NEW APPLEMAN ON INSURANCE

CURRENT CRITICAL ISSUES IN INSURANCE LAW

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by *Michael M. Marick*

The Amorphous Duty to Advise Clients About Possible Insurance Coverage
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Advertising Injury Coverage, Then and Now
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ADVERTISING INJURY COVERAGE, THEN AND NOW
A Look at the Changes and Most Compelling Issues in Advertising Injury Coverage Over the Past 25 Years

by Susan E. Firtch[*]

I. Introduction

Twenty-five years or so ago, policyholders could purchase commercial general liability insurance that afforded coverage for "advertising injury," which was defined to include such broad offenses as piracy and unfair competition committed in the course of the named insured's advertising activities. Over the intervening years, the scope of advertising injury coverage has narrowed considerably. Under current standard policy forms, advertising injury is contained within the combined category of "personal and advertising injury." This coverage is defined to include seven categories of enumerated offenses—only two of which must specifically be committed in an "advertisement," which is defined in the policy. This article takes a look back at the some of the more interesting issues that policyholders, practitioners, and the courts have faced under the various definitions of "advertising injury" over the years. The precedents they have created shapes the current state of the law as to advertising injury coverage. Fittingly, after reviewing how advertising injury coverage has developed, this article closes with an analysis of the advertising injury coverage contained in the Proposed 2007 ISO Commercial General Liability Coverage Form.

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> Unless [plaintiff's] claim was that [the insured] infringed his patent in his advertising, in a manner independent of its sale of the intraocular lens, the [plaintiff's] loss is not a form of piracy arising out of or committed in advertising, and is not covered under the policies.[5]

B. Unfair Competition

The enumerated offense of "unfair competition" raised questions for the courts as to whether the term included antitrust claims, price fixing, and statutory unfair competition. The vast majority of courts to consider the issue have held that, in the context of "advertising injury," the term "unfair competition" means the common-law tort, not statutory unfair competition or any allegedly unfair act.[6] As one court explained:

> While "unfair competition" is an enumerated offense, the mere reference to "unfair competition" without allegations that would support such a claim does not give rise to coverage. The majority of courts that have considered the issue have held that the term "unfair competition" contained in comprehensive general liability policies means the common-law tort, which includes "passing off" one's goods as those of another. [Citations omitted.][7]

The majority also held that unfair competition implies the use of an unfair competitive advantage, thereby restricting coverage to claims by competitors of the insured.[8]

For example, although allegations that the use of copyrighted songs in advertising without permission fell within the scope of coverage for "infringement of copyright," they did not fall with the scope of coverage for unfair competition under advertising injury coverage because the parties did not compete in business with each other.[9] Antitrust claims by schools participating in fundraising programs sponsored by the insureds did not seek damages for unfair competition within the scope of coverage because they did not allege the misappropriation of

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[5] *See Iolab Corp.*, 15 F.3d at 1500, 1506.

[6] *Amway Distributors*, 990 F. Supp. at 944; Westfield Ins. Co. v. TWT, Inc., 723 F. Supp. 492, 496 (N.D. Cal. 1989); Pine Top Ins. v. Public Utility Dist. 1 of Chelan County, 676 F. Supp. 212, 215–17 (E.D. Wash. 1987); Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1263 (1992); Smartfoods, Inc. v. Northbrook Prop. & Cas. Co., 35 Mass App. Ct. 239, 244 (1993); Seaboard Surety Co. v. Ralph Williams N.W. Chrys. P., Inc., 504 P.2d 1139, 1140–43 (Wash. 1973).

[7] *Amway Distributors*, 990 F. Supp. at 944.

[8] Tigera Group, Inc. v. Commerce & Indus. Ins. Co., 753 F. Supp. 858, 860–61 (N.D. Cal. 1991); Delta Pride Catfish, Inc. v. Home Ins. Co., 697 So. 2d 400, 405 (Miss. 1997); *see Amway Distributors*, 990 F. Supp. at 936, 943; Granite State Ins. Co. v. Aamco Transmissions, Inc. 57 F.3d 316, 320 (3d Cir. [Pa.] 1995); QSP, Inc. v. Aetna Casualty & Surety Co., 256 Conn. 343, 372 (2001).

