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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 *Travelers Property Casualty Co. of America v. KFx Medical Corp.*, 637 Fed. Appx. 989 (9th Cir. 2016) (applying California law), the counterclaims against the insured did not allege a covered claim, so the court considered whether the counterclaims might fairly be amended to state a claim for abuse of process or product disparagement. The court found that the possibility of amendment was too speculative and determined there was no factual support for any amendment. Thus, the court found that no duty to defend was owed.

In *AMCO Insurance Co. v. Carpet Direct Corp.*, 157 F. Supp. 3d 1018 (D. Colo. 2016) (applying Colorado law), the insured was sued for misrepresenting that the plaintiffs would become independent business owners with rights of ownership in the businesses in which they were investing. The court found that the allegations did not fall within the “personal and advertising injury” coverage of the policies, explaining that to trigger coverage, some allegation of the invasion of a right in real property is required. The court further explained that the plaintiffs were not alleging that they were being divested of ownership, but rather that despite the insured’s promises, they never had such rights. Thus, the court found no duty to defend.

In *National Fire Insurance Co. of Hartford v. Kosair Charities Committee, Inc.*, No. 3:15-CV-00577-CRS, 2016 WL 2622010 (W.D. Ky. May 5, 2016) (applying Kentucky Law), a counterclaim was brought against the insured for breach of fiduciary duty, unlawful business practice, intentional interference with a gift, unjust enrichment, declaratory judgment, and repudiation of contracts. The court found that the counterclaims did not seek damages for “personal and advertising injury.” The court explained that any reference to defamatory statements were merely made to provide context and did not form the basis of the claims against the insured. Thus, the insurer had no duty to defend.

In *Mark v. Sunshine Plaza Inc.*, No. 16-455, 2016 WL 6876645 (E.D. La. Nov. 22, 2016) (applying Louisiana law), the complaint alleged that the insured owned and operated a commercial property that did not comply with the regulatory requirements established under the Americans with Disabilities Act. In assessing the wrongful eviction offense, the court found that “wrongful eviction requires actual impingement of the plaintiff’s possessory rights.” The court explained that the complaint did not allege a

possessory interest in the insured’s property, but instead alleged that the property in question violated federal regulations governing accessibility. Accordingly, the court found that the claims did not allege any offense set forth in the definition of “personal and advertising injury.” Thus, no duty to defend was owed.

In *Steadfast Insurance Co. v. Tomei*, No. 477 WDA 2015, 478 WDA 2015, 479 WDA 2015, 2016 WL 2989982 (Pa. May 24, 2016) (applying Pennsylvania law), the insured, a tanning salon, was sued for negligently failing to ensure the safety of the plaintiffs and failing to secure the premises from a third-party’s misconduct in recording the salon’s patrons as they undressed. The court noted that the complaint lacked any allegation that the insured published oral or written material that violated the plaintiff’s right of privacy, or negligently enabled the electronic publication of the videos on the internet, or was vicariously liable for the criminal conduct of the third-party. Thus, the court held that the complaint did not allege any “personal and advertising injury” because negligent security is not an enumerated offense. Therefore, no duty to defend was owed.

#### **B. THE OFFENSE MUST BE COMMITTED DURING THE POLICY PERIOD**

In *Fox v. Admiral Insurance Co.*, No. 12 CV 8740, 2016 WL 454319 (N.D. Ill. Feb. 5, 2016) (applying Illinois law), a consent judgment was entered against an insured regarding plaintiff’s claims that he suffered severe injuries while an inmate. The policy at issue defined “personal and advertising injury” as an injury including consequential bodily injury arising out of a deprivation of civil rights of which the named insured may be held liable. The court found that the policy did not require that the “bodily injury” occur in the same policy period as the civil rights offense. The court, therefore, determined that the policy during which the “bodily injury” occurred and the policy during which the civil rights offense was committed were both implicated. Accordingly, the court found a duty to defend and indemnify.

In *Regent Insurance Co. v. Integrated Pain Management, S.C.*, 4:14-CV-1759, 2016 WL 6330386 (E.D. Miss. Oct. 27, 2016) (applying Illinois law), the insured was sued for sending unsolicited marketing facsimiles in violation of the Telephone Consumer Protection Act (“TCPA”) and for conversion. The policy at issue was effective from November 18, 2010 to November 18, 2011. The complaint alleged the two facsimile advertisements were sent on July 11, 2012 and September 24, 2012. The insured argued that, although the complaint only alleged two instances of unwanted faxes, the complaint sought certification of a class that included faxes that were sent 4-5 years prior to the filing of the underlying lawsuit on April 30, 2014, thus implicating the policy. The court agreed and found that the allegations in the complaint implicated the policy. The court ultimately found no duty to defend based on the Distribution of Material Exclusion.

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

In *Foliar Nutrients, Inc. v. Nationwide Agribusiness Insurance Co.*, 133 F. Supp. 3d 1372 (M.D. Ga. 2016) (applying Georgia law), a counterclaim was filed against the insured, alleging Lanham Act violations, tortious interference, and unfair competition. The insured was alleged to have contacted the counter-plaintiff's customers, represented that the two were in litigation, and stated that the customers should not purchase the plaintiff's products. The court found that the allegations of tortious inference indicated that the conduct arose out of the insured's business and that the insured's statements to the counter-plaintiff's customers constituted disparagement. Accordingly, the insurer had a duty to defend.

In *Cincinnati Insurance Co. v. Global Caravan Technologies, Inc.*, No. 1:14-cv-01643-TWP-DML, 2016 WL 4194520 (S.D. Ind. Aug. 8, 2016) (applying Indiana law), the insured was sued as a result of an alleged failed business relationship with the plaintiff, which involved the development of the insured's company and the manufacture of recreational vehicles. The parties agreed that the complaint alleged defamatory conduct, but the insurer argued that the allegations did not arise out of the insured's business. Citing to allegations in the complaint and a published response to the lawsuit, the court held that the defamation allegations would not have occurred but for the plaintiff's employment with the insured, and, thus, the allegations arose out of the insured's business. The court declined to find that the conduct did not arise out of the employment relationship simply because the complaint did not allege the defendants acted pursuant to their official business capacity. However, the court found that the Employment-Related Practices Exclusion was unambiguous and precluded coverage. Accordingly, the insurer did not owe any duty to defend or indemnify the insured.

In *Penn-America Insurance Co. v. Tomei*, No. 480 WDA 2015, 2016 WL 2990093 (Pa. May 24, 2016) (applying Pennsylvania law), the insured was sued by 37 plaintiffs whose claims arose from the videotaping of patrons as they undressed during tanning sessions, and the subsequent posting of these videos to the public. The court determined that the offense arose out of the insured's business because there was a causal relationship and the offensive videos would not have existed but for the insured's business. The court found, however, that the complaint did not allege a claim for invasion of privacy against the insured. Accordingly, the insurer did not owe any duty to defend.

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

In *United States Fidelity & Guaranty Co. v. Fendi Adele S.R.L.*, 823 F.3d 146 (2d Cir. 2016) (applying New York law), the insured was found liable in two actions for trademark counterfeiting, false designation of origin, trademark dilution, unfair competition and as a third-party for the sale of counterfeited Fendi branded merchandise. The court held that the claims did not implicate coverage because the damages awarded were based only on the sale of counterfeit goods, and not for the advertising of the counterfeit goods. The court explained that the parties could not have reasonably expected that the "advertising injury" coverage would extend to the insured's sale of infringing goods or

counterfeit products. The court also explained that the Fendi brand and logo were used as product identification, rather than as an “advertisement.” Thus, no indemnification was owed under the policies.

In *Great Lakes Reinsurance UK PLC v. In & Out Fashion, Inc.*, 2:15-cv-05889-CAS, 2016 WL 3450732 (C.D. Cal. June 20, 2016) (applying California law), the insured was sued for trademark infringement, false designation of origin, false advertising, trademark dilution, unfair competition and inducement of breach of contract. The court held that, although the complaint alleged trademark infringement, which was not covered under the policy, the complaint also alleged trade dress infringement, which is a specifically enumerated offense. The court also held that the complaint alleged that the infringement took place in the named insured’s “advertisement.” Accordingly, the court found a duty to defend.

In *Educational Impact v. Travelers Property Casualty Co. of America*, 15-cv-04510, 2016 WL 7386139 (N.D. Cal. Dec. 21, 2016) (applying California law), it was alleged that the insured engaged in false advertising by asserting it was the only company authorized to make use of certain intellectual property relating to professional development programs, in which the plaintiff had exclusive rights. The court held that nothing in the “advertisement” itself was alleged to infringe any copyright. The court explained that it was the production and sale of the insured’s products that infringed the plaintiff’s copyrights, not its advertisements. The court noted that the wrongful conduct alleged in “advertisements” was not copyright infringement, but the making of a false statement that the insured was the only one authorized to use the product. The court held that the complaint did not allege any copyright in the title of the programs, nor did the complaint allege any ownership of the title. The court further held that because the plaintiff did not claim ownership of any material used in the insured’s “advertisement,” there was no claim for “advertising injury.” Thus, no duty to defend was owed.

In *Caveo, LLC v. Citizens Insurance Co. of America*, No. 15-cv-6200, 2016 WL 5477537 (N.D. Ill. Sept. 29, 2016) (applying Illinois law), the insured was sued for theft of copyrighted material and other confidential information during a webinar conducted by the insured. The insurer argued that coverage was not implicated because the webinar did not constitute an “advertisement” as it was not widely disseminated. The court disagreed and explained that the webinar incorporated the plaintiff’s copyrighted material, which was advertised on the insured’s website and open to the public. Thus, the court found that the insured owed a duty to defend.

In *Design Basics, LLC v. Fox Cities Construction Corp.*, No. 13-c-548, 2016 WL 5485185 (E.D. Wis. Feb. 9, 2016) (applying Wisconsin law), the insured was sued for infringing the plaintiff’s copyrighted home designs. The insurer argued that the plaintiff sought recovery of the insured’s profits from infringing home sales as opposed to damages for injury directly attributable to advertising, and thus there was no causal connection between the alleged injury and advertising activity. The court rejected this argument and found that a portion of the alleged injuries was directly attributable to the insured’s advertising activities, as the complaint alleged that the insured placed the copyrighted designs on a website. However, the court held that because the insured published the plaintiff’s plans and

constructed homes prior to the inception of the policies, the Prior Publication Exclusion applied. Therefore, the court found no duty to defend.

In *Boehm v. Scheels All Sports, Inc.*, No. 15-cv-379-jdp, 2016 WL 4386104 (W.D. Wis. Aug. 17, 2016) (applying Wisconsin and Illinois law), the insureds were sued by sports photographers for copyright infringement for allegedly making and selling unauthorized reproductions of their work. Three different insurance companies issued a policy to three different insureds. As to the first insured, the court found no duty to defend or indemnify because the plaintiffs did not allege that the insured used the photographs in its “advertisement.” As to the second insured, the court found that the insurer did not owe any duty to defend because the policy contained an endorsement excluding coverage for “personal and advertising injury.” As to the third insured, the court found that the allegations that the insured published listings of the infringing photographs for sale, constituted an “advertisement”. However, the court found that the Prior Publication Exclusion precluded a duty to defend the third insured.

