

Coverage

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The parties to a business relationship often memorialize it in writing. That agreement, a contract between the parties, often seeks to allocate risks associated with the venture, hopefully according to which party is best able to handle it. The paradigm of this type of business relationship in which parties allocate risks is the construction contract, and the risks associated with construction are considerable.

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Whether the insured is a large corporation, small business or individual, the procuring of insurance is typically accomplished through an intermediary who has special knowledge in the business of insurance. These intermediaries are most commonly recognized as "broker" and "agent," although their duties and obligations can often become blurred, thus effecting the legal consequences of their actions.

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Misrepresentations in the Application as Grounds for Rescission of the D&O Policy


by John H. Mathias, Jr., Timothy W. Burns,
and Traci M. Braun

In a seemingly inverse proportion to recent losses on the NASDAQ, stock-drop securities class actions are on the rise. While trying to defend against this recent spate of securities litigation, corporations and their directors and officers must often face battle on a second front with their insurer over the question of coverage under the company's D&O policy. In many instances, the insurers attempt to rescind the D&O policy due to alleged misstatements in the corporation's application for insurance. Courts continue to struggle with striking a balance between ensuring that directors and officers receive the benefit of their D&O policy while at the same time shielding insurers from liability for risks they arguably did not intend to insure. This article discusses that case law.

The Application

Not surprisingly, the first step in evaluating insurer claims for Rescission based on misrepresentations in the application is the language of the application form itself. Although the lack of a standard application is problematic, in some respects, to the analysis, the general nature of the in-

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Coverage B

Personal and Advertising Injury Liability—1998 Revisions

by Michael Sean Quinn

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

The actual text of the “new” coverage is the necessary starting point. There are both striking and subtle differences between the language of the old coverage and the language of the new. Mostly, the differences are not obvious. There are important distinctions, however, and more may be discovered 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, and hence the fact that exhaustion limits the duty to defend, are omitted. They are seldom controversial outside rather unusual circumstances.³ It is convenient to think of 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 also in the pre-1998 form as well. Relevant definitions are contained in a separate section entitled, whimsically enough, “DEFINITIONS.”

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.⁴

The structure—indeed the 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;**
- 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 will be true with respect to the new Definition #1.⁵

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;**

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(3) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

(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, mention a condition precedent, 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.⁶ 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 use of the term "occurrence," but the presence of that term

was a stray mutt anyway. No one was really confused by this obvious, inelegant drafting error.

A. Duty to Defend

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 that an insurer has no duty to defend any lawsuit which does not contain allegations which would be covered if true. Given generally existing understanding about the duty to defend, the new sentence, thusly understood, would be otiose. On the other hand, 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."⁷ 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.⁸

B. Some Technical Changes

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

- 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. These offenses are causes of action, for the most part, or generic names for several causes of action.⁹
- 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 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.¹⁰ More of this presently.
- The old definition of "advertising injury" made a covered offense the "[m]isappropriation of advertising ideas or style of doing business[.]"¹¹ The new compound definition makes an offense of

"[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.¹²

- 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 '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, pre-1998 advertising liability coverage was restricted to "advertising injury" caused by offenses committed "in the course of advertising your goods, products, or services[.]"¹³ That language is not present in the new Coverage B.¹⁴

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 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).¹⁵

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.¹⁶ 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.¹⁷ The formulation of new Coverage B makes those arguments much more difficult, if it is now possible at all.

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."¹⁸ Others have rightly rejected this view.¹⁹ Still others have embraced the idea that tradedress and trademark infringement are included within the ambit of "advertising injury" without getting involved in the dispute.²⁰ That matter has now been resolved by definition.

C. Damages

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.²¹

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.

Very little thinking has gone into proving mental anguish in the context of the types of causes of action insured under Coverage B. The highest mental anguish awards usually result from ghastly accidents that leave people physically devastated. Severe and gross physical injuries often have substantial emotional consequences. It is a much more subtle matter to prove substantial mental anguish from Coverage B offenses. No doubt, over the next several decades, as the service component of the American economy becomes ever more important, plaintiff's lawyers will become more sophisticated about this matter. In consequence, civil defense lawyers and eventually even coverage lawyers will have to learn about these matters as well. The literature is already fairly substantial, although hardly scratched by lawyers and legal scholars.²² Negative emotions as a source of legal injury and money damages have not even begun to be explored in any depth. Consider the following problem pertaining to mitigation. Suppose someone is humiliated as the result of, say, an invasion of privacy, and is therefore entitled to mental anguish damages. But also suppose that as a result of this humiliation, the person undergoes a religious conversion—or something of the sort—and becomes to believe that things have come out for the best since he now has access for the true joy. Should these tort victims entitlement to mental anguish damages be diminished by his access to joy, inspiration, and hope.²³

D. "Advertisement"

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.²⁴ 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.²⁵ 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 publication to more than one market segment before a notice constitutes an "advertisement." The definition says "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.²⁶

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 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."²⁷ 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 is defined in the policy.²⁸ For reasons which are obscure, courts have some doubt as to whether cases resembling the above hypo can meet the requirement of causation.²⁹

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 a novel Christmas tree stand to a trade show, and certain identities were noticed by a competitor.³⁰ 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 as one which does not self-destruct.

If the actual case were 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 "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" traditionally meant 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.³¹ 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.³² Perhaps most courts would construe the word "publish" to mean the same in the definition of "advertisement" that it means in two subsections of the definition of "personal and advertising injury." There is nothing about the contra-insurer ambiguity rule that requires this result.

