

ADVERTISING INJURY AND PERSONAL INJURY COVERAGE UNDER COMMERCIAL GENERAL LIABILITY POLICIES

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There is little doubt that advancements in computer technology and the internet have greatly influenced the manner in which modern society conducts business during the latter part of the twentieth century. These developments have spurred a dramatic increase in electronic commerce (“e-commerce”), and the assertion of intellectual property rights. While some insurers have developed new products to provide coverage for the unique risks associated with technology, creative policyholders have sought insurance coverage for claims related to e-commerce, technology and property rights under the “advertising injury” and “personal injury” provisions of general liability policies, or, for more recent policies, the “personal and advertising injury” coverage grant.

Historically, commercial general liability coverage forms contained a coverage grant for “advertising injury” and “personal injury” (Coverage B). The definition for each type of injury invariably depends upon the particular coverage form used by the insurer. As a general matter, however, both “advertising injury” and “personal injury” are defined to include a list of specifically enumerated offenses. Most definitions contain such offenses as the infringement of copyright or slogan and the oral or written publication of material that violates a person’s right to privacy, slanders or libels a person, or disparages a person’s goods.¹

Before the age of e-commerce, commercial insureds attempted to obtain “advertising injury” coverage for breach of contract or other garden variety commercial disputes. The seminal case in Massachusetts on the scope of “advertising injury” coverage is Smartfoods, Inc.

¹ ISO has recently introduced coverage forms that contain only a single coverage grant for “personal and advertising injury” as opposed to the predecessor policy forms that have a separate grant of coverage for “personal injury” and “advertising injury”.

v. Northbrook Property and Casualty Co., 35 Mass.App.Ct. 239 (1993). The underlying dispute arose after Smartfoods cancelled distribution agreements with seven of its distributors because the distributors were distributing competing products in alleged violation of an exclusive distribution agreement with Smartfoods. The distributors brought suit against Smartfoods alleging, among other things, misappropriation of trade secrets and unfair business practices arising out of cancellation of the agreements. Smartfoods tendered the defense of the claims to its general liability insurance carriers, which disclaimed coverage.

The Appeals Court rejected Smartfoods' argument that letters that it sent to one of its distributors as a business proposal qualified as "advertising". The court explained that "[s]uch a proposal to a particular company to do business [did] not conform to ordinary notions of calling to the attention of the public the merits of a product." It therefore was not "advertising." Perhaps more importantly, the Appeals Court noted that the purchaser of comprehensive liability insurance would not expect that "it will cover legal costs attendant on commercial disputes That would transform the policy to comprehensive litigation insurance." Id. at 245.

More recently, the United States Court of Appeals for the First Circuit had the opportunity to consider the scope of the "advertising injury" and "personal injury" provisions contained in primary and excess insurance policies in the context of a business dispute. In Open Software Foundation, Inc., et al. v. United States Fidelity and Guaranty Co., 307 F.3d 11 (1st Cir. 2002), the First Circuit Court of Appeals was called upon to resolve a coverage dispute between United States Fidelity & Guaranty Insurance Company, ("USF&G"), and its policyholder, Open Software Foundation ("OSF"). The dispute arose as the result of an underlying claim by Addamax Corporation that OSF's decision not to bundle Addamax security software into its UNIX-based operating system constituted, among other things, unfair

competition. OSF tendered the defense of the lawsuit to USF&G, claiming that the allegations made by Addamax fell within the “advertising injury and personal injury” coverages afforded by the USF&G policy and, therefore, USF&G was obligated to defend and indemnify against claims. USF&G declined to accept tender of the defense.

Six years after USF&G rejected OSF’s tender, OSF filed suit against USF&G seeking reimbursement of the defense costs it incurred in defending Addamax’s lawsuit. OSF argued that Addamax’s Complaint, “specifically alluded” to “personal injury”, including defamation, and “advertising injury”, including unfair competition. The primary policy 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 arose out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition or infringement of copyright, title or slogan.” Of all of the acts listed in the advertising injury provisions of the policy, only “unfair competition” was claimed by OSF as a cause of the advertising injuries alleged in the Addamax Complaint.

The First Circuit held that the meaning of the term “unfair competition,” was well settled under Massachusetts law and did not fall within the advertising injury coverage in the USF&G policy. Citing to the Smartfoods decision, the court noted that “unfair competition”, in its common law meaning, implied “palming off; an attempt by one person to induce customers to believe that its products are actually those of another.” The court found that Massachusetts’ decision to construe the advertising injury of “unfair competition” in a general commercial liability insurance policy as equivalent in scope to the state common law tort of the same name, reflected the position of a majority of jurisdictions. Consequently, the First Circuit declined

OSF's invitation to broadly interpret Addamax's allegations of unfair competition beyond the scope of the Massachusetts common law tort.

Having failed to persuade the First Circuit that the Addamax Complaint stated a claim for "advertising injury," OSF alternatively argued that the extrinsic evidence required an interpretation that Addamax's complaint alleged claims for "personal injury," specifically defamation and product disparagement. OSF insisted that liability coverage was triggered under the personal injury provisions of its policies on the theory that Addamax's damages allegedly occurred, in part, because of communications by OSF to its sponsors and members about the selection of comparable software. The First Circuit disposed of OSF's claims on the grounds that the underlying complaints did not allege that any "defamatory or disparaging material" cited by OSF caused Addamax injury. *See Ekco Group, Inc. v. Travelers Indem. Co.*, 273 F.3d 409, 415 (1st Cir. 2001)("There must be some causal connection running from the offense . . . to the injury.").

In view of the holdings in Smartfoods and Open Software, it appears safe to say that Massachusetts law narrowly construes the scope of advertising and personal injury coverage in terms of commercial and business disputes. However, the facts of any particular claim will likely vary as broadly as the language of any particular insurance policy. As insurers move forward with the introduction of specialized products into the marketplace to address the unique risks associated with e-commerce and intellectual property rights, they can certainly expect creative policyholders to continue their efforts to obtain coverage under the "personal injury" or "advertising injury" provisions of their general liability policies. When such claims involve high stakes, excess and surplus insurers should endeavor to conduct thorough and prompt investigations of such claims to ensure that they are only providing coverage for the claims

covered by the policy and, when necessary, seek the advice and guidance of experienced coverage counsel.