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Introduction

All too often, businesses defend themselves against a myriad of lawsuits without taking advantage of the coverage provided by their Comprehensive General Liability Insurance (CGL) policies, for which they pay continually increasing premiums. The complex transactions and intricate factual situations common in today's litigation may lead some risk managers to conclude that a particular claim is not covered by a CGL policy. Insurers perpetuate such a conclusion by denying that they have a duty to defend or to indemnify insureds. The unfortunate result is that businesses may be paying twice for certain liabilities. This article discusses a trend in California law whereby insureds have been successful in obtaining coverage under the "advertising injury" clause found in many CGL policies.[1] By focusing on advertising injury coverage (as opposed to traditional property loss or personal injury coverages), insureds have been able to obtain coverage for claims involving antitrust, patent infringement, unfair competition, piracy, and various intentional torts including misrepresentation.[2]

A few caveats should be mentioned. First, although this article describes coverage under the advertising injury clause, the other insuring clauses of the policy should not be ignored when analyzing coverage under a given policy.[3] Second, this article focuses on the insurer's duty to defend rather than the specific duty to indemnify the insured for the claimed loss.[4]

I
Canons of Policy Interpretation

Although an insurance policy is a contract, there are several unique canons or guiding principles by which these contracts are to be interpreted. The California Supreme Court addressed one such canon, the "reasonable expectation of the insured," in the seminal case of *Gray v. Zurich Insurance Co.*[5] In *Gray,* the court had to determine whether an

1. *See generally,* William J. Robinson, *Insurance Coverage of Intellectual Property Lawsuits,* 17 AIPLA Q. J. 122 (1989).

2. *See, e.g., id.*

3. The most common forms of coverage under the CGL policy are for property damage and bodily injury. One should always evaluate these portions of the policy in addition to the advertising injury clause to determine whether coverage is available.

4. Most of the cases interpreting the advertising injury clause have focused on the insurers' duty to defend. Since the duty to defend is broader than the duty to indemnify, the analysis needed to obtain indemnification will usually be a subset of the duty to defend analysis. *See* CNA Casualty of Cal. v. Seaboard Sur. Co., 222 Cal. Rptr. 276, 278 (Ct. App. 1986) ("The duty to defend is much broader than the duty to indemnify.").

5. 419 P.2d 168 (Cal. 1966).

insurance company could avoid its duty to defend a claim that its insured, Dr. Vernon Gray, intentionally assaulted the underlying claimant. The insurer argued that intentional conduct was excluded by the policy so that its duty to defend was not triggered.[6] The court, noting that the exclusionary clause at issue was not clear or conspicuously stated in the policy, held that Dr. Gray had a reasonable expectation of coverage that triggered the insurer's duty to defend.[7] The court added that an insurer's duty to defend will be triggered if the underlying claim "*potentially* seeks damages within the coverage of the policy," and that the insurer must look to the underlying complaint as well as other information to determine if its policy affords coverage for a given claim.[8]

The California Court of Appeals extended the *Gray* analysis to advertising injury in *CNA Casualty of California v. Seaboard Surety Co.*[9] In *CNA,* the insurers denied coverage for an antitrust claim brought against Western States Bank Association. The court, recognizing that the underlying complaint alleged facts that could give rise to coverage under the advertising injury clause, held:

> [T]he duty to defend is so broad that as long as the complaint contains language creating the potential of liability under an insurance policy, the insurer must defend an action against its insured even though it has independent knowledge of facts not in the pleadings that establish that the claim is *not* covered.[10]

Thus, the insurer's duty to defend does not turn on whether the insured would ultimately be liable for a covered loss. Rather, the duty to defend arises if there is merely a potential (based on the facts found in the complaint or available from any other source) that an insured may be liable for a covered loss.[11] Moreover, an insurer cannot complacently

6. *Id.* at 169-70.

7. *Id.* at 170. In so holding, the court established the well accepted rule that any policy exclusion must be clearly and conspicuously stated and should be found in the policy near the coverage language. *Id.*; *see also* Miller v. Elite Ins. Co., 161 Cal. Rptr. 322, 329 (Ct. App. 1980) (holding that the exclusion in a motorcycle liability insurance policy was not sufficiently conspicuous, clear, and plain and had to be interpreted in the insured's favor).

