Life on the B Side: Hot Topics in CGL Coverage B

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The standard commercial general liability (“CGL”) policy provides defense and indemnity coverage to the insured for a multitude of risks inherent in typical business operations. While most lawyers are aware of the bodily injury and property damage protections provided in the “A” coverage, “B” coverage, which provides coverage for “personal and advertising injury,” is arguably less well-known.

The typical “Personal and Advertising” provision contained in Coverage B contains language similar to the following:

b. This insurance applies to “personal and advertising injury” caused by an offense arising out of your business but only if the offense was committed in the “coverage territory during the policy period.

Additionally, the standard CGL policy also contains a definition similar to the following:

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

   a. False arrest, detention or imprisonment;

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b. Malicious prosecution;

c. 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;

d. 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;

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

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”.

Notably, the steady proliferation of policyholders using the Internet in conducting their business has resulted in new, developing factual scenarios ripe with coverage questions and disputes. This article seeks to introduce several of these timely issues, particularly in timely “hot” areas. Accordingly, this article analyzes why claims arising from social media marketing activity, trademark infringement, and other various modes of publication may or may not be covered under Coverage B.

**Coverage B Issues and Social Media**

I. Introduction

Social media advertising, social media marketing, and social media targeting are all terms used somewhat interchangeably to describe forms of online advertising that focus on social networking services, such as Facebook, YouTube, Instagram, Twitter, Yelp, LinkedIn, or Snapchat. As of 2018,
there are 3.196 billion people using social media on the planet, up 13 percent from 2017 to 2018. As the number of users on these social media sites has increased, businesses have realized that they can utilize advertising on social media platforms to reach a wide audience.

A. Traditional Advertising in Digital Form

Social media advertising has become prevalent because of its ability to reach and engage a massive audience fairly quickly and easily. Banner ads, or the ads displayed along the tops and sides of webpages, are more akin to paper advertisements, and therefore carry fewer associated risks than some other forms of social media advertising. Generally, the ads displayed on social media sites are generated by creative teams and vetted by the website hosts. Therefore, the risk that the content of those ads contains disparaging information or casts subjects in a false light is relatively low.

B. The New Wild West: Social Media Influencers

Social media “influencers” are those with a significant following on social media who post content about products and services, generally at the request of a marketer. The value of these influencers cannot be underestimated. For instance, Twitter recently conducted a survey in which “nearly 40% of Twitter users say they made a purchase as a direct result of a Tweet from an influencer.”

It will come as a surprise to no one that these influencers are not posting simply because they like a brand or its products. Instead, the influencer typically receives anything from free products to


tens of thousands of dollars in exchange for posting about a particular brand or product. Captiv8, a social media marketing agency, estimates that someone with three million to seven million followers can charge the following for a post:

- YouTube- $187,500
- Instagram- $75,000
- Twitter- $30,000

The use of influencers as part of a marketing campaign is not without risks. Indeed, a number of settlements with major retailers flowed from the recent increase in enforcement actions involving advertising through social media influencers, and such consent orders carry the force of law with respect to future actions, and can result in civil penalties of up to $16,000 per violation.9

For example, one such settlement involved national clothing retailer Lord & Taylor. The settlement arose after Lord & Taylor paid fifty social media influencers between $1,000 and $4,000 to post pre-approved photo posts on Instagram and other social media sites of the influencers wearing a Lord & Taylor dress. The posts were effective: the dress quickly sold out, the posts reached 11.4 million Instagram users over a two day period, and led to 328,000 brand engagements with Lord & Taylor’s own Instagram handle.10 However, the campaign was not all good news for Lord & Taylor. The fact that the social media influencers were being paid by Lord & Taylor was not disclosed by the company or the influencers, leading the FTC to bring an enforcement action against

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8 Sapna Maheshwari, *Endorsed on Instagram by a Kardashian but Is It Love or Just an Ad?*, The New York Times (Aug. 30, 2016) https://www.nytimes.com/2016/08/30/business/media/instagram-ads-marketing-kardashian.html. Even influencers with less followers can still earns thousands of dollars. For instance, an influencer with as few as 50,000 followers may be able to charge $2,500 for a YouTube post. *Id.*

the company.\textsuperscript{11} Ultimately the matter settled by Consent Order.

