



Legal Beat

By MICHAEL SEAN QUINN

Advertising Liability

Exploring the often misunderstood coverage

Standard commercial general liability policies cover something they term "advertising injury." This insurance is to be found in Coverage B. Advertising, for insurance purposes, can refer to virtually all marketing functions.

The "advertising injury" CGL policies insure against is tricky. First, it includes any bodily injury, property damage, financial loss, or emotional injury for which money damages can be awarded. No other part of the policy is this broad.

Second, covered advertising injuries must arise in the course of an insured's advertising its products or services. No other part of the policy is this narrow. Third, the injury must result from a commission of an enumerated offense. In effect, these offenses are various of the business torts to be found in virtually every jurisdiction.

Insuring agreement

Sometimes, the CGL policy describes these offenses in the language of the law. Sometimes they are not detailed. In any case, here they are:

- defamation,
- product disparagement,
- misappropriation of advertising ideas,
- misappropriation of style of doing business, and
- infringement of "copyright, title or slogan."

Defamation is either libel or slander. Libel is written. Slander is spoken. Only defamation of persons or organizations are covered. The tort known as "slander of title" may, therefore, not be covered. The tort "slander to credit" probably is. The idea of product disparagement includes the disparagement services.

The misappropriation of ad ideas is not akin to stealing trade secrets. Ad ideas are generally not secret but public. It cannot be repeated too often that insured advertising injuries arise only in the context of advertising. Thus, if a teacher violates a copyright by illegally distributing material to his students, there is no coverage because it did not happen in the context of advertising. On the other hand, if one designer of wedding dresses violates the design copyrights of another in the context of selling knock-off dresses, this may very well be insured ad injury.

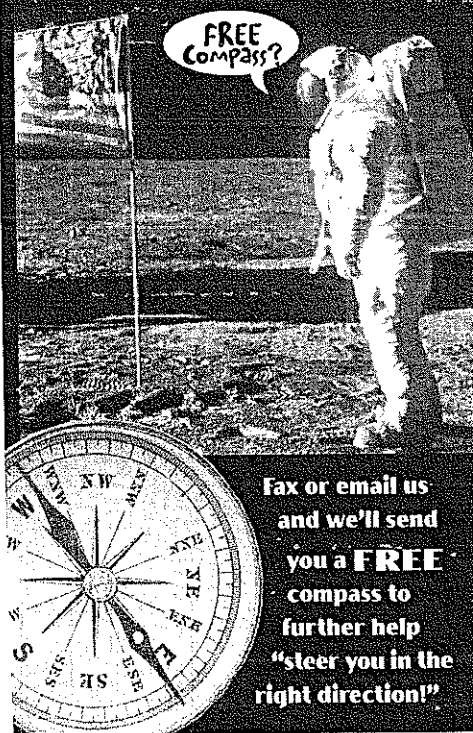
Coverage B resembles Coverage A somewhat. The carrier has a right and duty to defend. It has a right to investigate and settle. Probably, if it does not settle within policy limits, when it has a clear opportunity to do so, it may expose itself to damage beyond policy limits. (In Texas, this kind of opportunity arises only when the plaintiff offers to settle within policy limits.)

Exclusions

Coverage for advertising liability is subject to a number of exclusions. For the most part, they are pretty straightforward.

Known Falsity. There is no coverage for defamation when the insured knows that the content of the ad is false. This exclusion is a kind of fortuity requirement. Coverage A

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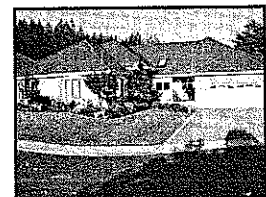
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covers only accidents, so the fortuity requirement usually found in insurance is built into the foundation of Coverage A. This is not true with advertising liability, since it insures against offenses. In this context, offenses are intentional torts, not accidents.

Time of Offense. If the first statement to another (what the law calls "publication") of the defamatory material occurred before a given policy period begins then there is no coverage under that policy even if some of the later publications occurred during the policy period. Coverage will be found in the CGL policy that existed during the first utterance, if at all.

Willfulness. Advertising liability is excluded if the offense that causes it arose out of the "willful" violation of a penal statute or

ordinance, and that violation is committed by the insured or with his consent. This exclusion, like the first one, is a fortuity exclusion. The concept of willfulness is much stronger than the concept of intentionality. Conduct is willful only if it is explicitly contemplated in context. Every person is presumed to know the law so violations are presumed intentional. One is not presumed to violate the law willfully, however. One can violate a statute willfully, only if one realizes that one is doing so.

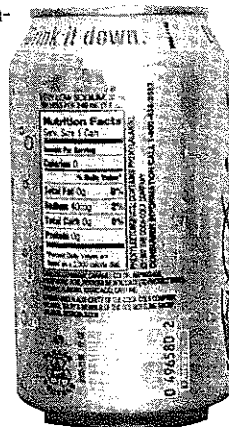
An action is willful when one means to do what one does, and one understands the meaning of what is done. Willfulness does not equal meanness, however. The willful person is not necessarily a meany.

