ENTERTAINERS BEWARE –

YOU MAY HAVE LESS INSURANCE COVERAGE THAN YOU THINK

Edwin F. McPherson*

As with other careful business people, all shrewd entertainers (or, more accurately, their business managers) purchase commercial general liability[1] ("CGL") insurance policies for their businesses. However, what neither they nor their business managers may know is that, although they are paying as much or more of a premium than anyone else for such a policy, they often obtain less coverage.

The coverage parts for CGLs rarely differ from business to business or from insurer to insurer; most insurers use standard ISO (Insurance Services Office, Inc.) forms, or a slight variation thereof. However, the exclusions that may be attached to a CGL policy that is issued to an entertainer (or at least the manner in which insurers interpret those exclusions) may very well eviscerate much or all of certain portions of coverage, so that portions of coverage under the policy might be completely illusory.

Perhaps the greatest offender of them all is the "Entertainment Industry Exclusion" or "Field of Entertainment Endorsement" (collectively "EIE"). Many carriers include this within their litany of exclusions or endorsements that are attached to their policies when they are insuring entertainers.[2] Fireman's Fund, through its subsidiary, American Insurance Company, actually has the temerity to issue a policy called the "Entertainment

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1. Formerly referred to as a *comprehensive* general liability policy. The name was changed in the 1980s, presumably because insureds and juries expected "comprehensive" to mean comprehensive.

2. *See, e.g.*, FIREMAN'S FUND INSURANCE COMPANY ENTERTAINMENT INSURANCE POLICY E 92 XPK 80803930 [hereinafter "Fireman's Fund Policy"] (on file with author).

Insurance Policy," which is approximately 172 pages long, with a one-page exclusion called "Entertainment Industry Exclusion."[3] According to Fireman's Fund, this exclusion eliminates all coverage (at least under Coverage B) for injuries that arise out of the insured's activities that are associated in any way with the entertainment industry.[4] Thus, even though a CGL policy, by definition, provides coverage for the insured's *business*, many carriers take the position that, if the insured's business is *entertainment*, there is no coverage under Coverage B of the policy (essentially 50% of the policy).

However, there are other exclusions that insurers have often utilized in their attempts to avoid coverage under CGL policies for entertainers. The most popular ones, from the carriers' point of view, are the Prior Publication Exclusion and the E&O (errors and omissions) Exclusion. These exclusions, as well as the EIE, are discussed below, following a discussion of the general coverage parts of a CGL policy.

THE COVERAGE

Coverage A and B

A typical CGL policy provides that the insurer will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which the policy applies ("Coverage A"), as well as those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury." ("Coverage B").[5]

Coverage A of a typical policy provides: "We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages . . . ."[6]

Coverage B of a typical policy provides: "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. We will have the right and duty to defend the insured against any suit[7] seeking those damages . . ."[8]

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3. *Id.* at 48.

4. *Id.*

5. *See generally id.*

6. *Id.* at 23.

7. "Suit" is defined in typical policies as a "civil proceeding in which damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance

According to the "Definitions" in a typical CGL policy, "property damage" is defined as:

> (a) Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of physical injury that caused it; or (b) Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.[9]

"Personal and advertising injury" is defined as:

> "Injury, including consequential bodily injury" arising out of one or more of the following offenses: (a) False arrest, detention or imprisonment; (b) Malicious prosecution; (c) The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor; (d) Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organizations goods, products, or services; (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.[10]

The term "advertisement" is defined in the policy as follows: "A notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters."[11] Additionally, for purposes of this definition:

> [N]otices that are published include material placed on the Internet or on similar electronic means of communication. Regarding websites, only that

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applies are alleged." Many insurers take the position that, even though a claim has been made against the insured, they have no duty to defend the insured, or assist the insured in any way, until that claim ripens into a lawsuit. Oftentimes, a "claim" may not ripen into a "suit" for 1-6 years, depending on the relevant statute of limitations in a particular state. Irrespective of what the insured has to do to defend or investigate that "claim" during that time, the insurer may not provide any assistance whatsoever. In fact, at the end of the coverage parts for Coverage A and Coverage B, some carriers provide: "We may, at our discretion, investigate any "occurrence" and settle any claim or 'suit' that may result . . . ." leaving it within the complete discretion of the insurer whether or not to investigate the claim during the 1-6 years following an alleged injury.

8. Fireman's Fund Policy, *supra* note 2, at 28.

9. *Id.* at 39.

10. *Id.* at 38.

11. *Id.* at 36. Significantly, the terms "advertising idea," "notice," "broadcast," "published," and "specific market segments" are not defined anywhere in a typical CGL policy.

