Colorado CGL Coverage B Demystified

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This article discusses Coverage B of commercial general liability insurance policies.

Most attorneys are familiar with Coverage A of commercial general liability (CGL) insurance policies. Coverage A insures many claims for accidental tangible damages—bodily injury and property damage caused by an occurrence (i.e., an accident), subject to numerous exclusions.

Coverage B of CGL policies is less well-known. Coverage B insures claims for several specific personal injury and advertising injury torts. In contrast to Coverage A, many of the covered torts involve intangible damages. And, unlike injuries under Coverage A, personal and advertising injuries can be intentional torts—they do not need to be caused by an "occurrence."[1] This article discusses potential claims covered under Coverage B.

Coverage B Background

The Insurance Services Office (ISO) is an advisory organization for the insurance industry and, among other services, provides standard policy forms. Personal injury and advertising injury coverages were not included in the original 1955, 1966, or 1973 CGL policies.[2] These coverages first appeared in the 1976 and 1981 Broad Form Endorsements to the standard ISO CGL policy.[3] The Broad Form Endorsements included "personal injury" coverage for the following offenses:

- false arrest, detention, imprisonment, or malicious prosecution;
- wrongful entry or eviction or other invasion of the right of private occupancy;
- a publication or utterance (a) of a libel or slander or other defamatory or disparaging material, or (b) in violation of an individual's right of privacy; except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.[4]

The Broad Form Endorsements included "advertising injury" coverage for an injury

arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if the injury was based on libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title, or slogan.[5]

Starting in 1986, the standard ISO CGL policy brought the "personal injury" and "advertising injury" coverages into the policy itself, with minor modifications, as a new Coverage B. The "personal injury" coverage included five enumerated offenses:

1. false arrest, detention, or imprisonment;
2. malicious prosecution;
3. wrongful entry into, or eviction of a person from, a room, dwelling, or premises that the person occupies;
4. 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; or
5. oral or written publication of material that violates a person's right of privacy.[6]

Coverage for "advertising injury" included four enumerated offenses:

1. 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;
2. oral or written publication of material that violates a person's right of privacy;
3. misappropriation of advertising ideas or style of doing business; or
4. infringement of copyright, title, or slogan.[7]

In 1998, ISO streamlined and unified Coverage B into seven categories of "personal and advertising injury" offenses, essentially combining the prior overlapping categories and adding an express requirement that the final two advertising offenses occur in the insured's "advertisement":

1. false arrest, detention, or imprisonment;
2. malicious prosecution;
3. 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;
4. 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;
5. oral or written publication, in any manner, of material that violates a person's right of privacy;
6. use of another's advertising idea in the insured's "advertisement"; or
7. infringement upon another's copyright, trade dress, or slogan in the insured's "advertisement."[8]

With minor changes, these seven Coverage B offenses have remained unchanged since 1998. These seven covered offenses are analyzed below. Most CGL policies also include several significant Coverage B exclusions, such as insured's business, advertising-conduct, and known-falsity exclusions, which are examined below.

Coverages

In the leading Coverage B case, *Thompson v. Maryland Casualty Co.*,[9] the Colorado Supreme Court identified two stages of coverage analysis. The first step involves identifying the claims expressly covered by the insurance policy. Then, courts "refer to our case law to determine the elements of the covered claims."[10]

If all the elements of the covered tort are factually alleged, the insurer has a duty to defend the case, even if the underlying complaint does not expressly allege the tort.[11]

The requirement that the underlying tort claims satisfy the elements of Colorado law (rather than the understanding of lay people based upon the policy language) is consistent with the insured's reasonable expectations:

> When parties agree under the terms of an insurance policy that an insurer will defend its insured against specified causes of action, the reasonable expectation of the parties is that the insurer will defend its insured only against specific legal claims as they are defined by the law of the applicable jurisdiction.[12]

False Arrest, Detention, or Imprisonment

Coverage for false arrest, detention, or imprisonment is generally limited to claims against law enforcement and security personnel, since they have the power to arrest, detain, or imprison people.[13]

There is no coverage when no factually viable tort was alleged against the insured. Thus, in *Mountain States Mutual Casualty Co. v. Hauser*,[14] the Colorado Court of Appeals held there was no coverage for false imprisonment when the underlying claim for sexual assault was against a subordinate manager, not the insured business, and the elements for respondeat superior were not satisfied against the insured.

