



Emerging Coverage B Claims

American College of Coverage and Extracontractual Counsel
6th Annual Meeting
Chicago, IL

May 16-18, 2018

James W. Bryan
Nexsen Pruet, PLLC
701 Green Valley Road
Suite 100
Greensboro, North Carolina, 27408
JBryan@nexsenpruet.com
336.373.1600

Laura A. Foggan
Crowell & Moring LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
lfoggan@crowell.com
1.202.624.2774

Seth D. Lamden
Neal, Gerber & Eisenberg LLP
Two North LaSalle Street, Suite 1700
Chicago, IL 60602
slamden@nge.com
312.269.8052

© 2018 American College of Coverage and Extracontractual Counsel,

Nexsen Pruet, PLLC, Crowell & Moring LLP and Neal, Gerber & Eisenberg LLP*

*This paper is informational and does not represent legal advice. All statements do not necessarily reflect the views of the individual authors or their clients.

I. Introduction

Coverage issues surrounding wrongful conviction, imprisonment and incarceration have put a spotlight on Coverage B litigation. The litigation is complex and multi-faceted. What follows is an overview of Coverage B policy provisions and applicable exclusions. The focus will be not only on wrongful arrest, malicious prosecution, abuse of process, and wrongful convictions, but also on the emerging Coverage B claims of right of privacy, wrongful entry coverage for pollution claims, and disparagement.

II. Coverage B of a CGL Policy Covers Liability Arising Out of Enumerated “Offenses.”

Coverage B of the standard Insurance Services Office, Inc. (ISO) CGL policy (CG 00 01) provide coverage for damages because of enumerated “personal and advertising injury” offenses committed during the policy period. Unlike the CGL policy’s coverage for damages because of bodily injury or property damage, which must be caused by an “occurrence” and result from bodily injury or property damage that occurs during the policy period, the personal and advertising injury coverage applies to injury arising out of one or more “personal injury” offenses committed during the policy period.

The Coverage B insuring agreement in the 2013 ISO GGL form provides, in relevant part, as follows:

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which this insurance applies . . . This insurance applies to “personal and advertising injury” caused by an offense arising out of your business but only if the offense was committed in the “coverage territory” during the policy period.¹

The 2013 ISO CGL form defines “personal and advertising injury” as follows:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a persons’ or organization's goods, products or services;

¹ CG 00 01 04 13, p. 6 of 16.

- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your advertisement".²

ISO's 2007 version of the ISO CGL form contained the same definition of "personal and advertising injury" as the 2013 version.³ From 1986 through 2007, standard CGL policies also provided personal and advertising coverage, although they defined "personal injury" and "advertising injury" separately.

Although ISO's 1973 Comprehensive General Liability Form did not provide personal injury coverage, personal injury coverage was available pursuant to an optional 1976 ISO endorsement called the "Broad Form Comprehensive General Liability Endorsement" ("BF Endorsement"), and was available on non-ISO forms prior to 1976.⁴ Similar in scope to post-1986 CGL personal injury coverage, the personal injury coverage available in the BF Endorsement covered "all sums which the insured shall become legally obligated to pay as damages because of personal injury . . . to which this insurance applies." The BF Endorsement defined "personal injury" as:

injury arising out of one or more of the following offenses committed during the policy period:

- (1) false arrest, detention, imprisonment, or malicious prosecution;
- (2) wrongful entry or eviction or other invasion of the right of private occupancy;
- (3) a publication or utterance
 - (a) of a libel or slander or other defamatory or disparaging material, or
 - (b) in violation of an individual's right of privacy; except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.⁵

In 1986, ISO moved personal injury coverage from the BF Endorsement to Coverage B of its CG 00 01 Commercial General Liability form. As with the personal injury provision in the BF Endorsement, Coverage B covered "those sums that the insured becomes legally obligated to

² CG 00 01 04 13, Definitions (14).

³ CG 00 01 12 07, Definitions (14).

⁴ See, e.g., *Roess v. St. Paul Fire & Marine Ins. Co.*, 383 F. Supp. 1231, 1233 (M.D. Fla. 1974) (discussing "Top Brass Personal Catastrophe Policy" issued in 1968 that covered damages due to "personal injuries" including "malicious prosecution.")

⁵ CG 04 04 (Ed. 7-76), I(D).

pay as damages because of ‘personal injury’ that is committed during the policy period.⁶ The 1986 CGL policy slightly revised the definition of “personal injury” as follows:

“Personal injury” means injury, other than “bodily injury,” arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
- d. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; or
- e. Oral or written publication of material that violates a person’s right of privacy.⁷

The definition of “personal and advertising injury” contained in the 2007 version of CG 00 01 remained in the most recent version of CG 00 01, which is CG 00 01 04 13.⁸

III. Coverage B Covers “Malicious Prosecution” Suits.

A. Courts Look to Substantive Tort Law In Determining Whether an Underlying Suit Alleges “Malicious Prosecution.”

In evaluating whether an underlying suit alleges “malicious prosecution” for purposes of triggering Coverage B, many courts hold that “‘malicious prosecution’ in an insurance policy means the technical legal definition of ‘malicious prosecution’ under the applicable jurisdiction’s tort law.”⁹ Recognizing that CGL policies provide a “national scope” of coverage, however, other courts ignore whether the underlying claim bears the “label” of malicious prosecution, instead finding that an underlying claim alleging “essentially the elements required to prove common-law malicious prosecution” falls within the scope of Coverage B.¹⁰

Although “[t]he Restatement (First) of Torts [and] the Restatement (Second) of Torts provide separate sections to explain malicious prosecution claims arising out of civil litigation and those arising from criminal prosecutions . . . the essential elements of the two are virtually

⁶ CG 00 01 11 85, Coverage B, 1.a.

⁷ CG 00 01 11 85, Definitions (10).