> part of a website that is about your goods, products, or services for the purposes of attracting customers or supporters is considered an advertisement.[12]

THE ENTERTAINMENT INDUSTRY EXCLUSION (EIE)

A typical entertainment industry exclusion reads as follows:

> This policy does not apply to Personal Injury or Advertising Injury arising out of the development, creation, pre-production, production, post-production, distribution, exploitation, writing, broadcasting, airing, performing, or exhibition of films, television/cable programs, radio programs, stage plays, video/audio cassettes, music, sheet music, computer programs, books or other similar materials and properties.[13]

Arising Out Of

It is the "arising out of" (sometimes replaced by "that results from") language and the "or other similar materials and properties" language that appear to cause the most trouble in insurance companies' (and some trial courts') interpretation of the exclusion. Many insurance companies take the position that, if the insured's primary business is, *e.g.*, music or film, then everything that the insured does, and every injury that it causes, "arises out of" its music or film endeavors. Moreover, carriers construe the "or other similar materials and properties" language to be an all-inclusive omnibus clause that includes every kind of entertainment-related activity imaginable.

The essence of insurers' arguments is that the only reason for which an entertainer could have another business is because of his or her fame from his or her entertainment business; this assertion is both speculative and irrelevant for the purposes of the construction of insurance policies. In fact, in so doing, insurers disregard the principle that, in interpreting an insurance policy, the "clear and explicit" meaning of a provision, interpreted in its "ordinary and popular sense," should govern the interpretation, unless "used by the parties in a technical sense of a special meaning is given to them by usage."[14]

A reasonable person certainly would not interpret the language in the Entertainment Industry Exclusion to mean that, for instance, a rock band's use of a logo on a flier, or its use of copyrighted artwork on its

12. *Id.*

13. *Id.* at 48.

14 *See* MacKinnon v. Truck Ins. Exch., 73 P.3d 1205, 1213 (Cal. 2003) (quoting Cal. Civ. Code § 1644).

merchandise, including t-shirts or posters, "arises out of" the *development*, *pre-production* or *post-production*, *distribution*, *exploitation* or *exhibition* of the band's *sheet music* or *music*. Such a construction would be an unreasonable and overly broad interpretation of the plain language of the EIE.

None of those properties (a flier, a t-shirt, a poster, a website, a key chain, and a sticker) is among the specific properties that are listed in the EIE[15] (*i.e.*, a film, television/cable program, radio program, stage play, video/audio cassette, music, sheet music, computer program, or book); nor are they even remotely "similar" to any of those properties. Certainly, an argument can be made that, had the insurer wished to include properties such as merchandise, fliers, or t-shirts, it certainly could have expressly listed them in the EIE.

A layperson certainly would not read and interpret the phrases "arising out of" and "other similar materials and properties" to mean that virtually all claims against a band – including claims relating to the band's merchandising and advertising activities – would be excluded on the ground that the band's primary business is music. Such an interpretation would deprive the insured of its right to rely upon the actual language of the EIE, which clearly relates to the *creation* of music (or films, etc.), and not to collateral activities.

Such an interpretation would also require an insured to understand that the term "arising out of" has a meaning that is contrary to the common meaning of the phrase. An exclusion cannot be written so as to require the insured to do research in order to understand what the exclusion encompasses.[16] Significantly, however, insurers' applications of the term "arising out of" in this exclusion are impermissibly broad, and do not comport with the authorities that have applied the term in the context of an exclusion.[17]

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15. *Id.*

16. Ponder v. Blue Cross, 193 Cal. Rptr. 632, 640 (Cal. Ct. App. 1983) ("[I]nsurance contracts – and especially their exclusionary clauses – must be expressed in language comprehensible to citizens of average education, knowledge and experience."); *see also* Haynes v. Farmers Ins. Exch., 89 P.3d 381, 385 (Cal. 2004) ("[A]ny provision that takes away or limits coverage reasonably expected by an insured . . . must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson").

17. State Farm Mut. Auto Ins. Co. v. Partridge, 10 Cal. 3d 94, 101-02 (1973) ("an entirely different rule of construction applies to exclusionary clauses as distinguished from coverage clauses" so that one policy *covering* harm "arising out of" use of an automobile and another *excluding* such harm may both provide coverage) (emphasis added); JUSTICE H. WALTER

Although the term "arising out of" (as every other term) is to be construed broadly in a coverage provision, where the phrase "arising out of" is used in an *exclusion*, the term must be construed narrowly against the insurer that wrote the language.[18] In fact, the phrase "arising out of" has been quite narrowly construed in general when used in an exclusion, and requires *a strong causal connection*.[19]

Finally, insurers' interpretations of the phrase "arising out of" disregard the requirement for any rational causal connection to exist between the alleged injury and the exclusion, and instead rests upon the faulty assumption that "arising out of" means "but for." However, as noted by Judge Posner, the Chief Judge for the Seventh Circuit, in *James River Insurance Co. v. Kemper Casualty Insurance Co.*,[20] with respect to a similar term, "arising from," the term implies a tighter connection than a mere "but for" causation: "maybe if Columbus hadn't discovered America the federal court of appeals would not have been created in 1891; but it would be odd to say that the federal appellate judiciary 'arose from' Columbus's voyages."[21]