In addition, the court found no coverage in *Hauser* because the facts did not support such a claim. Instead, in the underlying case, Hauser said she hid in a bathroom following the manager's sexual assault; there was no finding of false imprisonment and no damages were awarded based on her hiding in the bathroom.[15]

Malicious Prosecution

In *Thompson*,[16] the Colorado Supreme Court held that a coverable claim for "malicious prosecution" must satisfy all elements of the corresponding common law cause of action: (1) the defendant contributed to bringing a prior action against the plaintiff, (2) the prior action ended in favor of the plaintiff, (3) no probable cause, (4) malice, and (5) damages. Those legal elements had to be satisfied because "'malicious prosecution' is not merely a term in an insurance policy; it is a legal claim comprised of specific elements."[17]

In *Thompson*, there was no coverage for the malicious prosecution claim because the second element was missing. The prior action was for lis pendens, and the plaintiff did not prevail. Consequently, the underlying action did not trigger Coverage B.[18]

Wrongful Eviction, Wrongful Entry, or Invasion of Right of Private Occupancy

In Colorado and most other jurisdictions, coverage for wrongful eviction, wrongful entry, and other invasion of the right of private occupancy all require an interference with "possessory rights" in real estate.[19]

In addition, as held by the Colorado Court of Appeals in *TerraMatrix, Inc. v. US Fire Insurance Co.*,[20] coverage is limited to entries, evictions,

and invasions "committed by or on behalf of the owner, landlord, or lessor," based on the plain policy language. There, neither the owner, nor the landlord, nor the lessor caused the emission of ammonia vapors from the insured tenant's printer. Consequently, the claim did not come within personal injury coverage for wrongful eviction, entry into, or evasion of right of private occupancy "on behalf of its owner, landlord or lessor."[21]

Publication That Libels, Slanders, or Disparages

Coverage for libel or slander does not require an express allegation of defamation. But it does require the complaint to state all elements of defamation, including that the alleged statement is false.[22]

Coverage for disparagement is distinct from libel and slander. As the Colorado Supreme Court explained in *Thompson*,[23] "disparagement" differs from defamation because it "focuses on the economic consequences of an injurious statement rather than on damage to reputation."[24]

The Court in *Thompson* held that coverage for disparagement does not extend to claims for slander of title because the policy language requires disparagement of an organization's "goods, products, or services."[25] However, the Court held that disparagement of "services" does extend to the development and selling of real estate because "service" is an "intangible commodity" in the form of human effort, such as labor, skill, or advice, and the developing and selling of real property "involve human labor and skill and do not produce a tangible commodity distinct from the real property itself."[26]

In *Thompson*, the Court held that when coverage is sought for product disparagement, six elements must be present: (1) a false statement; (2) publication to a third party; (3) derogatory to the title or quality of plaintiff's property, plaintiff's business in general, or aspect of plaintiff's personal affairs; (4) through which defendant intended to cause harm to the plaintiff's pecuniary interest or either recognized or should have recognized that it was likely to do so; (5) malice; and (6) special damages.[27]

Element three in *Thompson* requires disparagement as to the plaintiff's property or business. Thus, the federal court in *Travelers Indemnity Co. of America v. Luna Gourmet Coffee & Tea Co.* held that disparagement coverage does not extend to implied disparagement based on disparagement of a third party's goods, products, or services.[28] There was no coverage for disparagement in *Travelers* because the plaintiffs did not allege that "any of their goods, products, or services have been disparaged by [the insured's] conduct."[29]

Publication That Violates Right of Privacy

Coverage for invasion of privacy requires the complaint to state all the elements of invasion of privacy, including publicizing the information to more than one individual or a small group or people.[30]

For example, a Telephone Consumer Protection Act (TCPA) invasion-of-seclusion claim may be covered as an invasion of privacy, since the transmission of an unsolicited fax can constitute a publishing act, while receiving the same can result in an invasion of privacy, because "the TCPA protects a species of privacy in the sense of seclusion."[31]

Use of Another's Advertising Ideas

As noted by the federal court in *Wardcraft Homes, Inc. v. Employers Mutual Casualty Co.*,[32] Colorado cases provide little guidance as to the proper interpretation of "the use of another's advertising idea." However, most courts presented with this issue have held that the "use of another's idea" means the "wrongful taking of the manner by which another advertises its goods or services" or the "wrongful taking of an idea about the solicitation of business."[33] Additionally, the claimed injury must arise "in the course of advertising."[34] The advertising activities "must cause the injury—not merely expose it."[35]

In *Dish Network Corp. v. Arch Specialty Insurance Co.*,[36] the Tenth Circuit Court of Appeals recognized the general rule that patent infringement claims do not trigger advertising injury coverage. However, predicting Colorado law, the court held that a patent infringement claim can trigger coverage if the "advertising technique itself" is patented.[37]