There is another problem connected to the term "publish" as it is used in Coverage B. That form repeatedly refers to "oral or written publication." Two items on the definition of "personal and advertising injury" are like this, one having to do with defamation (slander, libel, or product discouragement) and the other having to do with the right of privacy. The same pair comes up in the list

of exclusions—once in the knowledge-of-falsity exclusion and again in the first-publication-before-our-policy-period exclusion.

Traditionally, the common law distinguished slander and libel by reference to whether the defamation was spoken or in writing. During the formative centuries of the common law, these two categories were exhaustive. All presentations of information were either written or oral. In some sense, even pictures were written, since they were always drawings. Things have changed in the last 150 years, or so, although the insurance industry doesn't seem to have realized it yet. One form of publication is now by means of pictures. Some of them are still; some of them move; some are videotaped; some are computer stored; and some are computer generated.

Obviously, if someone speaks in a movie, on a tape recording, on the video, or something of the sort, it will be slander. After all, there is a *speaking*. But what about pictures. Do they constitute writings? They certainly do for the purpose of the law of defamation. Ordinary words in insurance contracts are to be given their ordinary meaning, however, and the word "writing" by itself does not include videotape.

If this conception of the word "written" is utilized, all sorts of problems arise. Videotapes of naked school girls created by a perverted coach (say) for her own sexual enjoyment will neither be oral nor written invasions of privacy.³³ If such a video is shown before the commencement of a policy period, the before-my-policy-period exclusion will not apply, because the pictures were neither written nor oral.

Probably, the term "written" should be taken to be ambiguous, as the result of its connection to the law of defamation and its consequent function in the insurance policy. Under normal circumstances, however, courts would not permit this kind of ambiguity. It simply involves too much of a stretch. Nevertheless, in this particular context, however, it makes pretty good sense.

E. Definition 14.c

Definition #14.c has changed very little. Consequently, there will continue to be some confusion.

The drift of the cases is that an "[e]viction occurs when a person claiming a superior title to property dispossesses a tenant of that property."³⁴ A wrongful eviction is an eviction which is unlawful. Obviously, all evictions, and therefore wrongful evictions, are deliberate. There is no such thing as a negligent wrongful eviction. (As stated, this is the drift of the cases. One wonders if this outlook need always be true. The law of many states recognizes such a thing as *constructive eviction*, as does property law. A constructive eviction occurs when it is simply no longer possible to occupy premises because of conditions. These might be flood, smoke, noise. There is no reason why this kind of situation could not be caused by the landlord, but it might be caused by someone else. Obviously, a new definition 14.c restricts whatever coverage there is to evictions caused by the landlord.

Insurers should not be terribly confident that there is no such thing as *constructive wrongful eviction* under Coverage B. Under some circumstances, it is not so much an *offense* as it is a defense to having to pay rent under a lease. Under other circumstances, it might be an offense, since it might be a tort cause of action.)

Wrongful entries may be understood in a similar way. Thus, "a wrongful entry takes place when someone other than a landlord claims a possessory interest in a room, dwelling, or premises." This approach makes for a nice symmetry and is therefore attractive to those who love formalistic reasoning. However, many courts are much messier in their approach. For example, some courts suggest that trespass, received as an intentional tort, constitutes a type of wrongful entry. Other cases define the concept of trespass very broadly:

[A] trespass is an unauthorized entry into the property of another. The entry may be momentary or it may only brush the boundary. As Blackstone stated, "every man's land is in the eye of the law enclosed." Any entry or breach of that enclosure is a trespass and is actionable even if the damage is not appreciable. Such an action fits squarely within the definition of "personal injury" contained in the [Coverage B section of the CGL] policy ... [as well as related umbrella policies.] [Citations omitted.]³⁵

One case casts the net even wider so that the language under consideration here includes all sorts of physical invasions of property, such as trespass and nuisance, as well as non-invasive interferences with the use and enjoyment of the property.³⁶ Probably, since the trend is to count trespass as a form of wrongful entry, and the new version of Coverage B does not explicitly rule this out, trespass is included within Definition #14.c.

A number of cases observe that wrongful entry is analogous to and therefore inclusive of trespass and nuisance.³⁷ (These two cases also say that trespass can be negligent, as opposed to mandatorily intentional, and that trespass does *not* require any intent to dispossess.) The argument that trespass is included within wrongful entry because it is not explicitly excluded and because a trend of the cases in that direction, is not strong with nuisance. Not so many cases are included, and there is some disagreement on this matter.

Even cases which say that trespass must be intentional, define wrongful entry more broadly and concede that acts of wrongful entry need not be intentional.³⁸ Thus, wrongful entry is a congeries of different causes of action. It is an error, displaying remarkable ignorance of insurance practice, to suppose that each of the various offenses listed in Coverage B are identical to specifiable tort causes of action. Those drafting insurance policies often try to avoid using legal terms of art precisely to capture variations in causes of action which might vary from jurisdiction to jurisdiction and to be open to unusual torts. Thus, for example, in Coverage A the key defined term is "occurrence," and it turns upon the undefined term "accident." So it is here in Coverage B, as well.