The test is clearly not whether the alleged activity and resulting alleged injury would have occurred *but for* the insured being in the entertainment

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CROSKEY ET AL., CALIFORNIA PRACTICE GUIDE INSURANCE LITIGATION §4:120.5, at 4-23 (2015) ("When the phrase arising out of is used in an *exclusion* rather than a coverage provision, it is interpreted *narrowly against the insurer* (citing *Partridge*, 10 Cal. 3d at 101-02) (emphasis in original).

In fact, the phrase "arising out of" has been quite narrowly construed when used in an exclusion, and requires *a strong causal connection*. *See, e.g.*, Golden Eagle Ins. Co. v. Rocky Cola Café, Inc., 94 Cal. App. 4th 120, 126 (2001) (exclusion for personal injury to a person "arising out of any . . . [e]mployment-related practices narrowly construed to require direct and proximate causation) (emphasis added); *see also* McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 318 (1993) (when construing exclusionary clause in general liability policy, "arising out of" should be narrowly construed as meaning "caused by").

18. State Farm Mut. Auto Ins. Co. v. Partridge, 514 P.2d 123, 128 (Cal. 1973) ("[A]n entirely different rule of construction applies to exclusionary clauses as distinguished from coverage clauses" so that one policy *covering* harm "arising out of" use of an automobile and another *excluding* such harm may both provide coverage) (emphasis added); CROSKEY ET AL., *supra* note 17 ("When the phrase arising out of is used in an *exclusion* rather than a coverage provision, it is interpreted *narrowly against the insurer*." (citing *Partridge*, 514 P.2d at 128)) (emphasis in original).

19. *See, e.g.*, Golden Eagle Ins. Co. v. Rocky Cola Café, Inc. 114 Cal. Rptr. 2d 16, 20-21, 23 (Cal. Ct. App. 2001) (exclusion for personal injury to a person "arising out of any . . . [e]mployment-related practices" narrowly construed to require direct and proximate causation) (emphasis added); *see also* McPherson v. Michigan Mut. Ins. Co. 426 S.E. 2d 770, 771 (S.C. 1993) (when construing exclusionary clause in general liability policy, "arising out of" should be narrowly construed as meaning "caused by").

20. James River Ins. Co. v. Kemper Cas. Ins. Co., 585 F.3d 382, 386 (7th Cir. 2009).

21. *Id.*

business. Such an expansive and distorted interpretation of this exclusion defies California case law,[22] and would also render the CGL policy illusory.

Illusory Coverage

A very basic tenet of contract interpretation, including insurance contracts, is that, "[w]hen reasonably practical, contracts are to be interpreted in a manner that makes them reasonable and *capable of being carried into effect*."[23] This obviously would not be possible if the EIE had the meaning that was ascribed to it by insurers, which eviscerates any real personal or advertising injury coverage under the policy.

Simply put, an exclusion or endorsement cannot render the coverage in an insurance policy illusory.[24] Indeed, in *Safeco*, the court noted that a broad interpretation of the "illegal act" exclusion in the insurance policy would violate this rule, and impermissibly render the promised coverage "illusory," which is not acceptable.[25]

Additionally, in *Marquez Knolls Property Owners Ass'n v. Executive Risk Indemnity*,[26] at issue was the scope of an exclusion in a liability insurance policy for claims involving "[t]he design, construction, renovation or rehabilitation of any building, structure or other improvement on any real property."[27] Although the insurer interpreted the exclusion as precluding coverage for a claim that pertained to improvements made by a third party, the court rejected this interpretation because:

> Any other interpretation of the exclusion would be contrary to principles of contract interpretation requiring language to be construed in the context of the policy as a whole and the circumstances of the case; would result in

22. *See* Manzarek v. St. Paul Fire & Marine Ins. Co. 519 F.3d 1025, 1032-33 (9th Cir. 2008).

23. Safeco Ins. Co. v. Robert S., 28 P.3d 889, 894 (Cal. 2001) (emphasis added); Palmer v. Truck Ins. Exch., 988 P.2d 568, 572-73 (Cal. 1999).

24. *See* N. Ins. Co. v. Allied Mut. Ins. Co., 1995 U.S. Dist. LEXIS 14739, at *17 (N.D. Cal. Oct. 2, 1995) (endorsement "should be nullified, because its enforcement would enforce an interpretation of the policy that would result in the contracting party receiving no benefits from the insurance contract."); Research Corp. v. Westport Ins. Corp., 289 F. App'x 989, 993 (9th Cir. 2008) (No. 05–16031) ("An insurer may not grant coverage with one provision, and then take it away with another.").

