

ISO BROADENS PERSONAL AND ADVERTISING INJURY COVERAGE GAPS

Recent changes to the Commercial General Liability Policy (“CGL”) by the Insurance Services Office (“ISO”) have widened the coverage gap for publishing and advertising exposures. Naturally, the media liability insurance implication caused us to bolt upright in our double-wide hammock, brush the cicadas off our lapels and take notice.

The ISO filed a new CGL form (CG 00 01 04 13) and coverage limiting endorsements, which have created significant buzz in the insurance community. This article will focus upon those that specifically impact coverage arising from an insured’s utterance or dissemination of content, which could include advertising, social media postings, informational content via website, press conferences or other forms of corporate expression. Policyholders should review all of the changes with coverage counsel and insurance professionals because the enhanced exclusions, in particular, may significantly increase an insured’s uninsured exposures.

These new changes clarify and amplify what the ISO has been signaling for some time - namely that the CGL policy’s Advertising and Personal Injury coverage is not intended to be the “go-to” coverage for the dissemination of media content, even when that content is incidental to a non-media business. Over the years, the ISO has been gradually narrowing coverage under COVERAGE B – PERSONAL AND ADVERTISING INJURY COVERAGE (“Coverage B”). This insuring agreement provides coverage for liability for non-media companies arising from personal and advertising injury, such as damage to a third party’s reputation or feelings. From the beginning, this coverage didn’t apply to media companies (in the words of CGL insurers, “Insureds in Media and Internet Type Businesses”), thus sending those insureds to the specialty media market that specifically provides coverage for perils arising from the gathering, creation, publication and distribution of media content. Coverage B has been significantly eroded with respect to coverage for intellectual property causes of action and claims arising from Internet activities. With the new revisions, the ISO has downsized coverage even further and will push many non-media companies into the specialty media liability market to adequately insure their incidental media exposures.

Whereas prior CGL form revisions focused upon limiting coverage for claims involving intellectual property, such as patent, trademark and copyright infringement, this version turns its attention to invasion of privacy relating to content and electronic data. Key is the following newly minted exclusion, which may be added by endorsement: Amendment of Personal and Advertising Injury Definition (CG 24 13 04 13 “Amendment”). The Amendment, while quite simple on its face, significantly limits coverage for policyholders under Coverage B. It states as follows:

With respect to **Coverage B Personal And Advertising Injury Liability**, Paragraph 14.e of the **Definitions** section does not apply.

The relevant paragraph deleted by the above Amendment is as follows:

V. DEFINITIONS

* * *

14. "Personal and advertising injury" means injury, including consequential "bodily injury" arising out of one or more of the following offenses:

* * *

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

* * *

The Amendment eliminates coverage for invasion of privacy, which is a publishing and advertising peril. There are also a number of state and federal laws regulating the collection, use, storage and transmittal of personally identifiable information ("PII"). A cause of action for invasion of privacy may also accrue in this context, and it appears to be ISO's intent to exclude coverage for claims arising from PII.¹ Generally, invasion of privacy means the following four specific torts with respect to an oral or written publication of content:

1. Public disclosure of embarrassing private facts; where, for instance, a plastic surgeon's advertisement showing "before and after" photographs of a patient discloses private facts, i.e. a new nose, without permission;
2. Publicity placing an individual in a false light, where, for example, a politician says something false, but not defamatory, about his or her opponent;
3. Appropriation of an individual's likeness for commercial advantage, such as where a retailer's advertisement uses a customer's photograph without consent to promote products or services;
4. Intrusion upon seclusion is an intentional physical, electronic or mechanical invasion of a person's solitude or seclusion that is highly offensive to a reasonable person, such as where a tech school drone videotapes a neighborhood from the air— some of which includes footage of

¹ See **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY** wherein **A.2.Exclusions p. Electronic Data** provides that harm from breaches of data bases is not "property damage" and therefore not subject to coverage.

people sunbathing in their backyard - and posts the footage to a robotics class website in promotion of school activities.