Not all cases that discuss trespass and nuisance are easy to understand. One case holds that the leakage of petroleum fumes which may have made it impossible to live or work on the premises, constituted neither trespass nor nuisance.³⁹ This case also says that nuisance is not an enumerated offense in Coverage B and hence could not be included within the insured offenses. *Id.* The reasoning of *Whiteville Oil* may be shaky; however, other cases have also held that unintentional torts against property cannot be Coverage B offenses,⁴⁰ yet and other cases have held that wrongful entry must involve intentional misconduct, so that negligent conduct which involves some sort of an invasion of a property interest cannot be covered.⁴¹ This view may be summarized as follows:

[C]overage under the personal injury liability endorsement is limited to liability for purposeful acts aimed as dispossession of real property by someone asserting an interest therein[.]⁴²

Still another court found that wrongful entry was substantially analogous to trespass.⁴³

So far, "wrongful eviction" and "wrongful entry have been discussed." The residual category must also be discussed: other invasions of the right of private occupancy of a premises that a person occupies. Some courts have held that the *other invasion* language is ambiguous and is to be broadly construed.⁴⁴ Similarly, courts have held that the *other invasions* language includes both trespass and nuisance.⁴⁵ In addition, the *Great Northern Nekoosa* case just cited defines the tort of trespass very broadly to include dispossession, attempts of dispossession, physical invasion, and rather more esoteric invasions, such as some telephone calls. Of course, the fact that trespass is a spectral concept in various jurisdictions means there is another narrow-broad axis along which Coverage B problems can be arrayed. (Of course, hardly anyone doubts that the *other invasion* phraseology applies fundamentally to real property and never merely to personal property by itself.⁴⁶

The concept of *occupancy* raises new problems for the *other invasion* component of the definition of "personal injury." Only invasions, (*i.e.*, torts of the right of private *occupancy*) are included, and the person must actually *occupy* the premises. One court has held that a private occupancy involves realty, and not personalty. Consequently, no interference with personalty can ever meet this part of the definition of "Personal Injury."⁴⁷ In addition, another court has held that one occupies premises only if one inhabits them, and has further held that a covered interference must be with the right of habitation and not merely the right to enjoy:

"Occupancy" normally refers to the state of being inhabited. The right of "private occupancy" can only refer to those rights associated with an individual's act of inhabiting the premises, and not to rights associated with the individual's right to use and enjoy the "inhabited premises."⁴⁸

In other words, the right of private occupancy is the legal right to occupy premises, not the right to *enjoy* occupying those premises.⁴⁹ One wonders if this distinction is a stable one, or even coherent. It seems to me that substantial interference to the enjoyment of the property may well constitute interference with an occupancy.

Other cases treat the concept of *occupy* as a good deal more nebulous, especially when it comes to premises and not rooms. In *A. J. Gregory v. Tennessee Gas Pipeline Co.*,⁵⁰ the court held that the city occupied a lake when it owned the lake bed and had caused the lake to come into existence. Later, by a vote of 5-4, the Texas Supreme Court held that a transitory physical presence did not constitute occupation. Obviously, this is another broad-narrow axis along which the key element in the definition of "Personal Injury" must be arrayed.⁵¹ The axis is *occupy*, and there are good many different conceptions as to what counts as occupying something.

Finally, the right of occupancy that must be violated, in order to trigger coverage, is the right of *private* occupancy. One court has held that a public entity does not have a right of private occupancy.⁵² Obviously, an invasion of the right of private occupancy under Definition #14.c is not the same as an invasion of a person's right of privacy under Definition #14.e. Consider a real estate manager which is trying to stop the tenant from smoking and who inserts hidden cameras in false ceilings in an office. Almost certainly, the real estate manager will be an additional insured under standard CGL policies. Suppose that the hidden camera captures the administration of a "Lewinsky" involving persons who would be loath for anyone to know of this indulgence.⁵³ Assuming for the moment that playing of the film or videotape constitutes written publication, would the real estate manager have violated § 14.c or § 14.e? The answer is: *Probably both.*

III. Coverage B Exclusions: More Speculative Commentary

There are many reasons why an insured may not have coverage under a liability policy. The damages may not be of an insured sort. The injury causing event may not fit within the insuring agreement. Conditions precedent, such as notice, may not have been met.⁵⁴ There may be some implied exclusions, though not many, and then there are the express exclusions.⁵⁵ 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.⁵⁶ 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 he or she 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.⁵⁷ Perhaps the courts have tended to apply fortuity requirements from the standpoint of the tort victim, rather than the insured.

New Exclusion (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 Exclusion (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 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 at least four 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.⁵⁸ Notice that the exclusion does not address 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 Exclusion (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 Exclusion (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. Un-

fortunately, 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 Exclusion (1) means *injury*, then the exclusion is satisfied. If "injury" in Ex. (1) means *offense*, then it 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 files 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 consequentially. In either case, so long as the insured knows that *someone's* rights are being—or are about to be—violated, there will be no coverage for injuries caused to anyone else by the same act.

Fourth, it looks as if when an officer of a corporation causes either "personal injury" or "advertising injury" but does not do so at the direction of the corporate employer, or—perhaps—with the actual knowledge of a corporate employer, there may be coverage for the employer. Often, the knowledge and intentions of employees are attributed to corporate employers. There is no substantial body of case law applying those ideas to locutions like *caused by* or *done at the direction of*. This same kind of point probably applies to Exclusion (2).

Exclusion (2) suffers from some more of the same problems, moreover, namely, problems having to do with the nature of knowledge. Exclusion (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 Exclusion (2) is quite clear. Pleadings of fraud without any pleading of negligence will not generate even a duty to defend under Coverage B.⁵⁹ 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 that *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 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.

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 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. (These problems are not entirely new, of course, several Coverage B cases involving prior acts have come up recently.⁶⁰)

Another problem has arisen 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.⁶¹ 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. That problem has already come up in connection with Exclusions (1) and (2). It is even a more serious problem here. 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, and 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.⁶² The mere fact that a criminal act is committed *along with* an insured-against offense is insufficient. No doubt, they *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 have 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 should not 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 of the criminal law but some other civil law in order to violate the criminal law).⁶³ Now let us suppose that I direct some-

one 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?

