

# THE NATIONAL LAW REVIEW

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## Social Media Advertising Under CGL Coverage B (Part 1)

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The following is Part I of a two-part series on the intersection between social media advertising and the lesser known portion of commercial general liability (“CGL”) policies—the illusive “Coverage B.” This first part will provide a brief overview of the prevalence of social media in today’s society and types of advertising found in the social media world. It will then provide a brief overview of the Coverage B provisions that are likely to be implicated by social media advertising. In the second part, we will take a deeper look into coverage issues likely to be implicated by social media advertising. You can read [Part 2 here](#).

### WHAT IS SOCIAL MEDIA ADVERTISING?

Social media advertising, social media marketing, and social media targeting are all terms used somewhat interchangeably to describe forms of online advertising that focus on social networking services, such as Facebook, YouTube, Instagram, Twitter, Yelp, LinkedIn, or Snapchat. As of 2018, there were 3.196 billion people using social media on the planet, up 13% from 2017 to 2018.<sup>[1]</sup>

While these sites began as a way for friends and relatives to stay in touch, as the number of users on these social media sites has increased, businesses have realized that they can utilize advertising on social media platforms to reach a wide audience.

### Traditional Advertising in Digital Form

Social media advertising has become prevalent because of its ability to reach and engage a massive audience fairly quickly and easily. Banner ads, or the ads displayed along the tops and sides of webpages, are more akin to paper advertisements, and therefore carry fewer associated risks than some other forms of social media advertising. Generally, the ads displayed on social media sites are generated by creative teams and vetted by the website hosts. Therefore, the risk that the content of those ads contains disparaging information or casts subjects in a false light is relatively low.

### The New Wild West: Social Media Influencers

Social media “influencers” are those with a significant following on social media who post content about products and services, generally at the request of a marketer.<sup>[2]</sup> The value of these influencers cannot be underestimated. For instance, Twitter recently conducted a survey in which “nearly 40% of Twitter users say they made a purchase as a direct result of a Tweet from an influencer.”<sup>[3]</sup>

It will come as a surprise to no one that these influencers are not posting simply because they like a brand or its products. Instead, the influencer typically receives anything from free products to tens of thousands of dollars in exchange for posting about a particular brand or product. Captiv8, a social media marketing agency, estimates that someone with three million to seven million followers can charge the following for a post:

- YouTube: \$187,500
- Instagram: \$75,000

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- Twitter: \$30,000<sup>[4]</sup>

The use of influencers as part of a marketing campaign is not without risks. Indeed, a number of settlements with major retailers flowed from the recent increase in enforcement actions involving advertising through social media influencers, and such consent orders carry the force of law with respect to future actions, and can result in civil penalties of up to \$16,000 per violation.<sup>[5]</sup>

For example, one such settlement involved national clothing retailer Lord & Taylor. The settlement arose after Lord & Taylor paid 50 social media influencers between \$1,000 and \$4,000 to post pre-approved photo posts on Instagram and other social media sites of the influencers wearing a Lord & Taylor dress. The posts were effective: the dress quickly sold out, the posts reached 11.4 million Instagram users over a two-day period, and led to 328,000 brand engagements with Lord & Taylor’s own Instagram handle.<sup>[6]</sup> However, the campaign was not all good news for Lord & Taylor. The fact that the social media influencers were being paid by Lord & Taylor was not disclosed by the company or the influencers, leading the Federal Trade Commission (“FTC”) to bring an enforcement action against the company.<sup>[7]</sup> Ultimately the matter settled by Consent Order.

## **A GENERAL OVERVIEW OF WHAT “COVERAGE B” INSURES**

The standard CGL policy provides defense and indemnity coverage to the insured for a multitude of risks inherent in typical business operations. While most lawyers are aware of the bodily injury and property damage protections provided in the “A” coverage, “B” coverage, which provides coverage for “personal and advertising injury,” is arguably less well-known. Importantly for businesses large and small, Coverage B may provide coverage for certain issues involving social media advertising, social media marketing, and social media targeting.

In understanding the potential interplay between social media advertising and Coverage B, one must keep in mind that Coverage B generally covers acts that somehow violate or infringe on the rights of persons or organizations, and those acts must result in loss to those persons or organizations. The acts are usually alleged to be intentional, even if the consequences of those acts were unintentional.

Coverage B provides coverage for seven enumerated “covered offenses,” four of which are most likely to be implicated by social media advertising:

- (1) Oral or written publication, in any manner, of material that . . . disparages a person’s or organization’s goods, products, or services;
- (2) Oral or written publication, in any manner, of material that violates a person’s right of privacy;
- (3) The use of another’s advertising idea in your “advertisement”; or
- (4) Infringing upon another’s copyright, trade dress, or slogan in your “advertisement.”