II. Coverage Issues & Social Media Advertising

A. What’s Covered?

In understanding the potential interplay between social media advertising and Coverage B, it is important to keep in mind that Coverage B generally covers acts that somehow violate or infringe on the rights of persons or organizations, and those acts must result in loss to those persons or organizations. The acts are usually alleged to be intentional, even if the consequences of those actions were unintentional.

Four types of “covered offenses” are most likely to be implicated by social media advertising:


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| (1) Oral or written publication, in any manner, of material that . . . disparages a person’s or organization’s goods, products, or services; |
| (2) Oral or written publication, in any manner, of material that violates a person's right of privacy; |
| (3) The use of another’s advertising idea in your “advertisement”; or |
| (4) Infringing upon another’s copyright, trade dress or slogan in your “advertisement.” |

Offense (1) above includes allegations of slander, libel, or disparagement, which involves a comparison that detracts or discredits the goods, products, or services of another because of false statements.

Offense (2) above includes allegations of a misappropriation of a person’s likeness or name for the commercial benefit of another, use of publicity to place another in a false light (which carries a reasonable person standard – that a reasonable person would find it objectionable is sufficient, the depiction does not have to be defamatory), or the public disclosure of private facts if those facts are embarrassing or otherwise reasonably objectionable, even if the information is true and not

\textsuperscript{11} Mandell, \textit{supra}, at 560.
defamatory. Certain of these allegations, to be covered, must be contained within the named insured’s advertisement, i.e., in the named insured’s notice broadcast or published to the general public (or specific target markets within the general public) about the named insured's goods, products, or services.

Offenses (3) and (4) are fairly self-explanatory, and cover allegations that the named insured used another’s advertising idea, copyright, trade dress (a business style or image that is unique or distinctive), or slogan in its advertisement. Allegations that a fast food restaurant was using golden arches in its advertisements, for example, might constitute a covered offense under Coverage B.12

Importantly though, Coverage B carries with it a number of coverage-defeating exclusions largely revolving around whether the acts at issue were “knowing.” If the acts were “knowing violations of the rights of another” or if the information was published “with knowledge of falsity,” defenses to Coverage B claims might exist.

B. General Issues Involving Advertising Injury

In general, the “Covered Offenses” implicated by social media advertising are similar to those likely to be implicated by traditional advertising. Thus, the allegations that stem from ads on social media may look a lot like the allegations that stem from TV or print ads - allegations of slander, defamation, disparagement, misappropriation of a person’s likeness, or use of another’s advertising idea, copyright, or trade dress (a business style or image that is unique or distinctive), or slogan in its advertisement.

It is important to note, though, that claims involving false or misleading advertising are not

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covered by Coverage B. In fact, such claims are likely excluded by exclusions (g) (Quality Or Performance Of Goods – Failure To Conform To Statements) and (h) (Wrong Description Of Prices). False advertising claims involve alleged misrepresentations about one’s own products, whereas product disparagement involve allegations that a company’s ads disparage another’s products.  

Depending on the jurisdiction, coverage for claims involving social media advertising injury may hinge on these additional issues:

- Whether the underlying complaint must specifically allege the cause of action for which the policyholder seeks coverage. For example, must an underlying plaintiff specifically file claims for “product disparagement” in order for the policyholder to then seek coverage under Coverage B for an act that “disparages a person’s or organization’s goods, products or services[?]” Certain courts hold that the duty to defend attaches regardless of the “label” given to the underlying claims, while indemnification may not.  

- Whether the product or business that was allegedly harmed had to have been specifically mentioned in the underlying action, or whether claims for “disparagement by implication,” for example, are sufficient. At least some courts have held that defense obligations arise where there is disparagement by implication. Indeed, a California court

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14 See, e.g., E. piphany, 590 F. Supp. at 1252.

15 See id. at 1253 n.9. (“The fact that the Underlying Complaint does not specifically allege a disparagement cause of action is of no moment, because the scope of the duty to defend ‘does not depend on the labels given to the causes of action’ and can be found merely by ‘comparing the allegations of the complaint with the terms of the policy.’”) (citations omitted).