The concept of a *criminal act* may also be important. Acts become criminal by being prohibited by certain types of statutes. Generally, statutes which criminalize conduct include *mens rea* requirements. Consequently, strict liability statutes are unlikely to count as the relevant sort of statute.⁶⁴ Consider the example of the real estate manager installing hidden cameras discussed earlier. This may very well be a criminal act if there is a criminal statute prohibiting trespass. It may not, however, be a criminal act if the statute prohibits *willful trespasses*.⁶⁵ Pretty obviously, the crucial issue will become *willfulness*. If there was ever an ambiguous term, that one is it.⁶⁶

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 agreement. This exclusion does not 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. Assume 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. This endorsement, CG 22 74, 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 rid of it. Agents, risk managers, and insurers alike need to be 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.⁶⁷ 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.

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, because 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 Exclusion (6), but it also drastically alters its meaning.)

The next two exclusions—Exclusions (7) and (8)—are designed to prevent CGL coverage from becoming warranty insurance or insurance against deceptive trade practices.⁶⁸ Exclusion (9) is designed to require advertising, broadcasting, telecasting, and publishing concerns to buy their own special insurance.⁶⁹ 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.⁷⁰ 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.⁷¹ Other courts have held that if

a policyholder is not trying to circumvent Coverage A, but is trying to export the pollution exclusion from Coverage A to Coverage B, the gambit will not succeed.⁷² 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 easily could have 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.⁷³ 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 Exclusion (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 to suits for cleanup brought by governmental entities.

IV. Pleading Problems: Yet a Further Speculation

The relationship between pleading rules and the principles of determining coverage has always been somewhat obscure.⁷⁴ 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.⁷⁵ 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.⁷⁶ 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 contemporary rules of civil procedure that a plaintiff must plead a cause of action. Under current procedural rules and customs, any set of averments sufficient to give the defendant some sort of notice is 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 a covered 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 common law torts.⁷⁷ And some of them are generic descriptions of a congerie consisting of several closely related torts, each having different names in different jurisdictions. The "invasion of the right of private occupancy" component of Definition #14.c is like this.⁷⁸

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.⁷⁹ Everyone understands that concept of an *offense* is not identical to the concept of any particular tort or to any particular cause of action.⁸⁰ 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.⁸¹

Moreover, some offenses and some causes 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.⁸²

In addition, it is important to remember that if an offense occurs as a discrete, relatively self-contained, and identifiable event in a larger, possibly excluded, context, there may still be coverage. Almost certainly, there will be a duty to defend.⁸³ Insurers need to be especially careful when refusing to defend a case under these circumstances. Such refusals appear to be a 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 every business tort constitutes a covered tort under Coverage B. This is true even though policyholders and their lawyers constantly push in that direction.⁸⁴ Courts tend not to imply defamation or disparagement claims from other more explicitly pleaded claims.⁸⁵ 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.⁸⁶ 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*, *adver-*

tisements,⁸⁷ *malicious*, *prosecute*, *patent*, *copyright*, *reputation*,⁸⁸ 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 which could be marshaled to support a covered claim."⁸⁹ 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 result."⁹⁰ 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 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 advertisement 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 that infringing activity [citation omitted]. ... [T]he required causal nexus between injury and advertising activity is relatively loose in New York.⁹¹

Obviously, *Moonlight Design* is a pre-1998 Coverage B case. One wonders how the changes in the 1998 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 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 emphasizes 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.”⁹² So what does this mean as a practical matter? First, if the plaintiff pleads a bunch of facts which add up to a Coverage B offense, but does not plead all of the elements of that tort in detail, the insurer probably has a duty to defend. Second, if a plaintiff pleads one fact which constitutes one element of a covered tort, but no others, there is probably no duty to defend. Third, if there is a reference to the commission of the covered tort but no facts are pleaded, there is probably no coverage. If, in a lengthy complaint, a fact is dropped here, a fact is mentioned there, and a third fact is obliquely referred to somewhere else, with no other suggestion that the pleader might be seeking damages for a covered tort, it is uncertain what will happen, but the more obscure the pleading, the less likelihood there is the court will find a duty to defend.⁹³ Fourth, if a plaintiff constructs his pleading so that extensive damages are pleaded but no damages are pleaded for a covered defense, courts may very well decline to find coverage under Coverage B.

As things go in the world of principled insurance claims, these observations are actually fairly clear and straightforward. However, they are not bright-lined, black-and-white, mechanical rules. Like many other things in the law, they require the exercise of some judgment. The requirement that some judgment be exercised, however, is not the same as rampant subjectivity.

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 many problems left to dispute. No doubt there are large ones not so much as envisaged here.

Notes

1. 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.
2. 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).
3. *Fireman’s Fund Ins. Co. v. TIG Ins. Co.*, 14 S.W.3d 230, 235 (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.