There are new changes to Coverage B that expand exclusions for companies that gather and/or disseminate certain types of content, notably commercial and personal information. **Exclusion p: Recording And Distribution Of Material Or Information In Violation Of Law**, which was previously entitled, “**Distribution Of Material In Violation Of Statues,**” has been broadened to exclude coverage for “Personal and advertising injury “ that violates or is alleged to have violated the following laws:

2. Exclusions

This insurance does not apply to:

* * *

(3) The Fair Credit Reporting Act (FRCA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

* * *

Item **(3)** is a new exclusion. Item **(4)** is an expansion of the previous exclusion by including “addresses,” “prohibits or limits” and “printing, dissemination, disposal, collecting, or recording, of material or information.” The previous version of this exclusion applied to the “sending, transmitting, communicating or distribution” of material or information. This exclusion also appears in its entirety in **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY.**

Additionally, **Exclusions, 2. b.** and **c.** of Coverage B have been broadened to add “in any manner” as follows:

* * *

b. Material Published With Knowledge Of Falsity

“Personal and advertising injury” arising out of oral or written publication, *in any manner* [emphasis added] of material, “if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior to Policy Period

“Personal and advertising injury” arising out of oral or written publication, *in any manner* [emphasis added], of material whose first publication took place before the beginning of the policy period.

* * *

The above changes clarify that the “oral or written publication” of content or matter may also be electronic and thereby barred from coverage. While this change is consistent with the definition of “Personal and advertising injury” as set forth in **SECTION V-DEFINITIONS, 14. d., e.** wherein “in any manner” follows “oral or written publication,” the overall impact of this change has been to broaden the two exclusions.

The newly broadened exclusions and the new Amendment excluding coverage for privacy causes of action indicate that CGL insurers are particularly concerned about covering data privacy and network security actions arising from the misuse of PII. In ISO’s attempt to exclude these perils, coverage for “garden variety” privacy actions relating to reputational harm and hurt feelings consistent with personal and advertising injury actions has been thrown out with the proverbial bath water. The full reach of the new Amendment will have to await judicial review before we fully understand its coverage implication. In the interim, coverage professionals and policyholders are left to wonder about its breadth and how it will be applied by insurers.

The Amendment may cause coverage headaches for insurers. A number of covered torts under the CGL - especially those involving reputation or emotional distress - overlap with and are often intertwined with invasion of privacy. Defamation, in particular, is often pled in combination with invasion of privacy, which will create coverage dilemmas for insurers that utilize this endorsement. Whenever an insurer does not provide full coverage for causes of action raised against the insured, a conflict of interest exists between the economic and litigation interests of the parties to the insurance contract. In some states, such as California, the insurer is obligated to retain coverage or monitoring counsel for the insured at its own expense or allow the insured to retain counsel and control the defense. While every claim must be evaluated on a case-by-case basis, it is foreseeable that many CGL insurers will choose to waive the reservation – and avoid paying for two sets of counsel.

Earlier restrictions on coverage for content and its dissemination by insureds remain in the new form, continuing ISO’s push to the specialty markets, including the following:

- Claims for infringement of intellectual property (patent, copyright, trademark and trade secrets) are excluded - except for copyright (and trade dress or slogan) infringements which appear in the insured’s advertising only.
- Website content that is not “about” the insured’s products or services is not considered “advertising” and not subject to coverage.
- There is no coverage for chat rooms or electronic bulletin boards the insured hosts, owns, or over which the insured exercises control. The nomenclature, “chat rooms and electronic

bulletin boards” is clearly antiquated, but would likely include social media commentary and web postings. A key component of the exclusionary language is the requirement that the insured host, own or exercise control. Facebook, Twitter and other social networking sites are hosted and owned by third parties. That said, an insured with social media accounts has some control over access and the type of information that is shared with third parties, which could raise a coverage conundrum with respect to postings on the insured’s social media accounts. This exclusion would probably not apply to offending postings made by the insured on a third party’s site.

- There is no coverage for trespass unless committed by or on behalf of a property owner, landlord or lessor, thus virtually eliminating coverage for information gathering activities.

The new form revisions signal that any non-media insured that disseminates media content will not be adequately covered for media perils under Coverage B. Any company that gathers or disseminates content – including the gathering, storage and use of PII - should discuss the form changes with an experienced insurance professional and consider additional coverage through the media liability or other specialty market.

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