In *Holyoke Mutual Insurance Co. v. Vibram USA, Inc.*, 33 Mass. L. Rptr. 564 (Mass. 2016) (applying Massachusetts law), the insured was sued for violation of the Washington Personality Rights Act, unfair or deceptive act, false designation, and unjust enrichment. After the death of a racing athlete, the insured applied for a trademark using the deceased’s name to sell shoes and running wear. The heirs asserted that they owned the intellectual property rights associated with the deceased’s name. The court noted that although the insured used the deceased’s name in an advertising idea, there were no allegations that the *plaintiffs* used the name as an advertising idea. Thus, the claims did not fall within the “use of another’s advertising idea in your ‘advertisement’” offense and no duty to defend was owed.

#### **E. THE OFFENSE MUST BE COMMITTED IN THE “COVERAGE TERRITORY”**

#### **F. THE SUIT MUST SEEK DAMAGES**

In *Travelers Property Casualty Co. of America v. KFx Medical Corp.*, 637 Fed. Appx. 989 (9th Cir. 2016) (applying California law), the counterclaims against the insured in a patent dispute sought injunctive and declaratory relief, attorneys’ fees and “other and further relief at law or in equity.” The court found that there was no potential for coverage because the relief sought did not constitute “damages” under the policy. Thus, the court found that no duty to defend was owed.

In *Evanston Insurance Co. v. Gene by Gene, Ltd.*, 155 F. Supp. 3d 706 (S.D. Tex. 2016) (applying Texas Law), the insured was sued for improperly publishing the plaintiff’s DNA results on its website without the plaintiff’s consent in violation of the Genetic Privacy Act. The plaintiff sought actual and statutory damages of \$5,000. The policy defined the term “damages” as “the monetary portion of any judgment, award or settlement.” The policy’s definition of “damages” excluded “punitive or exemplary damages ... taxes, criminal or civil fines, or attorney’s fees or penalties imposed by law ... sanctions ... or

the return of or restitution of fees, profits or charges for services rendered.” Pursuant to the policy’s definition of “damages,” the court found that fines, penalties, and taxes are “limited to payments made to the government” and do not include statutory damages that make up the monetary portion of a judgment. Thus, the court held that the actual and statutory damages sought by the plaintiff constituted “damages” under the policy. Accordingly, the court found that the insurer owed a duty to defend.

## **II. ANALYSIS OF THE ENUMERATED OFFENSES IN THE DEFINITION OF “PERSONAL AND ADVERTISING INJURY”**

### **A. FALSE ARREST, IMPRISONMENT OR DETENTION**

In *United States Fire Insurance Co. v. Fea*, No. 1:16-cv-00173, 2016 WL 7395691 (D. Haw. Dec. 2, 2016) (applying Hawaii law), the insured was sued after its employee trapped the plaintiff in her room and sexually assaulted her after installing a TV at her residence. Without analyzing whether the complaint alleged false imprisonment or false detention, the court found that the Knowing Violation Exclusion applied to preclude coverage because the employee acted intentionally and because a reasonable person would expect the injuries resulting from the alleged sexual attack. Thus, no duty to defend was owed.

### **B. MALICIOUS PROSECUTION**

In *Hammond v. U.S. Liability Insurance Co. & Group*, No. 15-1349, 2016 WL 929288 (3d Cir. March 10, 2016) (applying Pennsylvania law), the insured was sued for breach of contract, conversion, and intentional interference with existing and prospective contractual relations regarding the use of computer software. The insured argued that although no malicious prosecution claim was filed, the plaintiffs’ request for attorney’s fees triggered the malicious prosecution offense because attorney’s fees are recoverable in a malicious prosecution action. The court held that such a request for prevailing party fees did not constitute a malicious prosecution claim. In addition, the court found that although the plaintiffs admitted that their claim for relief was based on conduct that also supported a malicious prosecution claim, such admission did not constitute a malicious prosecution claim. Accordingly, no duty to defend was owed.

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

In *AMCO Insurance Co. v. Carpet Direct Corp.*, 157 F. Supp. 3d 1018 (D. Colo. 2016) (applying Colorado law), the insured was sued for misrepresenting that the plaintiffs would become independent business owners with rights of ownership in the businesses in which they were investing. The court found that the allegations did not fall within the “personal and advertising injury” coverage of the policies. The court explained that coverage requires some allegation of the invasion of a right in real

property. The court further explained that the plaintiffs were not alleging that they are being divested of ownership, but rather that despite the insured’s promises, they never had such rights. Thus, the court found no duty to defend was owed.

In *Mark v. Sunshine Plaza Inc.*, No. 16-455, 2016 WL 6876645 (E.D. La. Nov. 22, 2016) (applying Louisiana law), the complaint alleged that the insured owned and operated a commercial property that did not comply with the regulatory requirements established under the Americans with Disabilities Act. In assessing the wrongful eviction offense, the court found that “wrongful eviction requires actual impingement of the plaintiff’s possessory rights.” The court explained that the complaint did not allege a possessory interest in the insured’s property, but instead alleged that the property in question violated federal regulations governing accessibility. Accordingly, the court found that the claims did not allege any offense in the definition of “personal and advertising injury.” Thus, no duty to defend was owed.

In *Lakeside Terrace Homes Sales, Ltd. v. Arrowood Indemnity Co.*, No. 1:15 CV 1794, 2016 WL 4493841 (N.D. Ohio Aug. 26, 2016) (applying Ohio Law), the plaintiffs filed a class action complaint alleging that they purchased a manufactured home from the insureds for installation and upon taking possession, discovered numerous defects, unauthorized deviations, and unfinished work that breached their contract with the insured. The plaintiffs also alleged that the insureds made certain misrepresentations regarding the value of the manufactured homes, and common area amenities that the insureds promised to build, but never did. The insureds argued that the alleged misleading advertisements about the park amenities and cost savings fell within the definition of “personal and advertising injury” as the allegations directly impacted the plaintiffs’ right of private occupancy. The court held that with no amenities to invade, the insureds failed to show how the wrongful invasion of the right of private occupancy offense was implicated. The court also held that this offense requires purposeful intent, which was not alleged. The court further explained that the complaint did not allege any trespass or physical invasion of the right of private occupancy. Thus, the insurer had no defense or indemnity obligation.

#### **D. DEFAMATION, LIBEL, SLANDER & DISPARAGEMENT**

In *S. Bertram v. Citizens Insurance Co. of America*, 657 Fed. Appx. 477 (6th Cir. 2016) (applying Michigan law), the insured was sued for trademark infringement, unfair competition, trade name infringement, and trademark dilution, arising from the insured’s sale of food products using the same name trademarked by the plaintiff. The insured argued that the claims included allegations of disparagement and trade dress infringement. The court disagreed and found that the complaint lacked any allegation that the insured made a false or derogatory communication about the plaintiff’s product. The court held that the complaint only alleged trademark infringement claims, which were barred by the IP Exclusion. Thus, no duty to defend was owed.

In *Travelers Property Casualty Co. of America v. KFx Medical Corp.*, 637 Fed. Appx. 989 (9th Cir. 2016) (applying California law), the counterclaims against the insured did not allege a covered claim so

the court considered whether the counterclaims might fairly be amended to state a claim for abuse of process or product disparagement. The court found that the possibility of amendment was too speculative and determined there was no factual support for any amendment. The court also found that there was no potential for coverage because only injunctive and declaratory relief was sought, which were not damages under the policy. Thus, the court found that no duty to defend was owed.

In *Crisp Enterprises Inc. v. Golden Eagle Insurance Co.*, No. SACV 15-02011, 2016 WL 786063 (C.D. Cal. Feb. 26, 2016) (applying California law), the insured was sued for interference with prospective economic relations and unfair competition. It was alleged that the insured took private customer account information when he resigned and used that information to solicit customers and transfer their business. As to the insured’s initial tender, the court stated that “neither the complaint nor the correspondence expressly mentioned a false or misleading statement that specifically referred to and clearly derogated” the claimant. The court also noted that the complaint did not request damages for loss of reputation or goodwill as a result of disparagement. As to the insured’s second tender, the court explained that the false association with an allegedly superior product does not constitute disparagement. The court found that the insured’s correspondence did not clearly imply inferiority of the claimant’s products or services. The court also held that injurious misrepresentations that do not necessarily derogate competitors (disparagement by implication) are insufficient to trigger a duty to defend. Accordingly, no duty to defend was owed.

In *Mendocino Wine Group, LLC v. QBE Americas, Inc.*, No. 15-cv-06342-HSG, 2016 WL 4154853 (N.D. Cal. Aug. 5, 2016) (applying California law), the insured was sued for a declaration that it could no longer use the plaintiff’s trademark, unfair competition, violation of the common law right of publicity, violation of statutory right of publicity under California civil code, and cancellation of a trademark registration. The insured was a winemaker using the plaintiff’s name as a trademark. The court determined that the insured’s alleged trademark infringement standing alone did not constitute a defamatory statement. Accordingly, the court found that no duty to defend was owed.

In *Spaulding Decon, LLC v. Crum & Forster Specialty Insurance Co.*, 158 F. Supp. 3d 1293 (M.D. Fla. 2016) (applying Florida law), a suit was filed against the insured for trademark and intellectual property infringement, which was settled. In a second lawsuit, the insured was sued for breach of the confidential settlement agreement, which prohibited the insured from disparaging the plaintiff. The court found that the plaintiff’s use of the conclusory buzz-word “disparaging” in its complaint was not sufficient to trigger a duty to defend. The court explained that the complaint lacked sufficient factual allegations to assert a claim for disparagement, and noted that the word “disparaging” appeared twice in the complaint without any factual support. Thus, the court found no duty to defend.

In *Foliar Nutrients, Inc. v. Nationwide Agribusiness Insurance Co.*, 133 F. Supp. 3d 1372 (M.D. Ga. 2016) (applying Georgia law), a counterclaim was filed against the insured alleging Lanham Act violations, tortious interference, and unfair competition. It was alleged that the insured contacted the counter-plaintiff’s customers, represented that the two were in litigation, and stated that they should

not purchase the counter-plaintiff’s products. The court found that the allegations of tortious inference indicated that the conduct arose out of the insured’s business and that the insured’s contact with the counter-plaintiff’s customers constituted disparagement. Accordingly, the insurer had a duty to defend.

In *Hanover Insurance Co. v. Anova Food, LLC*, No. 14-00281 HG-RLP, 2016 WL 3620730 (D. Haw. June 29, 2016) (applying Florida law), the insureds and their insurer funded the settlement of certain claims against the insureds for patent infringement, unfair competition and deceptive trade practices, based on the insureds’ false advertisements that their fish products were treated by a clearsmoke process, which the insureds represented as being a superior process to the plaintiff’s tasteless smoke process. The complaint expressly alleged that the insureds’ conduct constituted disparagement and “the misappropriation or infringement of advertising ideas, style of doing business, title and slogan.” Without addressing the other enumerated offenses, the court found that the claims implicated the disparagement offense. The court also held that none of the exclusions precluded coverage. Accordingly, the insurer owed a duty to indemnify.

