

RECENT
DEVELOPMENTS
IN
INSURANCE LAW

ST. LOUIS

KURTIS B. REEG
BRENT W. BALDWIN
A.J. BRONSKY
MARK A. KINZIE
RONALD C. WILLENBROCK

Lorman Education Services

P.O. BOX 509
EAU CLAIRE, WI 54702-0509
PHONE 715/833-3940 • FAX 715/833-3944

**AN INSURANCE CONTRACT IS STILL A CONTRACT:
UNWARRANTED EXPANSION BEYOND ITS FOUR CORNERS**

BY

KURTIS B. REEG^o*

A. Personal Injury Coverage Under Comprehensive General Liability Policies.

I. Introduction.

During the 1980s and 1990s there has been an increase in the number of claims by governmental agencies and individuals against American businesses. This increase in actions against businesses includes emotional distress, sexual harassment, race discrimination and various environmental claims. Businesses, in turn, have attempted to pass these liabilities on to their insurance carriers. In order to find safe harbors of coverage, businesses have turned to their comprehensive general liability insurance (hereinafter "CGL") policies. Faced with the reality that such claims are often barred or not covered within standard CGL policies, policyholders, and more particularly attorneys representing the insureds, try to bootstrap a claim into the confines of the personal injury coverage within their CGL policies.

* Kurtis B. Reeg is a litigation partner at the St. Louis, Missouri, law firm of Gallop, Johnson & Neuman where he is the Chairman of the firm's Insurance Law Group. He is a coordinating counsel for a large group of insurance carriers and regularly represents carriers in insurance matters and coverage disputes which range from nationwide environmental and toxic tort claims to individual policyholder claims. This article represents the opinions of the individual author and does not necessarily represent the views, theories and philosophies of any insurance carrier or other clients represented by Mr. Reeg or Gallop, Johnson & Neuman. Mr. Reeg wishes to thank Joseph J. Porzenski (B.A., St. Louis University; St. Louis University School of Law Class of 1994; Summer Associate at Gallop, Johnson & Neuman) for his assistance in preparing this article.

This article covers the recent increase in insurance litigation regarding the scope of personal injury coverage. Part II of this article discusses the standard personal injury provisions within most comprehensive general insurance policies. Part III discusses a recent case law concerning the coverage for "wrongful entry or eviction, or other invasion of the right to private occupancy." Part IV discusses how policyholders are trying to establish coverage for environmental claims. Part V discusses the application of the pollution exclusion to personal injury coverage. Finally, Part VI asserts that the personal injury endorsement was never intended by the parties to include environmental claims, and asserts alternatively, that even if a claim is determined to be within the personal injury coverage, the standard pollution exclusion should be applicable to the personal injury provision and, therefore, bar coverage.

II. Standard Personal Injury Coverage.

Prior to 1966, the standard CGL policy only provided coverage for bodily injury and property damage. Beginning in 1966, separate coverage for personal injury was available to policyholders under the Insurance Services Office (ISO) Coverage "P," the predecessor to today's personal injury insuring agreements. In 1973, the insurance industry adopted a standard form CGL policy which included an endorsement known as Coverage P (hereinafter "Personal Injury Liability"). A standard form of a personal injury liability endorsement insuring agreement provides as follows:

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (hereinafter called "Personal Injury") sustained by any person or organization and arising out of one or more of the following offenses committed in the conduct of the named insured's business:

Group A -- false arrest, detention, or imprisonment, or malicious prosecution.

Group B -- the publication or utterance of libel, or slander, or other defamatory or disparaging material, or a publication or utterance in the violation of an individual's right of privacy

Group C -- wrongful entry or eviction or other invasion of a right of private occupancy

National Bureau of Casualty Underwriters, Standard General Liability Policy (1966). Typically, the personal injury coverage is followed by a set of exclusions. There are four such standard exclusions: first, liability assumed by the insured under any contract or agreement; second, injury arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any insured; third, injury arising out of any advertising, broadcasting or telecasting activities by or for the insured; and finally, injury sustained by any person who is an employee of any insured at the time of the offense causing the injury.

III. Coverage under "Group C" of the Personal Injury Liability Provision for Other than Environmental Claims.

Coverage for wrongful entry or eviction or other invasion of the right of private occupancy unquestionably includes possessory torts committed in the context of landlord-tenant relations.

Beltway Management Co. v. Lexington-Landmark Ins. Co., 746 F.Supp. 1145 (1990). However, recent litigation between policyholders and insurance carriers has focused on whether certain other actions come within the "Group C" coverage for the "wrongful entry or eviction, or other invasion of the right of private occupancy," and that is the focus of this article.

The only relatively consistent limitation is that most courts agree that Group C coverage must somehow still relate to an interest in real property. The Group C coverage of the enumerated torts listed in the personal injury provision is the only group which lists two specific torts followed by a general statement. The general statement, which has given rise to the increased insurance litigation, is the phrase "other invasion of a right of private occupancy." Since the above phrase was tacked on to the wrongful entry or eviction group of offenses, one court has held that it related to real property as being in the nature of the right to private occupancy and not the right of privacy. Fibreboard Corp. v. Hartford Acc. & Indemnity Co., 1993 W.L. 138707 (Cal.App. 1 Dist.) (holding that there were no allegations that could be classified as wrongful entry or eviction because there was no direct or indirect injury or physical intrusion by the insured upon plaintiff's land). See also Nicholas v. Great Am. Ins. Co., 169 Cal.App. 3d 766, 215 Cal. Rptr. 416 (1985) (holding that a claim of airway ^{piracy} ~~privacy~~ was not covered under personal injury provisions because "personal injury" relates to some interest in real property); Red Ball Leasing, Inc. v. Hartford Accident &

Indemnity Co., 915 F.2d 306 (7th Cir. 1990) (holding that no coverage existed for a suit alleging wrongful repossession of trucks because coverage is limited to claims relating to real property under personal injury provisions); Boston Housing Authority v. Atlanta Int'l. Ins. Co., 781 F.Supp. 80 (D. Mass. 1992) (holding that no coverage existed against alleged racial discriminatory housing practices because racial discrimination did not constitute an act of trespass and, therefore, could not be considered to be a wrongful eviction or entry or invasion of the right of private occupancy); Martin V. Brunzelle, 699 F.Supp. 167 (N.D. Ill. 1988) (holding that the insurance carrier was not obligated to defend against a discrimination claim brought against its insured); Hrabak v. Marquit, Inc., 798 F.Supp. 550 (W.B. Wisc. 1992) (holding that an insurance company was not obligated to defend its insured against a sexual harassment claim); Lindsey v. Admiral Ins. Co., 804 F.Supp. 47 (N.D. Cal. 1992) (same); Pleasure Driveway & Park Dist. v. Aetna Casualty & Surety Co., 400 N.E.2d 651 (Ill. 1980) (holding that no coverage existed under the personal injury liability provision for a claim of alleged monopoly and price fixing); Topeka Tent & Awning Co. v. Glenn Falls Ins. Co., 13 Kan. App.2d 553, 774 P.2d 984 (1989) (holding that no coverage existed under a personal injury liability provision for a claim of employment discrimination); Ledbetter v. Concord General Corp., 588 So.2d 115 (1991) (holding that no coverage existed under a personal injury liability provision for a suit alleging assault, battery, rape, and kidnapping because there was no wrongful entry

into the motel room where the events took place). In contrast, see Hartford Acc. & Indemnity Co. v. Krekeler, 491 F.2d 884, 886-87 (8th Cir. 1974) (holding that a battery committed in the plaintiff's residence was covered because the battery that caused the injuries was made possible by a trespass, which falls within the realm of coverage for "wrongful entry or eviction." 886-87.

In contrast, a federal district court held that an insurance company had to defend a claim brought by prospective tenants of an apartment building against the landlord for racial discrimination under the personal injury coverage. The court held that the policy language "invasion of the right of private occupancy" was vague and should be construed against the carrier. Id. at 493. In such, the court held that personal injury coverage for claims of race discrimination by potential tenants was within "the reasonable expectation of the insured." Id. Gardner v. Romano, 688 F.Supp. 489, 492 (E.D. Wis. 1988). The carrier unsuccessfully argued that no coverage existed because the plaintiff was not alleging any interference with a possessory right. Id. at 492.

IV. Policyholders Are Trying to Find Liability Coverage for Environmental Claims.

Environmental claims, by definition, involve real property and, therefore, meet the threshold requirement for potential coverage under Group C of the personal injury endorsement. Courts are split on the issue of whether the endorsement provides coverage for environmental claims. Courts which find coverage for environmental claims under the personal injury liability provision

determine that the phrase "other invasion of the right of private occupancy" necessarily includes the common law claims for nuisance and trespass or the courts otherwise determine that the term "other invasion of the right of private occupancy" is ambiguous, and that the ambiguity is to be resolved against the insurer.

Those courts which reject coverage under the endorsement reason that the personal injury coverage only applies to the defined risks of the personal injury provisions and coverage for claims of nuisance and trespass are denied because such claims are not enumerated within the personal injury liability provision. In addition, some of these courts reject coverage on a "trespass" theory, reasoning that a trespass requires an intentional entry on land and a typical environmental claim involves only negligent conduct. In addition, courts often reason that an actual interference with possessory rights to real property must exist in order for a claim to be brought under the personal injury liability provision. As such, coverage for environmental claims which only allege property damage and not an interference with a possessory right are not deemed to be covered within the personal injury liability provision.

The author believes that the better-reasoned argument is to deny coverage for environmental claims under the personal injury provision because such claims were never intended to be covered and that the coverage under the personal injury liability provision is strictly limited to liability for purposeful acts aimed at

disposition of real property by someone asserting an interest therein.

a. **Authorities Finding Coverage under the Provision "Wrongful Entry or Eviction, or Other Invasion of the Right of Private Occupancy" for Environmental Liability Alleging Trespass and Nuisance Claims.**

Policyholders argue that the provision "wrongful entry or eviction or other invasion of the right of private occupancy" encompasses trespass and nuisance claims, thereby providing liability coverage for environmental claims brought against them. Titan Holdings Syndicate, Inc. v. City of Keene, 898 F. 2d 265, 274 (1st Cir. 1990) (holding that environmental claims premised upon trespass or nuisance were covered because the policy defined personal injury as "wrongful entry or eviction or other invasion of the right of private occupancy"); Pipefitters Welfare Education Fund v. Westchester Fire, 976 F.2d 1037, 1041 (7th Cir. 1992) (holding that the insurance carrier was obligated to defend a pollution claim under the personal injury provision, under either Illinois or Missouri law, because unlawful entry was substantially similar to the trespass claimed); Hirschberg v. Lumbermens Mutual Casualty Company, 798 F. Supp. 600, 604-05 (N.D. Cal. 1992) (holding that the insured was entitled to a defense against a pollution claim based on nuisance and trespass claims because "[a]t a minimum, the term 'other invasion of the right of private occupancy' is ambiguous, and any ambiguity is to be resolved against the insurer"); City of Edgerton v. General Casualty Co. of Wisconsin, 493 N.W.2d 768, 780-81 (Wis.App. 1992) (allowing

coverage for a claim of underground contamination under the personal injury coverage based on private nuisance and negligent trespass theories); High Voltage Eng'g. Corp. v. Liberty Mutual Ins. Co., No. 90-00566 (Mass. Super. Ct., Jan. 24, 1992) (holding that pollution claims were covered under personal injury coverage provision); Lincoln Properties Limited v. CIGNA Ins. Co., No. 238274 (Calif. San Joaquin Super. Ct., March 3, 1993) (determining that a letter from the Regional Water Quality Control Board regarding groundwater contamination did give rise to a cause of action for trespass and nuisance which was covered under the personal injury provisions of the CGL policy); Depaco Incorporated v. Fireman's Fund Ins. Co., No. 90-0993 (W.D. Pa. May 22, 1991) (Magistrate's Recommendation) (stating that there existed a duty to defend the chemical dumping claim because the trespass and nuisance allegations were potentially covered under the personal injury provisions); Northrop Corp. v. American Motors Ins. Co., No. C 710571 (Cal. Los Angeles Super. Ct., April 8, 1992) (holding that coverage for pollution related damage under the personal injury coverage was effective from the time it spilled to the date of tender).

