STEPTOE & JOHNSON PLLC

FIRST LOOK

ISSUES AND DEVELOPMENTS IN INSURANCE LAW

CGL POLICY COVERAGE B: PERSONAL AND ADVERTISING INJURY

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ADVERTISING INJURIES: DEFAMATION AND RIGHT OF PUBLICITY

BY: MEGAN FARRELL WOODYARD

Advertising injuries occur when a business injures another party during the course of advertising its products or services. The Insurance Services Office (ISO) defines advertisement as "a notice that is broadcast or published to the general public or specific market segment about your goods, products, or services for the purpose of attracting customers or supporters." Generally, an advertising injury results in financial loss to the injured party through damage to reputation or by lost profits. These claims are often brought against a business by a competitor, though an advertisement may also injure an individual.

Businesses and individuals can protect themselves from such claims by purchasing the appropriate insurance. Coverage for advertising injuries is a type of general liability coverage, normally combined in standard commercial general liability (CGL) policies with personal injury (PI) coverage in a form called Coverage B, that applies to defamation, libel, product disparagement, invasion of privacy, misappropriation of advertising ideas, and infringements of copyrights, trademarks, and slogans.[1] These are all types of claims that allege a violation of a legally protected right, but that do not result in bodily injury or property damage.

Defamation is a statement that injures another party's reputation. This includes both libel (written statements) and slander (spoken statements). In general, in order to constitute defamation, a party must make a statement which includes the following four elements:

1. It must be a false statement and defamatory statement concerning another;
2. The false statement must be communicated/published to a third party;
3. The person making the false statement must be at least negligent in doing so[2]; and
4. The false statement must have caused harm to the subject of the statement (or otherwise be actionable irrespective of harm).[3]

Where the policy language can be construed to require the insurer to defend or indemnify the policyholder for a claim of defamation, such is generally required.[4]

This type of insurance policy also covers the right of publicity, where a policyholder faces liability for alleged unauthorized appropriation of another individual's identity for commercial purposes. The right of publicity pertains to *commercial use* of another individual's name, likeness, and persona. Many states have enacted statutes which allow an individual to regulate use of their public image so that it cannot be used by someone else without their permission in commercial ventures, such as for advertising or selling products or services.[5] The right of publicity exists under the broader legal umbrella of the right

of privacy, but may also involve intellectual property law, a category that includes copyrights and trademarks. The common theme between the two is the legal protection against unfair use of an image or idea that is closely associated with another commercial entity. Although the majority view is that every individual has the right of publicity[6], most legal disputes arise over the unauthorized use of celebrities' names and likenesses, since they are often used in advertisements.

Some of the more famous right of publicity cases involved the misappropriation of celebrity voices. In *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1989), Bette Midler sued Ford for hiring a Bette Midler impersonator to sing its advertising jingle after she declined the job. Similarly, singer Tom Waits sued Frito-Lay for the same conduct in *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992). Both Midler and Waits were awarded significant financial damages in these claims.

Other cases involve merchandise bearing the "marks" of rock music groups and solo performers. In *Bi-Rite Enterprises, Inc. v. Button Master*, a variety of rock music groups, including Judas Priest, Devo, and Iron Maiden, and solo performers Neil Young and Pat Benatar, brought suit against a music merchandising company for making and selling buttons and other novelty items featuring the musical acts.[7] The performers, including the rock groups, prevailed on their right of publicity claims.[8] Of course, it is worth remembering that there is no federal right of publicity, so commercial entities must consult a patchwork of state laws to examine the risks posed by unauthorized use of another person's identity in their advertising.