In *Diamond State Insurance Co. v. Duke*, No. 14 CV 7764, 2016 WL 1247473 (N.D. Ill. March 30, 2016) (applying Illinois law), the insured was sued by DR Distributors which distributes e-cigarettes. The suit alleged: 1) Federal Trademark Counterfeiting and Infringement; 2) Federal Unfair Competition and False Designation of Origin; 3) Common Law Unfair Competition; and 4) violation of the Illinois Deceptive Trade Practices Act. The complaint alleged that the insured contacted DR Distributors’ customers and made false statements regarding its affiliation with DR Distributors in order to sell its competing products to those customers. Based on those allegations, the court found it “conceivable” that DR Distributer pled a claim for disparagement. Thus, the insurer had a duty to defend.

In *Cincinnati Insurance Co. v. Global Caravan Technologies, Inc.*, No. 1:14-cv-01643-TWP-DML, 2016 WL 4194520 (S.D. Ind. Aug. 8, 2016) (applying Indiana law), the insured company was sued after a failed business relationship with the plaintiff in developing the company. The parties agreed that the complaint alleged defamatory conduct, but the insurer argued that the allegations did not arise out of the insured’s business. Citing to allegations in the complaint and a published response to the lawsuit, the court held that the defamation allegations would not have occurred but for the plaintiff’s employment with the insured, and thus, the allegations arose out of the insured’s business. However, the court found that the Employment-Related Practices Exclusion precluded coverage. Accordingly, the insurer did not owe any duty to defend or indemnify the insured.

In *National Fire Insurance Co. of Hartford v. Kosair Charities Committee, Inc.*, No. 3:15-CV-00577-CRS, 2016 WL 2622010 (W.D. Ky. May 5, 2016) (applying Kentucky Law), a counterclaim was brought against the insured for breach of fiduciary duty, unlawful business practice, intentional interference with a gift, unjust enrichment, declaratory judgment, and repudiation of contracts. The court found that the counterclaims did not seek damages for “personal and advertising injury.” The court explained that any reference to defamatory statements was merely made to provide context and did not form the basis of the claims against the insured. Thus, the insurer had no duty to defend.

In *Vitamin Health Inc. v. Hartford Casualty Insurance Co.*, No. 15-10071, 2016 WL 2622353 (E.D. Mich. May 9, 2016) (applying Michigan law), the insured, an eye health supplement manufacturer, was sued for patent infringement and false advertising. The court found that there could be no disparagement where a policyholder is alleged to have misrepresented the content of its own product, and not its competitor's. The court further explained that the false advertising claim could not be a claim for product disparagement where the insured is not alleged to have made or implied false claims about its competitor's products or the superiority of its own. Therefore, the court concluded that the claims did not implicate coverage and the insurer owed no duty to defend.

In *Nautilus Insurance Co. v. Access Medical, LLC*, No. 2:15-cv-00321-JAD-GWF, 2016 WL 5429650 (D. Nev. Sept. 27, 2016) (applying California law), a cross-complaint was filed against the insured alleging four claims for interference with prospective economic advantage. The insured argued that the alleged facts supported a possible defamation claim. The cross-complaint alleged that the insured engaged in wrongful acts that caused various users to stop using the plaintiff, resulting in injury to the plaintiff's reputation. The court also considered an email stating that a former, unidentified distributor was banned from selling products. The court found that the cross-complaint and email did not give rise to a potential claim for slander, libel or disparagement. The court explained that the cross-complaint did not allege that the insured made any false statement, nor did it allege that any statement in the email was false. Accordingly, the insurer owed no duty to defend or indemnify the defendants for the cross-claims.

In *Desabato v. Assurance Co. of America*, No. 2:15cv484, 2016 WL 5661745 (W.D. Pa. Sept. 30, 2016) (applying Pennsylvania law), the insured was sued, in part, for declaratory judgment, breach of fiduciary duty, conversion, breach of contract, and breach of duty of fair dealing, after terminating an employee. The insureds argued that the complaint alleged that the insured had defamed the plaintiff by terminating him for gross misconduct in a letter. The court held that the allegations were insufficient to trigger a duty to defend. The court explained that even if the letter terminating the plaintiff contained a false statement, the complaint did not allege that the letter was published or that any third-party learned of its contents. Accordingly, no duty to defend was owed.

In *Selective Way Insurance Co. v. Crawl Space Door System, Inc.*, 162 F. Supp. 3d 547 (E.D. Va. 2016) (applying Virginia law), the insured was sued for unfair competition, negligent misrepresentation, and trademark infringement. The insured argued that although the complaint did not allege direct claims of disparagement, it alleged claims of general superiority and direct comparisons to the plaintiff's product that constituted disparagement. The court did not address whether such allegations constituted disparagement and instead found that the Quality of Goods Exclusion precluded coverage. The court explained that the allegations related to the failure of the insured's products to live up to the statements of quality and performance contained in their advertisements. Thus, the court found no duty to defend.

In *OneBeacon America Insurance Co. v. Hanover Insurance Co.*, No. HHDCV156057541S, 2016 WL 4200237 (Conn. July 5, 2016) (applying Connecticut law), the insured was sued for misappropriation

of trade secrets and for making disparaging statements to the plaintiff's clients. The court found that the false statements alleged in the complaint served to denigrate, discredit and detract the plaintiff's reputation and business. Thus, the court held that such allegations constituted disparagement. However, the court found that an endorsement excluding from coverage "any act committed ... with malice" applied to preclude coverage, as the complaint alleged that the disparaging statements were motivated by actual malice. Accordingly, no duty to defend was owed.

## E. VIOLATION OF RIGHT OF PRIVACY

In *Mid-Century Insurance Co. v. Windfall Inc.*, No. 15-146-M-DLC, 2016 WL 2992114 (D. Mont. May 23, 2016) (applying Montana law), the insured was sued by a local newspaper's parent company Lee Enterprises, alleging that the insured wrongfully used the newspaper's confidential and proprietary information to compete with a local marketing group owned by Lee Enterprises. Lee Enterprises alleged claims for violation of Montana's Trade Secrets Act, breach of implied covenant of good faith and fair dealing, tortious interference with business relations, civil conspiracy, breach of a duty of loyalty, unfair competition and other similar claims. The court held that a corporation cannot have a right of privacy and thus, the right of privacy offense was not implicated. Accordingly, no duty to defend was owed.

In *Evanston Insurance Co. v. Gene by Gene, Ltd.*, 155 F. Supp. 3d 706 (S.D. Tex. 2016) (applying Texas Law), the insured was sued for improperly publishing the plaintiff's DNA results on its website without the plaintiff's consent in violation of the Genetic Privacy Act. The court found that the allegations fell within the publication of material that violates a person's right to privacy offense. Thus, the court found that the insurer owed a duty to defend.

In *Holyoke Mutual Insurance Co. v. Vibram USA, Inc.*, 33 Mass. L. Rptr. 564 (Mass. 2016) (applying Massachusetts law), the insured was sued for violation of the Washington Personality Rights Act, unfair or deceptive act, false designation, and unjust enrichment. After the death of a racing athlete, the insured applied for a trademark using the deceased's name to sell shoes and running wear. The heirs asserted that they owned the intellectual property rights associated with the deceased's name. The court found that the alleged losses arose out of an infringement of the right of publicity, not the violation of the right of privacy. The court held that an insurance policy providing coverage for violation of the right to privacy does not cover claims for unauthorized commercial use of a person's name.

In *Penn-America Insurance Co. v. Tomei*, No. 480 WDA 2015, 2016 WL 2990093 (Pa. May 24, 2016) (applying Pennsylvania law), the insured was sued by 37 plaintiffs whose claims arose from the videotaping of patrons as they undressed during tanning sessions, and the subsequent posting of these videos to the public by a third-party videographer. The court found that the complaint did not allege a claim for invasion of privacy against the insured. The court explained that the insured's negligent failure to prevent the videotaping did not constitute the oral or written publication of material. Accordingly, the insurer did not owe any duty to defend.

In *Steadfast Insurance Co. v. Tomei*, No. 477 WDA 2015, 478 WDA 2015, 479 WDA 2015, 2016 WL 2989982 (Pa. May 24, 2016) (applying Pennsylvania law), the insured, a tanning salon, was sued for negligently failing to ensure the safety of the plaintiffs and failing to secure the premises from a third-party's misconduct in recording the salon's patrons as they undressed. The court noted that the complaint lacked any allegation that the insured published oral or written material that violated the plaintiff's right of privacy, or negligently enabled the electronic publication of the videos on the internet, or was vicariously liable for the criminal conduct of the third-party. Thus, the court held that the complaint did not allege any personal and advertising injury because negligent security is not an enumerated offense. Therefore, no duty to defend was owed.

## F. USE OF ANOTHER'S ADVERTISING IDEA

In *Infinity Micro Computer v. Continental Casualty Co.*, No. CV 15-04777, 2016 WL 5661755 (C.D. Cal. Sept. 29, 2016) (applying California law), the insured was sued for trademark infringement, trademark counterfeiting, false advertising, trademark dilution, statutory dilution, unfair competition, and false advertisement, for the unauthorized use of a trademarked "Cisco Premiere Certified Partner" logo on its website and selling counterfeit products. The court held that the allegations did not implicate the "use of another's advertising idea in your 'advertisement'" offense. The court explained that the insured could not reasonably expect that trademark infringement would constitute an advertising idea. The court explained that at some level, everything a business does to market a product is an "idea," and to construe "advertising idea" as including the use of a trademarked logo would render the term meaningless.

In *Food Market Merchandising Inc. v. West Bend Mutual Insurance Co.*, No. 15-3347, 2016 WL 1192661 (D. Minn. March 28, 2016) (applying Minnesota Law), a counterclaim was asserted against the insured for trademark and service mark infringement, unfair competition, false designation of origin, trademark dilution, counterfeiting, contributory trademark infringement, fraud, breach of contract and rescission, arising out of the insured's continued use of the "got milk?" mark, after its right to do so was terminated under an amended license agreement. Based on the insured's alleged use of the plaintiff's mark on the insured's product packaging, display cases and websites, the court found that the counterclaims implicated the "use of another's advertising idea in your 'advertisement'" offense. However, the court held that the Breach of Contract and Knowing Violation Exclusions precluded coverage. Accordingly, the court found no duty to defend was owed.

In *Mid-Century Insurance Co. v. Windfall Inc.*, No. 15-146-M-DLC, 2016 WL 2992114 (D. Mont. May 23, 2016) (applying Montana law), the insured was sued by a local newspaper's parent company, Lee Enterprises, alleging that the insured wrongfully used the newspaper's confidential and proprietary information to compete with a local marketing group owned by Lee Enterprises. Lee Enterprises alleged claims for violation of Montana's Trade Secrets Act, breach of implied covenant of good faith and fair dealing, tortious interference with business relations, civil conspiracy, breach of a duty of loyalty, unfair competition and other similar claims. The court found that the "use of another's advertising idea in your

‘advertisement’” offense was not implicated, as the complaint did not allege that the insured used Lee Enterprises’ advertising idea that called the public’s attention, but that it used proprietary information regarding historical customers in order to solicit customers. Accordingly, no duty to defend was owed.

