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"Personal and Advertising Injury" Liability Coverage: An Analytical Approach to Claims

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"PERSONAL AND ADVERTISING INJURY" LIABILITY COVERAGE: AN ANALYTICAL APPROACH TO CLAIMS

I. GENERAL REQUIREMENTS OF THE PERSONAL AND ADVERTISING INJURY COVERAGE

A. THE INJURY MUST ARISE OUT OF ONE OF THE ENUMERATED OFFENSES

In *Sentinel Ins. Co., Ltd. v. Serra International*, No. 14 C 08087, 2015 WL 4727496 (N.D. Ill. August 10, 2015) (applying Illinois law), the insured was sued for breach of contract, conversion and misappropriation of trade secrets, for the insured's failure to pay for certain information technology work performed by the claimant for the insured. The court found that the complaint did not allege any of the offenses in the definition of "personal and advertising injury." Thus, the court held that the complaint did not implicate the "personal and advertising injury" liability coverage and that the insurers did not owe any duty to defend.

In *Maxum Indemn. Co. v. Audiology, LLC*, No. 13-5216, 2015 WL 114138 (E.D. La. January 8, 2015) (applying Louisiana law), the claimant entered into a contract under which it was the exclusive installer and service provider for interlock devices rented by Louisiana Interlocks LLC. Prior to the termination of that contract by Louisiana Interlocks, the insured falsely represented to Louisiana Interlocks' customers that the insured was affiliated with the claimant. Thereafter, Louisiana Interlocks' contacted its customers, advised that the insured was replacing the claimant, and thereafter terminated its contract with the claimant. The insured was sued for fraud, unfair trade practices, antitrust violations and intentional interference with contract. Without specifically analyzing any of the offenses, the court found that the complaint did not implicate any of the "personal and advertising injury" offenses. As such, the court held that the insurer did not owe any duty to defend or indemnify.

In *Chartis Specialty Ins. Co. v. JSW Steel (USA), Inc.*, No. H-14-1527, 2015 WL 4378366 (S.D. Tex. July 8, 2015) (applying Texas law), the insured was sued for breach of contract, based on the insured's refusal to honor its contract to sell steel to the claimant and the insured's participation in a scheme to drive the claimant out of business. The court found that the allegations relating specifically to the insured did not implicate any of the "personal and advertising injury" offenses. The court also found that even if the general allegations of disparagement committed with malice were alleged against or imputed to the insured, the Knowing Violation Exclusion and Known Falsity Exclusion applied to preclude coverage. Thus, the insurer did not owe any duty to defend.

In *State Auto Prop. & Cas. Ins. Co. v. Fas Check Enterprises, Inc.*, No. 2:15-cv-00809, 2015 WL 1894011 (S.D. W. Va. April 27, 2015) (applying West Virginia law), the insured was sued because its manager and employees allegedly attacked and assaulted the claimant while the claimant was visiting the insured's store. The claimant sought recovery of damages for medical bills, lost wages, loss of cell phone, physical damage and emotional damage. The court determined that the complaint did not allege injury arising out of any of the offenses in the definition of "personal and advertising injury." Accordingly, the insurer did not owe any duty to defend or indemnify.

The insured in *Westfield Ins. Co. v. Records Imaging & Storage, Inc.*, No. 2:14-18854, 2015 WL 1737881 (S.D. W. Va. April 16, 2015) (applying West Virginia law) was sued for fraud, breach of contract, and violations of West Virginia state law, based on the unreasonable fees charged for retrieval of medical records. The court determined that the claims alleged in the complaint were not "reasonably susceptible" of being interpreted as alleging any of the "personal and advertising injury" offenses. Thus, the court held that the insurer did not owe any duty to defend.

B. THE OFFENSE MUST BE COMMITTED DURING THE POLICY PERIOD

In *State Farm Fire & Cas. Co. v. Easy PC Solutions, LLC*, No. 2014 AP 2657, 2015 WL 8215533 (Wis. Ct. App. December 9, 2015) (applying Wisconsin law), the insured was sued in a class action lawsuit for violation of the Telephone Consumer Protection Act (TCPA) and conversion, based on the insured's transmission of unsolicited facsimiles on three instances in September and October 2010. The proposed class included persons who received faxes from the insured 4-6 years prior to the commencement of the lawsuit in 2014. The court held that the complaint did not implicate the liability policies preceding 2010, because the complaint lacked any allegation that the insured transmitted faxes at any time prior to September and October 2010. The court also held that the Distribution of Material Exclusion in the 2010-11 policy applied to preclude coverage for both the TCPA and conversion claims. Thus, the insurer did not owe any duty to defend.

C. THE OFFENSE MUST OCCUR IN THE NAMED INSURED'S BUSINESS

In *Hanover American Ins. Co. v. Balfour*, 594 Fed. Appx. 526 (10th Cir. 2015) (applying Oklahoma law), an insured chiropractor was sued for negligence when her ex-husband raped an under-aged girl at her place of business. The court held that the claimant's injury "arose out of" the insured's business because commercial business owners have a duty to provide adequate security measures, and failing to provide such measures is conduct that arises out of the business. The court ultimately determined that the complaint did not implicate the offense of humiliation, because the gravamen of the claim was negligence, not humiliating conduct. Thus, the insurer did not owe any duty to defend.

D. CERTAIN OFFENSES MUST BE COMMITTED IN THE NAMED INSURED'S "ADVERTISEMENT"

In *Nationwide Mut. Ins. Co. v. Gum Tree Property Management, LLC*, 597 Fed. Appx. 241 (5th Cir. 2015) (applying Mississippi law), the insured was sued for tortious interference with contractual relations and business advantages, misappropriation of trade secrets, fraud and conversion, based on the insured's hiring of the claimant's former employee. The insured allegedly solicited and received confidential information regarding the claimant from the employee, and then used that information to solicit the claimant's customers. The court rejected the insured's argument that the complaint implicitly alleged disparagement, based on allegations that the insured solicited the claimant's customers. The court also rejected the insured's argument that the alleged misappropriation of confidential information implicated the right of privacy offense, because the insured failed to establish that the claimant corporation had any right of privacy. In addition, the court determined that the complaint did not allege any causal connection between any "advertising" and any "advertising injury." Thus, the court held that the insurer did not owe any duty to defend.

In *Mid-Continent Cas. Co. v. Kipp Flores Architects, LLC*, 602 Fed. Appx. 985 (5th Cir. 2015) (applying Texas law), the insured was found liable at a jury trial for copyright infringement for building homes without paying the architecture firm the agreed upon licensing fees. The insurer argued that it did not owe a duty to indemnify because the judgment was not a covered "advertising injury," on the basis that the copyright infringement did not take place in an "advertisement" as defined in the policy. The issue was whether the constructed houses were "advertisements." The court held that the houses constituted "advertisements" because they were used as marketing tools. Therefore, the court held that the insurer had a duty to indemnify.

In *West Trend, Inc. v. AMCO Ins. Co.*, No. CV 14-06872, 2015 WL 263934 (C.D. Cal. 2015) (applying California law), the insured was sued for trademark infringement, false designation of origin and unfair competition, based on the insured's sale and marketing of long-sleeved shirts bearing the claimant's "Spirit Jersey Mark." The complaint alleged that the "Spirit Jersey Mark" consisted of "a unique and recognizable combination of stitching, lettering and sleeve placement …." The court found that the insured's promotion of the shirts was "advertising" because the complaint contained references to the marketing, advertising and sale of the products. The court held that allegations implicated the offense of "infringing upon another's trade dress in your 'advertisement.'" The court also found that the IP Exclusion and the Prior Publication Exclusion did not apply to preclude coverage. Thus, the insurer owed a duty to defend.

In *Design Basics LLC v. Campbellsport Building Supply Inc.*, 99 F. Supp. 3d 899 (E.D. Wis. April 10, 2015) (applying Wisconsin law), the insureds were sued for copyright infringement based on the insureds' reproduction of the claimant's architectural plans on the insureds' websites. The umbrella policies issued to the insured afforded liability coverage for "advertising injury," which was defined as "infringement of copyright, title or slogan" but without any language requiring that such infringement

occur in the insured's advertisements. The court found that the allegations of the complaint implicated coverage under the umbrella policies. Accordingly, the insurer owed a duty to defend.

In *Erie Ins. Exchange v. Compeve Corp.*, 32 N.E.3d 160 (Ill. App. Ct. 2015) (applying Illinois law), the insured was sued by Microsoft for copyright infringement, based on the insured's sale of computers containing unauthorized copies of Microsoft software. Although the complaint contained general allegations of advertising by the insured, the court noted that the complaint did not allege that any copyrighted information was contained in the insured's advertisement, nor did the complaint specifically allege that the insured's advertisements harmed Microsoft. The court found that the allegations of advertising were conclusory and did not establish any connection between copyright infringement in the insured's advertisement and Microsoft's injury. Accordingly, the court held that the complaint did not allege any infringement of copyright in the insured's "advertisement." Thus, the insurer did not owe any duty to defend.

In *Selective Ins. Co. of Southeast v. Creation Supply, Inc.*, 2015 IL App (1st) 140152-U (Ill. App. Ct. February 9, 2015) (applying Illinois law), the insured was sued for trademark infringement, trade dress infringement and unfair competition, for its advertising and sale of "squarish" markers. The insured argued that the retail store displays of the markers constituted "advertisements" as defined in the policies and thus, the complaint implicated the infringement of trade dress offense. The court agreed that the retail displays of the markers were an "advertisement", and that it was reasonable to infer that the advertising activity contributed to the alleged injury of consumer confusion between the two producers of the squarish markers. Therefore, the court held that the insurer had a duty to defend.

In *Maryland Cas. Co. v. Blackstone International Ltd.*, 442 Md. 685 (2015) (applying Maryland law), the insured was sued for breach of contract, promissory estoppel, unjust enrichment, quantum meruit, intentional misrepresentation and accounting. The complaint alleged that the insured and claimant verbally agreed on a joint venture, whereby the claimant's work would be used in the insured's advertisements and in exchange, the insured would provide the claimant with a share of profits or an equity interest. The court noted that the claimant did not suffer any injury from the insured's use of advertising materials provided by the claimant. Rather, the claimant's injury related to the insured's failure to compensate the claimant for his advertising work. Accordingly, the court determined that the allegations did not implicate the "use of another's advertising idea in your 'advertisement.'" As such, the insurer did not owe any duty to defend.

(PRE-1998 FORMS) CERTAIN OFFENSES MUST BE COMMITTED IN THE COURSE OF ADVERTISING

1. What Is Advertising?

2. "In The Course Of Advertising"

In *Design Basics LLC v. J&V Roberts Investments, Inc.*, No. 14-cv-1083-JPS, 2015 WL 5315680 (E.D. Wis. September 11, 2015) (applying Wisconsin law), the insured was sued for copyright infringement, based on a third-party's publication of an advertisement of an infringing architectural plan on the insured's website. One umbrella insurer, Wilson Mutual, argued that it had a limited indemnity obligation as its policies only afford coverage for copyright claims relating to or caused by advertising, and not for the actual copying or reproduction of the plans or the construction and advertising of the residences based upon such plans. The court rejected that argument and found that the language of the infringement of copyright offense in the Wilson Mutual policy did not require a causal connection to advertising. As such, the court found that Wilson Mutual owed a potential indemnity obligation for all claims for copyright infringement.

E. THE OFFENSE MUST BE COMMITTED IN THE "COVERAGE TERRITORY"

F. THE SUIT MUST SEEK DAMAGES

G. THE CLAIM MUST FALL OUTSIDE THE EXCLUSIONS FOR "PERSONAL AND ADVERTISING INJURY"

1. The Exclusions Contained in the 1998 and 2001 CGL Policy Forms

(a) Knowing Violation of Another's Rights

In *Emcasco Ins. Co. v. CE Design, Ltd.*, 784 F.3d 1371 (10th Cir. 2015) (applying Oklahoma law), the insured was sued for violation of the TCPA, conversion and violation of the Illinois Consumer Fraud and Deceptive Practices Act, based on the insured's fax advertisements. The court found that the Distribution of Material exclusion applied to preclude coverage for all the claims in the complaint. In addition, as respects the conversion claim, the court found that such claim did not implicate the right of privacy offense on the basis that the wrongful appropriation of property does not constitute the publication of material. The court also determined that coverage for the conversion claim was otherwise precluded by the Knowing Violation Exclusion because the insured did not establish that it mistakenly believed that the fax advertisements were welcomed by the claimants. As respects the consumer fraud claim, the court held that such claim did not implicate any of the offenses in the definition of "personal and advertising injury." In addition, because the consumer fraud claim requires intent to deceive, the court found that Knowing Violation Exclusion applied to preclude coverage for that claim. Thus, the insurer did not owe any duty to defend or indemnify.