16 See id. at 1252-53.
held an insurer had a duty to defend where (1) a software company’s advertisement stated it was “the only component-based, fully-J2EE complete CRM suite available” because the ad “necessarily suggests that competitor products did not have such capabilities;” and (2) a software company’s advertisement stated it had “a couple of year lead on competitors” because it “also necessarily suggests that competitors were well behind” the policyholder “in terms of technology development.”

Nonetheless, as long as the allegations of product disparagement cannot be shown to be intentional, they may be covered under Coverage B. False advertising claims, on the other hand, are more likely to be covered under other types of insurance policies, such as Directors & Officers (“D&O”) insurance policies.

C. Specific Issues for Social Media Advertisers: “Conquest is easy. Control is Not.”
   – Captain Kirk

Social media advertising can be a Catch-22: on the one hand, the large amount of user data available to social media sites allows ads to be targeted and tailored to reach only the most interested and highly engaged consumers, which is a huge win for advertisers of all sizes. In addition, mom and pop shops are able to buy banner space on sites like Facebook for relatively low buy-in and are therefore able to reach audiences en masse quickly and with relatively low expense. Even simpler, a business owner could open a social media account for the business itself and any resulting posts could be considered advertisements. This is in significant contrast to traditional paper advertisements, which are usually more expensive and have a more limited reach.

However, those smaller companies may be entering the advertising space with a more elementary understanding of the implications of publishing their content, and the resulting implications on their insurance.

For example, in late 2017, Canadian-born actor and director William Shatner (famous for his

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17 See id.
portrayal of James T. Kirk, captain of the USS Enterprise, in the Star Trek franchise), hit the headlines voicing displeasure that his name and likeness were used without his permission to promote a condo development in Hamilton, Ontario. The development in question offered units named after several television stars - including Shatner, former Tonight Show host, Jay Leno, and comedian Betty White - and used promotional material featuring caricatures of those stars to promote the units. Although this particular matter was resolved without court proceedings, it demonstrates how smaller advertisers, such as a one-off condo development, could find themselves spreading content en masse through social media advertising with the click of a button.

Had those ads been spread across social media sites such as Facebook or LinkedIn, the development could have faced costly misappropriation or false light claims from the celebrities depicted. Would the condo development be covered under Coverage B? That would depend on whether the misappropriation was a “knowing violation of the rights of another.” If so, it falls within an exclusion to Coverage B, and coverage might not be available. Nonetheless, at a minimum, there is good reason to believe that defense of the celebrity claims would be covered under Coverage B.

D. Social Media Influencers: Ignorance, Apathy, & Greed? Oh My!

Equally, if not more, concerning are issues relating to the content of the “ads” promoted through social media influencers. As discussed above, social media influencers are certainly not professional advertisers – recent studies show they are not only not aware of the rules and

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regulations concerning their paid posts, but may actually be consciously ignorant of those rules and regulations.\textsuperscript{19}

According to new research discussed in an April 2018 article by Forbes, a study of “800 Instagram influencers found that 71.5\% attempted to disclose their relationships, but only 1 in 4 actually did it in a way that complies with FTC regulations. It seems like nearly half of influencers simply don’t understand the rules.”\textsuperscript{20} Forbes cites apathy and greed as other potential reasons for the failure to abide by FTC requirements. Regardless of influencers’ motivations, the FTC has made one thing clear: brands are responsible for the influencers they engage on their behalf.\textsuperscript{21}

For example, the FTC’s FAQ page includes the following question and answer:

Q: Our company uses a network of bloggers and other social media influencers to promote our products. We understand we’re responsible for monitoring our network. What kind of monitoring program do we need? Will we be liable if someone in our network says something false about our product or fails to make a disclosure?

A: Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, a network devoted to the sale of health products may require more supervision than a network promoting, say, a new fashion line.

The FTC also states that even if companies outsource their social media advertising to a public relations firm, “[y]our company is ultimately responsible for what others do on your behalf . . . Delegating part of your promotional program to an outside entity doesn’t relieve you of


\textsuperscript{20} See id.

responsibility under the FTC Act.”