[9] *See Amway Distributors*, 990 F. Supp. at 936, 943.

II. Policies Defining "Advertising Injury" to Include "Piracy" and "Unfair Competition"

It is difficult to imagine an insurer today offering coverage for such broad and undefined offenses as "piracy" and "unfair competition," yet as cases cited in this article reflect, such coverage was available and spawned litigation through the 1990s.

A common policy definition of "advertising injury" was:

> "Advertising injury" means injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.[1]

As in subsequent policy forms issued through the 1990s, any advertising injury offenses under these earlier policies had to be committed in the course of the named insured's advertising. That element of coverage is discussed later in this article. The focus in this section, is the definition of the offenses themselves. While most of the enumerated offenses were fairly straightforward, the meanings of "piracy" and "unfair competition" required judicial interpretation.

A. Piracy

The biggest question with the offense of "piracy" was whether it encompassed patent infringement. A few courts accepted, or seemed to accept the idea that infringing a patent could constitute piracy.[2] However, a greater number of courts rejected that proposition, holding that patent infringement was not covered as piracy, when the term was read within the context of the policy.[3] Some courts reasoned that piracy referred to the element of an advertisement, not to the product being advertised.[4]

For example, in holding that the insured's infringement of the plaintiffs' patent for an intraocular lens was not covered, the Ninth Circuit Court of Appeals stated that, under California law:

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[1] Delta Pride Catfish, Inc. v. Home Ins. Co., 697 So. 2d 400, 403 (Miss. 1997). *See also* Amway Distributors Benefits Ass'n v. Federal Ins. Co., 990 F. Supp. 936, 944 (W.D. Mich. 1997).

[2] United States Fid. & Guar. Co. v. Star Technologies, Inc., 935 F. Supp. 1110, 1114 (D. Or. 1996); Davila v. Arlasky, 857 F. Supp. 1258, 1263 (N.D. Ill. 1994); National Union Fire Ins. Co. v. Siliconix, Inc., 729 F. Supp. 77, 79 (N.D. Cal. 1989).

[3] Heil Co. v. Hartford Accident & Indemnity Co., 937 F. Supp. 1355, 1364–66 (E.D. Wis. 1996); Iolab Corp. v. Seaboard Surety Co., 15 F. 3d 1500, 1506 (9th Cir. [Cal.] 1994); Gencor Indus. v. Wausau Underwriters Ins. Co., 857 F. Supp. 1560, 1565–66 (M.D. Fla. 1994); Atlantic Mutual Ins. Co. v. Brotech Corp., 857 F. Supp. 423, 428 (E.D. Pa. 1994); Winner International Corp. v. Continental Casualty Co., 889 F. Supp. 809, 815 (W.D. Pa. 1994).

[4] *See Iolab Corp.*, 15 F.3d at 1500, 1506; *Gencor Indus.*, 857 F. Supp. at 1560, 1565–66.

a commercial advantage or that the plaintiffs suffered any competitive injury.[10] Consumers' price-fixing suits against a catfish producer did not fall within the scope of coverage because they could not constitute unfair competition, which required "at a minimum" a competitive injury.[11] A consumer class action suit against a bank, alleging violations of the California Unfair Business Practices Act, did not constitute claims for unfair competition under advertising injury coverage because the Act did not authorize an award of damages, and a definition of "unfair competition" that cannot support a claim for damages cannot reflect the objectively reasonable expectation of the insured.[12]

III. The 1985-1996 ISO Commercial General Liability Coverage Forms

The 1985 edition of the Insurance Services Office, Inc.'s (ISO) commercial general liability coverage form (number CG 00 01 11 85), similar to earlier policies, afforded coverage for advertising injury committed during the policy period in the course of advertising the named insured's goods, products, or services.[13] However, it did not define "advertising injury" to include either piracy or unfair competition. Instead, it provided:

1. "Advertising injury" means injury arising out of one or more of the following offenses:
    a. 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;
    b. Oral or written publication of material that violates a person's right of privacy;
    c. Misappropriation of advertising ideas or style of doing business; or
    d. Infringement of copyright, title, or slogan.[14]

The ISO commercial general liability forms continued to use this definition of "advertising injury" through the 1996 version.[15]

The offenses of slander, libel, and violation of the right of privacy were enumerated advertising injury (and personal injury) offenses under both the pre-1985 and post-1985 policies. The scope of coverage for these offenses has

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[10] *See QSP, Inc.*, 256 Conn. at 343, 370–74.

[11] *See Delta Pride*, 697 So. 2d at 400, 405.

[12] *See Bank of the West*, 2 Cal. 4th at 1254, 1263, 1272.

[13] ISO form CG 00 01 11 85, at 3.

[14] *Id.* at 7.

[15] *See, e.g.*, ISO forms CG 00 01 10 93 at 9; CG 00 01 01 96 at 11.

been infrequently litigated, apparently because the terms have common meanings. While some questions arose concerning the meaning of the term "disparages," the key issues raised by the new definition of advertising injury in the 1985-1996 ISO forms were the meanings of "misappropriation of advertising ideas or style of doing business" and "infringement of title."

A. Disparagement

The addition of the term "disparages," which was included in the definition of personal injury as well as advertising injury, raised questions as to the meaning of the offense of disparagement. For example, courts considered whether the passing off of the insured's product as that of the plaintiff disparaged the plaintiff's product, or whether patent infringement could constitute disparagement.[16] Both of these arguments, however, were rejected. Passing off the insured's product as that of the plaintiff does not disparage the plaintiff's product because there is no false or injurious statement about the plaintiff's product.[17] Similarly, allegedly false statements on the insured's packaging, stating that the insured's products are compatible with plaintiffs' products, do not constitute disparagement.[18] If allegations of patent infringement were held to imply a disparagement of title to the patent, all claims of patent infringement would fall within the scope of coverage.[19]

Instead, courts have held that the tort of disparagement, as used in liability policies, means product disparagement or trade libel, which requires an injurious falsehood that causes pecuniary injury.[20]

B. Misappropriation of Advertising Ideas or Style of Doing Business

The undefined offense of "misappropriation of advertising ideas or style of doing business" inevitably raised questions as to the meaning of that phrase. The most common questions involved coverage for trade dress and trademark infringement, and the misappropriation of trade secrets, including customer lists.

1. Trade Dress and Trademark Infringement

At one time, coverage for trademark and trade dress infringement was a heavily

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[16] Microtec Research, Inc. v. Nationwide Mutual Ins. Co., 40 F. 3d 968 (9th Cir. [Cal.] 1994) (as to the issue of "passing off"); Everest & Jennings v. American Motorists Ins. Co., 23 F. 3d 226, 229–30 (9th Cir. [Cal.] 1994) (as to the issue of patent infringement).

[17] *See Microtec*, 40 F.3d at 968, 972.

[18] Skylink Tec., Inc. v. Assurance Co. of Am., 400 F. 3d 982, 984–85 (7th Cir. 2005).

[19] *See Everest & Jennings*, 23 F.3d at 226, 230 (discussing disparagement under personal injury coverage).

