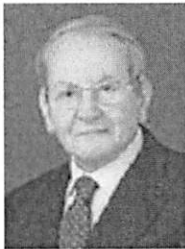


Malicious Prosecution: Coverage Under the CGL Policy

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INSURANCE coverage for “malicious prosecution” has been available for over forty years. It was first included in the definition of

“Personal Injury” in the Insurance Services Office’s (“ISO’s”) Broad Form Endorsement (GL 00 04) to its 1973 Comprehensive General

Liability Form (“CGL”; GL 00 02), as a covered “offense,” as distinguished from the “occurrences” that could give rise to “bodily injury” and “property damage” liability. “Personal injury” was defined to include, among other offenses, “false arrest, detention, imprisonment, or malicious prosecution.” The additional coverage provided by that endorsement had to be purchased separately. In 1985, ISO’s standard CGL form (renamed “Commercial General Liability Coverage Form”; CG 00 01 11 85), was revised to include coverage for “Bodily Injury and “Property Damage Liability” (Coverage A) and “Personal and Advertising Liability (Coverage B); at that time, the definition of “Personal injury” was amended and since then “False arrest, detention and imprisonment” have been separated from “malicious prosecution.”¹ Despite its long existence, and the spate of coverage litigation during the past forty years, there are surprisingly few cases dealing with coverage for malicious prosecution; and, among those, a sharp difference of opinion is found as to whether potential coverage is nullified by exclusions. This article will look at and comment on those cases.

I. CGL Coverage B

The Insuring Agreement of Coverage B in the 2006 ISO Commercial General Liability Coverage Form (CG 00 01 12 07) provides coverage for “those sums that the insured becomes legally obligated to pay as damages because of ‘personal and advertising injury’ to which this insurance applies.” “Personal and advertising injury” is defined as follows:

14. “Personal and advertising injury” means 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

¹ See, e.g., CG 00 01 12 07.

or organization's 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."

The coverage provided by the Insuring Agreement is made subject to a number of exclusions, including:

2.a. Knowing Violation of Rights of Another
"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."

2.b. "Material Published with Knowledge of Falsity"
"Personal and advertising injury' arising out of oral or written publication of

material, if done by or at the direction of the insured with knowledge of falsity.

II. Malicious Prosecution Overlaps with Abuse of Process

"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 . . ."²

The elements necessary for the successful maintenance of a malicious prosecution action are: "(1) the commencement and prosecution of a judicial proceeding against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which has terminated in favor of the plaintiff in the malicious prosecution (6) to his injury, and (7) where the proceeding complained of was civil in nature, it must also be shown that the plaintiff suffered interference from some provisional remedy."³

² Toll Bros. v. General Accident Ins. Co., 1999 Del. Super. LEXIS 313 *1, *28 (Del. Sup. 1999).

³ Ellman v McCarty, 70 A.D.2d 150, 155, 420 N.Y.S.2d 237, 241 (N.Y. Sup. Ct. 2d Dept

“Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.”⁴ Abuse of process has three essential elements: (1) there must be a regularly issued process, either civil or criminal, compelling the performance or forbearance of some act, (2) an intent to do harm without an economic or social excuse or justification, and (3) use of the process to obtain a collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process.⁵

1979); *see also* *Thompson v. Maryland Cas. Co.*, 84 P.3d 496, 503 (Colo. 2004).

⁴ *Lunsford v. American Guar. & Liab. Ins. Co.*, 18 F.3d 653, 655 (9th Cir. 1994), quoting *W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS* § 121, at 897-898 (5th ed. 1984); *see also* *Smart v. Board of Trustees*, 34 F.3d 432, 434 (7th Cir. 1994) (“Malicious prosecution is the bringing of a suit known to be groundless, while abuse of process is the bringing of a suit that may, like the professors’ defamation suit against Smart, have a solid grounding in law but that the plaintiff has filed not in order to vindicate his legal rights and obtain a judgment but in order to harass the defendant.”).