25. *Safeco*, 28 P.3d at 894.

26. Marquez Knolls Prop. Owners Ass'n v. Exec. Risk Indem., 62 Cal. Rptr. 3d 510 (Cal. Ct. App. 2007).

27. *Id.* at 513.

> a policy that is almost entirely illusory; has no support in the cases on which the insurer relies; and would defy common sense.[28]

Coverage B typically insures against liability arising out of "advertising activity" and "personal injury" relating to the entertainer's business.[29] Yet, under insurers' analyses, there is literally *nothing* that the entertainer/insured does that does not "arise from" the creation, etc. of music, and therefore *nothing* for which the entertainer could be sued (at least with respect to Coverage B) that would not similarly "arise from" such music (or film, etc.).[30] Essentially, in the insurers' view, as long as the insureds are entertainers, they will have *no* coverage under Coverage B, and no other business in which they are involved will be covered either.[31] However, that is not what the policies say.

Insurers' broad interpretations and applications of the EIE eliminate *all* coverage for *all* personal and advertising injury, thereby impermissibly rendering *all* of those coverages illusory. Indeed, their interpretation creates a serious and arbitrary gap in insurance protection under the policy,[32] which is impermissible.[33]

EIE Cases

Although there are two Federal cases that specifically address the entertainment industry exclusion, and both are directly on point, the California Court of Appeal, unfortunately, has chosen not to publish the only State Court case that conclusively determined the issue. First, the Federal cases:

In *Manzarek v. St. Paul Fire & Marine Insurance Co.*, the plaintiffs in two underlying lawsuits (a former member of The Doors band and the parents of Jim Morrison and the parents of Morrison's late wife) had alleged that Ray Manzarek and Doors Touring, Inc. ("DTI") (along with other members of Manzarek's touring band) had infringed the name,

28. *Id.* at 514.

29. *Manzarek*, 519 F.3d at 1028-29.

30. *Id.* at 1029.

31. *Id.*

32. Some insurers have taken the position that, if an insured entertainer did not want so much excluded, he could have paid a higher premium to remove the EIE from the policy. However, in most, if not all, cases, underwriters will not allow an entertainer to purchase a CGL policy without an EIE exclusion attached, irrespective of how much money the insured pays for the policy.

33. *See Safeco*, 28 P.3d at 894; State Farm Mut. Auto Ins. Co. v. Jacober, 514 P.2d 953, 960 (Cal. 1973).

trademark, and logo of the band "The Doors" in connection with the marketing of products and merchandise.[34]

Manzarek and DTI were insured under a CGL policy. Their insurer denied coverage, asserting that a Field of Entertainment Limitation Endorsement ("FELE") precluded coverage. "Field of Entertainment Business" was defined in the policy as:

> The creation, production, publication, distribution, exploitation, exhibition, advertising and publicizing of product or material "*in any and all media such as*" motion pictures of any kind and character, television programs, commercials or industrial or educational or training films, phonograph records, audio or video tapes, CDs or CD ROMS, computer on-line services or internet or Web site pages, cassettes or discs, electrical transcriptions, music in sheet or other form, live performance, books or other publications.[35]

In the subsequent coverage action that Manzarek and DTI filed against the insurer, the district court granted the insurer's motion to dismiss, holding that "[t]he [exclusion] was sufficiently conspicuous," and "[i]n addition to being conspicuously referenced in the policy declarations and attached as a separate endorsement, the language of the [exclusion was] plain and clear."[36]

The Ninth Circuit reversed, and stated that the District Court failed to apply the language of the exclusion to the factual allegations contained in the complaints in the underlying actions.[37] The Court noted that, although the plaintiffs had alleged that Manzarek and DTI marketed allegedly infringing products and merchandise at their concerts and on The Doors' official website, the lawsuit was silent about what *type* of products and merchandise Manzarek and DTI produced and marketed.[38] Specifically, the Ninth Circuit stated:

> California law requires us to adopt a narrow construction of the FELE. With such narrow construction, the FELE would not exclude advertising injury coverage if, for example, Manzarek and DTI began distributing "The Door's Own" line of salad dressing. Advertising injury coverage for such a product would still exist because Manzarek and DTI would not necessarily publicize, distribute, exploit, exhibit or advertise in media such

34. *Manzarek*, 519 F.3d at 1027-28.
35. *Id.* at 1032.
36. *Id.*
37. *Id.*
38. *Id.* at 1033.