In *Travelers Prop. Cas. Co. of America v. Kansas City Landsmen, LLC*, 592 Fed. Appx. 876 (11th Cir. 2015) (applying Georgia law), the insured was sued for willfully violating the Fair and Accurate Credit Transaction Act (FACTA), based on its printing of receipts listing more than the last 5 digits of the customer's credit card number and the expiration date. The complaint alleged that the insured "willfully

failed to comply with FACTA" despite having knowledge of the requirements of FACTA. The court held that the Knowing Violation Exclusion did not apply to preclude a defense obligation because a "willful" violation of FACTA could include either a "knowing" violation or a "reckless disregard." The court denied the insurer's motion for summary judgment and remanded the case back to the district court.

In *KM Strategic Management, LLC v. American Cas. Co. of Reading, PA,* No. EDCV15-1869-CAS(KKx), 2015 WL 945562 (C.D. Cal. December 21, 2015) (applying California law), the insureds were sued in two lawsuits, which alleged that the insured intentionally published false statements regarding the claimant's financial condition. Although a specific cause of action for defamation was not asserted in the complaint, the court found that such allegations implicated the defamation offense. The court determined that the Knowing Violation Exclusion did not apply to preclude a defense obligation because of the potential that the insureds may be found liable for reckless or negligent conduct. The court also determined that none of the policies' other exclusions precluded liability coverage. Thus, the insurer owed a duty to defend.

The insured in *Singer v. Colony Ins. Co.*, No. 14-22310-CIV, 2015 WL 7720570 (S.D. Fla. November 30, 2015) (applying Florida law), was sued by a former employee for invasion of privacy, sexual harassment and retaliation. The complaint alleged that after reporting the sexual harassment and in retaliation, "someone" at the insured called the police, resulting in the police arriving at the claimant's house and detaining her under a Florida mental health act. The court found that even if the complaint sufficiently alleged a "personal and advertising injury" offense, the Knowing Violation Exclusion would apply to preclude coverage because the allegations of the complaint clearly supported a finding that the insured acted "with knowledge." Accordingly, the insurer did not owe any duty to defend.

The insured in *Foliar Nutrients, Inc. v. Nationwide Agribusiness Ins. Co.*, No. 1:14-cv-75, 2015 WL 5595523 (M.D. Ga. September 21, 2015) (applying Georgia law), was sued for violation of the Lanham Act, tortious interference and unfair competition. The complaint alleged that the insured contacted the claimants' customers, falsely advised them that the insured and claimant were involved in litigation and directed the customers to not purchase the claimant's products. The court found that such allegations implicated the disparagement offense. The court also found that the Knowing Violation Exclusion did not apply because there must be an intentional act plus a showing of actual knowledge that the insured's conduct would violate the claimant's rights and inflict "personal and advertising injury." The allegations of the complaint did not establish the latter nor did the insurer present evidence establishing same. In addition, the court determined that the IP Exclusion did not apply to preclude a defense obligation. Therefore, the court held that the insurer owed a duty to defend.

In *County of Maui v. Ace American Ins. Co.*, No. 14-00236, 2015 WL 1966682 (D. Haw. April 30, 2015) (applying Hawaii law), the insured was sued for violating the claimants' constitutional rights by evicting the claimants from a public sidewalk area at the entrance of the Maui County Fair. Broadly construing "eviction" to include "being forced to leave a legitimately occupied public space," the court found that

the allegations of the complaint implicated the "wrongful eviction from … premises that a person occupies, committed by or on behalf of its owner, landlord or lessor" offense. The court also found that the Knowing Violation Exclusion did not apply to preclude a defense obligation, because of the possibility that the claimants were evicted without knowledge that such eviction violated their rights. As such, the insurer owed a duty to defend.

In *Burlington Ins. Co. v. Eden Cryogenics LLC*, No. 2:14-cv-00066, 2015 WL 5145554 (S.D. Ohio September 1, 2015) (applying Ohio law), three insureds were sued for copyright infringement and misappropriation of trade secrets, based on the insureds' use of the claimant's confidential shop drawings to develop products identical to the claimant's products. The complaint also alleged that the claimant's advertising ideas, reflected in the confidential information and trade secrets, were used in the insured's marketing materials and product catalogue. At trial, the jury assessed compensatory damages against the insureds on the single remaining claim, misappropriation of trade secrets, based on the insureds' willful and malicious misappropriation. The court found an ambiguity in the language of an IP Exclusion added by endorsement and determined that the IP Exclusion only applied to the Product/Completed Operations Liability Coverage Part. The court also found that the Knowing Violation Exclusion did not apply to preclude a defense obligation because the claimant was not required to establish willful conduct to recover for copyright infringement or misappropriation of trade secrets. Thus, the court held that the insurer owed a duty to defend. As respects indemnity, because the jury made a finding that the insured acted willfully and maliciously in misappropriating the claimant's trade secrets, the court held that the Knowing Violation Exclusion applied to preclude an indemnity obligation to two insureds for compensatory damages assessed by the jury. The court also determined that the IP Exclusion applied to preclude an indemnity obligation for the third insured, on the basis that the jury verdict did not include any finding of infringement of copyright, trade dress or slogan- the exception to the exclusion. Thus, the insurer did not owe any duty to indemnify the insureds.

In *Chartis Specialty Ins. Co. v. JSW Steel (USA), Inc.*, No. H-14-1527, 2015 WL 4378366 (S.D. Tex. July 8, 2015) (applying Texas law), the insured was sued for breach of contract, based on the insured's refusal to honor its contract to sell steel to the claimant and the insured's participation in a scheme to drive the claimant out of business. The court found that the allegations relating specifically to the insured did not implicate any of the "personal and advertising injury" offenses. The court also found that even if the general allegations of disparagement committed with malice were alleged against or imputed to the insured, the Knowing Violation Exclusion applied to preclude coverage. Thus, the insurer did not owe any duty to defend.

In *Design Basics LLC v. J&V Roberts Investments, Inc.*, No. 14-cv-1083-JPS, 2015 WL 5315680 (E.D. Wis. September 11, 2015) (applying Wisconsin law), the insured was sued for copyright infringement, based on a third-party's publication of an advertisement of an infringing architectural plan on the insured's website. One umbrella insurer, Wilson Mutual, argued that it did not owe an indemnity obligation for the insured's willful infringement based on the Knowing Violation Exclusion. However, in making such argument, the insurer did not cite to any facts in the record or any legal authority. Thus,

the court determined that Wilson Mutual's argument was "wholly undeveloped" and denied Wilson Mutual's motion for summary judgment.

(b) Knowing Publication of Falsehoods

In *Charter Oak Ins. Co. v. Maglio Fresh Foods*, No. 14-4094, 2015 WL 6735908 (3rd Cir. 2015) (applying Pennsylvania law), the insured was sued for allegedly packaging stromboli produced by third-party manufacturer in boxes reflecting product information corresponding to the claimant's stromboli products. The court determined that the claim did not implicate the disparagement offense because the insured only made false statements about its own products, and did not make any false statements about the claimant or the claimant's products. In addition, because testimony established that the insured had knowledge that its boxes contained false statements and did not accurately reflect the packaged product, the court found that the Knowledge of Falsity Exclusion applied to preclude coverage. Accordingly, the insurer did not owe any duty to defend or indemnify.

In *KM Strategic Management, LLC v. American Cas. Co. of Reading, PA,* No. EDCV15-1869-CAS(KKx), 2015 WL 945562 (C.D. Cal. December 21, 2015) (applying California law), the insureds were sued in two lawsuits, which alleged that the insureds intentionally published false statements regarding the claimant's financial condition. Although a specific cause of action for defamation was not asserted in the complaint, the court found that such allegations implicated the defamation offense. The court determined that the Knowledge of Falsity Exclusion did not apply to preclude a defense obligation because of the potential that the insureds may be found liable for reckless or negligent conduct. The court also determined that none of the policies' other exclusions precluded liability coverage. Thus, the insurer owed a duty to defend.

In *Chartis Specialty Ins. Co. v. JSW Steel (USA), Inc.*, No. H-14-1527, 2015 WL 4378366 (S.D. Tex. July 8, 2015) (applying Texas law), the insured was sued for breach of contract, based on the insured's refusal to honor its contract to sell steel to the claimant and the insured's participation in a scheme to drive the claimant out of business. The court found that the allegations relating specifically to the insured did not implicate any of the "personal and advertising injury" offenses. The court also found that even if the general allegations of disparagement committed with malice were alleged against or imputed to the insured, the Known Falsity Exclusion applied to preclude coverage. Thus, the insurer did not owe any duty to defend.

In *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, No. 15-0424, 236 W.Va. 228 (2015) (applying West Virginia law), the insured was sued for defamation and breach of contract relating to the insured's agreement to construct a house for the claimants. The complaint alleged that the insured falsely stated to subcontractors and suppliers that the insured was unable to pay them because the claimants failed to provide the insured with funds to do so. The court found that the complaint implicated the defamation offense in the definition of "personal and advertising injury." However, the court held that the Knowledge of Falsity Exclusion applied to preclude coverage on the basis that the complaint alleged that

the insured made false statements with knowledge that the statements were false at the time they were made by the insured. As such, the insurer did not owe a duty to defend.

(c) Publication of Material Before Inception of Policy ("Prior Publication Exclusion")

The insured in *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761 (3d Cir. 2015) (applying Pennsylvania law), was sued for trademark infringement, unfair competition and false advertising, based on the insured's unauthorized use of the "Navaho" and "Navajo" names and marks. Without discussion, the court determined that the claims implicated the "personal and advertising injury" liability coverage. However, because the complaint alleged that the insured first advertised and promoted its goods using the infringing names and marks before the inception date of the policy, the court held that the Prior Publication Exclusion applied to preclude coverage. In doing so, the court noted that the advertisements that preceded the policy's inception date shared a "common objective" with the advertisements that were published during the insurer's policy period and therefore, the latter advertisements did not constitute "fresh wrongs." As such, the insurer did not owe any duty to defend.

In *West Trend, Inc. v. AMCO Ins. Co.*, No. CV 14-06872, 2015 WL 263934 (C.D. Cal. 2015) (applying California law), the insured was sued for trademark infringement, false designation of origin and unfair competition, based on the insured's sale and marketing of long-sleeved shirts bearing the claimant's "Spirit Jersey Mark." The complaint alleged that the "Spirit Jersey Mark" consisted of "a unique and recognizable combination of stitching, lettering and sleeve placement …." The court found that the insured's promotion of the shirts was "advertising" because the complaint contained references to the marketing, advertising and sale of the products. The court held that allegations implicated the offense of "infringing upon another's trade dress in your 'advertisement.'" The court also found that the Prior Publication Exclusion did not apply to preclude coverage, because insurer's extrinsic evidence failed to establish that the insured did not publish any advertisements prior to the insurer's policy period, and that any such advertisements were identical or "substantially similar" to the advertisements at issue in the complaint. Thus, the insurer owed a duty to defend.

In *Design Basics LLC v. J&V Roberts Investments, Inc.*, No. 14-cv-1083-JPS, 2015 WL 5315680 (E.D. Wis. September 11, 2015) (applying Wisconsin law), the insured was sued for copyright infringement, based on a third-party's publication of an advertisement of an infringing architectural plan on the insured's website. The publication occurred prior to the inception of the Acuity policy period. Noting that the language of the Prior Publication Exclusion does not require that the insured itself publish the infringing material, the court found that the Prior Publication Exclusion applied to preclude liability coverage. Thus, the court held that Acuity did not owe any duty to defend.

(d) Criminal Acts

In *Liberty University, Inc. v. Citizens Ins. Co. of America*, 792 F.3d 520 (4th Cir. 2015) (applying Virginia law), the insured was sued for conspiring to commit kidnapping and racketeering, based on the

insured's efforts to assist a third-party in kidnapping a child to Nicaragua. Without addressing whether the claims implicated any "personal and advertising injury" offense, the court held that even assuming the complaint alleged "personal and advertising injury," the Criminal Acts Exclusion would apply to preclude coverage. Accordingly, the insurer did not owe any duty to defend.

In *KM Strategic Management, LLC v. American Cas. Co. of Reading, PA,* No. EDCV15-1869-CAS(KKx), 2015 WL 945562 (C.D. Cal. December 21, 2015) (applying California law), the insureds were sued in two lawsuits, which alleged that the insured intentionally published false statements regarding the claimant's financial condition. The court found that such allegations implicated the defamation offense. Although the complaints alleged a RICO claim based on the insureds engaging in mail fraud, the court determined that insureds nonetheless faced the potential of being found liable for defamation. The court determined that the Criminal Acts Exclusion did not apply to preclude coverage for the insureds' potential liability for defamation, and that none of the other exclusions applied. As such, the insurer owed a duty to defend.

(e) Contractual Liability

In *John Sexton Sand & Gravel Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, No. 14-cv-9827, 2015 WL 8536736 (N.D. Ill. December 11, 2015) (applying Illinois law), the insured was sued by a claimant for breach of a partnership contract and for recovery of response costs it incurred in the clean-up of hazardous substances at a site, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1990. The claimant was involved in three prior lawsuits relating to the site. Because two of the prior lawsuits involved contamination of public property and because the claimant's claim did not specify what prior litigation (if any) its response costs related to, the court held that the claim against the insured did not implicate the wrongful entry offense, as the claim did not sufficiently allege a nexus between the response costs and any invasion of a private property right. The court also found that the Contractual Liability Exclusion precluded coverage for the breach of contract claim, on the basis that under the partnership agreement, the insured agreed to share in the liability of Congress Development Company, the partnership that operated the site. Thus, the insurer did not owe any duty to defend or indemnify.