⁵ *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn.*, 38 N.Y.2d 397, 403, 343 N.E.2d 278, 283 (N.Y. Ct. App. 1975); *Thompson v. Beecham*, 72 Wis. 2d 356, 362, 241 N.W.2d 163 (Wis. 1976) (“the two elements of the tort are: (1) a purpose other than that which the process was designed to

The two torts overlap in that each requires the defendant to have made use of legal process for an improper purpose, such as the commencement of an unjustified criminal prosecution or to enjoin the plaintiff from developing his real property. “Both torts are designed to offer redress to a plaintiff who has been made the subject of legal process improperly, where the action was wrongfully brought by a defendant merely for the purpose of vexing or injuring the plaintiff, and resulting in damage to his or her personal rights.”⁶ The New Mexico Supreme Court concluded that “the torts of malicious prosecution and abuse of process should be restated as a single tort known as malicious abuse of process.”⁷

accomplish, and (2) a subsequent misuse of the process”).

⁶ *Devaney v. Thriftway Mktg. Corp.*, 124 N.M. 512, 517, 953 P.2d 277, 282 (N.M. 1997), *overruled in part on other grounds by* *Durham v. Guest*, 145 N.M. 694, 701, 204 P.3d 19 (N.M. 2009).

⁷ *Devaney*, 121 N.M. 645. *See also* *Durham*, 204 P.3d at 26-27:

We leave in place the combined tort of malicious abuse of process, but restate its elements as follows: (1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages. An improper use of process may be shown by (1) filing a complaint without probable cause, or (2) “an irregularity or impropriety suggesting extortion, delay, or

While knowingly instituting or maintaining a baseless action may give rise to a cause of action for malicious prosecution, "the mere filing or maintenance of a lawsuit -- even if for an improper purpose -- is not a proper basis for an abuse of process action."⁸

Since the CGL's definition of "personal injury" does not expressly include "abuse of process," some courts have found no coverage where the complaint does not contain a cause of action for malicious prosecution.⁹ Thus, the Washington Court of Appeals found "[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. Hanson could have insured against abuse of process, but it did not. Presumably, the words of the policy have some meaning, purpose and limit."¹⁰ However, a plaintiff "is not required to put labels on the allegations in the complaint in order to state a valid claim. It is the sufficiency of the facts alleged that control the determination of whether a claim for relief is properly plead."¹¹

harassment[.]" or other conduct formerly actionable under the tort of abuse of process. . . . A use of process is deemed to be irregular or improper if it (1) involves a procedural irregularity or a misuse of procedural devices such as discovery, subpoenas, and attachments, or (2) indicates the wrongful use of proceedings, such as an extortion attempt. . . . Finally, we emphasize that the tort of malicious abuse of process should be construed narrowly in order to protect the right of access to the courts.[citations omitted].

⁸ *Lunsford*, 18 F.3d at 655 (quoting *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1169, 232 Cal. Rptr. 567, 574, 728 P.2d 1202, 1209 (Cal. 1986)); see also *Ferguson v. Atlantic Land &c. Corp.*, 248 Ga. 69, 71, 281 S.E.2d 545, 547 (Ga. 1981) ("malicious abuse lies for 'wrongfully and unlawfully using legally and properly issued process for a purpose the law never intended it to effect, while the latter action [malicious use] lies for maliciously suing out civil process without probable cause.'").

⁹ *Heil Co. v. Hartford Accident & Indem. Co.*, 937 F. Supp. 1355, 1362-1363 (E.D. Wis. 1996) (allegation of abuse of process does not trigger insurer's duty to defend under malicious prosecution provision); *Parker Supply Co., Inc. v. Travelers Indemnity Co.*, 588 F.2d 180, 182-183 (5th Cir. 1979) ("Since the differences between actions for malicious prosecution, abuse of process, and wrongful attachment or garnishment are recognized in Alabama, . . . the policies' reference to the offense of 'malicious prosecution' was not ambiguous and only a suit against Parker for that offense would have created an obligation for the insurers to defend and indemnify"); *Narragansett Bay Ins. Co. v. Kaplan*, 146 F. Supp.3d 364, 372 n.2 (D. Mass. 2015) ("The express inclusion of the related, though distinct, tort of malicious prosecution in the Mariner Plus Endorsement, without a parallel inclusion of abuse of process, is corroborative of a contractual determination not to cover abuse of process claims.").

¹⁰ *R.A. Hanson Co., Inc. v. Aetna Ins. Co.*, 26 Wash. App. 290, 295 n. 3, 612 P.2d 456, 459 (Wash. App. 1980).