In Titan, a seminal case on this issue, the court construed differently ^{worded} ~~awarded~~ personal injury provisions to arrive at opposite results on the issue of coverage. The insured, the City of Keene, New Hampshire, was sued under the claims of trespass and nuisance alleging that the operation of a sewage treatment plant had unreasonably and substantially interfered with the plaintiffs'

quiet enjoyment of the homestead and had substantially deprived the plaintiffs of the use of the homestead. Titan, 898 F.2d at 267. The insured held two separate general liability policies with two independent insurance companies. Both insurance policies provided coverage for bodily injury, property damage, and personal injury. One provided personal injury coverage under the standard endorsement quoted above, which included a reference to "other invasion of the right of private occupancy." The other policy contained a variation of the standard form which did not include the clause.

Reversing a grant of summary judgment on behalf of the insurer which utilized the standard personal injury clause, the court held that under New Hampshire law the term "other invasion of the right of private occupancy" does not require allegations of physical invasion of the property. In light of the asserted ambiguity as to the meaning of the clause, the court held that for purposes of summary judgment, allegations of noxious odors, noise and light emitting from the insured's sewage plant stated a viable claim for coverage under the personal injury endorsement. Id. at 272-73. (However, the court also held that if upon development of the factual record it was determined that the parties did not intend to include pollution claims within the coverage, summary judgment might be appropriate.) Id.**

** The court affirmed summary judgment on behalf of the insurer which utilized a variation of the standard personal injury clause; that provision included coverage for personal injury caused by a "wrongful entry into, or eviction of a person from, a room,
(footnote continued on next page)

In Pipefitters, the insured was sued for the unlawful disposal of a transformer that contained PCBs. The insured sought coverage for the environmental claims under the personal injury liability provisions of the policy. Pipefitters, 976 F.2d at 1039. The insurer argued that an "other invasion of the right of private occupancy" required a specific intent, like an eviction, and therefore there was no coverage. Id. at 1040-41. The court, in finding coverage under both Missouri and Illinois law, stated that the term "wrongful entry" was unambiguous, but was substantially similar to the cause of action of trespass because a trespass under both Missouri and Illinois law can be based upon negligent entry upon land. Id. at 1041. Although the court accepted the applicability of the doctrine of ejusdem generis in construing the meaning of the clause, the doctrine did not limit the applicability of the endorsement to intentional acts of wrongful entry or trespass. The ambiguity would be construed against the insurance company, with the result that the environmental trespass claim

dwelling or premises that the person occupies." Id. at 271. The court held that the allegations of fumes, noise and light constituted neither a "wrongful entry" nor "eviction" from the property within the meaning of the personal injury clause. With respect to the "wrongful entry" reference, the court analogized a wrongful entry to the common law tort of trespass which the court viewed as requiring an allegation of intentional, as opposed to merely negligent, invasion of properties. Therefore, the allegations against the insured, being based on negligence, were therefore not covered. Id. at 272. With respect to the wrongful eviction aspect, the court held that that clause was applicable solely within the landlord-tenant relationship and, therefore, did not extend to claims of nuisance and pollution. Id.

against the insured could potentially fall within the personal injury provisions for wrongful injury. Id. at 1041-42.

Following the lead of the courts in Pipefitters and Titan, the court in both City of Edgerton v. General Casualty Co. and Hirschberg v. Lumbermens Mutual Casualty Co. found that the personal injury provision provided coverage for the insured's liability for environmental contamination as an "other invasion of the right of private occupancy." City of Edgerton, 493 N.W.2d at 780-81; Hirschberg 798 F.Supp. at 604.

These courts have found that coverage exists for environmental claims based upon trespass and nuisance theories under the personal injury liability provisions of CGL insurance policies. The courts have noted that a claim arising under "wrongful entry or eviction or other invasion of the right of private occupancy" does not mandate an actual interference with a possessory right and can be brought under both a nuisance and trespass claim. In addition, some courts have held that the phrase "wrongful entry or eviction or other invasion of a right of private occupancy" to be ambiguous and, therefore, construed against the carrier in finding coverage.

b. Authorities Rejecting Coverage for Environmental Claims Based Upon Nuisance or Trespass Theories under the Personal Injury Liability Provisions of a CGL Insurance Policy.

Other courts have held that the personal injury endorsements of CGL insurance policies do not cover nuisance or trespass claims. See, e.g., Gregory v. Tennessee Gas Pipeline Company, 948 F.2d 203 (5th Cir. 1991) (holding that coverage for wrongful entry by

polychlorinated biphenyls (PCBs) in cabinets was not afforded under the personal injury provision because no allegation was made that the pollution reached plaintiffs' land by intentional action of the insured and, therefore, coverage for wrongful entry did not apply); County of Columbia v. Continental Insurance Company, 1993 W.L. 104522 (N.Y.A.D. 3 Dept. April 8, 1993) (holding that no coverage existed under the personal injury provision for the environmental liability based upon a trespass and nuisance claim because the complaint did not allege that the acts were both purposeful and aimed at the disposition of real property by someone asserting an interest in the property); Fibreboard Corporation v. Hartford Accident & Indemnity Co., 1993 W.L. 138707 (Cal. App. 1 Dist., May 4, 1993) (holding that the personal injury endorsement did not cover nuisance-related actions because the underlying discreet offenses are not among the enumerated torts coming within the definition of personal injury and, in particular, do not constitute wrongful eviction, wrongful entry or invasion of privacy); Morton Thiokol Incorporated v. General Accident Insurance Company, No. C-3956-85 (N.J. Super. Ct., August 27, 1987) (holding the alleged trespasses were not covered by the personal injury endorsements); Outboard Marine Corporation v. Liberty Mutual Insurance Company,^{- but see} No. 86 MR 308 (Ill. Lake Co., Cir. Ct., May 17, 1989) (holding that ^{Outboard} ~~the~~ ^{Marine,} the personal injury clause was not applicable to the facts of a ^{Ill. S.Ct. 1992.} pollution case); Ludlow's Sand & Gravel Company v. General Accident Insurance Company, No. 87-CV 1239 (N.D.N.Y. May 16, 1991) (holding that personal injury coverage was not applicable to a CERCLA

claim); Interex Corporation v. Atlantic Mutual Insurance Company, No. 88-1380-J (D. Mass. June 15, 1992) (holding that there was no claim for injury by any owner of property adjacent to a hazardous waste site and, thus, there was no claim against the plaintiff within the scope of policies under the personal injury liability coverage); Ann McMillan Dev. Incorporated v. Illinois Union Insurance Company, No. 636225 (Cal. San Diego Co., Super. Ct., July 10, 1992) (holding that no coverage existed under the personal injury liability provision for the pollution claims); National Union Fire Insurance Company of Pittsburgh v. Rhone-Poulenc, Inc., No. 87C-SE-11 (Del. Super. Ct. May 19, 1993) (interference with the right of private occupancy was not ambiguous and the environmental claims grounded in nuisance and trespass theories were not covered under the personal injury liability provisions; however, such actions were applicable to a suit for property damage); Fireman's Fund Insurance Company v. ACC Chemical Company, Nos. CL-14219, CL-16034, (Iowa Dist. Ct. April 19, 1993) (denying coverage under a personal injury liability provision for an environmental claim because "[n]ormally a case for wrongful eviction requires that a tenant be interfered with in a fashion such that they are required to remove themselves or is otherwise forcibly or constructively removed from the premises"). See also Robert A. Zavin, Randolph P. Sinnott, LouCinda Laughlin, Blase S. Curet, & Evan A. Miller, The Limits of Coverage Under Personal Injury Endorsements for Environmental Claims: An Insurer's Perspective, 4 Mealey's Ins. Lit. Rep. 18, 25 (July 31, 1990). Victor C. Harwood, III, The

Drafting History of Personal Injury Liability Provisions and Environmental Coverage Claims, 7 Mealey's Ins. Lit. Rep. 16 (Feb 23, 1993).

In County of Columbia, the insured was sued by a neighboring landowner for contamination from land which was used by the insured as a refuse for solid waste disposal. The complaint alleged that the insured's conduct constituted a continuing nuisance and a continuing trespass onto plaintiff's land. The New York Appellate Court held for the insurance carrier in denying coverage under the personal injury endorsement, stating that "[a]n action for environmental damage to real property. . . could not possibly constitute a "wrongful entry or eviction or other invasion of the right of private occupancy" so as to come within the personal liability coverage of [the insured's] policies." Id. Slip Op. at 3. The Court reasoned that in order to base a claim under the phrase "wrongful entry or eviction or other invasion of the right of private occupancy," the alleged claim must arise from the purposeful acts which are aimed at the disposition of real property by someone asserting an interest therein. Id. Furthermore, the Court noted that a valid claim under the above phrase must involve an actual interference with possessory rights to real property. Id. Therefore, the claims of a continuing nuisance or trespass, which do not interfere with one's possessory rights, were held not to be viable claims under the personal injury liability provision of a CGL insurance policy. Id.

Similarly, the court in Fibreboard Corp. held that environmental liability, which was grounded in both a trespass and nuisance claim, was not among the enumerated torts coming within the definition of personal injury, and those claims did not constitute a wrongful eviction, wrongful entry or any other invasion of the right of private occupancy. Fibreboard Corp., 1993 WL 138707, Slip Op. at 15. In Fibreboard, the insured manufactured and sold products containing the pollutant asbestos. The insured was sued for alleged contamination through the release and dispersion of microscopic asbestos fibers, filaments and dust throughout the atmosphere of the surrounding properties. The insured sought coverage from its insurance carrier under the personal injury provision of its CGL insurance policy.

The California Appellate Court held that while the contamination by the asbestos fibers and filaments was not a trespass by the insured under the term wrongful entry or invasion upon the land, such conduct could hold the insured liable under a variety of products liability theories. Id. Slip Op. at 11. However, the court noted that every wrongful entry upon land in the occupation or possession of the owner would constitute a trespass, but in the case at hand, the contamination through the release and dispersion of microscopic asbestos fibers was not a trespass because there was "no direct or indirect entry or intrusion by the insured upon the plaintiffs' lands." Id.

Likewise, the court held that the personal injury endorsement did not cover the nuisance-related actions. Id. Slip Op. at 13.

The court held that the terms "other invasion of an individual's right of privacy" was intended by the parties to mean something akin to the "right of private occupancy" instead of the "right of privacy." Id. Moreover, the Court noted that since the phrase was added to the wrongful entry or eviction category of offenses, it was more in line with the right of private occupancy. Id. Accordingly, the court stated that it was clear that the term "other invasion of an individual's right of privacy" had a common thread with aggressive or unwarranted intrusions or ousters. Id. Slip Op. at 14. The court finally reasoned that "the offending behavior which created the public health hazard (public nuisance) allegations) or interfered with [insured's] use and enjoyment of their property, (private nuisance claims) invariably constituted the litany of products-based torts. . ." and were not covered within the personal injury coverage provision of the insured's insurance policy. Id. Slip Op. at 15.

In addition, the court in National Union Fire Insurance Co. of Pittsburgh held that environmental claims grounded in nuisance and trespass theories simply did not involve the possession, or right to occupancy, of any real property. Id. Slip Op. at 4-7. In National Union Fire, the insured was sued for ground water pollution resulting from the insured's disposition of industrial waste at a landfill. The court, in denying coverage, noted that the actions based on trespass and nuisance were not among the enumerated offenses listed in the personal injury provisions and they did relate to an interference with occupancy rights. Id. Slip

Op. at 8. The court also noted that the phrase "interference with the right of private occupancy" was unambiguous, and, therefore, would not be construed to encompass a nuisance or trespass claim. Id. Slip Op. at 9.

