SOCIAL MEDIA LAWSUITS
INSURANCE COVERAGE AND LIABILITY CONCERNS

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I. SOCIAL NETWORKING (FACEBOOK, LINKEDIN, INSTAGRAM, TWITTER, BLOGS)

A. Potential Claims

1. *Defamation*: Defamation is a false statement, published by a defendant acting with the required degree of fault that injures a person's reputation, exposes the person to public hatred, contempt, ridicule, shame or disgrace, or adversely affects the person's reputation. *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995); *Crase v. Shasta Bevs. Inc.*, 10th Dist. No. 11AP-519, 2012-Ohio-326 (Jan. 31, 2012).

   Defamation comes in two forms: slander, which is spoken, and libel, which is written. *Dale v. Ohio Civil Serv. Employees Ass'n*, 57 Ohio St.3d 112 (1992).

2. *Intentional Infliction of Emotional Distress*: To establish a claim for intentional infliction of emotional distress, a plaintiff must show: 1) that the actor either intended to cause emotional distress or knew, or should have known, that actions taken would result in serious emotional distress to the plaintiff; 2) that the actor's conduct was so extreme as to go beyond all possible bounds of decency and was such that it can be considered utterly intolerable in a civilized community; 3) that the actor's actions were the proximate cause of plaintiffs psychic injury; and 4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable person could be expected to endure it. *Martin v. City of Broadview Heights*, N.D. Ohio No. 1:08 CV 2165, 2011 U.S. Dist. LEXIS 92466 (Aug. 18, 2011).

   a. To show conduct "so extreme as to go beyond all possible bounds of decency… [i]t has not been enough that the defendant has acted with an intent to which is tortious or even criminal, or that he had intended to inflict emotional distress, or…that his conduct has been characterized by 'malice'." Because Ohio law gives a narrow definition for this extreme conduct, a *prima facie*

case of intentional infliction of emotional distress is extremely difficult to show. *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 6 Ohio St.3d 369, 374-375 (1983).

b. "Ordinarily, mere insulting language, without more, does not constitute outrageous conduct." *Cole v. Fair Oaks Fire Prot. Dist.*, 729 P.2d 743, 746 (Cal. 1987).

3. *Invasion of Privacy*: One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. There are four separate branches of tortious invasion of privacy: 1) an unreasonable intrusion upon the seclusion of another; 2) appropriation of another's name or likeness; 3) unreasonable publicity given to the other's private life; 4) publicity that unreasonably places the other in a false light before the public. *Welling v. Weinfeld*, 113 Ohio St.3d 464 (2007).

"An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's private affairs with which the public has no legitimate concern or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *Housh v. Peth*, 165 Ohio St. 35, at paragraph two of the syllabus (1956).

4. *Negligent Supervision*: To be successful on a negligent supervision claim, plaintiffs must show that the parents breached their duty to supervise their child and that these breaches proximately caused the plaintiffs to suffer injury. For the parents to be liable, the plaintiffs must allege an injury caused by the parents' breach of duty that is distinct from any injury caused by the intentional or criminal acts of the child. *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 571 (2009).

To establish foreseeability of the act or injury, plaintiff must prove that specific instances of prior conduct were sufficient to put a reasonable person on notice that the act complained of was likely to occur. *Nearor v. Davis*, 118 Ohio App.3d 806, 813 (1st Dist. 1997).

5. *Employment Claims*:

a. Discrimination/Retaliation: Employment discrimination suit arose out of a friendly relationship between a Library of Congress employee and his supervisor's daughter on facebook. After the daughter learned on facebook that the employee "liked" a page called "Two Dads", which fosters support for

families combating bullying from people who express hatred and prejudice towards homosexual parents, she posted a comment on the employee's facebook page "Don't tell me you're weird like that." Subsequently, the supervisor began sending the employee emails with religious lectures, treating him differently, giving him an extraordinary amount of work and ultimately a negative performance review. *Terveer v. Billington*, D.C. No. 1:12-cv-01290 (pending).

b. NLRA: Employer's electronic communication policy that prohibited electronic postings that "damage the Company, defame any individual or damage any person's reputation" unlawfully restricted employees' protected rights. *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012).

Employer's handbook rule prohibiting "disrespectful" language or "any other language which injures the image or reputation of the Dealership" was unlawful. *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012).

6. *Copyright/Trademark Infringement*: As a general matter, copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner. U.S. Copyright Office, http://www.copyright.gov/help/faq/faq-definitions.html.