¹¹ *Strid v. Converse*, 111 Wis. 2d 418, 422, 331 N.W.2d 350, 353 (Wis. 1980).

Other courts have held the undefined term “malicious prosecution” to be ambiguous and have construed the policy broadly to include abuse of process,¹² finding “the distinction between malicious prosecution and abuse of process is at best unclear.” “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.”¹³

“The theoretical legal distinction between ‘malicious prosecution’ and ‘abuse of process’ is not so clear that insurance coverage of one should exclude coverage of the other unless the exclusion is specifically stated in the policy.”¹⁴ The insurer “should bear the burden of any ambiguity. Had the insurer wished to exclude a tort so closely related to malicious prosecution, it should have done so expressly.”¹⁵

The Ninth Circuit resolved the issue in favor of coverage, finding “People buy insurance to protect themselves from legal costs for defending claims of various kinds.[¹⁶] There is no reason, given the overlap between malicious prosecution and abuse of process (particularly in the eyes of those untrained in the law), why persons who purchase insurance covering the cost of defending against the one claim would not also expect the contract to cover the cost of defending against the other. The term as used in the policy is ambiguous.”¹⁷

¹² *Lunsford*, 18 F.3d at 655; *Northwestern Nat'l Casualty Co. v. Century III Chevrolet*, 863 F. Supp. 247, 250-251 (W.D. Pa. 1994) (“If Northwestern had intended to limit coverage to claims of common law malicious prosecution, it was Northwestern's responsibility to specify ‘common law malicious prosecution, not including statutory actions under 42 Pa.C.S.A Section 8351.’ In the absence of such language, the ambiguity in the policy will be construed in favor of the insureds.”).

¹³ *Lunsford*, 18 F.3d at 655.

¹⁴ *Koehring Co. v. American Mut. Liability Ins. Co.*, 564 F. Supp. 303, 311 (E.D. Wis. 1983).

¹⁵ *Toll Bros. v. General Accident Ins. Co.*, 1999 Del. Super. LEXIS 313 at *29.

¹⁶ A duty to defend policy has been referred to as “litigation insurance.” *Fitzpatrick v. American Honda Motor Co.*, 78 N.Y.2d 61,70, 575 N.E.2d 90, 95, 571 N.Y.S.2d 672, 677 (N.Y. Ct. App. 1991).

¹⁷ *Lunsford*, 18 F.3d at 656.

III. Exclusion for Material Published with Knowledge of Falsity

In *Martin's Herend Imports, Inc. v. Twin City Fire Insurance Company*,¹⁸ a district court in Texas rejected the insurer's reliance on the "Oral or Written Publication of Material" exclusion to bar coverage for the offense of malicious prosecution, pointing out:

[the] argument, if taken to its logical conclusion, would be that, although the policy provides for "malicious prosecution" as a personal injury, it would exclude that coverage via the publication exclusion since Twin City argues that every claim for malicious prosecution involves a knowingly false oral or written publication.¹⁹

Based upon that reasoning, the Court concluded that the exclusion for a knowing or false publication "is meant to parallel the two definitions of personal injury that contain

publication language,"²⁰ and does not apply to malicious prosecution.²¹

Coverage was also found by a district court in Georgia in *Lincoln Nat'l Health & Casualty Insurance v. Brown*,²² under a Law Enforcement Officers' Comprehensive Liability Policy which provided coverage for "personal injury" — including "false arrest," "malicious prosecution," and "assault and battery" — caused by an "occurrence" resulting from law enforcement activities. "Occurrence" was defined as an event that results in "personal injury the insured did not expect or intend unless the personal injury resulted from the use of reasonable force to protect persons or property."²³ The court found that when the definition of "personal injury"

is read with the provision that only unintentional and unexpected "personal injury" is covered, then the policy only applies to unintentional false arrest, unintentional malicious prosecution, and uninten-

¹⁸ *Martin's Herend Imports, Inc. v. Twin City Fire Ins. Co.*, No. H-99-064, 2000 U.S. Dist. LEXIS 8690 (S.D. Tex., March 31, 2000).

¹⁹ *Id.* at *26-*27.

²⁰ Exclusions 2. d. "Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;" and 2.e. "Oral or written publication, in any manner, of

material that violates a person's right of privacy."