Likewise, the court stated that to make trespass or a nuisance claim equivalent to an interference with the right of private occupancy would unreasonably extend the intended coverage of the insurance policy. Id. Slip Op. at 10. Moreover, the court noted that the extension of the personal injury coverage, which would not be subjected to the "expected and intended" requirement of property damage claims, would effectively nullify "the express intent of the policies to limit recovery for property damage to instances where that damage was neither expected or intended by the insured." Id. Slip Op. at 11. Such a reading would allow insureds to be indemnified for environmental liability even if they intentionally disposed of hazardous waste onto their neighbor's property.

c. The Better Reasoned Approach is to Deny All Environmental Claims Which are Brought Under the Personal Injury Coverage Provision.

Clearly, personal injury endorsements do not specifically include the offenses of trespass and nuisance. It is the ingenuity of policyholders and their counsel, rather than the language of the personal injury coverage itself, which allegedly brings trespass and nuisance actions within the confines of coverage. If the policyholders and insurance carriers had intended for claims of nuisance and trespass to be covered within the personal injury provision, then those offenses would have been specifically listed

within the personal injury liability provisions of the policy. But see Pasich, Insurance Coverage for Environmental Claims under Personal Injury Provisions, 7 Mealey's Litigation Rep.: Ins., 18 (March 9, 1993) (arguing that had the insurance carriers intended that personal injury provisions not apply to claims of trespass or nuisance or in the context of pollution claims, they easily could have drafted language excluding those specific claims).

In addition, the offenses of trespass and nuisance are entirely separate independent claims from "wrongful entry or eviction or other invasion of the right of private occupancy." "Wrongful entry or eviction or other invasion of the right of private occupancy" require that someone (e.g. a landlord) who is asserting a valid interest in real property intentionally act to depose another of real property. County of Columbia, Slip op. at 3. See Fireman's Fund Insurance Company, Nos. CL-14219, CL-16034, Slip op. at 5. But see Town of Goshen v. Grange Mutual Insurance Company, 120 N.H. 915, 424 A.2d 822, 824 (1990) (stating that in order for a claim to come within coverage for liability arising from "other invasions of the right of private occupancy," the claim need not allege physical invasion of the property).

1. Trespass not Included Within Personal Injury Liability Coverage.

Any invasion of another's property which is uninvited, intentional and interferes with the exclusive possession of that property constitutes a trespass. Prosser & Keaton, Torts (5th Ed. 1984). Thus, a trespass must both be intentional and actually

interfere with possession of property. Moulton v. Gorton Papers Company, 289 A.2d 68, 72 (N.H. 1972); County of Columbia v. Continental Insurance Company, 1993 WL 104522, Slip op. at 3. The torts of wrongful entry, eviction and invasion of private occupancy all have to do with the actual interference with the possession of real property. See Fibreboard Corp., 1993 W.L. 138707, Slip op. at 12; County of Columbia v. Continental Insurance Company, 1993 WL 104522, Slip op. at 3.

A trespass typically occurs only when there is intentional invasion of property by tangible matter that actually interferes with possession. Therefore, some argue that environmental claims which involve an invasion by intangible matter (such as light, noise, motors, vibrations or gasses across or onto the land of another) should not be deemed to constitute a trespass because of their intangible nature and because such conduct was unintended. See Prosser & Keaton, supra.

2. The Personal Endorsement Does Not Cover Nuisance-Related Actions.

Many policyholders try to force environmental claims within the "other invasion of the right of private occupancy" by arguing that environmental claims fall within the scope of nuisance. If a policyholder projects or causes to float intangible matters such as light, noise, odors, vibrations or gasses across or onto the land of another, such conduct can only create a nuisance action. A nuisance action is not an actual interference with the right to occupy the property, but is the interference with the use and

enjoyment of the property. See, Prosser & Keaton, Supra at 630 (the interference must be substantial and unreasonable, which is determined by balancing several factors, such as the utility of the activity, the degree of harm, the nature of defendant's use of his property, the nature of the plaintiff's use of her property, the nature of the locality, and the priority in time).

A nuisance action can be either a private nuisance, which must affect one or only a few individuals, or a public nuisance, which interferes with the comfortable enjoyment of life and property of every person in the area. See, Zavin, supra at 28. In order for a cause of action to come within the realm of coverage under "wrongful entry or eviction or other invasion of the right of private occupancy," the action must entail actual interference with possessory rights to real property. See County of Columbia, Slip op. at 3. Thus, a nuisance action, either private or public, does not come within the realm of coverage because a nuisance action does not require that the right of occupancy or possession ~~be~~ denied. See Fibreboard; County of Columbia (both cases finding that the personal injury endorsement did not cover nuisance-related actions).

The better argument is that under the plain meaning of the policy language, "wrongful entry or eviction or other invasion of the right of private occupancy" should not provide coverage for a public nuisance claim. See, Zavin, supra at 28. But see Pasich at 25-7. For example, in Morton Thiokol Inc. v. General Accident Ins., Co., No. C-3956-85 (N.J. Super. Ct. Aug. 27, 1987), the

insured was found liable for causing a public nuisance by contaminating the waters of a nearby creek. The insured sought coverage under its CGL policy for personal injury coverage. Id. The court granted the insurer's summary judgment motion and held that no public nuisance could be maintained under the personal injury coverage because "the waters of Barry's Creek are public property." Id. slip op. at 4. Thus, there cannot be an invasion of "private occupancy" as required by the terms of the personal injury provision. Id. Environmental claims which are grounded in the public nuisance cause of action, would, therefore, not be covered pursuant to the plain reading of the personal endorsement.

V. The Application of Exclusions to the Personal Injury

By arguing that certain actions should come within the personal injury provisions of their CGL policies, policyholders try to avoid specific exclusions enumerated throughout their CGL policies. They contend that since personal injury coverage is separate and distinct from both bodily injury and property damage, the exclusions which apply to bodily injury and property damage do not apply to personal injury coverage. To support this line of reasoning, policyholders argue that the structure of the insurance coverage provisions within and throughout the policy establishes that each provision is subject only to those exclusions immediately following the line of coverage. See Pasich, supra. However, courts have held that in construing the personal injury coverage, such coverage must be construed in respect to the context of the entire policy. See County of Columbia, 1993 WL 104522, Slip op. at

3; See also Thompson-Starrett Company v. American Mutual Liability Insurance Company, 276 N.Y. 266, 11 N.E.2d 905, 906 (1937).

In 1970, the General Liability Governing Committee of the ISO drafted a new exclusion known as the Pollution Exclusion. This standard pollution exclusion barred from coverage any action for damages resulting from pollution, unless the events giving rise to the damages were both sudden and accidental. Within the standard pollution exclusion the terms "bodily injury" and "property damage" are explicitly mentioned but the term "personal injury" is usually not. Insureds argue that the drafting committee intentionally left out the term "personal injury" when drafting the language of the pollution exclusion. See Pasich, supra. The more reasonable conclusion is that the drafting committee omitted reference to "personal injury" liability in the pollution exclusion because they did not anticipate the advent of an argument that personal injury coverage would extend to environmental claims and, therefore, be other than "property damage" or "bodily injury."

There is a split of authority among the courts on whether pollution exclusions should apply to personal injury endorsements where the pollution exclusion explicitly only applies to "bodily injury and property damage." The author believes that the better reasoned approach is that even if a court holds that an environmental claim falls within the realm of coverage under the personal injury endorsement, the insurer still may deny coverage by the application of the pollution exclusion in the CGL policy. See, e.g., Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203, 209 (5th

Cir. 1991); American Universal Insurance Company v. Whitewood Custom Treaters, Inc., 707 F.Supp. 1140, 1144 (W.D.S.D. 1989); Morton International, Inc. v. Aetna Casualty & Surety Company, 1991 W.L. 201651 (Ohio App. Dist., Oct. 2, 1991). But see, Titan Holdings Syndicate, Inc., 898 F.2d at 270 (holding that pollution exclusion does not apply to coverage for personal injury); City of Edgerton v. General Casualty Co. of Wisconsin, 493 N.W.2d 768, 781 (Wis. App. Ct. 1992) (holding that the pollution exclusion did not apply to the personal injury liability coverage provision because, by its terms, it only explicitly applied to bodily injury and property damage); Pipefitters Welfare Education Fund v. Westchester Fire Insurance Company, 976 F.2d at 1042 (holding that the pollution exclusion, which explicitly provided that bodily injury, property damage, or personal injury be excluded, applied to personal injury claims, but the pollution exclusion, which only provided that bodily injury and property damage be excluded, did not apply to personal injury claims); Napco, Inc. v. Firemen's Funds Insurance Company, No. 90-0993 (W.D. Pa. May 22, 1991); Lincoln Properties Ltd. v. CIGNA Insurance Co., No. 238274 (Cal. San. Joaquin S. Ct., March 3, 1993).

By barring any application of the pollution exclusion to personal injury coverage, policyholders are allowed to bootstrap themselves into coverage which is clearly barred under bodily injury and property damage. See Gregory, 948 F.2d at 209; American Universal Insurance, 707 F. Supp. at 1147 (noting that public policy prohibits polluters from spreading risk of loss through the

instrument of liability insurance) (quoting Niagara CY. v. Utica Mutual Co., 427 N.Y.S.2d 171 (1980)).

Based upon some current court decisions, pollution exclusions will only apply to personal injury coverage when they so explicitly provide within the terms of the pollution exclusion. However, other courts still see the blatant problem with such reasoning in that by allowing coverage for pollution damage under personal injury endorsements, policyholders are allowed to circumvent the terms of their insurance policies and find coverage for causes of action which are specifically excluded from their policies. In addition, policyholders which hold insurance policies containing the pollution exclusion pay premiums based upon the insurance carrier's understanding that claims for pollution damage will not be insured, thereby allowing for the premiums to be assessed at a lower rate.

VI. Conclusion

The personal injury endorsement adopted by the insurance industry was intended to provide coverage for the enumerated torts listed within the endorsement. Recently, policyholders have tried to bring environmental claims within the realm of coverage under the phrase "wrongful entry or eviction or other evasion of the right of private occupancy." Some courts have allowed such claims; other courts, and a recent trend among state appellate and trial courts, have denied such claims under the personal injury provision.

The phrase "wrongful entry or eviction or other invasion of the right of private occupancy" was principally designed and intended to cover damages arising out of landlord and tenant relationship. Policyholders have tried to create coverage by arguing that the actions for trespass and nuisance come within the personal injury endorsement. However, recent courts have begun to deny coverage because such actions are not found within the realm of the personal injury liability coverage.

Finally, a number of courts have held that the pollution exclusion listed in the standard CGL policy applies equally to the personal injury provisions because such a construction of the endorsement must be construed and read with the entire contract. Courts that are prepared to enforce the straightforward insurance contract terms of the CGL policy will reject coverage under personal injury provision for environmental claims and carry out the true intentions of both the insurance carriers and the policyholders.

B. MISSING POLICIES: Trying to Prove the Existence and Material Terms of Coverage

I. Introduction

Recently there has been increased litigation over missing CGL policies, primarily because of the evolution of coverage and trigger theories placing the starting point of liability back into earlier years. Many courts in the United States have found companies liable for bodily injury or property damage that occurred over an extended period of years, which in turn has triggered coverage under CGL policies which were in effect during the dates of liability. In turn, many policyholders who have older CGL policies, which are either lost or forgotten, are trying to prove the existence of the missing policy because they are potential gold mines for the policyholder. For example, many older policies were not written with aggregate limits of liability, the policy may have had small deductibles, or the policy may not have contained a pollution exclusion clause.

Policyholders and insurance carriers did not anticipate the evolution of coverage theories; therefore, most insurance companies and policyholders did not retain their insurance policies past short document retention time schedules. The increase in liability coverage by courts has led to the increased litigation over "missing policies," with the policyholders trying to establish the existence and material terms of coverage by using secondary evidence.

This article discusses how policyholders try to locate and use secondary evidence to prove the existence and material terms of

missing CGL policies. In addition, this article will focus on the evidentiary rules surrounding the proof of the existence and material terms of a missing policy from secondary evidence.

II. Where to Search and What to Use as Secondary Evidence

If both the policyholder and insurance carrier have searched their files and are unable to locate the policy in question, then the burden is upon the policyholder to prove the existence and material terms of the policy in order to obtain coverage. The original policy itself will always be the best evidence to prove coverage existed. Even though an original cannot be found, a copy of the original will usually be satisfactory to prove the existence of coverage. However, in most missing policy litigation, the original and any copies cannot be obtained. Therefore, the policyholder must resort to the use of secondary evidence to prove the existence and the material terms of coverage.