8. *Gray,* 419 P.2d at 176 (emphasis in original). The court reasoned that since modern pleadings are "malleable, changeable and amendable," an insurer must look beyond the pleadings to determine whether the underlying facts present any potential for coverage. *Id.*

9. 222 Cal. Rptr. 276 (Ct. App. 1986).

10. *Id.* at 279 (emphasis in original). The court ultimately found that even though the underlying complaint specifically alleged claims for antitrust and intentional interference with contractual and business relationships, it also contained facts that could give rise to claims for "unfair competition," "piracy," and "idea misappropriation." Since the insurers had not defined these terms in the policy, the terms were construed against them. *Id.* at 280-81.

11. *Id.*

evaluate a claim by relying on the complaint alone. The insurer must thoroughly evaluate a claim before deciding to deny coverage.[12]

Beyond attempting to effectuate the reasonable expectations of the insured, courts also consider the following canons of policy interpretation.

1. The insurance policy must be viewed and construed in its entirety "with each clause lending meaning to the other."[13]
2. The words in an insurance policy must be construed in their ordinary sense and an ambiguity "cannot be based on a strained interpretation of the policy language."[14]
3. Doubts regarding the meaning of the insurance contract must be resolved in favor of the insured.[15]
4. Whether a policy provision is ambiguous is a question of law.[16]
5. A policy provision is ambiguous when it can be construed in two or more reasonable ways.[17]
6. A policy exclusion must be construed strictly against the insurer and liberally in favor of the insured.[18] Similarly, where a strict literal interpretation of a policy clause would unreasonably restrict coverage, it cannot be imposed on the insured.[19]

Courts adopted these canons of construction because insurance contracts are viewed as contracts of adhesion. The insurer offers coverage under a pre-printed form that typically allows little, if any, negotiation between the parties. As an adhesion contract, therefore, an insurance policy must be interpreted to effectuate the reasonable expectations of the insured.[20]

II
Coverage for Advertising Injury

A. Pre-1986 ISO Clause

The most commonly used advertising injury provision has normally been inserted into a policy as a "broad form endorsement." Before 1986,

12. Egan v. Mutual of Omaha Ins. Co., 598 P.2d 452, 456-57 (Cal. 1979) (insurer must completely evaluate the possible bases that might support an insured's claim, including conducting its own independent evaluation).

13. Delgado v. Heritage Life Ins. Co., 203 Cal. Rptr. 672, 677 (Ct. App. 1984) (quoting Holz Rubber Co., Inc. v. Am. Star Ins. Co., 533 P.2d 1055, 1061 (Cal. 1975)).

14. Producers Dairy Delivery Co. v. Sentry Ins. Co., 718 P.2d 920, 925 (Cal. 1986) (quoting McKee v. State Farm Fire & Cas. Co., 193 Cal. Rptr. 745, 746 (Ct. App. 1983)); *see also* Miller v. Elite Ins. Co., 161 Cal. Rptr. 322, 328-29 (Ct. App. 1980).

15. Gray v. Zurich Ins. Co., 419 P.2d 168, 171 (Cal. 1966); *Producers Dairy,* 718 P.2d at 924.

16. *Producers Dairy,* 718 P.2d at 925.

17. *Id.*

18. *Miller,* 161 Cal. Rptr. at 328-29 (citing Crane v. State Farm Fire & Cas. Co., 485 P.2d 1129, 1130 (Cal. 1971)).

19. *Id.* (citing Schilk v. Benefit Trust Life Ins. Co., 78 Cal. Rptr. 60, 64 (Ct. App. 1969)).

20. Gray v. Zurich Ins. Co., 419 P.2d 168, 171 (Cal. 1966).

the broad form endorsement of the Insurance Services Office (ISO) defined advertising injury as follows:

> 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.[21]

This definition identifies several bases for an insurance claim. Most notably, courts have recently imposed a duty to defend upon insurers for claims involving intellectual property and related disputes by adopting a broad definition of "unfair competition."