Advertising injury coverage has its exclusions. First, every such policy excludes intentional or malicious acts.[9] Other typical exclusions include knowledge of falsity (if you know the statement is false but make it anyway); knowing violations (where you know you will violate someone's rights by acting, but do it anyway, such as using someone's likeness without their permission); criminal acts; breach of contract; and price, quality, and performance (where a claim is made alleging your product failed to meet the quality, performance or price stated in the advertisement.)[10]

Courts have construed "false" for the purposes of the knowledge of falsity exclusion to mean "'untrue' or failing to correspond to a set of known facts."[11] Therefore, the conduct of an insured who directly asserts untrue facts in this context may be subject to the knowledge of falsity exclusion.[12] The exclusion also applies if the plaintiff alleges that the insured intentionally published statements which it knew to be false.[13] Application of the exclusion is, however, dependent on the facts of the claim. Thus, in *AMCO Ins. Co. v. Inspired Technologies, Inc.*, the Court held that the exclusion did not bar coverage of alleged negligent misrepresentation.[14] Importantly, therefore, based on the wording of the knowledge of falsity exclusion, it applies where the policyholder actually knows the information was false; it likely will not apply if the insured could have or should have known it was false.[15] Additionally, demonstrating actual knowledge is a factual matter.

Notably, advertising injury coverage does not apply to businesses such as publishers, broadcasters, website designers, ad agencies, or internet service providers that design and/or publish advertisements and content for other companies.[16] Those types of activities may be covered under a media liability policy, a specialized form of Errors & Omissions Insurance.

1 Coverage B typically also covers false arrest, detention or imprisonment; malicious prosecution; and wrongful eviction.

2 The standard varies by state, and many distinguish between whether the plaintiff is a private citizen or public figure/public official. For example, in West Virginia, public officials/figures must establish that the tortfeasor knew the statement was false or made it with reckless disregard of whether it was false. *See, e.g.*, *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975). *See also, New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (U.S. Supreme Court held that for a public figure to succeed on a defamation cause of action, she must show that the defendant acted with "actual malice", which means the statement was said with knowledge that it was false or with reckless disregard of whether it was false or not.) In contrast, private figures only need to show negligence on the part of the publisher. *See, e.g., Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1984).

3 Restatement (2d) of Torts, § 558 (1977).

4 *See, e.g.*, *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 779 N.E.2d 167 (2002) (because insured could be held liable upon proof that he had acted recklessly in defaming plaintiff, public policy did not preclude coverage under personal injury liability policy).

5 *See, e.g.*, Cal. Civ. Code § 3344 (2012); Fla. Stat. Ann. § 540.08 (2007); 765 ILCS 1075 (1999); Ind. Code § 32-36-1 (2012); Mass. Gen. Laws ch. 214, §3A (1974).

6 *See, e.g.*, Cal. Civ. Code §§ 3344, 3344.1 & App. B-1 (2012); N.Y. Civ. Rights §§ 50 & 51 (McKinney 2008).

7 555 F. Supp. 1188 (S.D.N.Y. 1983).

8 *Id.*

9 *See* 2013 ISO Commercial General Liability Coverage Form CG 00 01 04 13.

10 *Id.*

11 *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1195, 64 U.S.P.Q.2d 1411 (11th Cir. 2002).

12 *Id.*, 304 F.3d at 1196.

13 *Mulberry Square Productions, Inc. v. State Farm Fire and Cas. Co*, 101 F.3d 414, 422 (5th Cir. 1996).

14 648 F.3d 875 (8th Cir. 2011).

15 Per the 2012 ISO Form CG 00 01 04 13, the knowledge of falsity exclusion applies to: "'Personal and advertising injury' arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity."

16 2013 ISO Commercial General Liability Coverage Form CG 00 01 04 13, at subsection j.

ORGANIZATIONAL USE OF SOCIAL MEDIA: BOON OR BURDEN?

BY: CHRISTOPHER STARR ETHEREDGE

Organizational use of social media has evolved precipitously from the early days when social media was viewed as little more than a novel marketing concept on the fringe of broader traditional advertising campaigns. However, with the increase in innovation comes concern over the extent to which increased organizational activities on social media may expose the organization to potential civil liability. Indeed, organizational use of social media has been described by some as a "virtual Pandora's Box," which is at once an exciting boon for business but filled to the brim with the potential for legal exposure.[1] This article explores some of the most common insurance coverage issues organizations are likely to experience as their use of social media continues to expand and evolve. Although the article focuses on organizational issues, many of the principles described are equally applicable to coverage issues which may arise from an individual's use of social media under consumer-focused policies.