This liability may extend beyond enforcement actions to private causes of action, such as consumer class actions alleging all types of corporate wrongdoing, including allegations relating to product disparagement, misappropriation of a person’s likeness, copyright, or trade dress, for example. Thus, companies paying the social media influencers must be dogged in (1) educating their influencers and (2) monitoring their influencers’ content in order to minimize liability. This is especially true given the above-referenced statistics showing social media influencers are often ignorant of advertising norms. While the posts described in the Lord & Taylor case were carefully vetted by the company prior to the influencers’ publication, that will not always be the case. An influencer left to his or her own devices is an influencer that could cause great headaches for an insured.

And, although FTC enforcement actions regarding social media influencers are not likely covered by Coverage B, recent case law suggests that CGL insurers will at least provide defense coverage for other kinds of allegations stemming from social media. In a recent coverage case, Capitol Specialty Insurance Corporation provided a defense for its insured, a New Jersey strip club, which was alleged to have illegally used the images of 12 models and actresses in online advertising campaigns posted throughout its social media accounts, including Facebook, Twitter, and Instagram.22 Whether indemnity is covered, though, will depend largely on the mens rea of both the individuals posting the content and the advertisers footing the bills.

COVERAGE B ISSUES AND TRADEMARK INFRINGEMENT

I. Introduction

Coverage B disputes involving trademark infringement claims remain an interesting, ever-evolving area of coverage law. These disputes often require courts to determine whether the claims alleged against the insured fall within the scope of the policy’s covered offenses deemed “advertising injuries.” Often times, however, disputes more narrowly concern whether trademarks constitute “advertising ideas.” In summary, infringement of another’s trademark is more likely to be covered if policy language specifying coverage for “misappropriation” rather than “use” of another’s advertising idea is implemented. Otherwise, courts employing terminology covering the “use of another’s advertising idea” are more inclined to deny coverage and interpret trademarks as mere labels that serve primarily to identify and distinguish products.23

II. Policy Language: Trademark Infringement as an Advertising Injury

While trademark infringement claims are most commonly excluded from CGL policy forms, coverage is at times available for tangential or related claims if they arise from an “advertising injury.” Standard CGL policies typically define “personal and advertising injury” as injury “arising out of” a list of specified “offenses,” which in relevant part includes “the use of another’s advertisement idea or style of doing business in your ‘advertisement.’” This more recent policy language diverges from the older language covering the “misappropriation of advertising ideas and styles of doing business.”24 Thus, courts must often assess whether the claims include factual


allegations that assert liability based on “misappropriation of advertising ideas or styles of doing business,” or “use of another’s advertising idea in your ‘advertisement.’” There is no hard-and-fast analysis, however, as these disputes are typically decided on a case-by-case analysis.

III. “Misappropriation” v. “Use” of Another’s “Advertising Idea”

Traditionally, courts have no qualms in broadly finding trademarks as “advertising ideas” under CGL policy forms. This is especially true in policy language that indicates coverage for “misappropriation” rather than “use” of another’s advertising idea. Though seemingly a minor difference, it may make the difference in whether a claim is covered. This is due in part to the reasoning that “misappropriation” may be interpreted to encompass the wrongful use of a trademark.25

For example, in *Aero Corp. v. American International Specialty Lines Insurance Co.* SafeWaze—which had been purchased by Aero Corp., the insured—was accused of stealing propriety knowledge to reproduce infringing versions of Climb Tech’s proprietary product.26 Climb Tech further complained that Aero was illegally using its trademark “to identify products unaffiliated with Plaintiff’s fall support devices.”27 Aero brought a declaratory action after AISLIC denied coverage, asserting the claims in the Climb Tech lawsuit were not claims of “advertising injury.”28 In finding coverage, the court rationalized that the policy language “misappropriation of advertising ideas or style of doing business” includes trademark infringement. Noting that trademarks are frequently used in advertising and often become advertisements in themselves, the court held that the

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27 *Id.* at 742.

