Coverage B

"Advertising" Then and Now

By Alissa Christopher and Ashley Gomez-Rodon

Changes in technology and the emergence of web-based advertising have forced insurers to examine what constitutes "advertising" under commercial general liability Coverage B. This article traces policy language changes over the last forty years and how those changes have addressed the ever-evolving advertising landscape.

What constitutes "advertising" for purposes of Coverage B in a commercial general liability policy continues to evolve; changes in technology inform what we think of as "advertising" and are reflected in insurance policy forms.

The Insurance Services Office (ISO) has modified its commercial general liability (CGL) coverage forms over the last forty years or so, in part to adapt to the internet and electronic communications. This article explores the changes in what constitutes "advertising" under Coverage B from the mid-1980s to the present. Cyber-liability claims for data breaches continue to proliferate. Currently, courts have not been willing to find Coverage B applicable to data breaches where the hacker, or publisher, is not the insured because the policies generally do not insure third parties' actions.

Overview: Changes to Personal and Advertising Liability Coverage in CGL Policy Forms

Insurance for advertising liability for organizations other than advertising agencies was first available in the United States with umbrella liability policies in the 1940s. Donald S. Malecki & Arthur L. Flitner, *Commercial General Liability* 89–90 (8th ed. 2005). The first standardized form providing advertising liability coverage with the comprehensive general liability policy was the 1976 broad form comprehensive general liability endorsement. *Id.* In 1986, personal injury and advertising liability coverage was included as Coverage B and became part of the commercial general liability policy form as opposed to an optional coverage added by endorsement. Malecki & Flitner, *supra.* Thus, until the mid-1980s, unless an insured purchased an endorsement, no coverage existed for defamation, false arrest, or malicious prosecution under the standard CGL policy. And so, prior to 1986, even if "bodily injury" or "property damage" was alleged in the context of a defamation claim, the injury or damage was not considered to have been caused by an "occurrence" or accident as required by the insuring agreement for Coverage A. *See, e.g., State Farm Fire & Casualty Company*

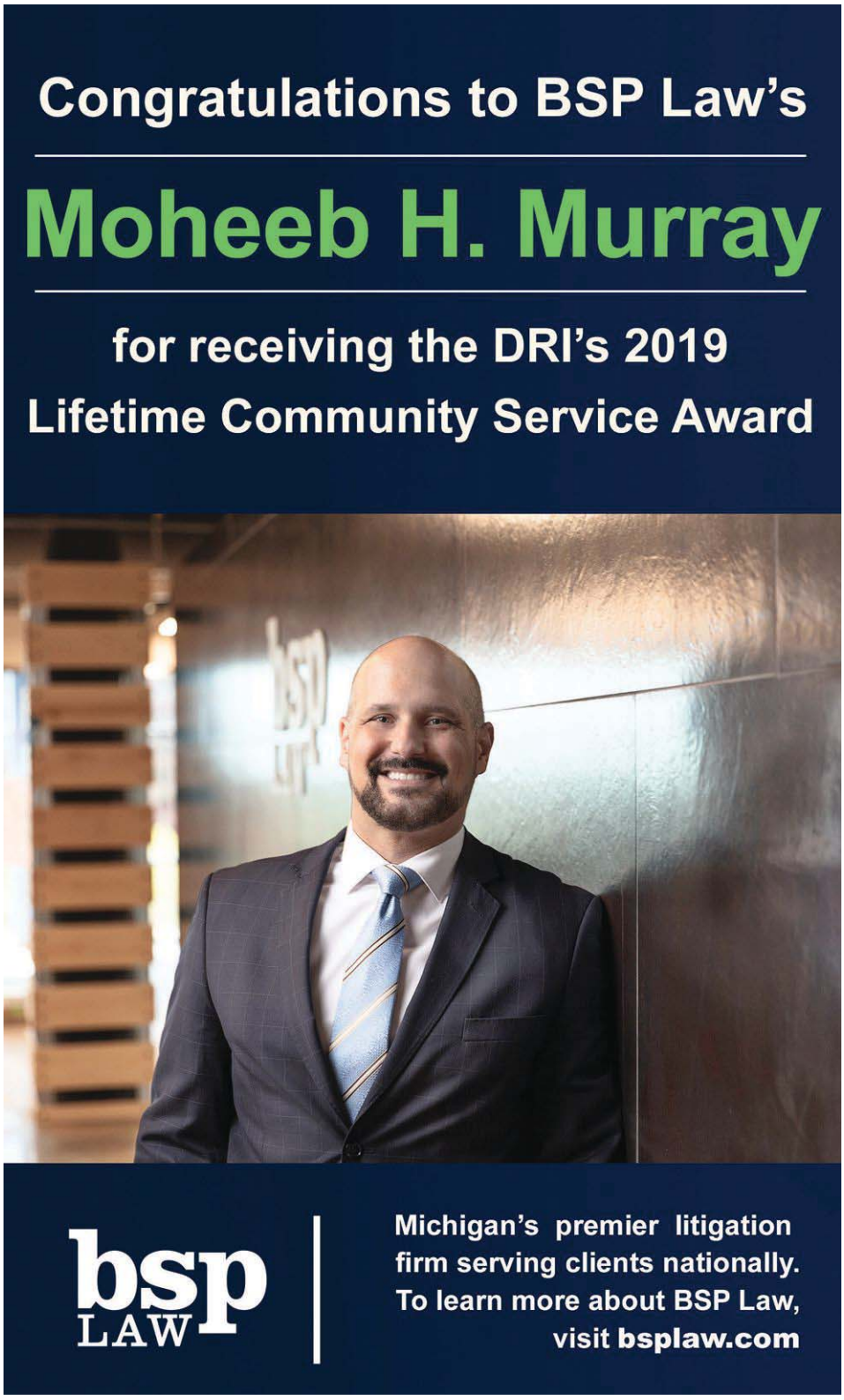
■ Alissa Christopher is a member in Cozen O'Connor's Dallas office. She represents and advises insurance companies in complex coverage and extra-contractual first- and third-party matters in addition to working on insurance coverage litigation. Ms. Christopher has presented seminars on topics involving coverage under general liability, homeowners, farm liability, directors and officers, excess, umbrella, and commercial automobile policies. Ashley Gomez-Rodon is an associate in Cozen O'Connor's Miami office. She focuses her practice on commercial litigation and insurance coverage matters.