> as motion pictures, etc. For similar reasons, the FELE would not completely exclude advertising injury coverage if Manzarek and DTI began marketing a line of t-shirts or electric guitars with *The Doors* logo or Morrison's likeness on them. Although marketing these products would undoubtedly expose Manzarek and DTI to a claim for advertising injury, Manzarek and DTI would still enjoy advertising injury coverage under the Policies.[39]

In the second of the two Federal cases, *Vivid Video, Inc. v. North American Specialty Ins. Co.*, Vivid Video Productions had sued Vivid Video, Inc., a producer, marketer, and distributor of adult entertainment videos, for common law and federal trademark infringement, among other claims.[40] Vivid sought a defense under its CGL policy.[41] However, Vivid's insurer refused to defend, asserting that the claims were excluded due to, in part, the Entertainment Industry Exclusion, which excluded advertising injury "*arising out of* the 'Field of Entertainment Business' of the Insured "with respect to . . . infringement of copyright or trademark whether common law or statutory."[42]

Vivid argued that the Entertainment Industry Exclusion did not exclude coverage for the underlying claims because the claims did not relate to the *content* of its videos, but the packaging of those videos, *i.e.* the trademarked name "Vivid."[43] In granting Vivid's motion for summary adjudication, the Court held that the entertainment industry exclusion did not eliminate the insurance company's duty to defend Vivid in the trademark lawsuit because "[t]he Endorsement's plain language supports an interpretation that it excludes only injuries an insured might suffer from the entertainment nature of its business, and would not encompass injuries an insured might experience even as a non-entertainment type business."[44]

The District Court further stated that "an insured might reasonably conclude that the Endorsement excludes coverage for injuries which may arise from the substantive content of its entertainment activities rather than from an insured's application of its own identifying mark on its line of products, even if those products are entertainment in nature."[45]

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39. *Id.* at 1032-33 (emphasis added).

40. Vivid Video v. N. Am. Specialty Ins. Co., U.S. Dist. LEXIS 15322 (C.D. Cal. June 29, 1999).

41. *Id.* at *3.

42. *Id.* at *3, *11 (emphasis added).

43. *Id.* at *12.

44. *Id.*

45. *Id.* at *12.

Significantly, the *Vivid* court found that the entertainment exclusion was ambiguous because the insured reasonably could have believed that the underlying claims were not excluded because they did not relate to the *content* of the insured's videos, but only to the *packaging* of those videos, *i.e.* the trademarked name "Vivid."[46]

In so holding, the court in *Vivid* necessarily found that an insured's alleged wrongful use of a trademarked name, even on the very product that was necessarily excluded, did not clearly "arise from" "the creation . . . exploitation, exhibition . . . advertising and publicizing various media of motion pictures on any kind . . . television programs . . . audio and videotapes . . . music in sheet and other form, books and other publications, and other similar properties."[47]

Indeed, that the Ninth Circuit held that the *Manzarek* insurer owed the insured a duty to defend notwithstanding the breadth of that exclusion is notably significant: "The decision in *Manzarek* thus serves as a potential touchstone for plaintiff's attorneys in coverage actions seeking to limit the scope of the entertainment limitation endorsement."[48]

The *Manzarek* and *Vivid* courts have made it clear that, if the EIE has any effect whatsoever, it is to exclude coverage for liability relating to the substantive content of the insured's entertainment creations.[49] In other words, if the insured is in the primary business of creating music, claims arising from the substantive content of that insured's music might be excluded under the EIE.[50] However, other claims – certainly ones that result from the packaging and/or promotion of that music (*Vivid*), or from another business of the insured *(Manzarek*) – clearly should not be excluded under the EIE.[51]

Notwithstanding the seemingly clear mandate of *Manzarek* and *Vivid*, insurers continue to assert the EIE as a defense to coverage claims involving entertainers. In *Clarendon National Insurance Co. v. Tool, et al.*, the rock band Tool had three separate policies of insurance with three

46. *Id.*

47. *Id.* at *11.

48. HINSHAW & CULBERTSON LLP, CALIFORNIA INSURANCE LAW & PRACTICE § 52.02[6], at 52-17 (2015).

49. *Manzarek*, 519 F.3d at 1032; *Vivid*, U.S. Dist. LEXIS 15322 at *12.

50. *Manzarek*, 519 F.3d at 1032.

51. *Vivid*, U.S. Dist. LEXIS 15322 at *12; *Manzarek*, 519 F.3d at 1033.

separate carriers, including Clarendon, Fireman's Fund,[52] and St. Paul.[53] When the band was sued for copyright infringement relating to artwork on its album covers and merchandising, and for slander, all three carriers denied coverage, based, in large part, on the EIE (though Clarendon provided a "defense" to Tool, and then sued the band to get its defense costs back).[54] The trial court granted Tool's motion for summary judgment against St. Paul, and held that St. Paul's EIE did not exclude coverage for the claims made in the underlying action.[55] However, the court determined that Fireman's Fund's EIE did apply, and held in favor of the carrier.[56] Tool appealed the ruling.[57]