As social media has become increasingly ingrained in the average consumer's life, organizations and commercial entities have developed innovative ways to leverage their own social media presence as a marketing tool and as a means by which they can communicate directly with the consumer. For many organizations, this evolution means nothing more than using social media as an analogue to traditional advertising concepts, such as banner and sidebar ads, audio and video spots, product placement, and endorsement deals. For others, social media is at the core of the organization's operations. Indeed, it is not uncommon for the world's leading corporations to devote entire teams to the development and use of social media. Organizations running the gamut from national governments and major religious institutions, to startup social activist groups and mom-and-pop shops have found creative ways to use social media for endeavors ranging from disaster and emergency response, security at major events, breaking news coverage, broadscale organizational efforts, get out the word efforts, and customer service response centers.[2]

But as is all too often the case with innovation, the increase in organizational use of social media has been accompanied by litigation presenting novel legal questions on a variety of social media-related issues. And with the increase in litigation have come questions over the degree to which Commercial General Liability ("CGL") insurance—the principles of which were developed decades before pioneering social media platforms such as MySpace and Friendster emerged—can keep up with ever evolving trends in the social media landscape. Fortunately, the legal theories under which social media-related lawsuits most typically arise are quite familiar. Libel, slander, copyright infringement, use of another's advertising idea, and invasion of privacy all remain the stalwarts of the industry.[3] Though courts throughout the nation have struggled at times to apply CGL's pre-internet principles to modern day realities, traditional common law principles remain at the core of

resolving these seemingly novel issues. Accordingly, and because courts have seemed inclined to require CGL carriers to provide coverage where the issues involved resemble otherwise traditional common law principles, organizations seeking to navigate the ever-evolving scope and substance of social-media related claims must keep traditional common law concepts in mind.

As a preliminary matter, social media comes with certain fundamental characteristics about which organizations must remain cognizant when developing their social media strategies. Indeed, the very feature of social media to which organizations are drawn most—the potential for cheap and instant access to 73% of the country[4]—necessarily implies that when a potentially problematic tweet or post catches steam, it stands to be shared far and wide and memorialized for all to see. Given the inherently "viral" nature of social media, plaintiffs are often well positioned to establish special damages by virtue of the far-reaching consequences of social media exposure alone. This is particularly problematic in libel-based defamation claims, which require proof of special damages as an element of the claim.[5] Predictably, lawsuits alleging libel have grown in popularity as organizational use of social media has evolved,[6] and given the wide array of theories under which such claims have been successful, they are perhaps the most problematic.[7] Indeed, libel claims arising from organizational use of social media have become so common that that the phrase "Twibel"—a portmanteau of "Twitter" and "libel"—has emerged as a new favorite in the legal lexicon.

But claims arising from organizational use of social media are not limited to defamation alone. In jurisdictions that recognize the tort of invasion of privacy, courts have required CGL carriers to provide coverage in causes of action resulting from an insured's role in the release of a third-party's confidential information online.[8] However, where the invasion of privacy has resulted from intentional conduct on the part of a third-party—such as a data breach—courts are divided on the issue of whether any potential negligence on the part of the insured satisfies the "publication" requirement of the invasion of privacy claim.[9]

Courts have also found that CGL coverage for so-called "advertising ideas" extends to social media-related claims.[10] While these issues commonly resemble traditional trademark and trade dress infringement claims,[11] some courts have interpreted Coverage B to encompass claims arising from organizations' alleged infringement on another's advertising strategy more broadly.[12] Further, courts have used advertising ideas coverage to address publicity rights cases[13] and, under certain circumstances, to encompass claims arising from patents related to internet and website functionality.[14] Claims alleging intellectual property infringement have also commonly been held to apply to social media conduct under Coverage B's express coverage for copyright, trade dress, and slogan infringement.[15] Such claims are particularly likely to arise where an organization adopts content created by its social media followers without permission to do so.[16]

Importantly, recent revisions to CGL forms expressly contemplate certain social media conduct as "advertisement" for the purpose of coverage arising from advertising idea and infringement-related claims. Because these forms often set forth specific definitions of what constitutes an advertisement in the context of social media, organizations must pay close attention to what types of social media activity are and are not covered when developing their social media strategies.[17]