(f) Breach of Contract

In *KM Strategic Management, LLC v. American Cas. Co. of Reading, PA,* No. EDCV15-1869-CAS(KKx), 2015 WL 945562 (C.D. Cal. December 21, 2015) (applying California law), the insureds were sued in two lawsuits, which alleged that the insured intentionally published false statements regarding the claimant's financial condition. The court found that such allegations implicated the defamation offense. The court also found that the alleged false statements could have been made even absent any prior contractual relationship or any breach of contract. Thus, the court determined that the Breach of Contract Exclusion did not apply to preclude coverage. As such, the insurer owed a duty to defend.

In *OneBeacon America Ins. Co. v. City of Zion*, No. 12 C 4437, 2015 WL 4572654 (N.D. Ill. July 29, 2015) (applying Illinois law), the City of Zion was sued by the claimant for materially breaching a contract under which the City of Zion agreed to construct a stadium for a minor league baseball team. Without specifically analyzing whether the complaint alleged any "personal and advertising injury" offense, the court held the Breach of Contract Exclusion applied to preclude coverage, on the basis that the allegations against the City of Zion related solely to its breach of the construction contract. Accordingly, the insurer did not owe any duty to defend the City of Zion.

In *Kompany, LLC v. AMCO Ins. Co.*, No. B259035, 2015 WL 6454906 (Cal. Ct. App. October 26, 2015) (applying California law), the insured was sued for breach of contract, slander of title and wrongful eviction. The complaint alleged that the insured leased certain commercial premises to the claimant and that during the term of the lease the insured allegedly charged the claimant unauthorized additional rent. In retaliation for being challenged on the unauthorized additional rents, the insured allegedly engaged in a campaign to oust the claimant from the premises, which included disparaging title of the claimant's leasehold and business. The claimant thereafter amended his complaint to dismiss all his tort-based causes of action, and elected to only proceed with his claims for breach of contract and restitution. The court found that the Breach of Contract Exclusion applied to preclude liability coverage for the remaining claims against the insured. Thus, the insurer did not owe a duty to defend the insured for the amended complaint.

In *Great Lakes Beverages, LLC v. Wochinski*, No. 11 CV 434 (Cir. Ct. of Outagamie County, Wis. December 18, 2015) (applying Wisconsin law) (unreported), the insured was sued for tortious interference with contract, rescission, and trade name infringement. The complaint alleged that claimant rescinded certain asset purchase, non-compete and supply agreements with the insured, after the insured breached those agreements. The insured allegedly failed to honor the rescission of those agreements by continuing to sell certain products to the claimant's customers. The court found that all of the claims against the insured arose from a contractual relationship, as they flowed from the insured's alleged breach of the asset purchase, non-compete and supply agreements. Thus, the Breach of Contract Exclusion applied to preclude coverage for the claims. Therefore, the insurer did not owe any duty to defend.

(g) Quality of Goods

In *General Star Indem. Co. v. Driven Sports, Inc.*, 80 F. Supp. 3d 442 (E.D.N.Y. 2015) (applying New York law), the insured was sued in three lawsuits alleging that the insured misrepresented that its pre-workout energy drink product contained only natural ingredients, when in fact the drink contained illegal and dangerous ingredients. The court rejected the insured's argument that some of the claims fell outside the scope of the Quality of Goods Exclusion, as each claim arose from the allegation that the insured misrepresented the ingredients of its product in its advertisements. The court also rejected that the insured's argument that the "quality" of the product does not include the product's ingredients. Because the underlying lawsuits fell within the Quality of Goods Exclusion, the insurer did not have a

duty to defend.

In *Vogue International, LLC v. Hartford Cas. Ins. Co.*, No. 14-008965-CI-21 (Circuit Court of Pinellas County, Fla. June 10, 2015) (applying Florida law) (unreported), the court found that the complaint did not contain allegations of disparaging statements about the claimants and therefore, the disparagement offense was not implicated. In addition, the court determined that the allegations of the complaint related only to the quality and makeup of the subject product and therefore, the claims fell within the scope of the Quality of Goods Exclusion. Thus, the insurer did not owe a duty to defend.

(h) Infringement of Copyright, Patent, Trademark or Trade Secret ("IP Exclusion")

In *Selective Ins. Co. of America v. Smart Candle, LLC*, 781 F.3d 983 (8th Cir. 2015) (applying Minnesota law), the insured, Smart Candle LLC, was sued for trademark infringement based on the insured's use of the trade name and trademark "Smart Candle," which infringed the rights of the claimant, Excell Consumer Products. The complaint lacked any claim for slogan infringement and did not reference the term "Smart Candle" as a slogan. Thus, the court held that the complaint did not implicate the infringement of slogan offense, and that the IP Exclusion applied to preclude coverage. Thus, the insurer did not owe any duty to defend or indemnify.

In *Keating Dental Arts, Inc. v. Hartford Cas. Ins. Co.*, No. 13056775, 2015 WL 9460142 (9th Cir. December 24, 2015) (applying California law), the insured was sued for trademark infringement. All of the allegations in the complaint tracked the elements of a trademark claim. The court found that, even assuming the allegations were sufficient to support a claim for implied disparagement, any such claim nonetheless arose out of potential consumer confusion caused by the alleged trademark infringement. As such, the IP Exclusion applied to preclude coverage for the claims against the insured, including any implied disparagement claim. Accordingly, the insurer did not owe any duty to defend.

In *Boler v. 3D International LLC*, No. 2:14-cv-00658-TLN-CKD, 2015 WL 8056100 (E.D. Cal. December 4, 2015) (applying California law), the insured was sued for trademark infringement, unfair competition and false advertising, based on the claimants' use of the term "Grand Slam" which allegedly infringed the claimant's "SLAM!" trademark. Because the complaint did not allege any slogan infringement, the court found that the complaint did not implicate the infringement of slogan offense in the definition of "personal and advertising injury." The court also found that the IP Exclusion precluded liability coverage for the claims alleged in the complaint. Accordingly, the insurer did not owe any duty to defend.

In *Pinnacle Brokers Ins. Solutions LLC v. Sentinel Ins. Co.*, No. 15-cv-02976-JST (N.D. Cal. September 2, 2015) (applying California law), the insured allegedly conspired to steal the claimant's customers and was sued for trade libel and misappropriation of trade secrets. The IP Exclusion at issue applied to "personal and advertising injury" arising out of the infringement of any intellectual property

right, as well as any injury or damage in any claim or "suit" that also alleges the infringement of any intellectual property right. Because the complaint alleged infringement of trade secrets, the court found that the IP Exclusion precluded coverage for all the claims in the complaint, even those claims alleging injury unrelated to intellectual property. As such, the insurer did not owe any duty to defend.

In *West Trend, Inc. v. AMCO Ins. Co.*, No. CV 14-06872, 2015 WL 263934 (C.D. Cal. 2015) (applying California law), the insured was sued for trademark infringement, false designation of origin and unfair competition, based on the insured's sale and marketing of long-sleeved shirts bearing the claimant's "Spirit Jersey Mark." The complaint alleged that the "Spirit Jersey Mark" consisted of "a unique and recognizable combination of stitching, lettering and sleeve placement …." The court found that the insured's promotion of the shirts was "advertising" because the complaint contained references to the marketing, advertising and sale of the products. The court held that allegations implicated the offense of "infringing upon another's trade dress in your 'advertisement.'" The court also found that the exception to the IP Exclusion applied. Thus, the insurer owed a duty to defend.

In *E.S.Y., Inc. v. Scottsdale Ins. Co.*, No. 15-21349-CIV, 2015 WL 6164666 (S.D. Fla. October 14, 2015) (applying Florida law), the insured was sued by a competitor for copyright infringement, trademark infringement, unfair competition and false designation of origin, based on the insured's sale of clothes bearing designs, labels and hang tags that infringed the claimant's copyrighted design and trademark. The court noted that the complaint clearly asserted a claim for copyright infringement. The court also found that the claimant's hang tags constitute trade dress. The court therefore determined that the insured's unauthorized use of the claimant's hang tags implicated the "infringing upon another's … trade dress … in your 'advertisement'" offense. In addition, based on the foregoing allegations of copyright and trade dress infringement in the insured's "advertisements," the court determined that the exception to the IP Exclusion applied. Accordingly, the insurer owed a duty to defend.

In *Auto Mobility Sales, Inc. v. Praetorian Ins. Co.*, No. 14-cv-80094, 2015 WL 3970578 (S.D. Fla. June 30, 2015) (applying Florida law), the insured was sued by Discount Mobility USA and Medical Travel, Inc. for trademark infringement and unfair competition based on the insured's use of the terms "Discount Mobility" and "Medical Travel" in the insured's advertisements. After noting that the complaint did not assert a claim for infringement of slogan, the court determined that the terms "Discount Mobility" and "Medical Travel" were identical to the claimants' names and therefore, the terms do not constitute slogans. Thus, the court held that the IP Exclusion applied to preclude coverage.

The insured in *Foliar Nutrients, Inc. v. Nationwide Agribusiness Ins. Co.*, No. 1:14-cv-75, 2015 WL 5595523 (M.D. Ga. September 21, 2015) (applying Georgia law) was sued for violation of the Lanham Act, tortious interference and unfair competition. The complaint alleged that the insured contacted the claimants' customers, falsely advised them that the insured and claimant were involved in litigation and directed the customers to not purchase the claimant's products. The court found that such allegations implicated the disparagement offense. The court also found that the IP Exclusion did not apply because

the disparagement allegations of the complaint fell outside the scope of the IP Exclusion. Thus, the insurer owed a duty to defend.

In *AU Electronics, Inc. v. Harleysville Group, Inc.*, 82 F. Supp. 3d 805 (N.D. Ill. 2015) (applying Illinois law), the insured was sued for trademark infringement by Sprint and T-Mobile because the insured bought Sprint and T-Mobile cell phones and reprogrammed them so they were no longer tethered to the carriers' network. The court rejected the insured's argument that the complaint alleged trade dress infringement. In doing so, the court found that claimants complained of the insured's use of the "Sprint" and "T-Mobile" marks on the reprogrammed phones. However, the complaint did not allege that the size, shape, color, or "look and feel" of the cell phones were misappropriated by the insured. Thus, the court found that complaint did not implicate the infringement of trade dress offense. As the policy excluded coverage for trademark infringement, the insurer did not have a duty to defend.

In *PTC, Inc. v. Charter Oak Fire Ins. Co.*, No. 14-14056-DPW, 2015 WL 5005796 (D. Mass. August 21, 2015) (applying Massachusetts law), the insured was alleged to have engaged in a scheme whereby the insured licensed certain software to customers. That software inaccurately reported back to the insured that the claimant had engaged in piracy of the insured's software, constituting copyright infringement. The claimant then initiated suit against the insured, seeking a declaration that the claimant had not infringed the insured's copyright. The court found that the language of the IP Exclusion broadly applied to injury "arising out of any actual or alleged infringement" and did not require that the infringement be committed by the insured. Therefore, the court determined that the IP Exclusion applied to preclude coverage for the claims against the insured. As such, the insurer did not owe any duty to defend.

In *S. Bertram, Inc. v. Citizens Ins. Co. of America*, No. 14-14241, 2015 WL 7351783 (E.D. Mich. November 20, 2015) (applying Michigan and New Jersey law), the insured was sued for trademark infringement, trade name infringement, trademark dilution and unfair competition, based on the insured's use of an "Eden Quality Products" label on its food products, which allegedly infringed the claimant's "Eden" trademark. The court found that complaint did not implicate the disparagement offense, because the complaint did not allege that the insured published any statement about the claimant, either directly or by implication. In addition, the court found that IP Exclusion precluded liability coverage for the claims alleged in the complaint. The court determined that the trade dress exception to the IP Exclusion did not apply because the complaint did not allege any visual similarity between the insured's products and the claimant's products. As such, the insurer did not owe any duty to defend.

In *Burlington Ins. Co. v. Eden Cryogenics LLC*, No. 2:14-cv-00066, 2015 WL 5145554 (S.D. Ohio September 1, 2015) (applying Ohio law), three insureds were sued for copyright infringement and misappropriation of trade secrets, based on the insureds' use of the claimant's confidential shop drawings to develop products identical to the claimant's products. The complaint also alleged that the claimant's advertising ideas, reflected in the confidential information and trade secrets, were used in

the insured's marketing materials and product catalogue. At trial, the jury assessed compensatory damages against the insureds on the single remaining claim, misappropriation of trade secrets, based on the insureds' willful and malicious misappropriation. The court found an ambiguity in the language of an IP Exclusion added by endorsement and determined that the IP Exclusion only applied to the Product/Completed Operations Liability Coverage Part. The court also found that the Knowing Violation Exclusion did not apply to preclude a defense obligation because the claimant was not required to establish willful conduct to recover for copyright infringement or misappropriation of trade secrets. Thus, the court held that the insurer owed a duty to defend. As respects indemnity, because the jury made a finding that the insured acted willfully and maliciously in misappropriating the claimant's trade secrets, the court held that the Knowing Violation Exclusion applied to preclude an indemnity obligation to two insureds for compensatory damages assessed by the jury. The court also determined that the IP Exclusion applied to preclude an indemnity obligation for the third insured, on the basis that the jury verdict did not include any finding of infringement of copyright, trade dress or slogan- the exception to the exclusion. Thus, the insurer did not owe any duty to indemnify the insureds.