The California Court of Appeal reversed the trial court's decision, holding that the EIE did not eliminate coverage for the slander or copyright infringement claims in the underlying action.[58] In so holding, the Court of Appeal rejected the trial court's finding that the defamation and copyright claims "arose from Tool's attempt to develop, distribute, exploit and exhibit its music," and therefore were excluded by the EIE.[59]

The Court rejected both a broad interpretation of the EIE as a whole, and of the term "arising out of."[60] Significantly, the Court stated: "[u]nder [the insurer's] and the court's interpretation, all personal and advertising injury would be eliminated as being incidentally related to Tool's music, meaning such coverage is *illusory*."[61] The Court further stated: "The evisceration of coverage if the court's interpretation is used indicates the parties did not intend the exclusion to be read so expansively.[62] 'It is a basic principle of insurance contract interpretation that doubts, uncertainties and ambiguities arising out of policy language ordinarily should be resolved in favor of the insured in order to protect his reasonable expectation of

52. The policy was actually issued by Fireman's Fund's subsidiary, American Insurance Company.

53. Clarendon Nat. Ins. Co. v. Tool Touring, L.A.S.C. Case No. BC 371 155.

54. *Spiraling Out Through Tool's Lawsuits*, TRADEMARKNERD.COM (Oct. 3, 2014), http://trademarknerd.com/spiraling-out-through-tools-lawsuits/#.Vo1VrGRViko.

55. Tool Touring v. Am. Ins. Co., No. B230136, 2012 WL 1595124, at *5 (Cal. Ct. App. May 8, 2012).

56. *Id.*

57. *Id.* at *6.

58. *Id.* at *13.

59. *Id.* at *9.

60. *Id.* at *9-*13.

61. *Id.* at *13 (emphasis added).

62. *Id.*

coverage.'"[63] Thus, the Court stated, "Tool had a reasonable expectation it would have the coverage for advertising injury for which it had paid."[64]

Accordingly, the Court concluded that:

> [T]he trial court failed to narrowly interpret the EIE and that the EIE only excludes personal and advertising injury that results from Tool's music, but not personal and advertising injury that results from what is displayed on merchandise. The advertising injuries in the [underlying complaint] arose from the exploitation, distribution or exhibition of Tool's merchandise, not from the exploitation, distribution or exhibition of Tool's music. Thus, the alleged injuries did not originate from Tool's music, but from its merchandise, such that any connection to Tool's music was too attenuated to fall under the EIE.[65]

Unfortunately, notwithstanding impassioned requests by Tool to both the Court of Appeal and the California Supreme Court to publish the decision so that other entertainers would not have to experience the same treatment that Tool received, the Tool decision was not published. However, there is specific California case authority that at least recognizes the ambiguity inherent in the exclusion.[66]

Ambiguity

In *Third Eye Blind v. Near North Entertainment Insurance Services, LLC*, the court noted that the trial court had found that exclusion was ambiguous as applied to the allegations set forth in the underlying action.[67] In *American International Specialty Lines Ins. Co. v. Continental Casualty Insurance Co.*, the Court declined to address the issue as to whether the field of entertainment exclusion barred coverage because the argument was

63. *Id.*

64. *Id.*

65. *Id.*

66. Third Eye Blind v. Near N. Entm't Ins. Services, LLC, 127 Cal. App. 4th 1311, 1316 (2005) (court noted that the trial court had found that exclusion was ambiguous as applied to the allegations set forth in the underlying action); Am. Int'l Specialty Lines Ins. Co. v. Cont'l Cas. Ins. Co., 142 Cal. App. 4th 1342, 1365 n.4 (2006) (declining to address the issue as to whether the field of entertainment exclusion barred coverage because the argument was not briefed or raised at the trial level, and "due to the ambiguity of the endorsement," the court was in no position to interpret it on appeal).

67. Third Eye Blind v. Near North End Entm't. Ins. Services, 26 Cal. Rptr. 3d 452, 456 (Cal. Ct. App. 2005).

not briefed or raised at the trial level, and "due to the ambiguity of the endorsement," the Court was in no position to interpret it on appeal.[68]

The EIE clearly is ambiguous at best, because at a minimum, it is capable of *at least* two meanings. The first is the typical insurer's broad interpretation that, because of the phrase "arising out of," all of the insured's advertising and merchandising activities that "have the purpose and effect" of exploiting, distributing or producing the insured's music, are excluded. The second is the typical insured's interpretation that the EIE only excludes personal or advertising injury that results from the insured's music (or film, etc.)[69] (*i.e.*, a copyright infringement claim or defamation claim that arises out of the lyrics or music), as opposed to personal or advertising injury that results from what it, *e.g.*, displays on a t-shirt.[70]

Between the inherent ambiguity of the EIE and the existing case law, insurance carriers should not be allowed to continue to assert the EIE as a blanket exclusion of everything that is otherwise covered in Coverage B for entertainers. However, unfortunately, it is quite obvious that insurers will continue to use the EIE against the myriad of entertainers who do not have experienced entertainment coverage counsel.[71]

The Prior Publication Exclusion

Another exclusion that insurance carriers will typically assert in entertainment cases is the "prior publication exclusion." A typical prior publication exclusion provides as follows: "Material Published Prior to Policy Period. Personal and advertising injury arising out of oral or written publication of material whose first publication took place before the beginning of the policy period."