28 *Id.* at 743.
natural interpretation of “advertising ideas or style of doing business” includes a company’s trademarks.\textsuperscript{29}

Policies opting to substitute “misappropriation” for “use” of another’s advertising idea are less inclined to broadly claim trademarks are covered advertising injuries.\textsuperscript{30} The court in \textit{Infinity Micro Computer, Inc. v. Continental Casualty Co.} explored this distinction, noting the differing legal implications in constructing the phrases “misappropriation of an advertising idea” and “use” of an advertising idea:

Plaintiff argues that the court in \textit{Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group}, 50 Cal. App. 4th 580 (1996) supports its broad reading of “advertising injury.” Indeed, the \textit{Lebas} court did hold that an allegation of trademark violation triggered coverage under an “advertising injury” insurance policy. Regardless whether this court would have so held, the terms at issue in \textit{Lebas} differ from those here. First, while the contract here referred to “use” of an advertising idea, the \textit{Lebas} court construed the term “misappropriation of an advertising idea,” alongside and along with the term “misappropriation of a style of doing business.” The inclusion of the word “misappropriation,” not present here, was central to the \textit{Lebas} court’s analysis.\textsuperscript{31}

Thus, in order to find coverage, the court must more narrowly construe trademarks as advertising or marketing devices falling within the scope of another’s “advertising idea.” For example, in \textit{E.S.Y. v. Scottsdale Insurance Co.}, the insured E.S.Y was accused of using Exist, Inc.’s trademarked shield designs on its competing garments’ labels and hang tags.\textsuperscript{32} In E.S.Y.’s declaratory action seeking coverage, the court found Exist’s claims fell within the scope of “personal

\textsuperscript{29} \textit{Id.} at 745-46.


\textsuperscript{32} \textit{E.S.Y. v. Scottsdale Ins. Co.}, 139 F. Supp. 3d 1341, 1347 (S.D. Fl. 2015).
and advertising injury” as “[t]he use of another’s advertising idea in your ‘advertisement.’”33 Noting that an advertising idea is a concept about the manner a product is promoted to the public, the court accepted E.S.Y’s argument that Exist’s use of hang tags bearing its trademark is an “advertising idea.”34 The hang tags not only provided information to customers, but were specially designed to have additional function of attracting consumers to the garments themselves and the insured’s brand more generally.35

IV. Trademarks as Identifiers Rather Than “Advertising Ideas”

With policy revisions to exclude the term “misappropriation” combined with more restrictive exclusions for trademark infringement and intellectual property claims more generally, many courts have progressively adopted the narrower and more conventional approach of defining an “advertising idea” as “any idea or concept related to the promotion of a product to the public.”36 In this regard, trademarks are not per se advertising ideas, but rather a separate and distinct method of identifying and labeling a different products and brands.

This was demonstrated in Allstate Insurance Co. v. Airport Mini Mall, LLC, where the District Court was tasked with determining for the first time whether a claim for “contributory trademark infringement” constituted an “advertising injury” covered under the Allstate policies.37 The insured operated a discount mall with tenants selling counterfeit Ray-Ban and Oakley

33 Id. at 1355.
34 Id. at 1355-56.
35 Id.
merchandise, which Luxottica claimed infringed upon their trademarks.\textsuperscript{38} Luxottica sued the mini mall, claiming it was “contributorily liable for the infringing activities” of its tenants by facilitating and acting with reckless disregard for their illegal counterfeiting activities.\textsuperscript{39} The court ultimately found that Luxottica’s contributory trademark infringement claim was not a “advertising injury” covered under the Allstate policies because it did not consider a trademark to within the scope of an “advertising idea.” The court reasoned that it would be unreasonable to construe the policies’ reference to “advertising ideas” as encompassing the concept of a trademark in light of the exclusion for trademark infringement.\textsuperscript{40} To hold otherwise would render the trademark exclusion meaningless.