In *Desabato v. Assurance Co. of America*, No. 2:15cv484, 2016 WL 5661745 (W.D. Pa. Sept. 30, 2016) (applying Pennsylvania law), the insured was sued, in part, for declaratory judgment, breach of fiduciary duty, conversion, breach of contract, and breach of duty of fair dealing, after terminating an employee. The insureds argued that the complaint alleged that the insured had defamed the plaintiff by terminating him for gross misconduct in a letter, and had misappropriated advertising ideas by continuing to advertise its business which plaintiff had started. The court held that the allegations were insufficient to trigger a duty to defend. The court found that the complaint did not allege any advertising idea that the plaintiff created and that was misappropriated. Accordingly, no duty to defend was owed.

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (applying Texas law), the insured was sued for trademark infringement, false and/or misleading advertising, deceptive business practices, unfair competition, breach of contract, and breach of good faith and fair dealing for forming a competing business and utilizing similar treatment methods and programs. The court held that the complaint did not state a claim for misappropriation of advertising ideas, but merely stated a claim for trademark infringement. The court further explained that the claims incidentally arose out of trademark infringement, misappropriation of trade secrets, or breach of contract, all of which were excluded by the IP Exclusion and the Breach of Contract Exclusion. Accordingly, no duty to defend was owed.

In *Evanston Insurance Co. v. Clarte, Inc.*, 158 F. Supp. 3d 1110 (W.D. Wash. 2016) (applying Washington law), the insured was sued for misappropriation of trade secrets, violation of the Lanham Act, violation of Unfair Business Practices and Consumer Protection Act, and related claims. The court rejected the insured’s argument that complaint alleged the misappropriation of an “advertising idea,” as the complaint did not reference an advertisement, nor did the complaint allege any misappropriation. The court explained that misappropriation of an advertising idea involves stealing the manner in which another entity advertises goods, emulating their form, logo or trade dress, and does not extend to appropriating another entity’s goods and passing them off as your own. The court rejected the insured’s argument that the alleged misuse of data and reports constituted misappropriation of style of doing business, as it did not concern the claimant’s comprehensive manner of operating its business.

## **G. INFRINGING UPON ANOTHER’S COPYRIGHT, TRADE DRESS OR SLOGAN IN YOUR “ADVERTISEMENT”**

### **1. Copyright Infringement**

In *Educational Impact v. Travelers Property Casualty Co. of America*, 15-cv-04510, 2016 WL 7386139 (N.D. Cal. Dec. 21, 2016) (applying California law), the insured allegedly engaged in false

advertising by asserting it was the only company authorized to make use of certain intellectual property relating to professional development programs, in which the plaintiff had exclusive rights. The court held that nothing in the advertisement itself was alleged to infringe any copyright. The court explained that it was the production and sale of the insured’s products that infringed the plaintiff’s copyrights, not its advertisements. The court noted that the wrongful conduct alleged with respect to advertisements was not copyright infringement, but the making of a false statement that the insured was the only one authorized to use the product. The court held that the complaint did not allege any copyright in the title of the programs, nor did the complaint allege any ownership of the title. Thus, no duty to defend was owed.

In *Caveo, LLC v. Citizens Insurance Co. of America*, No. 15-cv-6200, 2016 WL 5477537 (N.D. Ill. Sept. 29, 2016) (applying Illinois law), the insured was sued for theft of copyrighted material and other confidential information during a webinar conducted by the insured. The insurer argued that coverage was not implicated because the webinar did not constitute an “advertisement,” as it was not widely disseminated. The court disagreed and explained that the webinar incorporated the plaintiff’s copyrighted material, which was advertised on the insured’s website and open to the public. Thus, the court found that the insured owed a duty to defend.

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (applying Texas law), the insured was sued for trademark infringement, false and/or misleading advertising, deceptive business practices, unfair competition, breach of contract, and breach of good faith and fair dealing for forming a competing business and utilizing similar treatment methods and programs. The complaint alleged that the insured’s program was copied from “the EPN program and this program was the [plaintiff’s] trade secret.” Although the complaint did not assert a copyright infringement count, the insured argued that the foregoing allegation constituted copyright infringement. The court rejected that argument, finding that the allegation plainly asserted a non-covered trade secret claim only. Accordingly, no duty to defend was owed.

In *Design Basics, LLC v. Fox Cities Construction Corp.*, No. 13-c-548, 2016 WL 5485185 (E.D. Wis. Feb. 9, 2016) (applying Wisconsin law), the insured was sued for infringing the plaintiff’s copyrighted home designs. The insurer argued that the plaintiff sought recovery of the insured’s profits from infringing home sales as opposed to damages for injury directly attributable to advertising, and thus there was no causal connection between the alleged injury and advertising activity. The court rejected this argument and found that a portion of the alleged injuries were directly attributable to the insured’s advertising activities, as the complaint alleged that the insured placed the copyrighted designs on a website. However, the court found that the Prior Publication Exclusion applied. Therefore, the insurer had no duty to defend.

In *Boehm v. Scheels All Sports, Inc.*, No. 15-cv-379-jdp, 2016 WL 4386104 (W.D. Wis. Aug. 17, 2016) (applying Wisconsin and Illinois law), the insureds were sued by sports photographers for

copyright infringement for allegedly making and selling unauthorized reproductions of their work. Three different insurance companies issued a policy to three different insureds. As to the first insured, the court held that the plaintiffs did not allege that the insured used the photographs in its “advertisement.” Thus, the insurer did not owe any duty to defend or indemnify the first insured. As to the second insured, the court found that the insurer did not owe any duty to defend because the policy contained an endorsement excluding coverage for “personal and advertising injury.” As to the third insured, the court found that the allegations that the insured published listings of the infringing photographs for sale, constituted an “advertisement.” However, the court found that the Prior Publication Exclusion precluded coverage for the third insured.

## 2. Trade Dress Infringement

In *S. Bertram v. Citizens Insurance Co. of America*, 657 Fed. Appx. 477 (6th Cir. 2016) (applying Michigan law), the insured was sued for trademark infringement, unfair competition, trade name infringement, and trademark dilution, arising out of the insured’s sale of food products using the same name trademarked by the plaintiff. The insured argued that the claims included allegations of trade dress infringement. The court disagreed and found that the insured’s product label looked nothing like the plaintiff’s label in terms of overall image and appearance and, therefore, the complaint did not allege trade dress infringement. The court held that the complaint only alleged trademark infringement claims, which were barred by the IP Exclusion. Thus, no duty to defend was owed.

In *Infinity Micro Computer v. Continental Casualty Co.*, No. CV 15-04777, 2016 WL 5661755 (C.D. Cal. Sept. 29, 2016) (applying California law), the insured was sued for trademark infringement, trademark counterfeiting, false advertising, trademark dilution, statutory dilution, unfair competition, and false advertisement, for the unauthorized use of a trademarked “Cisco Premiere Certified Partner” logo on its website and selling counterfeit products. The court rejected the insured’s argument that the claims alleged trade dress infringement on the basis that the insured’s use of the logo by itself does not constitute trade dress. Accordingly, no duty to defend was owed.

In *Great Lakes Reinsurance UK PLC v. In & Out Fashion, Inc.*, 2:15-cv-05889-CAS, 2016 WL 3450732 (C.D. Cal. June 20, 2016) (applying California law), the insured was sued for trademark infringement, false designation of origin, false advertising, trademark dilution, unfair competition and inducement of breach of contract. The court held that although the complaint alleged trademark infringement, which is not covered under the policy, the complaint also alleged trade dress infringement, which implicated coverage. The court found that the insured’s passing off of garments from the plaintiff’s vendors as its own in their total image and overall appearance, created at least potential liability for infringement of trade dress. Accordingly, the court found a duty to defend.

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (applying Texas law), the insured was sued for trademark infringement, false and/or misleading advertising, deceptive business practices, unfair competition,

breach of contract, and breach of good faith and fair dealing for forming a competing business and utilizing similar treatment methods and programs. The court rejected the insured’s argument that the complaint implicated the infringement of trade dress offense on the basis that the insured’s unauthorized use of the “ART” and “Active Release Techniques” marks on the insured’s website did not constitute trade dress infringement.

In *Evanston Insurance Co. v. Clarte, Inc.*, 158 F. Supp. 3d 1110 (W.D. Wash. 2016) (applying Washington law), the insured was sued for misappropriation of trade secrets, violation of the Lanham Act, violation of Unfair Business Practices and Consumer Protection Act, and related claims. The court held that the complaint did not implicate the trade dress offense, as the complaint lacked any allegations that the insured attempted to emulate the “look and styling” or “overall appearance” of the claimant’s product or infringed on the “color scheme and graphics” of the claimant’s logo.

### 3. Infringement of Slogan

In *Infinity Micro Computer v. Continental Casualty Co.*, No. CV 15-04777, 2016 WL 5661755 (C.D. Cal. Sept. 29, 2016) (applying California law), the insured was sued for trademark infringement, trademark counterfeiting, false advertising, trademark dilution, statutory dilution, unfair competition, and false advertisement, for the unauthorized use of a trademarked “Cisco Premiere Certified Partner” logo on its website and selling counterfeit products. The court rejected the insured’s argument that the claims alleged slogan infringement on the basis that insured failed to establish that the plaintiff used the phrase “Cisco Premiere Certified Partner” as a slogan. Accordingly, no duty to defend was owed.

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (applying Texas law), the insured was sued for trademark infringement, false and/or misleading advertising, deceptive business practices, unfair competition, breach of contract, and breach of good faith and fair dealing for forming a competing business and utilizing similar treatment methods and programs. The court rejected the insured’s argument that the complaint implicated the infringement of slogan offense on the basis that the complaint lacked any allegation of slogan infringement and on the basis that the complained of phrases utilized by the insured were not trademarked phrases.

In *Holyoke Mutual Insurance Co. v. Vibram USA, Inc.*, 33 Mass. L. Rptr. 564 (Mass. 2016) (applying Massachusetts law), the insured was sued for violation of the Washington Personality Rights Act, unfair or deceptive act, false designation, and unjust enrichment. After the death of a racing athlete, the insured applied for a trademark using the deceased’s name to sell shoes and running wear. The heirs asserted that they owned the intellectual property rights associated with the deceased’s name. The court found that the complaint did not allege any loss from the insured’s use of a slogan that the plaintiffs used to sell products. Thus, the claims did not allege infringement of slogan and no duty to defend was owed.

**H. DISCRIMINATION OR HUMILIATION****I. PRE-1998 FORMS: MISAPPROPRIATION OF ADVERTISING IDEAS OR THE STYLE OF DOING BUSINESS****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**

In *Travelers Property Casualty Co. of America v. KFx Medical Corp.*, 637 Fed. Appx. 989 (9th Cir. 2016) (applying California law), the counterclaims against the insured did not allege a covered claim so the court considered whether the counterclaims might fairly be amended to state a claim for abuse of process or product disparagement. The court found that the possibility of amendment was too speculative and determined there was no factual support for any amendment. The court further found that even if amended, the IP Exclusion otherwise precluded coverage. Thus, the court found that no duty to defend was owed.

**B. ANTITRUST VIOLATIONS****C. DISCRIMINATION & HARASSMENT****D. HUMILIATION****E. INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE OR WITH CONTRACTUAL RELATIONS**

In *Foliar Nutrients, Inc. v. Nationwide Agribusiness Insurance Co.*, 133 F. Supp. 3d 1372 (M.D. Ga. 2016) (applying Georgia law), a counterclaim was filed against the insured alleging Lanham Act violations, tortious interference, and unfair competition. It was alleged that the insured contacted the counter-plaintiff's customers, represented that the two were in litigation, and stated that they should not purchase the counter-plaintiff's products. The court found that the allegations of tortious inference indicated that the conduct arose out of the insured's business and that the insured's contact with the counter-plaintiff's customers constituted disparagement. Accordingly, the insurer had a duty to defend.

In *Nautilus Insurance Co. v. Access Medical, LLC*, No. 2:15-cv-00321-JAD-GWF, 2016 WL 5429650 (D. Nev. Sept. 27, 2016) (applying California law), a cross-complaint was filed against the insured alleging four claims for interference with prospective economic advantage. The insured argued that the facts supported a possible defamation claim. The cross-complaint alleged that the insured engaged in

wrongful acts that caused various users to stop using the plaintiff, resulting in injury to the plaintiff’s reputation. The court also considered an email, which stated that a former, unidentified distributor was banned from selling products. The court found that the cross-complaint and email did not give rise to a potential claim for slander, libel or disparagement. The court explained that the cross-complaint did not allege that the insured made any false statement, nor did it allege that any statement in the email was false. Accordingly, the insurer owed no duty to defend the defendants for the cross-claims.

In *Allied World National Assurance Co. v. Great Divide Insurance Co.*, 140 A.D.3d 103 (N.Y. 2016) (applying Ohio Law), the plaintiff demanded arbitration and asserted claims for breach of contract and tortious inference against the insured, based on certain false statements made by the insured to plaintiff’s potential business partners. The court found that the tortious interference claim potentially alleged disparagement. However, the court held that the Knowledge of Falsity Exclusion precluded coverage, as the demand specifically alleged that the insured acted knowingly and intentionally.

## F. UNFAIR COMPETITION

In *United States Fidelity & Guaranty Co. v. Fendi Adele S.R.L.*, 823 F.3d 146 (2d Cir. 2016) (applying New York law), the insured was found liable in two actions for trademark counterfeiting, false designation of origin, trademark dilution, unfair competition and as a third-party for the sale of counterfeited Fendi branded merchandise. The court held that the claims did not implicate coverage because the damages awarded were based only on the sale of counterfeit goods, and not for the advertising of the counterfeit goods.

In *Hanover Insurance Co. v. Anova Food, LLC*, No. 14-00281 HG-RLP, 2016 WL 3620730 (D. Haw. June 29, 2016) (applying Florida law), the insureds and their insurer funded the settlement of certain claims against the insureds for patent infringement, unfair competition and deceptive trade practices, based on the insureds’ false advertisements that their fish products were treated by a clearsmoke process, which the insureds represented as being a superior process to the plaintiff’s tasteless smoke process. The complaint expressly alleged that the insureds’ conduct constituted disparagement and “the misappropriation or infringement of advertising ideas, style of doing business, title and slogan.” Without addressing the other enumerated offenses, the court found that the claims implicated the disparagement offense. The court also held that none of the exclusions precluded coverage. Accordingly, the insurer owed a duty to indemnify.

## G. PATENT INFRINGEMENT

In *St. Paul Mercury Insurance Co. v. Tessera, Inc.*, No. 12-cv-01827, 2016 WL 4719275 (N.D. Cal. Sept. 9, 2016) (applying California law), the insured entered into a licensing agreement with PTI that granted PTI a limited license to use its semiconductor packaging patents. PTI sued the insured for: declaratory judgment concerning PTI’s right to terminate the license, breach of the license and breach of implied covenant of good faith and fair dealing, fraud, and patent misuse. The court previously

determined that the complaint could potentially allege a claim for product disparagement. The issue before the court was whether the IP Exclusion precluded coverage. The court held that the license did not convey an intellectual property right and that the complaint did not allege a violation of any intellectual property right. The court further explained that patent misuse is not a true intellectual property claim. Accordingly, the court held the IP Exclusion did not apply to preclude coverage, and thus, the insurer owed a duty to defend.

## H. MISAPPROPRIATION OF TRADE SECRET

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (applying Texas law), the insured was sued for trademark infringement, false and/or misleading advertising, deceptive business practices, unfair competition, breach of contract, and breach of good faith and fair dealing for forming a competing business and utilizing similar treatment methods and programs. The complaint alleged that the insured’s program was copied from “the EPN program and this program was the [plaintiff’s] trade secret.” The court determined that the misappropriation of trade secrets claim was precluded from coverage by the IP Exclusion. Accordingly, no duty to defend was owed.

## I. TRADEMARK INFRINGEMENT

In *United States Fidelity & Guaranty Co. v. Fendi Adele S.R.L.*, 823 F.3d 146 (2d Cir. 2016) (applying New York law), the insured was found liable in two actions for trademark counterfeiting, false designation of origin, trademark dilution, unfair competition and as a third-party for the sale of counterfeited Fendi branded merchandise. The court held that the claims did not implicate coverage because the damages awarded were based only on the sale of counterfeit goods, and not for the advertising of the counterfeit goods. The court further found that the Knowledge of Falsity Exclusion otherwise precluded coverage. Thus, no indemnification was owed under the policies.

In *S. Bertram v. Citizens Insurance Co. of America*, 657 Fed. Appx. 477 (6th Cir. 2016) (applying Michigan law), the insured was sued for trademark infringement, unfair competition, trade name infringement, and trademark dilution, arising out of the insured’s sale of food products using the same name trademarked by the plaintiff. The insured argued that the claims included allegations of trade dress infringement. The court disagreed and found that the insured’s product label looked nothing like the plaintiff’s label in terms of overall image and appearance and therefore, the complaint did not allege trade dress infringement. The court held that the complaint only alleged trademark infringement claims, which were barred by the IP Exclusion. Thus, no duty to defend was owed.

In *Great Lakes Reinsurance UK PLC v. In & Out Fashion, Inc.*, 2:15-cv-05889-CAS, 2016 WL 3450732 (C.D. Cal. June 20, 2016) (applying California law), the insured was sued for trademark infringement, false designation of origin, false advertising, trademark dilution, unfair competition and inducement of breach of contract. The court held that the trademark claims were precluded from

coverage by the IP Exclusion. However, the court found that the complaint also alleged trade dress infringement, which implicated coverage. The court found that the insured’s passing off of garments from the plaintiff’s vendors as its own in their total image and overall appearance, created at least potential liability for infringement of trade dress. Accordingly, the court found a duty to defend.

In *Infinity Micro Computer v. Continental Casualty Co.*, No. CV 15-04777, 2016 WL 5661755 (C.D. Cal. Sept. 29, 2016) (applying California law), the insured was sued for trademark infringement, trademark counterfeiting, false advertising, trademark dilution, statutory dilution, unfair competition, and false advertisement, for the unauthorized use of a trademarked “Cisco Premiere Certified Partner” logo on its website and selling counterfeit products. The court held that the allegations did not implicate the “use of another’s advertising idea in your ‘advertisement’” offense and that the IP Exclusion otherwise precluded coverage. Accordingly, no duty to defend was owed.

In *Mendocino Wine Group, LLC v. QBE Americas, Inc.*, No. 15-cv-06342-HSG, 2016 WL 4154853 (N.D. Cal. Aug. 5, 2016) (applying California law), the insured was sued for a declaration that it could no longer use the plaintiff’s trademark, unfair competition, violation of the common law right of publicity, violation of statutory right of publicity under California civil code, and cancellation of a trademark registration. The insured was a winemaker using the plaintiff’s name as a trademark. The court found that the insured’s alleged trademark infringement was precluded from coverage by the IP Exclusion and that such claim, standing alone, did not constitute a defamatory statement. Accordingly, the court found that no duty to defend was owed.

In *Diamond State Insurance Co. v. Duke*, No. 14 CV 7764, 2016 WL 1247473 (N.D. Ill. March 30, 2016) (applying Illinois law), the insured was sued by DR Distributors which distributes e-cigarettes. The suit alleged: 1) Federal Trademark Counterfeiting and Infringement; 2) Federal Unfair Competition and False Designation of Origin; 3) Common Law Unfair Competition; and 4) violation of the Illinois Deceptive Trade Practices Act. The court held that the IP Exclusion did not preclude coverage because the allegations were such that the alleged tortious conduct may have included conduct other than trademark infringement, including disparagement. Thus, the insurer had a duty to defend.

In *Food Market Merchandising Inc. v. West Bend Mutual Insurance Co.*, No. 15-3347, 2016 WL 1192661 (D. Minn. March 28, 2016) (applying Minnesota Law), a counterclaim was asserted against the insured for trademark and service mark infringement, unfair competition, false designation of origin, trademark dilution, counterfeiting, contributory trademark infringement, fraud, breach of contract and rescission, arising out of the insured’s continued use of the “got milk?” mark, after its right to do so was terminated under an amended license agreement. Based on the insured’s alleged use of the plaintiff’s mark on the insured’s product packaging, display cases and websites, the court found that the counterclaims implicated the “use of another’s advertising idea in your ‘advertisement’” offense. However, the court held the Breach of Contract and Knowing Violation Exclusions precluded coverage. Accordingly, the court found no duty to defend was owed.

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (applying Texas law), the insured was sued for trademark infringement, false and/or misleading advertising, deceptive business practices, unfair competition, breach of contract, and breach of good faith and fair dealing for forming a competing business and utilizing similar treatment methods and programs. The court held that the complaint did not state a claim for misappropriation of advertising ideas, but merely stated a claim for trademark infringement. The court explained that the claims incidentally arose out of trademark infringement, misappropriation of trade secrets, or breach of contract, all of which were excluded by the IP Exclusion and the Breach of Contract Exclusion. Accordingly, no duty to defend was owed.

#### **IV. THE CLAIM MUST FALL OUTSIDE THE EXCLUSIONS FOR “PERSONAL AND ADVERTISING INJURY”**

##### **A. Knowing Violation of Another’s Rights (“Knowing Violation Exclusion”)**

In *Foliar Nutrients, Inc. v. Nationwide Agribusiness Insurance Co.*, 133 F. Supp. 3d 1372 (M.D. Ga. 2016) (applying Georgia law), a counterclaim was filed against the insured alleging Lanham Act violations, tortious interference, and unfair competition. It was alleged that the insured contacted the counter-plaintiff’s customers, represented that the two were in litigation, and stated that they should not purchase the plaintiff’s products. The court found that the insured’s statements to plaintiff’s customers constituted disparagement. The insurer argued that the Knowing Violation Exclusion precluded coverage, as the insured had actual knowledge that its conduct would impede on the plaintiffs’ rights and cause “personal and advertising injury.” The court disagreed, finding that the insurer did not provide adequate evidence that the insured had acted with actual knowledge. Accordingly, the insurer had a duty to defend.

In *United States Fire Insurance Co. v. Fea*, No. 1:16-cv-00173, 2016 WL 7395691 (D. Haw. Dec. 2, 2016) (applying Hawaii law), the insured was sued after its employee trapped the plaintiff in her room and sexually assaulted her after installing a TV at her residence. The court found that the Knowing Violation Exclusion applied to preclude coverage because the employee acted intentionally and because a reasonable person would expect the injuries resulting from the alleged sexual attack. Thus, no duty to defend was owed.

In *Krispy Krunchy Foods, LLC v. AMA Discount, Inc.*, No. 15-590, No. 15-2845, 2016 WL 128044 (E.D. La. Jan. 12, 2016) (applying Louisiana law), the insured was sued for trademark and trade dress infringement relating to the sale of chicken at its convenience store. The court found that the insurer did not demonstrate the unambiguous application of its Knowing Violation Exclusion. The court explained that, although the complaint alleged a deliberate course of action to support certain statutory remedies for intentional or willful behavior, the claims potentially alleged compensatory relief for less egregious conduct. Therefore, the Knowing Violation Exclusion did not preclude a defense obligation.

In *Food Market Merchandising Inc. v. West Bend Mutual Insurance Co.*, No. 15-3347, 2016 WL 1192661 (D. Minn. March 28, 2016) (applying Minnesota Law), a counterclaim was asserted against the insured for trademark and service mark infringement, unfair competition, false designation of origin, trademark dilution, counterfeiting, contributory trademark infringement, fraud, breach of contract and rescission, arising out of the insured’s continued use of the “got milk?” mark, after its right to do so was terminated under an amended license agreement. The court found that the counterclaims implicated the “use of another’s advertising idea in your advertisement” offense. However, the court held the Knowing Violation Exclusion precluded a defense obligation. The court found that, although the counterclaims did not require a showing of knowledge or intent, the counterclaims alleged that the insured knew that its use of the marks would violate the counter-plaintiff’s rights, and that the insured knowingly misrepresented the expiration dates on its “got milk?” products.

In *Awards Depot, LLC v. Scottsdale Insurance Co.*, No. H-15-3201, 2016 WL 1090110 (S.D. Tex. March 21, 2016) (applying Texas law), the insured was sued for knowingly, willfully, intentionally and maliciously adopting and using similar imitations of the plaintiff’s trade dress by using diamond shape medals. The court found that there were no allegations in the complaint suggesting that the insured acted without such knowledge. Thus, the court determined that the Knowing Violation Exclusion applied to preclude a defense obligation. The court rejected the argument that notwithstanding the factual allegations, the exclusion should not apply because knowledge is not an element of trade dress infringement.

In *Evanston Insurance Co. v. Clarte, Inc.*, 158 F. Supp. 3d 1110 (W.D. Wash. 2016) (applying Washington law), the insured was sued for misappropriation of trade secrets, violation of the Lanham Act, violation of Unfair Business Practices and Consumer Protection Act, and related claims. The complaint alleged that the insured and other defendants “executed and concocted a scheme” to misappropriate the plaintiff’s trade secrets and engaged in certain conduct to “conceal their improper activity.” The court explained that even if the allegations in the complaint implicated coverage, which the court held they did not, the Knowing Violation Exclusion precluded coverage because the alleged misconduct was done with knowledge that the acts would violate the rights of another. Accordingly, no duty to defend was owed.

In *Boehm v. Scheels All Sports, Inc.*, No. 15-cv-379-jdp, 2016 WL 4386104 (W.D. Wis. Aug. 17, 2016) (applying Wisconsin and Illinois law), the insureds were sued by sports photographers for copyright infringement for allegedly making and selling unauthorized reproductions of their work. Three different insurance companies issued a policy to three different insureds. As to one of the insureds, the court found that the allegations fell within the “personal and advertising injury” coverage. The court declined to apply the Knowing Violation Exclusion on the basis that the complaint included allegations of non-willful infringement. However, the court ultimately found that the Prior Publication Exclusion precluded coverage for the third insured.

In *OneBeacon America Insurance Co. v. Hanover Insurance Co.*, No. HHDCV156057541S, 2016 WL 4200237 (Conn. July 5, 2016) (applying Connecticut law), the insured was sued for misappropriation of trade secrets and for making disparaging statements to the plaintiff’s clients. The court found that the Knowing Violation Exclusion did not preclude coverage because the complaint alleged reckless conduct, in addition to intentional conduct. However, the court ultimately found that an endorsement excluding from coverage “any act committed ... with malice” applied to preclude coverage, as the complaint alleged that the disparaging statements were motivated by actual malice.

In *PeopleKeys, Inc. v. Westfield Insurance Co.*, No. 100 WDA 2015, 2016 WL 765458 (Pa. Feb. 25, 2016) (applying Pennsylvania law), a counterclaim was filed against the insured for unfair competition, alleging the insured’s suit was sham litigation. The court did not address whether the unfair competition claim constituted “personal and advertising injury,” but instead found that the Knowing Violation Exclusion and Knowledge of Falsity Exclusion precluded coverage. The court explained that the counterclaim alleged that the insured knew that its claims were baseless, but nevertheless instituted sham litigation with the intent of injuring the counter-plaintiff’s competitive ability and interfering with the counter-plaintiff’s business relationships.

## **B. Knowing Publication of Falsehoods (“Knowledge of Falsity Exclusion”)**

In *United States Fidelity & Guaranty Co. v. Fendi Adele S.R.L.*, 823 F.3d 146 (2d Cir. 2016) (applying New York law), the insured was found liable in two actions for trademark counterfeiting, false designation of origin, trademark dilution, unfair competition and as a third-party for the sale of counterfeited Fendi branded merchandise. The court found that the Knowledge of Falsity Exclusion precluded coverage, because the insured intentionally published the material with knowledge that it would be selling goods bearing a false designation of origin. Thus, no indemnification was owed under the policies.

In *National Fire Insurance Co. of Hartford v. E. Mishan & Sons, Inc.*, No. 15-2248, 2016 WL 3079958 (2d Cir. June 1, 2016) (applying New York law), the insured was sued in two lawsuits. The first lawsuit alleged: (1) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act; (2) fraud by omission; (3) breach of contract and (4) unjust enrichment. The other alleged: (1) violations of the Michigan Consumer Protection Act; (2) fraud by omission; (3) breach of contract; (4) unjust enrichment and (5) violations of TCPA. The court found that the Knowledge of Falsity Exclusion did not preclude a defense obligation because the conduct triggering the exclusion was not an element of each cause of action and the conduct alleged in the complaints did not rule out the possibility that the insured acted without intent.

In *Hanover Insurance Co. v. Anova Food, LLC*, No. 14-00281 HG-RLP, 2016 WL 3620730 (D. Haw. June 29, 2016) (applying Florida law), the insureds and their insurer funded the settlement of certain claims against the insureds for patent infringement, unfair competition and deceptive trade practices,

based on the insureds’ false advertisements that their fish products were treated by a clearsmoke process, which the insureds represented as being a superior process to the plaintiff’s tasteless smoke process. The complaint expressly alleged that the insureds’ conduct constituted disparagement and “the misappropriation or infringement of advertising ideas, style of doing business, title and slogan.” Without addressing the other enumerated offenses, the court found that the claims implicated the disparagement offense. The court also found that the Knowledge of Falsity Exclusion did not apply because no factual findings by court order, verdict, judgment or stipulation were made in the underlying action, establishing that the insured had knowledge as to any false statements in the insureds’ published materials. Accordingly, the insurer owed a duty to indemnify.

In *Allied World National Assurance Co. v. Great Divide Insurance Co.*, 140 A.D.3d 103 (N.Y. 2016) (applying Ohio Law), the plaintiff demanded arbitration and asserted claims for breach of contract and tortious interference against the insured. The court found that the tortious interference claim potentially implicated coverage, but that the Knowledge of Falsity Exclusion precluded coverage, as the demand specifically alleged that the insured acted knowingly and intentionally. The court noted that Ohio law requires intentional conduct to state a claim for tortious interference. The court also explained that the same conduct supported the Plaintiff’s breach of contract claim.

In *PeopleKeys, Inc. v. Westfield Insurance Co.*, No. 100 WDA 2015, 2016 WL 765458 (Pa. Feb. 25, 2016) (applying Pennsylvania law), a counterclaim was filed against the insured for unfair competition, alleging the insured’s suit was sham litigation. The court did not address whether the unfair competition claim constituted “personal and advertising injury,” but instead found that the Knowledge of Falsity Exclusion precluded coverage. The court explained that the counterclaim alleged that the insured knew that its claims were baseless, but nevertheless instituted sham litigation with the intent of injuring the counter-plaintiff’s competitive ability and interfering with the counter-plaintiff’s business relationships.

In *Evanston Insurance Co. v. Clarte, Inc.*, 158 F. Supp. 3d 1110 (W.D. Wash. 2016) (applying Washington law), the insured was sued for misappropriation of trade secrets, violation of the Lanham Act, violation of Unfair Business Practices and Consumer Protection Act, and related claims. The complaint alleged that the insured and other defendants “executed and concocted a scheme” to misappropriate the plaintiff’s trade secrets and engaged in certain conduct to “conceal their improper activity.” As part of that scheme, it was alleged that the insured intentionally, willfully and wrongfully interfered with the plaintiff’s business and allegedly “made false, misleading or deceptive representations” to third-parties regarding the insureds’ products. The court explained that even if the allegations in the complaint implicated coverage, which the court held they did not, the Knowledge of Falsity Exclusion precluded coverage because the insured allegedly acted with the knowledge of the falsity of their claims and actions.

### C. Publication of Material Before Inception of Policy (“Prior Publication Exclusion”)

In *Hanover Insurance Co. v. Anova Food, LLC*, No. 14-00281 HG-RLP, 2016 WL 3620730 (D. Haw. June 29, 2016) (applying Florida law), the insureds and their insurer funded the settlement of certain claims against the insureds for patent infringement, unfair competition and deceptive trade practices, based on the insureds’ false advertisements that their fish products were treated by a clearsmoke process, which the insureds represented as being a superior process to the plaintiff’s tasteless smoke process. The complaint expressly alleged that the insureds’ conduct constituted disparagement and “the misappropriation or infringement of advertising ideas, style of doing business, title and slogan.” Without addressing the other enumerated offenses, the court found that the claims implicated the disparagement offense. The court further found that the Prior Publication Exclusion did not apply because the insurer failed to establish that the disparaging statements were first made before the insurer’s policy period. Accordingly, the insurer owed a duty to indemnify.

In *Design Basics, LLC v. Fox Cities Construction Corp.*, No. 13-c-548, 2016 WL 5485185 (E.D. Wis. Feb. 9, 2016) (applying Wisconsin law), the insured was sued for infringing the plaintiff’s copyrighted home designs. The court found that a portion of the alleged injuries were directly attributable to the insured’s advertising activities, as the complaint alleged that the insured placed the copyrighted designs on a website. However, the court held that because the insured published the plaintiff’s plans and constructed homes prior to the inception of the policies, the Prior Publication Exclusion applied. Therefore, the court found no duty to defend.

In *Design Basics LLC v. Best Built Inc.*, No. 14-cv-597, 2016 WL 1060253 (E.D. Wis. March 15, 2016) (applying Wisconsin law), the insured was sued for copyright infringement after displaying certain architectural work copyright designs on its website and building homes that constituted derivatives of the copyrighted works. The court held that although re-production or successive distribution of the same infringing work is a “new wrong” under copyright law, such “new wrong” does not apply to application of the Prior Publication Exclusion. The court explained that the purpose of the Prior Publication Exclusion is to exclude damages for “advertising injury” arising out of infringing material published before the policy period and then republished during the policy period. Accordingly, the court found that there was no duty to defend.

In *Boehm v. Scheels All Sports, Inc.*, No. 15-cv-379-jdp, 2016 WL 4386104 (W.D. Wis. Aug. 17, 2016) (applying Wisconsin and Illinois law), the insureds were sued by sports photographers for copyright infringement for allegedly making and selling unauthorized reproductions of their work. Three different insurance companies issued a policy to three different insureds. As to one of the insureds, the court found that the allegations that the insured published listings of the infringing photographs for sale, constituted an “advertisement.” However, the court found that the Prior Publication Exclusion precluded coverage for that insured, because the insured’s discovery responses established that the insured published the offending photographs before the policy period.

#### **D. Criminal Acts**

In *United States Fire Insurance Co. v. Fea*, No. 1:16-cv-00173, 2016 WL 7395691 (D. Haw. Dec. 2, 2016) (applying Hawaii law), the insured was sued after its employee trapped the plaintiff in her room and sexually assaulted her after installing a TV at her residence. The court found that the employee’s sexual assault was a criminal act, coverage for which was barred by the Criminal Acts Exclusion. Thus, no duty to defend was owed.

#### **E. Contractual Liability**

In *X2 Biosystems, Inc. v. Federal Insurance Co.*, 656 Fed. Appx. 864 (9th Cir. 2016) (applying Washington law), the insured was sued for breach of special relationship and conversion based on a Technology Licensing Agreement. The court found that the claims fell within the policy’s Contractual Liability Exclusion because the breach of special relationship and conversion claims were not independent of the insured’s contractual liability. Accordingly, no duty to defend was owed.

#### **F. Breach of Contract**

In *National Fire Insurance Co. of Hartford v. E. Mishan & Sons, Inc.*, No. 15-2248, 2016 WL 3079958 (2d Cir. June 1, 2016) (applying New York law), the insured was sued in two lawsuits for engaging in a scheme to defraud customers that included deceptively trapping customers into recurring credit card charges and disclosing customers’ private information. The first lawsuit alleged: (1) violations of the Illinois Consumer Fraud and Deceptive Business Practices Act; (2) fraud by omission; (3) breach of contract and (4) unjust enrichment. The other alleged: (1) violations of the Michigan Consumer Protection Act; (2) fraud by omission; (3) breach of contract; (4) unjust enrichment and (5) violations of TCPA. Without analysis, the court found that the Breach of Contract Exclusion applied to preclude coverage for the breach of contract claims, but not the unjust enrichment claims. Thus, a duty to defend was owed.

In *Spaulding Decon, LLC v. Crum & Forster Specialty Insurance Co.*, 158 F. Supp. 3d 1293 (M.D. Fla. 2016) (applying Florida law), the insured was sued for trademark and intellectual property infringement, which suit was settled. In a second lawsuit, the insured was sued for breach of the confidential settlement agreement, which prohibited the insured from disparaging the plaintiff. The court found that the plaintiff’s use of the conclusory buzz-word “disparaging” in its complaint was not sufficient to trigger a duty to defend. The court also found that the facts alleged in the complaint only supported a breach of contract claim, coverage for which was precluded by the Breach of Contract Exclusion. Thus, the court found no duty to defend was owed.

In *Food Market Merchandising Inc. v. West Bend Mutual Insurance Co.*, No. 15-3347, 2016 WL 1192661 (D. Minn. March 28, 2016) (applying Minnesota Law), a counterclaim was asserted against the insured for trademark and service mark infringement, unfair competition, false designation of origin, trademark dilution, counterfeiting, contributory trademark infringement, fraud, breach of contract and

rescission, arising out of the insured’s continued use of the “got milk?” mark, after its right to do so was terminated under an amended license agreement. The court found that the counterclaims implicated the “use of another’s advertising idea in your ‘advertisement’” offense. However, the court held the Breach of Contract Exclusion precluded coverage. The court explained that the counterclaims related to the unauthorized use of the mark under the amended license agreement. Thus, the counterclaims flowed from the breach of contract. Accordingly, the court found no duty to defend was owed.

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (applying Texas law), the insured was sued for trademark infringement, false and/or misleading advertising, deceptive business practices, unfair competition, breach of contract, and breach of good faith and fair dealing for forming a competing business and utilizing similar treatment methods and programs. Such conduct allegedly breached a “participating-provider” agreement with the plaintiff. The court determined that the allegations of the complaint incidentally arose, in part, out of a breach of contract. Thus, the court held that the Breach of Contract Exclusion precluded a duty to defend.

In *Allied World National Assurance Co. v. Great Divide Insurance Co.*, 140 A.D.3d 103 (N.Y. 2016) (applying Ohio Law), the plaintiff demanded arbitration and asserted claims for breach of contract and tortious inference claims against the insured. The court found that the Knowledge of Falsity Exclusion and the Breach of Contract Exclusion applied to preclude coverage. Accordingly, no duty to defend was owed.

## **G. Quality of Goods**

In *Hanover Insurance Co. v. Anova Food, LLC*, No. 14-00281 HG-RLP, 2016 WL 3620730 (D. Haw. June 29, 2016) (applying Florida law), the insureds and their insurer funded the settlement of certain claims against the insureds for patent infringement, unfair competition and deceptive trade practices, based on the insureds’ false advertisements that their fish products were treated by a clearsmoke process, which the insureds represented as being a superior process to the plaintiff’s tasteless smoke process. The complaint expressly alleged that the insureds’ conduct constituted disparagement and “the misappropriation or infringement of advertising ideas, style of doing business, title and slogan.” Without addressing the other enumerated offenses, the court found that the claims implicated the disparagement offense. The court also found that the Quality of Goods Exclusion and Knowledge of Falsity Exclusion did not apply because no factual findings were made in the underlying action to support application of the exclusions. Accordingly, the insurer owed a duty to indemnify.

In *Vitamin Health Inc. v. Hartford Casualty Insurance Co.*, No. 15-10071, 2016 WL 2622353 (E.D. Mich. May 9, 2016) (applying Michigan law), the insured, an eye health supplement manufacturer, was sued for patent infringement and false advertising. The court found that there could be no disparagement where a policyholder is alleged to have misrepresented the content of its own product, and not its competitor’s. The court also found that the Quality of Goods Exclusion barred coverage

because the claims arose out of the insured’s failure to conform with its representations. Therefore, the claims did not implicate coverage and the insurer owed no duty to defend.

In *Selective Way Insurance Co. v. Crawl Space Door System, Inc.*, 162 F. Supp. 3d 547 (E.D. Va. 2016) (applying Virginia law), the insured was sued for unfair competition, negligent misrepresentation, and trademark infringement. The insured argued that although the complaint did not allege direct claims of disparagement, it alleged claims of general superiority and direct comparisons to the plaintiff’s product which constituted disparagement. The court did not address whether such allegations constituted disparagement but instead found that the Quality of Goods Exclusion precluded coverage. The court explained that the allegations related to the failure of the insured’s products to live up to the statements of quality and performance contained in their advertisements.

#### **H. Infringement of Copyright, Patent, Trademark or Trade Secret (“IP Exclusion”)**

In *Hammond v. U.S. Liability Insurance Co. & Group*, No. 15-1349, 2016 WL 929288 (3d Cir. March 10, 2016) (applying Pennsylvania law), the insured was sued for breach of contract, conversion, and intentional interference with existing and prospective contractual relations regarding the use of computer software. The court held that the plaintiff’s request for prevailing party fees did not constitute a malicious prosecution claim. The court further held that the IP Exclusion precluded coverage because the attorney’s fees sought were recoverable under statutes involving bad faith trademark and copyright claims. Accordingly, no duty to defend was owed.

In *S. Bertram v. Citizens Insurance Co. of America*, 657 Fed. Appx. 477 (6th Cir. 2016) (applying Michigan law), the insured was sued for trademark infringement, unfair competition, trade name infringement, and trademark dilution, for the insured’s sale of food products using the same name trademarked by the plaintiff. The insured argued that the claims included allegations of disparagement and trade dress infringement. The court disagreed and held that the complaint only alleged trademark infringement claims, which were barred by the IP Exclusion. Thus, no duty to defend was owed.

In *Travelers Property Casualty Co. of America v. KFx Medical Corp.*, 637 Fed. Appx. 989 (9th Cir. 2016) (applying California law), the counterclaims alleged against the insured did not state a covered claim, so the court considered whether the counterclaims might fairly be amended to state a claim for abuse of process or product disparagement. The court found that the possibility of amendment was too speculative and determined there was no factual support for any amendment. The court further found that even if amended, the IP Exclusion otherwise precluded coverage. Thus, the court found that no duty to defend was owed.

In *Infinity Micro Computer v. Continental Casualty Co.*, No. CV 15-04777, 2016 WL 5661755 (C.D. Cal. Sept. 29, 2016) (applying California law), the insured was sued for trademark infringement, trademark counterfeiting, false advertising, trademark dilution, statutory dilution, unfair competition,

and false advertisement, for the unauthorized use of a trademarked “Cisco Premiere Certified Partner” logo on its website and selling counterfeit products. The court held that the allegations did not implicate the “use of another’s advertising idea in your ‘advertisement’” offense. The court also found that the IP Exclusion otherwise precluded coverage. Accordingly, no duty to defend was owed.

In *Mendocino Wine Group, LLC v. QBE Americas, Inc.*, No. 15-cv-06342-HSG, 2016 WL 4154853 (N.D. Cal. Aug. 5, 2016) (applying California law), the insured was sued for a declaration that it could no longer use the plaintiff’s trademark, unfair competition, violation of the common law right of publicity, violation of statutory right of publicity under California civil code, and cancellation of a trademark registration. The insured was a winemaker using the plaintiff’s name as a trademark. With regards to the misappropriation of likeness claim, the court found that the plaintiff’s right of publicity was an intellectual property right that was barred by the IP Exclusion. The court also explained that the insured’s alleged trademark infringement standing alone did not constitute a defamatory statement. Accordingly, the court found that no duty to defend was owed.

In *St. Paul Mercury Insurance Co. v. Tessera, Inc.*, No. 12-cv-01827, 2016 WL 4719275 (N.D. Cal. Sept. 9, 2016) (applying California law), the insured entered into a licensing agreement with PTI that granted PTI a limited license to use its semiconductor packaging patents. PTI sued the insured for: declaratory judgment concerning PTI’s right to terminate the license, breach of the license and breach of implied covenant of good faith and fair dealing, fraud, and patent misuse. The court previously determined that the complaint could potentially allege a claim for product disparagement. The issue before the court was whether the IP Exclusion precluded coverage. The court held that the license did not convey an intellectual property right and that the complaint did not allege a violation of any intellectual property right. The court further explained that patent misuse is not a true intellectual property claim. Accordingly, the court held the IP Exclusion did not apply to preclude coverage, and thus, the insurer owed a duty to defend.

In *Foliar Nutrients, Inc. v. Nationwide Agribusiness Insurance Co.*, 133 F. Supp. 3d 1372 (M.D. Ga. 2016) (applying Georgia law), a counterclaim against the insured was filed alleging Lanham Act violations, tortious interference, and unfair competition. It was alleged that the insured contacted the counter-plaintiff’s customers, represented that the two were in litigation, and stated that they should not purchase the plaintiff’s products. The insurer argued that the IP Exclusion precluded coverage for the claims. The court disagreed and found that the counterclaim alleged a claim for disparagement, to which the IP Exclusion did not apply. Accordingly, the insurer had a duty to defend.

In *Hanover Insurance Co. v. Anova Food, LLC*, No. 14-00281 HG-RLP, 2016 WL 3620730 (D. Haw. June 29, 2016) (applying Florida law), the insureds and their insurer funded the settlement of certain claims against the insureds for patent infringement, unfair competition and deceptive trade practices, based on the insureds’ false advertisements that their fish products were treated by a clearsmoke process, which the insureds represented as being a superior process to the plaintiff’s tasteless smoke process. The complaint expressly alleged that the insureds’ conduct constituted disparagement and “the

misappropriation or infringement of advertising ideas, style of doing business, title and slogan.” Without addressing the other enumerated offenses, the court found that the claims implicated the disparagement offense. The court also held that the IP Exclusion did not preclude coverage because the disparagement claim existed independent of the patent infringement. Accordingly, the insurer owed a duty to indemnify.

In *Diamond State Insurance Co. v. Duke*, No. 14 CV 7764, 2016 WL 1247473 (N.D. Ill. March 30, 2016) (applying Illinois law), the insured was sued by DR Distributors which distributes e-cigarettes. The suit alleged: 1) Federal Trademark Counterfeiting and Infringement; 2) Federal Unfair Competition and False Designation of Origin; 3) Common Law Unfair Competition; and 4) violation of the Illinois Deceptive Trade Practices Act. The court held that the IP Exclusion did not preclude coverage because the allegations were vague such that the alleged tortious conduct may have included conduct other than trademark infringement, including disparagement. Thus, the insurer had a duty to defend.

In *Vitamin Health Inc. v. Hartford Casualty Insurance Co.*, No. 15-10071, 2016 WL 2622353 (E.D. Mich. May 9, 2016) (applying Michigan law), the insured, an eye health supplement manufacturer, was sued for patent infringement and false advertising. The IP Exclusion at issue precluded coverage for claims arising out of “any injury or damage alleged in any ... ‘suit’ that also alleged an infringement or violation of any intellectual property right ... regardless of whether this insurance would otherwise apply.” Based on the language of the IP Exclusion at issue, the court held that the IP Exclusion applied to preclude coverage for both the patent claim and the false advertising claim.

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 4:15-CV-135-Y, 2016 WL 3916005 (N.D. Tex. July 20, 2016) (applying Texas law), the insured was sued for trademark infringement, false and/or misleading advertising, deceptive business practices, unfair competition, breach of contract, and breach of good faith and fair dealing for forming a competing business and utilizing similar treatment methods and programs. The court held that the complaint did not state a claim for misappropriation of advertising ideas, but merely stated a claim for trademark infringement. The court further explained that the claims arising out of trademark infringement and misappropriation of trade secrets were excluded from coverage by the IP Exclusion.

In *Selective Way Insurance Co. v. Crawl Space Door System, Inc.*, 162 F. Supp. 3d 547 (E.D. Va. 2016) (applying Virginia law), the insured was sued for unfair competition, negligent misrepresentation, and trademark infringement. The complaint alleged that the insured used the plaintiff’s registered trademark as a tag and meta-tag in the coding of its website. The court determined that such claims were excluded by the IP Exclusion. Thus, the court found no duty to defend.

In *Evanston Insurance Co. v. Clarte, Inc.*, 158 F. Supp. 3d 1110 (W.D. Wash. 2016) (applying Washington law), the insured was sued for misappropriation of trade secrets, violation of the Lanham Act, violation of Unfair Business Practices and Consumer Protection Act, and related claims. The IP Exclusion in the first policy at issue expressly excluded coverage for “...unfair competition, violation of

the Lanham Act ... or misappropriation of trade secrets.” Thus, the court found that the IP Exclusion precluded coverage for the counts asserting such claims in the complaint. The IP Exclusion in the second and third policies expressly excluded coverage for “infringement ... of trade secret or other intellectual property rights.” Without analysis, the court found that the IP Exclusion in the second and third policies precluded coverage for the trade secret claim only.

In *Holyoke Mutual Insurance Co. v. Vibram USA, Inc.*, 33 Mass. L. Rptr. 564 (Mass. 2016) (applying Massachusetts law), the insured was sued for violation of the Washington Personality Rights Act, unfair or deceptive act, false designation, and unjust enrichment. After the death of a racing athlete, the insured applied for a trademark using the deceased’s name to sell shoes and running wear. The heirs asserted that they owned the intellectual property rights associated with the deceased’s name. The court held that an insurance policy providing coverage for violation of the right to privacy does not cover claims for unauthorized commercial use of a person’s name. The court also found that the unauthorized commercial use of a person’s name constitutes an infringement of an intellectual property right, and therefore, the IP Exclusion otherwise applied to preclude coverage.

#### **I. Media & Internet Business Exclusion (“Media Business Exclusion”)**

In *Ace American Insurance Co. v. Dish Network*, No. 13-cv-00560-REB-MEH, 2016 WL 1182744 (D. Colo. March 28, 2016) (applying Colorado Law), it was alleged that the insured, DISH Network, violated the TCPA by making unsolicited phone calls. The court held that the Media Business Exclusion precluded coverage because DISH is in the business of broadcasting, and that the terms “broadcasting” and “telecasting” encompassed DISH’s transmissions. Thus, the court found the insurer had no duty to defend or indemnify.

#### **J. Electronic Chat Rooms Or Bulletin Boards**

#### **K. Unauthorized Use of Another’s Name**

#### **L. Pollution Exclusion**

#### **M. Willful Violation of a Penal Statute**

#### **N. Employment-Related Practices Exclusion**

In *Cincinnati Insurance Co. v. Global Caravan Technologies, Inc.*, No. 1:14-cv-01643-TWP-DML, 2016 WL 4194520 (S.D. Ind. Aug. 8, 2016) (applying Indiana law), the insured company was sued after a failed business relationship with the plaintiff. The insured company allegedly voted to remove the plaintiff as a partner through the passing of certain frivolous and unconventional bylaws. The court found the claims against the insured arose out of the plaintiff’s employment relationship. The court also found that the policy was not intended to protect the insured from suits arising out of internal, business

related disagreements. Therefore, the court held that the Employment-Related Practices Exclusion precluded coverage and that the insurer did not owe any duty to defend.

### O. Professional Services Exclusion

In *Sentinel Insurance Co., Ltd. v. Cogen*, No. 15 C 8612, 2016 WL 4270213 (N.D. Ill. Aug. 15, 2016) (applying Illinois law), the insured law firm was sued for defamation, alleging that one of its attorneys sent an e-mail to the law clerk of a judge, asserting that the plaintiff had committed serious ethical and professional misconduct. The court found that the Professional Services Exclusion did not apply, as the reporting of suspected attorney misconduct is a professional duty that did not involve service to another. However, the court ultimately found that the insurer had no duty to defend based on the insured’s failure to comply with the policy’s notice conditions.

In *Caveo, LLC v. Citizens Insurance Co. of America*, No. 15-cv-6200, 2016 WL 5477537 (N.D. Ill. Sept. 29, 2016) (applying Illinois law), the insured was sued for theft of copyrighted material and other confidential information during a webinar conducted by the insured. The court declined to apply the Professional Services Exclusion, as the solicitation of potential customers to purchase consulting services and software did not constitute the actual provision of a professional service. Thus, the court found that the insured owed a duty to defend.

### P. Distribution of Material in Violation of Statute (“Distribution of Material Exclusion”)

In *Regent Insurance Co. v. Integrated Pain Management, S.C.*, 4:14-CV-1759, 2016 WL 6330386 (E.D. Miss. Oct. 27, 2016) (applying Illinois law), the insured was sued for sending unsolicited marketing facsimiles in violation of the TCPA and for conversion. The policy at issue was in effect from November 18, 2010 to November 18, 2011. Citing to prior Illinois decisions, the court found that the Distribution of Material Exclusion applied to preclude coverage for both the TCPA violation and conversion claims, as the conduct underlying both claims related to the insured’s violation of the TCPA. Therefore, no duty to defend was owed.

In *Evanston Insurance Co. v. Gene by Gene, Ltd.*, 155 F. Supp. 3d 706 (S.D. Tex. 2016) (applying Texas Law), the insured was sued for improperly publishing the plaintiff’s DNA results on its website without the plaintiff’s consent in violation of the Genetic Privacy Act. The court found that the allegations fell within the publication of material that violates a person’s right to privacy offense. The court determined that the Distribution of Material Exclusion did not apply to preclude coverage, because the Genetic Privacy Act does not concern unsolicited communications to consumers. Thus, the court found that the insurer owed a duty to defend.

In *Fayezi v. Illinois Casualty Co.*, 58 N.E.3d 830 (Ill. App. Ct. 2016) (applying Illinois law), the insured was sued for violating the TCPA, conversion and violation of the Consumer Fraud and Deceptive Business Practices Act, for the insured’s alleged transmission of an unsolicited fax. The court held that

the Distribution of Material Exclusion precluded coverage under the policy, and explained that all counts asserted liability arising out of the TCPA. Thus, the court concluded that the insured had no duty to defend.

In *CE Design Ltd. v. Continental Casualty Co.*, 2016 IL App. (2d) 150530-U (2016) (applying Texas Law and Illinois Law), the insured was sued for violation of the TCPA, conversion and violation of the Consumer Fraud Act. The court found that each count incorporated the complaint’s general allegations, which alleged that the unsolicited facsimile advertisement sent by the insured violated the TCPA. Thus, the court found that each count arose from the same conduct that was the basis for the TCPA claim. Accordingly, the court held that coverage was precluded by the Distribution of Material Exclusion and that no duty to defend was owed.

In *Penn-America Insurance Co. v. Tomei*, No. 480 WDA 2015, 2016 WL 2990093 (Pa. May 24, 2016) (applying Pennsylvania law), the insured was sued by 37 plaintiffs whose claims arose from the videotaping of patrons as they undressed during tanning sessions, and the subsequent posting of these videos to the public by a third-party videographer. The court found that because the complaint did not allege that the third-party videographer acted on the insured’s behalf when he videotaped and posted the videos on the internet, the Distribution of Material Exclusion did not apply.

**Q. Defects or Errors in Testing**

**R. Entertainment Industry Exclusion**

In *Princeton Express v. DM Ventures USA, LLC*, 15-CV-81685, 2016 WL 3950933 (S.D. Fla. July 19, 2016) (applying Florida law), the insured bar was sued for violation of the Lanham Act, unauthorized publication of name or likeness, invasion of privacy, civil theft, conversion, violation of Florida Deceptive and Unfair Trade Practices Act, unfair trade, defamation, fraudulent misrepresentation, unjust enrichment, negligence, and respondeat superior, by eight models who alleged that their photos were used in the insured’s advertisements to promote the bar. A “Field of Entertainment” endorsement in the policy precluded coverage for all claims involving infringement of intellectual property, invasion of privacy, and disparagement. The court found that the endorsement rendered coverage under the policy illusory, which is prohibited by Florida law. Thus, the court held that the insurer owed a duty to defend.

**S. Section 533 of the California Insurance Code**

**T. Business Pursuits**