v. Weaver, 585 F. Supp. 2d 722, 732 (D. S.C. 2008), on reconsideration in part, 2:06-CV-01752-PMD, 2008 WL 11349874 (D. S.C. Mar. 20, 2008) (holding that defamation does not meet the policy's definition of an occurrence). *See also Stellar v. State Farm General Insurance Company*, 157 Cal. App. 4th 1498, 1505, 69 Cal. Rptr. 3d 350, 354 (Cal. Ct. App. 2007) (holding that the very nature of defamation precludes the conclusion that it can occur accidentally) (internal citations omitted); *Ed Winkler & Son, Incorporated v. Ohio Casualty Insurance Company*, 51 Md. App. 190, 195, 441 A.2d 1129, 1132 (1982), disapproved by *Sheets v. Brethren Mutual Insurance Company*, 342 Md. 634, 679 A.2d 540 (1996) ("[t]he [evidence] permits no suggestion that it was by chance that appellant accused Mrs. Cromwell of being a thief," and therefore, the damages were not caused by an accident or occurrence).

Changes in the definition of "advertising injury" from the 1973 form to the 1986 form clarified the scope of covered advertising injuries and broadened coverage to apply specifically to both oral and written materials, disparagement of property, and misappropriation of ideas. James A. Robertson, *ISO Commercial Liability Forms: A Side-by-Side Comparison* 35 (1986). The phrase "unfair competition" was removed from the new wording, which could result in less coverage if courts interpreted the meaning of "misappropriation of advertising ideas or style of doing business" more narrowly than "unfair competition." *Id.*

The ISO 1998 CGL form combined the two Coverage B offenses, "personal injury" and "advertising injury," into one "personal and advertising liability" coverage. More significantly, the 1998 policy form required that the potentially covered offenses be committed in the named insured's "advertisement" as the term was defined in the 1998 form. A new exclusion was also added to the 1998 CGL policy form, barring coverage for personal and advertising injury "caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict personal and advertising injury." Another change in the 1998 policy form was that it included coverage for consequential bodily injury arising from "personal and advertising injury."

The next significant change to the ISO form came in 2001, likely due to the widespread use of the internet. The 2001 ISO form clarified the definitions of "personal and advertising injury" and "advertisement," and it added or expanded several exclusions. The definition of "advertisement" was expanded to include notices published through the internet generally, but with regard to websites specifically,



only the content of an insured's website that was intended to attract customers fell within the definition. Such language remained in place in subsequent revisions of the form.

Table 1 depicts the ISO policy form and corresponding policy language changes over the years.

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Majority View: "Advertising" Requires Widespread Dissemination

The Coverage B policy language of the mid-1980s did not define the term "advertising," though many of the separate "advertising injury" offenses would likely occur in the context of advertising goods, products, or services (e.g., disparagement and misappropriation of advertising ideas). Courts began to examine whether an insured's advertising activities required a widespread dissemination of material, or whether "advertising" includes any activity that a seller might use to promote its goods to a potential buyer.

Most courts interpreted "advertising" to mean "the widespread distribution of promotional material to the public at large." *Select Designs, Limited. v. Union Mutual Fire Insurance Company*, 674 A.2d 798, 801 (Vt. 1996) (collecting cases across jurisdictions).