Some jurisdictions take this reasoning a step further, holding that trademarks are unambiguously not an advertising idea. For example, \textit{Laney Chiropractic and Sports Therapy, P.A. v. Nationwide Mutual Ins. Co.}, the 5th Circuit upheld the district court’s holding that the insured’s use of trademarked phrases was not use of another’s advertising idea, thus barring coverage under the policy.\textsuperscript{41} The underlying dispute arose following trademark infringement claims involving one doctor’s use and description of a trademarked “Active Release Techniques” and “ART” on his website outside of any licensing agreement.\textsuperscript{42} Laney, the insured, argued that the underlying complaint alleged Laney’s use of the ART Companies’ advertising ideas when he promoted the benefits of the “soft tissue techniques” with ART testimonial videos on his website.\textsuperscript{43} The court

\textsuperscript{38} \textit{Id.} at 1362.
\textsuperscript{39} \textit{Id.} at 1363.
\textsuperscript{40} \textit{Id.} at 1372.
\textsuperscript{41} \textit{Laney Chiropractic, supra} note 21, at 260.
\textsuperscript{42} \textit{Id.} at 257-58.
\textsuperscript{43} \textit{Id.} at 259.
again disagreed on appeal, finding that a trademark is not a marketing or advertising device under Texas law.\textsuperscript{44} Thus, trademarked phrases are not the use another’s advertising idea.

As these cases and many other recent opinions concerning trademark infringement claims reveal, courts are increasing finding that trademark infringement claims are not covered as an “advertising injury.”

**Coverage B Issues and the “Publication” Requirement**

I. Introduction

Recall that “personal and advertising injury” is defined in standard CGL policies as an enumerated list of specific offenses, which includes in relevant part “[o]ral and written publication, in any manner, of material that violates a person’s right to privacy.” The meaning of “publication” has recently risen to the forefront of many coverage disputes, particularly in claims of data breach. Typically, however disputes over whether there has been a “publication” typically concern (a) whether there must be a widespread disclosure to third parties of the personal information, and (b) whether there must be affirmative communicative action by the insured such that the policyholder fails to prevent disclosure of the information. The resolution to these issues, however, may depend largely upon the context in which they arise.

II. Is Third-Party Viewing Required?

Many coverage disputes concerning the CGL policy’s definition of “publication” are assessed with regard to the alleged publication’s relationship with the public. More narrowly, though, some courts adopt a liberal interpretation of “public” that does not necessarily mean the

\textsuperscript{44} Id.
public-at-large, but can include at least a third party. Depending on the factual context underlying the claims, however, courts may or may not require some form of widespread disclosure. In reviewing claims moving forward, parties should ask who saw the allegedly private information, in what context was the information seen, and whether this information was made available to the public at large.

Consider Recall Total Info. Mgmt., Inc. v. Federal Ins. Co., in which the court held that there was no coverage after tapes containing private employee information fell out of a truck and were retrieved by an unknown individual. On appeal, the court reasoned that because there was no evidence that anyone ever accessed the information on the tapes or of injury, there had not been a “publication” resulting in a violation of a person’s right to privacy. Thus, under Recall, the mere potential for publication is insufficient for coverage.

Likewise, third party viewing is seemingly not required for claims arising under the Fair and Accurate Credit Transactions Act (“FACTA”). In Whole Enchilada, Inc. v. Travelers Property Cas. Co. of America, the court was tasked with determining whether the printing of a receipt is a written “publication” violating a person’s right to privacy for coverage purposes. Whole Enchilada was sued under FACTA after it provided to a customer an electronically printed receipt that included the

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45 See OneBeacon Am. Ins. Co. v. Urban Outfitters, Inc., 21 F. Supp. 3d 426, 437 (E.D. Pa. 2014); Springdale Donuts, Inc. v. Aetna Cas. & Sur. Co. of Illinois, 724 A.2d 1117, 1122 (Conn. 1999) (“Common sense dictates that that a lay person would understand the term ‘publication’ to mean communication of words to a third person.”); Tricknor v. Rouse’s Enterprises, LLC, 2 F. Supp. 3d 882, 896 (E.D. La. 2014) (holding there is a personal and advertising injury when there is “publication to a third party” and the material is “generally known, announced publicly, disseminated to the public, or released for distribution.”).