²¹ *Cf. Interface, Inc. v. Standard Fire Ins. Co.*, 2000 U.S. Dist. LEXIS 14019, at *12-13 (N.D. Ga., Aug. 10, 2000) (refusing to apply the exclusion to a claim for copyright infringement and stating, "This exclusion appears more relevant to coverage for claims of libel or slander.").

²² 782 F. Supp. 110 (M.D. Ga. 1992).

²³ *Id.* at 112.

tional assault and battery. This is complete nonsense. Thus, while under one provision, the policy claims that it covers claims for intentional acts such as malicious prosecution, false arrest, and assault and battery, on the other hand, the policy really covers no such claims.²⁴

Courts strive to give effect to the reasonable expectations of the insured²⁵ and where the coverage for which a premium was paid “would not pay benefits under any reasonably expected set of circumstances,” it is illusory and violates public policy.²⁶ The illusory coverage doctrine is “an independent means to avoid an

unreasonable result when a literal reading of a policy unfairly denies coverage. . . . [and] like reasonable expectations, operates to qualify the general rule that courts will enforce an insurance contract as written.”²⁷ Since most cases of malicious prosecution stem from knowingly false statements (as opposed to recklessness),²⁸ an insured sued for malicious prosecution might reasonably assume to be covered for defense and indemnity by the personal injury coverage for “malicious prosecution.”²⁹

In *Allstate Prop. & Cas. Ins. Co. v. Jong Hwan Choi*,³⁰ the district court in Washington found defense coverage for a claim of false imprisonment under an umbrella policy that covered occurrences resulting in “personal injury,”

²⁴ *Id.* at 112-113; *see also* *Illinois Farmers Ins. Co. v. Keyser*, 956 N.E.2d 575, 578 (Ill. App. 2011) (“Were we to accept Illinois Farmers’ position, coverage for certain named intentional torts would be included under the definition of ‘personal injury’ and then removed under the meaning of ‘occurrence.’ This would render the provision defining personal injury superfluous and would create ambiguity where none exists.”).

²⁵ *E.g.*, *Album Realty Corp. v. American Home Assurance Co.*, 80 N.Y.2d 1008, 1010, 607 N.E.2d 804, 805, 592 N.Y.S.2d 657 (1992) (“In determining the intent of the parties, [o]ur guide is the reasonable expectation and purpose of the ordinary business [person] when making an ordinary business contract”).

²⁶ *Fidelity & Guar. Ins. Underwriters, Inc. v. Everett I. Brown Co.*, 25 F.3d 484, 490 (7th Cir. 1994) (Indiana law).

²⁷ *Jostens, Inc. v. Northfield Ins. Co.*, 527 N.W.2d 116, 118 (Minn. Ct. App. 1995).

²⁸ An action based on truthful allegations but maliciously commenced with the intent to cause injury to the defendant might constitute a “prima facie tort,” a cause of action developed in New York that consists of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful. *Curiano v. Suozzi*, 63 N.Y.2d 113, 117, 469 N.E.2d 1324, 1327, 480 N.Y.S.2d 466, 469 (N.Y. Ct. App. 1984).

²⁹ *Davidson v. Cincinnati Ins. Co.*, 572 N.E.2d 502 (Ind. App. 1991) (general liability and umbrella policies providing coverage for malicious prosecution and slander, yet excluding coverage for expected or intended consequences provided only illusory coverage).

³⁰ 2015 U.S. Dist. LEXIS 25889 (E.D. Wash. March 3, 2015).

including "damages resulting from: (a) false arrest; false imprisonment; wrongful detention" and other enumerated intentional torts. The court found that the "policy's explicit inclusion of damages arising from these intentional torts is plainly incongruous with the intentional acts exclusion . . . This results in a blatant ambiguity which must be resolved in favor of the insured. . . . This rule of interpretation applies with added force when, as here, a Court is interpreting exceptions or limitations of coverage. When faced with this contradictory policy that includes a very specific type of coverage (damage for false imprisonment) while excluding a broad swathe of damages (intentional and criminal acts) the average purchaser of insurance would likely believe himself to be covered for the specific damage explicitly listed in the policy."³¹