4. 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, 538–41 (Cal. App. 1999).
5. 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.
6. One such refinement is to be found in Definition #14.c. The word “committed” has been added, and that addition helps disambiguate the clause under certain circumstances. This definition has been the source of some headaches, and it will continue to be so. See the text below.
7. Found. for *Blood Research v. St. Paul Marine and Fire Ins. Co.*, 730 A.2d 175, 176–177 (Me. 1999).
8. See *Shoshone First Bank v. Pac. 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).
9. There may be exceptions. *McCormack Baron Management Services, Inc. v. Am. Guar. & Liab. Ins. Co.*, 989 S.W.2d 168 (Mo. 1999).
10. *Wackenhut Services, Inc. v. Nat’l Union Fire Ins. Co. of Pgh., Pa.*, 15 F. Supp.2d 1314, 1323 (S.D. Fla. 1998). See *New Castle County, Del. v. Nat’l Union Fire Ins. Co. of Pgh., Pa.*, 174 F.3d 338, 347 (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 unclaritys, 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, 688–689 (Ill. App. 2000).
11. The term misappropriation has caused some trouble from time to time, and is unnecessary. *Heritage Mut. Ins. Co. v. Advanced Polymer Tech., 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, 1055–1056 (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[s] of doing business” see *Elcom Tech., Inc. v. Hartford Ins. Co. of the Midwest*, 991 F. Supp. 1294, 1297 (D. Utah 1997), and the cases cited therein. For another rather unusual Coverage B case, involving tradenames and the certification of audiologists and the misleading granting of degree-like designations, see *Hoosier Ins. Co. v. Audiology Fnd. of Am.*, — N.E.2d — (Ind. App. 2001) (2001 WL 337951).
12. It was probably a good idea to get rid of the term “misappropriation.” That is an accordian-like concept rife with ambiguity. *Heritage Mut. Ins. Co.*, 97 F. Supp.2d at 928–929.
13. See *Novell, Inc. v. Fed. Ins. Co.*, 141 F.3d 983, 986 (10th Cir. 1998). See also *Robert Bowden, Inc. v. Aetna Cas. & Sur. Co. of Conn.*, 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[.]” *Winklevoss Con-*