1. The Demonet Decision

In *Demonet Industries v. Transamerica Insurance Co.*,[22] Demonet Industries (Demonet) alleged that Transamerica Insurance Co. (Transamerica) breached the terms of an insurance policy and the implied covenant of good faith and fair dealing when it refused to defend Demonet in a lawsuit involving Demonet's sale and management of a commercial office building in San Jose.[23] In that action the plaintiff alleged that Demonet discouraged potential tenants from renting in a building that Demonet had sold to the plaintiff but continued to manage, breached its contractual and fiduciary obligations under the sales contract and management agreement, and committed fraud and interfered with the plaintiff's prospective economic advantage.[24]

Demonet's insurance policy with Transamerica adopted the ISO broad form endorsement for advertising injury, which includes coverage for unfair competition.[25] Demonet based its tender, as well as its later lawsuit against Transamerica, partly on the theory that the endorsement's inclusion of "unfair competition" obligated Transamerica to ac-

21. *CGL Reporter* at II-350B (App. Supp. Spring 1991) (ISO policy form GL 04 05 81). While this article focuses on the definition of advertising injury, the broad form endorsement contains additional elements that must be satisfied to obtain coverage. The advertising injury must arise "out of the named insured's business" and be within the "policy territory." *Id.* The definitions of these terms can usually be found in the policy but are not included in the broad form endorsement.

Though the ISO changed the language of its advertising injury clause in 1986, this version is still the most popular and certainly the most frequently litigated version of the clause.

22. 278 Cal. Rptr. 178 (Ct. App.), *review granted*, 810 P.2d 997 (Cal. 1991). Since the California Supreme Court recently granted review of *Demonet*, the Court of Appeals' decision cannot be cited as precedent in California. CAL. R. OF CT. 976(d), 977(a) (1991). Nevertheless, a review of *Demonet* is instructive to analyze the rationale being applied to the definition of "unfair competition."

23. *Demonet Indus.*, 278 Cal. Rptr. at 180.

24. *Id.*

25. *Id.*

cept its tender of defense in the underlying lawsuit. The superior court disagreed and granted Transamerica's demurrer.[26]

The Court of Appeal reversed, holding that Transamerica's "duty to defend [Demonet] was in fact triggered by language in the [underlying lawsuit] that raised at least the potential for coverage under the provision in the Endorsement relating to advertising injury; specifically, that covering 'injury arising out of . . . unfair competition . . . .' "[27]

In reaching this result, the court rejected Transamerica's contention that the endorsement's reference to "unfair competition" referred only to the common law tort of passing off the goods of a business rival as one's own. The court noted that California Business & Professions Code section 17200 defined "unfair competition" much more broadly to include "unlawful, unfair or fraudulent business practice[s] and unfair, deceptive, untrue or misleading advertising."[28] Moreover, in interpreting that statute, the California courts had rejected the common law view that unfair competition claims could only be brought by a competitor.[29] The court concluded that "unfair competition" should be given as broad a meaning in the context of its use in liability insurance policies as it has been given in the statutory context.[30] The court ultimately held that plaintiff's claim for interference with prospective economic advantage was covered by the unfair competition language of the policy.[31]

The court also rejected Transamerica's argument that it had no duty to defend because the alleged torts did not occur in the course of Demonet's "advertising activities." Under California law, the court ruled, even "one-on-one oral representations" could constitute advertising.[32]

2. *The Bank of the West Decision*

Another Court of Appeal panel reached a similar result in *Bank of the West v. Superior Court.*[33] Bank of the West sued its insurer, Indus-

26. *Id.* at 181.

27. *Id.* at 182. As mentioned above, an insurer's duty to defend will be triggered if there is a potential for coverage.

28. *Id.* (citing CAL. BUS. & PROF. CODE § 17200 (West 1991)).

29. *Id.* at 183.

30. *Id.*

31. *Id.* at 183-84. The court also adopted the rationale of CNA Casualty of California v. Seaboard Sur. Co., 222 Cal. Rptr. 276 (Ct. App. 1986), noting that an insurer's duty to defend does not depend on how a complaint is actually styled but rather on whether any facts derived from any source give rise to potential liability that would be covered under the policy. *Demonet,* 278 Cal. Rptr. at 183 n.3.

32. *Demonet,* 278 Cal. Rptr. at 184.