⁸ CG 00 01 04 14, Definitions (14).

⁹ *Pa. Pulp & Paper Co. v. Nationwide Mut. Ins. Co.*, 100 S.W.3d 566, 574 (Tex. App. 2003) (citing cases).

¹⁰ *Carolina Cas. Ins. Co. v. Nanodetex Corp.*, 733 F.3d 1018, 1025 (10th Cir. 2013) (“If labels rather than substance were the governing interpretative principle, then the term malicious prosecution would have no application in those states that use a different term to describe essentially the same tort”).

the same.”¹¹ Despite minor differences in wording from jurisdiction to jurisdiction, the following formulation of the core elements of the tort of malicious prosecution is typical: “(1) the initiation or continuation of a lawsuit; (2) lack of probable cause; (3) malice; and (4) favorable termination of the lawsuit.”¹² Other courts include a fifth element: damage or injury to the plaintiff.¹³ However, a majority of courts hold that “the right not to be unjustifiably involved in litigation” constitutes sufficient damages to sustain a malicious prosecution claim and do not require the plaintiff to prove additional damages.¹⁴ Moreover, “a plaintiff alleging malicious prosecution based on a criminal proceeding need not show special injury.”¹⁵

Not all jurisdictions recognize the tort of malicious prosecution.¹⁶ For example, New Mexico law recognizes the tort of “malicious abuse of process” but not “malicious prosecution.”¹⁷ Other jurisdictions recognize torts that are similar to malicious prosecution, but are not called malicious prosecution.¹⁸

B. Courts Are Split on Whether “Malicious Prosecution” Includes the Tort of Abuse of Process.

1. Some Courts Hold that “Malicious Prosecution” Does Not Include “Abuse of Process.”

“The elements of the tort of abuse of process are (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.”¹⁹ “The torts of malicious prosecution and abuse of process were both created to remedy abusive litigation. Malicious prosecution blazed the trail, while abuse of process followed behind to fill in the gaps. By virtue of their histories, they are distinct torts, at least in a strictly legal sense, . . . In reality, however, the line between these torts is blurred . . .”²⁰

Notwithstanding the similarities between abuse of process and malicious prosecution, a many courts to consider the issue have held that the term “malicious prosecution” is

¹¹ *Martin v. O'Daniel*, 507 S.W.3d 1, 10 (Ky. 2016)

¹² *Nanodetex Corp.*, 733 F.3d at 1025 (citing Black's Law Dictionary 977 (8th ed. 2004)).

¹³ *St. Paul Fire & Marine Ins. Co. v. The City of Zion, et al.*, 2014 IL App (2d) 131312, at ¶15. See also *Toll Bros. v. Gen. Accident Ins. Co.*, No. 98C-08-203, 1999 Del. Super. LEXIS 313, at *11-13 (Super. Ct. Aug. 4, 1999) (citing Prosser, *The Law of Torts* § 98, at 652 (2d. ed. 1955)); *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 503 (Colo. 2004).

¹⁴ See *DeVaney v. Thriftway Mktg. Corp.*, 124 N.M. 512, 524 (1998) (“a majority of the courts that have considered the issue . . . place no such limitations on the types of damage necessary”).

¹⁵ *City of Zion*, 2014 IL App (2d) 131312, at ¶15

¹⁶ See, e.g., *DeVaney*, 124 N.M. at 514.

¹⁷ See *id.*

¹⁸ See *Nanodetex Corp.*, 733 F.3d at 1025 (citing cases).

¹⁹ *Lunsford v. Am. Guar. & Liab. Ins. Co.*, 18 F.3d 653, 655 (9th Cir. 1994); *Toll Bros. v. Gen. Accident Ins. Co.*, No. 98C-08-203 WTQ, 1999 Del. Super. LEXIS 313, at *15 (Super. Ct. Aug. 4, 1999).

²⁰ *Toll Bros.*, 1999 Del. Super. LEXIS 313 at *28.

unambiguous and does not include abuse of process claims.²¹ Inherent in the decisions finding that “malicious prosecution” does not include abuse of process is that abuse of process and malicious prosecution are separate torts with distinct elements. As one court explained, “[i]nsurance against malicious prosecution does not cover abuse of process,” because there is “a clear distinction in Washington law between abuse of process and malicious prosecution. [The insured] could have insured against abuse of process, but it did not. Presumably, the words of the policy have some meaning, purpose and limit.”²²

2. Some Courts Hold that “Malicious Prosecution” Includes “Abuse of Process.”

Some courts have held that the personal injury offense of “malicious prosecution” “extends to the related but not enumerated offenses of abuse of process and wrongful use of civil proceedings.”²³ Courts’ rationale for finding that the term “malicious prosecution” includes abuse of process typically is that “malicious prosecution” “is ambiguous because it is not defined in the policy and because a laypersons’ understanding would differ from the legal definition of the term.”²⁴ Put differently, “[a] layperson could believe reasonably that the words ‘malicious prosecution’ only required a lawsuit or other legal proceeding to be brought maliciously or spitefully for an improper purpose . . . [and] that a counterclaim for abuse of process satisfied that requirement.”²⁵

C. Most Courts Find that the Offense of “Malicious Prosecution” Occurs When the Malicious Prosecution Is Commenced.

1. Majority Rule – Commencement of Litigation During Policy Period Triggers Coverage B.

As noted above, Coverage B requires that the offense occur during the policy period. Most courts that have addressed the issue have held that the commencement of a malicious prosecution during the policy period is the event that triggers insurance coverage.²⁶ In so ruling,

²¹ See *Hinkle v. State Farm Fire & Cas. Co.*, 308 P.3d 1009, 1015 (Ct. App. N.M. 2013) (citing cases).