To prevail on a claim of trademark infringement, a plaintiff must establish that it has a valid mark entitled to protection; and that the defendant used the same or a similar mark in commerce in connection with the sale or advertising of goods or services without the plaintiff's consent. The plaintiff must also show that defendant's use of the mark is likely to cause confusion as to the affiliation, connection or association of defendant with plaintiff, or as to the origin, sponsorship, or approval of defendant's goods, services or commercial activities by plaintiff. *See* 1-800 *Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir. 2005).

II. ONLINE REVIEWS/NEGATIVE FEEDBACK

A. Potential Claims

1. *Defamation*: Defamation is a false statement, published by a defendant acting with the required degree of fault that injures a person's reputation, exposes the person to public hatred, contempt, ridicule, shame or disgrace, or adversely affects the person's reputation. *A & B-*

Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 73 Ohio St.3d 1, 7 (1995); *Crase v. Shasta Bevs. Inc.*, 10th Dist. No. 11AP-519, 2012-Ohio-326 (Jan. 31, 2012).

Defamation comes in two forms: slander, which is spoken, and libel, which is written. *Dale v. Ohio Civil Serv. Employees Ass'n*, 57 Ohio St.3d 112 (1992).

2. *Product Disparagement*:

Disparage: "to dishonor (someone or something) by comparison" or "to unjustly discredit or detract from the reputation of (another's property, product, or business) or a false and injurious statement that discredits or detracts from the reputation of another's property, product or business. *Black's Law Dictionary* 483 (7th ed. 1999). Possible opportunities for product disparagement on the internet:

a. Outright false claims about a product by a competitor or other party;

b. Using anonymous comments or pseudonyms to make false claims about a competitor in online product or service reviews;

c. Setting up false rating and review Web sites to disparage a competitor;

d. Using a competitor's logo or trademark in a negative context;

e. Using a logo, name or other symbol similar to those of competitors;

f. Buying keyword advertising and using HTML Meta tags using competitors' trademarks;

g. Posting a Web page, comments or other publication associating a competitor's product with negative ideas or images;

h. Tampering with competitors' online listings, Web site or other advertising.

3. *Unfair Competition*: Unfair competition means any fraudulent, deceptive, or dishonest trade practice that is prohibited by statute, regulation, or the common law. It consists of a body of related doctrines that gives rise to several different causes of action, including: 1) actions for infringement of patents, trademarks, or copyrights; 2) actions for wrongful appropriation of trade names, trade dress, and

trade secrets; and 3) actions for publication of defamatory, false, or misleading representations.

B. Service Reviews (Yelp/Angie's List)

1. *Dietz Development, LLC v. Perez,* Fairfax County Circuit Court No. 2012-16249

   A Virginia homeowner posted statements on Angie's List and Yelp about a D.C. based contractor who performed work on her home – stating that his shoddy workmanship required extensive refinishing and insinuating that he stole jewelry from her home. The contractor posted a retort alleging that the homeowner retained or stole valuable goods from him and did not pay him for his work. He subsequently sued for defamation, claiming $750,000 in lost reputation and business contracts that were cancelled after the defamatory reviews were posted.

   The trial court ordered the homeowner to revise the statements in her post using words crafted by the judge, and to refrain from addressing a specific subject in any published review on the subject.

   The Virginia Supreme Court reversed the decision, with an unpublished ruling, finding that the preliminary injunction was not justified and that, in any event, the plaintiff had an adequate remedy at law.

   Recently, after a week-long trial, the jury returned a verdict finding that the homeowner and contractor had both defamed each other, but awarded no damages.

2. *Cats and Dogs Animal Hospital Inc. v. Yelp Inc.,* C.D. Cal. No. CV 10-1340 (transferred to N.D. Cal. No. 3:2010-cv-02351)

   Class action complaint against Yelp alleging violation of California unfair competition statute: A veterinarian sued Yelp after receiving frequent high pressure calls from Yelp advertising employees after receiving several negative reviews that he considered false and defamatory. The veterinarian claims that Yelp offered to remove negative reviews and hide them from Google search results if Cats and Dogs would commit to 12 months of advertising at $300 per month.

   <u>Factual Allegations</u>:

   a. Yelp controls content by promising to remove a negative review or relocate them to the bottom of page if the business agrees to purchase a costly monthly advertising subscription from Yelp

b. States that sales representatives contact business owners with emails saying "You have a few bad reviews at the top. I could do something about those…We can move them. Well, for $299 a month."

c. If businesses do pay for advertising, negative reviews reappear after contract ends.

d. At least one business owner claims to have received a negative review from a Yelp employee after refusing to advertise.

e. Sales representatives have contacted business with positive reviews saying "I notice you have a lot of positive reviews. We could make sure that those stay positive."