However, a number of courts found that something less than widespread dissemination qualified as "advertising." For example, in 1988, a Minnesota district court held that an insured's misappropriation of trade secrets claim was "arguably within the scope of coverage," even though the publication consisted of three letters to the same potential customer and a demonstration of the product to that same potential customer. *John Deere Ins. Co. v. Shamrock Industries*, 696 F. Supp. 434, 440 (D. Minn. 1988). In *John Deere,* a former employee of Shamrock, a company that produced ice cream container filling machines, and a former employee of Metal Craft, a supplier of various precision parts, created a new company to produce machines that could fill ice cream containers faster than Shamrock's machines. *Id.* at 435. The new company, NEOS, sent a series of letters to the president of Cardinal, a competitor of Shamrock. *Id.* In these letters, NEOS represented to Cardinal that it could "build machines to help [Cardinal] sell more of [its] containers," would "warrant each unit for one year," and would "furnish a complete maintenance manual with each machine." *Id.* at 440. In the last letter, NEOS "listed the machine's 'selling points'" and included pictures of the machine. *Id.* At issue was whether a misappropriation of trade secret claim against NEOS constituted an advertising injury. *Id.* at 437, 439. The insured's policy covered advertising injury that arose from "an offense committed… in the course of advertising [the insured's] goods, products or services." *Id.* The policy defined advertising injury as:

> [A]n injury arising out of one or more of the following offenses:
> (a) Oral or written publication or 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;
> (d) Infringement of copyright, title, or slogan; or
> (e) Unfair competition.

Id. The insurer argued that coverage was only provided for advertising injuries that arose out of "advertising" activity, and the letters and demonstrations of the machines were "selling activity." *Id.* The *John Deere* court noted the tension between cases finding that the undefined phrase "advertising activity" required "wide dissemination" and the insured's argument that broader coverage was afforded based on the plain meaning of the word "advertising," as found in the *Black's Law Dictionary* definition, which was "[a]ny oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business…." *Id.* at 439 (quoting *Black's Law Dictionary,* 50 (5th ed.1979)).

The *John Deere* court stated that if the letters had been sent to one hundred potential customers rather than one, there would be no question that the letters were advertising activity. *John Deere,* 696 F. Supp. at 440. Relying on the general principles of contract interpretation, the court found more than one reasonable interpretation of the meaning of "advertising activity" and therefore determined that the policy was ambiguous and must be construed against the insurer. *Id.* Consequently, the three letters and demonstration to one potential customer were found to be "advertising activity."

Similarly, a California court found that a letter promoting a company's revenue enhancement services sent to twenty to thirty customers qualified as "advertising." *New Hampshire Ins. Company v. Foxfire, Incorporated*, 820 F. Supp. 489, 494 (N.D. Cal. 1993). The court made a distinction between interpreting "advertising" in the context of an exclusion as opposed to determining whether a policy offered coverage, stating:

> While the court is mindful that there is more than one reasonable interpretation of the meaning of "advertising," the cases giving the term a narrow definition have involved insurers seeking a declaration that no coverage existed under an advertising injury exclusion. *See American States Insurance Com-*

Table 1

Policy Year	Advertising Injury/ Advertisement	Personal Injury/ Personal and Advertising Injury
1976 Broad Form CGL	"Advertising Injury" means 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, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.	"Personal Injury" means injury arising out of one or more of the following offenses committed during the policy period: (1) false arrest, detention, imprisonment, or malicious prosecution; (2) wrongful entry or eviction or other invasion of the right of private occupancy; (3) 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 related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.
1986	"Advertising Injury" means injury arising out of one or more of the following offenses: 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.	"Personal injury" means injury, other than "bodily injury," arising out of one or more of the following offenses: (a) False arrest, detention or imprisonment; (b) Malicious prosecution; (c) Wrongful entry into or eviction of a person from, a room, dwelling or premises that the person occupies; (d) 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 (e) Oral or written publication of material that violates a person's right of privacy.
1998	"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.	"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; 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 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 of material that violates a person's right of 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."
2001, 2004, 2013	"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 website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.	"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; 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 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 of material that violates a person's right of 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."

pany v. Canyon Creek, 786 F. Supp. 821, 828 (N.D. Cal.1991). Therefore, "because the term [advertising] is used within the context of the insuring provisions and not within an exclusion, the term should be interpreted broadly, with any doubts as to coverage resolved in favor of the insured." *Id.*

Foxfire, 820 F. Supp. at 494.

As demonstrated by the cases discussed above, the debate over what constituted "advertising" in the 1980s and 1990s focused primarily on how large the group was that received the promotional materials in question. Further, such promotional materials were generally tangible: paper letters, photographs, and flyers. As digital advertising emerged, courts began to determine that a website could also constitute advertising.