This exclusion, for at least its intended use, is more akin to an "outside the policy period" defense than an actual exclusion. Essentially, the exclusion strips coverage from a claim for damages that arises out of an act or omission that first occurred prior to the policy period. The exclusion was

68. Am. Int'l Specialty Lines Ins. Co. v. Continental Casualty Ins. Co. 49 Cal. Rptr. 3d 1, 17 n.4 (Cal. Ct. App. 2006).

69. Again, in addition to constituting a reasonable interpretation of the EIE, this is also the ordinary and plain meaning of the exclusion.

70. Yet another reasonable interpretation is that the EIE only excludes personal and advertising injury that is *caused* by the development, creation, pre-production, production, post-production, distribution, exploitation, writing, broadcasting, airing, performing, or exhibition of Tool's, video/audio cassettes, music, sheet music, or other similar materials, and properties.

71. Most experienced entertainment attorneys do not have significant insurance coverage experience, and most insurance coverage attorneys do not have significant entertainment experience.

traditionally used in connection with defamation claims.[72] If the defamation alleged occurred during the policy period, but there was a "prior publication" of that same alleged defamation that occurred outside of the policy period, there would be no coverage, or even potential for coverage, under the policy.[73]

In a copyright context, a musician might release an album prior to obtaining insurance coverage. If the musician then obtains CGL coverage, and someone sues him for copies of the album that were sold after coverage was effected, the carrier would rightfully assert the prior publication exclusion. The theory behind this would be, once again, that the insured had already engaged in the infringing activity *before* he obtained insurance coverage, and he therefore should not be covered for infringing acts that occurred before the policy period began.

The idea is that insurance is supposed to cover a *risk*; not a certainty. If someone were to defame someone else, then was allowed to run out and purchase a CGL policy to cover defamation, and then simply re-uttered or republished the very same defamation of the very same person, it would not be fair to the insurance company to expect it to cover such a claim; there would be no "risk" per se, but an after-the-fact coverage of an event that has already occurred.

The problem with the use of the exclusion in a copyright infringement context is that some insurance carriers abuse the exclusion by claiming that, if the allegedly *infringed* work was published prior to the policy period, there is no coverage.[74] The problem with this claim, other than that it is absurd, is that the prior publication exclusion has nothing to do with the allegedly *infringed* work; it is about the allegedly *infringing* work. Otherwise, it does not make sense.

If the policy covers copyright infringement, but does not cover copyright infringement of a work that was created and published prior to the policy period, the only claims that would be covered would be claims for copyright infringement of a work that was both created and infringed during the same (one-year) policy period. That would be a rare case indeed. Once again, such an interpretation would render the policy illusory.

The prior publication "exclusion only abrogates the duty to defend where the *insured's* first publication of actionable material occurred prior to

72. *See, e.g.*, Irons v. Home Builders, Inc. v. Auto-0wners Ins. Co., 839 F. Supp. 1260 (E.D. Mich. 1993).

73. *Id.*

74. *See* Fireman's Fund Policy, *supra* note 2, at 28.

the beginning of the policy.'"[75] Again, this comports with the policy behind the prior publication exclusion:

> The purpose of the 'prior publication' exclusion . . . can be illustrated most clearly with reference to liability insurance for copyright infringement. Suppose a few months before insurance coverage began on October 7, 1997, the insured published an infringing book that it continued to sell after October 6. The 'prior publication' exclusion would bar coverage because the *wrongful* behavior had begun prior to the effective date of the insurance policy. The purpose of insurance is to spread risk - such as the risk that an advertising campaign might be deemed tortious - and if the risk had already materialized, what is there to insure? (citation omitted). The risk has become a certainty.[76]

"Personal and advertising injury" could not "aris[e] out of" *the claimant's* oral or written publication of material. Clearly, it is only *the insured's* "oral or written publication" that could be the source of "personal and advertising injury," and *that* "oral or written publication," *i.e.*, the *insured's* infringing publication, is what must not have been published before the beginning of the policy period. It is definitely not when the *claimant* happened to decide to place his work into commerce for the first time.

This argument that it is the *claimant's* first publication of the artwork that triggers the exclusion is even more absurd when viewed in light of other policy language. The insuring agreement (Coverage B) typically provides that advertising injury (which includes copyright infringement) that is "committed" "during the policy period" is covered.[77] Insurers' claims that there is no such coverage unless the material that was infringed during the policy period also happened to be first "published" by the claimant, whom the carrier never agreed to insure, during the policy period, simply make no sense – and certainly are not stated anywhere in a typical policy.

