I. Introduction

We are long past the days when bodily injury and property damages claims ruled the world of insurance claims. As the world of litigation has evolved, so have the risks of liability, and the insurance industry has stepped in to address some those new risks through "Advertising Injury" provisions in Coverage B. Those new categories of claims – most of them commercial in nature – have brought with them a series of new challenges for insurance professionals who are often unfamiliar with the nuances of commercial litigation. The complexity and cost of defending these suits can be enormous, and insureds are increasingly looking to their insurers for defense and indemnification.

Intellectual property claims and class action litigation can fall within the purview of CGL policies, presenting unique challenges that require equally unique claim management skills. When are insurers required to defend intellectual property cases and class actions? How are these cases different than more traditional bodily injury or property damages claims?

In this paper, we will discuss the evolution of advertising injury coverage as the insurance industry attempts to keep pace with the ever-growing, ever-changing landscape of intellectual property and consumer class action litigation. We will also analyze the coverage issues presented by these types of claims and evaluate the continued viability of "Advertising Injury" coverage in current times.

II. Offense-Based vs. Occurrence Based Coverage

"Personal and advertising injury coverage" is "offense"-based, not "occurrence"-based, coverage. The ordinary meaning of the term "offense" is "a breach of a moral or social code" or "an infraction of law." Merriam Webster's Collegiate Dictionary 806 (10th ed. 1997). Because policy forms insure against liability arising out of certain enumerated "offenses," the word in this context conveys the same meaning as "tort." "Tort" has the same meaning in the ordinary and legal senses. Compare id. at 1245 ("a wrongful act other than a breach of contract for which relief may be obtained"), with Black's Law Dictionary 1496 (7th ed. 1999)("A civil wrong for which a remedy may be obtained"), and 1 Dan B. Dobbs, The Law of Torts § 1, at 1 (2001)("a legal wrong . . . that causes harm for which courts will impose civil liability").

For insurance purposes, this means that coverage for "Advertising injury" liability hinges on whether the plaintiff asserts a claim for the commission of certain offenses or torts – unlike coverage for bodily injury or property damage, which depends generally on the type of injury sustained, and not the cause of action. As explained by several courts, Coverage B is a theory-based coverage. It defines its coverage in terms of offenses, or theories of liability, not in terms of the injury sustained by the plaintiff. *Great Northern Nekoosa Corp. v. Aetna Cas. & Sur. Co.*, 921 F. Supp. 401, 416 (N.D. Miss. 1996); *see also Martin Marietta Corp. v. Insurance Co. of N. Am.*, 40 Cal. App. 4th 1113, 1124-25 (1995); *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567,

579-581 (Wash. 1998); 7A JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4501.14 (Walter F. Berdal ed., 1979).

III. Advertising Injury Coverage In The Comprehensive General Liability Form

Insurance coverage issues have become increasingly problematic for insureds, lawyers, insurance agents and underwriters as the insurance industry confronts a host of evolving issues such as the rapid growth and expansion of advertising, particularly through the internet. Advertising-based claims, and the coverage issues associated with those claims, are in a constant state of flux as internet technology and the means of advertising and engaging in commerce electronically evolve at lightning speed.

In response to this changing climate, the insurance industry and, more specifically, the Insurance Services Office ("ISO")[1] has, over the years, implemented a series of changes, revisions and additions to the coverage afforded under the "Advertising Injury" provisions of the CGL form. Most of these changes have sought to reduce the scope and grant of coverage by narrowing the definition of what constitutes a covered offense and the addition or broadening of exclusionary language. The best way to understand the current state of "Advertising Injury" and the scope of coverage available today, we must look to its history.

A. The 1973 Broad Form Endorsement.

The ISO CGL policy form created in 1973 did not include coverage for "Advertising Injury." Insureds seeking this type of coverage were required to purchase Broad Form Comprehensive General Liability Endorsement in ISO CGL policies.[2]. The coverage available in the 1973 Endorsement afforded coverage for "all sums which the insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies sustained by any person or organization and arising out of the conduct of the named insured's business within the policy territory. . . ."[3] The 1973 Endorsement, defined "advertising injury" as:

> 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,

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[1] The Insurance Services Office is a provider of data, underwriting, risk management and legal/reulatory services (with special focus on community fire-protection efforts and Building Code Effectiveness Evaluation) to property-casualty insurers and other clients. See, www.iso.com.