Some courts have distinguished solicitations, which do not require an element of public announcement, from advertisements, and they found that solicitations were broader than "advertising." *See Imaging Alliance Group, LLC v. American Economy Insurance Company*, Civ. 05-384 PAMRLE, 2006 WL 145428, at *4–5 (D. Minn. Jan. 19, 2006) (unpublished opinion) (holding that targeted solicitations at actual and prospective customers did not draw public attention to the company's goods or services, and therefore, they were not "advertising"). *See also Select Designs, Limited, v. Union Mutual Fire Insurance Company*, 674 A.2d 798, 801–02 (Vt. 1996).

As demonstrated by the cases discussed above, the debate over what constituted "advertising" in the 1980s and 1990s focused primarily on how large the group was that received the promotional materials in question. Further, such promotional materials were generally tangible: paper letters, photographs, and flyers. As digital advertising emerged, courts began to determine that a website could also constitute advertising. *See Hyundai Motor America v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania,* 600 F.3d 1092 (9th Cir. 2010). The court in *Hyundai* addressed whether patent infringement of a website triggered Coverage B under the offense of misappropriation of advertising ideas. The claimant patented a "build your own" (BYO) car software feature that the insured allegedly infringed by using a similar feature on its own website. *Id.* at 1095–96. The insured argued that it placed the BYO feature on its website to promote its products, and because a website is plainly directed to the public at large, the BYO feature constituted "advertising." *Id.* at 1098. The insurer contended that because the BYO feature created customized proposals specific to an individual user, the BYO feature was effectively a high-tech, one-on-one solicitation. *Id.* The Ninth Circuit Court of Appeals recognized that the solicitation versus advertising cases did not adequately address the situation involving a website, which was available to all but accessed by specific individuals (here, individuals in search of a car with particular features). The court used a hypothetical:

> An analogy to a hypothetical invention in the pre-Internet age helps to illustrate why the BYO feature advertises cars to the general public. Instead of the high-tech, Internet version of the BYO feature, imagine a more crude, paper-only version. The invention includes tabbed sliders and plastic overlays; the user chooses various options and follows directions to assemble the various physical parts. The resulting composite display shows the user's choices, along with pricing information displayed in a cut-out window. And imagine that Hyundai included one of these crude forms of the BYO feature as an insert in a general-circulation newspaper. It seems clear that this "invention" would constitute "advertising," even though the individual newspaper readers might each select different options and arrive at entirely different final "displays." Hyundai's BYO feature is much more akin to that example than it is to the individualized solicitations sent to a specified, extant customer list discussed in *Hameid,* or to the other individualized solicitations discussed in that case.

Hyundai, 600 F.3d at 1100 (citing *Hameid v. National Fire Insurance of Hartford,* 71 P.3d 761, 764 (Cal. 2003)). Thus, the *Hyundai* court concluded that a website could be an advertisement as opposed to a solicitation.

"Course of Advertising" Requires Causal Connection Between Offense and Advertising

Another related and sometimes overlapping issue in the context of Coverage B and "advertising injury" claims is whether the offense, or injury, occurred in the course of the insured's advertising activities. In other words, policy forms require a causal connection between the covered offenses and the insured's advertising for its goods or services for coverage to attach. Whether the causal connection is too tenuous is often litigated and establishing a sufficiently alleged causal connection would not focus on "whether 'the injury could have taken place without the advertising,'" but on "whether the allegations sufficiently assert that 'the advertising did in fact contribute materially to the injury.'" *West Bend Mutual Insurance Company v. Ixthus Medical Supply, Incorporated*, 923 N.W.2d 550, 558 (Wis. 2019) (internal citations omitted).

The California Supreme Court, interpreting a 1973 ISO form, discussed this causal connection in *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992). This claim arose out of the bank's loan program, which provided loans to consumers to pay

their automobile insurance premiums. *Id.* at 1258. The bank communicated directly with insurance agents, who then applied for loans in the consumer's name. *Id.* When consumers were approved for the loans and were finally notified of the astronomical interest rates, penalties, and fees, they filed a class action suit against the bank. *Id.* at 1259. The bank sought a defense from its insurer for the claims, and the insurer alleged that the policy did not afford the bank such coverage. *Id.* at 1260. The policy language provided: "The company [insurer] will pay on behalf of the insured [the bank] all sums which the insured shall become legally obligated to pay as damages because of… advertising injury to which this insurance applies…."*Id.* at 1262.The policy then 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 activity, if such injury arises out of libel, slander, defamation, violation of right of privacy, unfair competition, or infringement of copyright, title or slogan." *Id.*

The bank advertised its program to insurance agents through trade journals and representatives, but the loan customers who were injured were not aware of the advertising activities. The court found no coverage because of the lack of a connection between the injury, or offense, to the customers, and the bank's advertising activities to the insurance agents. The court stated:

> "Taken to its extreme, [the argument that no causal relationship is necessary] would lead to the conclusion that any harmful act, if it were advertised in some way, would fall under the grant of coverage merely because it was advertised. Under this rationale, for instance, injury due to a defective product which is sold as a result of advertising activity and which later harms a consumer may fall within the coverage grant. The definition of 'advertising' is quite broad and may encompass a great deal of activity. Thus, a great many acts may fall within the ambit of advertising, extending advertising injury coverage far beyond the reasonable expectations of the insured." (*National Union Fire Ins. Co. v. Siliconix Inc., supra,* 729 F. Supp. at p. 80, fn. omitted.)
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> We believe that the apparent majority rule, under which "advertising injury" must have a causal connection with "advertising activities," best articulates the insured's objectively reasonable expectations about the scope of coverage. This conclusion is partly a matter of interpretation and partly a matter of common sense.
>
> As a matter of interpretation, the context of the CGL policy strongly indicates the requirement of a causal connection. The other types of "advertising injury" enumerated in the policy often do have a causal connection with advertising. "Defamation," whether libel or slander, occurs upon publication. (*See* Civ. Code, §§ 45, 46.) "Violation of right of privacy," in the advertising context, is virtually synonymous with unwanted publicity. (*See, e.g.*, Civ. Code, § 3344.) "Infringement of copyright, title or slogan" typically occurs upon unauthorized reproduction or distribution of the protected material. (*See* 17 U.S.C. § 106.) Reading the term "unfair competition" in this context, an objectively reasonable insured would not conclude that the term "unfair competition" could refer to claims that bore no causal relationship to its advertising activities.

Bank of the West, 2 Cal. 4th at 1276 (alteration in original).

The Seventh Circuit further explained what satisfied the "in the course of advertising" rule in *Erie Insurance Group v. Sear Corporation*, 102 F.3d 880, 895 (7th Cir. 1996). The underlying claim for tortious interference with contract, defamation, and civil rights violations arose when a high school hired Alliance Environmental Group to investigate its asbestos problem. *Id.* at 891. After Alliance reported that the Sear Corporation, the original company hired to remove the asbestos, failed to remove all the asbestos from the high school, the company sued the environmental group for tortious interference with contract, defamation, and civil rights violations. *Id.*

The environmental group's insurance policy included advertising injury coverage for "defamatory statements made by [the group's] employees about another organization's products or services, but only if the statements [were] made 'in the course of advertising' [the group's] services."*Id.* The court interpreted this policy to mean that defamatory statements had to be made "in the course of active solicitation of business." *Id.* at 894. More generally, "actions taken 'in the course of advertising'" had to involve "actual, affirmative self-promotion of the actor's goods or services." *Id.* In *Sear*, the environmental group's allegedly defamatory statements occurred in the course of "fulfilling its job requirements," not when it was "actively soliciting business" from the school. *Id.* Therefore, the court held that the statements did not warrant advertising injury coverage. *Id.*

Numerous courts have addressed the causal connection requirement for advertising injury. *See, e.g., Fireman's Fund Insurance Company v. Bradley Corporation*, 660 N.W.2d 666, 681 (Wis. 2003) (holding that the policy's causal connection requirement was met where the insured created materials promoting misappropriated designs and displayed the designs at a trade show and these advertising activities contributed to the injury of consumer confusion); *R.C. Bigelow, Incorporated v. Liberty Mutual Insurance Company,* 287 F.3d 242 (2d Cir. 2002) (holding that allegations of trade dress infringement satisfied the causal nexus requirement when one of the alleged injuries was consumer confusion due to copied trade dress use); *Sentry Insurance. v. R.J. Weber Company*, 2 F.3d 554, 557 (5th Cir. 1993) (holding that because the copyright infringement claim was not alleged to have resulted from any advertising activity, there was no causal nexus and no coverage).

Parties continue to litigate whether an offense occurred in the course of advertising activities. *See, e.g., Premier Pet Products v. Travelers Property Casualty Company of America,* 678 F.Supp.2d 409,(E.D. Va. 2010) (involving a complaint alleging that harm occurred from the trademark infringement itself and not from advertising activities), *But cf. American Employers' Insurance Company v. DeLorme Publishing Company, Inc.,* 39 F.Supp.2d 64, 74 (D. Me. 1999) (noting that a trademark "inherently and necessarily implicates the possible advertising activities").

The Fourth Circuit addressed a trademark infringement case involving an internet domain name and concluded that trademark infringement on a website occurred in the course of advertising. *State Auto Property & Casualty Insurance Company v. Travelers Indemnity Company of America,* 343 F.3d 249, 251 (4th Cir. 2003). In the underlying complaint, the car manufacturer, Nissan, sued a computer sales and services company for "wrongful utilization of the NISSAN trademark." *Id.* After the company registered domain names using the trademark, Nissan alleged it "intended to confuse consumers into thinking that the ads and links were… somehow affiliated with Nissan." *Id.* at 252 (The domain names included "www.nissan.com" and "www.nissan.net.") The company turned to its insurer to provide coverage for the alleged advertising injury. *Id.* at 523. In deciding that the trademark qualified as an advertising idea, the court noted that a "trademark plays an important role in advertising a company's products." *Id.* at 258. It found that Nissan used its trademark to advertise its vehicles to the public. *Id.* In doing so, Nissan spent "hundreds of millions of dollars each year" developing and promoting its trademark so that it became "instantly recognizable throughout the United States and the world as a symbol of high-quality automobiles." *Id.* The company was using Nissan's trademarked logo to solicit "business for itself and for others"; therefore, the logo "was utilized 'in connection with the solicitation of business.'" *Id.* at 259. Therefore, the trademark infringement occurred in the course of the company's advertising. *Id. See also Street Surfing, LLC v. Great American E & S Insurance Company,* 776 F.3d 603, 611 (9th Cir. 2014) (holding that using a logo that is too similar to a competitor's logo infringes on the trademark and triggers advertising injury coverage unless an exclusion applies).