33. 277 Cal. Rptr. 219 (Ct. App.), *review granted,* 807 P.2d 1006 (Cal. 1991). *Bank of the West* was originally decided on November 15, 1990, and published at 275 Cal. Rptr. 39 (Ct.

trial Indemnity Company (Industrial), using California Business & Professions Code section 17200, for coverage in connection with an unfair competition action arising from the bank's advertising. Industrial had adopted the ISO broad form endorsement and defined "advertising injury" as injury occurring in the course of the "insured's advertising activities, if such injury arises out of libel, slander, defamation, violation of the right of privacy, unfair competition, or infringement of copyright, title or slogan."[34]

The court held that the endorsement entitled the bank to coverage because it included unfair competition claims within its scope.[35] It rejected Industrial's contention that the endorsement's use of "unfair competition" was limited to the narrow common law tort of palming off (also known as passing off) goods. The court reasoned that the phrase was susceptible to at least two meanings: one referring to common law tort, the other referring to the broader statutory definition of unfair competition which includes "unfair, deceptive, untrue or misleading advertising."[36] The court also noted that a third meaning for the phrase might also be found by resorting to its dictionary definition.[37] Because the phrase was susceptible to more than one reasonable construction, the court concluded that the phrase was inherently ambiguous and, as such, "the ambiguity must be resolved against the insurer in favor of providing coverage for the insured."[38]

Industrial contended that the policy's reference to "unfair competition" was not ambiguous if read in context with the rest of the policy and that instead the phrase clearly referred merely to the common law tort. Industrial argued that because the phrase appeared in the policy in a list with eight common law torts, it too should be interpreted as referring to the common law tort of unfair competition. This argument failed, the court concluded, because it rested on an erroneous premise: "[M]any of those torts have also been codified by statutes and cannot be considered as merely common law torts anymore."[39]

App. 1990). On December 17, 1990, the court granted rehearing. On January 4, 1991, the court vacated its earlier opinion and rendered a virtually identical opinion, which was published at 226 Cal. App. 3d 835. As in *Demonet,* however, the California Supreme Court has granted review. As a result the case may not be cited as valid California precedent. *See supra* note 22.

34. *Bank of the West,* 277 Cal. Rptr. at 221 (emphasis omitted). Industrial's definition of "advertising injury" excludes "piracy" but is identical to the ISO form in all other respects.

35. *Id.* at 224-30.

36. *Id.* at 224 (citing CAL. BUS. & PROF. CODE § 17200 (1990)).

37. *Id.*

38. *Id.* (citing Reserve Ins. Co. v. Pisciotta, 640 P.2d 764, 768 (Cal. 1982) and Poland v. Martin, 761 F.2d 546, 548 (9th Cir. 1985)).

39. *Id.* at 225.

The court also rejected Industrial's other contextual arguments, finding that:

> (a) the court was not bound merely by the words in the contract itself because all the statutory and decisional law defining a term becomes a part of the contract by legal inference;[40]
>
> (b) the statutory definition of unfair competition did not subsume the other torts mentioned in the clause and thus render them meaningless because even "a cursory look" at the definitions "convinces us that all those torts continue to retain ample independent meaning even if a broader statutory definition . . . is adopted";[41]
>
> (c) Industrial's argument that the statutory definition could not have been intended because the statute did not permit damages was flawed because "a damage award under section 17200, et seq., [could not] be categorically excluded" due to the uncertain state of California precedent on the issue;[42]
>
> (d) what Industrial considered to be a relatively low premium did not suggest narrow coverage because the amount paid ($6,700) was "hardly an insignificant sum" and in any event merely indicated that the bank had "shopped around" to get the lowest premium it could obtain;[43]
>
> (e) that courts in other jurisdictions had interpreted "unfair competition" in similar insurance contracts to refer only to the common law tort was immaterial because "[t]hose cases apply either the New York or Washington law which do not define unfair competition in the same terms as section 17200 does;"[44] and
>
> (f) other parts of the insurance policy exclude coverage for "palming off," which would render the policy's coverage for unfair competition

40. *Id.*

41. *Id.* at 225-26.

42. *Id.* at 226, 228-29.

43. *Id.* at 226.

