



## Insurance

Michael Sean Quinn

### Liability Insurance and High-Tech Industries

Several types of liability insurance are available to and necessary for high-tech firms. For any business, the foundation of every program of liability insurance is the commercial general liability

(CGL) contract. This column is about the unembroidered essence of that policy. Subsequent essays will discuss other policies and refined variations on the CGL.

If we set aside the insurance provided for medical expenses incurred in conjunction with

minor injuries—so-called med-pay coverage—CGL policies have two major coverages.

Coverage A insures against bodily injury and property damage from accidents, including prolonged accidental exposures to injurious activities, so long as they are not pollution related. Bodily injury is just that: physical injury to a human body. It includes all recoverable monetary damages consequent upon such an injury, such as mental anguish occasioned by physical injury. It does not cover mental

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anguish or financial losses not resulting from bodily injuries, deliberately inflicted bodily injuries, or injuries that naturally flow from intentional acts.

Coverage for property damage extends only to the property of others. CGL is, after all, third-party liability insurance, not first-party property insurance. The insured can be legally liable for injury to his own property. If I injure my own property, I simply suffer a loss. Moreover, the CGL defines property damage as "physical injury to tangible property." Thus, financial losses alone are not property damage, although the destruction of physical money might be.

In general, the destruction of computer circuits is property damage, whereas the destruction or misuse of information is not. Questions arise with respect to damage to computer programs and the like, because many courts are inclined to construe this as something other than property damage. That temptation is highly doubtful, however. When seeking coverage from a liability carrier for high-tech losses, the policyholder should be sure to mount a case demonstrating the physicality of everything that happened. The more abstract the injury looks, the less likely an insurer or a court is to classify it as property damage. Misuse of intellectual property, such as trade secrets, is not covered. Thus, an important rule in claims presentation is: Emphasize tangibility! Accentuate the physical!

Coverage B is for two specially defined forms of injury: "personal injury" and "advertising injury." In tort law, the phrase "personal injury" refers to any injury inflicted upon a natural person. In the world of insurance, however, the phrase refers to a list of named torts. Coverage A mostly deals with negligence and its cousins, but the "personal injury" torts of Coverage

B are a series of intentional torts that often have accidental contexts and consequences. These include false arrest, false imprisonment, malicious prosecution, wrongful eviction, defamation, and the "publication of material that violates a person's right of privacy." For a "personal injury" tort that arises out of defamation, there will be no coverage if the insured knew that what he or she was saying was false.

The phrase "advertising injury" refers to defamation, disparagement of products or services, publications that violate a right of privacy, "misappropriation of advertising ideas or style of doing business," and "infringement of copyright title, or slogan." Coverage B provides coverage for "advertising injury" only if it occurs during the course of the insured's advertising his or her products or services.

Businesses involved in email transmissions or Internet usage could very easily find themselves dragged into court either for defamation or for publishing material that violated a right of privacy. The term "publication" here means the same as it means in the law of defamation: any speaking or writing communicated to another constitutes a publication. Conceivably, monitoring and reviewing emails and then sending them to others could constitute an invasion of privacy through publication. Monitoring emails, and then describing them to others, might as well.

It is absolutely extraordinary how much advertising there is involving high-tech companies. It is a commonplace that the law of copyright is growing by leaps and bounds. If an invasion of copyright or of something similar, like a trade secret, occurs in the context of advertising, there may very well be coverage. This point may not apply to patents. Coverage B does not usually extend to patent infringement. Then again, if there is an infringement in an ad, then there may be coverage for offense to a title.

One of the really valuable things about CGL policies is that they contain a duty to defend, as well as a duty to indemnify. This means that CGL insurers must defend any lawsuit brought against the insured, if any portion of the lawsuit is covered. The duty to defend is usually not subject to policy limits in the CGL. (A tiny minority of states has recently begun permitting insurers to allocate defense costs amongst covered and uncovered claims, yet there is no real trend in this direction. Even in the minority states, the insurer has to pay the entire defense bill first, and then seek reimbursement from the insured.)

In virtually every jurisdiction, whether a CGL insurer has a duty to defend is usually determined from the face of the pleadings—in the first instance, at least. Sometimes this is called the "Complaint-Allegation Rule," sometimes the "Eight Corners Rule." If an insurer has doubts about coverage, it may defend under a reservation of rights and figure out coverage as it goes along. If the insurer and the insured cannot agree, it might be wise for the insurer to file a declaratory judgment action. In a number of states, once a declaratory judgment action has been filed, an insurer's duty to defend is determined by the true facts and not by the Eight Corners Rule. This rule varies from state to state, however.

If the insured does not file a declaratory action, the insured may wish to, under some circumstances. This is especially true in the not-so-brave new world of high-tech insurance. There is much more to be said about liability insurance in the high-tech industry, of course. I will take the matter up again in the next column.

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