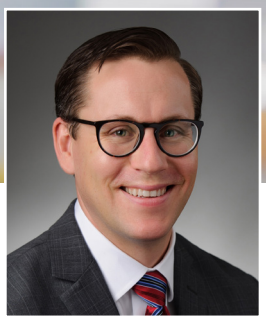
One interesting evolution in advertising in which such definitions have played an important role is the advent of an "influencer" industry, which has raised novel questions as to the degree to which a paid influencer's representations of a product or infringement upon another's intellectual property may constitute an advertisement for Coverage B purposes.[18]

Finally, it is worth noting that while Coverage B has been interpreted to cover a broad variety of claims arising from an organization's use of social media, evolutions in policy exclusions and coverage limits may in some cases defeat coverage for social media-related claims.[19] In particular, exclusions applicable to prior publication, intellectual property, media and internet, electronic chatrooms and bulletin boards, and unauthorized use of another's name exclusions all stand to be implicated. However, because exclusions vary from policy to policy and are ever-evolving, a detailed examination of their potential broad applicability to social media-related claims generally is outside the scope of this article.

As this article demonstrates, organizational use of social media has emerged as a lucrative means by which organizations can market themselves and connect individually with their market base. However, as the means by which organizations use social media continues to evolve, so too have the legal theories under which social media-related claims are raised. However, with careful planning and an eye toward trends in the industry and the availability of increasingly diverse coverage options, organizations can make the most of the social media boon without falling prey to its potential pitfalls.

1. Susan Evans Jennings, Justin R. Blount, & M. Gail Weatherly, Social Media—A Virtual Pandora's Box: Prevalence, Possible Legal Liabilities, and Policies, 77(1) Business & Professional Communication Quarterly, 96 (2014).
2. *See generally* Matteo Tonello, *Corporate Use of Social Media*, Harvard Law School Forum on Corporate Governance, May 17, 2016.
3. Although outside the scope of this article, organizational use of social media can under certain circumstances implicate federal regulatory issues. *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.
4. *See* Social Media Fact Sheet, Pew Research, https://www.pewresearch.org/internet/fact-sheet/social-media/.
5. *See* Restatement (Second) of Torts § 558 (describing the elements of defamation as "(1) a false factual statement concerning the plaintiff (2) published to a third-party (3) that is made either negligently or with malice, and (4) results in special damages").
6. *See* Raymond Placid, Judy Wynekoop, & Roger W. Feicht, *Twibel: The Intersection of Twitter & Libel*, 90 Fl. Bar J. 8, 32 (Sep./Oct. 2016).
7. *See, e.g.*, *AIX Specialty Ins. Co. v. Big Limo, Inc.*, Case No. 3:21-cv-08, 2021 WL 2708902, at *4–5 (S.D. Ohio July 1, 2021) (holding that an insurer had a duty to defend its insured nightclub under a theory of defamation where the nightclub had allegedly used a model's picture in a Facebook post to promote a cabaret); *Jar Labs. v. Great Am. E&S Ins. Co.*, 945 F. Supp. 2d 937 (N.D. Ill. 2013) (holding that an insurer had a duty to defend its insured under a theory of implied disparagement where the insured had published a Facebook post implicitly representing a competitor's products in a false and misleading way).

