Overview of Advertising Injury Coverage

Before 1973, broad form commercial general liability (CGL) policies typically did not contain a provision for "advertising injury." As defined in the standard CGL policy issued by the Insurance Services Office (ISO), the term included injuries arising out of actions conducted in the course of advertising activities, if they arose out of:

- Libel, slander, or defamation
- Violation of the right of privacy
- Piracy or infringement of copyright, title, or slogan

Coverage for trademark was specifically excluded.

Changes to Advertising Injury Clauses

Revised several times since its inception, the typical ISO policy now includes coverage for "personal or advertising injury" arising out of:

- Oral or written material that slanders or libels a person or organization or disparages another's goods, products, or services
- Oral or written publication of material that violates a person's right of privacy
- Misappropriation of another's advertising ideas or style of doing business
- Infringing a copyright, trade dress, or slogan in an advertisement

"Advertisement" is commonly defined as a notice, broadcast or published to the general public or specific market segment about goods, products, or services being sold, for the purpose of attracting customers or supporters. CGL policies now also provide that the term "advertisement" is to be strictly construed.

Coverage for Internet and Cyberspace Activities

Recent changes to CGL policy language have been prompted by the increasing involvement of insurers in Internet liability lawsuits, despite their claims that CGL insurance was never intended to cover Internet or cyberspace ventures.

Although most of these claims were ultimately held to be not covered, insurers were often forced to cover defense costs anyway, due to the potential for coverage under the language of the advertising injury clauses. This resulted in changes to policy language to exclude coverage for Internet activities, multimedia liability, and e-commerce.

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Coverage Standards Under Case Law

Case law, while limited and varying from state to state, provides some insight into the scope of the enumerated offenses in the common CGL policy:

1. "Oral or written material that slanders or libels a person or organization" has often been interpreted as trade libel. This may be defined as intentional disparagement of the quality of property that results in monetary damages.
2. Most courts have interpreted "misappropriation of another's advertising ideas or style of doing business" as trademark infringement and/or unfair competition.
3. Some courts have also interpreted the infringement of copyright, title, or slogan language as generally covering trademark infringement. However, this language has also been interpreted to cover claims based on interference with the customer list of another.

For coverage to exist, most courts require that there be a causal connection between the injury and advertising activities of the insured. Further, the insured has the burden of proof on this issue.

Most courts have held that "advertising" constitutes widespread promotional activities, as opposed to individual solicitations. In addition, the offending activity must have occurred within the policy period. While some courts have barred coverage if the action, such as defamation, was done willfully and with knowledge of falsity of the statement, other courts have been reluctant to relieve the insurer of its defense obligations based on such claims.

In many states, the terms of the insurance policy are given their plain and ordinary meaning. If the language is determined to be ambiguous, it will be construed in favor of the insured. In other jurisdictions, insurance policies are strictly construed against the insurer even where no ambiguity exists.

The duty of the insurer to pay for the cost of defense of an action can be broader than liability, as it is linked to the possibility of coverage. Therefore, an insurer may have to pay the cost of defense, even if the insurer is ultimately not liable for the judgment.

Case Law

A California circuit court was asked to determine whether an insurance company was required to provide coverage for an injury resulting from copyright infringement and breach of contract. The policy in question did not cover liability for breach of contract, but did cover copyright infringement associated with advertising injury. Although the lawsuit arose out of a breach of contract, the court held that the insurance company was required to provide a defense because of potential coverage for alleged copyright
infringement. Further, the court required the company to pay for the settlement reached by the parties.

In North Carolina, a lower court denied coverage for claims that included commercial disparagement and unfair competition because it found that the acts did not constitute an "occurrence." This term was defined in the policy as "neither intended nor expected from the standpoint of the insured." However, the appellate court reversed, finding that the definition of "occurrence" was only a "trigger" for coverage applicable to property damaged or personal injuries, not "advertising injury" coverage.

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