Infringement of Copyright, Trade Dress, or Slogan in Advertising

This coverage potentially extends to many advertising-based intellectual property (IP) claims, and thus it is of great interest to IP attorneys. However, the IP violations must have a close nexus to advertising—the violations must either occur in advertising or be "directly connected" to advertising.[38] IP claims standing alone do not trigger coverage.[39]

Thus, in *Travelers*,[40] the federal court construed Colorado law to hold that infringement of slogan in advertising is limited to a word or phrase being used as an "advertising tagline."[41] It does not extend to a word or phrase that simply identifies the "source" of the product, such as a geographical location.[42]

Exclusions

CGL policies include expansive Coverage B exclusions that significantly limit the scope of coverage, generally reducing coverage for the moral hazards that are inherent in many intentional torts. Thus, counsel should carefully read the language of the exclusions.

Many policies include a Coverage B advertising-conduct exclusion, precluding coverage for personal or advertising injury committed in the conduct of the insured's "advertising." This exclusion arguably negates all the traditional "advertising injury" coverages, which must be connected to the insured's advertising. However, the Colorado federal court enforced the policy's plain language in *National Union Fire Insurance Company of Pittsburgh v. DISH Network*. The court rejected the insured's argument based on the illusory-coverage doctrine, since Coverage B includes many "personal injury" torts with no advertising component.[43]

Many CGL policies also include a Coverage B insured's business exclusion, precluding coverage for an insured whose business is "advertising, broadcasting, publishing or telecasting."[44] In *DISH Network Corp. v. Arrowhead Indemnity Co.*, the Tenth Circuit applied Colorado law and held that the terms "broadcasting" and "telecasting" in the exclusion must be given their plain meaning. The court rejected Dish's argument that the terms "broadcasting" and "telecasting" must be defined to exclude

fee-for-service transmissions, like the ones Dish provided to its subscribers: "To the contrary, we conclude that the commonly-understood definitions of the terms 'broadcasting' and 'telecasting' undoubtedly encompass Dish's transmissions."[45]

Finally, most CGL policies include a Coverage B exclusion for publication of material with "knowledge of its falsity." In *Thompson*, the Colorado Supreme Court construed this exclusion broadly, in accordance with its plain language. In the underlying case, a real estate developer had alleged that the insured had disparaged its services by sending a letter to county planning officials falsely claiming a preemptive right of first refusal, which entitled the insured to refuse to cooperate in the county platting effort. The Court rejected the insured's technical argument that there was a duty to defend because the underlying complaint did not specify that the insured knew the statement was false at the time it was made. The Court held that the exclusion applied because, reading the complaint "as a whole," it was clear that the insured knew his statement was false. And a person who intentionally makes a false statement "unquestionably knows the statement is false at the time it is made."[46]

Conclusion

CGL Coverage B provides important supplemental liability coverage to Coverage A's insurance for accidental bodily injury and property damage claims. Coverage B's personal and advertising injury coverages insure a variety of business torts, including claims for intentional acts and intangible damages. Thus, studying the policy language and case law is an excellent investment for Colorado counsel involved in commercial litigation. CL