²² *A. Hanson Co., Inc. v. Aetna Ins. Co.*, 26 Wash. App. 290, 295 n. 3 (1980).

²³ 3 New Appleman on Insurance Law Library Edition § 19.04 (2017)

²⁴ *Lunsford*, 18 F.3d at 654. See also *Martin’s Herend Imps., Inc. v. Twin City Fire Ins. Co.*, No. H-99-064, 2000 U.S. Dist. LEXIS 8690, at *20 (S.D. Tex. Mar. 31, 2000); *Northwestern Nat’l Cas. Co. v. Century III Chevrolet*, 863 F. Supp. 247, 250-251 (W.D. Pa. 1994) (“the distinction between malicious prosecution and abuse of process is at best unclear.”).

²⁵ *Lunsford*, 18 F.3d at 655; *Travelers Prop. Cas. Co. of Am. v. KFx Med. Corp.*, 637 F. App’x 989, 991 n.3 (9th Cir. 2016) (“We note that the Policy purports to cover only ‘malicious prosecution’ claims—not claims for abuse of process. Nevertheless, we have previously held that, as a matter of California law, the use of either term in an insurance policy should be construed as incorporating the other”).

²⁶ *Zook v. Arch Spec. Ins. Co.*, 336 Ga. App. 669, 675 (2016) (“we adopt the majority rule that when the contract does not specify, insurance coverage is triggered on a potential claim for malicious prosecution when the insured sets in motion the legal machinery of the state.”); *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1132 (7th Cir. 2012) (“the overwhelming majority of jurisdictions to address this issue consider the trigger date to be the date of the underlying criminal charges or conviction”); *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 812-813 (8th Cir. 2012) (collecting cases); *City of Erie v. Guar. Nat’l Ins. Co.*, 109 F.3d 156, 160 (3d Cir. 1997) (“[T]he

courts have focused on when the injury occurs (*i.e.* the filing of the improper charges or lawsuit), not when the cause of action accrues for statute of limitation purposes (*i.e.* the termination of the charges or suit in favor of the defendant). As one court explained:

Reliance on the commencement of the statute of limitation is not dispositive in determining when a tort occurs for insurance purposes. Statutes of limitation and triggering dates for insurance purposes serve distinct functions and reflect different policy concerns. Statutes of limitation function to expedite litigation and discourage stale claims. But when determining when a tort occurs for insurance purposes, courts have generally sought to protect the reasonable expectations of the parties to the insurance contract.²⁷

And as another court noted, “it is improbable that the term ‘personal injury’ is used in a technical sense to speak of time when a cause of action has fully matured. It is more likely intended to describe the time when harm begins to ensue, when injury occurs to the person, that is, in this case, when the relevant law suit is filed.”²⁸

As noted above, Coverage B under an ISO policy is triggered when the offense of malicious prosecution occurs, and the requirement of an “occurrence” is inapplicable to Coverage B claims. Due to differences between ISO and non-ISO policy language, some courts evaluating trigger of coverage for malicious prosecution sometimes discuss when the “occurrence” took place instead of when the offense took place.²⁹ However, the result in such cases typically is the same as cases involving ISO personal injury coverage. In one such case, the court explained, “[a] plaintiff suffers actual damages from a malicious prosecution on the filing of the underlying complaint, which at a minimum triggers the need to invest the time, money, and effort to prepare a defense. While the termination of the underlying action is a required element and a necessary condition precedent before the malicious prosecution claim accrues for purposes of the statute of limitations, it is not an event that causes harm to the plaintiff and therefore not an ‘occurrence’ within the meaning of the policy.”³⁰

Accordingly, although most courts to consider what event must occur during the policy period to trigger coverage for a malicious prosecution claim have held that it is the filing of the charges or commencement of the litigation, it is possible that courts in those jurisdictions or others would be receptive to the argument that the triggering event is the termination of underlying proceedings in favor of the defendant.

2. Minority Rule – Favorable Termination of Underlying Proceedings During Policy Period Triggers Coverage B.

clear majority of courts have held the tort [of malicious prosecution] occurs [for insurance purposes] when the underlying criminal charges are filed.”).

²⁷ *City of Erie*, 109 F.3d at 161.

²⁸ *Genesis Ins. Co.*, 677 F.3d at 813-14.

²⁹ See, e.g., *Roess v. St. Paul Fire & Marine Ins. Co.*, 383 F. Supp. 1231, 1235 (M.D. Fla. 1974) (“Thus, in the context of this case, the date of favorable termination (rather than commencement) of the malicious action against Koubek was the operative occurrence upon which the effectiveness of the policy stands or falls”).

³⁰ *Billings v. Commerce Ins. Co.*, 458 Mass. 194, 198 (2010).

A “small minority” of courts have held that the event that triggers coverage is the “favorable termination of the underlying proceeding” rather than the commencement of the proceeding.³¹ The rationale behind those decisions is that termination of the underlying proceedings in favor of the plaintiff is a necessary element of the tort of malicious prosecution and, therefore, the offense of malicious prosecution does not occur until favorable termination of the malicious claim against the defendant.³² However, courts rejecting this argument have observed that the event that causes the harm to the underlying plaintiff is the commencement of malicious prosecution, not the release from prison or termination of malicious proceedings.³³

3. Rejection of Continuous Trigger

Some courts have considered – and rejected – the argument that there are multiple events that trigger malicious prosecution coverage, such as the date the underlying criminal charges were filed and the date of exoneration.³⁴ In one case, for example, the Supreme Judicial Court of Massachusetts rejected the position that malicious prosecution should be treated as a continuing tort that triggers all policies in effect while the underlying litigation was ongoing because “[u]nlike the asbestos-caused latent injuries . . . the injury to the person maliciously prosecuted is apparent the day he is served with process . . . It is clearer, simpler, and fairer to define the time of the ‘occurrence’ as the time the injurious effects ‘first became apparent,’ i.e., the date of filing.”³⁵ It should be noted, however, that the leading cases to reject multiple trigger or continuous trigger theories involved non-ISO policies that covered “personal injury” caused by an “occurrence.”