There are many different types of secondary evidence which have been utilized in efforts to prove the existence and material terms of the insurance policy. The list includes: binders, partial policy wording; endorsements; insurance applications; cover notes; declaration pages with reference to earlier policies; letters regarding policy renewals; certificates of insurance; letters between the policyholder and its insurance brokers; records of loss experiences; records of claims made under the policies; significant corporate documents, such as annual reports and minutes of directors meetings; accounting records, including ledgers and canceled checks, showing premium payments; contracts or agreements

that include proof of insurance; and proof of insurance retained in government agency files. In addition, the past recollection of both present and former employees, brokers, attorneys, or the insurance carrier's employees who were familiar with the alleged missing policies, can be extremely helpful in discovering additional secondary evidence.

The search for secondary evidence to prove the existence of coverage should begin with the internal corporate records of the policyholder. In general, the search should encompass at least all of the following avenues: the insurance department files; the corporate treasury records; the corporate legal records; the general corporate files; the corporate accounting files; and all audit files. In addition, the oral testimony of every person who had any contact or knowledge of such policies should be taken. The oral testimony usually helps to identify new sources of insurance related documents or leads to establishing the existence and material terms of coverage.

In addition to the internal search, the policyholder should also make a diligent search of external sources. The list of external areas are as follows: the present and former broker's files; the insurance carrier's files; the London insurance market for old "placing slips" made by London brokers for excess liability insurance; any present and former insurance consultant's files; governmental agency's files that require proof of insurance; present and former outside counsel files; and the files of any third parties who required the proof of insurance prior to engaging

in business. The policyholder should interview and, if need be, depose all outside parties who may have knowledge of or information leading to the discovery of additional secondary evidence to prove the existence and material terms of the missing policy.

After the policyholder has made its diligent search of all internal and external sources, it should bring together all evidence and try to reconstruct the missing policy and its material terms. The policyholder must document its search for the original policy and all relevant secondary evidence because showing that a reasonable and diligent search was made is a condition precedent to admitting secondary evidence of the missing policy in a court of law.

III. Proving the Existence and Material Terms of Missing Policies

The admissibility of the secondary evidence, which was discovered in the policyholder's diligent search, will depend upon the policyholder's ability to satisfy: (1) the best evidence rule; (2) the burden of proof and standard of proof; and (3) authenticating the evidence and satisfying the hearsay rule.

1. The Best Evidence Rule

Almost every jurisdiction has a best evidence rule which tracks Federal Rule of Evidence 1002, which provides: "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by act of Congress." Fed. R. Evid. 1002. However, Fed. R. Evid. 1004, the exception to the best evidence rule, allows the admissibility of secondary evidence to

prove the context of a writing if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith" Fed. R. Evid. 1004(1). See also Fed. R. Evid. 1003 (allowing the admissibility of a duplicate or copy to the same extent as the original unless a question is raised to the authenticity of the original or under the circumstances it would be unfair to admit the duplicate instead of the original).

In order for a policyholder to have secondary evidence of coverage admitted, the policyholder has the burden of proving that the original insurance policy is missing and that it was lost or destroyed without bad faith. Bituminous Casualty Corporation v. Vacuum Tanks Incorporated, No. 91-2709 (U.S. Ct. App., 5th Cir. October 22, 1992); Burroughs Wellcome Company v. Commercial Union Insurance Company, 632 F.Supp. 1213 (S.D.N.Y. 1986); Seiler v. Lucasfilm Ltd., 613 F.Supp. 1253 (N.D.Cal. 1984); Sylvania Electric Products, Inc. v. Flanagan, 352 F.2d 1005 (1st Cir. 1965); Walsh v. St. Louis National Baseball Club, 822 S.W.2d 559 (Mo. Ct. App. 1992). See generally 83 A.L.R. Fed. 554 § 7 (1987). The purpose of the best evidence rule is to allow evidence in lieu of the original writing when needed and to keep out secondary evidence when its admission would be contrary to the furtherance of justice. See Seiler at 1261.

In order for the policyholder to satisfy its burden under Fed. R. Evid. 1004, it must be shown that a reasonable and diligent search has been made for the original without success. See U.S. v. McGaughey, 977 F.2d 1067 (7th Cir. 1992); Sylvania; Bituminous.

However, where the missing original documents are the very foundation of the claim asserted, the court may apply a more restricted standard than where the writings are only collaterally involved. See Sylvania, 352 F.2d at 1008 (the more central the document is, the higher the burden of proof); Seiler v. Lucasfilm, 613 F.Supp. at 1261 (applying the "more probable than not" standard where the document was central to the claim and was lost under suspicious circumstances). Even if the destruction of the original document was intentional or negligent on the part of the policyholder, the court will allow such secondary evidence as long as there was no bad faith in the policyholder's actions. See Sylvania; Seiler.

There is no set rule that determines the sufficiency of the evidence which is offered to show that a reasonable or diligent search has been made by the policyholder. Each case is governed on an ad hoc basis taking into account the totality of the circumstances. See Burroughs; Sylvania. Thus, conducting an exhaustive search will probably be deemed sufficient to lay the proper foundation for the admission of secondary evidence. The question of whether the policyholder has met this burden is a preliminary question of law for the court. See, e.g., United States v. Gerhart, 538 F.2d 807, 809 (8th Cir. 1976); Seiler v. Lucasfilm, 613 F.Supp. at 1261.

2. Burden of Proof

After the policyholder has established that a reasonable and diligent search has been made for the missing policy, and that the

policy was lost or destroyed without bad faith, secondary evidence regarding the existence and material terms of the policy is admissible. Remington Arms Co. v. Liberty Mut. Ins. Co., 89-420-JLL (D. Del. December 30, 1992); see 21 J. Appleman, Insurance Law and Practice, § 12094 (Rev. Ed. 1981). In most states, the policyholder has the burden of proving that a loss is within an insurance policy by proving the existence, execution, and material terms of the insurance policy. See, e.g., Fibreboard Corporation v. Commercial Union Insurance Company, No. 844903 (Calif. Super. Ct., San Francisco Co., April 1, 1992) (holding that an insured had to prove the following: the terms of the policy; that it was an insured party; the period of the policy; that the policy was for property damage; the amount of coverage provided for each occurrence; and that the policy provided for defense coverage); Milton Chortkoff v. Hartford Accident and Indemnity Company, No. C758253, (Calif. Super. Ct., Los Angeles Co., March 6, 1992); Remington Arms Company v. Liberty Mutual Insurance Company, No. 89-420-JLL (D. Del., December 30, 1992); Boyce Thompson Institute v. Insurance Company of North America, 751 F.Supp. 1137 (S.D.N.Y. 1990); U.S. Fidelity and Guaranty Company v. Thomas Solvent Company, 683 F.Supp. 1139 (W.D. Mich. 1988); Burroughs Wellcome Company v. Commercial Union Insurance Company, 632 F.Supp. 1213 (S.D.N.Y. 1986). See also Martin v. Prier Brass Manufacturing Company, 710 S.W.2d 466 (Mo. Ct. App. 1986). The insurance carrier, however, has the burden of proving the existence and material terms of any exclusions or limitations relied upon by the

insurance carrier. See Cooley Incorporated v. Aetna Casualty Insurance Company, No. 90-00060 (Mass. Super. Ct. Bristol Co., February 17, 1993); Suburban Construction Company Incorporated v. Century Insurance Company, No. 90-379-N (D. N.H., January 4, 1993); Continental Casualty Company v. St. Clair Rubber Company, No. 2:89-CB-73768 DT (E.D. Mich., May 18, 1992); Fibreboard Corporation v. Commercial Union Insurance Company; Burroughs, 632 F.Supp. at 1223; Emons Industries v. Liberty Mutual Fire Insurance Company, 545 F.Supp. 185 (1982); Martin v. Prier Brass Manufacturing Company, 710 S.W.2d at 470.

It is sometimes unclear to the court whether a provision of an insurance policy is a material term of coverage or of an exclusion or limitation. This is a very important and critical decision to be made by the court, because the determination of the provision will dictate who bears the burden of proving whether the provision exists. For example, it is unclear whether notice of loss and policy limitation provisions are terms of coverage or limitation. See, e.g., Emons, 545 F.Supp. at 189 (stating that limitations on liability "may arguably be considered . . . an exclusion"). See also, T. Newman & R. Corsi, Litigation Over Lost or Destroyed Policies, Insurance, Excess and Reinsurance Coverage Disputes 1988, 343 PLI/Lit. 383 (1988) (discussing whether the policyholder should have the burden of proving whether product liability coverage exists or whether the insurance carrier should have the burden of proving that product liability is excluded under a CGL policy).

3. Standard of Proof

There appears to be a split of authority as to whether the policyholder must prove the policies' existence and material terms by a preponderance of the evidence or by clear and convincing evidence. The majority of states require the policyholder to prove the existence, execution, delivery and material terms by clear and convincing evidence. Voice Thompson Institute v. Insurance Company of North America, 751 F.Supp. 1137, 1140 (S.D.N.Y. 1990); Emons Industries v. Liberty Mutual Fire Insurance Company, 545 F.Supp. 185, 188 (S.D.N.Y. 1982); Whitenton v. Whitenton, 659 S.W.2d 542, 547 (Mo. Ct. App. 1983) (holding that where the Statute of Frauds requires a contract to be in writing and the written document has been lost, secondary evidence as to the provisions of the written document must be clear and convincing). Still, a minority of courts apply a "preponderance of the evidence" standard. See, e.g., Remington (holding that the appropriate standard of proof is a preponderance of the evidence because of the inherent safeguard of veracity of the typical evidence offered in missing policy litigation); Turner v. Ewing, 255 La. 659, 232 So.2d 468 (1970); see generally Mapco Alaska Petroleum, Inc. v. Central Nat'l Ins. Co., 784 F.Supp. 1454 (D.Alaska 1991); Mission Ins. Co. v. General Steel & Wire Co., No. C. 532184, slip op. at 2 (Cal. Super. Ct., Feb. 10, 1992).

4. Degree of Proof Required

The degree of proof required to establish the contents of a lost policy is an issue upon which the policyholders and insurance carriers automatically disagree. The policyholders would prefer only to be required to establish the general terms of a missing policy, while insurance carriers demand a verbatim record of all the terms of the missing policy. Courts which have ruled on this issue usually require something between the two extremes. For example, in Fiberboard Corporation v. Commercial Union Insurance Company, a California court held that the policyholder had to prove the existence and material terms of the missing policy which included proving that it was an insured party, that the period of the insurance policy was for property damage, the amount of coverage provided for each occurrence, and that the policy provided for defense coverage.

In addition, a California Superior Court Judge granted two insurance carriers' motions for judgment notwithstanding a jury verdict on the question of policy terms. Milton Chortkoff v. Hartford Accidental & Indemnity Company, No. C-758253 (Calif. Super. Ct., Los Angeles Co., March 6, 1992). In Milton, the court held that the jury verdict for the policyholder was not supported by substantial evidence of the essential terms (not all) of the missing policy "in a meaningful way, to give effect to the mutual intentions of the parties to the alleged contract." Id. slip op. at 3. The policyholder should have to establish at a minimum: the identity of the insurance carrier; the identity of the insureds

under the missing policy; the policy period; the subject matter of the policy, including all material terms; and the amount of coverage allowed per occurrence.

The policyholder may prove the existence and material terms of the missing policy by any kind of secondary evidence after it has established that the original policy has been lost or destroyed without bad faith. Burroughs Wellcome Company v. Commercial Union Insurance Company, 632 F.Supp. at 1223. In turn, generally, there is no best evidence rule for secondary evidence which is used to establish the existence and material terms of a missing policy.

a. Examples of Secondary Evidence Used to Prove the Existence of the Missing Policy.