In *Hammond v. U.S. Liability Ins. Co.*, No. 14 cv 0847, 2015 WL 401503 (W.D. Pa. 2015) (applying Pennsylvania law), the claimant sought recovery of attorneys fees from the insured based on the insured's bad faith misappropriation of trade secrets and copyright infringement. The court rejected the insured's argument that such request for attorneys' fees implicated the malicious prosecution offense. In doing so, the court found that the basis for the claimant's request for attorneys' fees was not a separate claim filed against the insured, and that the IP Exclusion precluded coverage for any loss, cost or expense arising out of infringement of trade secret or copyright. Thus, the insurer did not owe any duty to defend.

In *Shanze Enterprises, Inc. v. American Cas. Co. of Reading, PA*, No. 3:15-cv-0756-D, 2015 WL 8773629 (N.D. Tex. 2015) (applying Texas law), the insured was sued for trademark infringement, unfair competition and false advertising. The suit alleged that the insured's use of the trade name or service mark "Baja Auto Insurance" infringed upon the claimant's registered trademark "Baja Insurance Services, Inc." The court first found that the suit did not allege any infringement of slogan, on the basis that the allegations of the complaint were premised on the infringement of the claimant's trademark and lacked any reference to a slogan. Relying on prior 5th Circuit case law finding that a trademark is not an "advertising idea" within the scope of "personal and advertising injury," the court also held that the allegations of trademark infringement did not implicate the offense of "use of another's advertising idea." In addition, the court found that because all of the claims alleged in the complaint "bear an incidental relationship to, and cannot be separated from, its trademark infringement claim," the IP Exclusion applied to preclude coverage for all of the claims. Thus, the insurer did not owe any duty to defend.

In *Alterra Excess and Surplus Ins. Co. v. Snyder*, 234 Cal. App. 4th 1390 (Cal. App. Ct. March 9, 2015) (applying California law), an inventor's estate brought an action for misappropriation of the inventor's name against the insured. The insured argued that the IP Exclusion did not apply to "intellectual property rights," including the claimant's claim for misappropriation of name and likeness. The court rejected that argument and determined that the claims fell within the scope of the IP Exclusion. Thus, the insurer did not owe a duty to defend.

(i) Media and Internet Business Exclusion (Publishing, Advertising)

(j) Electronic Chat Rooms or Bulletin Boards

(k) Unauthorized Use of Another's Name

(l) Pollution Exclusion

2. Pollution Exclusion Is Expressly Applicable to "Personal and Advertising Injury"

3. Pollution Exclusion Is Not Set Forth in the "Personal And Advertising Injury" Coverage

4. Other Exclusions or Provisions

(a) Willful Violation of a Penal Statute

(b) Employment-Related Practices Exclusion

In *Village of Piermont v. American Alternative Ins. Corp.*, No. 14 Civ. 5172, 2015 WL 9302830 (S.D.N.Y. December 17, 2015) (applying New York law), the insured, a village, was sued for violation of 42 U.S.C. Section 1983 and false imprisonment of the claimant. The complaint alleged that the claimant was physically restrained and forced to engage in a hazing ritual involving certain sexual acts and that as a result, the claimant became physically and psychologically ill. The court found that the allegations clearly implicated the false imprisonment offense. The court also found that the "Employment-Related Practices Exclusion" did not apply to preclude coverage. Thus, the insurer had a duty to defend.

(c) Professional Services Exclusion

(d) Distribution of Material in Violation of Statute ("Distribution of Material Exclusion")

The insured in *Big 5 Sporting Goods Corp. v. Zurich American Ins. Co.*, No. 13-56249, 2015 WL 8057228 (9th Cir. December 7, 2015) (applying California law), was sued for ZIP code violations under the Song-Beverly Act. The court found that while the underlying actions arose out of the alleged violation of the statutory right to privacy, the exclusion barring coverage for any violation of a statute

involving the transmission of information and the exclusion barring coverage for violation of a person's right of privacy under state or federal act, precluded any "personal and advertising injury" coverage for the underlying claims. The court also determined that California law does not recognize any common law or constitutional right of privacy with respect to the distribution or transmission of ZIP codes. The court, therefore, found that the insurers did not owe any duty to defend.

In *Emcasco Ins. Co. v. CE Design, Ltd.*, 784 F.3d 1371 (10th Cir. 2015) (applying Oklahoma law), the insured was sued for violation of the TCPA, conversion and violation of the Illinois Consumer Fraud and Deceptive Practices Act, based on insured's fax advertisements. The court found that the Distribution of Material exclusion applied to preclude coverage for all the claims in the complaint. Thus, the insurer did not owe any duty to defend or indemnify.

In *Scottsdale Ins. Co. v. Stergo*, No. 13 C 5015, 2015 WL 5634394 (N.D. Ill. September 23, 2015) (applying Illinois law), the insured was sued for violating the TCPA by sending unsolicited fax advertisements to the claimants. The court found the "Distribution of Material Exclusion" unambiguously applied to preclude coverage for the TCPA claim. Therefore, the insurer did not have any duty to defend or indemnify the insured.

In *Addison Automatics, Inc. v. Hartford Cas. Ins. Co.*, No. 13-cv-1922, 2015 WL 1543216 (N.D. Ill. March 31, 2015) (applying Illinois law), the insured was sued for violation of the TCPA, conversion and violation of the Illinois Consumer Fraud and Deceptive Practices Act, for sending unsolicited facsimiles to the claimants. The court found that the Distribution of Material exclusion precluded coverage for all of the claims in the complaint. In doing so, the court rejected several arguments that the allegations of the conversion claim fell outside the scope of the exclusion, including the argument that the complaint alleged that some claimants received facsimiles that did not contain advertisements. As such, the insurer did not owe a duty to defend or indemnify.

In *American Cas. Co. of Reading, PA v. Superior Pharmacy, LLC*, 86 F. Supp. 3d 1307 (M.D. Fla. January 8, 2015) (applying Florida law), the insured was sued for violation of the TCPA and conversion for faxing unsolicited advertisements. The insured argued that the conversion claim did not fall within the scope of the Distribution of Material Exclusion because the conversion claim required a showing of different elements from the TCPA claim, and because the conversion claim sought damages independent from those sought in the TCPA claim. The court rejected the insured's arguments and noted that the faxes at issue in the conversion claim are unsolicited advertising faxes. The court determined that the conversion claim arose out of the TCPA violation and therefore, the Distribution of Material Exclusion applied to preclude coverage for both the TCPA claim and the conversion claim. As such, the insurer did not owe a duty to defend.

The insured in *American Economy Ins. Co. v. Aspen Way Enterprises, Inc.*, No. CV 14-09-BLG-SPW, 2015 WL 5680134 (D. Mont. September 25, 2015) (applying Montana law), installed certain software on computers that it rented or sold to customers, which surreptitiously collected and

transmitted to the insured customer information, including private emails, keystroke logs for usernames and passwords, banking information, social security numbers and webcam photos. The insured was sued in two lawsuits, which included one class action suit alleging that the insured collected the claimants' private data and transmitted such data to unknown persons and locations, in violation of the Electronic Communications Privacy Act. The court found that the allegations of the class action complaint implicated the invasion of privacy offense, but that coverage was precluded by the exclusion barring coverage for any violation of a statute involving the collection or transmission of information. As respects the second suit, the court determined that the complaint did not implicate the right of privacy offense because the complaint lacked any allegation that the insured published to any third-parties the customer information that the insured had collected. Accordingly, the insurer did not owe any duty to defend the insured for the two lawsuits.

In *Addison Automatics, Inc. v. Netherlands Insurance Co.*, 32 Mass. L. Rptr. 715 (Sup. Ct. Mass. 2015) (applying New Jersey law), the insured was sued by a corporation for TCPA violations for sending unauthorized fax advertisements and sought indemnity from its insurers after settling the claims. The court found that the right of privacy offense was ambiguous, and determined that the offense applied to a person's and an entity's right to privacy. Thus, the court determined that claimant-corporation's complaint implicated the right of privacy offense. The court also determined that the Distribution of Material Exclusion did not apply because the insurers failed to provide the insured with adequate notice of the exclusion upon the renewal of the policies. Accordingly, the court held that the insurer had a duty to indemnify the insureds for the class action settlement.

In *Illinois Cas. Co. v. West Dundee China Palace Restaurant, Inc.*, No. 3-15-0016, 2015 IL App (2d) 150016 (Ill. App. Ct. December 23, 2015) (applying Illinois law), the insured was sued for violation of the TCPA, conversion and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The court found that all three claims alleged the common fact that the insured sent unsolicited fax advertisements to the claimants. Therefore, all three claims fell within the scope of the Distribution of Material Exclusion. Thus, the insurer did not owe any duty to defend.

In *State Farm Fire & Cas. Co. v. Easy PC Solutions, LLC*, No. 2014 AP 2657, 2015 WL 8215533 (Wis. Ct. App. December 9, 2015) (applying Wisconsin law), the insured was sued for violation of the TCPA and conversion, based on the insured's transmission of unsolicited facsimiles on three instances in September and October 2010. The court held that the Distribution of Material Exclusion applied to preclude coverage for both the TCPA and conversion claims, on the basis that the complained of conduct for the violation of the TCPA was identical to the complained of conduct for the conversion claim. Thus, the insurer did not owe any duty to defend.

(e) Defects or Errors in Testing

(f) Entertainment Industry Exclusion

(g) Section 533 of the California Insurance Code

(h) Business Pursuits

II. ANALYSIS OF THE ENUMERATED OFFENSES IN THE DEFINITION OF "PERSONAL AND ADVERTISING INJURY"

A. FALSE ARREST, IMPRISONMENT OR DETENTION

The insured in *Singer v. Colony Ins. Co.*, No. 14-22310-CIV, 2015 WL 7720570 (S.D. Fla. November 30, 2015) (applying Florida law), was sued by a former employee for invasion of privacy, sexual harassment and retaliation. The complaint alleged that after reporting the sexual harassment and in retaliation, "someone" at the insured called the police, resulting in the police arriving at the claimant's house and detaining her under a Florida mental health act. The court found that under Florida law, the mere providing of information to law enforcement, without more, does not constitute false imprisonment, as long as the decision of whether to arrest is left to the law enforcement. Because the complaint did not allege that the insured persuaded or influenced the police to detain the claimant, the court found that the allegations of the complaint did not state a claim for false imprisonment. The court also found that the complaint did not implicate the right of privacy offense, and that the Knowing Violation Exclusion otherwise applied to preclude coverage. Accordingly, the insurer did not owe any duty to defend.

In *Village of Piermont v. American Alternative Ins. Corp.*, No. 14 Civ. 5172, 2015 WL 9302830 (S.D.N.Y. December 17, 2015) (applying New York law), the insured, a village, was sued for violation of 42 U.S.C. Section 1983 and false imprisonment of the claimant. The complaint alleged that the claimant was physically restrained and forced to engage in a hazing ritual involving certain sexual acts and that as a result, the claimant became physically and psychologically ill. The court found that the allegations clearly implicated the false imprisonment offense. The court also found that the "Employment-Related Practices Exclusion" did not apply to preclude coverage. Thus, the insurer had a duty to defend.

In *Barnard v. Menard, Inc.*, 25 N.E.3d 750 (Ind. Ct. App. January 22, 2015) (applying Indiana law), a store patron sued the insured hardware store after he was attacked by the insured's loss prevention officer. The claimant was allegedly grabbed by the arm, slammed into a van, and thrown to the ground by the loss prevention officer, and then forced back into the store and confined. The claimant was also allegedly slandered and falsely accused of theft in the process. The court determined that the policy's "assault and battery" exclusion did not apply to preclude coverage for the false imprisonment and slander claims. Thus, the court held that the insurer owed a duty to defend.

B. MALICIOUS PROSECUTION

In *Hammond v. U.S. Liability Ins. Co.*, No. 14 cv 0847, 2015 WL 401503 (W.D. Pa. 2015) (applying Pennsylvania law), the claimant sought recovery of attorneys fees from the insured based on the insured's bad faith misappropriation of trade secrets and copyright infringement. The court rejected the insured's argument that such request for attorneys' fees implicated the malicious prosecution offense. In doing so, the court found that the basis for the claimant's request for attorneys' fees was not a separate claim filed against the insured, and that the IP Exclusion precluded coverage for any loss, cost or expense arising out of infringement of trade secret or copyright. Thus, the insurer did not owe any duty to defend.