D. Potentially Applicable Exclusions

Few exclusions come into play when addressing coverage under Coverage B for offenses such as malicious prosecution and false imprisonment. Courts seem to focus on one exclusion in particular entitled “Knowing Violation of Rights of Another.” It states as follows: “This insurance does not apply to: ‘Personal and advertising injury’ caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury.’” A West Virginia federal court noted this exclusion “applies if the insured acted with the knowledge that his acts would violate another’s rights, and intended them to cause ‘personal and advertising injury.’”³⁶ In that case, the allegations of

³¹ Zook, 336 Ga. App. at 674 (citing cases); *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 678 F.3d 475 (7th Cir. 2012); *Nat'l Cas. Co. v. McFatridge*, 604 F.3d 335 (7th Cir. 2010); Roess, 383 F. Supp. at 1235 (applying Florida law).

³² See *Am. Safety Cas. Ins.*, 678 F.3d at 479-80

³³ *Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 755 F. Supp. 2d 988, 1008 (S.D. Iowa 2010) (“it is difficult to see how [a criminal defendant’s] release from prison can be described as an ‘injury’ in any sense of the word.”); *Billings*, 458 Mass. at 198 (favorable termination of a prosecution “is not an event that causes harm”).

³⁴ See *Billings*, 458 Mass. at 199 (“A malicious prosecution is not a tort where it is difficult to ascertain when the injurious effects of the tortious conduct first become manifest; any reasonable person recognizes that the injury occurs on the filing”); *City of Erie*, 109 F.3d at 165 (“no federal or state court has adopted the multiple trigger theory in malicious prosecution cases”).

³⁵ *Billings*, 458 Mass. at 199 (Punctuation and citations omitted).

³⁶ *Erie Ins. Property & Cas. Co. v. Edmond*, 785 F.Supp.2d 561, 568 (N.D.W.Va. 2011).

false imprisonment and invasion of privacy were “unambiguously root[ed] … in Mr. Edmond’s alleged sexual misconduct and harassment. … [I]t alleges that Mr. Edmond engaged in ‘inappropriate touching, and other inappropriate conduct,’ made ‘unwelcome sexual advances,’ ‘request[ed] sexual favors,’ and exhibited ‘other conduct of a sexual nature.’”³⁷ The court held that the allegations sufficiently “impl[ied] the fact that he acted intentionally and with knowledge that his actions ‘would violate the rights of another’” such that under the exclusion the insurer had no duty to defend.³⁸

Several cases stem from one incident in Pennsylvania involving a judicial kickback scheme to maintain a high rate of occupancy in juvenile detention facilities operated by the insureds.³⁹ As part of the alleged conspiracy, judges would violate the civil rights of the juveniles appearing before them by denying them a right to counsel and ensuring disproportionately large sentences.⁴⁰ The Middle District federal court held that the underlying complaints clearly allege that the insureds were part of a conspiracy in which they committed false imprisonment of the underlying plaintiff with the knowledge that their detention had been procured by violating the constitutional rights of the plaintiffs, that the insureds knew of these deprivations because it was part of the scheme, funded by their kickbacks, to facilitate detention of the juveniles in the facilities owned by and managed by the insureds.⁴¹ “Even though the MIC and MCAC make out claims for false imprisonment that would otherwise fall under the protection of Coverage B, the alleged knowing violation of the underlying plaintiffs’ rights trigger the ‘knowing violation’ exclusion and strip Colony of its duty to defend against the allegations in the underlying complaints.”⁴² The Third Circuit ruled in an appeal by an insured in another similar case: “We agree with the District Court that coverage is excluded because the complaint alleges that the defendants, including Mericle, ‘knowingly and willfully’ entered into an agreement to ensure future contracts for the construction of new detention facilities would be awarded to Mericle Construction in exchange for compensation.”⁴³

IV. Right of Privacy

Another important issue being tested in the courts is the meaning of a commercial general liability policy’s Coverage B offense of “publication” of material that gives unreasonable publicity to a person’s private life. This issue concerns the important question whether the limited, offense-based coverage of Coverage B in widely-issued commercial general liability

³⁷ *Id.*

³⁸ *Id.* at 569.

³⁹ *Colony Ins. Co. v. Mid-Atlantic Youth Services Corp.*, 2010 WL 817703 (M.D.Pa. Mar. 9, 2010) (insureds’ motion to dismiss denied); *Markel International Ins. Co. v. Western PA Child Care, LLC*, 805 F.Supp.2d 88 (M.D.Pa. 2011) (same -- insureds’ motion to dismiss denied); *Markel International Ins. Co. v. Western PA Child Care, LLC*, 2012 WL 750842 (M.D.Pa. Mar. 8, 2012) (insurer’s motion for summary judgment granted); *Travelers Property Cas. Co. v. Mericle*, 2010 WL 3505117 (M.D.Pa. Aug. 31, 2010) (judgment entered for insurer); *Travelers Property Cas. Co. v. Mericle*, 486 Fed.Appx. 233 (3d Cir. 2012) (judgment for insurer affirmed).

⁴⁰ *Colony*, 2010 WL 817703 at *6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Travelers*, 486 Fed.Appx. 233 at *5.

policies will be held to cover what are essentially cyber-liability claims—that is, claims alleging a failure to adequately protect private information. These might include, for instance, claims that a third-party hacker criminally accessed private information or claims where a mistake by the policyholder left open a means for access to certain personal information, although the policyholder intended *not* to publish that information. Such claims also might involve theft or loss of a mobile device containing personal information such as a laptop or cell phone.