[2] Beth D. Bradley, *Update on Coverage B: Personal and Advertising Injury*, The University of Texas School of Law, 7th Annual Insurance Law Institute (September 2002) (hereinafter "Bradley"); see also, Richard J. Bale, Patrick J. Boley, *Advertising Injury Coverage*, Larson King, LLP, found online at www.larsonking.com) (hereinafter "Bale").

[3] See, Bradley, supra at 1-2; see also, Bale, supra, at 2.

violation of right of privacy, piracy, unfair competition or infringement of copyright, title or slogan.

The 1973 Endorsement failed to define what would be considered "advertising activities." The Endorsement also contained several exclusions which provided, in part, that the insurance did not apply:[4]

> (6) to advertising injury arising out of:
>
> (a) failure of performance of contract, but this exclusion does not apply to the unauthorized appropriation of ideas based upon alleged breach of implied contract, or
>
> (b) infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods, products or services sold, offered for sale or advertised...
>
> (7) with respect to advertising injury
>
> (a) to any insured in the business of advertising, broadcasting, publishing or telecasting, or
>
> (b) to any injury arising out of any act committed by the insured with actual malice."

The broad scope of offenses and lack of definition of advertising activities led courts in the 1980s to find that the 1973 Endorsement to offer very broad coverage.

B. The 1986 Form: Inception of Coverage B[5]

In order to simplify CGL policies and expand the scope of coverage, in 1986, ISO introduced a new CGL form that for the first time incorporated "Advertising Injury" into the body of the form under what we now know as Coverage B. Thus, insureds no longer needed to purchase separate broad-form endorsements. The 1986 change deleted "piracy" as an enumerated offense and removed the exclusion for trademark infringement; revising the form to replace "unfair competition" with the very broad phrase "misappropriation of advertising ideas and style of doing business."

The 1986 form also failed to define "advertising activities," but substantially revised the listed offenses for which advertising injury coverage would apply. In this regard, advertising injury covered injury arising out of one or more of the following offenses:[6]

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[4] See, Bradley, supra, at 2.

[5] CG 00 01 11 85; see also, Bradley, supra, at 2.

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.

C. The 1998 ISO Form:[7] Fine Tuning Coverage B

"Advertising Injury" coverage underwent some major changes in the 1998 ISO Form. Most significantly, the 1998 form combined advertising injury coverage provisions with the personal injury coverage provisions into a "Personal and Advertising Injury" coverage, which merged the definition of personal and advertising injury. The 1998 form also made significant changes to the enumerated offenses for advertising injury coverage, eliminating the term "misappropriation" and replacing the term "title" with "trade dress." In an effort to further refine and limit coverage, the offense of "misappropriation of advertising ideas or style of doing business" was changed to "use of another's advertising idea in your advertisement." Also, the offense of "infringement of copyright, title or slogan" was changed to "Infringing upon another's copyright, trade dress or slogan in your advertisement."

But the most significant revision in the 1998 form was the inclusion, for the first time, of a definition for "advertisement" 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."[8]

D. The 2001 ISO Form[9]

In the 2001 CGL form, ISO explicitly recognized the growing prevalence of the internet as an advertising tool by adding language to the CGL form stating that "material placed on the Internet or on similar electronic means of communication" can be advertising. The 2001 ISO form reflects a clear intent to limit claim exposure to narrowly defined exposure for true advertising expenses.

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[6] See, CG 00 01 11 85; see also, Bale, supra, at 3.

[7] CG 00 01 07 98.

[8] See, CG 00 01 07 98; see also, Bale, supra, at 3; Bradley, supra, at 4.

[9] CG 00 01 10 01.

Although the insuring language for “Personal and Advertising Injury” remained unchanged from the prior version, the definition of “advertisement” was amended to state:

> “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. For the 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.