C. WRONGFUL EVICTION, WRONGFUL ENTRY OR INVASION OF THE RIGHT OF PRIVATE OCCUPANCY

In *Camp Richardson Resort, Inc. v. Philadelphia Indemn. Ins. Co.*, No. 2:15-cv-01101, 2015 WL 8328529 (E.D. Cal. December 9, 2015) (applying California law), the insured was sued for trespass and interference with an easement, with respect to the claimant's right to use a certain roadway. The court first found that the claims did not implicate the offense of "invasion of the right of private occupancy… of a premises… committed by … its owner," because such offense requires interference with an enforceable possessory interest in real property, not just interference with the use or enjoyment of real property. The court also found that such offense was not implicated because the insured was not the owner of the roadway and therefore, any alleged invasion of the right of private occupancy was not committed by the owner. Therefore, the court held that the insurer did not owe any duty to defend.

In *Parklyn Bay Co., LLC v. Liberty Ins. Corp.*, No. C-13-3124, 2015 WL 4760376 (N.D. Cal. August 12, 2015) (applying California law), the insured was sued for wrongfully entering the claimant-tenants' apartment without the claimants' consent. The complaint also alleged that the insured engaged in conduct that caused dust, debris and unknown contaminants to enter the claimants' apartment, forcing the claimants to "flee" their apartment. The court found that the allegations implicated the "…wrongful entry into, or invasion of the right of private occupancy …" offense. Therefore, the insurer owed a duty to defend.

In *Colorado Cas. Ins. Co. v. Infinity Land Corp.*, No. 12-cv-02748, 2015 WL 5032201 (D. Colo. August 26, 2015) (applying Colorado law), the insured was sued for its alleged alteration or destruction of a road easement in favor of the claimants. The court found that the wrongful entry offense was not implicated because the insured was not the owner, landlord or lessor of the easement, nor did the insured act on behalf of any owner, landlord or lessor of the easement. As such, the insurer did not owe any duty to defend.

In *County of Maui v. Ace American Ins. Co.,* No. 14-00236, 2015 WL 1966682 (D. Haw. April 30, 2015) (applying Hawaii law), the insured was sued for violating the claimants' constitutional rights by

evicting the claimants from a public sidewalk area at the entrance of the Maui County Fair. Broadly construing "eviction" to include "being forced to leave a legitimately occupied public space," the court found that the allegations of the complaint implicated the "wrongful eviction from … premises that a person occupies, committed by or on behalf of its owner, landlord or lessor" offense. The court also found that the Knowing Violation Exclusion did not apply to preclude a defense obligation, because of the possibility that the claimants were evicted without knowledge that such eviction violated their rights. As such, the insurer owed a duty to defend.

In *John Sexton Sand & Gravel Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, No. 14-cv-9827, 2015 WL 8536736 (N.D. Ill. December 11, 2015) (applying Illinois law), the insured was sued by a claimant for breach of a partnership contract and for recovery of response costs it incurred in the clean-up of hazardous substances at a site, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1990. The claimant was involved in three prior lawsuits relating to the site. Because two of the prior lawsuits involved contamination of public property and because the claimant's claim did not specify what prior litigation (if any) its response costs related to, the court held that the claim against the insured did not implicate the wrongful entry offense, as the claim did not sufficiently allege a nexus between the response costs and any invasion of a private property right. Thus, the insurer did not owe any duty to defend or indemnify.

The insured in *Westfield Ins. Co. v. Pinnacle Group, LLC*, No. 5:14-cv-25227, 2015 WL 5884896 (S.D. W. Va. October 7, 2015) (applying West Virginia law), was sued for invasion of privacy and violations of certain West Virginia state laws. The complaint alleged that after the claimants fell into arrears on certain debts, the insured made debt collection attempts using harassing telephone calls and other communications. The court found that the complaint did not implicate the offense of "invasion of the right of private occupancy… of a premises… committed by … its owner, landlord or lessor," because the insured was not alleged to be the owner, landlord or lessor of the premises. The court also found that the allegations of the complaint did not implicate the offense of "publication of material that violates a person's right of privacy" because the offense only applies to a person's privacy interest in secrecy, not a person's privacy interest in seclusion. As such, the insurer did not owe a duty to defend.

In *Kompany, LLC v. AMCO Ins. Co.*, No. B259035, 2015 WL 6454906 (Cal. Ct. App. October 26, 2015) (applying California law), the insured was sued for breach of contract, slander of title and wrongful eviction. The complaint alleged that the insured leased certain commercial premises to the claimant and that during the term of the lease the insured allegedly charged the claimant unauthorized additional rent. In retaliation for being challenged on the unauthorized additional rents, the insured allegedly engaged in a campaign to oust the claimant from the premises, which included disparaging title of the claimant's leasehold and business. The claimant thereafter amended his complaint to dismiss all his tort-based causes of action, and elected to only proceed with his claims for breach of contract and restitution. The court found that the Breach of Contract Exclusion applied to preclude liability coverage for the remaining claims against the insured. Thus, the court held that the insurer did not owe a duty to defend the insured for the amended complaint.

D. DEFAMATION, LIBEL, SLANDER, DISPARAGEMENT

In *Charter Oak Ins. Co. v. Maglio Fresh Foods*, No. 14-4094, 2015 WL 6735908 (3rd Cir. 2015) (applying Pennsylvania law), the insured was sued for allegedly packaging stromboli produced by third-party manufacturer in boxes reflecting product information corresponding to the claimant's stromboli products. The court determined that the claim did not implicate the disparagement offense because the insured only made false statements about its own products, and did not make any false statements about the claimant or the claimant's products. In addition, because testimony established that the insured had knowledge that its boxes contained false statements and did not accurately reflect the packaged product, the court found that the Knowledge of Falsity Exclusion applied to preclude coverage. Accordingly, the insurer did not owe any duty to defend or indemnify.

In *Nationwide Mut. Ins. Co. v. Gum Tree Property Management, LLC*, 597 Fed. Appx. 241 (5th Cir. 2015) (applying Mississippi law), the insured was sued for tortious interference with contractual relations and business advantages, misappropriation of trade secrets, fraud and conversion, based on the insured's hiring of the claimant's former employee. The insured allegedly solicited and received confidential information regarding the claimant from the employee, and then used that information to solicit the claimant's customers. The court rejected the insured's argument that the complaint implicitly alleged disparagement, based on allegations that the insured solicited the claimant's customers. The court also rejected the insured's argument that the alleged misappropriation of confidential information implicated the right of privacy offense, because the insured failed to establish that the claimant corporation had any right of privacy. In addition, the court determined that the complaint did not allege any causal connection between any "advertising" and any "advertising injury." Thus, the court held that the insurer did not owe any duty to defend.

In *Keating Dental Arts, Inc. v. Hartford Cas. Ins. Co.*, No. 13056775, 2015 WL 9460142 (9th Cir. December 24, 2015) (applying California law), the insured was sued for trademark infringement. All of the allegations in the complaint tracked the elements of a trademark claim. The court found that, even assuming the allegations were sufficient to support a claim for implied disparagement, any such claim nonetheless arose out of potential consumer confusion caused by the alleged trademark infringement. As such, the IP Exclusion applied to preclude coverage for the claims against the insured, including any implied disparagement claim. Accordingly, the insurer did not owe any duty to defend.

In *KM Strategic Management, LLC v. American Cas. Co. of Reading, PA,* No. EDCV15-1869-CAS(KKx), 2015 WL 945562 (C.D. Cal. December 21, 2015) (applying California law), the insureds were sued in two lawsuits, which alleged that the insured published false statements regarding the claimant's financial condition. Although a specific cause of action for defamation was not asserted in the complaint, the court found that such allegations implicated the defamation offense. The court also found that none of the policies' exclusions precluded liability coverage. Thus, the insurer owed a duty to defend.

In *Kim v. Truck Ins. Exchange*, No. CV 14-4270, 2015 WL 3912452 (C.D. Cal. June 25, 2015) (applying California law), the insured was sued for trademark infringement and unfair competition, based on the insured's products falsely containing the mark "Patented. Made in USA." The court found that the complaint did not implicate the disparagement offense because the false patent marking did not expressly or impliedly refer to the claimant's products or derogate the claimant's products. The court also rejected the insured's argument that the false patent marking constituted a logo and held that the complaint did not implicate the "use of another's advertising idea" offense. Therefore, the insurer did not owe any duty to defend.

In *E.S.Y., Inc. v. Scottsdale Ins. Co.*, No. 15-21349-CIV, 2015 WL 6164666 (S.D. Fla. October 14, 2015) (applying Florida law), the insured was sued by a competitor for copyright infringement, trademark infringement, unfair competition and false designation of origin, based on the insured's sale of clothes bearing designs, labels and hang tags that infringed the claimant's copyrighted design and trademark. The court first determined that the complaint did not implicate the disparagement offense because the allegations did not reference the claimant or the claimant's products. In making such determination, the court noted that imitation, without any comparison suggesting the claimant's products as inferior, does not constitute disparagement. The court, however, found that the complaint implicated the "use of another's advertising idea in your 'advertisement'" and "infringing upon another's copyright, trade dress … in your 'advertisement'" offenses. Accordingly, the court held that the insurer owed a duty to defend.

The insured in *Foliar Nutrients, Inc. v. Nationwide Agribusiness Ins. Co.*, No. 1:14-cv-75, 2015 WL 5595523 (M.D. Ga. September 21, 2015) (applying Georgia law) was sued for violation of the Lanham Act, tortious interference and unfair competition. The complaint alleged that the insured contacted the claimants' customers, falsely advised them that the insured and claimant were involved in litigation and directed the customers to not purchase the claimant's products. The court found that such allegations implicated the disparagement offense. The court also found that the Knowing Violation Exclusion and the IP Exclusion did not apply to preclude a defense obligation. Therefore, the insurer owed a duty to defend.

In *S. Bertram, Inc. v. Citizens Ins. Co. of America*, No. 14-14241, 2015 WL 7351783 (E.D. Mich. November 20, 2015) (applying Michigan and New Jersey law), the insured was sued for trademark infringement, trade name infringement, trademark dilution and unfair competition, based on the insured's use of an "Eden Quality Products" label on its food products, which allegedly infringed the claimant's "Eden" trademark. The court found that complaint did not implicate the disparagement offense, because the complaint did not allege that the insured published any statement about the claimant, either directly or by implication. In addition, the court found that IP Exclusion precluded liability coverage for the claims alleged in the complaint. As such, the insurer did not owe any duty to defend.

In *Chartis Specialty Ins. Co. v. JSW Steel (USA), Inc.*, No. H-14-1527, 2015 WL 4378366 (S.D. Tex.

July 8, 2015) (applying Texas law), the insured was sued for breach of contract, based on the insured's refusal to honor its contract to sell steel to the claimant and the insured's participation in a scheme to drive the claimant out of business. The court found that the allegations relating specifically to the insured did not implicate any of the "personal and advertising injury" offenses. The court also found that even if the general allegations of disparagement committed with malice were alleged against or imputed to the insured, the Knowing Violation Exclusion and Known Falsity Exclusion applied to preclude coverage. Thus, the insurer did not owe any duty to defend.

In *Uretek (USA), Inc. v. Continental Cas. Co.*, 92 F. Supp. 3d 589 (S.D. Tex. 2015) (applying Texas law), the insured was sued for false representation under the Lanham Act, monopolization under the Sherman Act and unfair and deceptive trade practices. The complaint alleged that the insured knowingly and falsely represented that its road repairs and maintenance contracts were covered under a certain "pavement-lifting process" patent, and that such misrepresentations had an anti-competitive effect. The court found that the complaint did not implicate the disparagement offense because the misrepresentations related solely to the insured's own services and patent, and did not reference the claimant. The court also rejected the insured's argument that the Lanham Act claim *per se* implicates the offenses of "use of another's advertising injury in your 'advertisement'" and "infringing upon another's copyright, trade dress or slogan in your 'advertisement'" because the complaint lacked any allegations establishing that the insured misappropriated any advertising idea, or infringed any copyright, trade dress or slogan. Thus, the insurer did not owe any duty to defend.

In *Kompany, LLC v. AMCO Ins. Co.*, No. B259035, 2015 WL 6454906 (Cal. Ct. App. October 26, 2015) (applying California law), the insured was sued for breach of contract, slander of title and wrongful eviction. The complaint alleged that the insured leased certain commercial premises to the claimant and that during the term of the lease the insured allegedly charged the claimant unauthorized additional rent. In retaliation for being challenged on the unauthorized additional rents, the insured allegedly engaged in a campaign to oust the claimant from the premises, which included disparaging title of the claimant's leasehold and business. The claimant thereafter amended his complaint to dismiss all his tort-based causes of action, and elected to only proceed with his claims for breach of contract and restitution. The court found that the Breach of Contract Exclusion applied to preclude liability coverage for the remaining claims against the insured. Thus, the court held that the insurer did not owe a duty to defend the insured for the amended complaint.

In *Barnard v. Menard, Inc.*, 25 N.E.3d 750 (Ind. Ct. App. January 22, 2015) (applying Indiana law), a store patron sued the insured hardware store after he was attacked by the insured's loss prevention officer. The claimant was allegedly grabbed by the arm, slammed into a van, and thrown to the ground by the loss prevention officer, and then forced back into the store and confined. The claimant was also allegedly slandered and falsely accused of theft in the process. The court determined that the policy's "assault and battery" exclusion did not apply to preclude coverage for the false imprisonment and slander claims. Thus, the court held that the insurer owed a duty to defend.