Coverage B typically affords coverage for “those sums that the insured becomes legally obligated to pay as damages because of ‘personal injury’ . . . to which this insurance applies.” Personal injury coverage is limited to injury arising out of a list of designated offenses. An example of typical wording defines “personal injury” as:

“Personal injury” means injury, other than “bodily injury”, arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. 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 by or on behalf of its owner, landlord or lessor, provided that the wrongful eviction, wrongful entry or invasion of the right of private occupancy is performed by or on behalf of the owner, landlord or lessor of that room, dwelling or premises;
- d. Oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services, provided that claim is made or “suit” is brought by a person or organization that claims to have been slandered or libeled, or whose goods, products or services have allegedly been disparaged; or
- e. Oral, written or electronic publication of material that appropriates a person’s likeness, unreasonably places a person in a false light or gives unreasonable publicity to a person’s private life.

Under provisions such as these, it is hotly contested whether there is coverage for claims that a policyholder failed to safeguard private and confidential information that was in their custody, control and care or failed to adequately monitor, audit and oversee the security of their electronic systems containing confidential records. Coverage B personal injury coverage is limited to injury arising out of a list of designated offenses. Under the plain language of Coverage B, this coverage depends on whether the insured has committed an enumerated offense. *See, e.g., Whiteville Oil Co. v. Federated Mut. Ins. Co.*, 87 F.3d 1310 (4th Cir. 1996) (“Unlike Coverage A which provides for coverage based on the harm suffered, Coverage B’s applicability depends upon whether the injuries arose from one of the enumerated offenses listed in the policy.”). Policyholders have sought to fit allegations concerning failure safeguard private and confidential information that was in their custody, control and care into the Coverage B “offense” of “electronic publication of material that . . . gives unreasonable publicity to a person’s private life” or the “offense” of “publication by electronic means of material that . . . discloses information about a person’s private life.”

A key issue in these types of “failure to protect” cases is whether there was any “publication” or unreasonable publicity or disclosure of information about a person’s private life. In some cases, while information may have been exposed, it will be unclear whether the plaintiff’s material was viewed by third-parties at all, and in most of these disputes it is clear that the policyholder did not take any steps that were designed to disseminate or publish the material.

Insurers urge, and many courts have held, that the Coverage B offense of “publication” of material is not the same as an alleged failure to safeguard confidentiality. Many courts have concluded that the plain meaning of the term “publication” is the “act of declaring or announcing to the public,” “to disseminate to the public,” or materially similar definitions. *See, e.g., Whole Enchilada, Inc. v. Travelers Prop. Cas. Co. of Am.*, 581 F. Supp. 2d 677, 685 (W.D. Pa. 2008) (holding that insurer had no duty to defend where underlying complaint did “not allege that [the policyholder] is liable for ‘publication’”; plaintiffs only received their own personal information on credit card receipts); *Creative Hospitality Ventures, Inc. v. U.S. Liab. Ins. Co.*, 444 Fed. App’x 370, 375-76 (11th Cir. 2011) (the phrase “publication, in any manner” was unambiguous and did not apply when there was no dissemination of information to the public); *Ticknor v. Rouse’s Enters., LLC*, 2 F. Supp. 3d 882, 896 (E.D. La. 2014) (in order for “publication” to occur, the material must be “made generally known, announced publicly, disseminated to the public, or released for distribution”); *OneBeacon Am. Ins. Co. v. Urban Outfitters, Inc.*, No. 14-2976, 2015 WL 5333845, at *2 (3d Cir. Sept. 15, 2015) (“publication requires dissemination to the public”); *Terra Nova Ins. Co. v. Fray-Witzer*, 449 Mass. 406, 415, 869 N.E.2d 565, 572 (2007) (communication required a “public announcement”).

In each of these cases “publication”—to announce, to disseminate, to communicate, to distribute—required an intention to distribute material to others. Typically, in cyber claims, the policyholder did not take any steps to communicate anything to the public: it in fact sought to keep plaintiffs’ information private. Indeed, far from seeking to “publish” anything, the policyholder in a failure-to-protect case in fact sought to do the opposite. Even so, at least one prominent court has found coverage under Coverage B for such “right to privacy” claims. *Travelers Indemnity Company of America v. Portal Healthcare Solutions, LLC*, 2016 U.S. App. Lexis 6554 (4th Cir. 2016).

Another issue in the forefront of the dispute over whether Coverage B responds to “right of privacy” claims is that a “publication” requires that the material be communicated or disseminated to others. *See, e.g., Recall Total Info. Mgmt. v. Fed. Ins. Co.*, 83 A.3d 664, 672 (Conn. Ct. App. 2013) (no “publication” where record was entirely devoid of facts suggesting that the personal information actually was accessed”), *aff’d* 115 A.3d 458 (Conn. 2015). In many cyber cases, the claim alleges something short of communication or dissemination of the plaintiff’s personal information to others, e.g., in the instance of a lost laptop or other mobile device that holds personal information which cannot easily or automatically be accessed due to passwords or encryption. Insurers urge that the plain meaning of “unreasonable publicity” and “disclosure of information about private lives” requires actual communication of information to the public. Hence, where an underlying complaint alleges only the risk that someone could access the materials, not that any unreasonable publicity or

disclosure of information about the plaintiffs' lives actually took place, there may be no coverage for the claims under the designated offenses in Coverage B.