³¹ *Id.* at *13; see also *Keyser*, 956 N.E.2d. at 579 (the insured "contracted to insure against the risk of loss resulting from the intentional civil tort of malicious prosecution, and Illinois Farmers promised coverage when it accepted her premium payments. While generally excluding coverage of intentional conduct, the policy explicitly provided coverage for damages caused by malicious prosecution, and the insured could reasonably anticipate that the policy protections would apply. Public

IV. Cases Holding No Duty to Defend/Indemnify Based on the Exclusion and Complaint Alone

Although a liability insurance policy's covenant to defend is "separate from" and "broader than" the covenant to indemnify,³² other courts have found, solely on the basis of the allegations in the complaint, that the "Knowledge of Falsity" exclusion bars coverage even for a defense.

In *Navigators Specialty Insurance Company v. Beltman*,³³ the insurer sought a declaratory judgment that it had no duty to defend its insureds in an action brought against them by Chevron in the Southern District of New York. The district court found that the underlying alleged "sham" litigation brought against Chevron in Ecuador qualified as a malicious prosecution under the policy. After finding that the policy was triggered by the allegations in the "sham" action, the court found that coverage was barred the "Knowledge of Falsity" exclusion for injury arising out of

policy requires Illinois Farmers to fulfill its contractual obligation to defend and indemnify.").

³² See, e.g., *IBM v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 424 (2d Cir. 2002) ("Under New York Law, it is axiomatic that the duty to defend is "exceedingly broad" and more expansive than the duty to indemnify"); *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 592 F.3d 687, 694 (5th Cir. 2010).

³³ 2012 U.S. Dist. LEXIS 156666 (D. Colo. Nov. 1, 2012) at *26.

oral or written publications done at the direction of the insured with knowledge of its falsity. In reaching that conclusion, the court noted that the “thrust of the claims” stemmed from the insured preparing false documents and reports and publicly attacking a business competitor “based upon false and misleading statements” that had been made by the insured. Under those facts, the court found “This exclusion bars coverage because the Chevron Action is replete with allegations of intentional misrepresentations.”³⁴

PeopleKeys, Inc. v. Westfield Insurance Company,³⁵ is another “sham” litigation case in which the court considered the same issue and also found that although the underlying sham litigation arguably qualified as a malicious prosecution offense triggering coverage under the policy, the “Knowledge of Falsity” exclusion nullified the insurer’s duty to defend because it was alleged that the insured knowingly filed a baseless claim and in doing so knowingly published false material with the intent of interfering with a business relationship. The court stated:

Here, the allegations of the counterclaim, *i.e.*, that PeopleKeys knowingly filed a sham lawsuit with the intent of

harming a business competitor, fall squarely within the plain language of the “Material Published with Knowledge of Falsity” exclusion. . . . [T]he insurance policy under scrutiny provided ‘personal and advertising injury’ coverage for malicious prosecution and oral or written publication that slanders or libels The counterclaims averred that PeopleKeys knew that its claims against Myers were baseless, but they nevertheless instituted sham litigation against him with the subjective intent of injuring Myers’ ability to be competitive and to interfere with his business relationships. . . . These allegations explicitly plead that PeopleKeys knowingly published material with knowledge of its falsity and Westfield properly relied upon this exclusion provision in denying coverage to PeopleKeys.³⁶

Several non-malicious prosecution cases are also illustrative. New York’s Appellate Division, First Department has twice held that where it is alleged in the complaint that the insured

³⁴ *Id.* at *28.

³⁵ 2016 Pa. Super. Unpub. LEXIS 599 *Id.* at *14 (Pa. Super. Feb. 25, 2016) (applying Ohio law).

³⁶ *Id.*, at *19-*21.

knowingly made false statements of fact in documents filed with the court and those documents were alleged to be the basis of a personal injury or advertising injury offense (or the legal equivalent thereof), the "Knowledge of Falsity" exclusion was triggered on the pleadings alone, relieving the insurer of any duty to defend or indemnify the loss.