[20] *See Microtec*, 40 F. 3d at 968, 972; QSP, Inc. v. Aetna Casualty & Surety Co., 256 Conn. 343, 359–60 (2001); Atlantic Mutual Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1035 (2002).

litigated issue. Trademarks are defined under 15 U.S.C. § 1125 (the Lanham Act) as words names, symbols, or devices used to identify and distinguish goods from those manufactured or sold by others and to indicate the source of the goods. Trade dress involves the total image of a product, and may include such distinctive features as color, shape, texture, or graphics.[21] Trade dress and trademarks are protected under § 1125 of the Act, which prohibits the use of using a term, name, symbol or device, or any combination thereof, which is likely to cause confusion, mistake or deception as to the manufacturer, origin or description of a good or service.[22]

The first coverage question was whether trademarks and/or trade dress could constitute advertising ideas or a style of doing business, and the second was whether the infringement was committed in the course of the insured's advertising. In the mid-1990s many courts answered both questions in the affirmative, holding that trademarks and trade dress could constitute an advertising idea or style of doing business because they are a distinctive designation of a product's origin that serve to "advertise" a product.[23] This trend towards finding coverage for trademark and trade dress infringement apparently started, in large part, with a case from the Eastern District of Michigan in early 1995.[24] Thereafter, between 1995 and 1997, a number of cases throughout the nation found coverage for trademark (and trade dress) infringement when the infringement was contained in or on the product that was advertised.[25] Courts found coverage for such infringements as the copying of a trademarked design on the top of a pen,[26] the use of the name "Dunhill" and a stylized "D" on products,[27] "knockoff" handbags,[28] the distinctive shape of foam bath toys,[29] and the configuration of a

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[21] John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (1983); Poof Toy Products, Inc. v. United States Fid. & Guar., 891 F. Supp. 1228, 1232–33 (E.D. Mich. 1995).

[22] 15 U.S.C. § 1125.

[23] American Economy Ins. Co. v. Reboans, Inc., 900 F. Supp. 1246, 1254–55 (N.D. Cal. 1995); Advance Watch Co., Ltd. v. Kemper National Ins. Co., 878 F. Supp. 1034, 1041–42 (E.D. Mich. 1995), *rev'd*, 99 F. 3d 795 (6th Cir. 1996).

[24] *See* Advance Watch Co., Ltd. v. Kemper National Ins. Co., 878 F. Supp. 1034 (E.D. Mich. 1995), *rev'd*, 99 F.3d 795 (6th Cir. 1996).

[25] *See Reboans*, 900 F. Supp. at 1246; Poof Toy Products, 891 F. Supp. at 1232–33; Dogloo, Inc. v. Northern Ins. Co. of New York, 907 F. Supp. 1383, 1398 (C.D. Cal. 1995); Lebas Fashion Imports v. ITT Hartford Ins. Group, 50 Cal. App. 4th 548, 564–65 (1996); B.H. Smith, Inc. v. Zurich Ins. Co., 285 Ill. App. 3d 536 539–40 (1996).

[26] *Advance Watch*, 878 F. Supp. at 1041–42, *rev'd*, 99 F.3d 795 (6th Cir. 1996).

[27] *Reboans*, 900 F. Supp. at 1254–55.

[28] *B.H. Smith*, 285 Ill. App. 3d at 539–40 (1996).

[29] *Poof Toy Products*, 891 F. Supp. at 1232–33.

dome shaped dog house.[30]

However, at the end of 1996, the Sixth Circuit reversed the Michigan District Court's decision (*Advance Watch*) that had essentially started the trend of finding coverage for trademark and trade dress infringement (concerning the copy of a trademarked design on the top of a pen).[31] The Sixth Circuit extensively analyzed the issue of whether the offense of misappropriation of advertising ideas or style of doing business should be limited to common-law torts distinct from statutory trademark and trade dress protection, or whether the ordinary meaning of "misappropriation" refers broadly to a category of wrongful conduct, including trademark and trade dress infringement.[32] The court held that accepting the broad meaning of "misappropriation" would "expand the meaning of the term to the extent of not having any distinctive meaning at all."[33] It further held that the offense of misappropriation of advertising ideas or style of doing business was limited to the unauthorized taking or use of interests other than those which are eligible for protection under statutory or common-law trademark law.[34] The court noted that "it is common practice, but not legally precise, to refer to the misappropriation of a trademark or of trade dress," when the claim is really one for infringement.[35]

The reversal of the original *Advance Watch* decision caused a split among the courts subsequently deciding the issue of coverage for trademark and trade dress infringement. Some courts adopted the Sixth Circuit's decision, finding its reasoning sound.[36] Others disagreed, harshly criticizing the court's reasoning and conclusion, and continuing to follow the majority view that trademark and trade dress infringement are covered.[37] One court stated: "The decision in *Advance Watch* is the great exception to the trend under the law," without considering that the original *Advance Watch* decision appears to have started that trend.[38]

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[30] *Dogloo*, 907 F. Supp. at 1398.