The Connecticut Supreme Court's recent decision in *Recall Total* is illustrative. In the underlying litigation, a tape with electronic data containing personal information fell from the back of a van. *Recall Total*, 83 A.2d at 667-68. The underlying complaint did not allege, however, that anyone ever accessed the information on the tape. Because "access is a necessary prerequisite to the communication or disclosure of personal information," the court held that the claim did not fall within the Coverage B designated offense of "electronic, oral, written or other publication of material that . . . violates a person's right of privacy . . ." Id. The Third Circuit reached the same conclusion in *Urban Outfitters*. The underlying complaints at issue in *Urban Outfitters* alleged that the policyholder collected personal ZIP codes of customers when purchasing products via credit cards. See *Urban Outfitters*, 2015 WL 5333845, at *3. In evaluating whether the claims alleged a Coverage B offense, the court determined that a "publication" required "provision of information to the public." Id. In *Urban Outfitters*, the insured was alleged to have used those ZIP codes internally to distribute material to consumers' homes, but there was no allegation that the insured took any steps to share the information with any third party. The Third Circuit found that no "publication" had occurred. This is an independent area of dispute in "right of privacy" cyber cases under Coverage B.

V. Wrongful Entry - Coverage for Pollution Claims

As stated above, liability policies typically contain "personal injury" coverage for intentional-type torts. The term "personal injury" is defined as an injury other than "bodily injury" arising out of the offense of "[t]he 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."⁴⁴ The main coverage issue for pollution claims under Coverage B is this definition of "personal injury" -- wrongful entry/invasion of right of private occupancy. Courts have wrestled with whether "wrongful entry" is a personal injury offense that is covered.

A. Restrictive Interpretation/No Coverage

Some courts have given a restrictive interpretation to "wrongful entry" and determined that personal injury coverage does not apply to trespass claims for environmental contamination. In *Whiteville Oil Co. v. Federated Mut. Ins. Co.*, a restaurant owner sued the insured gas station owner for trespass because fumes from insured's petroleum had caused the closing of the restaurant and other damages.⁴⁵ The "wrongful entry" offense language was the same as in the above *Meyers Lake* case. The court in *Whiteville Oil* noted that under North Carolina law the elements of trespass include an unauthorized, and therefore unlawful, entry on the land of

⁴⁴ See, e.g., *Meyers Lake Sportsman's Club, Inc. v. Auto-Owners (Mut.) Ins. Co.*, 2013 WL 3787437, at *5 (Ohio App. 5 Dist. July 15, 2013).

⁴⁵ *Whiteville Oil Co. v. Federated Mut. Ins. Co.*, 889 F.Supp. 241 (E.D.N.C.1995), aff'd, 87 F.3d 1310 (4th Cir.1996).

another and may result from petroleum seeping onto another's land.⁴⁶ "Wrongful entry," however, is generally used to refer to claims involving the wrongful taking of property or real estate and requires actual entry on another's land. *Id.* The ordinary meaning of entry involves the actual taking of lands or tenements by entering or setting foot on them.⁴⁷ While every person who wrongfully enters the property of another becomes a trespasser, the converse is not true. *Id.* Every trespass is not necessarily a "wrongful entry" because to be such, there must be a threat to the owner's possessory rights in the property, which goes beyond the less involved elements of trespass which simply involve an unauthorized presence.⁴⁸ In the underlying complaint in *Whiteville Oil*, the claimant restaurant owner did not allege that there was entry by a person onto the land or any attempt by an individual to exercise possession of the land.⁴⁹ In other words, the complaint does not state a claim for "wrongful entry," but does state a claim for trespass, which is a separate offense.⁵⁰ Under that distinction, it was clear to the court that the trespass claim in the underlying suit is a *property offense* and not a *personal injury offense*.⁵¹ As a property offense, the pollution exclusion applies to the trespass claims and the insurer did not have the obligation to defend those claims.⁵²

Another argument for no personal injury coverage is that the liability policy section defining "personal injury" lists wrongful entry "alongside a host of other torts which all require intent: malicious prosecution, false imprisonment, libel, slander, and invasion of privacy, [and] under the contract interpretation canon of *noscitur a sociis*, the meaning of a word is or may be known by the words accompanying or surrounding it."⁵³ For this reason, the court in *Arrowood* "interprete[d] the term 'wrongful entry' in light of the words around it, which indicate that only

⁴⁶ *Id.* at 247.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* See also *Kruger Commodities, Inc. v. United States Fidelity & Guar.*, 923 F.Supp. 1474, 1480-81 (M.D.Ala.1996) (right of private occupancy only refers to those rights associated with individual's act of inhabiting the premises, not to rights associated with individual's right to use and enjoy the inhabited premises; because claimants were not denied occupancy of their property due to the foul odors from insured's nearby processing animal carcasses plant, insured was not entitled to indemnity for personal injury coverage) (Arkansas law); *Dryden Oil Co. of New England, Inc. v. Travelers Indem. Co.*, 91 F.3d 278, 286-87 (1st Cir. 1996) ("wrongful entry" did not embrace the trespass claim for release of hazardous material during manufacturing process because (1) the wrongful conduct comprehended by the personal injury coverage afforded under policies like the present one amounts to an intentional tort under Massachusetts law, and (2) the Massachusetts tort of wrongful entry had yet to be extended beyond trespasses by landlords upon the leased premises).

⁵³ *Arrowood Indem. Co. v. Oxford Cleaners and Tailors, LLC*, 2014 WL 4104169, at *8 (D. Mass. August 15, 2014).

intentional torts are covered by the personal injury provision. A claim of negligent trespass is insufficient to trigger coverage under the personal injury provision.”⁵⁴