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NOTES

1. *Mike Lee Co. v. Nationwide Mut. Ins. Co.*, No. 19-cv-00006, 2020 WL 8370081 (D.Colo. 2020).
2. The 1955 and 1966 versions of the CGL policy were created jointly by the National Bureau of Casualty and Surety Underwriters and the Mutual Casualty Rating Bureau. The 1973 and subsequent policies were prepared by the Mutual Insurance Rating Bureau and the Insurance Services Office, the successor to the National Bureau of Casualty Underwriters. *See* Weimer et al., *CGL Policy Handbook*, Introduction at xviii (3d ed. Wolters Kluwer 2018).
3. For the history of the Broad Form Endorsements, *see id.*
4. *Id.* at § 9.01.
5. *Id.* at § 10.01.
6. *Id.* at § 9.01.
7. *Id.* at § 10.01.
8. *Id.* at App-118.
9. *Thompson v. Md. Cas. Co.*, 84 P.3d 496, 503 (Colo. 2004).
10. *Id.* at 502–03.
11. "When all the elements of a claim covered by the policy are alleged, an insurer has a duty to defend its insured, even if a claim is not labeled according to the terms used in an insurance policy." *Id.* at 502.
12. *Id.* at 503 n.7 (citing *Lextron, Inc. v. Travelers Cas. and Sur. Co. of Am.*, 267 F.Supp.2d 1041, 1047 (D.Colo. 2003)) (court first looks to the elements of the covered claims of defamation and invasion of privacy under the law of the relevant jurisdiction to determine whether the insurer's duty to defend was triggered by facts alleged in the pleadings); *QSP, Inc. v. Aetna Cas. And Sur. Co.*, 773 A.2d 906, 918–19 (Conn. 2001) (court's first step in analyzing insurer's duty to defend against claim of malicious prosecution is to consider elements of the claim under applicable Connecticut case law).
13. Weimer et al., *supra* note 2 at § 9.02 ("Counsel will encounter coverage for false arrest, detention, or imprisonment primarily in claims against law enforcement entities such as police, private security services, and businesses that employment security guards.").
14. *Mountain States Mut. Cas. Co. v. Hauser*, 221 P.3d 56, 62 (Colo.App. 2009).
15. *Id.* ("Because there was no finding of false imprisonment, and no damages were awarded on this cause of action, the . . . judgment does not support a conclusion that Hauser is entitled to have Mountain States indemnify any damages actually awarded.").
16. *Thompson*, 84 P.3d at 503.
17. *Id.* at 504.
18. *Id.*
19. Weimer et al., *supra* note 2 at § 9.04[A].
20. *TerraMatrix, Inc. v. US Fire Ins. Co.*, 939 P.2d 483, 489 (Colo.App. 1997).
21. *Id.* (citing *US Fid. & Guar. Co. v. Goodwin*, 950 F.Supp. 24 (D. Maine 1996)).
22. *Lextron*, 267 F.Supp.2d at 1046–47.
23. *Thompson*, 84 P.3d 496.
24. *Id.* at 506 (citing *Zerpol Corp. v. DMP Corp.*, 561 F.Supp. 404, 408 (E.D.Pa. 1983)) ("The action for defamation serves to protect one's interest in character and reputation. The cause of action for disparagement, on the other hand, protects economic interests by providing a remedy to one who suffers pecuniary loss from slurs affecting the marketability of his business.").
25. *Id.*
26. *Id.*
27. *Id.* at 507 n. 16.
28. *Travelers Indem. Co. of Am. v. Luna Gourmet Coffee & Tea Co.*, 533 F.Supp.3d 1013, 1023 (D.Colo. 2021).
29. *Id.* at 1024.
30. *Lextron*, 267 F.Supp.2d at 1047 (Montana law).
31. *Ace Am. Ins. Co. v. Dish Network, LLC*, 173 F.Supp.3d 1128, 1137 (D.Colo. 2016) (citing *Park Univ. Enters. v. Am. Cas. Co.*, 442 F.3d 1239, 1249–51 (10th Cir. 2006) (Kansas law)), *abrogated on other grounds by Magnus, Inc. v. Diamond State Ins. Co.*, 545 Fed.Appx. 750, 753 (10th Cir. 2013).
32. *Wardcraft Homes, Inc. v. Emps. Mut. Cas. Co.*, 70 F.Supp.3d 1198, 1209 (D.Colo. 2014).
33. *Id.* (citing *Discovery Fin. Servs., LLC v. Nat'l Union Fire Ins. Co.*, 527 F.Supp.2d 806, 824 (N.D.Ill. 2007), and *Amazon.com Int'l, Inc. v. Am. Dynasty Surplus Lines Ins. Co.*, 85 P.3d 974, 976 (Wash.App. 2004)).
34. *Wardcraft Homes*, 70 F.Supp.3d at 1210 (citing *Dish Network Corp. v. Arch Specialty Ins. Co.*, 659 F.3d 1010, 1015 (10th Cir. 2011) (Colorado law)).
35. *Id.* (quoting *Novell, Inc. v. Fed. Ins. Co.*, 141 F.3d 983, 989 (10th Cir. 1998)).
36. *Dish Network Corp. v. Arch Specialty Ins. Co.*, 659 F.3d at 1018.
37. *Id.* at 1019 ("Numerous cases suggest that while the advertisement of an infringing product will not qualify, the infringement of a patented advertising idea will.").
38. Weimer et al., *supra* note 2 at § 10.06[B].
39. *Id.* at § 10.05.
40. *Travelers*, 533 F.Supp.3d 1013.
41. *Id. at* 1025.
42. *Id.*
43. *Nat'l Union Fire Ins. Co. of Pittsburgh v. DISH Network, LLC*, 445 F.Supp.3d 1191, 1211 (D.Colo. 2020) (citing *DISH Network Corp. v. Arrowhead Indem. Co.*, 772 F.3d 856, 872–73 (10th Cir. 2014) (Colorado law)).
44. *Ace Am. Ins. Co.*, 173 F.Supp.3d at 1137.
45. *DISH Network Corp. v. Arrowhead Indem. Co.*, 772 F.3d at 872–73.
46. *Thompson*, 84 P.3d at 508.