8. *See State Farm Gen Ins. Co. v. JR's Frames, Inc.*, 181 Cal. App. 4th 429, 448 (2010); *Travelers Indem. Co. of Am. v. Portal Healthcare Sols., LLC*, 644 F. App'x 245 (4th Cir. (Va.) 2016).
9. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Rosen Millennium, Inc.*, 2018 WL 4732718, at *3 (M.D. Fla. Sept. 28, 2018); *Innovak Int'l v. Hanover Ins. Co.*, 280 F. Supp. 3d 1340 (M.D. Fla. 2017); *Zurich Am. Ins. Co. v. Sony Corp. of Am.*, 2014 WL 8382554 (N.Y. Sup. Ct. Feb. 21, 2014) (denying claims for invasion of privacy where the publication at issue arose from intentional third-party conduct); *but see Landry's Inc. v. Ins. Co. of the State of Penn.*, 4 4th 366, 270 (5th Cir. (Tex.) 2021) (requiring an insurer to defend against publication of personally identifiable information resulting from a data breach).
10. *See Atlantic Mut. Ins. Co. v. Badger Medical Supply Co.*, 528 N.W.2d 486, 490 (Wis. App. 1995) (defining "advertising idea" as "an idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage").
11. *See Cat Internet Servs., Inc. v. Providence Washington Ins. Co.*, 333 F.3d 138, 142 (3rd Cir. (Penn.) 2003).
12. *See Great American Inc. Co. v. Beyond Gravity Media, Inc.*, Case No. 3:20-cv-53, 2021 WL 4192738 (S.D. Tex. Sept. 15, 2021) (finding that an insured's use of the claimant's martial arts-themed advertising strategy was subject to CGL coverage); *See also Native Am. Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729 (7th Cir. 2006); *Gustafson v. Am. Family Mut. Ins. Co.*, 901 F. Supp. 2d 1289 (D. Colo. 2012).
13. *See Air Eng., Inc. v. Industrial Air Power, LLC*, 828 N.W.2d 565 (Wis. App. 2013); *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 600 F.3d 1092 (9th Cir. (Cal.) 2010); *but see Holyoke Mut'l Ins. Co. in Salem v. Vibram USA Inc.*, 106 N.E.3d 572 (Mass. 2018) (rejecting claim that Coverage B provides coverage for traditional patent infringement claim).
14. *See Gencor Indus, Inc. v. Wausau Underwriters Ins. Co.*, 857 F. Supp. 1560 (M.D. Fla. 1994).
15. *See generally* Daniel I. Graham Jr. & Thomas W. Arvanitis, *Social Media Risks & "Personal & Advertising Injury" Coverage Issues*, DRI Insurance Coverage & Practice Symposium, December 9–10, 2021. A special thanks to the authors for their extensive research, from which this article benefits considerably.
16. *See Stross v. Redfin Corp.*, 730 Fed. App'x 198 (5th Cir. 2018).
17. *See* Graham & Arvanitis, *supra*, at 10–11.
18. Michael B. Rush, Social Media Advertising Under CGL Coverage B, The National Law Review, May 21, 2019.
19. *See* Graham & Arvanitis, *supra*, at 11.



SOCIAL MEDIA & CGL COVERAGE B: ARTFUL PLEADING CIRCUMVENTS EXCLUSIONS

BY: GREG JACKSON

Beware negligence allegations – they may negate exclusions and support a duty to defend liability claims for social media activity as personal and advertising injury under Coverage B. Two cases decided in 2021, one from the Northern District of Illinois and one from Southern District of Texas, illustrate how claims that negligence resulted in culpable social media posts may provide an avenue for savvy plaintiff lawyers to artfully plead to find coverage that would otherwise not exist.[1] Specifically, in the Northern District of Illinois, the underlying plaintiffs' claims that an employer's negligence proximately caused the misappropriation of images posted to Facebook and Instagram were found to be outside Coverage B exclusions and, therefore, obligated a defense, while the Southern District of Texas ruled that similar claims that did not advance a negligence theory were excluded.[2]

1. Commercial General Liability, Coverage B.

Commercial General Liability ("CGL") policies are generally broken down into Coverage A and Coverage B. Coverage A covers bodily injury and property damage.[3] Coverage B provides coverage for personal and advertising injury, including the obligation to defend against any suit for such damages. Coverage B often has additional requirements, such as the personal and advertising injury must arise out of the insured's business or that the offense be committed during the policy period and within the coverage territory.[4] "Personal and advertising injury" is typically defined as follows:

> "Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:
>
> 1. 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.
> 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."
> 4. Infringing on another's copyright, trade dress or slogan in your "advertisement."[5]

However, this coverage is limited by the Coverage B exclusions, which generally preclude coverage for intentional or knowing acts that result in personal or advertising injury, acts that violate specific statutes or other law, acts that breach contracts, copyright infringement, or the unauthorized use of material.[6]

2. *Great American Insurance Company v. Beyond Gravity Media, Inc.*: Coverage B exclusions preclude coverage and the duty to defend social media liability in the absence of negligence allegations.