Legal Claims:

a. "The advertising sales and employee reviewing process of Yelp as alleged herein constitute unfair business acts and practices because they are immoral, unscrupulous, and offend public policy."

b. "The practices of Yelp complained of herein had no countervailing benefit to consumers or competition when weighted against the harm caused by such practices."

c. Yelp's motion to dismiss was granted by the Court, finding in part that Yelp was immune from liability for its alleged conduct under the Communications Decency Act ("CDA") 47 U.S.C. §231: This statute exempts internet service providers (ISPs), telecommunications carriers, and search engines from defamation liability.

d. Section 231 also exempts persons who are "similarly engaged in the transmission, storage, retrieval, hosting, formatting or translation * * *of a communication made by another" as long as the person doesn't alter the content of the message.

e. Section 231 bars courts and legislatures from treating ISP's as the "publisher or speaker" of content that was provided by another information content provider which is defined as anyone "responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service. * * *"

f. The CDA also protects ISPs from civil liability for not prohibiting the transmission or posting of offensive material. Section 230 specifically dictates that ISP's are not liable for blocking content considered to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

C. Product Reviews (Ebay, Retail Stores, Facebook)

1. *Med Express, Inc. v. Nicholls*, Medina County Common Pleas No. 13CIV0351

Used medical equipment dealer (Ohio Corporation) filed lawsuit against a customer (South Carolina resident) and Ebay for negative feedback. The customer purchased a piece of medical equipment for $175 and paid $12 in shipping costs. The package was received by the customer with $1.44 postage due. The customer complained and the error was acknowledged but she was never reimbursed. The customer posted this "negative" feedback: "Order arrived with postage due with no communication from seller beforehand."

The verified complaint appears to state a cause of action for defamation. (Attached affidavit alleges both "false and slanderous statements" and "false and libelous statements".) The customer answered and counterclaimed that the court lacked personal jurisdiction and that the suit was frivolous and sought attorney fees and punitive damages from plaintiff, plaintiff's president in his individual capacity and plaintiff's counsel.

The main defense includes that the statements were truthful, as indicated by the verified complaint and attached printouts of Ebay transaction, and also alleged that Med Express has engaged in a pattern of such frivolous conduct as it has many other cases pending in the Medina County Common Pleas Court against out-of-state defendants.

C. Anti-SLAPP Statutes

A Strategic Lawsuit Against Public Participation ("SLAPP") is a lawsuit that is intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defense until they abandon their criticism or opposition.

1. It is believed that the typical SLAPP plaintiff does not normally expect to win the lawsuit. It is believed that the goal is that the defendant either

doesn't answer the complaint or removes the feedback to avoid further litigation. A SLAPP lawsuit may also intimidate others from participating in the debate.

2. Critics of Anti-SLAPP legislation argue that it could have a chilling effect on legitimate claims.

3. Twenty-eight states, the District of Columbia, and Guam have enacted statutory protections against SLAPPs:

Arizona	Hawaii	Massachusetts	New York	Texas
Arkansas	Illinois	Minnesota	Oklahoma	Utah
California	Indiana	Missouri	Oregon	Vermont
Delaware	Louisiana	Nebraska	Pennsylvania	Washington
Florida	Maine	Nevada	Rhode Island	
Georgia	Maryland	New Mexico	Tennessee	

4. In Colorado and West Virginia, the courts have adopted protections against SLAPPs. These laws vary dramatically in scope and level of protection, and the remaining states lack protections.

5. There is no federal anti-SLAPP law. The extent to which state laws apply in federal courts is unclear, and the courts have reached different conclusions. The United States Court of Appeals for the Ninth Circuit has allowed California litigants to use their state's "special motion" in federal district courts located in California, in cases where the court is hearing at least one California state law claim through the doctrine of supplemental jurisdiction. However, the United States Court of Appeals for the First Circuit has held that the Massachusetts anti-SLAPP law, as a mere matter of procedure, does not apply in federal courts.