Numerous courts have found that partial policies and policies issued in years prior and subsequent to the term of a missing policy can be used to establish the existence and material terms of the missing policy. See, e.g., Remington Arms Company v. Liberty Mutual Insurance Company, No. 89-420-JLL (D. Del., December 30, 1982) (denying an insurance carrier's motion for summary judgment because the policyholder established that a material issue of fact was present, by introducing sample policies, policies from one year prior, and policies from one year subsequent to the missing policy, and other additional evidence); Burroughs, 632 F.Supp. at 1222-24 (finding copies of policies from prior and subsequent years and endorsements, together with other evidence, to be very persuasive in proving the existence of the missing policy); Emons, 545 F.Supp. 185 (stating that the provision for product liability coverage and subsequent policies tended to suggest that the missing policies

also contained the products liability coverage). But see Mission Insurance Company v. General Steel and Wire Company Incorporated, No. C-532-184 (Calif. Super. Ct., Los Angeles Co., February 1, 1992) (dismissing the insurance carrier because the insured was unable to prove the existence or material terms of any missing policy by the introduction of the insured's business practice to carry CGL coverage and evidence of such coverage before and after the disputed missing policy).

In addition, specimens of standard policies that the insurance carrier used during the relevant time periods can also be used as secondary evidence to establish the existence and material terms of the missing policy. However, the specimen alone is insufficient to prove the existence and material terms of coverage because numerous other terms and endorsements may have been part of the insurance policy. See, e.g., UNR Indus. Incorporated v. Continental Insurance Company, 682 F.Supp. 1434, 1442-43 (N.D. Ill. 1988). The specimens of standard policies are more probative when used in conjunction with other, more specific evidence of the existence and material terms of the missing policy. See Remington Arms Company v. Liberty Mutual Insurance Company, No. 89-420-JLL (D. Del., December 30, 1992) (holding that the insured established that a material issue of fact existed as to the renewal of a policy through the introduction of business records, specimens of standard policies, bookend policies to the one in question, depositions of carrier employees on the policy and the time frames thereof, and

insured's internal documents and records reflecting premium and dividend payments from the missing policies in question).

Other documents relating to the policyholder's insurance, which are obtained from brokers, carriers and insurance consultants, have also been deemed persuasive in proving the existence and material terms of the missing policy. See, e.g., Remington; Cooley Incorporation v. Aetna Casualty Insurance Company, No. 90-00060 (Mass. Super. Ct., Feb. 17, 1993) (denying the insurance carrier's motion for summary judgment on missing policies because the policyholder adequately established that secondary evidence of coverage would be forthcoming at trial via letters from former insurance agents and by documents from excess carriers of primary coverage); Underwriters Life Insurance Company v. Bornemann, 141 S.W.2d 1005 (Tex. Civ. App. 1940) (correspondence between insurer and insured); Abex, 790 F.2d at 130 (copies of policies and insurance broker files); Burroughs, 632 F.Supp. at 1222-24 (letters discussing renewal of coverage and product liability claims under the alleged missing policies, board of directors' minutes discussing decisions to purchase coverage, and survey of product liability history prepared by an insurance broker); Emons, 545 F.Supp. at 187 (loss prevention survey report concerning the increase in insurance coverage).

Similarly, the testimony from third parties, such as the policyholder's employees, carrier's employees, insurance brokers, or insurance agents, can be useful in proving the existence and material terms of a missing policy. In Remington, for example, the

depositions of the insurance carrier's employees on the terms and periods of policies was deemed to be relevant in the court's decision that a material issue of fact existed, thereby denying the insurance carrier's motion for summary judgment. See Emons, 545 F.Supp. at 187-88 (finding that the former president's testimony that the company never had less than \$150,000 in product liability coverage was key in defeating the insurance carrier's motion for summary judgment by establishing that a material issue of fact existed).

Likewise, the proof of premium payments, the calculation of premium payments, or dividends received on the missing policy have been found to be relevant in determining whether coverage existed. In Remington, part of the evidence which defeated the insurer's motion for summary judgment included internal documents and records reflecting premium and dividend payments from the missing policies. See Remington Arms Company v. Liberty Mutual Insurance Company; see also Littrall v. Indemnity Insurance Company of North America, 300 F.2d 340 (7th Cir. 1962), cert. denied, 370 U.S. 919 (1962); UNR Indus., 682 F.Supp. at 1443. The evidence of premium payments can establish that coverage actually existed, and in turn, higher premium payments may infer that the policyholder had different levels or types of insurance coverage.

In addition, proof of business customs or practices may be relevant in proving the existence of the missing policy or exclusions within the missing policy. In Continental, a Michigan Federal District Court was persuaded that a pollution exclusion

existed within a missing policy by the production of evidence from the insurance carrier which included (1) documents that the standard pollution exclusion endorsement was approved by the state insurance commission, (2) evidence that the endorsement was mandated by the home office on all general liability policies, (3) an affidavit of the former manager that the policy would not have been approved if no endorsement for pollution exclusion was attached, and (4) evidence that no deviation from the corporate-wide requirement was ever approved. Continental Casualty Company v. St. Clair Rubber Company, No. 2:89-CV-73768 DT (E.D. Mich., May 18, 1992).

5. Other Evidentiary Requirements for the Admission of Secondary Evidence.

Even if the policyholder establishes that the original policy has been lost or destroyed without bad faith and the policyholder has made a reasonable and diligent search for the missing policy, the policyholder must still satisfy general evidentiary requirements to get secondary evidence admitted into evidence. The three most relevant and common evidentiary requirements are as follows: (1) establishing the existence, execution and genuineness of the missing original policy; (2) establishing the authenticity of the secondary evidence; and (3) coming within the requirements of an exception to the hearsay rule since such evidence will be offered to prove the truth of the matter asserted.

Before the policyholder can introduce secondary evidence to prove the existence and material terms of the missing policy, it must prove the existence, execution and genuineness of the original

missing policy by direct, circumstantial, or parole evidence. See, e.g., Fed. R. Evid. 901; McCormick on Evidence, § 218-28 (3rd ed. 1984). In other words, the policyholder must prove the "authenticity" of the missing policy. The question of whether enough evidence has been introduced to establish the missing policy's authenticity is a preliminary question for the court to decide. See Fed. R. Evid. 104. The policyholder can use different types of evidence to prove the authenticity of the original missing policy. See, e.g., Emons (testimony of president); Burroughs (offering evidence that the insurance carrier defended a prior claim on behalf of the policyholder). This requirement can usually be satisfied without any substantive problems by the insured's personal testimony.

Just as the original missing policy has to be authenticated, so must the secondary evidence. See, Fed. R. Evid. 901 & 902. Authenticity is achieved by introducing evidence sufficient to prove that the purported evidence is what the proponent claims it to be. 7 Wigmore Evidence, §§ 2129-35 (3rd ed. 1940).

Under the Federal Rule of Evidence 901(8), the ancient document illustration, the requirement of authentication is satisfied by evidence that a document "is in such condition as to create no suspicion concerning its authenticity, . . . was in a place where it, if authentic, would likely be, . . . and has been in existence for 20 years or more at a time it is offered." Therefore, a policyholder can authenticate secondary evidence by establishing the requirements of the "ancient documents"

illustration under Fed. R. Evid. 901(8). Likewise, there exist other examples of authentication that satisfy the rule of authenticity under the Federal Rule of Evidence. See, e.g., Fed. R. Evid. 901(b)(2). (authenticity by non-expert opinion on handwriting); Fed. R. Evid. 901(b)(4) (authenticity by distinctive characteristics); Fed. R. Evid. 901(b)(7) (authenticity satisfied by public records or reports). See also, Fed. R. Evid. 902 (listing ten examples of self-authenticating evidence).

The last hurdle for the policyholder is satisfying the hearsay rule. If a policyholder wants to offer the secondary evidence, assuming it is an out-of-court statement, to prove the truth of the matter asserted, the evidence must come within an exception to the hearsay rule. However, the hearsay rule has been whittled away and a number of exceptions exist for the policyholder.

Probably the most useful exception available to the policyholder is the ancient documents exception. Under the Federal Rule of Evidence 803(16), authenticated documents over 20 years old are not barred by the hearsay rule. Other available exceptions to the hearsay rule are as follows: business records (Fed. R. Evid. 803(6)); public records (Fed. R. Evid. 803(8)); and admissions of party opponents (Fed. R. Evid. 801(d)(2) (a statement satisfying Fed. R. Evid. 801(d)(2) is deemed not to be hearsay)). Even if the policyholder cannot establish or meet the requirements of one of the hearsay enumerated exceptions, the policyholder may still get the document or statement into evidence under the "catch all" exception which allows certain out-of-court statements offered to

prove the truth of the matter asserted, but only if the document or statement contains certain indicia of reliability." See Fed. R. Evid. 803(24).

IV. Conclusion

Without the original insurance policy or copies thereof, policyholders face a difficult task trying to prove the existence, execution, and material terms of the alleged missing policy. However, policyholders will go to great lengths and expense to prove that the missing policy existed because of the financial benefit of placing the burden of providing coverage onto an insurance carrier. To date, courts have required reasonable and prudent secondary evidence in establishing the existence and material terms of missing policies. Courts should be reluctant and hesitant to find coverage under alleged missing policies because of the threat of fraudulent and ill-founded claims.

C. Insurance Coverage Under the Advertising Injury Endorsement.

I. Introduction

Recently there has been a new area of insurance litigation that focuses on whether coverage exists for offenses arising out of the advertising injury endorsement of a policy. Policyholders have tried to obtain coverage under the advertising injury endorsement for a number of different business torts including anti-trust violations, consumer fraud practices, copyright infringement and patent infringement. The California courts have been the most active battle field for such litigation. Some California cases have allowed businesses to act wrongfully and intentionally, while at the same time profiting from such acts, and in the interim, the business is allowed to be represented by the insurance carrier in defending the wrongful conduct. These cases have completely ignored the plain and ordinary reading of the advertising injury endorsement by allowing coverage for offenses which are not specifically enumerated within the endorsement or by allowing coverage for offenses which did not occur out of the insured's advertising activity.

The standard CGL insurance policy includes coverage for "advertising injury liability." The typical advertising injury endorsement obligates the insurance carrier to pay, on behalf of the insured, "all sums which the insured shall become legally obligated to pay as damages because of . . . advertising injury to which this insurance applies, sustained by any person or organization and arising out of the conduct of the named insured's

business." ISO Comprehensive General Liability Policy Form (1986), Para. II(A). The policy usually defines advertising injury as "an 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." Id., Para. II(D). There has been a trend among insurance carriers to omit the offense of "unfair competition" from the advertising injury definition. The omission of "unfair competition" from the advertising injury definition is a direct response to the handful of courts across the United States that have found coverage under the offense "unfair competition" which was both unintended and not within the reasonable expectations of the policyholder and insurance carrier. Advertising injury endorsements usually include several exclusions. These exclusions apply to advertising injury:

- "1. Arising out of liability assumed under contract;
2. Arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the insureds;
3. Advertising injury arising out of a publication or utterance of libel or slander or other defamatory material if the first publication or utterance was made prior to the effective date of the insurance;
4. Arising out of a publication or utterance of a libel or slander or other defamatory material made by or at the direction of the insured with knowledge of its falsity;
5. Arising out of the failure of performance of contract or infringement of trademark, service mark or trade name, or incorrect description or mistake in advertised price of goods, products, or services sold; and

6. Arising out of any act committed by the insured with actual malice.

Kurt A. Pasich, Advertising Injury and Personal Injury Coverage After Bank of the West, 454 Litigation and Administration Practice Course Handbook Series: Litigation 545 (January-February 1993).

This article covers the recent issues which have surfaced between policyholders and insurance carriers regarding the scope of coverage under the advertising injury endorsement. Part two discusses the two separate definitions used by courts throughout the United States to define the term "unfair competition." Part three discusses both the broad and narrow interpretation of the term "advertising activities." Part four discusses the necessary causal connection that must exist between a policyholder's advertising activities and the claimant's injury in order for the insured to be provided with coverage. Finally, part five concludes that the majority of courts require that the term "unfair competition" be read narrowly and in line with the common law definition. In addition, in order for a claim to be brought within the advertising injury coverage, the claim must be one of the enumerated offenses listed in the advertising injury provision and arise out of the occurrence of the insured's advertising activity. Also, part five concludes that in order for a claim to be brought within the advertising injury provision, there must exist a causal connection between the insured's advertising activities and the claimant's injury.