[31] *Advance Watch*, 99 F.3d 795, 802.

[32] *Id.* at 800–804.

[33] *Id.* at 803.

[34] *Id.* at 802, 804.

[35] *Id.* at 805–06.

[36] ShoLodge, Inc. v. Travelers Indem. Co., 168 F.3d 256, 295 (6th Cir. 1999); Callas Enters. v. Travelers Indem. Co. of Am., 193 F.3d 952, 957 (8th Cir. 1999).

[37] Houbigant, Inc. v. Fed. Ins. Co., 374 F.3d 192, 202 (3d Cir. 2004); State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am., 343 F.3d 249, 257 (4th Cir. 2003); Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1188–98 (11th Cir. 2002); Am. Employers' Ins. Co. v. Delorme Publishing Co., 39 F. Supp. 2d 64, 76–77 (D. Me. 1999).

[38] *Am. Employers' Ins. Co.*, 39 F. Supp. 2d at 76.

Nonetheless, the finding of coverage for trademark and trade dress claims continues to be the majority view.[39]

2. Misappropriation of Trade Secrets

Another question that arose with coverage for misappropriation of advertising ideas or style of doing business was the misappropriation of a competitor's trade secrets or other confidential information, such as customer lists. Some courts held that there was a potential coverage if the lists were used to solicit customers, because customer lists could constitute advertising ideas.[40]

As one court stated:

> In short, where a direct competitor allegedly acquires and uses the customer list of another company in order to send direct mail solicitations for business to the competitor, this Court concludes that such conduct is within the definition of conduct committed within the course of advertising . . . . Furthermore, where it is alleged that the insured improperly acquired, i.e., misappropriated the customer list, then there is coverage under the "misappropriation of advertising ideas" language . . . .[41]

However, at least one court rejected the idea that a list of customers could be an "advertising idea."[42] As that court explained:

> A confidential customer list is a trade secret, not an idea about advertising or an outward expression of a business's style. Without relevant, attendant allegations pertaining to advertising, no coverage under a "misappropriation of advertising ideas or style of doing business" theory is available to the . . . defendants.[43]

Similarly, the alleged misappropriation of trade secrets such as marketing plans and customer and supplier identities to solicit existing customers has been held to be uncovered because such solicitation did not constitute advertising.[44]

Courts have held that trade secrets in the form of a proprietary process or formula are not covered because they are not used in advertising and do not constitute advertising ideas or style of doing business.[45] For example, the

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[39] *See Hyman*, 304 F.3d at 1189–90, discussing the majority view after the Sixth Circuit's decision in *Advance Watch.*

[40] Sentex Systems, Inc. v. Hartford Accident & Indemnity Co., 882 F. Supp. 930, 944 (C.D. Cal. 1995); Merchants Co. v. American Motorists Ins. Co., 794 F. Supp. 611, 618–19 (S.D. Miss. 1992).

[41] *Merchants Co.*, 794 F. Supp. at 619.

[42] State Farm Fire & Cas. Co. v. Steinberg, 393 F.3d 1226, 1234 (11th Cir. 2004).

[43] *Id.* at 1234.

[44] Hayward v. Andresen Color of San Francisco, Inc., 430 F.3d 989, 992 (9th Cir. 2005).

[45] Simply Fresh Fruit v. Continental Ins. Co., 94 F.3d 1219, 1223 (9th Cir. 1996); Winklevoss Consultants, Inc. v. Federal Ins. Co., 991 F. Supp. 1024, 1037–39 (N.D. Ill. 1998).

misappropriation and use of a patented process for cutting fruit did not fall within the scope of coverage because patent infringement cannot occur in advertising and was not an advertising idea.[46]

3. Other "Advertising Ideas"

Some courts have defined "advertising ideas as an idea for calling public attention to a product or business, especially by proclaiming its desirable qualities in order to increase sales or patronage."[47] Under this definition, trade name, such as the name "GellyComb" have been held to constitute "advertising ideas."[48]

> The discrete trade names of GellyComb, Gelastic, and Intelli-Gel expressly describe and promote the gel-like and elastic qualities of the material, calling the public's attention to the desirable qualities of [the] products. Those trade names are "advertising ideas" as that phrase is understood by the average reasonable purchaser of insurance.[49]

C. Infringement of Title

The term "infringement of title" has been widely construed to encompass infringements of names, words, phrases, and trade names.[50] False descriptions of the original of a product, such as claiming it is an authentic American Indian product, does not constitute infringement of title.[51]

Some courts held that the term "infringement of title" does not encompass trademark infringement,[52] while others held that it can.[53] Most, if not all, courts have declined to find coverage for patent infringement as infringement of title, rejecting the argument that because one holds title to a patent, patent infringement could constitute infringement of that title.[54]

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[46] *Simply Fresh Fruit*, 94 F.3d at 1223.

[47] Ohio Cas. Ins. Co. v. Cloud Nine, LLC, 464 F. Supp. 2d 1161, 1166 (D. Utah 2006); Atlantic Mut. Ins. Co. v. Badger Med. Supply Co., 191 Wis. 2d 229, 239 (1995).

[48] Ohio Cas. Ins. Co., 464 F. Supp. 2d at 1166.

[49] *Id.* at 1166–67.

[50] *See Reboans*, 900 F. Supp. at 1246, 1253; Winklevoss Consultants, Inc. v. Federal Ins. Co., 991 F. Supp. 1024, 1040 (N.D. Ill. 1998); A Touch of Class Imports, Ltd. v. Aetna Casualty & Surety Co., 901 F. Supp. 175, 177 (S.D.N.Y. 1995).

[51] Native Am. Arts, Inc. v. Hartford Cas. Ins. Co., 435 F.3d 729, 734 (7th Cir. 2006).

[52] *See* Advance Watch, 99 F.3d at 795, 803 (trademark); Callas Enterprises, Inc. v. Travelers Indem. Co. of America, 193 F.3d 952, 956–57 (8th Cir. Minn. 1999).

[53] Union Ins. Co. v. Knife Co., 897 F. Supp. 1213, 1217 (W.D. Ark. 1995), *summary judgment granted, in part, summary judgment denied, in part*, 902 F. Supp. 877 (W.D. Ark. 1995); American Employers' Ins. Co. v. De Lorme Pub. Co., Inc. 39 F. Supp. 2d 64, 77 (D. Me. 1999).

[54] Atlantic Mutual Ins. Co. v. Brotech Corp., 857 F. Supp. 423, 429 (E.D. Pa. 1994); Gencor Indus. v. Wausau Underwriters Ins. Co., 857 F. Supp. 1560, 1564–65 (M.D. Fla. 1994).

IV. The Meaning of "Advertising," and the Causal Connection Requirement

The determination of whether a claim fell within one of the enumerated advertising injury offenses was only the first step in determining whether there was coverage under the policy forms through 1996 discussed above, as the policies required that the offense be committed during the policy period in the course of advertising the insured's goods products or services.[55]

The meaning of the term "advertising" was widely litigated, and the number of cases on this topic alone, can be overwhelming. The principal dispute, however, was whether "advertising" was limited to activities directed at the public at large, or included activities directed at a small defined group.[56] Some courts held that the word "advertising" meant only widespread distribution of material to the public at large.[57] Other courts held that "advertising" could include the solicitation of only a few customers, or even one-on-one solicitation.[58] As one court noted in 1997, it was unclear at that point whether the narrow or broad interpretation represented the majority view, as there were cases stating that each represented the majority.[59] However, after that time, an increased number of cases held that "advertising" is limited to only widespread distribution of promotional material to the public at large, putting that view in the clear majority.[60]

The majority also required that there be a causal connection, or nexus, between the offense and the insured's advertising activities as a matter of policy interpretation and as a matter of common sense.[61] "If no causal relationship were required between 'advertising activities and 'advertising injuries,' then 'advertising injury coverage, alone, would encompass most claims related to the insured's

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[55] Delta Pride Catfish, Inc. v. Home Ins. Co., 697 So. 2d 400, 403 (Miss. 1997). *See also Amway Distributors*, 990 F. Supp. at, 944; ISO forms CG 00 01 11 85, p. 7; CG 00 01 10 93, p. 4, and CG 00 01 01 96, pp. 4–5.

[56] *See Amway Distributors*, 990 F. Supp. at 936, 939.

[57] *See* Delta Pride, 697 So. 2d at 400, 405; Smartfoods, Inc. v. Northbrook Prop. & Cas. Co., 35 Mass App. Ct. 239, 244 (1993); Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1276–77 (1992); Fox Chemical Co. v. Great Am. Ins. Co., 264 N.W.2d 385–86 (Minn. 1978).

[58] John Deere Ins. Co. v. Shamrock Indus, Inc., 696 F. Supp. 434, 440 (D. Minn. 1988), *aff'd*, 929 F.2d 413 (8th Cir. 1991); New Hampshire Ins. Co. v. Foxfire, Inc. 820 F. Supp. 489, 494 (N.D. Cal. 1993) (mem).

[59] *See Amway Distributors*, 990 F. Supp. at 936, 945 n.6.

[60] USX Corp. v. Adriatic Ins. Co., 99 F. Supp. 2d 593, 618 (W.D. Pa. 2000); Hameid v. National Fire Ins. of Hartford, 31 Cal. 4th 16, 24–30 (2003) (both explaining the current majority view).

[61] QSP, Inc. v. The Aetna Casualty & Surety Co., 256 Conn. 343, 372 (2001); Knoll Pharm. Co. v. Automobile Ins. Co. of Hartford, 152 F. Supp. 2d 1026, 1038–39 (N.D. Ill. 2001); *Amway Distributors*, 990 F. Supp. at 946; Delta Pride Catfish, Inc. v. Home Ins. Co., 697 So. 2d 400, 404 (Miss. 1997); Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1276–77 (1992).

business."[62] Thus, when a complaint alleged facts corresponding to the covered offenses of defamation and disparagement, and the offenses were allegedly committed in the insured's advertising for its drug products and caused injury to plaintiffs, the causal connection was met.[63] On the other hand, claims that consumers received inadequate disclosures as to the terms of loans did not have a causal connection with advertisements that were directed solely to insurance agents sufficient to trigger coverage even if the offense of unfair competition had constituted an advertising injury offense.[64]

The causal connection requirement also precluded coverage for patent infringement, even if such infringement could have been construed as a covered offense.[65] The same was held to be true for the misappropriation of trade secrets that had no connection to advertising.[66]

V. The 1998-2004 ISO Commercial General Liability Coverage Forms

A. Personal and Advertising Injury

Beginning with the 1998 edition of the commercial general liability form, the ISO combined "personal injury" and "advertising injury" into "personal and advertising injury."[67] This coverage applies to personal and advertising injury caused by an offense arising out of the named insured's business if the offense is committed in the coverage territory during the policy period.[68] The requirement that the offense be committed in the course of the insured's advertising was dropped, eliminating the former troublesome question of the scope of the meaning of "advertising."

The 1998 form defines "personal and advertising injury" as injury arising out of seven enumerated offenses.[69] Those offenses include the offenses formerly contained in the definition of "personal injury," such as false arrest, malicious

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[62] *See Bank of the West*, 2 Cal. 4th at 1254, 1261, 1276–77; *Delta Pride*, 697 So. 2d at 400, 404–05.

[63] *See Knoll*, 152 F. Supp. 2d at 1026, 1038–39.

[64] *See Bank of the West*, 2 Cal. 4th at 1254, 1277.

[65] Iolab Corp. v. Seaboard Surety Co. 15 F. 3d 1500, 1507 (9th Cir. Cal. 1994); National Union Fire Ins. Co. v. Siliconix, 729 F. Supp. 77, 79 (N.D. Cal. 1989); Aetna Casualty & Surety Co. v. Superior Court, 19 Cal. App. 4th 320, 298 (1993).

[66] Winklevoss Consultants, Inc. v. Federal Ins. Co., 991 F. Supp. 1024, 1034–35 (N.D. Ill. 1998).

[67] *See* ISO form CG 00 01 07 98, pp. 4–5.

[68] *Id.* at 5.

[69] *Id.* at 12.

prosecution, wrongful eviction and related enumerated offenses.[70] They also include the oral or written publication of material that slanders or libels a person or organization, disparages a person's or organization's goods, products or services, or violates a person's right of privacy; all of which were formerly within the separate definitions of "personal injury" and "advertising injury." This eliminated the need to determine whether the publication was in the course of advertising or simply within the course of the insured's business. Under the new language, the enumerated publications are within the scope of coverage as long as they arise out of the insured's business, regardless of the context in which they are published.

The former advertising injury offenses of "misappropriation of advertising ideas or style of doing business," and "infringement of copyright title or slogan," were removed and replaced with:

> 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".[71]
>
> "Advertisement" is defined as:
>
> "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.[72]

The new combined personal and advertising injury offenses from the 1998 ISO form were carried over into the 2001 and 2004 editions of the form.[73]

Beginning with the 2001 edition, however, the definition of "advertisement" was supplemented to add:

For purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.[74]

The 2001 edition of the ISO CGL form also contained an important new exclusion:

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *See* ISO forms CG 00 01 10 01 at pp. 5–6, 14; and CG 00 01 12 04 at pp.5, and 14.

[74] ISO form CG 00 01 10 01 at p.12; *see also* ISO form CG 00 12 04 at p.12.

also noted that privacy is a personal right, not a business or corporate right.[89]

The debate over coverage for violations of the TCPA will likely wind down if the ISO's proposed 2007 edition of the commercial general liability coverage form, containing an exclusion for such claims, is approved by insurance regulators.

VI. The Proposed 2007 ISO Commercial General Liability Coverage Form

The ISO recently submitted its proposed 2007 edition of the commercial general liability coverage form to insurance regulators across the country. The enumerated personal and advertising injury offenses remain unchanged. There are, however, two changes with regard to exclusions.

The first is a revision to the exclusion for infringement of copyright, patent, trademark or trade secret, which will now provide:

> i. Infringement of Copyright, Patent, Trademark or Trade Secret
>
> "personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement."
>
> However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.[90]

The second is a new exclusion for distribution of material in violation of statutes:

> **p. Distribution Of Material In Violation Of Statutes**
>
> "Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:
>
> **(1)** The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
>
> **(2)** The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
>
> **(3)** Any statute, ordinance or regulation, other than the TCPA and CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.[91]

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[89] *Id.* at 942.

[90] ISO form CG 00 01 12 07, at p.6.

[91] *Id.* at p.7.

Although coverage for violations of the TCPA has been a widely litigated issue over the past few years, it will no longer be an issue under policies containing the new exclusion (assuming the proposed 2007 form is approved and utilized). Similarly, issues that were once the focus of intense litigation, such as the meaning of "advertising," and coverage for trademark infringement, have been fading from view as fewer and few policies utilize the pre-1998 form, and/or claims under the earlier forms are time-barred. It will be interesting to see what the litigated coverage issues will be in the future under the 2001, 2004, and proposed 2007 forms.