Indemnity Agreements. Coverage A encompasses indemnity agreements. Thus, if a subcontractor indemnifies a general contractor against liability for bodily injuries it causes to the employee of the subcontractor, the subcontractor's insurer will insure the indemnity agreement. Precisely the opposite is true for advertising injury. Indemnity agreements in the context of advertising are not insured, by Coverage B.

Breach of Contract. There is no coverage for breach of contract in advertising contexts. Thus, if an accounting firm advertises that it will finish specific work by a date certain and does not, Coverage B does not provide insurance. Coverage B is quite explicit about this exclusion (Coverage A does not expressly exclude breaches of contract. Most courts exclude any breach of contract damages, even when they result from an accident. This view may be changing, however.)

Warranties. Similarly, if an advertiser says that his goods or services are of a certain qual-

ity and they are not, advertising liability will not help him meet his warranty obligations. Nor will it help if he is sued for misrepresentation or fraud in the sale of the goods.



Price Ad Errors. This general idea also applies to errors in advertising the prices of products and services. If an advertiser says that he will sell a widget for \$10—he meant to advertise it for \$20—and he gets sued as a result, Coverage B will not help him.

Finally, Coverage B is not intended as insurance for organizations which are in the business of advertising, broadcasting, telecasting, or publishing. If an ad agency screws up a job, Coverage B will not help it. If a newspaper, radio, or TV station labels somebody, Coverage B will not help out. There are specialized policies for

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those business torts.

Quandaries and qualms

Question: Is cable television transmission telecasting and so excluded? If not, does Coverage B cover defamation by cable? What about Internet companies? Surely, the company that uses the Internet

and slanders somebody in an ad gets coverage. But what about the provider? Is it not in the advertising business? After all, it makes money by selling ads.

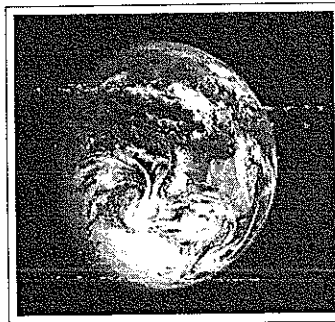
In general, the idea of advertising is understood fairly broadly. Solicitations of all types may count as advertising. Some courts have even held that one-to-one solicitations are a type of advertising. One court held that a letter to a customer libeling a competitor may count as advertising.

If business buildings are painted the same outlandish color—say, aqua(ish)-lavender—and that color becomes associated with a particular product or firm, if a competing firm were to paint its buildings the same color, and the first company sue the second, the CGL carrier for the second might be on the hook. The type of offense insured against is misappropriation of a style doing business. The tort of traddress infringement involves just that. The product of D (the insured) looks too much like the product of P, and P sues D for trying to exploit the look of P's product illegitimately. Traddress infringement is almost inevitably an ad injury, since the look of a product almost always constitutes a kind of ad.

Sometimes, the use of names constitutes advertising. For example, if somebody, other than the already existing system of stores, started selling "Gappy" clothes with

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an exterior label, this might constitute actionable advertising. It might be insured. A century ago the U.S. Supreme Court enjoined using the name "Koke" for competing cola drinks.

Several years ago, one business, P, used the trademark "Touch of Class" in connection with advertising its jewelry. Another firm, D, later began using the same phrase. P sued D for trademark infringement. Eventually, D suffered a judgment of \$1 million. D's insurance company refused to pay. Eventually, the court decided that the phrase "Touch of Class" was used as a title or slo-

gan in advertising. The court said that it used the phrase as "an attention-getting device for its jewelry, the effort being to convey a sense of style, fashion, and class."

In most jurisdictions, advertising products that infringe the patents of other products is not automatically advertising injury. The patent infringement must play a causal role in the advertising to be insured against.

The cases are different when the issue is not patent infringement but trademark or tradenames infringement. The later two infringements are almost always involved in advertising. In one Texas case, a firm manu-

factured Christmas tree stands that appeared to copy the novel Christmas tree stands of someone else. The first manufacturer discovered the infringement at a trade show. It managed to take photographs and get a peak at the manufacturer's sales catalog. The second manufacturer got sued for trademark infringement.

A federal district court in Lubbock concluded that the insured-defendant had misappropriated the ad ideas of another. In addition, the insured had misappropriated the style of doing business of another, the court said.

Business litigators are getting savvier

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about pleading cases into coverage. Business torts can often be pleaded in such a way that advertising is somehow involved in a plaintiff's claim. Insurance companies, and insurance agents, need to keep this in mind. Insurance adjusters appear to have very little experience, comparatively speaking, in evaluating advertising injury claims. There are few established protocols, and the adjustment manuals provided the adjusters are not very concrete. The coverage is too young, as yet. This is a dangerous area.

It can be dangerous for agents, too. In 1998 the Insurance Services Office promulgated a new form. It is not used much yet. It makes some subtle changes in substance, though it looks more different than it really is. No doubt they will be important in the future, once insurers start using them. The new form might change the way cases like the wedding dress case discussed earlier are handled. Agents need to study both the old and the new forms; look for hidden differences that may affect the policyholders they service; and choose their words carefully. ■

Quinn is an Austin shareholder in the law firm of Sheinfeld, Maley & Kay. He litigates and testifies on insurance related problems and is currently the chair of the Insurance Section of the State Bar of Texas. He also is a Visiting Professor of Law at the University of Texas-Austin.



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