In order for a policyholder to obtain coverage under the advertising injury liability provision of its CGL policy certain

requirements, at minimum, must be met. First, the advertising injury must arise out of the conduct of the named insured's business. Second, the injury must arise out of an offense committed during the policy period. Third, the offense giving rise to the injury must occur in the course of the named insured's advertising activities. Finally, the injury must arise out of one of the enumerated offenses listed within the advertising injury provision. It is paramount to understand that for advertising coverage to exist the injury arising out of one of the enumerated offenses, listed above, must result from and be caused by the defined insured's advertising activities. The majority of cases concerning advertising injury coverage have focused on the final two requirements that the injury occur in the course of the insured's advertising activities and arise out of one of the enumerated offenses.

II. The common law definition of "unfair competition" most accurately represents the plain and ordinary meaning of the insurance provision and the reasonable expectancy of the insured.

Litigation regarding advertising injury coverage has centered around two competing definitions of unfair competition. The traditional common law definition, which is followed by the majority of courts, focuses on the tort of passing off or substituting one's own goods for those of a competitor. See Bank of the West v. Superior Court of Contra Costa County, 10 Cal. Rptr. 2d 538 (Cal. 1992). To the contrary, policyholders argue that the term "unfair competition" encompasses a large variety of loosely

defined, unethical business practices. See Keating v. National Union Fire Insurance Company, 754 F.Supp. 1431 (C.D. Cal. 1990).

In Keating, the insureds argued that the claims of fraudulent misrepresentation fell within the advertising injury coverage of their insurance policies. Id. The insurance carrier argued that the term "unfair competition" was strictly limited to the common law tort of palming off. Keating at 1453. The court, in rejecting the insurance carrier's argument, held that the term "unfair competition" as used in the standard advertising policy means "unlawful, unfair, or fraudulent business practice and unfair, deceptive, untrue or misleading advertising." Id. at 1437. In Keating, the court ruled in favor of the broader definition of "unfair competition" because it determined it to be a more reasonable definition. Id. at 1435-36. See also American States Insurance Company v. Canyon Creek, 786 F.Supp. 821 (N.D. Cal. 1991) (finding a duty to defend under a broad definition of "unfair competition"). Numerous courts across the United States have adopted the more restrictive interpretation of unfair competition, which refers to the common law notion of passing off one's own goods or services as that of a competitor. See, e.g., Bank of the West v. Superior Court, 10 Cal. Rptr.2d 538 (Cal. 1992); Ruder and Finn Incorporated v. Seaboard Surety Company, 422 N.E.2d 518 (N.Y. 1981); Pine Top Insurance Company v. Public Utility, 676 F.Supp. 212, (E.B. Wash. 1987); Globe Indemnity Company v. First American State Bank, 720 F.Supp. 853 (W.D. Wash. 1989); Westfield Insurance Company v. TWT Incorporated, 723 F.Supp. 492 (N.B. Cal. 1989);

Boggs v. Whitaker, Lipp and Healea Incorporated, 784 P.2d 1273 (Wash. App. 1990); Aetna Casualty and Surety Company v. Transworld Assur. Company, 745 F.Supp. 1524 (N.D. Cal. 1990); Tigera Group Incorporated v. Commerce Industry Insurance, 753 F.Supp. 858 (N.D. Cal. 1991); Nationwide Mutual Insurance Company v. Dynasty Solar Incorporated, 753 F.Supp. 853 (N.D. Cal. 1990). For example, in Bank of the West, the California Supreme Court rejected the Court of Appeal's opinion that unfair competition could refer to both common law claims and broadly defined statutory claims. Id. at 10. In Bank of the West, the California Supreme Court stated that "[t]he majority of courts have concluded that the term unfair competition as used in policy language defining advertising injury refers to the common law or tort of unfair competition" Id.

In Bank of the West, the bank policyholder sought insurance coverage under advertising injury in connection with its settlement of a consumer class action brought under California's Unfair Business Practices Act. The bank had developed a new program to finance automobile insurance premiums for consumers. The bank did not advertise directly to consumers but instead offered an incentive to insurance agents who would refer business to the bank. Under the program, when a consumer indicated interest, the insurance agent would ask for a down payment, the consumer's power of attorney, and apply for a loan in the consumer's name. However, many consumers were unaware of material terms of the loan, which included substantial interest rates, fees, and penalties. Thereafter, a number of consumers filed suit alleging violation of

the California Unfair Business Practices Act. The bank settled and sought coverage under its advertising injury provisions within its CGL policy. The bank argued that the settlement amount constituted "damages" for "unfair competition" that had occurred during the bank's advertising activities. Id. The insurers argued that the advertising injury provision only referred to the common law tort of unfair competition rather than conduct prohibited by California's Unfair Business Practices Act. Id.

The trial court ruled in favor of the insurers, but the Court of Appeals found coverage and vacated the trial court's order. The Court of Appeals found the term "unfair competition" to be ambiguous. Therefore, it was construed against the insurer and found that it could refer to either the common law tort or to conduct prohibited by a statute such as the Unfair Business Practices Act. Id. California's Supreme Court rejected the Court of Appeal's opinion that unfair competition could refer to either statutory or common law claims. The Supreme Court stated that a majority of courts have concluded that the term unfair competition, as applied within a standard advertising injury provision, only refers to the common law tort of unfair competition rather than to conduct addressed by the Unfair Business Practices Act. Id. The Supreme Court, in defining the common law tort of unfair competition, stated that it possessed two key elements. First, it is similar to the act of passing off one's goods or services as that of one's competitor. Second, the tort required a specific showing of "competitive injury." In other words, the common law

tort of unfair competition is only applicable between competitors and not the entire consuming public, which is the topic of the Unfair Business Practices Act.

The Supreme Court also noted that the term unfair competition, as used in the policy, was not ambiguous. The bank tried to argue that even if the majority rule applied, the term unfair competition should still be construed against the insurer because it was undefined and, therefore, ambiguous. The court rejected this argument and stated that the coverage provided under the common law tort of unfair competition was consistent with the insured's objectively reasonable expectations when the policy language is interpreted in context (as with any contract) with regard to its intended function within the policy, pursuant to a traditional rule of contract construction.

Other courts have also adopted the more restrictive interpretation of unfair competition as being similar to the common law tort of unfair competition. In Boggs v. Whitaker, Lipp & Healea Incorporated, 784 P.2d 1273 (Wash. App. 1990), the policyholder was sued for allegedly operating a fraudulent investment scheme to induce consumer participation. The insured sought coverage under the advertising injury endorsement within its insurance policy. The Court held that the suits were based upon conduct that was harmful to consumers but not harmful to competitors and, therefore, did not arise under the term "unfair competition." Id. The court stated that the element of "competition" must be present in order for an action to come within

the term "unfair competition." Id. at 1276. In addition, the court stated that "[t]here is nothing in the record to suggest that the insured's advertising was intended to give the company an advantage over competitors or that it actually harmed competitors." Id. Numerous other courts across the United States have similarly limited the term "unfair competition" to its common law meaning. See, e.g., Tigera Group Incorporated v. Commerce & Industry Insurance, 753 F.Supp. 858 (N.D. Cal. 1991) (holding that the term "unfair competition" was not ambiguous and required an injury to a competitor and not a public consumer); Globe Indemnity Company v. First American State Bank, 720 F.Supp. 853 (W.D. Wash. 1989), aff'd, 904 F.2d 710 (9th Cir. 1990) (relying on Pine Top Insurance Company v. Public Utility, 676 F.Supp. 212 (E.D. Wash. 1987) and Boggs, the court held that the term "unfair competition" refers unambiguously only to actions between or affecting competitors).

III. What Constitutes Advertising Activities.

Even if a court determines that a policyholder committed one of the enumerated offenses within the advertising injury provision, the offense must have arose out of the occurrence of the insured's advertising activities in order for coverage to exist. Consequently, the definition of "advertising activities" is a pivotal determination by the court which will play a significant part in finding whether coverage exists. Courts have interpreted the term "advertising activities" to either encompass the traditional notion of advertising which involves some form of broad

distribution to consumers, or more broadly to include almost any communication to at least one person.

The majority of courts that have defined the term "advertising activities" have chosen a narrow definition of the term, but have failed to offer or cite any specific definition of advertising activities. However, the cases seem to implicitly assert that the term advertising activities involves more than a mere face to face description or sale of products or services. Most courts look for some form of broad distribution to potential or existing consumers. It is settled that the advertising activity requirement would be satisfied if a policyholder actively advertised in magazines, newspapers or other print sources, on television or radio, or otherwise promoted its products or services through other promotional means.

Fox Chemical Company v. Great American Insurance Company, 264 N.W.2d 385 (1978), and Playboy Enterprises Incorporated v. St. Paul Fire & Marine Insurance Company, 769 F.2d 425 (7th Cir. 1985), were two of the first cases to define the term "advertising activities" and determine that the term should be narrowly applied. In Fox Chemical, the policyholder was sued by a competitor for allegedly using a defamatory pamphlet in personnel training. Id. The insured held an insurance policy which covered personal injury liability but excluded injuries arising out of advertising. The court determined that the term advertising activities as used in the policy's exclusionary clause (which excluded actions or utterances in the course of or related to advertising, broadcasting

or telecasting activities) must be determined in context with the whole policy. Id. The court held that the seventy-four defamatory pamphlets printed by the policyholder and distributed to seventy-four of its distributors did not amount to advertising activities. Id.

Likewise, in Playboy, the court decided to interpret the exclusionary term "advertising" narrowly. Playboy, the insured, was sued by Penthouse International for sending a false letter to eleven advertisers of Penthouse. The insurance carrier refused to defend Playboy in the libel suit arguing that the eleven letters constituted advertising and was excluded under the exclusionary clause, which was identical to the one in Fox Chemical. Id. The court held that coverage existed because the distribution of eleven letters did not constitute advertising. Id. Thus, the letters did not fall within the exclusion of coverage for publications or utterances in the course of advertising. Id. at 429. The court specifically stated that "the term advertising refers to the wide spread distribution of promotional material to the public at large." Id.

Many policyholders try to distinguish the holdings of Fox Chemical and Playboy by arguing that their definitions of advertising activities should not apply to the advertising injury coverage provided in an insurance policy. Policyholders argue that the Fox and Playboy courts applied a narrow definition to the term advertising activities because they were interpreting an exclusion which is generally read and interpreted narrowly to exclude

coverage. Therefore, the term advertising activities, as applied in advertising injury coverage, should be read broadly because terms of coverage generally are read and interpreted expansively to afford coverage to the insured.

This argument must fail because numerous courts, interpreting the term advertising injury within the coverage of an endorsement, have relied upon and used the definitions set out in the Playboy and Fox Chemical opinions. See, e.g., International Insurance Company v. Florist Mutual Insurance Company, 201 Ill. App. 3d 428, 559 N.E.2d 7 (Ill. App. 1990). The fact that exclusions are interpreted narrowly while coverage provisions are construed broadly has not effected other courts' analysis or interpretation of the term "advertising activities." For example, in National Union Fire Insurance Company v. Siliconix, Incorporated, 729 F. Supp. 77 (N.D. Cal. 1989), the court held that an offense that occurs during the selling of a product or service is not automatically an offense which is committed in the course of advertising. Id. at 79.

Likewise, in A. Meyers & Sons Corporation v. Zurich American Insurance Company, 74 N.Y.2d 298, 546 N.Y.S.2d 818 (1989), the court held that the policyholder was not within coverage because the alleged offense of unlawful manufacture, importation and sale of a patented plastic fastener was not an offense that arose out of an advertising activity. The court emphasized that the alleged harm arose from the importation and sale of products which infringed upon certain patents and not from the insured's

advertising activities; therefore, the underlying litigation was outside the scope of coverage under the advertising injury endorsement.

Similarly, the court in International Insurance Company v. Florist Mutual Insurance Company, 559 N.E.2d 7 (Ill. App. 1990), held that the alleged injuries did not arise out of the insured's advertising activities because advertising, as used in the advertising injury provision, was held to refer to widespread distribution of promotional material to the public at large. Id. The court stated that the in-house rule prescribing conditions for processing floral arrangements that had been advertised was not an advertising activity under the insurance policy. Id. See, generally, Safeco Insurance Company of America v. Penco International Incorporated, No. 89-56060 (9th Cir. January 20, 1991) (stating that the alleged application of false or counterfeit labels and selling or using inferior parts with original labels did not occur in the course of advertising).

Some courts have decided to apply an unreasonably broad meaning to advertising activities. But see Intex Plastics Sales Company v. United National Insurance Company, No. CV-90-2050 CBM (C.D. Cal. December 13, 1990 and Aetna Casualty and Surety Company v. Water Cloud Bed Company, No. CV 88-200 (C.D. Cal. November 17, 1988) (both courts failed to understand the significance of the language "occurring in the named insureds advertising activities" by failing to identify any advertising activity on the part of the insured). For example, in John Deere Insurance Company v. Shamrock

Industries Incorporated, 696 F.Supp. 434 (D. Minn. 1988), aff'd, 929 F.2d 413 (8th Cir. 1991), the insured wrote three letters to a potential customer describing the qualities of the insured's product. The court unreasonably held that this activity of sending three letters to a potential client constituted advertising because "advertising encompasses any form of solicitation, presumably including solicitation of one person." Id. at 39-40.

A minority of courts have determined that the term "advertising activities" is ambiguous and should be construed against the insurer. For example, in Liberty Life Insurance Company v. Commercial Union Insurance Company, 857 F.2d 945 (4th Cir. 1988), the insured was sued for allegedly being involved in a scheme to use Metropolitan's trade secrets and customer lists to hire Metropolitan agents and to induce them to thereafter disparage Metropolitan's policy. The insurance carrier denied coverage, arguing that no advertising activity was involved. The court disagreed, holding that the undefined term "advertising activities" is ambiguous and should be construed against the drafter. The court noted that it was possible that the activities alleged in the complaint could be deemed as constituting an advertising activity. Id. at 950.

Likewise, the Seventh Circuit has found the term advertising activities in a CGL policy to be ambiguous. In TWS Funeral Home Incorporated v. Ohio Casualty Insurance Company, 832 F.2d 1037 (7th Cir. 1987), the insured was sued for allegedly conspiring to make false and defamatory statements about the plaintiff's funeral home

for the purpose of discouraging potential customers from purchasing the plaintiff's products and services. The insured sought coverage for defending the alleged offenses under its CGL policy. The court found that the term advertising activities was ambiguous and should be construed against the insurer. Even though the court declined to specifically define what constitutes "advertising activities," its final holding that the insurer had a duty to provide coverage implies that the alleged false and disparaging statements were within the general definition of "advertising activities."

The majority of courts that have decided the issue of what constitutes an advertising activity have applied a somewhat narrow view of the term. However, whether the court decides to define the term advertising activity narrowly or broadly, if an insured promotes its products or services in magazines, newspapers, or other printed sources, or on television or radio, or by other promotional means, it likely will be found to satisfy the advertising activity requirement found within the advertising injury provision.

IV. The plain and ordinary meaning of the advertising injury provision requires that a causal connection exist between an insured's advertising activity and the resulting injury.

It must be strongly emphasized that in order for advertising coverage to exist, the alleged injury/action must both arise from one of the enumerated offenses within the provision and result from and be caused by the insured's advertising activities. See generally William M. Sabil & Celeste N. Butera, Insurance Coverage and a Logical Application of the Advertising Injury Endorsement, 6

Mealey's Litigation Reports: Insurance 7 (December 17, 1991). The requirement that the injury result from and be caused by the insured's advertising activities comes from the standard advertising injury provision which allows coverage for "[a]n injury . . . occurring in the course of the named insured's advertising activities." Id.

As with all undefined terms of an insurance policy, there exist both broad and narrow theories on the degree of causation which is required between an insured's advertising activity and the actual injuries sustained. Numerous courts have spoken on the issue of causation and most have agreed that the insured must establish that its advertising activity actually caused the alleged injuries. For example, in National Union Fire Insurance Company v. Siliconix Incorporated, 729 F.Supp. 77 (N.D. Cal. 1989), the insured was charged with patent infringement and sought to force the insurance carrier to provide coverage under the advertising injury provision of its CGL policy. The insured argued that the alleged injury does not have to be actually caused by an advertising activity, but that it need only bear some known relationship in order to fall within the coverage. Id. at 80. The court denied coverage because the insured failed to establish that its advertising activity actually caused some degree of the alleged injuries. Id. In rejecting the insured's unreasonable argument, the court stated that such an "argument 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." Id. at 80.

Likewise, the court in Jerry Madison Enterprises Incorporated v. Grasant Manufacturing Company, No. 89 Civ. 2346, 1990 U.S. Dist. LEXIS 1649 (S.D.N.Y. February 15, 1990), reached a similar conclusion in holding that no coverage existed for copyright infringement because no causal connection existed between the actual injury and advertising activity. In Grasant, the plaintiff's copyright infringement claim was based upon the plaintiff's manufacturing, publishing, and placing upon the market certain jewelry that was copied from other designs. The insured argued that the act of listing the copyrighted materials within a brochure was advertising and, therefore, a causal connection existed to the injuries sustained by the plaintiff. The court rejected this argument and stated that to provide coverage where the insured had distributed brochures that referenced the copyrighted material would blindly impose a duty on insurance carriers to provide coverage under advertising injury provisions whenever an insured "advertised" any allegedly infringing products or services. Id. at 10.

Recently, in Century Insurance Company v. R.J. Weber Incorporated, No. CA-3-92-1199-R (N.D. Texas, Dallas Div., December 23, 1992), the carrier sued the insured to recover legal fees expended in an action in which the insured had been charged with knowingly and willfully infringing on the plaintiff's copyright by copying, manufacturing, distributing and selling products similar

to the plaintiff's product. The carrier denied coverage arguing that there was no copyright injury that directly arose from the insured's advertising activity. The court accepted the insurance carrier's argument and held that before the court can find that a duty to defend exists, there must be a causal connection between the advertising activity and the infringement, instead of the mere existence of some form of advertising amidst the infringing activity. Id. slip op. at 4. The court stated that "[p]erhaps free samples is a form of advertising; but advertising here merely advanced the ultimate infringing activity." Id. The court also noted that to allow the copyright infringement to be covered under the advertising injury provision "would be to allow insureds to transform all potential torts into advertising injuries with a minimal advertising budget." Id. slip op. at 5 (quoting Bank of the West v. Superior Court, 2 Cal. 4th 1254, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992)).

The most surprising and substantial decision recently came from the California Supreme Court in Bank of the West v. Superior Court, 833 P.2d 545 (1992). There the court held that in context a CGL policy strongly indicated that the requirement of a causal connection between the insured's advertising activity and the claimant's injuries was a prerequisite to providing coverage. Id. The court stated that by reading the term "unfair competition" in context with the other enumerated offenses, an objectively reasonable insured could not argue that the term "unfair competition" could refer to claims that did not have a causal

relationship to the insured's advertising activities. In addition, the court noted that common sense precluded an objectively reasonable insured from denying that a causal relationship was required. See Bank of the West (citing with approval cases which have mandated that the insured's advertising activity itself must cause the advertising injury: Siliconix, 729 F.Supp. 77 (N.D. Cal. 1989); A. Meyers & Sons Corporation v. Zurich America Insurance, 545 N.E.2d 1206 (1989); Lazzara Oil Company v. Columbia Casualty, 683 F.Supp. 777 (N.D. Fla. 1988)). The California Supreme Court summed up the requirement of a causal relationship by stating:

If no causal relationship were required between "advertising activities" and "advertising injuries" then "advertising injury" coverage, alone, would encompass most claims related to the insured's business. However, insureds generally expect to obtain such broad coverage, if at all, only by purchasing several forms of insurance, including coverage for "errors and omissions liability," with "directors and officers liability" and/or other coverage available as part of a CGL policy.

Bank of the West v. Superior Court, 2 Cal. 4th 1254, 833 P.2d 545, 10 Cal. Rptr. 2d 538 (1992).

Pursuant to the plain and ordinary meaning of the advertising injury provision, more specifically the definition of an advertising injury, a causal connection must exist between the insured's advertising activity and the claimed injury. This causal connection requires that the injury was actually caused by the insured's advertising activities. To broadly define this nexus in any other manner would result in the transformation of all potential business torts into an advertising injury with only a minimum relation to advertising. In turn, such an expansion would

lead to the eventual exclusion of all genuine advertising injury coverage from CGL policies by the insurance industry.

V. Conclusion

In order for a policyholder to be provided with coverage under the advertising injury provision it must establish, at minimum, that: the advertising injury arose out of the conduct of the insured's business; the injury arose out of an offense committed during the policy period; the offense giving rise to the injury occurred in the course of the insured's advertising activities; and the injury arose out of one of the enumerated offenses listed in the advertising injury provision. The most litigated issues concerning advertising injury coverage concern what constitutes "unfair competition", what are "advertising activities", and what type of causal connection must exist between the alleged injury and the insured's advertising activities. The majority of courts have determined that the term "unfair competition" is synonymous with the common law tort of unfair competition, which is the tort of palming off or passing off one's own goods or services as that of its competitors. In addition, numerous courts have concluded that the definition of "advertising activities", at a minimum, requires some sort of distribution of promotional material to the public at large or a potential consumer. Finally, the majority of courts which have concluded that in order for the injury to be covered within the advertising injury provision, a causal connection must exist between an insured's advertising activities and the claimant's injury.

D. The Products Hazard Coverage: Policyholders Try to Manipulate the Products Hazard Provisions in Order to Find Coverage.

I. Introduction

The products hazard coverage is one of the typical areas that the insurance carrier agrees to insure when issuing a CGL insurance policy. Recently, there has been increased litigation concerning the products hazard coverage. Policyholders have tried to manipulate the terms and scope of coverage of the products hazard provisions by either arguing that a certain claim does not fall within the products hazard coverage and, therefore, not subject to any set limitations or exclusions, or by arguing that a certain claim is covered under the products hazard provision and within the standard products hazard exception to the pollution exclusion.

This article covers the recent issues which have emerged between policyholders and insurance carriers regarding the scope of the products hazard coverage. Part II discusses the terms and coverage of the products hazard provisions and the minimal requirements that must be established in order for products hazard coverage to exist. Part III of this article discusses the recent argument put forth by policyholders that certain claims do not come within the products hazard provisions, thus the claims are not subject to set limitations or exclusions under the products hazard coverage. Part IV discusses another argument urged by policyholders that hazardous waste or by-products of the policyholder come within the products hazard coverage and fall under the product hazard exception to the general pollution exclusions of the CGL policy. Part V of this articles concludes

that in order for coverage to exist under the products hazard provision, the policyholder must establish that the item causing the damage or injury must be classified as a "product", the injury giving rise to the claim must occur away from the insured's premises, and the injury must occur after the insured relinquished possession of the product. In addition, Part V concludes that a claim will be covered under the products hazard liability provision if the claim is sufficiently tied to the nature of the insured's product, including claims based on: negligent testing, design, manufacture and sale; strict liability for design and manufacturing defects; failure to warn; and misrepresentation.

II. Coverage Under the Products Hazard Provision

The products hazard coverage is typically provided and defined in the standard CGL insurance policy. The standard products hazard provision provides that the insurance carrier shall pay all sums which the insured shall become legally obligated to pay as damages, including all bodily injury or property damage encompassed within the products hazard and the completed operations hazard. The term "products hazard" is generally defined as including

bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from the premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.

7A Appleman, Insurance Law and Practice § 4508.01 (1979).