In *Great American Insurance Company v. Beyond Gravity Media, Inc.*, the Southern District of Texas considered coverage for a dispute between Beyond Gravity Media and Code Ninjas, LLC, under Coverage B of the commercial general liability policy Great American issued to Beyond Gravity.[7] Code Ninjas and Beyond Gravity contracted for Beyond Gravity to open franchises of Code Ninjas centers, which teach computer programming, math, and logic to children. In the underlying suit, Code Ninja claimed Beyond Gravity and its sole shareholder, Brandon Matalon, received Code Ninjas' proprietary and confidential information through Code Ninjas' training, communications, and an annual franchise conference. According to Code Ninjas' Complaint, Beyond Gravity attempted to rescind the franchise agreement while simultaneously working to misappropriate Code Ninjas' confidential information and trademark to "create and advertise (through a website, social-media pages, and a job listing) a competing education center called 'Dojo Tech' or 'CoDojo'."[8]

Code Ninjas brought the following causes of action: (1) breach of franchise agreement; (2) intentional, willful, and malicious misappropriation of trade secrets; (3) declaratory judgment on notice of contractual rescission; (4) unjust enrichment; (5) knowing, malicious, willful, and intentional unfair competition; and (6) breach of personal guarantees by Matalon.[9] Code Ninjas did not advance any claim of negligence. Before Code Ninjas and Beyond Gravity settled their dispute, Great American Insurance Company filed a declaratory judgment action against Beyond Gravity seeking a determination that it did not owe a duty to defend or indemnify Beyond Gravity in the Code Ninjas suit.

Great American argued that Beyond Gravity's social media posts about its server, business concepts, missions, and a job listing, did not constitute use of Code Ninjas' advertising ideas.[10] Similarly, the alleged misappropriation of confidential information and trade secrets, was also not use of Code Ninjas' advertising ideas. Further, Great American claimed Code Ninjas' allegations about Beyond Gravity's website and social media postings / pages did not state an injury arising out of Beyond Gravity's advertising or infringement of Code Ninjas' copyright, trade dress, or slogan. However, the Court disagreed.

The Court noted that the Complaint repeatedly stated that Beyond Gravity gained access to Code Ninjas' confidential information to use it for promotion of Tech Dojo on social media. Further, Beyond Tech registered a Tech Dojo trademark, which was very similar to Code Ninjas in name and appearance, and used it to promote Beyond Gravity's new venture on social media, its website, and a job listing.[11] Most importantly, the Court concluded that the promotion of the new venture, trademark, and use of Code Ninjas' confidential information on social media and websites constituted advertisement because "[b]usiness websites and social-media pages are by design digital storefronts – their entire point is to garner attention and attract customers."[12] The Court concluded that Beyond Gravity used Code Ninjas' advertising ideas, triggering Coverage B under the Great American CGL. However, the Court then continued to consider the Coverage B exclusions. The Court found that the knowing violation, unauthorized use, infringement of copyright, patent, trademark, or trade secret, and breach of contract exclusions precluded coverage and any duty to defend.[13] Consequently, the Court awarded summary judgment to Great American.

3. *First Mercury Insurance Company v. Triple Location LLC:* Allegations of negligence circumvent Coverage B exclusions, obligating a defense.

In the underlying suit involved in *First Mercury Insurance Company v. Triple Location LLC*, three professional models alleged Triple Location used their images without consent to promote its strip club, Club O.[14] According to the models, Triple Location posted their photographs on Club O's Instagram account and Facebook page on three occasions without their authorization. The models alleged the postings gave the false impression that they had consented to promote Club O, damaged their brands, images, and marketability, and destroyed any copyright that existed in their photographs by editing the original images.

Importantly, the models alleged that Triple Location negligently failed to promulgate policies and procedures about the misappropriation of the models' images that were used on the Club O website and social media accounts. Moreover, even if such policies and procedures existed, the models contended Triple Location was negligent in the enforcement of the policies and training and supervision of its employees to ensure the policies, federal law, and state law were not violated.[15] The images were posted without permission as a proximate result of Triple Location's alleged negligence.