- sultants, Inc. v. Fed. Ins. Co.*, 991 F. Supp. 1024, 1030 (N.D. Ill. 1998).
14. Some courts are inclined to see trade dress infringement as necessarily involving advertising. *Am. Employers' Ins. Co. v. DeLorme Pub. Co., Inc.*, 39 F. Supp.2d 64 (D. Me. 1999) (same for trademark infringement).
15. For a case summarizing this controversy, see *Heritage Mut. Ins. Co.*, 97 F. Supp.2d at 921-925.
16. For some history of this matter, see *Mez Ind., Inc. v. Pac. Nat'l Ins. Co.*, 90 Cal. Rptr.2d 721 (Cal. App. 1999). See *IMT Ins. Co. v. Papersystems, Inc.*, 201 WL 98545 (Iowa App. 2001).
17. *Bank One, Milwaukee, N.A. v. Breakers Dev., Inc.*, 559 N.W.2d 911, 912 (Wis. App. 1997).
18. *Advance Watch Co. Ltd. v. Kemper Nat'l Ins. Co.*, 99 F.3d 795, 800-801 (6th Cir.1996).
19. *Am. Employers' Ins. Co.*, 39 F. Supp.2d at 76. See *Flodine v. State Farm Ins. Co.*, 2001 WL 204786 (N.D. Ill. 2001) (critical of *Advance Watch*). In *Flodine* the Ho-Chuck Nation, an Indian tribe, sued J.C. Penney's for violating the Indian Arts & Crafts Act of 1990, 25 U.S.C. § 305e(a) by displaying for sale, offering for sale, and selling goods in a manner falsely suggesting that the goods are made by Indians. The issue revolved around Southwestern-style arts and crafts. Apparently, the label on the goods also suggested that they were authentic Indian products made by Native Americans. Not only did the tags and labels say this, but its catalog apparently did the same thing. After the Ho-Chuck Nation sued Penney's, Penney's sued Flodine, the original manufacturer of the goods. Flodine sought coverage from State Farm, but State Farm declined on the grounds that non-advertising injury was alleged. "A number of courts have found that passing off, trademark, tradename or traddress infringement claims implicitly involve advertising activity, because such a claim necessarily involve advertising or use of the mark to identify the insured's goods or services to a substantial number of people." "Under a broad interpretation, [therefore], a product's label might be considered advertising, as could its packaging. *Id.* at *10. "Flodine's alleged defenses, the marketing and promotion of products as 'authentic Indianmade,' reasonably fall within the common meaning of 'style of doing business' or 'advertising idea.' Capitalizing upon the good will associated with Indian-made products is a marketing idea concerned with how to persuade customers to buy certain goods. The wrongful use of these ideas or ways of marketing 'southwestern style' arts and crafts, are 'advertising injuries' under the policy." *Id.* See also *Platinum Technology, Inc. v. Federal Ins. Co.*, 2001 WL 109814 (N.D. Ill. 2001) (an umbrella insurance policy).
20. *Am. Mfgs. Mut. Ins. Co. v. Quality King Distributors, Inc.*, 721 N.Y.S. 83 (App. Div. 2001). The defendant, which was distributing counterfeit "Head & Shoulders Shampoo and was sued by Proctor & Gamble for its trouble, was entitled to a defense.
21. *Kite v. Gus Kaplan, Inc.*, 747 So.2d 503, 513-514 (La. 1999) (tenant's mental anguish was a non-physical "personal injury" under Coverage B).
22. Jack Katz, *HOW EMOTIONS WORK* (1999), William Ian Miller, *HUMILIATION* (1993), William Ian Miller, *THE ANATOMY OF DISGUST* (1997), Michael Lewis, *SHAME: THE EXPOSED SELF* (1992). Jealousy is an especially interesting complex emotion; it might be caused by violations of a person's right to privacy. For accounts of jealousy, see David M. Buss, *A DANGEROUS PASSION* (2000), Hildegard Baumgarte, *JEALOUSY: EXPERIENCES AND SOLUTIONS* (1990), and Peter M. Stearns, *JEALOUSY: THE EVOLUTION OF AN EMOTION IN AMERICAN HISTORY* (1989). On the emotionally damaging impact of invasion of privacy, see Jeffrey Rosen, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000).
23. See Verna Kast, *JOY, INSPIRATION AND HOPE* (1991).
24. *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).
25. Under previous policies, insureds have occasionally taken the view that one-on-one solicitations can constitute advertising. This idea ignores the distinction between *sales calls* and advertising—a fairly well-established distinction. Of course, one could say that when everyone's employees are out marketing, they are advertising for the firm. This is really a metaphor, and everyone knows it. It is a teaching tool designed to remind employees to put their best foot forward and to stay focused on the fact that judgments are made about companies on the basis of how employees behave themselves. There is no commonsensical way to conceive of a sales call as advertising. Indeed, entire university departments in B-schools are based on this distinction. *IMT Ins. Co. v. Papersystems, Inc.*, 2001 WL 98545 (Iowa App. 2001). (An offer to sale under 35 U.S.C. § 271(a), the U.S. Patent Code is not the same thing as advertising. Advertising requires some sort of appeal to the public. See also *Zurich Ins. Co. v. Amcor Sunclipse N.Am.*, 241 F.2d 605 (7th Cir. 2001) (Justice Easterbrook observed that one-on-one dealings do not constitute advertising and that there is very little deep, "weak"—support for this idea in the few cases which discuss it. *Id.* at 607-608.)
26. For an amazingly current discussion of the nature of advertising, see *Amway Distrib. Benefits Ass'n v. Fed. Ins. Co.*, 990 F. Supp. 936 (W.D. Mich. 1997).
27. *Farmington Cas. Co. v. Cyberlogic Tech., Inc.*, 996 F. Supp. 695, 703 (E.D. Mich. 1998).
28. *Farmington Cas. Co. v. Cyberlogic Tech., Inc.*, 996 F. Supp. 695, at 699.
29. *Farmington Cas. Co. v. Cyberlogic Tech., Inc.*, 996 F. Supp. 695, at 704. See *Simply Fresh Fruit, Inc. v. Continental Ins. Co.*, 94 F.3d 1219 (9th Cir. 1996).
30. *Ind. Molding Corp. v. Am. Mfg. Mut. Ins. Co.*, 17 F. Supp.2d 633 (N.D. Tex. 1998).
31. *Ringler Assoc., Inc. v. Maryland Cas. Co.*, 96 Cal. Rptr. 2d 136 (Cal. App. 2000). Recordings, are obviously a form of speaking. Photographs, film, and video are also generally treated as species of writing for the purpose the tort law of defamation. *Veilleux v. Nat'l Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000) and *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000). The same is true for invasion of privacy. See *Wiora v. Harrah's Ill. Corp.*, 68 F.Supp.2d 988 (N.D. Ill. 1999).
32. For a discussion of these matters and a holding focused on *What is a publisher?*, see *Am. Employers' Ins. Co.*, 39 F. Supp.2d at 80-84.
- 33For a vaguely similar case, see *Doe v. Mobile Videotapes, Inc.*, — S.W.3d — (Tex. App.—Corpus Christi) (2001 WL 167986).
34. *Patel v. Northfield Ins. Co.*, 940 F. Supp. 995, 1002 (N.D. Tex. 1996).
35. *Harvard Indus., Inc. v. Aetna Cas. & Surety Co.*, 642 A.2d 438, 444 (N.J. Super. 1993).
36. *Gen. Acc. Ins. Co. v. W. Am. Ins. Co.*, 49 Cal. Rptr.2d 603, 606 (Cal. App. 1996) [citing *American States Ins. Co. v. Canyon Creek*, 786 F. Supp. 821 (N.D. Cal. 1991)].
37. *Scottish Guarantee Ins. Co., Ltd. v. Dwyer*, 19 F.3d 307, 311 (7th Cir. 1994), *aff'g* *Scottish Guarantee Ins. Co., Ltd. v. Dyer* [sic?], 1992 WL 601889, * 3 (W.D. Wis. 1992).
38. *Garvis v. Employer's Mut. Cas. Co.*, 497 N.W.2d 254, 259 (Minn. 1993).
39. *Whiteville Oil Co. v. Fed. Mut. Ins. Co.*, 87 F.3d 1310 (Table), 1996 WL 327207, *1 (4th Cir. 1996) (this case not designated for publication).