II. INSURANCE COVERAGE

A. Homeowners Policies

1. *Coverage Provisions*:

ISO's Standard "H03" Form:

Section II – Liability Coverages

Coverage A – Personal Liability

If a claim is made or a suit is brought against "an insured" for damages because of "bodily injury" or "property damage" caused by an "occurrence" to which this coverage applies, we will:

1. Pay our limit of liability for the damages for which the "insured" is legally liable.

* * *

2. Provide a defense, at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent.***

2. *Relevant Exclusions*:

Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to "bodily injury" or "property damage":

a. Which is expected or intended by the "insured";

b. Arising out of or in connection with a "business" engage in by an "insured". This exclusion applies but it is not limited to an act or omission regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the "business";

* * *

d. Arising out of the rendering of or failure to render professional services;

* * *

k. Arising out of sexual molestation, corporal punishment or physical or mental abuse.

Some policies delete the exclusion for "expected or intended injury" and replace it with this one:

a. Which is expected or intended by one or more "insureds";

Some homeowners policies expand the definition of "personal injury" to include the following:

Personal Injury

Under Coverage E – Personal Liability, the definition of "bodily injury" is amended to include personal injury. "Personal injury" means injury arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment, or malicious prosecution;

b. Libel, slander or defamation of character; or

c. Invasion of privacy, wrongful eviction or wrongful entry.

SECTION II Exclusions do not apply to personal injury. Personal injury insurance does not apply to:

* * *

B. Injury caused by a violation of a penal law or ordinance committed by or with the knowledge or consent of an "insured";

C. Injury sustained by any person as a result of an offense directly or indirectly related to the employment or this person by the "insured";

D. Injury arising out of or in connection with a "business" engaged in by an "insured".

This exclusion applies but it is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed or implied to be provided because of the business." ***

3. *Definitions*:

1. "Bodily injury" means bodily harm, sickness or disease, including required care, loss of services and death that results.

2. "Business" includes trade, profession or occupation.

* * *

5. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:

   a. "Bodily injury"; or

   b. "Property damage".

6. "Property damage" means physical injury to, destruction of, or loss of tangible property.

4. *Recent Developments*:

   a. As of May 1, 2011, the ISO provided insurance companies with an optional homeowners insurance endorsement that would provide insureds personal injury coverage within an aggregate limit.

   b. The endorsement would generally provide insurance coverage to an insured with respect to personal injury arising from specified offenses including oral or written publication, in any manner, of material that libels or slanders a person or disparages a person's goods, products or services or violates a person's right of privacy.

   c. The American Association of Insurance Services ("AIS") has drafted an "electronic aggression" exclusion, added to its base umbrella policy, effective October 1, 2011, in most states.

   d. The "electronic aggression" exclusion precludes coverage for the following:

      > "Bodily injury", "personal injury", or "property damage" that arises out of electronic aggression, including but not limited to harassment or bullying committed:
      >
      > a. By means of an electronic forum, including but not limited to a blog, an electronic bulletin board, an electronic chat room, a gripe site, a social networking site, a website, or a weblog; or
      >
      > b. By other electronic means, including but not limited to e-mail, instant messaging or text messaging.

e. "Electronic aggression" is defined as follows:

> Including but not limited to harassment or bullying committed by means or an electronic forum, including but not limited to a blog, an electronic bulletin board, an electronic chat room, a gripe site, a social networking site, a website, or weblog; or by other electronic means, including but not limited to e-mail, instant messaging or text messaging.

B. CGL Policies

1. *Coverage Provisions*:

In addition to the same type grants of coverage, outlined above, for "bodily injury" and "property damage", most CGL policies provide coverage or "personal injury" or "advertising injury."

Typical "Personal and Advertising Liability" grant of coverage:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this coverage applies. We have the right and duty to defend the insured against any "suit" seeking those damages. However, we have no duty to defend the insured against any "suit" seeking damages for "personal injury" or "advertising injury" to which this coverage applies. We have the right and duty to defend the insured against any "suit" seeking those damages. However, we have no duty to defend the insured against any "suit" seeking damages for "personal injury" or "advertising injury" to which this insurance does not apply.

* * *

b. This insurance applies to:

1. "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by you or for your business;

2. “Advertising injury” caused by an offense committed in the course of advertising your goods, products or services;

But only if the offense was committed in the “coverage territory” during the policy period.

2. *Relevant Exclusions*:

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;

2. Arising out of the oral or written publication of material whose first publication took place before the beginning of the policy period;

3. Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured;

4. For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement; or ***

b. “Advertising injury” arising out of:

1. Breach of contract, other than misappropriation of advertising ideas under an implied contract;

2. The failure of goods, products or services to conform with advertised quality or performance;

3. The wrong description of the price of goods, products or services, or;

4. An offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

3. *Relevant Definitions*:

1. "Advertising injury" means injury arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas or styles of doing business; or

d. Infringement of copyright, title or slogan.