44. *Id.* Unlike the recent trend in California, courts interpreting New York and Washington law have adopted a narrower definition of "unfair competition." *See* Globe Indem. Co. v. First Am. State Bank, 720 F. Supp. 853, 855-57 (W.D. Wash. 1989) (Under Washington law, the definition of "unfair competition" in general liability policy endorsement did not cover alleged misrepresentations in course of bank's advertising.), *aff'd,* 904 F.2d 710 (9th Cir. 1990); Pine Top Ins. Co. v. Public Util. Dist. No. 1, 676 F. Supp. 212, 215-17 (E.D. Wash. 1987) (alternate holding) (Under Washington law, coverage for unfair competition claims in advertising injury clause did not extend coverage for claims in securities action alleging defendants were responsible for various misrepresentations and omissions in various official statements and prospectuses.); Ruder & Finn Inc. v. Seaboard Sur. Co., 422 N.E.2d 518, 523 (N.Y. 1981) (Under New York law, advertising injury clause providing coverage for unfair competition did not give rise to a duty to defend a state court action alleging infliction of intentional harm, where "the defendants were not competitors of [plaintiff in the state action], did not work for competitors of [plaintiff] and were not attempting to appropriate to themselves any profit, property or advantage belonging to [plaintiff]."); *cf.* Boggs v. Whitaker, Lipp & Helea, Inc., 784 P.2d 1273, 1276 (Wash. Ct. App. 1990) (Even if the unfair competition clause in the insurance contract were as broad as the state unfair competition statute, the clause would not provide coverage in a state securities action because the statute only applies to acts against competitors and there were no allegations or evidence that the insureds' actions had harmed a competitor.), *review denied,* 791 P.2d 535 (Wash. 1990).

"not only symbolic, but virtually nonexistent" if the common law definition applied.[45]

The court also disagreed with Industrial's contention that the insurance policy's language should not be strictly construed against it because "the Bank was not an unsophisticated insured and had equal bargaining power with Industrial."[46] The court reasoned that whatever merits the argument might have on other facts, it did not apply because "[t]he policy was not negotiated between the parties and the Bank had no hand in drafting it. The . . . policy and the extended coverage endorsement thereto were standard industry forms which were sold to the Bank on a take it or leave it basis."[47]

Last, the court rejected Industrial's contention that the policy did not provide coverage because the alleged acts of unfair competition did not occur in the insured's advertising activities. As in *Demonet,* the court held that "advertising" is "not limited to paid announcements in print and broadcast media," but can also include "one-on-one oral representations."[48] Both in that broad sense and also by printed advertisements, the court concluded "the Bank did engage in advertising . . . and that the advertising injury (i.e., unfair competition) occurred during such advertising."[49]

3. The Keating Decision

Like the California state courts, federal courts in California have also adopted a broad interpretation of unfair competition. In *Keating v. National Union Fire Insurance Co. of Pittsburgh,*[50] the court considered whether Charles Keating and his colleagues from American Continental Corporation fame were covered under a CGL policy against allegations that they had fraudulently sold corporate bonds through Lincoln Savings and Loan. Keating argued that since the CGL policy issued by the National Union Insurance Company (National Union) covered "unfair competition", it would have to cover claims involving unfair or fraudulent business practices as well as unfair, deceptive, untrue, or misleading advertising.[51] While the court recognized that palming off was a reasonable definition of "unfair competition," it ruled that a "broader definition

45. Bank of the West v. Superior Court, 277 Cal. Rptr. 219, 226 (Ct. App. 1991).

46. *Id.* at 227.

47. *Id.*

48. *Id.* at 229 (citing Nichols v. Great Am. Ins. Co., 215 Cal. Rptr. 416 (Ct. App. 1985); Feather River Trailer Sales, Inc. v. Sillas, 158 Cal. Rptr. 26 (Ct. App. 1979)).

49. *Bank of the West,* 277 Cal. Rptr. at 229.

50. 754 F. Supp. 1431 (C.D. Cal. 1990).

51. *Id.* at 1435. National Union argued that "unfair competition," as used in the policy, meant only the traditional common law tort of palming off. *Id.*

of the term is also reasonable."[52] Because "unfair competition" is now used as a generic name for several different torts involving the improper interference with business prospects, the court held that Keating's characterization of the term as including unlawful or unfair business practices as well as unlawful, untrue, or deceptive advertising was also reasonable.[53] The court found the term "unfair competition" was ambiguous and must be construed against National Union,[54] and concluded that National Union had a duty to defend Keating and his colleagues from the underlying complaint.[55]

4. Related Decisions

The United States District Court for the Central District of California has also issued unreported decisions that further illustrate the trend toward finding coverage for insureds under the advertising injury clause.[56] For example, in *Aetna Casualty and Surety Co. v. Watercloud*

52. *Id.* at 1436.

53. *Id.* at 1437.