40. *U.S. Fidelity & Guaranty Co. v. B&B Oilwell Service, Inc.*, 910 F. Supp. 1172, 1186 (S.D. Miss. 1995).
41. *Northbrook Indem. Ins. Co. v. Water District Mgmt. Co., Inc.*, 892 F. Supp. 170, 176 (S.D. Tex. 1995) (citing *Gregory v. Tennessee Gas Pipeline Co.*, 948 F.2d 203 (5th Cir. 1991)).
42. *County of Columbia v. Continental Ins. Co.*, 595 N.Y.S.2d 988, 991 (App. Div. 1993).
43. *Blackhawk v. Central City Sanitation District v. Am. Guar. & Liab. Ins. Co.*, 856 F. Supp. 584, 590 (D. Colo. 1994).
44. *Gould Inc. v. Arkwright Mut. Ins. Co.*, 829 F. Supp. 722, 728 (N.D. Pa. 1993), citing *Hirshberg v. Lumberman's Mut. Cas.*, 798 F. Supp. 600 (N.D. Cal. 1992) (a case relied on by Pasich in his articles).
45. *Great Northern Nekoosa Corp. v. Aetna Cas. & Surety Co.*, 921 F. Supp. 401, 418 (N.D. Miss. 1996).
46. Relative certainty about this observation can be gleaned from the fact that the following case, which made this point, was not marked for publication. *Trinity Management Services v. Travelers Prop. Cas. Corp.*, 2001 WL 275072 (9th Cir. 2001) (a raft). (Of course, one could muck about so radically with personal property in, for example, a room that there was a constructive eviction. Imagine stacking 5000 books against a door. In such a case, there will always be a wrongful entry in order to get to the personal property.)
47. *Tinseltown Video, Inc. v. Transportation Ins. Co.*, 71 Cal. Rptr.2d 371, 381-382 (Cal. App. 1998).
48. *Decorative Center v. Employer's Cas.*, 833 S.W.2d 257, 261 (Tex. App. 1992, writ denied).
49. *Columbia Nat'l Ins. v. Pacesetter Homes, Inc.*, 532 N.W.2d 1, 9 (Neb. 1995).
50. 948 F.2d 203, 207 (5th Cir. 1991).
51. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462 (Tex. 1998).
52. *Kent County v. Home Ins. Co.*, 551 N.W.2d 424, 442 (Mich. App. 1996) *rev'd on other grounds*.
53. For readers who have been living on other planets during the last five years or so, see Peter Baker, THE BREACH: INSIDE THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON (2000).
54. *Interface Flooring Systems, Inc. v. Aetna Cas. & Sur. Co.*, 2001 WL 238148 (Conn. Super. 2001) (notice requirements apply to Coverage B).
55. *Centennial Ins. Co. v. Bailey*, 2000 WL 1515158 (Tex. App.—Dallas 2000) (fortuity and Coverage B).
56. 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).
57. *Titan Indem. Co. v. Riley*, 679 So. 2d 701 (Ala. 1996). (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 receipt of premiums—to pay for the harm or loss suffered by a third party arising out of the intentional acts of its insured, may, nevertheless, avoid the contract on the ground of public policy." *Id.* at 706.)
58. THEAETETUS 202c. See Alvin Plantinga, WARRANT: THE CURRENT DEBATE (1993).
59. *Wackenhut Serv.*, 15 F. Supp.2d at 1321-1322 (fraud necessarily involves asserting known falsity).
60. *Comsat Corp. v. St. Paul Fire & Marine Ins. Co.*, — F.3d — (8th Cir. 2001) (2001 WL 345836). *Westchester Fire Ins. Co. v. G. Heileman Brewing Co., Inc.*, — N.E.2d — (Ill. App. 2001) (2001 WL 314667).
61. *Ringler Associates*, 96 Cal. Rptr.2d at 149.
62. There is substantial case law on the concept of *arising out of* in the context of Coverage B. See *Am. Guar. & 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); see also *12th Street Gym, Inc. v. Gen. Star Indem. Co.*, 980 F. Supp. 796, 798-799 (E.D. Pa. 1997) (discussing "arising out of" in a suit for indemnification by a club owner who excluded a patron because he had AIDS); see also *Am. Indem. Co. v. Foy Trailer Rentals, Inc.*, 2000 WL 1839131 at *4 (Tenn. App., Nov. 28, 2000) (discussing "arising out of" in a suit concerning human rights violations by a company against a pregnant employee).
63. *Johnston v. Del Mar Distrib. Co., Inc.*, 776 S.W.2d 768, 771 (Tex. App.—Corpus Christi 1989) (ignorance of the law is no defense to criminal prosecution).
64. *Flodine v. State Farm Ins. Co.*, 2001 WL 204786 (N.D. Ill. 2001). In this case, the court held that the Indian Arts & Crafts Act of 1990, 25 U.S.C. § 305 *et seq.* was not a penal statute, in the required sense, because it was a strict liability statute.
65. See, e.g., TEX. PENAL CODE § 30.05 (2000) ("Criminal Trespass").
66. Speaking of ambiguities, should misdemeanors be taken to be *criminal acts* for the purpose of this exclusion?
67. 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*.)
68. *Elcom Technologies, Inc.*, 991 F. Supp. at 1298.
69. See *Am. Employers' Ins. Co.*, 39 F. Supp.2d at 64 (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).
70. *Titan Holdings Syndicate, Inc. 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. Tool Works, 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. Lumbermens Mut. Cas.*, 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).
71. *Lakeside Non-Ferrous Metals, Inc. v. Hanover Ins. Co.*, 172 F.3d 702, 705-706 (9th Cir. 1999).
72. *Royal Ins. Co. of Am. v. Kirksville College of Osteopathic Medicine*, 191 F.3d 959 (8th Cir. 1999).
73. Several cases turn on whether the pollution exclusion applies to Coverage B at all. *Josephson, Inc. v. Crum & Forster Ins. Co.*, 679 A.2d 1206, 1229 (N.J. super. 1996), *Gould, Inc. v. Arkwright Mut. Ins. Co.*, 829 F. Supp. 722 (N.D. Pa. 1993), *STAEFA Control System, Inc. v. St. Paul Fire & Marine Ins. Co.*, 875 F. Supp. 656 (N.D. Cal. 1994), *Titan Corp. v. Aetna Cas. & Surety Co.*, 27 Cal. Rptr.2d 476 (1994), *U.S. Fidelity & Guaranty Co. v. B&B Oilwell Service, Inc.*, 910 F. Supp. 1172, 1186 (S.D. Miss. 1995), *Fibreboard Corp. v. Hartford Acc. & Indem. Co.*, 20 Cal Rptr.2d 376, 390-91 (Cal. App. 1993). 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, 987-988 (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).

74. See *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966), and its huge progeny.

75. *Am. Mfgs. Mut. Ins. Co. v. Quality King Distributors, Inc.*, 721 N.Y.S.2d 83, 84 (App. Div. 2001). *Southstar Corp. v. St. Paul Surplus Lines Ins. Co.*, — S.W.3d — (Tex. App.—Corpus Christi 2001) (2001 WL 167967 and 167904), *Structural Building Products Corp. v. Business Ins. Agency, Inc.*, 2000 WL 297640 (N.Y. App., March 26, 2001), *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.)

76. *Filenet Corp. v. Chubb Corp.*, 735 A.2d 1203 (N.J. Super. 1997) (patent infringement).

77. Malicious prosecution, for example, is not the same as misuse (or abuse) of process. *Atl. Mut. Ins. Co. v. Atlanta Datacom, Inc.*, 139 F.3d 1344, 1345-1346 (11th Cir. 1998). At the same time, some states recognize a civil action for malicious prosecution. *Fluke Corp.*, 7 P.3d at 829-30.

78. *New Castle County, Del. v. Nat'l Union Fire Ins. Co. of Pgh. Pa.*, 84 F.Supp.2d 550 (D.Del. 2000), *rev'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. (The relationship between an invasion of right of private occupancy and invasion of the right of privacy have already been discussed.)

79. *Int'l Ins. Co. v. Rollprint Packaging Prod., Inc.*, 728 N.E.2d 680, 688 (Ill. App. 2000).

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

81. *Foundation for Blood Research*, 730 A.2d at 175. See *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968 (9th Cir. 1994).

82. *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).

83. *CGU v. Travelers Prop. Cas.*, 121 F. Supp.2d 819 (E.D. Pa. 2000).

84. *Bruceton Bank v. U.S. Fidelity & Guar. Ins. Co.*, 486 S.E.2d 19, 24 (W.Va. 1997) (garden variety lender liability not personal injury); see also *State Farm Fire & Cas. Co. v. Martinez*, 995 P.2d 890, 893 (Kan. 2000) (unauthorized practice of law not within Coverage B); see also *KLL Consultants, Inc. v. Aetna Cas. & Sur. Co.*, 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).

85. *Motorists Mut. Ins. Co. v. Nat'l Dairy Herd Improvement Ass'n, Inc.*, 2001 WL 82930 (Ohio App. Feb. 1, 2001). *C. O. Morgan Lincoln-Mercury, Inc. v. Vigilant Ins. Co.*, 521 S.W.2d 318 (Tex. App.—Fort Worth 1975, no writ). (In this case, there was reference to defamation in some of the pleadings, but no cause of action for defa-

mation was pleaded, no damages to reputation were sought, and no specific facts were pleaded.) Obviously, this case does not stand for the proposition that the "Eight-Corners Rule," which is also known as the "Complaint Allegation Rule" does not apply to Coverage B. See *Houston Petroleum Co. v. Highlands Ins. Co.*, 830 S.W.2d 153 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Not every state, of course, follows the Eight-Corners Rule. Some states impose upon insurers a duty to defend when the insurers come into possession of facts which might have a bearing on coverage. *Aselco, Inc. v. Hartford Ins. Grp.*, — P.3d — (Kan. App. 2001) (2001 WL 363360). The rule in Kansas, if an insurer comes into possession facts which give rise to a potential for liability, even if the potential is remote, the insurer bears a duty to defend. *MGM, Inc. v. Liberty Mut. Ins. Co.*, 855 P.2d 77 (Kan. 1993). This is an interesting rule. It implies that if the insurer comes into possession of any facts whatsoever which, if pleaded, would give rise to a duty to defend, then the insurer owes the insured a duty to defend. This rule involves a high degree of subjectivity. There is almost no case where one cannot dream up some facts which one could plead and thereby trigger coverage. A better rule would be this: if an insurer comes into possession of facts which appear to be true, or which may well be true, and if those facts would give rise to a duty to indemnify if true, then the insurer owes insured a defense.

86. *Zurich Ins. Co. v. Sunclipse, Inc.*, 85 F. Supp. 2d 842, 853-854 (N.D. Ill. 2000), *aff'd*, 241 F.3d 605 (7th Cir. 2001). Then again, advertising alone probably never constitutes patent infringement. *United Nat'l Ins. Co. v. SST Fitness Corp.*, 182 F.3d 447, 449-451 (6th Cir. 1999).

87. *Heritage Mut. Ins. Co.*, 97 F. Supp.2d at 921. (Also stating that misappropriating trade secrets is not the misappropriation of advertising ideas or even a style of doing business. *Id.* at 926-927. See *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 744 (3d Cir. 1999) (advertising liability is not triggered by committing a business tort and then disseminating the result of the wrongful conduct).

88. 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.)

89. *USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593, 614 (W.D. Pa. 2000).

90. *USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp.2d 593 at 621, citing *Frog, Switch & Manufacturing Co.*, 193 F.3d at 744.

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

92. *Western States Ins. Co. v. Wis. Wholesale Tire, Inc.*, 184 F.3d 699, 702 (7th Cir. 1999) (applying Wisconsin law).

93. There are some strategic reasons for courts adopting this stance. One of the best plaintiffs' lawyers I know—and certainly one of the most intelligent—deliberately pleads cases in virtually incoherent ways. He does this for two reasons, he says. First, he is inviting defense counsel to believe that he is an idiot so that he can sneak up on them. Second, he is trying to trap insurance companies into failing to defend so that he can settle the case with the insured defendant, get an assignment, and proceed against the insurance company for outrageously large sums.