To start, holding oneself out as the only owner of a trademark meets the policy definition of "advertisement."

"Advertisement" Definition Revision Solidifies Offense and Advertising Activity Causal Connection Requirement

The CGL forms promulgated in 2001 and after define "advertisement" to clarify the "personal and advertising injury" offenses "f" (the use of another's advertising idea in your "advertisement"), and "g" (infringing on another's copyright, trade dress, or slogan in your "advertisement"). These changes solidified the required causal connection between the offense and the insured's advertising activities. Much Coverage B litigation involving the 2001 and later policy forms delineated what constituted an "advertisement."

To start, holding oneself out as the only owner of a trademark meets the policy definition of "advertisement." *Burgett, Incorporated v. American Zurich Insurance Company*, 830 F. Supp. 2d 953, 957 (E.D. Cal. 2011). In *Burgett*, the insured began advertising and selling pianos bearing the Sohmer and Sohmer & Company trademarks in the United States and through an internet website. Interestingly, the court made short shrift of the analysis pertaining to whether the insured's statement that it was the rightful owner of the trademark constituted an "advertisement," holding "[t]here is no dispute that the allegedly improper statement made by [the insured] constitutes an advertisement in accordance with the terms of the policy." *Id.* at n. 4.

Model homes can be considered an advertisement, depending on the circumstances. In *Highland Holdings, Incorporated v. Mid-Continent Casualty Company,* 687 Fed. Appx. 819, 823 (11th Cir. 2017), the insured sold homes constructed with plans that infringed upon another builder's architectural drawings. *Id.* at 821. As the court observed, "[s]imply selling an infringing product is not sufficient to satisfy the causal connection." *Id.* at 823 (internal citations omitted). However, builders who opened model homes to market business and placed signs in front of the copyright-infringing houses during construction committed "advertising injury"; the model homes along with the signage were "advertisements." *See Kirk King v. Continental Western Insurance Co.*, 123 S.W.3d 259, 262–63, 265–76 (Mo. Ct. App. 2003) (holding that advertising includes signs identifying the homebuilder that accompanied the home construction); *Mid-Continent Casualty Co. v. Kipp Flores Architects, L.L.C.*, 602 Fed. Appx. 985, 994 (5th Cir. 2015) (holding that the insured's "primary means of marketing its construction business was through the use of [its] homes").

An announcement over a loudspeaker in a mall was not viewed as an "advertisement" where the announcement merely thanked the customers for shopping and encouraged them to visit the one-hundred businesses selling various merchandise and food. *Allstate Insurance Company v. Airport Mini Mall, LLC*, 265 F. Supp. 3d 1356, 1375 (N.D. Ga. 2017), *appeal dismissed*, 17-14798-EE, 2017 WL 7058347 (11th Cir. Dec. 11, 2017). In *Airport Mini Mall,* a sunglasses manufacturer alleged that a mall owner infringed its trademark when the mall managers were aware that its tenant sold infringing sunglasses and made public announcements encouraging shoppers to visit the mall businesses. *Id.* The court concluded that the generic announcement, which did not mention the tenant who sold the infringing sunglasses, was not an "advertisement" for the infringing vendor.

The *Airport Mini Mall* case demonstrates the distinction between selling and advertising. *See also, e.g., Sentex Systems, Incorporated v. Hartford Accident & Indemnity Company*, 93 F.3d 578, 580 (9th Cir. 1996) ("In this day and age, advertising cannot be limited to written sales materials, and the concepts of marketing includes a wide variety of direct and indirect advertising strategies."); *Poof Toy Products, Incorporated v. United States Fidelity & Guaranty Company*, 891 F. Supp. 1228, 1234 (E.D. Mich. 1995) ("Courts have repeatedly rejected an insured's argument that advertising is part and parcel of selling and that an offense [that] occurs during selling is an offense committed in the course of the advertising."); *Frog, Switch & Manufacturing Company. v. Travelers Insurance Company,* 193 F.3d 742, 750 n.8 (3d Cir. 1999) (noting that "there is much confusion in the caselaw concerning when an 'advertising injury'"