Offense (1) above includes allegations of slander, libel, or disparagement, which involves a comparison that detracts or discredits the goods, products, or services of another because of false statements.

Offense (2) above includes allegations of a misappropriation of a person’s likeness or name for the commercial benefit of another, use of publicity to place another in a false light (which carries a reasonable person standard—that a reasonable person would find it objectionable is sufficient, the depiction does not have to be defamatory), or the public disclosure of private facts if those facts are embarrassing or otherwise reasonably objectionable, even if the information is true and not defamatory. Certain of these allegations, to be covered, must be contained within the named insured’s advertisement, i.e., in the named insured’s notice broadcast or published to the general public (or specific target markets within the general public) about the named insured’s goods, products, or services.

Offenses (3) and (4) are fairly self-explanatory, and cover allegations that the named insured used another’s advertising idea, copyright, trade dress (a business style or image that is unique or distinctive), or slogan in its advertisement. Allegations that a fast food restaurant was using golden arches in its advertisements, for example, might constitute a covered offense under Coverage B.

Importantly though, Coverage B carries with it a number of coverage-defeating exclusions largely revolving around whether the acts at issue were “knowing.” If the acts were “knowing violations of the rights of another” or if the information was published “with knowledge of falsity,” defenses to Coverage B claims might exist.

## **GENERAL ISSUES INVOLVING ADVERTISING INJURY**

In general, the “Covered Offenses” implicated by social media advertising are similar to those likely to be implicated by traditional advertising. Thus, the allegations that stem from ads on social media may look a lot like

the allegations that stem from TV or print ads – allegations of slander, defamation, disparagement, misappropriation of a person’s likeness, or use of another’s advertising idea, copyright, or trade dress (a business style or image that is unique or distinctive), or slogan in its advertisement. Claims involving *false* or *misleading* advertising, though, are not covered by Coverage B.<sup>[8]</sup>

Depending on the jurisdiction, coverage for claims involving social media advertising injury may hinge on (1) whether the underlying complaint must specifically allege the cause of action for which the policyholder seeks coverage, or (2) whether the product or business that was allegedly harmed had to have been specifically mentioned in the underlying action, or whether claims for “disparagement by implication,” for example, are sufficient.

## **NEXT TIME, IN PART II**

In Part II, we’ll dive further into [the specific issues companies face in seeking to use social media advertising](#). We will also provide additional information regarding the FTC’s handling of issues relating to social media advertising.

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[1] Paige Cooper, *Social Media Advertising Stats that Matter to Marketers in 2018*, Hootsuite (June 5, 2018), <https://blog.hootsuite.com/social-media-advertising-stats/> (including image).

[2] Steven P. Mandell et al., *Recent Developments in Media, Privacy, Defamation, and Advertising Law*, 52 Tort Trial & Ins. Prac. L.J. 531, 560 (2017).

[3] Katie Karp (@katieaka), *New Research: The Value of Influencers on Twitter*, Twitter (May 10, 2016) [https://blog.twitter.com/marketing/en\\_us/a/2016/new-research-the-value-of-influencers-on-twitter.html](https://blog.twitter.com/marketing/en_us/a/2016/new-research-the-value-of-influencers-on-twitter.html).

[4] Sapna Maheshwari, *Endorsed on Instagram by a Kardashian but Is It Love or Just an Ad?*, The New York Times (Aug. 30, 2016) <https://www.nytimes.com/2016/08/30/business/media/instagram-ads-marketing-kardashian.html>. Even influencers with fewer followers can still earn thousands of dollars. For instance, an influencer with as few as 50,000 followers may be able to charge \$2,500 for a YouTube post. *Id.*

[5] See *Lord & Taylor Settles FTC Charges It Deceived Consumers Through Paid Article in an Online Fashion Magazine and Paid Instagram Posts by 50 “Fashion Influencers”*, Federal Trade Commission (Mar. 15, 2016) <https://www.ftc.gov/news-events/press-releases/2016/03/lord-taylor-settles-ftc-charges-it-deceived-consumers-through>.

[6] See *id.*

[7] Mandell, *supra*, at 560.

[8] In fact, such claims are potentially excluded by exclusions (g) (Quality Or Performance Of Goods – Failure To Conform To Statements) and (h) (Wrong Description Of Prices). False advertising claims involve alleged misrepresentations about one’s *own* products, whereas product disparagement claims involve allegations that a company’s ads disparage *another’s* products.

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