Under the plain and ordinary meaning of the term products hazard, a policyholder is required to establish the following

elements in order to be provided coverage: that the item causing the damage or injury is classified as a product of the insureds; the injury giving rise to the claim occurred away from the insureds' premises; and the injury occurred after the insured relinquished possession of the product. Id. at 345-46; see generally Biddle Sayer Corporation v. Fireman's Fund Insurance Company, No. MON-L-5219-91 (N.J. Super. Ct., Monmouth Co., Dec. 22, 1992).

Recent litigation regarding products hazard coverage has revolved around whether a certain item, which has caused an injury or damage, is the actual product of the insured. Generally, the term "insured's products" is set out and defined within the CGL insurance policy. The standard definition for "insured's products" means any goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name, including any container thereof. Appleman at 344.

Some courts have found the term "product" within the products hazard coverage not to be ambiguous. Hydro Systems Inc. v. Continental Insurance Co. 929 F.2d 472 (9th Cir. 1991); Fibreboard Corp. v. Hartford Accident & Indemnity Co., 1993 WL 138707 (Cal. App. 1 Dist.). In addition, numerous courts have defined "products" as goods or services in which the insured trades or deals. Hydro at 475; CPS Chemical Company, Inc. v. Continental Insurance Company, 498 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984) (stating that industrial waste was not within the definition of "products" under a products hazard exception since the waste was

"not intended for consumption, sale, or use by others . . ."); see generally Paxton-Mitchell Company v. Royal Indemnity Company, 279 Or. 607, 569 P.2d 581, 587 (1977) (stating that the definition of "product", in the absence of a contractual definition, involves items in which the insured trades or deals). The term product, as used within the products hazard coverage, will be controlled by the definition set out in the insurance policy.

The second recurring issue in products hazard litigation deals with whether a certain claim or action relates enough to the insured's product to come within the products hazard coverage. Numerous courts have found that a claim will come within the products hazard coverage provision if it is sufficiently tied to the nature of the insured's products. Celotex Corporation v. AIU Insurance Company, ADV. No. 91-40 (U.S. Bkcy. Ct., N.D. Fla. Jan. 26, 1993); see Fibreboard Corporation v. Hartford Accident Indemnity Company, 1993 W.L. 138707 (Cal. App. 1 Dist.) (holding that the traditional products claims of negligent testing, design, manufacturing and sale, strict liability for design and manufacturing defense, failure to warn, breach of warranty, and misrepresentation fall within the boundaries of the products hazard coverage). See, infra, citations and accompanying text pages 63-66.

III. Policyholders Trying to Avoid the Limitations and Exclusions of their Products Hazard Provisions

Recently, policyholders have tried to manipulate the products hazard coverage within their CGL policies in order to circumvent the limitations and exclusions placed upon the policyholder's

products hazard coverage. In essence, policyholders try to argue that a particular injury or claim does not fall within the products hazard coverage, is covered under another general liability provision, and is not subject to limits and exclusions of the products hazard coverage.

For example, in Celotex Corporation v. AIU Insurance Company, Adv. No. 91-40 (U.S. Bkcy. Ct., N.D. Fla. Jan 26. 1993), the insured tried to argue that the liability for the asbestos-related property damage, which resulted from the insured's alleged failure to warn of potential hazards related to the insured's products, was not within the products hazard coverage. The insured was trying to get the claim out of products hazard coverage because the coverage was subject to aggregate limits of liability. Id. The court held that the damages, which resulted from the insured's negligent failure to warn of the dangers relating to the asbestos containing products, were sufficiently tied to the products themselves and exclusively covered by the products hazard provision of the insurance policy. The court noted that a negligent failure to warn claim will fall within the products hazard coverage if such claim goes to the inherent dangers that are associated with the product. Id. In addition, the court stated that "in some instances the act of negligently failing to warn may be sufficiently removed from the nature of the product to warrant classifying the liability as something other than products liability." Id. slip op. at 7; see, e.g., Scarborough v. Northern Assurance Company of America, 718 F.2d 130 (5th Cir. 1983) (holding that the injury resulting from

the use of sand in sandblasting operations was not within the products hazard provision because there was not a defect in the product, but merely negligent failure to warn of the dangers in using and inhaling the product); Florida Farm Bureau Mutual Insurance Company v. Gaskins, 45 So.2d 1013 (Fla. 1st D.C. 1981) (holding that coverage did not exist under the products hazard provision where the chemical supplier negligently supplied herbicide (the wrong product) rather than insecticide to the customer). But see Cobbins v. General Accident Fire and Life Assurity Corporation, 290 N.E.2d 873, 877 (Ill. 1972) (holding that products hazard, for insurance coverage purposes, includes the more extensive definition which applies to all product-related injuries, including the sale of wrong products or the wrongful sale of a product to a customer so long as the other requisites of the policies are present). Under the Celotex decision, a claim will be brought within the products hazard provision if it is substantially tied to the nature of the insured's products and meets the other requirements of the policy.

Similarly, in Fibreboard Corporation v. Hartford Accident Indemnity Company, 1993 WL 138707 (Cal. App. 1 Dist.), the insured argued that the claims regarding its products that contained mineral asbestos did not come within the products hazard provision of its insurance policy and were not subject to the special asbestos exclusion under the products hazard provision. In addition, the insured argued that the separate claims, which were based upon the general theories of concert of action, civil

conspiracy, and market share liability, had nothing to do with any product manufactured, sold, handled or distributed by the insured and, therefore, the claims were not subject to the limits of liability for products hazard. Id. The insured also argued that since the products hazard coverage was not applicable, the claims were covered under the insured's premises operations coverage. Id.

Holding that coverage existed under the products hazard coverage but was barred by the asbestos exclusion, the court noted that the traditional products claims of negligent testing, design, manufacturing and sale, strict liability for design and manufacturing defects, failure to warn, breach of warranties, and misrepresentations are well within "the four walls of the products hazard clause." Id. slip op. at 4. In addition, the court specifically held that the claims of concert of action, civil conspiracy and market share liability were types of liability which either stemmed from or arose out of the insured's products and were covered under the products hazard provision and the asbestos exclusion.

Under the Celotex and Fibreboard decisions, a claim will be within the products hazard coverage and subject to the applicable limitations and exclusions if the claim is sufficiently tied to the nature of the insured's product, arises out of or flows from the insured's products, and satisfies the additional requirements under the policy.

IV. Policyholders Try to Use the Products Hazard Coverage in Order to Circumvent the Pollution Exclusion.

Recently, policyholders have tried to circumvent the standard pollution exclusion by arguing that hazardous waste claims fall under a products hazard exception to the pollution exclusion or that the hazardous waste claim by itself, as a product hazard, is not excluded from coverage under the pollution exclusion. The standard CGL insurance policy has a pollution exclusion which bars insurance coverage for bodily injury or property damage arising out of the discharge, dispersal, release or escape of pollutants, but the exclusion usually does not apply to such discharge, dispersal, release or escape if sudden and accidental. In addition, some CGL policies provide that the pollution exclusion clause does not apply to its products hazard coverage. Thus, policyholders across America who are facing high cost environmental claims, are seeking coverage for the claims by arguing that they come within the products hazard exception to the pollution exclusion.

For example, in Liberty Mutual Insurance Company v. Triangle Industries Inc., No. 91-1685 (4th Cir. Mar. 2, 1992), the insured tried to persuade the court that a waste product known as "lime stabilized waste pickle liquor sludge" came within its products hazard coverage. The insured was trying to persuade the court that this waste product was an actual "product" which was covered under products hazard coverage and was exempt from the pollution exclusion because of a products hazard exception. The Fourth Circuit held that the property damage, which allegedly resulted from the disposal of a manufacturing waste product, did not involve

a product of the insured. Therefore, coverage was barred under the pollution exclusion of the insurance policy. Id. slip op. at 9-10. The court noted that the disposal of waste by-products, which are not intended for consumption, sale or use by others, are not products within the products hazard coverage. Id. slip op. at 10 (quoting CPS Chemical Company v. Continental Insurance Company, 489 A.2d 1265 1270 (N.J.Super. Ct. Law Div. 1984)).

Likewise, in Hydro Systems Incorporated v. Continental Insurance Company, 929 F.2d 472 (9th Cir. 1991), the Ninth Circuit found that styrene gas was not a "product" of the insured for purposes of applying the products hazard pollution exception. The insured manufactured fiberglass bathtubs at a plant located in California. Id. During the manufacturing process, styrene gas was dispersed into the air through exhaust fans and smoke stacks. Id. The City of Simi Valley sued the insured and required the insured to install a carbon absorption air pollution control system. The insured held a CGL insurance policy and sought coverage for the defense of the city's action and for reimbursement of the cost of installing the pollution control system. The insurance carrier denied coverage and concluded that the insured's claims were not covered under the policy. The trial court granted the insurance carrier's motion for summary judgement on the ground that coverage did not exist within the policy.

The Ninth Circuit held that the waste product, styrene gas, was not a product of the insured, thus, coverage was excluded under the pollution exclusion of the CGL insurance policy. The insured

argued that the gas was a product and covered under the products hazard provision of its policy. In addition, the insured argued that the products hazard exception to the pollution exclusion also applied to the hazardous gas since the gas was a product of the insured. The court disagreed by holding that the styrene gas was not a product of the insured, the products hazard pollution exception was not applicable, and coverage did not exist. Hydro at 474-75 (also noting that the hazardous gas could come within the "your work" definition of the products hazard exception, but such application was barred by a limitation to the products hazard exception). In all, the court noted that the styrene gas was not a product of the insured, thus the product hazard exception was not applicable and coverage was barred. Id; see generally Oregon Mutual Insurance Company v. Ripon Pacific Inc., No. 212735 (Calif. Super. Ct., San. Joaquin Co. Aug. 28, 1982) (holding that the absolute pollution exclusion barred coverage of a claim that a by-product of the insured's operation was within the products hazard coverage).

Even if an insured successfully established that an environmental claim arose out of the insured's product, the pollution exclusion will bar the coverage of the products hazard claim. See, e.g., Gregory v. Tennessee Gas Pipeline Company, 948 F.2d 203 (5th Cir. 1991). But see West American Insurance Company v. Tufco Flooring East Inc., No. 542 PA 91 (N.C. Sup. Ct. Nov. 5, 1991) (stating that the pollution exclusion was overridden by the completed operations coverage within the insurance policy);

Leatrice Nelson v. WCC Industries Inc., No. 88-2724 (Mass. Super. Ct., Feb. 17, 1993) (holding that the insurance carrier had a duty to defend because the claim only needed to possibly fall within the products hazard coverage, notwithstanding the pollution exclusion clause).

For example, in Gregory, the insured argued that the claims, which were based on a failure to detect and warn of the PCB contamination, fell within the products hazard coverage and were not excluded by the pollution exclusion. In the alternative, the insured argued that if the claims did fall within the products hazard coverage, they were barred by the pollution exclusion. The court agreed with the insurance carrier's argument in holding that the claims of PCB contamination did not fall within the products hazard coverage, thus no coverage existed. Id. at 208. In addition, the court noted that the products hazard coverage was governed by the pollution exclusion, thereby implying that claims which came within the products hazard coverage were susceptible to the pollution exclusion. Id. at 208.

In order for a claim to be within the products hazard coverage, the item giving rise to the cause of action must be a product of the insured and not just a by-product or waste of the insured. Even if a claim arose out of an insured's products and coverage existed under the products hazard provision, the pollution exclusion would be applied and coverage would be barred if the damage or injury arose out of the dispersement or discharge of pollutants.

V. Conclusion

In order for coverage to exist under the products hazard provision, the policyholder must establish that the item causing the damage or injury must be classified as a "product", the injury giving rise to the claim must occur away from the insured's premises, and the injury must occur after the insured relinquished possession of the product. A claim or cause of action will be covered under the products hazard liability provision if the claim is sufficiently tied to the nature of the insured's product, including claims based on negligent testing, design, manufacture and sale, strict liability for design and manufacturing defects, failure to warn, and misrepresentation.

The wrongful disposal of hazardous waste or toxic by-products will not be covered under products hazard coverage because the waste or by-products are not "products of the insured." Even if a court determines that hazardous waste or a by-product is covered under products hazard coverage, the insurer can still deny coverage under the standard pollution exclusion.