54. *Id.* The court cited the California Supreme Court's decision in Producers Dairy Delivery Co. v. Sentry Ins. Co., 718 P.2d 920 (Cal. 1986), for the proposition that a policy provision is ambiguous if it is capable of two or more reasonable definitions. *Keating,* 754 F. Supp at 1435.

55. *Keating,* 754 F. Supp. at 1441.

56. Judges in the Northern District of California have not shared the view of the California Court of Appeals and their colleagues in the Central District. *See* Tigera Group, Inc. v. Commerce & Indus. Ins. Co., 753 F. Supp. 858, 860 (N.D. Cal. 1991) (Vukasin, J.) (Granting summary judgment for insurer, holding insurer had no duty to defend misrepresentation claim under advertising injury clause providing coverage for "unfair competition." "There is no indication that the purpose of consumer protection language in California Business and Professions Code section 17200 was to overrule the common law definition of 'unfair competition' as that phrase is used in insurance policies."); Nationwide Mut. Ins. Co. v. Dynasty Solar, Inc., 753 F. Supp. 853, 857 (N.D. Cal. 1990) (Conti, J.) (Granting partial summary judgment for insurer, holding that under advertising injury clause providing coverage for "unfair competition" claims, insurer had no duty to defend or indemnify class action claims for alleged fraudulent and unfair sales practices; when read in context, "the only reasonable interpretation of unfair competition which emerges . . . is the common law definition . . . ."); Westfield Ins. Co. v. TWT, Inc., 723 F. Supp. 492, 496 (N.D. Cal. 1989) (Legge, J.) (Denying summary judgment for insured, holding that "advertising injury" clause that provided coverage for "unfair competition" did not cover claims in connection with defendants' alleged mishandling of financial matters for savings and loan association. "Courts have retained the more restrictive common law meaning of unfair competition in the interpretation of insurance policies, even when the term in a state statute has been interpreted more expansively."); *see also* Aetna Cas. & Sur. Co. v. Trans World Assurance Co., 745 F. Supp. 1524, 1529 (N.D. Cal. 1990) (Peckham, J.) (dictum) (Although the court finds persuasive the arguments against interpreting "unfair competition" as expansively as it is defined in the California unfair competition statute, summary judgment granted because the claims against insured did not include a claim brought under that statute, but rather asserted claims in fraud, RICO, estoppel, and contract.).

This obvious split in authority has apparently motivated the California Supreme Court to address the issue since, as mentioned above, it has granted review for both *Demonet* and *Bank of the West.*

Bed Co., Inc.,[57] the court considered whether an insured was covered under the advertising injury clause for a patent infringement claim. The insurers, Aetna Casualty and Surety Company (Aetna) and Industrial Indemnity Company (Industrial), argued that the insured, Watercloud Bed Company (Watercloud), was not covered against a patent infringement claim because the underlying claim did not involve any "advertising activity" by Watercloud and because patent infringement was not covered under the definition of "advertising injury."[58] The court concluded that section 271(a) of the Patent Code can involve advertising activities. Further, since the underlying complaint alleged that Watercloud offered to sell allegedly infringing products, the advertising activity requirement was satisfied.[59]

Aetna and Industrial also argued that the patent infringement claim against Watercloud did not involve advertising injury. But the court held that patent infringement claims may be both "unfair competition" and "piracy" as those terms are commonly defined.[60]

Similarly, the court in *Intex Plastics Sales Co. v. United National Insurance Co.*[61] ruled that a patent infringement claim is covered under the ISO broad form endorsement as both unfair competition and piracy.[62] In granting summary judgment to the Intex Plastics Sales Company (Intex), the court expressly found that the terms "unfair competition," "advertising activity," and "piracy" were not defined in the endorsement and were to be construed in favor of the insured. The court further held that patent infringement is an unfair business practice that is

57. No. SA CV 88-200 AHS (RWRx) (C.D. Cal. Nov. 17, 1988). For a copy of this decision, see Robinson, *supra* note 1, at 153 (appendix).

58. One of the prerequisites of coverage under the definition of advertising injury in the ISO broad form endorsement is that the alleged injury must occur "in the course of the named insured's *advertising activities*." *CGL Reporter, supra* note 21, at II-350B (emphasis added). While the endorsement does not define "advertising activity," the *Bank of the West* court declared that the term means to " 'advise, announce, apprise, command, give notice of, inform, make known, publish,' or to '*call to the public attention by any means whatsoever.*' " Bank of the West v. Superior Ct., 277 Cal. Rptr. 219, 229 (Ct. App.) (emphasis in original) (citing BLACK'S LAW DICTIONARY 50 (5th ed. 1979)), *review granted,* 807 P.2d 1006 (Cal. 1991).

