

## “Personal Injury and Advertising Injury” Coverage Experience



Competition-related litigation has exploded in recent years; as a result, corporate policyholders face increased exposure in the form of defense costs and settlements or verdicts for intellectual property (“IP”) claims alleging infringement of copyrights, trademarks, and patents; Sherman Act antitrust claims; and state law claims of unfair competition. When competition-related claims are asserted in connection with an insured’s advertising activities, there is often insurance coverage under the “personal injury and advertising injury” coverage of commercial general liability (“CGL”) policies. In light of the enormous number of IP claims that

have been filed against corporate policyholders in the past decade, it is especially prudent for policyholders to interpose their “personal injury and advertising injury” coverage between themselves and their IP and other competition-related defense and indemnity exposures.

The “personal injury and advertising injury” coverage of CGL policies is an often-overlooked source of coverage for competition-related claims. The changes made to industry standard-form terms in 2001 have not been uniformly incorporated into many CGL policies. Many policyholders may have paths to coverage under either the 2001 standard-form language or variations on that language in their CGL policies. Policyholders facing expensive IP claims may find it especially prudent to examine their “personal injury and advertising injury” coverage and consult with experienced coverage counsel to obtain the coverage to which they are entitled.

K&L Gates has substantial experience securing defense and indemnity coverage for policyholders facing claims alleging IP violations, including the Digital Millennium Copyright Act (“DMCA”), Lanham Act violations, antitrust and state law unfair competition violations, and defamation and product disparagement.

### REPRESENTATIVE EXPERIENCE:

- Our lawyers won summary judgment for a policyholder against its liability insurer, who was trying to avoid coverage for a computer-related copyright claim in which the underlying plaintiff sought billions of dollars in damages. The successful strategy included calling the court’s attention to references in the underlying complaint to the client’s advertising activities as a principal basis for coverage. After summary judgment was secured, a favorable settlement was reached with the insurance carrier.
- K&L Gates has represented a client in the fashion industry in several coverage actions against its insurers related to underlying trademark lawsuits brought by a competitor. We asserted and secured the client’s coverage rights in response to the insurers’ delaying tactics and failure to pay more than a small fraction of their coverage obligations. K&L Gates secured the dismissal of the insurers’ counterclaims alleging the client failed to cooperate with the insurers in its own defense.
- K&L Gates secured a favorable coverage outcome—while avoiding coverage litigation—for a policyholder facing an underlying lawsuit alleging copyright infringement and false advertising, among other claims. The insurer originally agreed to pay for defense counsel,

but only at the insurer's customary rate and only for covered claims. After we explained the insurer's obligations under the applicable state law, the insurer began to pay defense counsel bills at full rates (subject only to limited reductions). The carrier later agreed to pay a substantial portion of the settlement amount in the underlying case and not to seek recoupment of any defense costs.

- K&L Gates brought and favorably settled a case in which the client's insurers were refusing to pay defense costs for a class action lawsuit brought under the federal Telephone Consumer Protection Act ("TCPA"). In addition to securing a favorable forum, we successfully obtained the dismissal of a subsequent declaratory judgment action brought in a separate forum by one of the defendant-insurers. We ultimately negotiated a settlement for an amount that essentially covered the client's defense and settlement costs in the underlying TCPA action.
- K&L Gates obtained a favorable settlement under our client's advertising injury coverage for the fees and costs incurred by our client in defending an expensive multi-defendant Sherman Act antitrust action. The coverage action that led to the settlement was one of the first advertising injury coverage cases to be filed in the U.S. District Court for the Western District of Pennsylvania.
- K&L Gates represents the defendants in a federal district court action brought by a large business telecommunications system provider claiming, among other things, trade secret infringement, violations of the anti-circumvention provisions of the DMCA, false advertising, and unfair competition. At the outset of the litigation, we carefully reviewed the client's insurance coverage policies and found that they provide coverage for the false advertising and unfair competition claims. We were able to convince the client's two insurance carriers to cover a substantial amount of the costs involved in defending the action.
- K&L Gates secured summary judgment for a policyholder in a declaratory judgment action filed by an insurer seeking to avoid coverage for an underlying defamation action brought by a former employee of the insured. The insurer argued that "personal injury and advertising injury" coverage for the defamation claim was barred by an "employment-related practices exclusion." We successfully argued that the employment relationship was largely unrelated to the alleged defamation, so the exclusion did not apply, and the "personal injury and advertising injury" coverage was, therefore, available.
- K&L Gates represented an agricultural cooperative and food processing corporation in litigation to recover the costs of defending a counterclaim that alleged disparagement, defamation, and trespass. We obtained partial summary judgment on the insurer's duty to defend under the "personal and advertising injury" coverage of the policyholder's CGL policy. The case was ultimately settled after K&L Gates secured a jury verdict in favor of the policyholder and a finding of insurer bad faith.
- K&L provided advertising injury coverage counseling to garment retailer that was sued by a large international clothing manufacturer for the use of a number in its advertising. The plaintiff alleged that it had trademarked the number. Through discussions with the carrier, K&L Gates was able to obtain the insurer's consent to our continued representation of the garment manufacturer and the payment of our fees until the underlying action settled.
- We are providing advertising injury coverage counseling to an outdoor products manufacturer in connection with alleged Lanham Act and state law violations.