B. Expansive View/Coverage

Other courts take a more expansive view of “wrongful entry” and apply personal injury coverage for trespass and nuisance claims for pollution. In *Kitsap County v. Allstate Ins. Co.*, where adjoining landowners alleged trespass as a result of odors and pollution emanating from the insured’s landfill and waste disposal facility, the personal injury offense had a broader definition – “wrongful entry or eviction, or other invasion of the right of private occupancy.”⁵⁵ The court noted that one must look to the type of offense that the insured is alleged to have committed and not the nature of the damages sought in the action.⁵⁶ Personal injury coverage does not just involve intentionally inflicted injury since the dictionary defines “offense” as an act of breaking the law, sin, crime, transgression, misdeed, and there are many laws that one may violate without intending to do so.⁵⁷ The court determined that an average purchaser of insurance would think that a trespass was a wrongful entry.⁵⁸ As to the meaning of “other invasion of the right of private occupancy,” the phrase is intended to encompass torts that are not encompassed by the terms “wrongful entry” and “wrongful eviction” and thus to the court the average purchaser of insurance would include a trespass on or against a person’s right to use premises or land that are secluded from the intrusion of others.⁵⁹ The court in *Kitsap* reached the same conclusion about nuisance claims because a nuisance is an unreasonable interference with another’s use and enjoyment of property, whereas a trespass is an invasion of the interest in exclusive possession of property, and each is an invasion of the possession of land normally involving some degree of interference with its use and enjoyment.⁶⁰

Illinois. In Illinois, courts have found “wrongful entry” ambiguous and held it covers a trespass injury caused by migration of a hazardous substance onto the property of another.⁶¹ The *Millers* court noted that “wrongful entry” could reasonably mean a dispute over “possession of real property,” but it could also reasonably mean “all trespassory invasions to real property, whether aimed at dispossession or not.”⁶² Illinois cases referring to “wrongful entry” do not

⁵⁴ *Id.*

⁵⁵ *Kitsap County v. Allstate Ins. Co.*, 136 Wash.2d 567, 964 P.2d 1173, 1176 (1998).

⁵⁶ *Id.* at 1179.

⁵⁷ *Id.* at 1181.

⁵⁸ *Id.* at 1184.

⁵⁹ *Id.* at 1185; see also *Titan Holdings Syndicate, Inc. v. City of Keene, N.H.*, 898 F.2d 265 (1st Cir. 1990) (“other invasion of the right of private occupancy” encompasses negligent unintentional trespass).

⁶⁰ *Id.*; see also *Homesite Ins. Co. of the Midwest v. Ascolese*, 2018 WL 1156075 (W.D.Wash. Mar. 5, 2018) (applies *Kitsap*: nuisance and trespass constitute personal injury offense arising out of wrongful entry and invasion of right of private occupancy).

⁶¹ See, e.g., *Millers Mut. Ins. Ass’n of Illinois v. Graham Oil Co.*, 668 N.E.2d 223, 231 (Ill. App. 1996).

⁶² *Id.*

define it as a cause of action, but merely use it to characterize the unlawful nature of the trespasses therein considered.⁶³ As such, the court held “wrongful entry” ambiguous and construed it to include “unauthorized seepage and migration of gasoline onto the property of an adjoining neighbor.”⁶⁴

One Illinois case articulated a test for determining whether the personal injury coverage for wrongful entry applies – there must be a ““nexus’ between an allegation of conduct that constitutes trespass or nuisance and the legal basis for the underlying plaintiffs’ entitlement to relief.”⁶⁵ “The wrongful entry coverage applies only when the entry is into property that the injured person *occupies*.”⁶⁶ Where the underlying complaint does not allege a claim arising out of the invasion of any private occupancy rights but instead arises out of contamination of public property, the duty to defend is not triggered.⁶⁷ Similarly, even if the contamination invades a private occupancy right, there is no wrongful entry coverage if the nexus test is not met. In *John Sexton*, the insured sought coverage for payments made in three underlying actions for CERCLA response costs but the insured failed to prove that the one action involving a private occupancy right was actually seeking contribution from the insured for CERCLA response costs.⁶⁸ In other words, the nexus test was not met and there was no wrongful entry coverage.

C. Reading the Pollution Exclusion Out of Policy?

A frequent debate in cases is whether allowing personal injury coverage for trespass and nuisance has the effect of reading the pollution exclusion for bodily injury and property damage out of the policy. If this is permitted, so the insurer’s argument goes, an insured could avoid limitations to coverage through the simple artifice of recharacterizing pollution liability claims as actions for personal injury, thereby trumping other limitations to coverage.⁶⁹ Courts have held that a personal injury provision cannot serve as the basis for coverage of pollution-related claims that otherwise come within the ambit of the pollution exclusion.⁷⁰ While there is a “theoretical possibility that the [personal injury provision], if read standing alone, might provide coverage, ... when read in the context of the entire insurance policy, coverage would contradict the clear

⁶³ *Id.*

⁶⁴ *Id.*; see also *National Fire and Indem. Exchange v. Ali & Sons Co.*, 346 Ill.App.3d 107, 803 N.E.2d 636, 639 (2004) (because lessor sued lessee for contaminating only the leased premises, there was no “wrongful entry” coverage since a lessee could not trespass upon premises it leased).

⁶⁵ *John Sexton Sand & Gravel Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.*, 2015 WL 8536736, at *3 (N.D. Ill. December 11, 2015).

⁶⁶ *Id.* (emphasis in original).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Kitsap County*, 964 P.2d at 1182.