47 Id. at 671-74.
expiration date of the customer’s credit or debit card.\textsuperscript{48} The court found that the complaint did not allege that Whole Enchilada was liable for “publication,” however, because the printed receipts were handed directly back to the cardholders and not disseminated to the public.\textsuperscript{49}

The third-party viewing analysis engaged by some courts is distinguishable when applied to information posted on the internet, however. For example, in \textit{Travelers Indemnity Co. of America v. Portal Healthcare Solutions, LLC}, the court held that making confidential medical records publically accessible via an internet search falls within the plain meaning of “publication” for coverage purposes.\textsuperscript{50} Portal, which had contracted with a hospital to safeguard confidential medical records of patients, was sued following allegations that Portal posted confidential medical records on the internet, making the records available to anyone who searched for a patient’s name and clicked the first result.\textsuperscript{51} The court rejected Traveler’s argument that Portal’s conduct did not effect a “publication” because no third party was alleged to have viewed the information, rationalizing that the definition of “publication” does not hinge on whether a third party accessed or viewed the information.\textsuperscript{52} Thus, at least with regard to the internet, all that matters is that the private information is “placed before the public.”\textsuperscript{53}

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\textsuperscript{49} \textit{Id.} at 697; see also \textit{Creative Hospitality Ventures, Inc. v. U.S. Liability Ins. Co.}, 444 Fed. Appx. 370 (11th Cir. 2011) (holding insured’s issuance of credit card receipt was not publication as required for coverage for personal and advertising injury).


\textsuperscript{51} \textit{Id.} at 767.

\textsuperscript{52} \textit{Id.} at 770-71.

\textsuperscript{53} \textit{Id.}
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III. Policyholder’s Failure to Prevent Disclosure

Many coverage disputes regarding the definition “publication” also concern instances in which the policyholder may not have affirmatively disclosed private information, but rather failed to prevent the information’s loss or dissemination. In other words, courts have been confronted with the question of whether publication by a third-party other than the policyholder is a “publication” for coverage purposes. Thus, the inquiry becomes whether the insured can successfully argue that their negligence in preventing this breach constitutes a “publication.”

Cases involving hacking and data breaches by a third-party demonstrate that in many jurisdictions, “publication” requires more than the failure to prevent theft or loss.54 For example, in Innovak International, Inc. v. Hanover Insurance Co., Innovak sought coverage under its CGL policy with Hanover for a class action suit resulting from the release of their personal private information after Innovak was subject of a data breach.55 Hanover maintained that there was no coverage under the policy because the underlying claimants did not allege publication—that is, public dissemination—of their private information, but instead alleged theft of their information by third-party hackers.56 Applying South Carolina law, the court held that this did not constitute “publication” by Innovak, rationalizing that Innovak did not directly or indirectly commit the act.57 In explicitly rejecting Hanover’s argument that the publication of the private information resulted

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54 See Zurich v. Am. Ins. Co. v. Sony Corp. of Am., No. 651982/2011, 2014 WL 838255 (N.Y. Sup. Ct. Feb. 21, 2014) (denying coverage for a claim after hackers broke into Sony networks and stole person information involving 100 million users); Butts v. Royal Vendors, Inc., 504 S.E.2d 911, 917 (W. Va. 1998) (holding that “since the policy was not written to cover publication by a third-party,” there was no coverage under the personal and advertising section of the policy).
56 Id. at 1344.
57 Id.
directly from Innovak’s negligent failure to prevent third parties from obtaining the information, the court held that the only plausible interpretation of Coverage B is that it requires the insured to the publisher of the private information. 58

Likewise, in St. Paul Fire & Marine Insurance Co. v. Rosen Millennium, Inc., the court declined to extend coverage for alleged negligence claims arising from a credit card breach. 59 In analyzing whether the “publication” requirement had been met, 60 the court found Innovak persuasive. Noting that the CGL policies required covered injuries to “result[] from [the insured’s] business activities, the court reasoned that the breach in question did not result from Millenium’s business activities but rather the actions of third parties. 61 Thus, while case law on this particular issue is scarce, it is clear courts are resistant in defining “publication” to include affirmative actions by parties other than the insured.

CONCLUSION

From this brief discussion and sampling of case law, it is clear that Coverage B’s “personal and advertising injury” provisions give rise to several unique claims and coverage disputes. As it stands, the insurance industry continues the ongoing effort to draft to account for known risks—particularly those posed by the pervasive use of the internet in business operations. Attorneys would be wise to keep an eye on this ever-developing area of coverage law.

58 Id. at 1348.


60 The contract language here use the phrase “making known,” which both parties agreed is synonymous with “publication.” Id. at 1185.

61 Id. at 1186-87.