In *Atlantic Mutual Insurance v. Terk Technologies*,³⁷ a trademark infringement suit, the question before the court was whether, under the findings of fact by the district court judge in the underlying suit, the insurer had either a duty to defend or duty to indemnify the insured's alleged trademark violations. In the underlying action, it was found that the insured's trademark violations had been done "intentionally, willfully, knowingly, surreptitiously and fraudulently"³⁸ Subsequently, the insured filed a notice of claim and the insurer denied the claim based on the "knowing and willful" exclusion and for late notice. The only issue considered by the First Department was whether the "knowing and willful" exclusion applied to preclude reimbursement of defense and indemnity of the claim and the court concluded that,

based upon the district court's findings of fact and the "knowledge of falsity" exclusion, the insurer had no duty to indemnify.

... [W]e harbor no doubt that Terk's conduct falls within the "knowledge of falsity" exclusion set forth in the policy.³⁹ Indeed, the facts, as determined by the District Court, are that Terk knowingly and intentionally obtained counterfeit . . . [goods distributed by the insured]. The Fourth Circuit Court of Appeals, in affirming the District Court, held that 'the district court was correct in finding that Terk intentionally, willfully, knowingly, surreptitiously and fraudulently passed off counterfeit goods of inferior quality as Larson's authentic Danish-made goods.

In view of the foregoing, we can only conclude that Terk's actions fell squarely within the Policy's exclusion for 'advertising injur[ies]' which arise out of the insured's publication of

³⁷ 309 A.D.2d 22, 763 N.Y.S.2d 56 (N.Y. Sup. Ct. App. Div. 2003).

³⁸ *Id.*, 309 A.D.2d at 25.

³⁹ The exclusion language being considered provided: "This insurance does not apply to: a. 'Personal Injury' or 'Advertising Injury' (1) Arising out of oral or written publication of material, if done by or at the direction of the insured *with knowledge of its falsity*.'" (emphasis in original). 309 A.D.2d at 26.

material 'with knowledge of its falsity.'⁴⁰

Significantly, the court went on to find that despite the fact that the claims against the insured could have been proven without intent, *i.e.*, based upon negligent acts, the insurer still had no duty to defend under the circumstances because the allegations in the complaint alleged without exception, that the insured had knowingly and intentionally caused the injuries at issue in the underlying suit. Citing to its prior holding in *A.J. Sheepskin & Leather Co., Ins. v. Colonia Ins. Co.*,⁴¹ another trademark infringement action, the First Department found:

The motion court correctly found that defendant insurer was under no duty to defend and indemnify plaintiff insured in the underlying Federal action, because the allegations of the complaint in that action, setting forth claims of trademark infringement [were] premised, without exception, upon conduct both knowing and intentional [and] fell wholly within the exclusion

in the subject insurance policy pertaining to advertising injury 'arising out of oral or written publication of material; if done by or at the direction of the insured with knowledge of its falsity.'⁴²

In *Del Monte Fresh N.A., Inc. v. Transp. Ins. Co.*,⁴³ the Seventh Circuit, applying Illinois law, found that the "knowledge of falsity" exclusion relieved the insurer of any duty to defend actions alleging advertising and personal injury offenses when the underlying complaint against the insured alleged only intentional conduct and proof of that conduct was necessary to prevail:

Del Monte does not point to a single factual allegation that is not a part of a specific allegation of fraud and that does not use the language of the "paradigm of intentional conduct." The class plaintiffs can prevail only if they are able to prove that the underlying statements made by Del Monte were knowingly false. Therefore, the complaints

⁴⁰ *Id.* at 28. The court also found that the exclusion applies to the misappropriation of ideas, not only written materials.

⁴¹ 273 A.D. 2d 107, 709 N.Y.S.2d 82 (N.Y. Sup. Ct. App. Div. 2000). The insurer's obligation to defend or indemnify was held barred by the Knowledge of Falsity exclusion where the court in the underlying trademark

infringement action made an express finding after a full evidentiary hearing that, as stated in the complaint, the insured "was a 'serial infringer' that had 'deliberately sought to confuse the public' by selling goods nearly identical to BEAR's" *Id.*, 273 A.D. 2d at 108.

⁴² *Terk Techs. Corp.*, 309 A.D.2d at 31.