⁷⁰ *Arrowood*, 2014 WL 4104169, at *9.

pollution exclusion for damage to real property.”⁷¹ In dealing with unintentional migration of contaminants such as perchloroethylene, *Arrowood* court followed this reasoning:

While the pollution exclusion in the Arrowood policy is appended only to the property damage section, the Court does not read the provisions of an insurance policy in a vacuum, but rather considers them in the context of the entire contract. Because D & D’s claim alleges contamination of its property by substances clearly established as pollutants, an insured would have to do a pretzel-twist logically to believe on the one hand that Oxford was not entitled to coverage under the ‘bodily injury’ and ‘property damage’ sections of the policy because coverage is barred by the pollution exclusion, yet on the other hand believe he should receive coverage for the same risk under the personal injury liability coverage afforded by the policy. To do so would “render … the pollution exclusion a dead appendage to the policy. *Lakeside*, 172 F.3d at 705.⁷²

On the other hand, the insured’s argument is that the pollution exclusion applicable to the property damage and bodily injury provisions would not be read out of the policy.⁷³ Not every claim for release of pollutants is a trespass, nuisance or interference with use and enjoyment of property, and the exclusion would have viability in cases where the pollution claim against the insured could not be characterized as trespass, nuisance, or other claims for personal injury.⁷⁴ In essence, a pollution exclusion clause which, by its terms, applies only to the policy’s property damage and bodily injury provisions, cannot defeat coverage for pollution-related claims that “arguably fall[] within the scope of [the policy’s] personal injury coverage.”⁷⁵

⁷¹ *Id.*, citing *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1023 (6th Cir.1995) (applying Michigan law, holding that a policy’s personal injury provision did not cover suit for TCE release because of the pollution exclusion); *Lakeside Non–Ferrous Metals, Inc. v. Hanover Ins. Co.*, 172 F.3d 702, 705–06 (9th Cir.1999) (applying California law, declining to find a duty to defend under an insurance policy’s “personal injury” provision where the underlying suit alleged land and water contamination); *Gregory v. Tennessee Gas Pipeline Co., et al.*, 948 F.2d 203, 207 (5th Cir.1991) (applying Louisiana law, holding that pollution exclusion precluded duty to defend under personal injury provision for suit alleging chemical contamination of lake).

⁷² 2014 WL 4104169, at *9.

⁷³ *Kitsap*, 964 P.2d at 1182.

⁷⁴ *Id.*

⁷⁵ *Arrowood*, 2014 WL 4104169, at *8, citing *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1042 (7th Cir.1992) (applying Illinois law, holding that insurer had a duty to defend plaintiff in underlying suit alleging negligence in connection with a chemical spill under the “other invasion of the right to private occupancy clause”); see also *Scottish Guar. Ins. Co. v. Dwyer*, 19 F.3d 307, 311–12 (7th Cir.1994) (similarly applying Wisconsin law, holding that insurer was obligated to defend insured in suit claiming damages for property damage and ingestion of contaminated water as a result of chemical releases); *City of Delray Beach, Fla. v. Agric. Ins. Co.*, 85 F.3d 1527, 1533–35 (11th Cir.1996) (applying Florida law, holding that, generally, a pollution exclusion that does not expressly apply to a personal injury provision will not bar coverage of environmental contamination, but declining to find a duty to defend because the underlying pollution claim did not fit the definition of any of the provision’s enumerated risks, including “wrongful entry”); *Admiral Indem. Co. v. 899 Plymouth Court Condominium Association*, 2017 WL 345559 (N.D.Ill. Jan. 24, 2017) (“wrongful entry” offense requires the wrongful entry to be committed by the owner, landlord or lessor of the property at issue; thus no coverage here because the insured condominium association was not the owner, landlord or lessor).

VI. Disparagement

A final key area of dispute in Coverage B matters concerns the interpretation of the following offense: "Oral, written or electronic publication of material that slanders or libels a person or organization or *disparages a person's or organization's goods, products or services.*" The application of this offense presents questions such as whether the policy's disparagement clause refers to the common law tort of product disparagement, which requires pleading and proof of a false statement, or to any statement or opinion that disparages another's goods. Probably the most notorious case, *Travelers Property Casualty Company of America v. Charlotte Russe Holding, Inc.*, 207 Cal. App. 4th 969 (2012), found a potential for coverage in an allegation that the insured retailer sold the manufacturer's premium apparel at closeout prices, thereby damaging the apparel's high-end reputation. However, *Charlotte Russe Holding, Inc.*, was disapproved two years later by the California Supreme Court in *Hartford Casualty Insurance Company v. Swift Distribution, Inc.*, 2014 Cal. Lexis 3765 (2014).

The question presented was whether the phrase "disparages a person's or organization's goods, products or services," construed in the context of the policy, referred to the common law tort of product disparagement, also known as trade libel, or whether it referred generally to any statement or opinion that denigrates another's goods. The distinction is significant because to recover for the tort of product disparagement, the plaintiff typically must plead and prove the defendant made a false statement. Ultimately, the California Supreme Court held in *Swift Distribution, Inc.* that, in order to trigger a duty to defend a disparagement claim under the "personal and advertising injury" coverage of a general liability policy, the plaintiff must show, by express mention or clear implication, that the insured made a false or misleading statement that specifically refers to, and clearly derogates, the plaintiff's products or business.

After *Swift Distribution, Inc.*, the prevailing view is that to trigger the "personal injury" coverage at issue in the disparagement cases, the plaintiff must plead and prove the defendant's statement was not only disparaging but also false. The issue is not without controversy, however. Courts construing similar policy language under the laws of other states have reached inconsistent conclusions. E.g., *Mulberry Square Prod. v. State Farm Fire and Cas.*, 101 F.3d 414, 421 (5th Cir. 1996) (insurer had no duty to defend under business liability policy's coverage for personal injury where counterclaims against insured did not allege that insured "authored some oral or written publication that amounted to trade libel or product disparagement"); *Winklevoss Consultants, Inc. v. Federal Ins. Co.*, 11 F. Supp. 2d 995, 1000 (N.D.Ill. 1998) ("the policy offense of 'disparagement' is not synonymous with common law commercial disparagement"); *PCB Piezotronics, Inc. v. Kistler Instrument Corp.* 1997 WL 800874, at p. *3 (W.D.N.Y. Dec. 31, 1997)) ("disparage" as used in policy's "advertising injury" coverage did not "refer[] exclusively to the common law tort of product disparagement"); *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.*, 214 Fed.Appx. 596, 599 (7th Cir. 2007) (adopting dictionary definitions of "disparage").