The exclusions were amended to addresses copyrights, patents, trademarks and trade secrets. Likewise several new exclusions were added to address Internet usage. These exclusions provide that the insurance does not apply to:

> **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. However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.
>
> **j. Insured In Media And Internet Type Businesses**
>
> “Personal and advertising injury” committed by an insured whose business is:
>
> (1) Advertising, broadcasting, publishing or telecasting;
>
> (2) Designing or determining content of web-sties for others; or
>
> (3) An Internet search, access, content or service provider.
>
> However, this exclusion does not apply to Paragraphs 14.a., b. and c. of “personal and advertising injury” under the Definitions Section.
>
> For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet,

is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

IV. The Question of Coverage

With this framework in mind, the question becomes how does an insured confronted with a commercial or consumer advertising claim obtain defense and indemnification coverage? And, relatedly, what obligations does the insurer have once presented with such a claim?

Typically, once the insured tenders the required notice of claim, the insurer will either accept the claim entirely, deny the claim or if insufficient information is known to make a definitive determination, proceed with a defense of the insured under a reservation of rights. The most frequent grounds for the denial of an advertising injury claim are: (1) the claim does not fall within an enumerated offense set forth in the policy's definition of "advertising injury;" (2) the insured did not engage in advertising activities within the scope of the policy; or (3) the injury allegedly sustained did not arise out of the insured's "advertising activities."

While there has not been a consensus among courts regarding the elements of the insured's required showing for coverage, the most commonly applied and generally accepted test requires the insured to demonstrate three elements:

1. The insured was engaged in "advertising" during the policy period when the alleged advertising injury took place;

2. The Claimant's allegations create a potential for liability for a covered advertising injury offense; and

3. There is a causal connection between the alleged injury and the "advertising. [10]

[10] See, *Hameid v. National Fire Insurance Co. of Hartford*, 31 Cal. 4th 16 (2003); also *State Farm Fire & Casualty v. Steinburg*, 393 F.3d. 1226 (11th Cir. 2004); *Polaris Indus. v. Continental Ins. Co.*, 539 N.W.2d 619, 621-23 (Minn. App. 1995) (an insured must demonstrate that the suit filed alleges a cognizable advertising injury as defined

A. The "Advertising" Requirement – When is an Insured "Engaged In Advertising"?

The question of what constitutes advertising by an insured has been one of the most often litigated issues in the area of advertising injury coverage, particularly in suits involving the 1973 Broad Form Endorsement and 1986 ISO policy form, where the term "advertising" was undefined. Courts had little guidance and thus gave substantial latitude in crafting and applying a wide array of definitions of the term advertising.[11]

Courts have generally been split on the precise definition and required scope of activity sufficient to constitute advertising. Most courts have adopted a narrow definition, holding that "advertising activity" requires the widespread dissemination of promotional information or material to the public.[12] These courts have relied upon the rationale that application of a broader definition would render the term meaningless by affording advertising injury coverage to smaller scale "solicitation" and/or "marketing" activity for which no coverage was purchased by the insured. Application of this standard usually precludes coverage for small-scale distribution or one-on-one solicitation, often on the basis that this conduct is not sufficiently public in nature.[13]

A smaller number of courts have interpreted the term "advertising" more broadly to encompass a wide variety of activities that reach a client or customer base, including one-on-one or targeted group solicitations.[14] And a minority of courts, when confronted with litigation

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by the policy, the allegedly infringing party was advertising or engaged in an "advertising activity", there is a causal connection between the advertising activity and the alleged injury and coverage is not negated by an exclusion in the policy.)

[11] *Adolpho House Distributing Corp v. Travelers Property and Casualty Ins. Co*., 2001 U.S. Dist. LEXIS 14489 (S.D. Fla. 2001) (recognizing that Florida Supreme Court had not yet construed the insurance terms "advertising injury" and that trademark and trade dress infringement meet the definition of advertising injury in the CGL policy).
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[12] *Erie Insurance Group v. Sear Corp*., 102 F.3d. 889 (7th. Cir. 1996); *Solers Inc. v. Hartford Cas. Ins. Co*., 146 F. Supp. 2d. 785 (E.D.V.A. 2001); *International Insurance Company v. Florists Mutual Insurance Company*, 559 N.E.2d. 7 (Ill. App. 1990); *Playboy Enterprises v. St. Paul Fire & Marine Insurance Company*, 769 F.2d. 425 (7th Cir. 1985); *Zurich Ins. Co. v. Amcor Sunclipse North America*, 241 F.3d 605 (7th Cir. 2001); *Liberty Mutual Ins. Co. v. Metropolitan Life Ins. Co.*, 260 F.3d 54 (1st Cir. 2001).; *International Insurance Co. v. Florists Mutual Ins. Co*., 201 Ill. App. 3d 428 (1990).