is "caused by advertising within the meaning of standard business insurance policies," and stating that the most reasonable approach is to require "that the injury be complete in the advertisement"). *See also United States Fidelity and Guaranty Company. v. Fendi Adele S.R.L.,* 823 F.3d 146 (2nd Cir. 2016) (holding that the "parties could not have reasonably expected that the advertising injury coverage of the Policies would extend to the insured's sale of infringing goods" or that " 'advertising' would include the sale (without more) of counterfeit products"); *United States Fidelity & Guaranty Company v. Ashley Reed Trading, Incorporated,* 43 F. Supp. 3d 271, 276 (S.D.N.Y. 2014) (holding that selling counterfeit handbags was not advertising). Importing and distributing, (i.e., selling) products without more is not "advertising." But as long as allegations against the insured describe some advertising activity, a defense likely will be owed. For example, in *Ixthus Medical Supply,* an insured medical supply company allegedly imported, advertised, and subsequently distributed boxes of the claimant's blood glucose test strips intended for the international market (and sold internationally for a much lower price) in the United States. *West Bend Mutual Insurance Company v. Ixthus Medical Supply, Incorporated*, 923 N.W.2d 550, 554–55 (Wis. 2019). Despite the insurer's argument that the insured's conduct focused on importation and distribution rather than advertising the international test strips, the court found a duty to defend the insured because the allegations, read broadly, alleged a causal nexus between the insured's conduct and advertising the products. *Id.*

Notably, a press release is not considered an "advertisement" if no selling or promotion is involved. *Standard General L.P. v. Travelers Indemnity. Co. of Connecticut,* 261 F. Supp. 3d 502, 505 (S.D.N.Y. 2017). In *Standard General*, the insured company issued a press release supporting its board of directors' decision to terminate the CEO. *Id.* Seeking coverage for a defamation suit by the ousted CEO, Standard General argued that as an investment fund, its services consisted of identifying and investing in distressed companies and making them profitable. *Id.* at 508. Standard General's theory was that the press release constituted an "advertisement" because it was meant to allay its investors' concerns and to promote further investment in its fund. *Id.* The court held that the press release was not "about" the "goods, products, or services" that Standard General provided. "It does not, for example, tout the expertise of Standard General's employees, call attention to its investment services, or express hope that customers continue to invest in Standard General," the court noted. *Id.* Thus, the court determined that the press release was not an "advertisement."

Software, such as an internet-advertising system whose purpose is to advertise the insured's products to the public to facilitate sales, qualifies as "advertising." *Air Engineering, Incorporated v. Industrial Air Power, LLC,* 828 N.W.2d 565, 571–72 (Wis. Ct. App. 2013), *review denied,* 353 Wis.2d 430, 839 N.W.2d 617 (Wis. 2013). In *Air Engineering*, when someone used certain terms in an internet search, the advertising system designed and placed ads in the search containing domain names leading to information about available products and how to purchase them. Liberally construing the allegations in the complaint, the court found that these ads gave notice to potential customers about the insured's goods, products, or services, and they were placed with the purpose of attracting customers. Therefore, the court concluded that using the internet advertising system to place these ads was advertising and the links were advertisements. *Id.*

Despite the proliferation of internet activities, some "old-fashioned" promotional activities continue to spur debate about whether they qualify as an "advertisement." In *Hershey Creamery Company v. Liberty Mutual Fire Insurance Company and Liberty Insurance Corporation,* 386 F. Supp. 3d 447 (M.D. Penn. 2019), the court found that a self-serve milkshake machine and related display could constitute an "advertisement" for purposes of insurance coverage, and Hershey was owed a defense for claims alleging patent and trademark infringement of f'real Foods LLC, (f'real), which had a similar machine and display. The f'real display kiosk had a blender atop a merchandizing freezer with a see-through glass door. The f'real milkshake products were displayed in cylindrical sealed cups that were arrayed in rows and columns within the freezer. The kiosk prominently featured f'real's name with advertising slogans such as "Blend a F'REAL… for REAL," or "REAL Milkshakes, REAL good." The word "REAL" was a prominent feature of f'real's advertising. Hershey packed its competing frozen milkshakes in plastic containers of comparable size and shape and sold the products in kiosks that closely mimicked those developed by f'real. The Hershey milkshake containers prominently and repeatedly used the word "REAL" in all capital letters, including in the phrases "REAL MILKSHAKE" and "REAL ICE CREAM."

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Hershey's general liability policy excluded coverage for injuries stemming from intellectual property infringement. But it included exceptions and expressly provided coverage for injury to another stemming from infringing the other's "advertising idea" or from infringing another's "copyright, trade dress or slogan." The parties disputed whether the signage on the purportedly infringing kiosks was an "advertisement," which the policy defined as "a paid announcement that is broadcast or published in the print, broadcast or electronic media." Hershey argued that the phrase "published in the print media" was broad enough to include slogans published on in-store advertising signage—or at least was ambiguous and the court should construe the phrase in Hershey's favor. The court agreed, finding that the allegations made clear that f'real

believed Hershey infringed upon f'real's advertising ideas and slogans and specifically did so in the context of advertising for competing blending machines and milkshakes located in convenience stores. The court found a sufficient nexus between advertising and injury to trigger a duty to defend.