The insured in *Rose Acre Farms, Inc. v. Liberty Ins. Corp.*, No. 14-P-915, 87 Mass. App. Ct. 1120 (May 12, 2015), was sued for unfair competition, violation of the Sherman Act, and violation of state consumer protection laws, for conspiring to fix the price of eggs. The court rejected the insured's argument that the complaint implicated the disparagement offense, on the basis that the claimants did not suffer any reputational injury. The allegations of disparagement in the complaint concerned anticompetitive conduct that was directed only to entities that were not parties to the suit. Thus, the insurer did not owe any duty to defend.

In *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, No. 15-0424, 236 W. Va. 228 (2015) (applying West Virginia law), the insured was sued for defamation and breach of contract relating to the insured's agreement to construct a house for the claimants. The complaint alleged that the insured falsely stated to subcontractors and suppliers that the insured was unable to pay them because the claimants failed to provide the insured with funds to do so. The court found that the complaint implicated the defamation offense in the definition of "personal and advertising injury." However, the court held that the Knowledge of Falsity Exclusion applied to preclude coverage on the basis that the complaint alleged that the insured made false statements with knowledge that the statements were false at the time they were made by the insured. As such, the insurer did not owe a duty to defend.

E. VIOLATION OF RIGHT OF PRIVACY

In *OneBeacon American Ins. Co. v. Urban Outfitters, Inc.*, No. 14-2976, 2015 WL 5333845 (3d Cir. September 15, 2015) (applying Pennsylvania law), the insured was sued in three class action lawsuits, for collecting and using customer ZIP codes. The first lawsuit alleged that the insured requested and collected ZIP codes and in doing so, misrepresented that the customer's provision of a ZIP code was necessary for completion of the transaction, in violation of District of Columbia law. The court found that the first lawsuit did not implicate the right of privacy offense, because the complaint lacked any allegation that the insured published the customers' ZIP codes. A second lawsuit alleged that the insured violated the Song-Beverly Credit Card Act, by collecting and recording customers' ZIP codes and selling that information to third-parties. The court found that although the second lawsuit implicated the right of privacy offense, the Distribution of Material Exclusion applied to preclude coverage. A third lawsuit alleged that the insured collected customers' ZIP codes and used that information to send its own "junk" mail to those customers, in violation of Massachusetts law. The court found that the third lawsuit did not implicate the right of privacy offense, because the offense only relates to the right to secrecy, whereas the complained of receipt of "junk" mail relates to the customers' right to seclusion. Thus, the insurer did now owe any duty to defend the lawsuits.

In *Nationwide Mut. Ins. Co. v. Gum Tree Property Management, LLC*, 597 Fed. Appx. 241 (5th Cir. 2015) (applying Mississippi law), the insured was sued for tortious interference with contractual relations and business advantages, misappropriation of trade secrets, fraud and conversion, based on the insured's hiring of the claimant's former employee. The insured allegedly solicited and received confidential information regarding the claimant from the employee, and then used that information to

solicit the claimant's customers. The court rejected the insured's argument that the complaint implicitly alleged disparagement, based on allegations that the insured solicited the claimant's customers. The court also rejected the insured's argument that the alleged misappropriation of confidential information implicated the right of privacy offense, because the insured failed to establish that the claimant corporation had any right of privacy. In addition, the court determined that the complaint did not allege any causal connection between any "advertising" and any "advertising injury." Thus, the court held that the insurer did not owe any duty to defend.

In *Defender Sec. Co. v. First Mercury Ins. Co.*, 803 F.3d 327 (7th Cir. 2015) (applying Indiana law), the insured, a security company, was sued for recording confidential information during telephone communications without the consent of the claimants. After the conversations were recorded by the insured, the conversations were never accessed or shared. The court concluded that the mere recording and holding of information did not constitute "publication" as required by the right of privacy offense. Therefore, the insurer did not owe a duty to defend.

The insured in *Big 5 Sporting Goods Corp. v. Zurich American Ins. Co.*, No. 13-56249, 2015 WL 8057228 (9th Cir. December 7, 2015) (applying California law), was sued for ZIP code violations under the Song-Beverly Act. The court found that while the underlying actions arose out of the alleged violation of the statutory right to privacy, the exclusion barring coverage for any violation of a statute involving the transmission of information and the exclusion barring coverage for violation of a person's right of privacy under state or federal act, precluded any "personal and advertising injury" coverage for the underlying claims. The court also determined that California law does not recognize any common law or constitutional right of privacy with respect to the distribution or transmission of ZIP codes. The court, therefore, found that the insurers did not owe any duty to defend.

In *Emcasco Ins. Co. v. CE Design, Ltd.*, 784 F.3d 1371 (10th Cir. 2015) (applying Oklahoma law), the insured was sued for violation of the TCPA, conversion and violation of the Illinois Consumer Fraud and Deceptive Practices Act, based on insured's fax advertisements. The court found that the Distribution of Material exclusion applied to preclude coverage for all the claims in the complaint. In addition, as respects the conversion claim, the court found that such claim did not implicate the right of privacy offense on the basis that the wrongful appropriation of property does not constitute the publication of material. The court also determined that coverage for the conversion claim was otherwise precluded by the Knowing Violation Exclusion because the insured did not establish that it mistakenly believed that the fax advertisements were welcomed by the claimants. Thus, the insurer did not owe any duty to defend or indemnify.

The insured in *Singer v. Colony Ins. Co.*, No. 14-22310-CIV, 2015 WL 7720570 (S.D. Fla. November 30, 2015) (applying Florida law), was sued by a former employee for invasion of privacy based on the claimant's receipt of offensive text messages from the insured, the insured's general harassment of the claimant and the insured's call to the police which allegedly resulted in the claimant's detainment under a Florida mental health act. The court found that the allegations of the complaint did

not implicate the right of privacy offense, because the complaint did not allege any oral or written publication. The complaint did not allege any publication of the insured's text messages or harassing comments, nor did the complaint allege that the insured's call to the police conveyed any information to the public. The court also found that the complaint did not implicate the false imprisonment offense, and that the Knowing Violation Exclusion otherwise applied to preclude coverage. Accordingly, the insurer did not owe any duty to defend.

The insured in *American Economy Ins. Co. v. Aspen Way Enterprises, Inc.*, No. CV 14-09-BLG-SPW, 2015 WL 5680134 (D. Mont. September 25, 2015) (applying Montana law), installed certain software on computers that it rented or sold to customers, which surreptitiously collected and transmitted to the insured customer information, including private emails, keystroke logs for usernames and passwords, banking information, social security numbers and webcam photos. The insured was sued in two lawsuits: the first, a class action suit alleging that the insured collected the claimants' private data and transmitted such data to unknown persons and locations, in violation of the Electronic Communications Privacy Act; the second, a suit by the State of Washington alleging that the insured collected customer data in violation of various Washington state laws. As respects the class action suit, the court found that the allegations of the complaint implicated the right of privacy offense, but that coverage was precluded by the exclusion barring coverage for any violation of a statute involving the collection or transmission of information. As respects the Washington state suit, the court determined that the complaint did not implicate the right of privacy offense because the complaint lacked any allegation that the insured published to any third-parties the customer information that the insured had collected. Accordingly, the insurer did not owe any duty to defend the insured for the two lawsuits.

The insured in *Westfield Ins. Co. v. Pinnacle Group, LLC*, No. 5:14-cv-25227, 2015 WL 5884896 (S.D. W. Va. October 7, 2015) (applying West Virginia law) was sued for invasion of privacy and violations of certain West Virginia state laws. The complaint alleged that after the claimants fell into arrears on certain debts, the insured made debt collection attempts using harassing telephone calls and other communications. The court found that the complaint did not implicate the offense of "invasion of the right of private occupancy… of a premises… committed by … its owner, landlord or lessor," because the insured was not alleged to be the owner, landlord or lessor of the premises. The court also found that the allegations of the complaint did not implicate the offense of "publication of material that violates a person's right of privacy" because the offense only applies to a person's privacy interest in secrecy, not a person's privacy interest in seclusion. As such, the insurer did not owe a duty to defend.

In *Addison Automatics, Inc. v. Netherlands Insurance Co.*, 32 Mass. L. Rptr.715 (Sup. Ct. Mass. 2015) (applying New Jersey law), the insured was sued by a corporation for TCPA violations for sending unauthorized fax advertisements and sought indemnity from its insurers after settling the claims. The court found that the right of privacy offense was ambiguous, and determined that the offense applied to a person's and an entity's right to privacy. Thus, the court determined that claimant-corporation's complaint implicated the right of privacy offense. The court also determined that the Distribution of Material Exclusion did not apply because the insurers failed to provide the insured with adequate notice

of the exclusion upon the renewal of the policies. Accordingly, the court held that the insurer had a duty to indemnify the insureds for the class action settlement.

F. USE OF ANOTHER'S ADVERTISING IDEA[1]

In *Kim v. Truck Ins. Exchange*, No. CV 14-4270, 2015 WL 3912452 (C.D. Cal. June 25, 2015) (applying California law), the insured was sued for trademark infringement and unfair competition, based on the insured's products falsely containing the mark "Patented. Made in USA." The court rejected the insured's argument that the false patent marking constituted a logo and held that the complaint did not implicate the "use of another's advertising idea" offense. Therefore, the insurer did not owe any duty to defend.

In *E.S.Y., Inc. v. Scottsdale Ins. Co.*, No. 15-21349-CIV, 2015 WL 6164666 (S.D. Fla. October 14, 2015) (applying Florida law), the insured was sued by a competitor for copyright infringement, trademark infringement, unfair competition and false designation of origin, based on the insured's sale of clothes bearing designs, labels and hang tags that infringed the claimant's copyrighted design and trademark. The court found that the unauthorized hang tags constituted an "advertisement" and therefore, the insured's alleged use of such hang tags implicated the "use of another's advertising idea in your 'advertisement'" offense. The court also found that the allegations of the complaint implicated the "infringing upon another's copyright, trade dress … in your 'advertisement'" offense. Accordingly, the court held that the insurer owed a duty to defend.

In *Shanze Enterprises, Inc. v. American Cas. Co. of Reading, PA*, No. 3:15-cv-0756-D, 2015 WL 8773629 (N.D. Tex. 2015) (applying Texas law), the insured was sued for trademark infringement, unfair competition and false advertising. The suit alleged that the insured's use of the trade name or service mark "Baja Auto Insurance" infringed upon the claimant's registered trademark "Baja Insurance Services, Inc." The court first found that the suit did not allege any infringement of slogan, on the basis that the allegations of the complaint were premised on the infringement of the claimant's trademark and lacked any reference to a slogan. Relying on prior 5th Circuit case law finding that a trademark is not an "advertising idea" within the scope of "personal and advertising injury," the court also held that the allegations of trademark infringement did not implicate the offense of "use of another's advertising idea." In addition, the court found that because all of the claims alleged in the complaint "bear an incidental relationship to, and cannot be separated from, its trademark infringement claim," the IP Exclusion applied to preclude coverage for all of the claims.

[1] See analogous cases addressing the offense of "misappropriation of advertising ideas or style of doing business" in Section H, *infra*.

In *Maryland Cas. Co. v. Blackstone International Ltd.*, 442 Md. 685 (2015) (applying Maryland law), the insured was sued for breach of contract, promissory estoppel, unjust enrichment, quantum meruit, intentional misrepresentation and accounting. The complaint alleged that the insured and claimant verbally agreed on a joint venture, whereby the claimant's work would be used in the insured's advertisements and in exchange, the insured would provide the claimant with a share of profits or an equity interest. The court noted that the claimant did not suffer any injury from the insured's use of advertising materials provided by the claimant. Rather, the claimant's injury related to the insured's failure to compensate the claimant for his advertising work. Accordingly, the court determined that the allegations did not implicate the "use of another's advertising idea in your 'advertisement.'" As such, the insurer did not owe any duty to defend.

The insured in *Rose Acre Farms, Inc. v. Liberty Ins. Corp.*, No. 14-P-915, 87 Mass. App. Ct. 1120 (May 12, 2015), was sued for unfair competition, violation of the Sherman Act, and violation of state consumer protection laws, for conspiring to fix the price of eggs. The insured argued that the complaint implicated the "use of another's advertising idea" offense because the insured used a co-defendant's "advertising idea" relating to certifications depicted on advertisements. The court rejected the insured's argument because such "advertising idea" was used with the co-defendant's consent, whereas the offense required the misappropriation of an advertising idea. The court also rejected the insured's argument that the complaint implicated the disparagement offense, on the basis that the claimants did not suffer any reputational injury. The allegations of disparagement in the complaint concerned anticompetitive conduct that was directed only to entities that were not parties to the suit. Thus, the insurer did not owe any duty to defend.