* * *

3. "Bodily Injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

* * *

c. All parts of the world if:

1. The injury or damage arises out of:

a. Goods or products made or sold by you in the territory described in a. above; or

b. The activity of a person whose home is in the territory described in a. above, but is away for a short time on business; and

2. The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in the settlement agreed to.

* * *

12. "Occurrence" means an accident including continuous or repeated exposure to substantially the same general harmful conditions.

13. "Personal Injury" means injury, other than "bodily injury" arising out of one or more of the following offenses:

* * *

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

e. Oral or written publication of material that violates a person's right of privacy.

* * *

C. Representative Coverage Cases

1. *Heacker v. Safeco Ins. Co. of America*, 676 F.3d 724 (8th Cir. 2012)

Facts:

Lewis Heacker sued Jessica Wright in Federal Court for hacking into his voicemail and Facebook services, sending disparaging letters and e-mails about him, and making anonymous phone calls and texts to harass or defame him, among other things. Heacker alleged emotional distress, which allegedly manifested itself physically and through PTSD and alcoholism. Heacker and one of Wright's insurers settled during trial. Heacker then amended his complaint to include a claim that Wright negligently failed to supervise her children, who may have participated in his harassment or defamation.

The settling insurer and Heacker agreed to allow the judge to find damages within the limits set by the settlement agreement. Wright did not participate in the settlement.

After trial, Heacker obtained a $7.3 million judgment ($5 million for punitive damages) against Wright for breach of fiduciary duty/confidential relationship, negligent failure to supervise children, premises liability, negligent infliction of emotional distress, negligence, defamation, invasion of privacy, and tortious interference/injurious falsehood.

To satisfy the judgment, Heacker sued Wright and her remaining insurers in an equitable garnishment action. The case was removed to federal court. For about six months, beginning in May, 2006, Wright was insured by Nationwide under a homeowners' policy. For a year, beginning at the same time, she was also insured under a Nationwide umbrella policy. Heacker argued that since Nationwide did not defend the original action or reserve its rights, it was estopped from asserting defenses now.

Procedural History:

The District Court rejected the estoppel argument holding that, under Missouri law, coverage cannot be created by estoppel or does not exist, and held that Missouri law applied to the equitable garnishment issues in the diversity case whereas Kansas law applied to the interpretation of the policies.

The District Court found that the acts during periods of the Nationwide policies were text messages, e-mails about Heacker and harassing phone calls, placed through a phone-number/voice alteration service. These acts corresponded with the negligent failure to supervise children, the negligent infliction of emotional distress, and the defamation and invasion of privacy claims.

The District Court also held that the homeowner's policy's bodily injury coverage would not apply to Heacker's mental illnesses and alcohol addiction as they did not constitute "bodily injury."

The District Court granted summary judgment to the insurers. Plaintiffs appealed as to the insurance company.

Eighth Circuit Court of Appeals Ruling:

PTSD and alcoholism are not bodily illnesses, sickness or diseases, under the policies' bodily injury coverage. The umbrella policy covered personal injury arising from defamation or privacy violations but excluded coverage for personal injury arising from "mental abuse". The term "mental abuse" was not defined in the policy. Heacker argued that

the term "mental abuse" was not defined in the policy, thus rendering the term ambiguous. The Court of Appeals rejected that argument:

> "* * *A reasonably prudent insured would discern that mental abuse was mental maltreatment, often resulting in mental or emotional injury. * * *According to the Policy, the mental abuse exclusion includes both intentional and unintentional acts. Thus, the acts in the case – whether or not they were the result of Wright's negligence – were mental abuse. Heacker cites Kansas criminal cases and statutes defining mental abuse. These cases and statutes are irrelevant because according to the Policy, the mental abuse exclusion applies whether or not the acts violate a criminal code or accompany physical or sexual abuse. Heacker finally argues that even if some of the defamatory acts and invasions of privacy were mental abuse, not all of them were. All of the acts, however, were maltreatment, meeting the reasonable definition of mental abuse." *Id.* at 729.

Therefore the Eighth Circuit Court of Appeals affirmed the U.S. District Court order granting the insurer summary judgment and precluding coverage.

2. *Am. Family Ins. Co. v. Roach,* 5th Dist. No. 2008CA00181, 2009-Ohio-4532

There was no coverage under a business liability policy for insured's comments on a newspaper website which did not relate to any business of the insured's business, a real estate holding company. Rather, the insured was acting in his individual personal capacity unrelated to his business.