59. *See* Robinson, *supra* note 1, at 163. The court reached an opposite conclusion in Nat'l. Union Fire Ins. Co. of Pittsburgh v. Siliconix Inc., 729 F. Supp. 77, 80 (N.D. Cal. 1989) (ruling that even though a patent infringement claim was included in the definition of "piracy," it did not involve advertising activity).

60. Robinson, *supra* note 1, at 166-68.

61. No. CV 90-2050 CBM (Kx) (C.D. Cal. Dec. 6, 1990). For a copy of this decision see David A. Gauntlett, *Recent Developments in Insurance Coverage of Intellectual Property Lawsuits,* 3 J. OF PROPRIETARY RIGHTS 2, 12-15 (Feb. 1991) (appendix).

62. Gauntlett, *supra* note 61, at 15 (appendix).

anticompetitive and legally prohibited. As a result, the insurers had to defend Intex.[63]

5. Policy Exclusions

The broad form endorsement contains a number of exclusions designed to preclude coverage for advertising injury. Perhaps the most notable excludes coverage for advertising injury arising out of "infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods, products or services sold, offered for sale or advertised."[64] As mentioned, policy exclusions must be clear, unambiguous, and conspicuous.[65] Moreover, exclusions will be interpreted strictly against the insurer.[66] These rules may have particular importance to businesses seeking insurance coverage for trademark infringement claims.

Arguably, the trademark exclusion in the ISO broad form endorsement is ambiguous and should be construed against the insurer. The policy provides coverage for, among other things, piracy, unfair competition, and infringement of title. Each of these items covers trademark infringement claims.[67] Thus, to provide coverage and then exclude that same coverage creates the type of ambiguity that the *Gray* court denounced.[68]

63. *Id.* at 13-14 (appendix). Similarly, Judge Gray of the Central District ruled that excess insurers who were potentially liable for trademark infringement had a duty to defend the insured under the advertising injury clause. *See* Aetna Casualty & Sur. Co. v. Centennial Ins. Co., 838 F.2d. 346, 349 (9th Cir. 1988).

64. *CGL Reporter, supra* note 21, at II-350B.

65. *See supra* Part II.

66. *Id.*

67. Even if "unfair competition" had not been broadly defined by the *Demonet, Bank of the West,* and *Keating* cases, trademark infringement would be included in the term. *See* Int'l Order of Job's Daughters v. Lindeburg & Co., 633 F.2d 912, 915 (9th Cir. 1980) (trademark infringement is a species of unfair competition), *cert. denied,* 452 U.S. 941 (1981). Similarly, piracy "may be interpreted to include such offenses as . . . trademark infringement." Nat'l. Union Fire Ins. Co. of Pittsburgh v. Siliconix Inc., 729 F. Supp. 77, 80 (N.D. Cal. 1989). Finally infringement of title, though not defined in the broad form endorsement, arguably covers trademark infringement. A "title" may be a "mark, style, or designation," "the name by which anything is known" that "may become a subject of property . . . as one who has adopted a particular title for a . . . business enterprise, may, by long and prior usage, . . . acquire a right to be protected in the exclusive use of it." BLACK'S LAW DICTIONARY 1485 (6th ed. 1990). Under this definition, a claim for infringement of title is tantamount to a claim for infringement of trademark.

68. *See, e.g.,* Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co., 832 F.2d 1037, 1044-45 (7th Cir. 1987) (policy held ambiguous and construed in insured's favor where it provided coverage for libel and tortious interference with contract but excluded coverage for intentional acts); Tire Kingdom, Inc. v. First S. Ins. Co., 573 So. 2d 885, 887 (Fla. Dist. Ct. App. 1990) (Court determined that an insurer cannot provide coverage for certain advertising activities and then exclude coverage for those same activities.); Seals v. Morris, 423 So. 2d 652, 656 (La. Ct. App.

More significantly, the trademark exclusion itself is internally ambiguous. The exclusion purports to exclude claims for infringement of "trademark, service mark or trade name," but then excepts claims for infringement of "titles or slogans, by use thereof on or in connection with goods, products or services sold . . . ."[69] Since infringement of title may well include trademark infringement, the exclusion excepts at least some trademark claims from its scope. At the very least, the exclusion is unclear and ambiguous.[70] Arguably, therefore, the exclusion should be construed against the insurer.

