

## Personal And Advertising Injury Coverage Is Fertile Ground For Policyholders

June 27, 2014 | [Claims, Policyholder Protection](#)



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**advertisementpicSmall** Many policyholders overlook or don't understand the "personal and advertising injury liability" section of a standard commercial general liability (CGL) policy. That section is fertile ground for policyholders, and this lesson is taught even from two recent California cases that policyholders lost. In *Street Surfing, LLC v. Great Amer. E&S Ins. Co.*, (9th Cir. June 10, 2014), the policyholder began selling a skateboard with the Street Surfing brand name and logo in December 2004. It purchased a CGL policy in August 2005. Street Surfing was later sued for trademark infringement, unfair competition and unfair trade practices by the owner of the "Streetsurfer" trademark. Importantly, the insurance company conceded that the lawsuit was potentially covered as arising from "[t]he use of another's advertising idea in [the policyholder's] 'advertisement.'" The court ultimately held, however, that the claim was barred by the policy's exclusion for advertising injury "arising out of oral or written material whose first publication took place before the beginning of the policy period." The court commented that the exclusion would not have applied if advertisements during the policy period were not substantially similar to the earlier advertising. In *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, (Cal. Sup. June 12, 2014), Swift sold a product called the Ulti-Cart, a cart marketed to help musicians load and transport their equipment. Swift was sued for patent infringement, trademark infringement and damage to reputation by the manufacturer of the Multi-Cart, a product similar to the Ulti-Cart. Swift sought coverage under the portion of the CGL policy that defines "personal and advertising injury" to include injury arising out of "[o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." The court found no coverage because Swift's advertising never mentioned the Multi-Cart and merely claimed that Swift's own products were "superior" and that the Ulti-Cart had a patent pending. The court noted, however, that coverage could exist for an advertisement "that claims a superior feature of a business or product as distinct from all competitors, such as a claim to be the 'only' producer of a certain kind of software or the 'only' owner of a trademark" even if the competitor or its product is not expressly mentioned. Although the insurance companies prevailed on their denials of coverage in these two cases, they serve as a reminder that policyholders should carefully review the "personal and advertising injury" provisions of their CGL policies, both during the policy procurement stage and in the unfortunate event of a claim against the policyholder. The most recent version of the standard CGL policy defines "personal and advertising injury" to include injury arising out of one or more of the following offenses:

### RELATED PRACTICE AREAS

Commercial General Liability  
Copyright, Trademark, and Media Liability  
Credit and Mortgage Insurance  
Directors and Officers Liability  
Employment Practices Liability  
Fidelity Bonds and Commercial Crime Policies  
First-Party Property  
Insurance Recovery and Counseling  
Ocean Marine and Cargo Coverage  
Professional Liability  
Representations and Warranties  
Workers' Compensation and Employers' Liability

### RELATED TOPICS

Commercial General Liability (CGL)

- False arrest, detention or imprisonment
- Malicious prosecution
- The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor
- Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services
- Oral or written publication, in any manner, of material that violates a person's right of privacy
- The use of another's advertising idea in your "advertisement"
- Infringing upon another's copyright, trade dress or slogan in your "advertisement"

Some insurance companies still use earlier versions of the CGL form with somewhat different definitions. Moreover, most policies have other terms, exclusions and endorsements that significantly affect the scope of "personal and advertising injury" coverage. Thoughtful review is always wise for any policyholder.