G. INFRINGING UPON ANOTHER'S COPYRIGHT, TRADE DRESS OR SLOGAN IN YOUR "ADVERTISEMENT"

1. Copyright Infringement

In *Mid-Continent Cas. Co. v. Kipp Flores Architects, LLC*, 602 Fed. Appx. 985 (5th Cir. 2015) (applying Texas law), the insured was found liable at a jury trial for copyright infringement for building homes without paying the architecture firm the agreed upon licensing fees. The insurer argued that it did not owe a duty to indemnify because the judgment was not a covered "advertising injury," on the basis that the copyright infringement did not take place in an "advertisement" as defined in the policy. The issue was whether the constructed houses were "advertisements." The court held that the houses constituted "advertisements" because they were used as marketing tools. Therefore, the court held that the insurer had a duty to indemnify.

In *E.S.Y., Inc. v. Scottsdale Ins. Co.*, No. 15-21349-CIV, 2015 WL 6164666 (S.D. Fla. October 14, 2015) (applying Florida law), the insured was sued by a competitor for copyright infringement, trademark infringement, unfair competition and false designation of origin, based on the insured's sale of clothes bearing designs, labels and hang tags that infringed the claimant's copyrighted design and

trademark. The court noted that the complaint clearly asserted a claim for copyright infringement. The court also found that the claimant's hang tags constitute trade dress. The court therefore determined that the insured's unauthorized use of the claimant's hang tags implicated the "infringing upon another's … trade dress … in your 'advertisement'" offense. In addition, the court determined that the complaint implicated the "use of another's advertising idea in your 'advertisement'" offense. Accordingly, the court held that the insurer owed a duty to defend.

In *Design Basics LLC v. Campbellsport Building Supply Inc.*, 99 F. Supp. 3d 899 (E.D. Wis. April 10, 2015) (applying Wisconsin law), the insureds were sued for copyright infringement based on the insureds' reproduction of the claimant's architectural plans on the insureds' websites. The umbrella policies issued to the insured afforded liability coverage for "advertising injury," which was defined as "infringement of copyright, title or slogan" but without any language requiring that such infringement occur in the insured's advertisements. The court found that the allegations of the complaint implicated coverage under the umbrella policies. Accordingly, the insurer owed a duty to defend.

In *Erie Ins. Exchange v. Compeve Corp.*, 32 N.E.3d 160 (Ill. App. Ct. 2015) (applying Illinois law), the insured was sued by Microsoft for copyright infringement, based on the insured's sale of computers containing unauthorized copies of Microsoft software. Although the complaint contained general allegations of advertising by the insured, the court noted that the complaint did not allege that any copyrighted information was contained in the insured's advertisement, nor did the complaint specifically allege that the insured's advertisements harmed Microsoft. The court found that the allegations of advertising were conclusory and did not establish any connection between copyright infringement in the insured's advertisement and Microsoft's injury. Accordingly, the court held that the complaint did not allege any infringement of copyright in the insured's "advertisement." Thus, the insurer did not owe any duty to defend.

2. Trade Dress Infringement

In *West Trend, Inc. v. AMCO Ins. Co.*, No. CV 14-06872, 2015 WL 263934 (C.D. Cal. 2015) (applying California law), the insured was sued for trademark infringement, false designation of origin and unfair competition, based on the insured's sale and marketing of long-sleeved shirts bearing the claimant's "Spirit Jersey Mark." The complaint alleged that the "Spirit Jersey Mark" consisted of "a unique and recognizable combination of stitching, lettering and sleeve placement …." The court found that the insured's promotion of the shirts was "advertising" because the complaint contained references to the marketing, advertising and sale of the products. The court held that allegations implicated the offense of "infringing upon another's trade dress in your 'advertisement.'" The court also found that the IP Exclusion and the Prior Publication Exclusion did not apply to preclude coverage. Thus, the insurer owed a duty to defend.

In *E.S.Y., Inc. v. Scottsdale Ins. Co.*, No. 15-21349-CIV, 2015 WL 6164666 (S.D. Fla. October 14, 2015) (applying Florida law), the insured was sued by a competitor for copyright infringement,

trademark infringement, unfair competition and false designation of origin, based on the insured's sale of clothes bearing designs, labels and hang tags that infringed the claimant's copyrighted design and trademark. The court noted that the complaint clearly asserted a claim for copyright infringement. The court also found that the claimant's hang tags constitute trade dress. The court therefore determined that the insured's unauthorized use of the claimant's hang tags implicated the "infringing upon another's … trade dress … in your 'advertisement'" offense. In addition, the court determined that the complaint implicated the "use of another's advertising idea in your 'advertisement'" offense. Accordingly, the court held that the insurer owed a duty to defend.

In *AU Electronics, Inc. v. Harleysville Group, Inc.*, 82 F. Supp. 3d 805 (N.D. Ill. 2015) (applying Illinois law), the insured was sued for trademark infringement by Sprint and T-Mobile because the insured bought Sprint and T-Mobile cell phones and reprogrammed them so they were no longer tethered to the carriers' network. The court rejected the insured's argument that the complaint alleged trade dress infringement. In doing so, the court found that claimants complained of the insured's use of the "Sprint" and "T-Mobile" marks on the reprogrammed phones. However, the complaint did not allege that the size, shape, color, or "look and feel" of the cell phones were misappropriated by the insured. Thus, the court found that complaint did not implicate the infringement of trade dress offense. As the policy excluded coverage for trademark infringement, the insurer did not have a duty to defend.

In *Test Masters Educational Services, Inc. v. State Farm Lloyds*, 791 F.3d 561 (5th Cir. 2015) (applying Texas law), the insured was sued in a counterclaim for its operation of a website "confusingly similar" to the claimant's website, based on the insured's use of the "Testmasters" name and mark on the website and the insured's false representations that it offered courses nationwide. The court found that the counterclaim did not implicate the infringement of trade dress offense, because the counterclaim did not allege the insured misappropriated the "look and feel" of the claimant's website, but instead focused on the insured's use of Testmasters' mark and the misrepresentations. Thus, the insurer did not owe any duty to defend.

In *Selective Ins. Co. of Southeast v. Creation Supply, Inc.*, 2015 IL App (1st) 140152-U (Ill. App. Ct. February 9, 2015) (applying Illinois law), the insured was sued for trademark infringement, trade dress infringement and unfair competition, for its advertising and sale of "squarish" markers. The insured argued that the retail store displays of the markers constituted "advertisements" as defined in the policies, and thus, the complaint implicated the infringement of trade dress offense. The court agreed that the retail displays of the markers were an "advertisement", and that it was reasonable to infer that the advertising activity contributed to the alleged injury of consumer confusion between the two producers of the squarish markers. Therefore, the court held that the insurer had a duty to defend.

3. Infringement of Slogan

In *Selective Ins. Co. of America v. Smart Candle, LLC*, 781 F.3d 983 (8th Cir. 2015) (applying Minnesota law), the insured, Smart Candle LLC, was sued for trademark infringement based on the

insured's use of the trade name and trademark "Smart Candle," which infringed the rights of the claimant, Excell Consumer Products. The complaint lacked any claim for slogan infringement and did not reference the term "Smart Candle" as a slogan. The court held that the complaint did not implicate the infringement of slogan offense, and that the IP Exclusion applied to preclude coverage. Thus, the insurer did not owe any duty to defend or indemnify.

In *Boler v. 3D International LLC*, No. 2:14-cv-00658-TLN-CKD, 2015 WL 8056100 (E.D. Cal. December 4, 2015) (applying California law), the insured was sued for trademark infringement, unfair competition and false advertising, based on the claimants' use of the term "Grand Slam" which allegedly infringed the claimant's "SLAM!" trademark. Because the complaint did not allege any slogan infringement, the court found that the complaint did not implicate the infringement of slogan offense in the definition of "personal and advertising injury." The court also found that the IP Exclusion precluded liability coverage for the claims alleged in the complaint. Accordingly, the insurer did not owe any duty to defend.

In *Auto Mobility Sales, Inc. v. Praetorian Ins. Co.*, No. 14-cv-80094, 2015 WL 3970578 (S.D. Fla. June 30, 2015) (applying Florida law), the insured was sued by Discount Mobility USA and Medical Travel, Inc. for trademark infringement and unfair competition based on the insured's use of the terms "Discount Mobility" and "Medical Travel" in the insured's advertisements. After noting that the complaint did not assert a claim for infringement of slogan, the court determined that the terms "Discount Mobility" and "Medical Travel" were identical to the claimants' names and therefore, the terms do not constitute slogans. Thus, the court held that the IP Exclusion applied to preclude coverage.

In *Shanze Enterprises, Inc. v. American Cas. Co. of Reading, PA*, No. 3:15-cv-0756-D, 2015 WL 8773629 (N.D. Tex. 2015) (applying Texas law), the insured was sued for trademark infringement, unfair competition and false advertising. The suit alleged that the insured's use of the trade name or service mark "Baja Auto Insurance" infringed upon the claimant's registered trademark "Baja Insurance Services, Inc." The court first found that the suit did not allege any infringement of slogan, on the basis that the allegations of the complaint were premised on the infringement of the claimant's trademark and lacked any reference to a slogan. Relying on prior 5th Circuit case law finding that a trademark is not an "advertising idea" within the scope of "personal and advertising injury," the court also held that the allegations of trademark infringement did not implicate the offense of "use of another's advertising idea." In addition, the court found that because all of the claims alleged in the complaint "bear an incidental relationship to, and cannot be separated from, its trademark infringement claim," the IP Exclusion applied to preclude coverage for all of the claims. Thus, the insurer did not owe any duty to defend.

H. DISCRIMINATION OR HUMILIATION

In *Hanover American Ins. Co. v. Balfour*, 594 Fed. Appx. 526 (10th Cir. 2015) (applying Oklahoma law), an insured chiropractor was sued for negligence when her ex-husband raped an under-aged girl at

her place of business. The court held that the claimant's injury "arose out of" the insured's business because commercial business owners have a duty to provide adequate security measures, and failing to provide such measures is conduct that arises out of the business. However, the court determined that the complaint did not implicate the offense of humiliation, because the gravamen of the claim was negligence, not humiliating conduct. Thus, the insurer did not owe any duty to defend.

I. PRE-1998 FORMS: MISAPPROPRIATION OF ADVERTISING IDEAS OR THE STYLE OF DOING BUSINESS[2]

In *State Farm Fire & Cas. Co. v. Christie*, No. 10-cv-2699, 2015 WL 751808 (D. Kan. February 23, 2015) (applying Kansas law), the insured was sued for breach of a joint venture agreement, breach of fiduciary duty, wrongful dissociation, civil conspiracy and unjust enrichment, based on the insured's misappropriation of the claimant's PowerPoint, which contained a proprietary design for an apartment complex. The insured allegedly displayed the PowerPoint at a trade show. At the construction site of the apartment complex, the insured also displayed a sign depicting the insured's logo and concept art of the apartment complex. A jury verdict was entered against insured for each of the foregoing claims. The court found that the claims did not implicate the "misappropriation of advertising ideas" offense because the PowerPoint was not an idea concerning the solicitation of business and customers. In addition, the insured failed to establish that the claimant suffered any advertising injury "in the course of advertising [the insured's] good, products or services." Thus, the insurer did not owe any duty to defend or indemnify.

J. PRE-1998 FORMS: INFRINGEMENT OF TITLE

K. PRE-1996 FORM: PIRACY, UNFAIR COMPETITION

III. ANALYSIS OF NON-ENUMERATED OFFENSES

A. ABUSE OF PROCESS; VEXATIOUS LITIGATION

B. ANTITRUST VIOLATIONS

C. DISCRIMINATION AND HARASSMENT

D. HUMILIATION

[2] See analogous cases addressing the offense of "use of another's advertising idea in your 'advertisement'" in Section F, *supra*.

E. INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE OR WITH CONTRACTUAL RELATIONS

In *Nationwide Mut. Ins. Co. v. Gum Tree Property Management, LLC*, 597 Fed. Appx. 241 (5th Cir. 2015) (applying Mississippi law), the insured was sued for tortious interference with contractual relations and business advantages, misappropriation of trade secrets, fraud and conversion, based on the insured's hiring of the claimant's former employee. The insured allegedly solicited and received confidential information regarding the claimant from the employee, and then used that information to solicit the claimant's customers. The court rejected the insured's argument that the complaint implicitly alleged disparagement, based on allegations that the insured solicited the claimant's customers. The court also rejected the insured's argument that the alleged misappropriation of confidential information implicated the right of privacy offense, because the insured failed to establish that the claimant corporation had any right of privacy. In addition, the court determined that the complaint did not allege any causal connection between any "advertising" and any "advertising injury." Thus, the court held that the insurer did not owe any duty to defend.

F. UNFAIR COMPETITION

The insured in *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761 (3d Cir. 2015) (applying Pennsylvania law) was sued for trademark infringement, unfair competition and false advertising, based on the insured's unauthorized use of the "Navaho" and "Navajo" names and marks. Without discussion, the court determined that the claims implicated the "personal and advertising injury" liability coverage. However, because the complaint alleged that the insured first advertised and promoted its goods using the infringing names and marks before the inception date of the policy, the court held that the Prior Publication Exclusion applied to preclude coverage. In doing so, the court noted that the advertisements that preceded the policy's inception date shared a "common objective" with the advertisements that were published during the insurer's policy period and therefore, the latter advertisements did not constitute "fresh wrongs." As such, the court held that the insurer did not owe any duty to defend.