In general, a copyright claimant is not able to assert his infringement claim *until* after his own work is published; otherwise, the defendant would have no "access" to his work.[78] Therefore, in virtually every case of copyright infringement, the *claimant* is going to have first published his own work *prior* to the policy period.

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75. Capitol Indem. Corp. v. Elston Self Serv. Wholesale Groceries, Inc., 559 F.3d 616, 620-21 (7th Cir. 2009) (emphasis added).

76. *Capitol Indem. Corp.*, 559 F.3d at 620-21 (citing Taco Bell Corp. v. Cont'l Cas. Co., 388 F.3d 1069, 1072-73 (7th Cir. 2004)).

77. *See, e.g.*, Fireman's Fund Policy, *supra* note 2, at 28.

78. *See generally* Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000).

The E&O Exclusion

Another exclusion on which insurers often rely in attempting to avoid coverage under CGL policies for their entertainment industry insureds is the E&O (errors and omissions) exclusion. E&O exclusions are typically written even more poorly than other CGL exclusions – most likely by design. The typical E&O exclusion provides as follows:

> It is agreed that such coverage as is afforded by this policy does not apply to:
>
> 1. Radio, television and motion picture producers' errors and omissions liability
> 2. Advertisers' errors and omissions liability
> 3. Broadcasters' errors and omissions liability
> 4. Publishers' errors and omissions liability
> 5. Loss arising from any publication or literature including any musical material conducted or composed, by or on behalf of the named insured
> 6. Liability arising out of contracts or agreements with labor unions except entertainment related unions or professional guilds[79]

Insurers have claimed that the E&O exclusion eliminates coverage (Coverage B only) for any claim that is covered by errors and omissions insurance, under the categories listed on the exclusion.[80] However, the exclusion very clearly does not say that. What the exclusion does say is that coverage under the policy does not apply to "Radio, television and motion picture producers' errors and omissions *liability*"; "Advertisers' errors and omissions *liability*; etc."[81]

Although insurers have claimed that this exclusion eliminates coverage for any risk that would be covered by any one of six separate errors and omissions policies, and that this exclusion lists those policies, the exclusion only refers to various types of undefined "errors and omissions *liability*" (whatever that is) and merely says that the policy "does not *apply* to" that *liability*. One could certainly argue that, if the insurers wanted to say: "this

79. *See, e.g.*, Fireman's Fund Policy, *supra* note 2, at 47.

80. Fireman's Fund has had the temerity to make this claim, in a music context, notwithstanding that representatives of the company have testified that Fireman's Fund does not even sell "E&O" policies to touring musicians.

81. *See, e.g.*, Fireman's Fund Policy, *supra* note 2, at 47.

policy *excludes* anything that is covered by the following errors and omissions *policies*," it could have done so.[82]

However, even then, the insurer would have an insurmountable burden. In order for an insured to know what is excluded by this endorsement, it would have to know everything that is covered by every one of the six so-called "E&O" policies that are referred to in this exclusion. To require an insured to have such knowledge would be completely unreasonable (and certainly contrary to law).

An exclusion cannot be written so as to require the insured to do research in order to understand what the exclusion encompasses:

> To be effective . . . the exclusion must be couched in words which are part of the working vocabulary of average lay persons . . . . The terminology used must be comprehensible to the persons purchasing the insurance and expecting to receive the benefits they are paying for . . . . *[I]nsurance contracts – and especially their exclusionary clauses – must be expressed in language comprehensible to citizens of average education, knowledge and experience*."[83]

It is therefore quite clear that having an ambiguous exclusion that eliminates all coverage that is afforded by any one (or more) of six separate types of errors and omissions insurance is completely contrary to California insurance case law. Yet, insurers continue to get away with taking this position with insured after insured, as they do with respect to the other entertainment-related exclusions.

CONCLUSION

Many actors, actresses, producers, directors, musicians, and songwriters have extremely competent and experienced representatives, and even insurance brokers. However, it is evident from the foregoing that every entertainer should have entertainment litigation counsel that is well-versed in the intricacies of insurance law to guide them through the complex minefields that are laid out before them.

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82. The fact is – and this has been confirmed by insurance underwriters – that there *are* risks that are covered by E&O policies that are also covered by CGL policies, thus rendering insurers' positions on this exclusion, at best, disingenuous.

83. Ponder v. Blue Cross of S. Cal., 193 Cal. Rptr. 632, 640 (Cal. Ct. App. 1983) (emphasis added); *see also* Haynes v. Farmers Inds. Exch., 89 P.3d 381, 385 (Cal. 2004) ("[A]ny provision that takes away or limits coverage reasonably expected by an insured . . . must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson").