coverage B situations.<sup>38</sup> In Coverage B situations, what is actually pleaded determines the duty to defend, not what might be pleaded, or what might be pleaded in an amended complaint.<sup>39</sup> At the same time, the factual pleadings need not be exhaustive, and tort causes of action need not be pleaded perfectly or even fully in order to trigger coverage. As a general rule, there is unlikely to be a duty to indemnify when there is not a duty to defend. Consequently, there is an indirect relationship between the rule of insurance law requiring fact pleading to some extent, and the duty to indemnify. Notice that there is absolutely no requirement generated by insurance law or generated by temporary rules of civil procedure that a plaintiff must plead a cause of action. Under procedural rules, any set of averments sufficient to give the defendant some sort of notice are probably okay, and under insurance law, only some salient facts have to be pleaded. Less than complete, and even fragmentary pleadings will probably trigger contractually based insurer duties.

Coverage B is conceptually and linguistically different from Coverage A. Coverage A requires that the insurer be able to determine that the plaintiff is claiming there has been an accident, that he has sustained bodily injury or property damage, and that he wants the insurer to pay (usually damages). There is nothing in the linguistic or ideational structure of Coverage A which suggests that insurance law requires a tort plaintiff to plead a cause of action. Things are somewhat different when it comes to Coverage B. There, the insurance policy talks about *offenses*. This suggests that, far from pleading accident/bodily injury/damages, the plaintiff must plead an offense. When one reads the list of offenses, it is entirely clear that several of them exactly are common law torts, which may be distinguishable from closely related yet different

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<sup>37</sup>See *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966) and its huge progeny.

<sup>38</sup>*Indus. Indem. Co. v. Apple Computer, Inc.*, 95 Cal. Rptr.2d 528 (Cal. App. 1999). (This case involved Apple Corps., Ltd., better known as Apple Records, the business arm of The Beatles, suing Apple Computer then Apple Computer suing its insurance company. It was a hard day's night.)

<sup>39</sup>*Filenet Corp. v. Chubb Corp.*, 735 A.2d 1203 (N.J.Super. 1997) (patent infringement).

common law torts.<sup>40</sup> And some of them are generic descriptions of what may be several closely related torts, but have different names and different jurisdictions. The "invasion of the right of private occupancy" component of Definition #14.c is like this.<sup>41</sup>

Obviously, no responsible insurer would suggest that the *offense*-based language of Coverage B mandates a return to full blown common law cause-of-action pleadings, any more than the requirement that facts be pleaded under Coverage A mandates adherence to the rigorous "Field Code" form of fact pleading. No responsible insurer would deny a defense to an insured simply because a tort like malicious prosecution was inadequately pleaded, as long as the gist of the thing was clear.<sup>42</sup> Everyone understands that concept of an *offense* is not identical to the concept of any particular tort or to any particular cause of action.<sup>43</sup> A non-standard version of Coverage B uses the term "belittle." There actually was a common law tort of *belittlement*. The language of the non-standard policy making it an offense to belittle the products of another is not restricted to that ancient, antique, and antiquated cause of action.<sup>44</sup>

Moreover, an offense and a cause of action may be linked in unusual ways. For example, from the surface, it looks like one of the offenses forbidden in Coverage B is the cause of action in *slander*. However, what is forbidden is the publication of defamatory language. If someone were to sue for tortious interference and plead facts which added up to the publication of defamatory language, but didn't sue for slander, a covered offense would be pleaded although the cause of action for slander would not. Under these circumstances, there probably is coverage.<sup>45</sup>

In addition, it is important to remember that if an offense occurs as a discreet, relatively self-contained, and identifiable event in a larger, possibly excluded, context, there may still be

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<sup>40</sup>Malicious prosecution, for example, is not the same as misuse of process. *Atlantic Mut. Ins. Co. v. Atlanta Datacom, Inc.*, 139 F.3d 1344, 1345-46 (11th Cir. 1998). At the same time, some states recognize a civil action for malicious prosecution. *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 7 P.3d 825, 829-30 (Wash. App. 2000).

<sup>41</sup>*New Castle County Delaware v. Nat'l Union Fire Ins. Co.*, Pgh. Pa., 84 F.Supp.2d 550 (D.Del. 2000), *rv'd* 174 F.3d 338 (3d Cir. 1999). Oddly enough, both the district court and the circuit court agree on this proposition, although in different ways.

<sup>42</sup>*Int'l Ins. Co. v. Rollprint Packaging Products, Inc.*, 728 N.E.2d 680, 688 (Ill. App. 2000).

<sup>43</sup>*McCormack Baron Mgmt. Services, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 989 S.W.2d 168, 169 (Mo. 1999).

<sup>44</sup>*Foundation for Blood Research v. St. Paul Marine & Fire Ins. Co.*, 730 A.2d 175 (Me. 1999). See *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968 (9th Cir. 1994).

<sup>45</sup>*Butts v. Royal Vendors, Inc.*, 504 S.E.2d 911 (W.Va. 1998). See *Home Ins. Co. v. Waycrosse, Inc.*, 990 F.Supp. 720 (D. Minn. 1996). See also *United Wats, Inc. v. Cincinnati Ins. Co.*, 971 F.Supp. 1375 (D. Kan. 1997). Finally, see *Bankwest v. Fidelity & Deposit Co. of Md.*, 63 F.3d 974 (10th Cir. 1995).

coverage. Almost certainly, there will be a duty to defend.<sup>46</sup> Insurers need to be especially careful refusing to defend a case under these circumstances. It seems to be an especially tempting gambit for lots of adjusters.

At the same time, policyholders and their lawyers find it imperative to look for coverage. After all, defending lawsuits is an extremely expensive proposition, not to mention the payment of damages. Hence, insurers are beginning to get requests for defense in cases which are related to "personal and advertising injury" but are not really within the scope of the coverage. No one thinks that all business torts constitute covered torts under Coverage B. This is true even though policyholders and their lawyers constantly push in that direction.<sup>47</sup> Courts tend not to imply defamation or disparagement claims from other more explicitly pleaded claims.<sup>48</sup> Courts construe this as going outside the pleadings when looking for a duty to defend. Under the old definitions, to take another example, insureds sometimes argued that if an alleged tortfeasor touted its own product, it was impliedly disparaging the product of the competitor, thereby triggering some sort of advertising injury.<sup>49</sup> The danger is that a tort plaintiff will use words here and there in various contexts which are prominent in Coverage B; the policyholder will then claim that there is coverage; and a cowardly insurance adjuster (say, named "Burt Larva") will cave in when he should not. The truth is that the appearance of words like *marketing*, *advertising*, *advertisements*,<sup>50</sup> *malicious*, *prosecute*, *patent*, *copyright*, *reputation*,<sup>51</sup> and so forth, do not automatically trigger coverage. Similarly, with the duty to indemnify, "it is the actual basis for liability in the underlying action which determines whether there is a duty to indemnify, not whether the underlying course of conduct involved historical facts could be marshaled to support

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<sup>46</sup>CGU v. Travelers Property Cas., 121 F.Supp.2d 819 (E.D. Pa. 2000).

<sup>47</sup>Bruceton Bank v. U.S. Fidelity & Guaranty Ins. Co., 486 S.E.2d 19, 24 (W. Va. 1997) (garden variety lender liability not personal injury), State Farm Fire & Cas. Co. v. Martinez, 995 P.2d 890, 893 (Kn. 2000) (unauthorized practice of law not within Coverage B), KLL Consultants, Inc. v. Aetna Cas. & Surety Co. of Ill., 738 So.2d 691, 695 (La. App. 1999) (interference with a consultant's prospective business advantage was neither advertising nor personal injury under the factual circumstances of the case).

<sup>48</sup>Motorist Mut. Ins. Co. v. Nat'l Dairy Herd Improvement Ass'n, Inc., 2001 WL 82930 (Ohio App. 2001).

<sup>49</sup>Zurich Ins. Co. v. Sunclipse, Inc., 85 F. Supp. 2d 842, 853-54 (N.D. Ill. 2000). Then again, advertising alone probably never constitutes patent infringement. United Nat'l Ins. Co. v. SST Fitness Corp., 182 F.3d 447, 449-51 (6th Cir. 1999).

<sup>50</sup>Heritage Mut. Ins. Co. v. Advanced Polymer Technology, Inc., 97 F. Supp. 2d 913, 921 (S.D. Ind. 2000). (Also stating that misappropriating trade secrets is not the misappropriation of advertising ideas or even a style of doing business. *Id.* at 926-27. See Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742, 744 (3rd Cir. 1999) (advertising liability is not triggered by committing a business tort and then disseminating the result of the wrongful conduct).

<sup>51</sup>See Commercial Union Assurance Co. v. Merrill, 6 F.Supp.2d 439 (D.V.I. 1998). (The court found coverage when the policyholder was accused of breaching a contract as the result of making defamatory assertions. The court found the policy ambiguous.)

a covered claim."<sup>52</sup> With respect to both the duty to defend and the duty to indemnify, one should keep in mind that "an injury and any resulting liability does not become an advertising activity merely because the insured commits a business tort and then advertises the results."<sup>53</sup> Clearly, the tort plaintiff must plead offenses, although she need not plead them perfectly or thoroughly.

At the same time, it is helpful to remember, in thinking about pleadings (as well as other features of Coverage B), that jurisdictions differ with respect to how tight a connection there must be between the advertising activity and the offense. Consider this language:

Many jurisdictions require a tight causal connection between the underlying injury and advertising activity, and frequently hold that an insurer is not obligated to defend even where the underlying complaint contains allegation of advertising activity, so long as the ultimate source of the allegations is the manufacture, design or sale of an infringing product. [In a footnote, the court suggests that Michigan, Illinois, and California are like this.] Not New York. Breaking from the majority position, courts in New York have held that 'it would be artificial to deny coverage by constructing a distinction between the injuries arising from the manufacturer and sale of infringing goods and the injuries arising from the marketing of these same goods by means of display or advertising of the goods.' [Citation omitted.] All that is needed under New York law are allegations that the insured has advertised a 'knock-off' product and thereby caused harm. [Citation omitted.] Indeed, a duty to defend arises in New York even if the underlying copyright infringement claims stem mainly from the design or sale of 'knock-off' goods, and the advertisements are merely incidental to the infringing activity [citation omitted]. . . . [T]he required causal nexus between injury and advertising activity is relatively loose in New York.<sup>54</sup>

Obviously, *Moonlight Design* is an "old Coverage B" case. One wonders how the changes in the definition of "personal and advertising injury" will affect New York law.

One of the real issues has to do with how to understand the phrase *arising out of*. If *A* advertises wedding dresses which knock-off the wedding dresses of *B*, and then *A* sells a whole mess of them, the question is whether *A* is responsible only for those damages which are traceable

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<sup>52</sup>USX Corp. v. Adriatic Ins. Co., 99 F. Supp. 2d 593, 614 (W.D. Pa. 2000).

<sup>53</sup>*Id.* at 621, citing *The Frog, Switch & Manufacturing Co.*, 193 F.3d at 744.

<sup>54</sup>*Western Am. Ins. Co. v. Moonlight Design, Inc.*, 95 F. Supp. 2d 838, 844-45 (N.D. Ill. 2000).

to the copyright violations in the ads, or whether *A* is responsible for the damages caused by everything. From the point of view of the duty to indemnify, these are extremely difficult questions. From the point of view of the duty to defend, the difficulty of the question will be inversely proportional to the extent to which a pleader emphasis the central role of advertising in causing his problems.

A judicial koan is worth remembering when thinking about how far courts will go to reorganize petitions—or reshuffle their verbiage—to find coverage under Coverage B. Here it is: "Deconstruction is not part of [any state]'s approach to insurance contracts."<sup>55</sup>

## V. CONCLUSION

The new, 1998 version of Coverage B mostly tinkers with the older version. Probably, it is a step in the right direction. The problem concerning patent infringement as personal injury or advertising injury is gone, one would think. The wrongful eviction language is clarified. Nevertheless, the 1998 revision is only one step. As demonstrated here, there are lots of problems left to dispute. No doubt there are large ones not so much as envisaged here.

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<sup>55</sup>Western States Ins. Co. v. Wisconsin Wholesale Tire, Inc., 184 F.3d 699, 702 (7<sup>th</sup> Cir. 1999) (Wisconsin).