[13] See, *Monumental Life Ins. Co. v. United States Fidelity & Guaranty Co.*, 617 A.2d 1163 (Md. App. 1993); *M.G.M. Inc. v. Liberty Mut. Ins. Co.*, 17 Kan. App. 2d 492 (1992) (advertising requires public or widely disseminated solicitation or promotion); *A.N.R. Production Co. v. American Guar. Liability Ins. Co.,* 981 S.W.2d 889, (Tex. App. Houston 1st Dist. 1998) (rejecting the policyholder's argument that advertising included oral representations made to a potential customer during contract negotiations); *USX Corp. v. Adriatic Ins. Co.,* 99 F.Supp. 2d, 593 (W.D. Pa. 2000).

[14] See, *Tri-State Ins. Co. v. B&L Products, Inc.*, 964 S.W.2d 402 (Ark. Ct. App. 1998) (Direct solicitation to one customer was held to be an advertisement.); *Sentex Systems, Inc. v Hartford Acc. Indemnity Co.*, 882 F.Supp. 930 (C.D. Cal. 1995) (Misappropriation of customer lists and marketing techniques might be a form of advertising); *Ross v. Briggs & Morgan,* 520 N.W.2d 432 (Minn. App. 1994) *rev. den.* 540 N.W.2d 843 (Minn. 1995) (Any oral, written or graphic statement made by the seller in a manner intended to solicit business could constitute advertising); *John*

involving pre 1998 CGL policies, found the undefined term "advertising activity" too ambiguous and thus found a very broad array of claims to fall within the purview of the policy, i.e., in favor of coverage.[15]

1. The Eroding Usefulness of These Tests In the Age of Internet Advertising

As organizations and business increasingly shift the focus of their advertising strategy away from traditional forms of print and broadcast media toward internet based advertising, the "widespread dissemination" and the broader solicitation standards have become nearly useless. The very nature of internet postings and advertisement leads to instantaneous widespread dissemination throughout the world, whether intended or not. As a result, courts faced with internet-based advertising claims will be able to forego the first part of the analysis, and focus instead on resolving whether any potentially covered offense taking place on the internet automatically satisfies the requirement that the enumerated offense take place "in the named insured's advertisement." In other words, courts will need to answer the question of whether it is possible to have internet based content that is not deemed an advertisement.

To date, several courts have resolved this issue by concluding that the posting of a web site implicitly constitutes advertising.[16] In *Amazon.com International, Inc. v. American Dynasty Surplus Lines Insurance Co.,*[17] the court held that Amazon.com's alleged infringement of patented music preview technology on its web site was committed "in the course of advertising." The case involved a software manufacturer who sued Amazon alleging that the company infringed upon its patents by misappropriating its software for use on Amazon's website to

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Deere Ins. Co. v. Shamrock Indus., Inc., 696 F.Supp 434 (D.Minn 1988) (an insured's acts of sending three letters to a single potential customer and conducting product demonstrations for the customer's sales staff found to be "advertising" for purposes of coverage in patent infringement, misappropriation of trade secrets and unfair competition based on the design of the product. The court, applying the dictionary definition of advertisement, found that advertising activity was subject to varying reasonable interpretations and that the policy language was deemed ambiguous and thus construed in favored of coverage.)

[15] See, e.g., *Farmington Casualty Co. v. Cyberlogic Technologies, Inc.*, 996 F. Supp. 695, 701 (E.D. Mich. 1998), the court held that a catalog sent to potential purchasers constituted advertising activities. In *United States Fid. & Guar. Co. v. Star Techs,* 935 F. Supp. 1110, 1115 (D. Or. 1996), the court held that advertising activity included sales meetings where a company's product was shown to potential customers.