Based on these allegations, the models advanced claims of state law negligence, false advertising under the Lanham Act, and violations of the Illinois Right of Publicity Act. First Mercury sued Triple Location seeking a declaratory judgment that it did not owe a duty to defend against the models' lawsuit. First Mercury claimed Coverage B exclusions precluding coverage for acts that would knowingly violate the rights of another or publication of material with knowledge of its falsity prevented coverage.[16] However, because the models' Complaint advanced negligence allegations and did not rest solely on allegations of intentional misconduct, the Court concluded the knowing violation and intentional publication exclusions did not preclude coverage. The negligence allegations did not fall within the exclusions First Mercury relied on and it was obligated to defend Triple Location.[17]

Additionally, the *First Mercury* case illustrates the limitations of exclusionary language. First Mercury also relied on a third exclusion that excluded "personal and advertising injury" that arose "directly or indirectly out of any action or omission that violates or is alleged to violate" the Telephone Consumer Protection Act ("TCPA"), the CAN-SPAM Act of 2003, or any other "statute, ordinance[,] or regulation ... that prohibits or limits the sending, transmitting, communicating or distribution of material or information."[18] The Court found that the TCPA and CAN-SPAM Act of 2003 regulated methods of communication, such as email and phone calls. According to the Court, the exclusion's catch-all provisions, therefore, were limited to other statutes, ordinances, and regulations limiting the sending or sharing of certain information. This did not encompass the Lanham Act or IRPA claims advanced by the underlying plaintiffs, and the third exclusion was inapplicable.[19]

Ultimately, these cases demonstrate that artfully pleading that negligent conduct resulted in culpable social media posts could bypass exclusions and result in a duty to defend under CGL Coverage B. This is a risk carriers need to be cognizant of when reviewing liability claims for social media activity that advance negligence theories.

1. *See, First Mercury Ins. Co. v. Triple Location LLC,* 536 F.Supp.3d 326 (N.D. Ill. 2021); *Great American Inx. Co. v. Beyond Gravity Media, Inc.,* No. 3:20-cv-53, 2021 WL 4192738 (S.D. Tex. Sept. 15, 2021).
2. *Id.*
3. *See,* Cassandra Cole & Kathleen McCullough, Editors, *Insurance for Social Media Liability*, Journal of Insurance Regulation, Vol. 4, No. 4, p. 4 (2021).
4. *Id.* at 20-21.
5. *Id.*
6. *See, First Mercury,* 536 F.Supp.3d at 328-329; *see also Great American*, 2012 WL 419292738, at *8-11.
7. *See, Great American*, 2012 WL 419292738.
8. *Id.* at *1
9. *Id.* at *4.
10. *Id.* at *6.
11. *Id.* at *6-7.
12. *Id.* at *7.
13. *Id.* at *7-11.
14. *First Mercury,* 536 F.Supp.3d at 327.
15. *Id.* at 327-328.
16. *Id.* at 328-329.
17. *Id.* at 330-331.
18. *Id.* at 329.
19. *Id.* at 331-332.

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STEPTOE & JOHNSON INSURANCE TEAM OVERVIEW

Steptoe & Johnson's Insurance Company Team has more than 100 years of experience providing legal service and advice to the insurance industry. Our attorneys possess a wealth of knowledge and understanding of insurance issues. We are prepared to manage insurance carriers' complex legal issues and defend insurance companies during claim investigations.

REPRESENTATIVE EXPERIENCE

- Prepared insurance coverage opinions
- Developed successful strategies used in federal and state courts to resolve complex insurance claims
- Defended first party cases involving bad faith claims, unfair claim settlement practices, and general first party responsibilities
- Provided advice regarding the regulatory aspects of insurance
- Provided Insurance claim handling training
- Compliance issues, including the Unfair Trade Practices Act
- Investigated fraudulent fire and theft claims, including examinations under oath
- Investigated insurance losses for subrogation potential

HIGHLIGHTS

- **370+** attorneys and other professionals
- **18** offices in Colorado, Kentucky, Ohio, Oklahoma, Pennsylvania, Texas, and West Virginia
- **More than 50** areas of practice
- **90** lawyers recognized in *The Best Lawyers in America®*
- **20+** attorneys listed as leaders in their field by Chambers USA
- **Four** Fellows of the American College of Trial Lawyers
- **Six** Fellows of the American College of Labor & Employment Lawyers

370+
Attorneys & Other Professionals

18
Office Locations

50+
Areas of Practice