⁴³ 500 F.3d 640, 643-644 (7th Cir. 2007).

at issue in this case fall squarely within the exclusion in the policy for personal or advertising injury if the injury arose out of statements made by the insured (or at its direction) with knowledge of falsity.⁴⁴

Further, the court rejected the insured's argument that the "knowledge of falsity" exclusion should not bar coverage for the insured's defense if some of the claims at issue permitted liability for less culpable behavior:

We repeat that the application of the "knowledge of falsity" exclusion is based on the actual pleadings, even when the statute underlying the action allows relief on a lesser showing of culpability. At oral argument, Transportation acknowledged that the class action complaints could have included requests for relief based on conduct that does not require a showing of knowingly false statements. But they did not. As we said in *Connecticut Indemnity*, "[w]hile . . . negligent conduct is actionable under the Consumer Fraud Act, it is

the actual complaint, not some hypothetical version that must be considered." Liability will not attach in the cases against Del Monte without a showing of knowledge of falsity, because the allegations against Del Monte are not grounded in any theory of relief except fraud. The statutes underlying the class action complaints do not change this conclusion.⁴⁵

V. Contrary Decisions Finding Coverage

In *National Fire Insurance Company of Hartford v. E. Mishan & Sons, Inc.*,⁴⁶ the Second Circuit, applying New York law, reversed the district court's finding that the insurer had no duty to defend the insured in an underlying suit based solely upon the allegations in the complaint. In that case, the insured argued that the district court had misapplied the law in finding the "Knowledge of Falsity" exclusion had been triggered on the pleadings alone:

The District Court concluded that 'all of the allegations' against Emson in the underlying lawsuits fall into the coverage

⁴⁴ *Id.* at 645.

⁴⁵ *Id.* at 646 (internal citations omitted).

⁴⁶ 650 Fed. Appx. 793, 2016 U.S. App. LEXIS 10151 (2d Cir. June 1, 2016).

exclusion for ‘personal and advertising injury.’ The District Court reached that conclusion on the basis that the ‘alleged conduct was intentional and knowing,’ as the underlying complaints ‘allege that Emson intentionally passed along the consumers’ private information as a part of a scheme to defraud those consumers.’ The District Court denied Emson’s motion to alter or amend the judgment, reiterating that ‘the factual allegations in the underlying complaints, upon which all the claims against Emson rest, necessarily concern knowing violations.’ Emson appeals, principally arguing that the District Court misapplied the knowing violation⁴⁷ exclusion⁴⁸

The Second Circuit agreed and reversed the district court’s finding of no duty to defend. The court reasoned that, though the allegations were all intentional in nature, offenses that did not require such intent had been alleged in the complaint. On that basis, the Second Circuit found that the insured could in the future be found liable for an

offense that would be covered under the policy. The court further reasoned that the facts alleged did not rule out the possibility that the insured did not act with the intent to cause harm:

We cannot conclude with certainty that the policy does not provide coverage, because the conduct triggering the knowing violation policy exclusion is not an element of each cause of action. Therefore, Emson could be liable to plaintiffs even absent evidence that it knowingly violated its customers’ right to privacy. Furthermore, while the underlying plaintiffs allege generally that Emson acted knowingly and intentionally, the actual conduct described does not rule out the possibility that Emson acted without intent to do harm.⁴⁹

The Second Circuit went on to address the New York Appellate Division decisions that reached a different conclusion, and specifically the line of cases set forth in the First Department discussed above. Reducing those cases to a footnote, the Second Circuit explained:

⁴⁷ The exclusion at issue in the case was the Knowing Violation of the Rights of Another, which is *not* the published material exclusion. The significance of the case is the

district court’s reasoning in applying the exclusion to the allegations in the complaint.

⁴⁸ 2016 U.S. App. LEXIS 10151 at *3.

⁴⁹ *Id.* at * 8.

In *CGS Industries*, we acknowledged two cases decided by the First Department, which propound a theory that even if a cause of action in a complaint against an insured could be proved by negligence, and thus would not necessarily trigger a knowing violation exclusion, if the actual conduct alleged rules out any workable negligence theory, the policy exclusion applies. *Atlantic Mutual Insurance Co. v. Terk Technologies Corp.*, *A.J. Sheepskin & Leather Co. v. Colonia Insurance Co.* While the plaintiffs in the underlying lawsuits assert that Emson acted with knowledge, here, as in *CGS Industries*, the actual conduct alleged does not foreclose

the possibility of recovery against Emson on a negligence theory. Therefore, we have no occasion to decide whether the New York Court of Appeals would likely embrace the First Department's approach to those cases.⁵⁰

VI. When Coverage is Triggered for Malicious Prosecution

Whether a malicious prosecution claim triggers coverage under a liability insurance policy depends upon whether the occurrence or offense triggering coverage under the policy is the commencement of the alleged malicious prosecution or its termination in favor of the accused.