[16] See also, *Central Mutual Insurance Co. v. StunFence, Inc.*, 292 F.Supp.2d 1072 (N.D.111. 2003) (the insured's alleged use of a competitor's trademark on its web site provided a sufficient link between the insured's advertising and the complainant's injury for purposes of implicating "use of another's advertising idea" offense in "personal and advertising" coverage); *Westfield Cos. v. O.K.L. Can Line,* 155 Ohio App.3d 747, (2003) (although the plaintiff did not use words "advertisement" or "advertising" in allegations against the insured, the insurer had a duty to defend the insured against trade-dress-infringement claims under "advertising injury" coverage because web pages from insured's web site depicting for sale a allegedly infringing product).

[17] 85 P.3d 974 (2004).

market goods for sale to the public.[18] Amazon tendered its defense to two insurers: Atlantic Mutual Insurance Company, its commercial general liability carrier; and American Dynasty Surplus Lines Insurance Company, an excess carrier. The Atlantic Mutual policy did not expressly cover patent infringement, but did cover advertising injury. The American Dynasty policy covered patent infringement, but only as excess coverage.[19] Both insurers refused to defend. Amazon initiated a declaratory judgment action against American Dynasty and the parties settled. American Dynasty reimbursed Amazon for its costs in the underlying litigation, and Amazon assigned its rights against Atlantic Mutual to American Dynasty.[20]

There, the court considered both the widespread dissemination analysis as well as the broader solicitation standard. In the context of the subject alleged advertisement, the court expressly stated that "Amazon's website exists for the purpose of promoting products for sale to the public. This is advertising." [21]

Other courts have drawn a distinction between informational and advertising web postings. In *Teletronics International Inc., v. CNA Insurance Company*, 302 F.Supp.2d. 442 (D.Md. 2004) the District Court concluded that the insured was not entitled to a defense and indemnification from its insurer under the advertising provision of the policy based on its purported act of posting a competitor's copyrighted manual on its own website on the basis that the posting of such material, in and of itself, did not constitute advertising.

The Fourth Circuit reversed the decision. While recognizing that the posting of material on a website must have the purpose of generating or soliciting business to be considered an advertisement, the court of appeals found that the posting of the manual was designed to promote the insured's sales, thus constituting an advertisement sufficient to trigger the insurer's duty to defend.[22]

B. Does the Claim Fall within one of the Enumerated Offenses?

Simply establishing that the insured was engaged in advertising activity when the alleged injury arose is insufficient to trigger coverage under the "Advertising Injury" provisions Coverage B of the CGL. The insured seeking coverage must also establish that the claims asserted by the underlying plaintiff fall within one of the enumerated offenses identified in the

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[18] *Amazon.com Intern.*, 85 P.3d at 975.

[19] *Id*. at 975.

[20] *Id*. at 975.

[21] Id. at 977.

[22] See, *Teletronics International Inc., v. CAN Ins. Co./Transportation Ins. Co*, 120 Fed. Appx. 440, 445-446 (4th Cir. 2005).

policy.[23] This is the most critical difference with Coverage A of the CGL -- Bodily Injury or Property Damage Liability claims. For Coverage A to apply, bodily injury and property damage must be caused by an "occurrence," which generally means an accident.

As noted above, "Advertising Injury" claims do not depend upon an "accident" or "occurrence," but instead are based on injury arising out of the insured's conduct. In fact, the concept of "occurrence'" is irrelevant to "Advertising Injury" claims as the term does not appear in the Coverage B insuring agreement or in the application of Coverage B limits. It is the Coverage B exclusions, not the insuring agreement, that address the scope of coverage for intentional acts. This is because a person or organization alleged to have committed a personal or advertising injury offense usually intended their actions (but not necessarily the result of their actions). This concept is central to understanding personal and advertising injury claims—and a critical factor that distinguishes it from Coverage A.