Facts:

In the underlying case, plaintiff alleged that the insured had "impugned and disparaged" plaintiff in these two separate comments posted on the *Canton Repository* website, which caused damage to the plaintiff's reputation:

> "This story has a local connection that has failed to make the Canton Repository. AultCare and the Aultman Heath Foundation have paid similar, more excessive, "conversion fees" to local brokers under a similar arrangement. I find it interesting the Repository has not picked up on the story run in a competing paper and a

> national healthcare publication. Could it be because the Repository has an employee on the Aultman Board? Could it be because the Foundation and its related entities spend thousands and thousands of dollars on advertising in The Rep? Or is it simply poor reporting?
>
> This story, and its local link, is not going away. Civil suits have been filed locally and as the practice becomes more widely known, I am sure more civil suits will follow
>
> When is the Repository going to print the local story involving AultCare, Aultman Health Foundation and local brokers? Millions in 'kickbacks' have been paid to local brokers by Aultman Health Foundation under their 'conversion' program which is essentially the exact type of payment and conflict driving the Marsh & McLennan case."

Holding:

As stated in the Statement of the Facts and Case, *supra,* the Declarations page of the American Family policy lists "BRIAN ROACH DBA INNOVATIVE FUTURE LD" as the named insured.

It is clear from the policy language the intent of the parties was to insure the business activities and operations of Brian Roach relative to Innovative Future. The evidence demonstrates the posted comments did not relate to any business of Innovative Future, a real estate holding company; rather, Brian Roach was acting in his individual personal capacity unrelated to Innovative Future. *Roach* at 59.

3. *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.,* 294 P.3d 73 (Cal. 2013)

Pending coverage case in the California Supreme Court the over issue of duty to defend disparagement claim.

Underlying Case:

Dahl v. Swift Distribution, Inc. dba Ultimate Support Systems, Inc., U.S.D.C., C.D. Cal., No. CV 10-0551-SJO

Complaint alleged that Ultimate published false material, including in advertising, which unfavorably compared Ultimate's product to Dahl's product. Much of this marketing involved Ultimate's website

California Court of Appeals Coverage Decision:

The court of appeals agreed with trial court that insurer owed no defense duty to Ultimate, but stated that the reason why was because Ultimate did not publish a disparaging statement. Insured sought and was granted a review on the issue of whether product disparagement can be found through "reasonable implication."

The court of appeals also reasoned that Dahl did not allege that Ultimate's publication disparaged Dahl and therefore Dahl alleged no claim for injurious false statement or disparagement that was potentially within the scope of the insurer's policy coverage for advertising injury.

4. *C.R. Bard, Inc. v. Liberty Mut. Ins. Co.,* 473 Fed. Appx. 128, 132-134 (3d Cir. N.J. 2012)

Coverage excluded by prior publication exception clauses (PPECs) in the insurance policies. Under the PPECs, the policies did not cover advertising injury that arose from materials that were first published by the insured prior to the relevant policy periods.

Under the PPECs, Defendants' Policies do not cover advertising injury arising from materials that were first published by Bard prior to the relevant policy periods.

> "We conclude that, under these circumstances, the PPECs are unambiguous, written in plain language, and were clearly presented to Bard as an exception to the policies. Defendants' Policies first went into effect on April 1, 2003, and thus, advertising injuries arising out of materials first published before April 1, 2003 are excluded."

5. *Sentex Sys., Inc. v. Hartford Accident & Indem. Co.,* 93 F.3d 578 (9th Cir. 1996)

Federal court of appeals held that interpretation of the advertising injury provisions of a CGL policy required a contemporary approach.

> "In this day and age, advertising cannot be limited to written sales materials, and the concept of marketing

includes a wide variety of direct and indirect advertising strategies." Id. at 580.

6. *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.NY. 1996), aff'd 126 F.3d 25 (2d Cir. 1997)

The policyholder, an owner of a small jazz club in Missouri, was sued for trademark infringement, trademark dilution, and unfair competition after he advertised his jazz club by creating a website. The claimant, a New York City jazz club, brought its lawsuit in federal court in New York. The policyholder's lawyers were successful in getting the claims against their client dismissed by the court. For policyholders, the most important aspect of this case was the fact that the policyholder's insurance company provided insurance coverage for the internet-related claim under a CGL policy it had sold to the jazz club owner. *See*, Susan Dominus, "Simpson Thacher's Blues Club Connection," *AmLaw Tech* at 28 (1996).