The broad form endorsement contains other exclusions. Risk managers must carefully evaluate each exclusion to see if they apply in any given case.[71]

B. 1986 ISO Clause

The ISO changed its approach to advertising injury coverage in 1986. Rather than using an endorsement format, the ISO incorporated advertising injury coverage into the main body of the policy. The policy form still required that the advertising injury occur in the "coverage territory" in the course of an insured's efforts to advertise his goods, products or services.[72] However, this ISO dramatically changed the definition of "advertising injury." Among other things, the ISO defined "advertising injury" as, "[m]isappropriation of advertising ideas or style of doing business; or . . .[i]nfringement of copyright title or slogan."[73] The policy does not mention "unfair competition" or "piracy." Nor does it define "style of doing business" or infringement of title.[74] Moreover, the trademark infringement exclusion is conspicuously absent from the 1986 form.

Despite the semantic changes in the 1986 ISO form, many of the potential claims that could give rise to coverage in the form of unfair competition may also be covered under the misappropriation of style of doing business clause. According to a legal dictionary, "misappropriation" means "the taking and use of another's property for [the] sole purpose of capitalizing unfairly on the good will and reputation of property

1982) ("coverage can not be provided by the right hand and then be excluded by the left hand").

69. *CGL Reporter, supra* note 21, at II-35OB.

70. Gray v. Zurich Ins. Co., 419 P.2d 168, 174-76 (Cal. 1966).

71. Each policy exclusion should be measured against the canons of policy interpretation discussed above. *See supra* notes 13-19 and accompanying text.

72. *CGL Reporter, supra* note 21, at II-101I (ISO policy form CG 00 02 02 86).

73. *Id.* at II-101O.

74. Only one reported opinion has mentioned the "misappropriation of style of doing business" language, but that case did not attempt to define the phrase. John Deere Ins. Co. v. Shamrock Indus., Inc., 696 F. Supp. 434, 437 (D. Minn. 1988).

owner."[75] "Style," in its noun form, can mean "[a] form of words, phrase, or formula, by which a particular idea or thought is expressed,"[76] or "[a]ny distinguishing or qualifying title, appellation, or denomination."[77] "Business," among other things, means "[t]rade, commercial transactions or engagements."[78] Thus, a reasonable definition of "misappropriation of style of doing business" may be "the taking of another's title, appellation or denomination used to conduct trade or commercial transactions for the sole purpose of capitalizing on the good will and reputation of the owner."

Arguably, misappropriation of one's style of doing business may cover trademark, service mark, or trade name claims. It could also cover claims for misappropriation of trade secrets and interference with contractual relationships. Similarly, infringement of title arguably covers trademark, service mark and trade name infringement claims as well as claims for patent infringement and misappropriation of trade secrets.[79]

While these theories have not been judicially tested, they present reasonable definitions for undefined phrases. There may be other reasonable definitions as well. If so, the phrases "misappropriation of style of doing business" and "infringement of title" would be deemed ambiguous and construed in favor of the insured.[80] In any event, if an insured can show that it faces an actually or potentially covered claim it should be able to require the insurer to defend the claim.

III
Conclusion

Advertising injury clauses have been used with increasing success as a way for insureds to obtain defense costs for a variety of claims. A company that sells and advertises products should always evaluate whether claims brought against it are covered under the advertising injury clause. Specifically, claims involving interference with contractual relations, misrepresentation, unfair competition (in its broadest sense), patent infringement, trademark infringement, misappropriation of trade secrets, and infringement of title all may be covered under the CGL policy. Risk managers, recognizing that the canons of policy interpretation primarily favor the insured, should take the initiative to make sure their companies receive all the insurance protection to which they are entitled.

75. BLACK'S LAW DICTIONARY 998 (6th ed. 1990).
76. 16 THE OXFORD ENGLISH DICTIONARY 1009 (2d ed. 1989).
77. *Id.*
78. 2 THE OXFORD ENGLISH DICTIONARY 696 (2d ed. 1989).
79. *See supra* note 67.
80. Producers Dairy Delivery Co. v. Sentry Ins. Co., 718 P.2d 920, 924 (Cal. 1986).