As noted above, it is increasingly likely that internet postings will satisfy the "advertisement" requirement. But unless an insured's liability arises out of one of the offenses enumerated in a policy's definition of "advertising injury" or "personal and advertising injury," the insurer will have no duty to defend or indemnify.[24]

C. The Significance of Policy Exclusions

As set forth above, the evolution of the Advertising Injury provision contained in Part B of the standard CGL has reflected a clear trend toward narrowing the general grant of coverage and broadening the applicable exclusions as the legal landscape has changed in the internet era. Courts have consistently upheld the validity of exclusions contained within the insuring agreement for some of the more common exclusions such as the prior publication exclusion,[25]

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[23] *Fallon McElligot, Inc. v. Seaboard Surety Co.*, 607 N.W.2d 801 (Minn. App. 2000) (to fall within the scope of coverage the connection between the underlying claim and the enumerated offense must be more than simply an esoteric one); *Ross v. Briggs & Morgan*, 540 N.W.2d. 843 (Minn. 1995) (underlying claim must be described by one of the enumerated offenses in the policy).

[24] See, e.g., *Rombe Corp. v. Allied Insurance Co.*, 128 Cal.App.4th 482,27 Cal.Rptr.3d 99 (2005), (Applying California law, the court acknowledged that a press report disseminated on the Internet might be an advertisement, as contemplated by the policy's "advertising injury" coverage. However, under the specific facts presented that the insurer had no obligation to the insured with respect to the claim because the insured's liability in the underlying action arose out of an offense for which the policy provided no "advertising injury" coverage.)

[25] See, *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761 (3d Cir. 2015)(prior publication exclusion precludes coverage when pre-policy inception advertisements shared common theme with different advertisements first published after the policy period); *Kim Seng Co. v. Great American Insurance Company of New York*, 179 Cal. App. 4th 1030 (2 Dist. 2009); *Ringler Associates, Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165 (2000) (The first publication exclusion bars coverage if the first publication of the offending materials occurs before policy inception, even if the material is republished during the subject policy period); *Envirotech Industries Inc. v. United Capitol Ins. Co.*, 141 F.3d. 1175 (9th Cir. 1998) (an insurer owed no duty to defend where advertising injury was committed by publication before the policy incepted).

the knowledge of falsity exclusion,[26] the exclusion for advertising injury claims arising out of breach of contract[27] and claims arising out of violations of intellectual property rights.[28]

The legal landscape remains in flux as to how courts will interpret the more recent internet activity related exclusions in the 2001 CGL form. As the complexity and novelty of internet-based torts continues to evolve, courts will probably continue to employ the same coverage analysis for determining whether advertising injury exclusions are triggered. Generally, when analyzing exclusions, courts place the burden on the insurer to establish that a claim falls within its scope and that the exclusion is unambiguous. Thus, these new exclusions will likely give rise to litigation over the intended scope and ambiguity of their language.

IV. The Expansion of an Insurer's Duty To Defend - Hyundai v. National Union

Given the substantial legal costs and uncertainties involved in defending advertising injury claims, insureds and insurers need to carefully assess their respective positions on the duty to defend. Some of the questions presented by these claims are: (1) should the suit be tendered to the insurer; (2) should the insurer accept coverage and agree to defend, deny coverage and refuse to defend, or defend under a "reservation of rights;" (3) should the policyholder accept a limited defense or expend its own funds defending the suit and seek reimbursement later; and (4) should the insurer file a declaratory judgment action to determine its defense and indemnity obligations. These are complex and difficult issues for both policyholders and carriers.

The Ninth Circuit Court of Appeals addressed an insurer's duty to defend under the advertising injury provision of a CGL policy where the alleged patent infringement constituted "advertising injury" under the definitions of the policy. In *Hyundai Motor America v. National Union Fire Ins. Co. of Pittsburgh, PA*,[29] Hyundai filed suit against its insurer after it was denied a defense in a patent infringement claim involving allegations by Orion IP, LLC, a patent holding company, that Hyundai's website had features that violated Orion patents. Specifically, the patents pertained to a "build-your-own vehicle" feature on the website and a parts catalogue feature that allowed users to navigate a series of menus to essentially "build-their-own" vehicle.[30]

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[26] See, *American Guarantee and Liability Ins. Co. v. Shel-Ray Underwriters, Inc.*, 844 F. Supp. 325, 331 (S.D. Texas 1993) (knowledge of falsity was unambiguous and must be applied to exclude coverage for injury committed by or at the direction of the insured with knowledge of falsity).