In *St. Paul Fire & Marine Insurance v. City of Zion*,⁵¹ the

⁵⁰ *Id.* at *9-*10, fn. 2 (citations omitted).

⁵¹ 385 Ill. Dec. 193, 18 N.E.3d 193, 195 (Ill. App. 2014); *see also* *City of Erie v. Guaranty Nat'l Ins. Co.*, 109 F.3d 156, 160 (3d Cir. 1997) (surveying the law and finding that "the clear majority of courts have held the tort occurs when the underlying criminal charges are filed"); *Royal Indem. Co. v. Werner*, 979 F.2d 1299 (8th Cir. 1992) (applying Missouri law); *Southern Maryland Agric. Ass'n, Inc. v. Bituminous Cas. Corp.*, 539 F. Supp. 1295 (D. Md. 1982) (applying Maryland law); *Ethicon, Inc. v. Aetna Cas. and Sur. Co.*, 688 F. Supp. 119 (S.D.N.Y. 1988) (applying New Jersey law); *S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co.*, 396 A.2d 195 (D.C. 1978); *American Family Mut. Ins. Co. v. McMullin*, 869 S.W.2d 862 (Mo. Ct. App. 1994); *Patterson Tallow Co., Inc. v. Royal*

Appellate Court of Illinois, in a case arising out of a wrongful conviction and prison sentence, found that “[m]ost courts that have addressed the issue have held that the commencement of a malicious prosecution is the event that triggers insurance coverage.” The court rejected the argument that coverage is only triggered when all the elements of malicious prosecution, including favorable termination of the prosecution, are in place.

New York courts have taken a contrary position, holding that “a cause of action for malicious prosecution is governed by a one-year statute of limitations, which

begins to run upon termination of the underlying lawsuit.”⁵² A district court in Florida also held that “a cause of action for the tort of malicious prosecution in Florida does not arise, mature or accrue until all of the essential elements of the tort have materialized, including favorable termination of the malicious action in favor of the victim.”⁵³

VII. Conclusion

While insurance is generally thought of as covering only harm that is fortuitous rather than intentionally caused by the insured, Coverage B, Personal Injury, of the CGL policy (and similar personal injury coverage in other policy forms) provides coverage for “offenses” that are intentional torts, including malicious prosecution. The coverage is subject to all the terms of the policy, including a number of exclusions one of which is for publication of knowingly false written material, which describes just about every complaint for malicious prosecution. Some courts apply this exclusion literally and allow insurers to avoid even their duty to defend, while others

Globe Ins. Companies, 89 N.J. 24, 444 A.2d 579 (N.J. 1982); Muller Fuel Oil Co. v. Ins. Co. of North America, 95 N.J. Super. 564, 232 A.2d 168 (N.J. Super. 1967); Harbor Ins. Co. v. Cent. Nat’l Ins. Co., 165 Cal. App. 3d 1029, 211 Cal. Rptr. 902 (Cal. App. 1985); Zurich Ins. Co. v. Peterson, 188 Cal. App. 3d 438, 232 Cal. Rptr. 807 (Cal. App. 1986).

⁵² 10 Ellicott Sq. Ct. Corp. v. Violet Realty, Inc., 81 A.D.3d 1366, 1368, 916 N.Y.S.2d 705, 707 (N.Y. Sup. Ct. 2011).

⁵³ Roess v. St. Paul Fire & Marine Ins. Co., 383 F. Supp. 1231, 1235 (M.D. Fla. 1974) (applying Florida law).

recognize that it is “complete nonsense” to say that one provision of the policy expressly covers claims for malicious prosecution while another excludes them because the complaint alleges that the insured has made knowingly false statements of fact. Such an interpretation renders the policy illusory with respect to the coverage for malicious prosecution. The overwhelming majority of courts have held that coverage is triggered by the commencement of a malicious prosecution action, not by its favorable termination.