THERE'S COVERAGE FOR THAT?!

The 'Ins and Outs' of Personal and Advertising Injury Coverage

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Most practitioners know that a general liability insurance policy provides coverage for bodily injury and property damage claims within the Coverage A part of the policy. But what is often overlooked is the nuanced coverage provided by the Coverage B part of the policy typically styled "personal and advertising" injury.

But what is "personal and advertising" injury? Let's start with what it's not. Whereas Coverage A typically provides coverage for bodily injury or property damage caused by an occurrence – leaving up for debate what qualifies as an occurrence – Coverage B only extends coverage to certain clearly identifiable enumerated offenses which include:

- False arrest, detention or imprisonment;
- Malicious prosecution;
- 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;
- Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- Oral or written publication, in any manner, of material that violates a person's right of privacy;
- The use of another's advertising idea in your "advertisement"; and
- Infringing upon another's copyright, trade dress or slogan in your "advertisement."

Like Coverage A, Coverage B generally includes an insurer's duty to defend claims that allege any of the above-referenced offenses. This defense obligation is critical as the types of claims that fall within the purview of Coverage B are typically expensive cases to defend.

While certain of the enumerated offenses and the claims through which such offenses are alleged are self-evident (*e.g.*, false arrest, malicious prosecution, wrongful eviction, etc.), certain of the other enumerated offenses warrant discussion.

For example, Coverage B generally provides coverage for disparagement under the offense for "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." Claims for disparagement typically fall under one of two categories: direct disparagement or implied disparagement. Direct disparagement involves situations in which an insured makes a specific statement that disparages a competitor or a competitor's goods, products, or services. For example, a claim for direct disparagement may be alleged where an insured wrongfully asserts to a customer that one of its competitor's products violates a patent.[1] Claims alleging direct disparagement are generally less controversial, and most jurisdictions typically endorse coverage for such claims, absent any applicable exclusion.

Claims alleging implied disparagement, however, typically present a closer coverage question as some jurisdictions endorse coverage for such claims and others do not. For example, one district court found coverage under an implied disparagement theory where the insured was alleged to have made false statements about its allegedly inferior products and then compared its products to the plaintiff's products, thereby disparaging the plaintiff's products by implication. In doing so, the court reasoned that statements comparing a competitor's product to an allegedly inferior one are no different than, and no less disparaging than, stating that one's own product is superior to the competitor's product.[2] Likewise, another district court found coverage where the insured's advertisements led consumers to believe that the insured's inferior products were of the same high quality as the competitor's products, reasoning that such comparison disparaged the competitor's products.[3]

Another enumerated offense that warrants discussion are claims that allege the "[i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.'" In that connection, general liability policies have defined the word "advertisement," in relevant part, as "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." While the question of whether a claim alleges copyright or trade dress infringement is typically easily answered, the question of whether such infringement occurred in the insured's "advertisement" can be more challenging. For example, in *United States Fid. & Guar. Co. v. Fendi Adele S.R.L.*, the Second Circuit held that there was no coverage under this enumerated offense as:

> [the insured] did not engage in any advertising of the counterfeit goods, and in its complaints in the underlying actions, [the underlying plaintiff] did not allege that it suffered injury because of any advertising activities on the part of [the insured]. Rather, [the underlying plaintiff] complained that it suffered injury because defendants sold counterfeit goods, and damages were awarded in both of the underlying actions based not on [the insured's] advertising activities but on its sales of counterfeit products.[4]

In contrast, the United States District Court for the Southern District of New York concluded that the insured's use of copyrighted images in connection with the sale of certain toys fell within this enumerated offense based on plaintiff's allegation that millions of products were sold, resulting in a reasonable inference that the copyright infringement occurred in the insured's advertisement.[5] The court also supported this inference by pointing to, among other things, allegedly infringing marketing materials utilized by the insured.

Notwithstanding the existence of these enumerated offenses, serious consideration must also be given to certain policy exclusions which may take claims squarely outside of coverage. To that end, general liability policies typically contain multiple exclusions specific to Coverage B. For example, such exclusions may bar coverage for claims involving the knowing violation of the rights of another, material published with knowledge of falsity, material published prior to the policy period, the wrongful description of prices, or breach of contract. Given their breadth, two of these exclusions deserve further discussion.

First, general liability policies typically seek to bar coverage for all intellectual property claims except those specifically set forth in the "infringement" enumerated offense. To that end, Coverage B usually contains an exclusion entitled "Infringement of Copyright, Patent, Trademark or Trade Secret" that excludes coverage for personal and advertising injury "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. However, this exclusion does not apply to infringement, in your 'advertisement', of copyright, trade dress or slogan." Relying on this exclusion, courts have excluded coverage for intellectual property claims, such as trademark infringement claims, because the exclusion applies to claims that fall within the scope of the Lanham Act.[6]

Second, general liability policies also seek to bar coverage for claims based on statements made by an insured about its own products. In that regard, Coverage B typically contains an exclusion entitled "Quality or Performance of Goods – Failure to Conform to Statements." This exclusion bars coverage for personal and advertising injury "arising out of the failure of goods, products or services to conform with any statement of quality or performance made in [the insured's] 'advertisement.'" Relying on this exclusion, courts have excluded coverage for claims where the only falsity in the insured's advertisement was the failure of the insured's own product to meet its advertised quality and nature.[7]

In closing, Coverage B is an important aspect of the coverage potentially available under general liability insurance policies. Given the "enumerated offense" approach contained in Coverage B, and the many robust policy exclusions contained in that coverage part, careful consideration should be given to any claims that may potentially fall within the purview of Coverage B.

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1 *Amerisure Ins. Co. v. Laserage Tech. Corp.,* 2 F. Supp. 2d 296, 304 (W.D.N.Y. 1998).
2 *Jar Labs. LLC v. Great Am. E&S Ins. Co.,* 945 F. Supp. 2d 937, 944 (N.D. Ill. 2013).
3 *State Auto Prop. & Cas. Ins. Co. v. Ward Kraft,* 434 F. Supp. 3d 1003, 1009 (D. Kan. 2020).
4 823 F.3d 146 (2016).
5 *Lexington Ins. Co. v. MGA Entm't Inc.,* 961 F. Supp. 2d 536, 555 (S.D.N.Y. 2013).
6 *Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.,* 332 F.3d 215, 222 (4th Cir. 2003).
7 *Harleysville Mut. Ins. Co. v. Buzz Off Insect Sheild, L.L.C.,* 364 N.C. 1, 22 (2010).