[27] *Southstar Corp. v. St. Paul Surplus Lines Ins. Co.*, 42 S.W.3d. 187 (Tex. App. 2001); *Fallon v. McElligot, Inc. v. Seaboard Surety Co.*, 607 N.W.2d. 801 (Minn. App. 2000).

[28] *Industrial Indem. Co. v. Apple Computer Inc*., 79 Cal. App. 4th 817 (1999).

[29] 600 F.3d 1092 (9th Cir. 2010).

[30] *Hyundai* at 1095-1096.

Hyundai claimed that its insurer owed a duty to defend, arguing that the complaint alleged injuries based on the "misappropriation of advertising ideas," and as such, the injuries constituted "advertising injuries."[31] The insurer denied coverage requiring Hyundai to cover the cost of its own defense. Hyundai was ultimately found liable for patent infringement (with a jury awarding Orion $34 million in damages).[32]

Hyundai then filed suit against its insurer to recover defense costs. The District Court found in favor of the insurer, holding that the allegations in the complaint did not constitute "advertising injury" under the policy. On appeal, the Ninth Circuit reversed, finding that Hyundai was entitled to a defense under the "advertising injury" provision of the insurance policy. The Ninth Circuit, applying the widespread dissemination test, found that the build-your-own ("BYO") feature constituted advertising, stating that it "*is* widely distributed to the public at large, to millions of unknown web-browsing potential customers, even if the precise information conveyed to each user varies with user input. All the users are still using the same BYO feature."[33]

The court further concluded Orion's patent infringement claim constituted a "misappropriation of advertising ideas." In reaching this conclusion, the court applied a "contextual reasonableness" analysis, asking whether the patents at issue "involve any process or invention which could reasonably be considered an 'advertising idea'."[34]

While earlier case law had rejected claims that a patent infringement constituted an advertising injury, both the Ninth Circuit and California courts use a contextual analysis for such claims, and have held infringement of a patented advertising method could constitute misappropriation of advertising ideas. Here, because the patent infringement was the use of an advertising technique that was itself patented (not the product being sold by the technique), it constituted a misappropriation of advertising ideas.

Finally, the court found a causal connection between the advertisement and the advertising injury.[35] The court explained that when the infringement concerns the underlying

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[31] *Id*. at 1096.

[32] On May 17, 2010, the U.S. Court of Appeals for the Federal Circuit vacated the verdict, dismissing the case, finding that Orion's patent was not valid insofar as certain of the claims were anticipated. The court found that the jury could not reasonably find that the claims were not anticipated in light of clear and convincing evidence that a prior system taught by an Electronic Parts Catalog, generated proposals for customers including price and graphical information. The court noted that this would have reasonably led to the development of Orion's patented "Computer-Assisted Parts Sales Method."

[33] *Id*. at 1100.

[34] *Id*. at 1100.

[35] *Id*. at 1102.

product but not the advertisement itself, there is no causal connection. When the patent infringement occurs in the course of the advertising, however, a causal connection is established.[36] Here, it was the use of the BYO feature that violated the patent (not anything related to the car that Hyundai is trying to sell) and caused the injuries alleged by Orion. Thus, a direct causal connection had been established.

Insureds assert that the Hyundai decision represents a powerful victory and acknowledges an interpretation of "advertising injury" coverage that is in accord with the reasonable expectations of policyholders engaged in web-based activities. This decision further highlights the evolution of advertising in an internet based economy and the courts' inclination toward coverage for such claims.

V. Conclusion

The only constant in the era of the internet is change. As new technologies develop and social networks become increasingly prevalent as a preferred method of communication, legal issues associated with such sites will continue to become more complex. To remain competitive in the e-commerce era, an internet presence is a critical component of the overall advertising plan of virtually all companies in the e-commerce era. While the advertising injury provision of the standard CGL may provide the primary source of recovery for claims arising from the insured's internet activities, it is clear that such coverage remains in a constant state of flux.

As the courts struggle to deal with the increased prevalence of internet-based claims, it is likely that courts will continue to adapt the established coverage test to fit the novel issues raised by the internet and social network sites. While the status of advertising injury is uncertain in the internet age, it is important for insureds, insurers and their counsel to understand the need to adapt to this cyber-environment and develop policies that are specifically tailored to address the unique issues presented in cyber world.

[36] Id. at 1102.