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Data Breach Cases

Many policyholders assume cyberattacks are covered under existing commercial general liability policies. Contrary to this assumption, courts have interpreted policy language only to allow coverage where the policyholders themselves commit the data breach.

A New York state court case, *Zurich American Insurance Company v. Sony Corporation*, is the seminal decision for this coverage issue. No. 651982/2011, 2014 WL 8382554 (N.Y. Sup. Ct. Feb. 21, 2014). A few years ago, Sony experienced one of the largest cyberattacks of all time to its PlayStation Network. Ariel Yosefi, *Case Study: Sony, Zurich, and the PlayStation Data Breach*, Lexology (May 19, 2015). Hackers stole personal and financial information from approximately 77 million accounts on the network. *Id.* Consequently, dozens of class action complaints were filed against Sony. *Id.*

Sony turned to its general liability insurer for defense and indemnification under Coverage B, specifically the personal injury portion of the policy. Sony relied upon the provision in the policy that covered "oral or written publication in any manner of material that violates a person's right of privacy." Transcript of Oral Argument at 33, *Sony Corp.*, 2014 WL 8382554. The insurer brought a declaratory action, arguing that coverage only applied to a case where Sony perpetrated the cyberattack, not an outsider. *Id.* at 66.

In interpreting the policy, the court agreed that a cyberattack does result in a "publication" under the policy because "just merely opening up that safeguard or that safe box where all of the information was… is publication." *Id.* at 77. Nevertheless, Sony did not execute the publication; rather, hackers breached Sony's network and stole the information. *Id.* The court concluded that Coverage B was limited to Sony's conduct because the insurer only bargained with Sony when issuing the policy. *Id.* at 36, 78.

Some Florida federal district court cases have followed this policy interpretation. One case concerned a cyberattack upon Innovak, a payroll software company. *Innovak International, Inc. v. Hanover Insurance Company*, 280 F.Supp.3d 1340, 1342 (M.D. Fla. 2017). Hackers accessed the private and financial information stored on Innovak's software, including social security numbers, addresses, dates of birth, and employment information. *Id.* Innovak, like Sony, turned to its general liability insurer for defense and indemnification under Coverage B. *Id.* The court held that the insurer properly denied coverage because the policy was limited to Innovak's conduct. *Id.* at 1346–47. Applying South Carolina law, the court concluded that there was no coverage under Coverage B because Innovak did not publish the stolen information. *Id.* at 1348. Another Florida federal district court agreed with this analysis, reiterating that "the only plausible interpretation of the insurance policy is that it requires the insured to be the publisher of the private information." *St. Paul Fire & Marine Insurance Company v. Rosen Millennium, Inc.*, 337 F.Supp.3d 1176, 1185 (M.D. Fla. 2018), *appeal docketed*, No. 18-14427 (11th Cir. Oct. 19, 2018).

As companies obtain and store more information about consumers, data continues to be valuable to hackers and competitors. Thus far, injuries created by third party data breaches do not fall within a CGL policy's Coverage B. Notably, some courts have suggested that directors and officers liability insurance may cover direct losses from a cyber-breach. *See e.g., Spec's Family Partners, Limited v. Hanover Insurance Company,* No. 17-20263, 739 Fed. Appx. 233, 238-40 (5th Cir. 2018) (unpublished). In *Spec's Family Partners,* Spec's credit card network was hacked and Spec's vendor for credit card services had to reimburse the issuing banks for the costs of the fraudulent transactions. *Id.* at 234. The vendor demanded indemnification from Spec's under the merchant agreement between Spec's and the vendor. *Id.* The Fifth Circuit Court found that the trial court improperly granted the insurer's motion for judgment on the pleadings. The appellate court rejected the insurer's argument that the contractual liability exclusion barred a defense as well as indemnity for the losses due to a hack of the insured's credit card network. *Id.* at 238–40.

As cyberattacks become increasingly prevalent—leading some to compare data to oil—policyholders must not rely on Coverage B to meet the needs of coverage for data breaches. Instead, policyholders should consider purchasing insurance that specifically covers liability stemming from a cyberattack.

Conclusion

Since the 1980s, when it became a standard coverage in a CGL policy, Coverage B has continued to evolve along with the new tools businesses use to create, sell, and advertise their goods, products, and services. From ice cream machines to design-your-own-product software, litigation over advertising injuries will continue and insurance policies will continue to keep pace with the changing landscape of advertising. Cyber breaches have occurred with increasing frequency, prompting insureds to seek coverage for cyber losses under all available insurance; no doubt insurers will keep pace by offering products to cover the cyber losses. FD