In *Boler v. 3D International LLC*, No. 2:14-cv-00658-TLN-CKD, 2015 WL 8056100 (E.D. Cal. December 4, 2015) (applying California law), the insured was sued for trademark infringement, unfair competition and false advertising, based on the claimants' use of the term "Grand Slam" which allegedly infringed the claimant's "SLAM!" trademark. Because the complaint did not allege any slogan infringement, the court found that the complaint did not implicate the infringement of slogan offense in the definition of "personal and advertising injury." The court also found that the IP Exclusion precluded liability coverage for the claims alleged in the complaint. Accordingly, the court held that the insurer did not owe any duty to defend.

In *Kim v. Truck Ins. Exchange*, No. CV 14-4270, 2015 WL 3912452 (C.D. Cal. June 25, 2015) (applying California law), the insured was sued for trademark infringement and unfair competition, based on the insured's products falsely containing the mark "Patented. Made in USA." The court found

that the complaint did not implicate the disparagement offense because the false patent marking did not expressly or impliedly refer to the claimant's products or derogate the claimant's products. The court also rejected the insured's argument that the false patent marking constituted a logo and held that the complaint did not implicate the "use of another's advertising idea" offense. Therefore, the insurer did not owe any duty to defend.

In *E.S.Y., Inc. v. Scottsdale Ins. Co.*, No. 15-21349-CIV, 2015 WL 6164666 (S.D. Fla. October 14, 2015) (applying Florida law), the insured was sued by a competitor for copyright infringement, trademark infringement, unfair competition and false designation of origin, based on the insured's sale of clothes bearing designs, labels and hang tags that infringed the claimant's copyrighted design and trademark. The court found that the complaint implicated the "infringing upon another's copyright, trade dress … in your 'advertisement'" and the "use of another's advertising idea in you 'advertisement'" offenses. Accordingly, the court held that the insurer owed a duty to defend.

In *Auto Mobility Sales, Inc. v. Praetorian Ins. Co.*, No. 14-cv-80094, 2015 WL 3970578 (S.D. Fla. June 30, 2015) (applying Florida law), the insured was sued by Discount Mobility USA and Medical Travel, Inc. for trademark infringement and unfair competition based on the insured's use of the terms "Discount Mobility" and "Medical Travel" in the insured's advertisements. After noting that the complaint did not assert a claim for infringement of slogan, the court determined that the terms "Discount Mobility" and "Medical Travel" were identical to the claimants' names and therefore, the terms do not constitute slogans. Thus, the court held that the IP Exclusion applied to preclude coverage.

In *Shanze Enterprises, Inc. v. American Cas. Co. of Reading, PA*, No. 3:15-cv-0756-D, 2015 WL 8773629 (N.D. Tex. 2015) (applying Texas law), the insured was sued for trademark infringement, unfair competition and false advertising. The suit alleged that the insured's use of the trade name or service mark "Baja Auto Insurance" infringed upon the claimant's registered trademark "Baja Insurance Services, Inc." The court first found that the suit did not allege any infringement of slogan, on the basis that the allegations of the complaint were premised on the infringement of the claimant's trademark and lacked any reference to a slogan. Relying on prior 5th Circuit case law finding that a trademark is not an "advertising idea" within the scope of "personal and advertising injury," the court also held that the allegations of trademark infringement did not implicate the offense of "use of another's advertising idea." In addition, the court found that because all of the claims alleged in the complaint "bear an incidental relationship to, and cannot be separated from, its trademark infringement claim," the IP Exclusion applied to preclude coverage for all of the claims. Thus, the insurer did not owe any duty to defend.

The insured in *Rose Acre Farms, Inc. v. Liberty Ins. Corp.*, No. 14-P-915, 87 Mass. App. Ct. 1120 (May 12, 2015), was sued for unfair competition, violation of the Sherman Act, and violation of state consumer protection laws, for conspiring to fix the price of eggs. The insured argued that the complaint implicated the "use of another's advertising idea" offense because the insured used a co-defendant's "advertising idea" relating to certifications depicted on advertisements. The court rejected the insured's

argument because such "advertising idea" was used with the co-defendant's consent, whereas the offense required the misappropriation of an advertising idea. The court also rejected the insured's argument that the complaint implicated the disparagement offense, on the basis that the claimants did not suffer any reputational injury. The allegations of disparagement in the complaint concerned anticompetitive conduct that was directed only to entities that were not parties to the suit. Thus, the insurer did not owe any duty to defend.

G. PATENT INFRINGEMENT

H. TRADE SECRETS

In *Pinnacle Brokers Ins. Solutions LLC v. Sentinel Ins. Co.*, No. 15-cv-02976-JST (N.D. Cal. September 2, 2015) (applying California law), the insured allegedly conspired to steal the claimant's customers and was sued for trade libel and misappropriation of trade secrets. The IP Exclusion at issue applied to "personal and advertising injury" arising out of the infringement of any intellectual property right, as well as any injury or damage in any claim or "suit" that also alleges the infringement of any intellectual property right. Because the complaint alleged infringement of trade secrets, the court found that the IP Exclusion precluded coverage for all the claims in the complaint, even those claims alleging injury unrelated to intellectual property. As such, the court found that the insurer did not owe any duty to defend.

In *Burlington Ins. Co. v. Eden Cryogenics LLC*, No. 2:14-cv-00066, 2015 WL 5145554 (S.D. Ohio September 1, 2015) (applying Ohio law), three insureds were sued for copyright infringement and misappropriation of trade secrets, based on the insureds' use of the claimant's confidential shop drawings to develop products identical to the claimant's products. The complaint also alleged that the claimant's advertising ideas, reflected in the confidential information and trade secrets, were used in the insured's marketing materials and product catalogue. At trial, the jury assessed compensatory damages against the insureds on the single remaining claim, misappropriation of trade secrets, based on the insureds' willful and malicious misappropriation. The court found an ambiguity in the language of an IP Exclusion added by endorsement and determined that the IP Exclusion only applied to the Product/Completed Operations Liability Coverage Part. The court also found that the Knowing Violation Exclusion did not apply to preclude a defense obligation because the claimant was not required to establish willful conduct to recover for copyright infringement or misappropriation of trade secrets. Thus, the court held that the insurer owed a duty to defend. As respects indemnity, because the jury made a finding that the insured acted willfully and maliciously in misappropriating the claimant's trade secrets, the court held that the Knowing Violation Exclusion applied to preclude an indemnity obligation to two insureds for compensatory damages assessed by the jury. The court also determined that the IP Exclusion applied to preclude an indemnity obligation for the third insured, on the basis that the jury verdict did not include any finding of infringement of copyright, trade dress or slogan- the exception to the exclusion. Thus, the insurer did not owe any duty to indemnify the insureds.

I. TRADEMARK INFRINGEMENT

The insured in *Hanover Ins. Co. v. Urban Outfitters, Inc.*, 806 F.3d 761 (3d Cir. 2015) (applying Pennsylvania law), was sued for trademark infringement, unfair competition and false advertising, based on the insured's unauthorized use of the "Navaho" and "Navajo" names and marks. Without discussion, the court determined that the claims implicated the "personal and advertising injury" liability coverage. However, because the complaint alleged that the insured first advertised and promoted its goods using the infringing names and marks before the inception date of the policy, the court held that the Prior Publication Exclusion applied to preclude coverage. In doing so, the court noted that the advertisements that preceded the policy's inception date shared a "common objective" with the advertisements that were published during the insurer's policy period and therefore, the latter advertisements did not constitute "fresh wrongs." As such, the court held that the insurer did not owe any duty to defend.

In *Selective Ins. Co. of America v. Smart Candle, LLC*, 781 F.3d 983 (8th Cir. 2015) (applying Minnesota law), the insured, Smart Candle LLC, was sued for trademark infringement based on the insured's use of the trade name and trademark "Smart Candle," which infringed the rights of the claimant, Excell Consumer Products. The complaint lacked any claim for slogan infringement and did not reference the term "Smart Candle" as a slogan. The court held that the complaint did not implicate the infringement of slogan offense, and that the IP Exclusion applied to preclude coverage. Thus, the insurer did not owe any duty to defend or indemnify.

In *Keating Dental Arts, Inc. v. Hartford Cas. Ins. Co.*, No. 13056775, 2015 WL 9460142 (9th Cir. December 24, 2015) (applying California law), the insured was sued for trademark infringement. All of the allegations in the complaint tracked the elements of a trademark claim. The court found that, even assuming the allegations were sufficient to support a claim for implied disparagement, any such claim nonetheless arose out of potential consumer confusion caused by the alleged trademark infringement. As such, the IP Exclusion applied to preclude coverage for the claims against the insured, including any implied disparagement claim. Accordingly, the insurer did not owe any duty to defend.

In *Boler v. 3D International LLC*, No. 2:14-cv-00658-TLN-CKD, 2015 WL 8056100 (E.D. Cal. December 4, 2015) (applying California law), the insured was sued for trademark infringement, unfair competition and false advertising, based on the claimants' use of the term "Grand Slam" which allegedly infringed the claimant's "SLAM!" trademark. Because the complaint did not allege any slogan infringement, the court found that the complaint did not implicate the infringement of slogan offense in the definition of "personal and advertising injury." The court also found that the IP Exclusion precluded liability coverage for the claims alleged in the complaint. Accordingly, the court held that the insurer did not owe any duty to defend.

In *Auto Mobility Sales, Inc. v. Praetorian Ins. Co.*, No. 14-cv-80094, 2015 WL 3970578 (S.D. Fla. June 30, 2015) (applying Florida law), the insured was sued by Discount Mobility USA and Medical Travel, Inc. for trademark infringement and unfair competition based on the insured's use of the terms

"Discount Mobility" and "Medical Travel" in the insured's advertisements. After noting that the complaint did not assert a claim for infringement of slogan, the court determined that the terms "Discount Mobility" and "Medical Travel" were identical to the claimants' names and therefore, the terms do not constitute slogans. Thus, the court held that the IP Exclusion applied to preclude coverage.

In *Kim v. Truck Ins. Exchange*, No. CV 14-4270, 2015 WL 3912452 (C.D. Cal. June 25, 2015) (applying California law), the insured was sued for trademark infringement and unfair competition, based on the insured's products falsely containing the mark "Patented. Made in USA." The court found that the complaint did not implicate the disparagement offense because the false patent marking did not expressly or impliedly refer to the claimant's products or derogate the claimant's products. The court also rejected the insured's argument that the false patent marking constituted a logo and held that the complaint did not implicate the "use of another's advertising idea" offense. Therefore, the insurer did not owe any duty to defend.

In *AU Electronics, Inc. v. Harleysville Group, Inc.*, 82 F. Supp. 3d 805 (N.D. Ill. 2015) (applying Illinois law), the insured was sued for trademark infringement by Sprint and T-Mobile because the insured bought Sprint and T-Mobile cell phones and reprogrammed them so they were no longer tethered to the carriers' network. The court rejected the insured's argument that the complaint alleged trade dress infringement. In doing so, the court found that claimants complained of the insured's use of the "Sprint" and "T-Mobile" marks on the reprogrammed phones. However, the complaint did not allege that the size, shape, color, or "look and feel" of the cell phones were misappropriated by the insured. Thus, the court found that complaint did not implicate the infringement of trade dress offense. As the policy excluded coverage for trademark infringement, the insurer did not have a duty to defend.

In *S. Bertram, Inc. v. Citizens Ins. Co. of America*, No. 14-14241, 2015 WL 7351783 (E.D. Mich. November 20, 2015) (applying Michigan and New Jersey law), the insured was sued for trademark infringement, trade name infringement, trademark dilution and unfair competition, based on the insured's use of an "Eden Quality Products" label on its food products, which allegedly infringed the claimant's "Eden" trademark. The court found that complaint did not implicate the disparagement offense, because the complaint did not allege that the insured published any statement about the claimant, either directly or by implication. In addition, the court found that IP Exclusion precluded liability coverage for the claims alleged in the complaint. As such, the insurer did not owe any duty to defend.

In *Shanze Enterprises, Inc. v. American Cas. Co. of Reading, PA*, No. 3:15-cv-0756-D, 2015 WL 8773629 (N.D. Tex. 2015) (applying Texas law), the insured was sued for trademark infringement, unfair competition and false advertising. The suit alleged that the insured's use of the trade name or service mark "Baja Auto Insurance" infringed upon the claimant's registered trademark "Baja Insurance Services, Inc." The court first found that the suit did not allege any infringement of slogan, on the basis that the allegations of the complaint were premised on the infringement of the claimant's trademark and lacked any reference to a slogan. Relying on prior 5th Circuit case law finding that a trademark is not

an "advertising idea" within the scope of "personal and advertising injury," the court also held that the allegations of trademark infringement did not implicate the offense of "use of another's advertising idea." In addition, the court found that because all of the claims alleged in the complaint "bear an incidental relationship to, and cannot be separated from, its trademark infringement claim," the IP Exclusion applied to preclude coverage for all of the claims. Thus, the insurer did not owe any duty to defend.