Tressler LLP

2017

Annual Update

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

Covering cases from January 2017 – December 2017

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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 AN ENUMERATED OFFENSE

In *Vitamin Health, Inc. v. Hartford Casualty Insurance Co.*, 685 Fed. Appx. 477 (6th Cir. 2017) (applying Michigan law), the insured was sued for falsely advertising its product. The insured argued that the underlying action implicated "personal and advertising injury" coverage because the complaint alleged that the insured's mislabeling of its products injured the plaintiff. The court found that because the plaintiff alleged that the insured made false or misleading statements about its own products, such allegations did not constitute an explicit disparagement claim. The court also found that implied disparagement was not alleged as the insured did not make claims about the superiority of its own product, nor was there any implication of such an allegation. The court noted that no courts have recognized disparagement by implication to include claims alleging that an insured has made false statements about its own products while not making any comparison to another's product. Accordingly, as the complaint did not allege any of the other offenses in the definition of "personal and advertising injury," the court held that there was no duty to defend.

In *IVFMD Florida, Inc. v. Allied Property & Casualty Insurance Co.*, 679 F. App'x 769 (11th Cir. 2017) (applying Florida law), a counterclaim against the insured sought a declaration of trademark invalidity with respect to the mark "IVFMD." The court found that the claimant did not allege the "use of another's advertising idea in your 'advertisement'" offense as the claimant did not allege that the use of "IVFMD" was the claimant's idea or concept for the promotion of its services. The court also found that the claimant did not allege the "infringement of another's copyright, trade dress or slogan in your 'advertisement'" offense as the claimant did not allege that it had any copyright, trade dress or slogan related to the mark, nor did the counterclaim otherwise allege any trade dress infringement under the Lanham Act. Accordingly, the court held that the allegations did not allege "personal and advertising injury." Thus, the insurer did not owe a duty to defend.

In *Mt. Hawley Ins. Co. v. Crane Dev. Corp.*, No. 2:16-CV-0892-JAM-EFB, 2017 WL 928716 (E.D. Cal. Mar. 9, 2017) (applying California law), the insured was sued for negligent misrepresentation and breach of fiduciary duty, regarding defects in construction. The complaint alleged that the insured "submitted incorrect invoices for payment; altered lien releases of subcontractors to state incorrect amounts; submitted construction draw requests that overstated the dollar amount owed; failed to perform proper accounting; and accepted overpayment from [the underlying plaintiff] based on its fraudulent invoices." In a footnote, the court held that the negligent misrepresentation and breach of fiduciary duty claims did not allege any "personal and advertising injury." Accordingly, no duty to defend was owed.

In *Sentinel Ins. Co. v. Yorktown Indus. Inc*., No. 14-cv-4212, 2017 WL 446044 (N.D. Ill. Feb. 2, 2017) (applying Illinois law), the insured was sued for the alleged hiring of a competitor's employees and use of a confidential customer list. The court held that the complaint did not allege "personal and advertising injury," as the complaint did not allege use of the plaintiff's advertising plans, schemes, or designs in contacting customers, nor did the complaint allege any misappropriation of the plaintiff's advertising strategies. The complaint also did not allege that the plaintiff was injured by the copying of the plaintiff's customer list or other trade secrets in an "advertisement," nor did the complaint allege that the insured publically disseminated the customer list or proprietary business information. The court further held that the IP exclusion also applied to preclude coverage because at least one of the counts alleged an excluded intellectual property claim. Accordingly, the court held that no coverage was owed.

In *Parker v. Farm Bureau Prop. & Cas. Ins. Co.*, 240 F. Supp. 3d 1140 (D. Kan. 2017) (applying Kansas law), the insured was sued for selling wheat seed in violation of the Plant Variety Protection Act ("PVPA"). Under the PVPA, the plaintiff was given the exclusive right to market Fuller wheat. The court found that because the insured advertised the Fuller wheat for sale, such constituted a compensable infringement of the plaintiff's rights, and thus, the insured's advertisement could be considered an infringement of title, which constituted "personal and advertising injury" as defined by the policy. Therefore, the court found that a duty to defend was owed.

In *Unwired Solutions Inc. v. Ohio Security Insurance Co.*, 247 F. Supp. 3d 705 (D. Md. 2017) (applying Maryland law), the insured was sued for tortious interference with contract and trademark infringement for allegedly perpetrating a "Bulk Handset Trafficking Scheme" which took advantage of Sprint's selling of subsidized phones for use on its network. The insured argued that advertising on its website constituted disparaging material. The court found that the complaint did not allege "personal and advertising injury." The court explained that the allegations that the insured promoted its product on its website, which had the effect of damaging the plaintiff's reputation, and that the insured perpetrated a scheme that harmed the plaintiff, did not constitute disparagement. The court also found that the complaint did not allege implied disparagement by alleging that the insured falsely portrayed its phones as equivalent to the plaintiffs. Accordingly, the court held that no duty to defend was owed.

In *United Ohio Insurance Co. v. Durafloor Industrial Flooring and Coating Inc.*, No. HHDCV156062735S, 2017 WL 961453 (Sup. Ct. Conn. Jan. 24, 2017) (applying Connecticut law), the insured was sued for misappropriation of trade secrets relating to the formula and processes for floor coating systems and products. The court found that the complaint did not seek damages because of "personal and advertising injury," as the complaint alleged harm caused by misappropriation of trade secrets, not the advertising of trade secrets. The court further explained that there was no allegation of advertisement. Accordingly, the court found that no duty to defend was owed.

In *Dorsey v. Purvis Contracting Grp., LLC*, No. 17-CA-369, 2017 WL 6603819 (La. App. 5 Cir. Dec. 27, 2017) (applying Louisiana law), the insured was sued in connection with a renovation project. The plaintiff alleged that the insured misrepresented that he was a licensed general contractor rather than a licensed home improvement contractor. The court held that the plaintiff's fraud claims and unfair practice claims related to the insured's alleged false advertisement as a licensed general contractor and did not implicate the "personal and advertising injury" liability coverage. Therefore, there was no duty to defend.

B. THE OFFENSE MUST BE COMMITTED DURING THE POLICY PERIOD

In *Millennium Labs., Inc. v. Darwin Select Ins. Co.*, 676 F. App'x 734 (9th Cir. 2017) (applying California law), the insured was sued in two third-party disparagement lawsuits. The court held that the claims alleged against the insured implicated the "personal and advertising injury" coverage. The court also held that the policy's "prior noticed claims" exclusion did not preclude coverage, despite the fact that the insured had reported similar claims to prior insurers. The court explained that the insured could not have reported the events underlying the potential disparagement claim to a previous insurer because those events occurred during the current policy period. Thus, the insurer owed a duty to defend.

In *Am. Econ. Ins. Co. v. Hartford Fire Ins. Co.*, 695 Fed. Appx. 194 (9th Cir. 2017) (applying Montana law), the insured was sued in two actions (i.e. Washington and Byrd Suits) alleging that the insured used spy software to track customers who rented laptops by secretly taking photographs using the laptop's webcam, capturing keystrokes, and taking screenshots. The court held that the Washington Suit did not implicate coverage because it did not specifically allege that the insured published private material. The court also found that the Washington Suit alleged misconduct that was committed after the subject policies expired. Thus, no duty to defend was owed.

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

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

In *Highland Holdings, Inc. v. Mid-Continent Casualty Co.*, 687 Fed. Appx. 819 (11th Cir. 2017) (applying Florida law), the insured was sued for copyright infringement for advertising, designing, constructing and participating in the construction of one or more residences that purportedly copied three house plans registered by the plaintiff, which was later settled. The court found that the complaint did not allege an "advertising injury." The court explained that a schematic plan is not an "advertisement" because a drawing that shows the layout of a house does not provide notice about the product or services provided by a homebuilder. Accordingly, the court held that the insurer did not owe a duty to indemnify the insured.

In *Allstate Insurance Co. v. Airport Mini Mall, LLC*, 265 F. Supp. 3d 1356 (N.D. Ga. 2017) (applying Georgia law), the insured was sued for contributory trademark infringement as landlords of tenants selling counterfeit sunglasses. The complaint alleged that the insured facilitated the counterfeiting activities of its tenants at the discount mall by supplying the means for the tenants to infringe the plaintiff's trademarks in order to profit from the revenues it produced. The court held that the claim was not an "advertising injury" because the claim did not arise out of the insured's advertisement and that there was no causal connection between the alleged advertising and the alleged injury. The court also found that the complaint did not implicate the "infringement of a copyright, trade dress or slogan" and the "use of another's advertising idea" offenses. Accordingly, the court found that no duty to defend or indemnify was owed.

In *Sentinel Ins. Co. v. Yorktown Indus. Inc*., No. 14-cv-4212, 2017 WL 446044 (N.D. Ill. Feb. 2, 2017) (applying Illinois law), the insured was sued for the alleged hiring of a competitor's employees and use of a confidential customer list. The court held that the complaint did not allege "personal and advertising injury", as the complaint did not allege use of the plaintiff's advertising plans, schemes, or designs in contacting customers, nor did the complaint allege any misappropriation of the plaintiff's advertising strategies. The complaint also did not allege that the plaintiff was injured by the copying of the plaintiff's customer list or other trade secrets in an "advertisement," nor did the complaint allege that the insured publically disseminated the customer list or proprietary business information. Accordingly, the court held that no coverage was owed.

In *Standard Gen. L.P. v. Travelers Indemnity Co. of Connecticut*, No. 17CV0548, 2017 WL 3601181 (S.D.N.Y. Aug. 18, 2017) (applying New York law), the insured was sued for defamation, false light, "unfair business acts" and false advertising after the insured made a statement to the press falsely claiming that the plaintiff was terminated for cause based on an independent, third-party investigation into his alleged misconduct. The insured argued that the statement constituted an "advertisement" because it was intended to allay its investors' concerns regarding the plaintiff's employer and to promote further investment in its fund. However, the court held that the statement did not constitute an "advertisement" because the statement was not about the insured's goods, products, or services. Rather, the court found that the statement was an informative statement sent to press outlets clarifying the company's stance on the plaintiff's employment and the circumstances and propriety of his termination. The court also held that the mere fact that the complaint alleged a claim for false advertising did not establish that the statement constituted an "advertisement." Accordingly, the court held that the complaint did not allege an "advertising injury." However, the court found that the complaint alleged "personal injury". Accordingly, the court held that a duty to defend was owed.

In *Hattenhauer Distributing Co. v. Nationwide Agribusiness Insurance Co.*, No. 3:16-CV-1703-PK, 2017 WL 2821936 (D. Or. June 29, 2017) (applying Oregon law), the complaint alleged that the insured failed to conform to the plaintiff's standards and specifications as required under certain franchise agreements, as the insured's pizza store did not use the plaintiff's proprietary blend of cheese for plaintiff's brand of pizzas. The court found that the complaint did not allege any infringement regarding the appearance of the packaging itself, and thus, the complaint did not allege a claim for trade dress infringement. The court also found that the complaint did not allege trade dress infringement in an advertisement because the complaint did not allege that the pizza packaging was broadcasted to the public, only that the insured sold the pizza in packaging bearing the plaintiff's trademark. The court further found that even if the underlying claim alleged an "advertising injury," the Breach of Contract exclusion and Quality of Goods exclusion precluded coverage. Thus, the court held that no duty to defend was owed.

In *Colony Ins. Co. v. Custom Ag Commodities, LLC*, No. 4:16-CV-83, 2017 WL 2936208 (E.D. Tex. July 10, 2017) (applying Texas law), a dog food manufacturer was sued for false advertising and commercial disparagement because its product contained chicken by-product, which was contrary to its product labels. Thereafter, a third-party complaint was filed against the insured for breach of contract, which alleged that the insured supplied adulterated chicken by-product instead of single ingredient chicken meal. The insured argued that its liability arose out of the false advertising and disparagement claims against the dog food manufacturer. The insured argued that because the definition of "personal and advertising injury" did not require that the claims arise out of the named insured's slanderous and libelous statements, the insurer intended to provide coverage to insureds who are parties to litigation involving false advertising, irrespective of whether the insured actually committed the advertising offense. The court found that the insured was only covered when the insured committed an offense. The court determined that the third party complaint sought indemnification or contribution and did not allege any slander, libel or disparagement. The court also held that the Breach of Contract exclusion applied to preclude coverage. Thus, there was no duty to defend or indemnify the insured.

In *Boehm v. Heyrman Printing, LLC v. Event USA Corp.,* No. 16-cv-405-jdp, 2017 WL 943969 (W.D. Wis. Mar. 09, 2017) (applying Wisconsin law), the insured was sued for copyright infringement for printing a photographer's copyrighted work without authorization. The court held that the policy only covered copyright infringement if it occurred in the insured's advertisement. The court explained that the complaint did not allege that the insured was indirectly liable for any act of infringement that occurred in an advertisement, and even if the complaint had, the policy only covered infringement in the insured's advertisements. Accordingly, no duty to defend or indemnify was owed.

In *United Ohio Insurance Co. v. Durafloor Industrial Flooring and Coating Inc.*, No. HHDCV156062735S, 2017 WL 961453 (Sup. Ct. Conn. Jan. 24, 2017) (applying Connecticut law), the insured was sued for misappropriation of trade secrets relating to the formulae and processes for floor coating systems and products. The court found that the complaint did not seek damages because of "personal and advertising injury," as the complaint alleged harm caused by misappropriation of trade secrets, not the advertising of trade secrets. The court further explained that there was no allegation of any advertisement. Accordingly, the court found that no duty to defend was owed.

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

F. THE SUIT MUST SEEK DAMAGES

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

A. FALSE ARREST, IMPRISONMENT OR DETENTION

In *Evanston Insurance Co. v. Dillard House, Inc.*, 2017 WL 3498953 (N.D. Ga. June 28, 2017) (applying Georgia law), the insured was sued after its employee falsely imprisoned and sexually assaulted a minor child at a festival sponsored by the insured. The court found that the complaint alleged "personal and advertising injury" because it was alleged that the plaintiff suffered bodily injury caused, in part, by false imprisonment. Accordingly, the court found that a duty to defend was owed.

B. MALICIOUS PROSECUTION

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

In *Walden v. Maryland Cas. Co.*, 692 F. App'x 476 (9th Cir. 2017) (applying Montana law), the insured was sued by former students, in part, for wrongful expulsion. The court found that the district court did not err in construing the term "eviction" to mean the denial of a possessory interest in real property and finding that the insurer did not breach its duty to defend by failing to equate expulsion with Coverage B "evictions." Accordingly, the court affirmed the district court's determination that the insurer did not owe a duty to defend.

In *Admiral Indemnity Co. v. 899 Plymouth Court Condominium Association D&K Real Estate Services Corp.*, No. 16 C 5085m, 2017 WL 345559 (N.D. Ill. Jan. 24, 2017) (applying Illinois law), the insured was sued for water damage resulting from water leaks. The court held that the claims for private nuisance and trespass entail a wrongful entry or eviction or other invasion of the right of private occupancy. However, the court held that unless the insured was considered an "owner, landlord or lessor" of the room, dwelling or premises where the invasion

occurred, the claim did not implicate coverage. The court found that the damaged unit was not owned by the insured. Accordingly, the court held that no duty to defend was owed.

In *Allstate Ins. Co. v. McColly Realtors, Inc.*, No. 2:16-CV-00142, 2017 WL 4938154 (N.D. Ind. Oct. 31, 2017) (applying Indiana law), the insured was sued for wrongful death after 3 individuals died when carbon monoxide infiltrated a home they leased. The plaintiff alleged that the homeowner had contracted with the insured, a realtor, for purposes of leasing the home. While the complaint alleged that the premises was leased, not fit for habitation, and that carbon monoxide gas was allowed to infiltrate the living quarters, the court found that the complaint did not allege that the insured committed a wrongful entry or invasion of the property. The court also found that because the insured was not the owner, landlord or lessor of the property, the complaint did not allege wrongful entry committed by or on behalf of the insured as an owner, landlord or lessor of the property. Therefore, the court held that the insurer had no duty to defend.

In *2200 W. Alabama, Inc. v. W. World Ins. Co.*, No. 4:16-CV-2244, 2017 WL 4049272 (S.D. Tex. Sept. 13, 2017) (applying Texas law), the insured was sued by a tenant for its alleged failure to timely negotiate a lease agreement, which prevented the tenant from taking physical possession and opening a restaurant. The insured argued that when negotiations ceased, the plaintiff had a right of occupancy and that physical occupancy of the premises was not required by the policy. The court agreed and held that the "right of private occupancy" plainly meant that occupancy of the premises was unnecessary to implicate the duty to defend provision of the policy. The court explained that the term "possession" referred "to the right to occupy the premises, not necessarily physical occupancy." The court explained that the tenant alleged that it had tenant rights to a space at the premises. Based on the foregoing, the court held that a duty to defend was owed.

In *Grand China Buffett & Grill, Inc. v. State Auto Property & Casualty Co.*, 260 F. Supp. 3d 616 (N.D.W. Va. 2017) (applying West Virginia law), the insured was sued for denying the plaintiff and his service dog from being admitted to its restaurant. The court held that the complaint did not seek damages because of "personal and advertising injury" as the complaint did not allege that the plaintiff had a possessory interest in the restaurant that gave the plaintiff a right to occupy the restaurant, but rather merely alleged that the plaintiff was denied the right to be served with a certain accommodation. Accordingly, no duty to defend or indemnify was owed.

In *McClain v. State Farm Fire & Cas. Co.*, No. 02-16-00315-CV, 2017 WL 817152 (Tex. App. Mar. 2, 2017) (applying Texas law), the insured was sued, in part, for wrongful foreclosure after the insured issued accelerated payment demands and a notice of foreclosure. The insured argued that the allegations potentially could have occurred after the foreclosure sale—after the insured had title to the property—and thus, were injuries "arising out of ... the wrongful

eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling[,] or premises that a person occupies, committed by or on behalf of its owner, landlord[,] or lessor." However, the court found that the complaint did not allege that any of the complained of conduct occurred after the foreclosure sale. Thus, the court found that the complaint did not allege "personal and advertising injury." Accordingly, no duty to defend was owed.

D. DEFAMATION, LIBEL, SLANDER & DISPARAGEMENT

In *Uretek (USA), Inc. v. Cont'l Cas. Co.*, No. 15-20104, 2017 WL 3225700 (5th Cir. July 28, 2017) (applying Texas law), a counterclaim against the insured alleged that the insured made statements to the claimant's customers or potential customers that the claimant could not undertake work on various projects without infringing upon the insured's patent. The court held that a statement to a competitor's customer that the competitor is undertaking work that it has no legal right to undertake disparages that competitor and the services it offers by clear implication. Based on the foregoing, the court found that the counterclaim alleged disparagement. Accordingly, the court found that a duty to defend was owed.

In *Vitamin Health, Inc. v. Hartford Casualty Insurance Co.*, 685 Fed. Appx. 477 (6th Cir. 2017) (applying Michigan law), the insured was sued for allegedly publishing a false advertisement. The insured argued that the complaint implicated the "personal and advertising injury" coverage because the complaint alleged that the insured's mislabeling of its products injured the plaintiff. The court held that because the plaintiff alleged that the insured made false or misleading statements about its own products, such should not be interpreted to include an explicit disparagement claim. The insured also argued that because the plaintiff alleged that the insured's inferior product has caused and will continue to cause the plaintiff to lose sales, the insured has implicitly disparaged the plaintiff's product. The court disagreed and found that the insured did not make claims about the superiority of its own product, nor was there any implication of such an allegation. The court stated that no courts have recognized disparagement by implication to include claims that allege that an insured has made false statements about its own products while not also making any comparison to another's product. Accordingly, the court held that there was no duty to defend or indemnify the insured.

In *Millennium Labs., Inc. v. Darwin Select Ins. Co.*, 676 F. App'x 734 (9th Cir. 2017) (applying California law), the insured was sued in two third-party disparagement lawsuits. The court held that the claims implicated the "personal and advertising injury" liability coverage. The court explained that the insurer knew that its insured had been involved in several similar disputes and that its sales team allegedly told customers that its competitors' businesses were illegal. The court further noted that when the insurer learned that the insured's general counsel made aggressive and insulting statements about competitors in a presentation to sales employees during the coverage period, the insurer "should have realized that [the insured] faced potential disparagement claims." Thus, the insurer owed a duty to defend.

In *Cetera Fin. Holdings, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. CV1601313SJOJCX, 2017 WL 2119475 (C.D. Cal. Feb. 16, 2017) (applying California law), the insured was sued for product disparagement, slander per se, and business disparagement, among other claims. The complaint alleged that the insured made defamatory statements to the plaintiff's clients and representatives, including that the plaintiff was in severe financial trouble, had regulatory compliance problems, would be out of business in the next 3-4 months, and that clients would be tainted by allegations of embezzlement. Thereafter, an amended complaint was filed omitting the slander per se and disparagement claims, which resulted in the insurer withdrawing its defense. The insured argued that despite numerous amended complaints and the removal of certain counts, the plaintiff's main theory was that the insured's allegedly defamatory statements interfered with the plaintiff's business and caused it damage. In reaching its decision, the court considered three letters known to the insurer as extrinsic evidence and determined that the statements "treat(ed) slightingly," "depreciate(d)," "belittle(d)," "criticize(d)" in a way that showed a lack of "respect," constituted derogatory statements of the plaintiff's "goods, products or services." The court concluded that the business interference causes of action and the damages sought were related to and based on, at least in part, disparagement. Thus, a duty to defend was owed.

In *First One Lending Corp. v. The Hartford Casualty Insurance Co.*, No. SACV 13-01500 AG(DFMx), 2017 WL 1018305 (C.D. Cal. Apr. 12, 2017) (applying California law), the insured was sued for violation of the Lanham Act and common law unfair competition based on its operation of a fraudulent mortgage scam. The court found that the complaint alleged facts showing the insured's acts potentially disparaged the plaintiff's goods, products, or services. The court explained that the complaint made false statements that referred to the plaintiff and derogated the plaintiff's business by giving the false impression that the plaintiff was not free of charge. The court also found that the settlement agreement with the plaintiff alleged that the insured made false and disparaging statements. However, the court held that the "financial services" exclusion precluded coverage and that the insured's acts were uninsurable under Section 533 of California's Insurance Code. Accordingly, no duty to defend or indemnify was owed.

In *Unwired Solutions Inc. v. Ohio Security Insurance Co.*, 247 F. Supp. 3d 705 (D. Md. 2017) (applying Maryland law), the insured was sued for tortious interference with contract and trademark infringement for allegedly perpetrating a "Bulk Handset Trafficking Scheme" which took advantage of Sprint's sale of subsidized phones for use on its network. The insured argued that advertising on its website constituted disparaging material. The court disagreed and found that the allegations that the insured promoted its product on its website, which had the effect of damaging the plaintiff's reputation and that the insured made certain statements to advance a scheme that harmed the plaintiff, did not allege disparagement. The court also found that the allegations that the insured falsely portrayed its phones as equivalent to the plaintiff's did

not constitute implied disparagement. Accordingly, the court held that no duty to defend was owed.

In *Standard Gen. L.P. v. Travelers Indemnity Co. of Connecticut*, No. 17CV0548, 2017 WL 3601181 (S.D.N.Y. Aug. 18, 2017) (applying New York law), the insured was sued for defamation, false light, "unfair business acts" and false advertising after the insured made a statement to the press falsely claiming that the plaintiff was terminated for cause based on an independent, third-party investigation into his alleged misconduct. The insured argued that such statement constituted an "advertisement" because it was meant to allay its investors' concerns regarding the plaintiff's employer and to promote further investment in its fund. However, the court held that the statement did not constitute an "advertisement" because it did not relate to the insured's "goods, products, or services". Rather, the court found that the statement was an informative statement sent to press outlets clarifying the company's stance on the plaintiff's employment and the circumstances and propriety of his termination. The court also held that the mere fact that the complaint alleged a claim for false advertising did not establish that the statement constituted an "advertisement." Accordingly, the court held that the complaint did not allege an "advertising injury." However, the court found that the complaint alleged "personal injury" and that the employment related practices exclusion did not preclude coverage. Accordingly, the court held that a duty to defend was owed.

In *Green4All Energy Solutions, Inc. v. State Farm Fire & Casualty Co.*, 2017 IL App (1st) 162499 (applying Illinois law), the insured was sued for patent infringement and false marketing. The complaint alleged that the insured falsely marketed its product as having a "patent pending" even though no application had been filed by the insured. The plaintiff was allegedly harmed by such marketing because it suggested that the insured's product was superior. The court found that the complaint did not allege a claim of disparagement. The court explained that the allegations did not allege that the insured's literature made a disparaging statement about the plaintiff's product nor did it contain any comparative language. Accordingly, the court held that no duty to defend was owed.

E. VIOLATION OF RIGHT OF PRIVACY

In *Yahoo! Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. 17-CV-00447 NC, 2017 WL 2405025 (N.D. Cal. June 2, 2017) (applying California law), the insured was sued for violation of the Telephone Consumer Protection Act ("TCPA") as a result of its alleged transmission of unsolicited text messages. The insured argued that the underlying actions implicated the "right of privacy" offense. However, the court found that the use of the word "publication" suggests that the right of privacy offense only applies to injury caused by the disclosure of private content to third parties. The court explained that the insured "made the text messages known to the recipients, but did not make the content of the text messages known to third parties." Accordingly, the court held that the insurer did not owe a duty to defend.

F. USE OF ANOTHER'S ADVERTISING IDEA

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mut. Ins. Co.*, 866 F.3d 254 (5th Cir. 2017) (applying Texas law), the insured was sued for federal trademark infringement, deceptive business practices, unfair competition, breach of contract, false advertising and breach of duty of good faith and fair dealing as a result of its use and advertisement of soft tissue massage techniques. The insured argued that the complaint alleged advertising injury by alleging the use of the plaintiff's advertising ideas, trade dress infringement, and slogan infringement. The court disagreed. The court found that allegations that the insured used the plaintiff's trademarks do not allege "use of an advertising idea" because a trademark is not a marketing or advertising device. The court also found that taking and advertising another's product is different from taking another's "advertising idea." The court also held that the complaint did not allege trade dress infringement or slogan infringement. Therefore, no duty to defend was owed.

In *Burlington Ins. Co. v. Minadora Holdings, LLC*, 690 F. App'x 918 (9th Cir. 2017) (applying California law), a cross-claim was filed against the insured alleging breach of an express and implied intellectual property agreement. The cross-claim alleged that the insured used the plaintiff's advertising ideas in its online advertising after the plaintiff shared its advertising ideas with the insured. The court held that the allegations implicated the "use of another's advertising idea" offense. Accordingly, the court held that a duty to defend was owed.

In *IVFMD Florida, Inc. v. Allied Property & Casualty Insurance Co.*, 679 F. App'x 769 (11th Cir. 2017) (11th Cir. Feb. 8, 2017) (applying Florida law), a counterclaim was asserted against the insured seeking a declaration of trademark invalidity with respect to the mark "IVFMD." The insured argued that the counterclaim was an attack on its trademark, which implicated the "use of another's advertising idea" or "infringement on another's copyright, trade dress or slogan" offenses. The court found that the claimant did not allege that the use of the "IVFMD" mark was the claimant's idea or concept for the promotion of its services, nor did it allege that it had any copyright, trade dress or slogan related to the mark. Accordingly, the court held that the counterclaim did not allege "personal and advertising injury." Thus, the insurer did not owe a duty to defend the counterclaim.

In *Allstate Insurance Co. v. Airport Mini Mall, LLC*, 265 F. Supp. 3d 1356 (N.D. Ga. 2017) (applying Georgia law), the insured was sued by the plaintiff for contributory trademark infringement as landlords of tenants selling counterfeit sunglasses. The complaint alleged that the insured facilitated the counterfeiting activities of its tenants at the discount mall by supplying the means for the tenants to infringe the plaintiff's trademarks in order to profit from the revenues it produced. The court held that the contributory trademark infringement claim was not "advertising injury" because the claim did not arise out of any advertisement by the insured of its goods and services. The court also held that the "use of another's advertising

idea" offense does not include a claim for trademark infringement in light of the policy's exclusion for trademark infringement. Accordingly, the court held that no duty to defend or indemnify was owed.

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

1. Copyright Infringement

In *Highland Holdings, Inc. v. Mid-Continent Casualty Co.*, 687 Fed. Appx. 819 (11th Cir. 2017) (applying Florida law), the insured settled a suit against it alleging copyright infringement for advertising, designing, constructing and participating in the construction of one or more residences that purportedly copied three house plans registered by the plaintiff. The court found that the complaint did not allege an "advertising injury" and explained that a schematic plan does not constitute an "advertisement" because a drawing that shows the layout of a house does not provide notice about the product or services provided by a homebuilder. Accordingly, the court held that the insurer did not owe a duty to indemnify the insured.

2. Trade Dress Infringement

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 866 F.3d 254 (5th Cir. 2017) (applying Texas law), the insured was sued for federal trademark infringement, deceptive business practices, unfair competition, breach of contract, false advertising and breach of duty of good faith and fair dealing for its use and advertisement of soft tissue massage techniques. The court found that the complaint did not allege trade dress infringement and explained that the allegations only alleged the use of the plaintiff's product, which did not constitute trade dress infringement. The court also explained that allegations of trademark infringement do not necessarily constitute trade dress infringement and that the complaint neither expressly alleged a trade dress infringement claim nor alleged the required elements of trade dress infringement. The court further found that the allegations concerning the insured's website did not concern the "look and feel" of the website. The court explained that because the complaint only alleged that the insured's website used certain words and phrases to describe the product it offered, the allegations failed to include "any description of the design, layout, motif, or style of either [the insured's or the plaintiff's] marketing or websites." Therefore, no duty to defend was owed.

In *IVFMD Florida, Inc. v. Allied Property & Casualty Insurance Co.*, 679 F. App'x 769 (11th Cir. Feb. 8, 2017) (applying Florida law), a counterclaim against the insured sought a declaration of trademark invalidity with respect to the mark "IVFMD." The insured argued that the counterclaim was an attack on its trademark, which implicated the infringement of another's copyright, trade dress or slogan offense. The court found that the claimant did not allege that it had a copyright, trade dress or slogan related to the mark. The court also found that the

counterclaim did not allege trade dress under the Lanham Act, but rather merely sought attorney's fees under the Lanham Act on the basis that the trademark infringement action was unfound. Accordingly, the court held that the allegations did not allege "personal and advertising injury", and thus, the insurer did not owe a duty to defend the counterclaim.

In *High 5 Sportswear, Inc. v. H5G, LLC.*, 237 F. Supp. 3d 674 (S.D. Ohio 2017) (applying Wisconsin law), the insured was sued for trademark infringement and. The insured attempted to equate its trademarks to slogan and trade dress. The court found that the allegations referencing the marks at issue "High Five", "High 5 Sportswear" and "High 5" did not allege trade dress. The court explained that the marks did not constitute the total image nor the design or packaging of the plaintiff's goods, but rather were just words, names, and symbols intended to identify and distinguish the products. Accordingly, no duty to defend was owed.

In *Hattenhauer Distributing Co. v. Nationwide Agribusiness Insurance Co.*, No. 3:16-CV-1703-PK, 2017 WL 2821936 (D. Or. June 29, 2017) (applying Oregon law), the insured was sued for not using the plaintiff's proprietary blend of cheese for the plaintiff's brand of pizzas, and instead used a different cheese that did not conform to the plaintiff's standards and specifications as required under certain franchise agreements. The court found that the only infringement alleged pertained to the quality of the pizza inside the packaging, rather than the appearance of the packaging itself, and thus, the complaint did not allege a claim for trade dress infringement. The court also found that the complaint did not allege trade dress infringement as the complaint did not allege that the pizza packaging was broadcasted to the public, only that the insured sold the pizza in packaging bearing the plaintiff's trademark. Thus, the court held that no duty to defend was owed.

In *Selective Ins. Co. of the Se. v. Creation Supply, Inc.*, 2017 IL App (1st) 161899-U (applying Illinois law), the plaintiffs sued the insured for trademark infringement, violation of trade dress, and unfair competition in connection with the insured's sale of markers that purportedly had the same square bodies and end-caps as the plaintiff's markers. The insured then filed a third-party complaint against a manufacturer in a separate action. The court found that the allegations of the complaint, which the court previously found alleged "advertising injury" based on trade dress infringement, were inextricably intertwined with the allegations in the insured's third-party complaint, and thus, the duty to defend further extended to the prosecution of the insured's third-party complaint.

3. Infringement of Slogan

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 866 F.3d 254 (5th Cir. 2017) (applying Texas law), the insured was sued for federal trademark infringement, deceptive business practices, unfair competition, breach of contract, false advertising and breach of duty of good faith and fair dealing as a result of its use and

advertisement of soft tissue massage techniques. The court found that the complaint did not allege slogan infringement because the phrases that the insured used (i.e. ART, Active Release Techniques and Active Release Technique Protocols) did not constitute slogans. The court explained that the complaint did not allege that the phrases were used by the plaintiff as "catchy, stand-alone phrases." Accordingly, no duty to defend was owed.

In *Land's End at Sunset Beach Cmty. Ass'n v. Aspen Specialty Ins. Co.*, No. 8:17-cv-1740-T-30TGW, 2017 WL 4416829 (M.D. Fla. Oct. 3, 2017) (applying Florida law), a counterclaim against the insured alleged federal trademark infringement, false designation of origin, common law trademark infringement, and common law unfair competition. The court declined to find that the counterclaim implicated coverage because the counterclaim did not refer to the words "Land's End" as a slogan, nor did it otherwise allege slogan infringement. Accordingly, no duty to defend was owed.

In *Catlin Specialty Insurance Co. v. Tegol Inc.*, 3:14-CV-00607-GCM-DCK, 2017 WL 252290 (W.D.N.C. Jan. 19, 2017) (applying North Carolina law), the insured was sued after the plaintiff learned that it was using the same mark on its motorcycle gear. The court found that the phrase "Rebel Helmets" did not constitute a slogan because it was a mark that designated a particular brand of the plaintiff's products, not a motto about the plaintiff's product or a short phrase repeatedly used for advertising purposes. Accordingly, the court held that no duty to defend was owed.

In *High 5 Sportswear, Inc. v. H5G, LLC.*, 237 F. Supp. 3d 674 (S.D. Ohio 2017) (applying Wisconsin law), the insured was sued for trademark infringement and cyber squatting. The insured attempted to equate its trademarks to slogan and trade dress. The court found that the marks at issue (i.e. High Five, High 5 Sportswear and High 5) were not slogans. The court explained that the marks were not advertising phrases that promoted the plaintiff's product, but instead were just variations of the company's name. Accordingly, no duty to defend was owed.

H. DISCRIMINATION OR HUMILIATION

In *Auto-Owners Ins. Co. v. McMillan Trucking, Inc.*, 242 F. Supp. 3d 1259 (N.D. Ala. 2017), the insured was sued by the plaintiffs for discriminatory denial of the right to contract, civil conspiracy, racketeering, and unjust enrichment. The court found the complaint alleged the plaintiffs were injured by intentional acts of discrimination that largely resulted in economic harm and emotional distress, which did not constitute "advertising injury" or "personal injury" as defined in the primary policy. The court further held that although the complaint alleged discrimination, which constituted "personal injury" as defined in the umbrella policy, the complaint only alleged intentional and knowing discriminatory conduct, and thus, coverage was precluded by the Knowing Violation exclusion. Accordingly, no duty to defend was owed.

In *Tolson v. Hartford Fin. Servs. Grp.*, 2017 WL 4354685 (D.C. Dist. Ct. Sept. 29, 2017), the insured was sued by the plaintiff after she was allegedly sexually abused by the insured's employees. The court found that the complaint did not allege "personal and advertising injury." The court reasoned that while the policy's definition of "personal and advertising injury" extended to "humiliation that result[ed] in injury to the feelings or reputation of a natural person," the plaintiff did not allege how the insured's failure to accurately represent its qualifications or those of its employees, independent of the sexual assault to which those failures allegedly led, humiliated the plaintiff. Thus, there was no duty to defend.

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

B. ANTITRUST VIOLATIONS

C. DISCRIMINATION & HARASSMENT

In *Auto-Owners Ins. Co. v. McMillan Trucking, Inc.*, 242 F. Supp. 3d 1259 (N.D. Ala. 2017), the insured was sued by the plaintiffs for discriminatory denial of the right to contract, civil conspiracy, racketeering, and unjust enrichment. The court found the complaint alleged the plaintiffs were injured by intentional acts of discrimination that largely resulted in economic harm and emotional distress, which did not constitute "advertising injury" or "personal injury" as defined in the primary policy. The court further held that although the complaint alleged discrimination, which constituted "personal injury" as defined in the umbrella policy, the complaint only alleged intentional and knowing discriminatory conduct, and thus, coverage was precluded by the Knowing Violation exclusion. Accordingly, no duty to defend was owed.

D. HUMILIATION

E. INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE OR WITH CONTRACTUAL RELATIONS

In *Cetera Fin. Holdings, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, No. CV1601313SJOJCX, 2017 WL 2119475 (C.D. Cal. Feb. 16, 2017) (applying California law), the insured was sued for intentional interference with contractual relations, intentional interference with prospective economic relations, negligent interference with prospective

economic relations, disparagement, and slander per se, among other claims. The complaint alleged that the insured made defamatory statements to the plaintiff's clients and representatives, including that the plaintiff was in severe financial trouble, had regulatory compliance problems, would be out of business in the next 3-4 months, and that clients would be tainted by allegations of embezzlement. Thereafter, an amended complaint was filed omitting the slander per se and disparagement claims, which resulted in the insurer withdrawing its defense. The court concluded that the business interference causes of action and the damages sought were related to and based on, at least in part, disparagement. In reaching its decision, the court also considered three letters known to the insurer as extrinsic evidence and that the allegations "treat(ed) slightingly," "depreciate(d)," "belittle(d)," "criticize(d)" in a way that showed a lack of "respect," constituted derogatory statements of the plaintiff's "goods, products or services." Thus, a duty to defend was owed.

F. UNFAIR COMPETITION

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 866 F.3d 254 (5th Cir. 2017) (applying Texas law), the insured was sued for federal trademark infringement, deceptive business practices, unfair competition, breach of contract, false advertising and breach of duty of good faith and fair dealing as a result of its use and advertisement of soft tissue massage techniques. The insured argued that the complaint alleged the use of another's advertising idea, trade dress infringement and slogan infringement. The court found that allegations that the insured used the plaintiff's trademarks do not allege the use of an advertising idea because a trademark is not a marketing or advertising device. The court also found that the complaint did not allege trade dress infringement because the misappropriation of trademarks without more does not constitute a trade dress infringement claim. The court further found that the complaint did not allege slogan infringement because it was merely alleged that the insured used brand or product names, which do not constitute slogans. Therefore, no duty to defend was owed.

In *Am. States Ins. Co. v. Hubbard*, No. 216CV03734RGKJPR, 2017 WL 2423798 (C.D. Cal. Feb. 14, 2017) (applying California law), the insured was sued by juice maker, POM, for trademark infringement, false designation of origin, and unfair competition. The complaint alleged the insured infringed POM's trademark by marketing an energy drink named "Pur Pom." The court found that the policy did not include coverage for trademark infringement and that such claims are specifically excluded by the IP exclusion. Accordingly, the court held that no duty to defend was owed.

In *First One Lending Corp. v. The Hartford Casualty Insurance Co.*, No. SACV 13-01500 AG(DFMx), 2017 WL 1018305 (C.D. Cal. Apr. 12, 2017) (applying California law), the insured was sued for violation of the Lanham Act and common law unfair competition based on its operation of a fraudulent mortgage scam. The court found that the insured's acts potentially disparaged the plaintiff's goods, products, or services. The court held that the Quality of Goods

exclusion did not preclude coverage because the complaint did not solely allege that the insured injured the plaintiff by misrepresenting the plaintiff's services. However, the court held that the "financial services" exclusion precluded coverage, and that the insured's acts were uninsurable under Section 533 of California's Insurance Code. Accordingly, no duty to defend or indemnify was owed.

In *Land's End at Sunset Beach Cmty. Ass'n v. Aspen Specialty Ins. Co.*, No. 8:17-cv-1740-T-30TGW, 2017 WL 4416829 (M.D. Fla. Oct. 3, 2017) (applying Florida law), a counterclaim was filed against the insured alleging trademark infringement under the Lanham Act, false designation of origin, common law trademark infringement, and common law unfair competition. The court declined to find that the counterclaim alleged that the insured used the plaintiff's slogan because the counterclaim did not refer to the words "Land's End" as a slogan, nor did the counterclaim otherwise allege slogan infringement. The court found that the IP Exclusion precluded coverage because all of the allegations in the counterclaim relied on the same premise that the insured infringed the plaintiff's trademark. Accordingly, no duty to defend was owed.

In *Standard Gen. L.P. v. Travelers Indem. Co. of Connecticut*, No. 17CV0548, 2017 WL 3601181 (S.D.N.Y. Aug. 18, 2017) (applying New York law), the insured was sued for defamation, false light, "unfair business acts" and false advertising after the insured made a statement to the press falsely claiming that the plaintiff was terminated for cause based on an independent, third-party investigation into the plaintiff's alleged misconduct. The court held that the statement did not constitute an "advertisement" because the statement was not about the insured's goods, products, or services, and thus, the complaint did not allege an "advertising injury." However, the court found that the complaint alleged "personal injury." The court also found that the ERP exclusion did not apply because the exclusion did not clearly and unmistakably apply to situations where the injured party lacks any employment relationship with the insured. Accordingly, the court held that a duty to defend was owed.

G. PATENT INFRINGEMENT

In *WAWGD, Inc. v. Sentinel Ins. Co.*, No. 16-cv-2917-CAB-BGS, 2017 WL 4340437 (S.D. Cal. Sep. 29, 2017) (applying California law), the defendant was sued for patent infringement for infringing two patents by "making, using, offering for sale, and/or selling a golf equipment fitting system that use[d] advanced technology to objectively identify the optimum equipment for the golfer and correct swing flaws so that the golfer can achieve optimum performance on the golf course." The defendant filed a third-party complaint against the insured based on the insured's warranty of non-infringement and indemnity for the plaintiff's infringement claims. The court held that even if the third-party complaint's allegations created the potential for coverage, the IP exclusion precluded coverage because the third-party complaint was filed in a lawsuit that also included allegations of patent infringement and the language of the "absolute"

IP exclusion applied to any injury or damage alleged in a lawsuit including a patent infringement claim. Thus, no duty to defend was owed.

In *Minute Key, Inc. v. Charter Oak Fire Ins. Co.*, No. 16-cv-1850-JLK, 2017 WL 3584876 (D. Colo. Aug. 11, 2017) (applying Colorado law), the insured was sued for violation of the Lanham Act and Ohio Deceptive Trade Practices Act after it purportedly made false allegations of patent infringement. The court held that the tortious misconduct that took the form of false allegations of patent infringement did not fall within the IP exclusion. The court explained that the exclusion contemplates the defense of actual, rather than false allegations of patent infringement. Accordingly, the court found that a duty to defend was owed.

In *Green4All Energy Solutions, Inc. v. State Farm Fire & Casualty Co.*, 2017 IL App (1st) 162499 (applying Illinois law), the insured was sued for patent infringement and false marketing. The complaint alleged that the insured falsely marketed its product as having a "patent pending" even though no application had been filed by the insured. The plaintiff was allegedly harmed by such marketing because it suggested that the insured's product was superior. The court found that the complaint did not allege a claim of disparagement. The court explained that the allegations did not allege that the insured's literature made a disparaging statement about the plaintiff's product nor did it contain any comparative language. Accordingly, the court held that no duty to defend was owed.

H. MISAPPROPRIATION OF TRADE SECRET

In *United Ohio Insurance Co. v. Durafloor Industrial Flooring and Coating Inc.*, No. HHDCV156062735S, 2017 WL 961453 (Sup. Ct. Conn. Jan. 24, 2017) (applying Connecticut law), the insured was sued for misappropriation of trade secrets relating to the formulae and processes for floor coating systems and products. The court found that the complaint did not seek damages because of "personal and advertising injury." The court explained that the complaint alleged harm caused by misappropriation of trade secrets, not the advertising of trade secrets. The court further explained that there was no allegation of an advertisement. Accordingly, no duty to defend was owed.

I. TRADEMARK INFRINGEMENT

In *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mutual Insurance Co.*, 866 F.3d 254 (5th Cir. 2017) (applying Texas law), the insured was sued for federal trademark infringement, deceptive business practices, unfair competition, breach of contract, false advertising and breach of duty of good faith and fair dealing as a result of its use and advertisement of soft tissue massage techniques. The insured argued that the complaint alleged the use of another's advertising idea, trade dress infringement and slogan infringement. The court found that allegations that the insured used the plaintiff's trademarks do not allege the use of an advertising idea because a trademark is not a marketing or advertising device. The

court also found that the complaint did not allege trade dress infringement because the misappropriation of trademarks without more does not constitute a trade dress infringement claim. The court further found that the complaint did not allege slogan infringement because it was merely alleged that the insured used brand or product names, which do not constitute slogans. Therefore, no duty to defend was owed.

In *Am. States Ins. Co. v. Hubbard*, No. 216CV03734RGKJPR, 2017 WL 2423798 (C.D. Cal. Feb. 14, 2017) (applying California law), the insured was sued by juice maker, POM, for trademark infringement, false designation of origin, and unfair competition. The complaint alleged the insured infringed POM's trademark by marketing an energy drink named "Pur Pom." The court found that the policy did not include coverage for trademark infringement. Accordingly, the court held that no duty to defend was owed.

In *Land's End at Sunset Beach Cmty. Ass'n v. Aspen Specialty Ins. Co.*, No. 8:17-cv-1740-T-30TGW, 2017 WL 4416829 (M.D. Fla. Oct. 3, 2017) (applying Florida law), a counterclaim was filed against the insured alleging trademark infringement under the Lanham Act, false designation of origin, common law trademark infringement, and common law unfair competition. The court declined to find that the counterclaim alleged that the insured used the plaintiff's slogan because the counterclaim did not refer to the words "Land's End" as a slogan, nor did the counterclaim otherwise allege slogan infringement. The court found that the IP Exclusion precluded coverage because all of the allegations in the counterclaim relied on the same premise that the insured infringed the plaintiff's trademark. Accordingly, no duty to defend was owed.

In *Allstate Insurance Co. v. Airport Mini Mall, LLC*, 265 F. Supp. 3d 1356 (N.D. Ga. 2017) (applying Georgia law), the insured was sued for contributory trademark infringement as landlords of tenants selling counterfeit sunglasses. The complaint alleged that the insured facilitated the counterfeiting activities of its tenants at the discount mall by supplying the means for the tenants to infringe the plaintiff's trademarks in order to profit from the revenues it produced. The court held that the claim was not an "advertising injury" because the claim did not arise out of the insured's advertisement and that there was no causal connection between the alleged advertising and the alleged injury. The court also found that the complaint did not implicate the "infringement of a copyright, trade dress or slogan" and the "use of another's advertising idea" offenses. Accordingly, the court found that no duty to defend or indemnify was owed.

In *Sentinel Ins. Co. v. Beach for Dogs Corp.*, No. 17 C 1501, 2017 WL 6570079 (N.D. Ill. Dec. 21, 2017) (applying Illinois law), the insured was sued by the plaintiff for trademark infringement, violation of the Illinois Uniform Deceptive Trade Practices Act and violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act in connection with the insured's use of door hangers. The insured argued that the IP exclusion did not apply because the complaint

asserted a claim for copying the plaintiff's layout and design of its door hanger separate from the complaint's allegation of trademark infringement. The court held that pursuant to the language of the "absolute" IP exclusion, the existence of trademark allegations precluded coverage for the entire lawsuit. Accordingly, no duty to defend was owed.

In *Unwired Solutions Inc. v. Ohio Security Insurance Co.*, 247 F. Supp. 3d 705 (D. Md. 2017) (applying Maryland law), the insured was sued for tortious interference with contract and trademark infringement for allegedly perpetrating a "Bulk Handset Trafficking Scheme" which took advantage of Sprint's selling of subsidized phones for use on its network. The insured argued that advertising on its website constituted disparaging material. The court found that the complaint did not allege "personal and advertising injury." The court explained that the allegations that the insured promoted its product on its website, which had the effect of damaging the plaintiff's reputation, and that the insured perpetrated a scheme that harmed the plaintiff, did not constitute disparagement. The court also found that the complaint did not allege implied disparagement by alleging that the insured falsely portrayed its phones as equivalent to the plaintiffs. Accordingly, the court held that no duty to defend was owed.

In *Catlin Specialty Insurance Co. v. Tegol Inc.*, 3:14-CV-00607-GCM-DCK, 2017 WL 252290, (W.D.N.C. Jan. 19, 2017) (applying North Carolina law), the insured was sued after the plaintiff learned that it was using the same mark on its motorcycle gear. The court held that the IP exclusion precluded coverage because the complaint did not allege any conduct that could be extricated from the trademark infringement allegations. The court stated that although the complaint alleged a claim for trade name infringement, such claim was pursued only to protect the plaintiff's trademark interest. The court also found that the phrase "Rebel Helmets" did not constitute a slogan because it was a mark that designated a particular brand of the plaintiff's products, not a motto about the plaintiff's product or a short phrase repeatedly used for advertising purposes. Accordingly, the court held that no duty to defend was owed.

In *High 5 Sportswear, Inc. v. H5G, LLC*, 237 F. Supp. 3d 674 (S.D. Ohio 2017) (applying Wisconsin law), the insured was sued for trademark infringement and cyber squatting. The insured attempted to equate its trademarks to slogan and trade dress. The court found that the allegations referencing the marks at issue "High Five", "High 5 Sportswear" and "High 5" did not allege trade dress. The court explained that the marks did not constitute the total image nor the design or packaging of the plaintiff's goods, but rather were just words, names, and symbols intended to identify and distinguish the products. Accordingly, no duty to defend was owed.

In *Hattenhauer Distributing Co. v. Nationwide Agribusiness Insurance Co.*, No. 3:16-CV-1703-PK, 2017 WL 2821936 (D. Or. June 29, 2017) (applying Oregon law), the complaint alleged that the insured failed to conform to the plaintiff's standards and specifications as required under certain franchise agreements, as the insured's pizza store did not use the plaintiff's

proprietary blend of cheese for plaintiff's brand of pizzas. The court found that the complaint did not allege any infringement regarding the appearance of the packaging itself, and thus, the complaint did not allege a claim for trade dress infringement. The court also found that the complaint did not allege trade dress infringement in an advertisement because the complaint did not allege that the pizza packaging was broadcasted to the public, only that the insured sold the pizza in packaging bearing the plaintiff's trademark. The court further found that even if the underlying claim alleged an "advertising injury," the Breach of Contract exclusion and Quality of Goods exclusion precluded coverage. Thus, the court held that no duty to defend was owed.

In *Selective Ins. Co. of the Se. v. Creation Supply, Inc.*, 2017 IL App (1st) 161899-U (applying Illinois law), the plaintiffs sued the insured for trademark infringement, violation of trade dress, and unfair competition in connection with the insured's sale of markers that purportedly had the same square bodies and end-caps as the plaintiff's markers. The insured then filed a third-party complaint against a manufacturer in a separate action. The court found that the allegations of the complaint, which the court previously found alleged "advertising injury" based on trade dress infringement, were inextricably intertwined with the allegations in the insured's third-party complaint, and thus, the duty to defend further extended to the prosecution of the insured's third-party complaint.

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

A. Knowing Violation of Another's Rights ("Knowing Violation Exclusion")

In *Uretek (USA), Inc. v. Cont'l Cas. Co.*, No. 15-20104, 2017 WL 3225700 (5th Cir. July 28, 2017) (applying Texas law), a counterclaim was filed against the insured, which alleged that the insured made statements to the claimant's customers or potential customers that the claimant could not undertake work on various projects without infringing on the insured's patent. The court found that the counterclaim contained allegations of disparagement. The court also found that the Knowing Violation and Knowledge of Falsity exclusions did not preclude coverage because the complaint alleged both intentional and negligent conduct. Accordingly, the court found that a duty to defend was owed.

In *Burlington Ins. Co. v. Minadora Holdings, LLC*, 690 F. App'x 918 (9th Cir. 2017) (applying California law), the insureds were sued for using the plaintiff's advertising ideas in their online advertising after the plaintiff shared its advertising ideas with the insureds. The court held that the Knowing Violation exclusion did not preclude coverage because the cross-complaint did not preclude the possibility that the insureds' use of the plaintiff's advertising ideas was done without knowledge that it would have violated his rights. Therefore, a duty to defend was owed.

In *Auto-Owners Ins. Co. v. McMillan Trucking, Inc.*, 242 F. Supp. 3d 1259 (N.D. Ala. 2017), the insured was sued by the plaintiffs for discriminatory denial of the right to contract, civil conspiracy, racketeering, and unjust enrichment. The court found that the complaint alleged the plaintiffs were injured by intentional acts of discrimination that resulted in economic harm and emotional distress, which did not constitute "advertising injury" or "personal injury" as defined the primary policy. The court further held that although the complaint alleged discrimination, which constituted "personal injury" as defined in the umbrella policy, the complaint only alleged intentional and knowing discriminatory conduct, and thus, coverage was precluded by the Knowing Violations exclusion. Accordingly, the court found no duty to defend was owed.

In *National Union Fire Insurance Co. of Pittsburgh, PA v. Town of Norwood*, No. CV 16-11978-RGS, 2017 WL 3185848 (D. Mass. July 26, 2017) (applying Massachusetts law), the plaintiff alleged that the insured unlawfully retaliated against it in violation of the First Amendment. The insured argued that, in order for the Knowing Violation exclusion to apply, it must have not only intended the retaliatory acts, but also to have intended any resulting harm. However, the court held that because the conduct covered by a First Amendment retaliation claim is inherently willful, requiring intent and deliberate infliction of injury, such conduct fell within the policy's Knowing Violation exclusion. Thus, no duty to defend was owed.

In *Cohen v. Berkley Nat'l Ins. Co.*, No. 217CV00057GMNGWF, 2017 WL 3925418 (D. Nev. Sept. 6, 2017) (applying Nevada law), the insured was sued for defamation per se and false light invasion of privacy. The complaint alleged that the insured posted a defamatory and malicious website and that the website was an intentionally false and disparaging publication. The court found that although the only two issues at trial did not require intent, the jury still found fraud, oppression, and malice with each verdict and that a reasonable lay person would be able to find that knowledge of a violation is implicit in the findings of fraud, oppression and malice. Thus, the court found that the Knowing Violation exclusion precluded coverage and that no indemnity obligation was owed.

In *2200 W. Alabama, Inc. v. W. World Ins. Co.*, No. 4:16-CV-2244, 2017 WL 4049272 (S.D. Tex. Sept. 13, 2017) (applying Texas law), the insured was sued by a tenant for its alleged failure to timely negotiate a lease agreement, which prevented the tenant from taking physical possession and opening a restaurant. The insurer argued that the insured knowingly violated the tenant's right to take occupancy and breached the contract. The court found that it would be error to decide an insurer's claim of exclusion based on what was unsaid in the complaint. Thus, the court found that the Knowing Violation exclusion did not preclude coverage and a duty to defend was owed.

In *AIG Specialty Insurance Co. v. Stoller Enterprises, Inc.*, No. 4:16-cv-26, 2017 WL 541533 (S.D. Tex. Feb. 07, 2017) (applying Texas law), the insured was sued for tortious interference with a business interest, injurious falsehood, violation of the Lanham Act, civil conspiracy, defamation and violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO") after creating a false advertising scheme against the plaintiff's new product. The court found that there was sufficient evidence to demonstrate that the insured knew that its statements would inflict "personal and advertising injury", and thus, the Knowing Violation exclusion precluded coverage. Accordingly, no duty to indemnify was owed for the underlying judgment entered against the insured.

B. Knowing Publication of Falsehoods ("Knowledge of Falsity Exclusion")

In *Uretek (USA), Inc. v. Cont'l Cas. Co.*, No. 15-20104, 2017 WL 3225700 (5th Cir. July 28, 2017) (applying Texas law), a counterclaim was filed against the insured, which alleged that the insured made statements to the claimant's customers or potential customers that the claimant could not undertake work on various projects without infringing on the insured's patent. The court found that the counterclaim contained allegations of disparagement. The court also found that the Knowing Violation and Knowledge of Falsity exclusions did not preclude coverage because the complaint alleged both intentional and negligent conduct. Accordingly, the court found that a duty to defend was owed.

In *AIG Specialty Insurance Co. v. Stoller Enterprises, Inc.*, No. 4:16-cv-26, 2017 WL 541533 (S.D. Tex. Feb. 07, 2017) (applying Texas law), the insured was sued for tortious interference with a business interest, injurious falsehood, violation of the Lanham Act, civil conspiracy, defamation and RICO violations after creating a false advertising scheme against the plaintiff's new product. As respects the Knowledge of Falsity exclusion, the court found that there was insufficient evidence to establish the insured knew its statements were false and that liability under the Lanham Act was not dispositive on this issue. However, the court found that the Prior Publication and Knowing Violation exclusions nonetheless precluded coverage, and thus, no duty to indemnify was owed for the underlying judgment entered against the insured.

C. Publication of Material Before Inception of Policy ("Prior Publication Exclusion")

In *Burlington Ins. Co. v. Minadora Holdings, LLC*, 690 F. App'x 918 (9th Cir. 2017) (applying California law), the insureds were sued for using the plaintiff's advertising ideas in their online advertising, after the plaintiff shared its advertising ideas with the insureds. The court held that the allegations potentially implicated the "use of another's advertising idea" offense. The court also found that the Prior Publication exclusion did not preclude coverage. Although the cross-claim alleged that the insureds' website made certain claims before the policy incepted, the cross-claim did not allege that all of the advertisements containing the

plaintiff's advertising ideas were published prior to the policy's inception. Therefore, a duty to defend was owed.

In *High 5 Sportswear, Inc. v. H5G, LLC.*, 237 F. Supp. 3d 674 (S.D. Ohio 2017) (applying Wisconsin law), the insured was sued for trademark infringement and cyber squatting. The insured attempted to equate its trademarks to slogan and trade dress. The court found that the marks at issue (i.e. High Five, High 5 Sportswear and High 5) were not slogans or trade dress. The court also found that the Prior Publication exclusion precluded coverage. The court explained that the complaint alleged that the insured created its website on November 5, 2009, which was before the policy's inception and that the insured engaged in the bad faith use of the marks in its domain name. Accordingly, no duty to defend was owed.

In *AIG Specialty Insurance Co. v. Stoller Enterprises, Inc.*, No. 4:16-cv-26, 2017 WL 541533 (S.D. Tex. Feb. 07, 2017) (applying Texas law), the insured was sued for tortious interference with a business interest, injurious falsehood, violation of the Lanham Act, civil conspiracy, defamation and RICO violations after creating a false advertising scheme against the plaintiff's new product. The court found that the insured's liability under the settlement agreement was related to the Lanham Action claims, which were based solely on publication of written material that occurred before the policy's inception and thus, the Prior Publication exclusion precluded coverage. Accordingly, the court found that the insurer did not owe a duty to indemnify the underlying judgment entered against the insured.

D. Criminal Acts

E. Contractual Liability

F. Breach of Contract

In *Burlington Insurance Co. v. Minadora Holdings, LLC*, 690 F. App'x 918 (9th Cir. 2017) (applying California law), a cross-claim was filed against the insured alleging breach of an express and implied intellectual property agreement. The cross-claim further alleged that the insured used the plaintiff's advertising ideas in the insured's online advertising after the plaintiff shared its advertising ideas with the insureds. The court found that the allegations potentially implicated the "use of another's advertising idea" offense. The court also found that the Breach of Contract exclusion did not apply to claims arising from an implied contract for the use of another's advertising idea in the insured's advertisement. Accordingly, the court held that a duty to defend was owed.

In *Hattenhauer Distributing Co. v. Nationwide Agribusiness Insurance Co.*, No. 3:16-CV-1703-PK, 2017 WL 2821936 (D. Or. June 29, 2017) (applying Oregon law), the insured was sued for not using the plaintiff's proprietary blend of cheese for plaintiff's brand of pizzas, and instead using a different cheese that did not conform with the plaintiff's standards and

specifications as required under certain franchise agreements. The court found that the complaint did not allege "personal and advertising injury" arising out of infringement of trade dress. The court further found that the Breach of Contract exclusion applied to preclude coverage because the complaint alleged injuries arising out of the insured's breach of the franchise agreements.

In *Colony Ins. Co. v. Custom Ag Commodities, LLC*, No. 4:16-CV-83, 2017 WL 2936208, (E.D. Tex. July 10, 2017) (applying Texas law), a third-party complaint was filed against the insured for breach of contract after it supplied adulterated chicken meal instead of single ingredient chicken meal. The court found that the insured's liability undeniably rested on its alleged failure to perform a contract in accordance with the express specifications. The court explained that the third-party complaint contained numerous allegations concerning the contract. Thus, the court held that the Breach of Contract exclusion applied to preclude coverage. Accordingly, there was no duty to defend or indemnify the insured.

In *Great Lakes Beverages, LLC. v. Wochinski,* 373 Wis.2d 649 (Wis. Ct. App. Jan. 18, 2017) (applying Wisconsin law), the insured was sued for tortious interference, which arose out of the attempt to enforce a rescinded non-compete agreement. The court found that even if the complaint alleged disparagement, the Breach of Contract exclusion precluded coverage because the tortious interference claim arose out of the breach of a contractual relationship. Accordingly, the court held no duty to defend or indemnify was owed.

G. Quality of Goods

In *First One Lending Corp. v. The Hartford Casualty Insurance Co.*, No. SACV 13-01500 AG(DFMx), 2017 WL 1018305 (C.D. Cal. Apr. 12, 2017) (applying California law), the insured was sued for violation of the Lanham Act and common law unfair competition based on its operation of a fraudulent mortgage scam. The court found that the insured's acts potentially disparaged the plaintiff's goods, products, or services. The court held that the Quality of Goods exclusion did not preclude coverage because the complaint did not solely allege that the insured injured the plaintiff by misrepresenting the plaintiff's services. However, the court held that the "financial services" exclusion precluded coverage, and that the insured's acts were uninsurable under Section 533 of California's Insurance Code. Accordingly, no duty to defend or indemnify was owed.

In *Hattenhauer Distributing Co. v. Nationwide Agribusiness Insurance Co.*, No. 3:16-CV-1703-PK, 2017 WL 2821936 (D. Or. June 29, 2017) (applying Oregon law), the insured was sued for not using the plaintiff's proprietary blend of cheese for plaintiff's brand of pizzas, and instead using a different cheese that did not conform with the plaintiff's standards and specifications as required under certain franchise agreements. The court found that even if the complaint alleged an advertising injury, the Quality of Goods exclusion applied to preclude coverage because the complaint alleged injuries that arose from the insured's sale of inferior

pizza bearing the plaintiff's brand while failing to meet the requirements of the plaintiff's ingredients. Thus, the court held that no duty to defend was owed.

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

In *Burlington Ins. Co. v. Minadora Holdings, LLC*, 690 F. App'x 918 (9th Cir. 2017) (applying California law), the insureds were sued for using the plaintiff's advertising ideas in their online advertising after the plaintiff shared its advertising ideas with the insureds. The court held that the allegations potentially implicated the "use of another's advertising idea" offense. The court found that the IP exclusion did not exclude claims for the "use of another's advertising idea" as doing so would vitiate such offense and contradict the insured's reasonable expectations. Therefore, a duty to defend was owed.

In *Am. States Ins. Co. v. Hubbard*, No. 216CV03734RGKJPR, 2017 WL 2423798 (C.D. Cal. Feb. 14, 2017) (applying California law), the insured was sued by juice maker, POM, for trademark infringement, false designation of origin, and unfair competition. The complaint alleged the insured infringed POM's trademark by marketing an energy drink named "Pur Pom." The court found that the policy did not include coverage for trademark infringement and that such claims are specifically excluded by the IP exclusion. Accordingly, the court held that no duty to defend was owed.

In *First One Lending Corp. v. The Hartford Casualty Insurance Co.*, No. SACV 13-01500 AG(DFMx), 2017 WL 1018305 (C.D. Cal. Apr. 12, 2017) (applying California law), the insured was sued for violation of the Lanham Act and common law unfair competition based on its operation of a fraudulent mortgage scam. The court found that the complaint alleged facts showing that the insured's acts potentially disparaged the plaintiff's goods, products, or services. The court held that the IP exclusion did not preclude coverage because the complaint alleged injuries that arose from acts and business other than slogan infringement. However, the court held that the "financial services" exclusion precluded coverage and that the insured's acts were uninsurable under Section 533 of California's Insurance Code. Accordingly, no duty to defend or indemnify was owed.

In *WAWGD, Inc. v. Sentinel Ins. Co.*, No. 16-cv-2917-CAB-BGS, 2017 WL 4340437 (S.D. Cal. Sep. 29, 2017) (applying California law), the defendant was sued for patent infringement for infringing two patents by "making, using, offering for sale, and/or selling a golf equipment fitting system that use[d] advanced technology to objectively identify the optimum equipment for the golfer and correct swing flaws so that the golfer can achieve optimum performance on the golf course." The defendant filed a third-party complaint against the insured based on the insured's warranty of non-infringement and indemnity for the plaintiff's infringement claims. The court held that even if the third-party complaint's allegations created the potential for coverage, the IP exclusion precluded coverage because the third-party complaint was filed in a lawsuit that also included allegations of patent infringement and the language of the "absolute"

IP exclusion applied to any injury or damage alleged in a lawsuit including a patent infringement claim. Thus, no duty to defend was owed.

In *Minute Key, Inc. v. Charter Oak Fire Ins. Co.*, No. 16-cv-1850-JLK, 2017 WL 3584876 (D. Colo. Aug. 11, 2017) (applying Colorado law), the insured was sued for violation of the Lanham Act and Ohio Deceptive Trade Practices Act after it purportedly made false allegations of patent infringement. The court held that the tortious misconduct that took the form of false allegations of patent infringement did not fall within the IP exclusion. The court explained that the exclusion contemplates the defense of actual, rather than false allegations of patent infringement. Accordingly, the court found that a duty to defend was owed.

In *Land's End at Sunset Beach Cmty. Ass'n v. Aspen Specialty Ins. Co.*, No. 8:17-cv-1740-T-30TGW, 2017 WL 4416829 (M.D. Fla. Oct. 3, 2017) (applying Florida law), a counterclaim was filed against the insured alleging trademark infringement under the Lanham Act, false designation of origin, common law trademark infringement, and common law unfair competition. The court declined to find that the counterclaim alleged that the insured used the plaintiff's slogan because the counterclaim did not refer to the words "Land's End" as a slogan, nor did the counterclaim otherwise allege slogan infringement. The court found that the IP Exclusion precluded coverage because all of the allegations in the counterclaim relied on the same premise that the insured infringed the plaintiff's trademark. Accordingly, no duty to defend was owed.

In *Sentinel Ins. Co. v. Yorktown Indus. Inc.*, No. 14-cv-4212, 2017 WL 446044 (N.D. Ill. Feb. 2, 2017) (applying Illinois law), the insured was sued for the alleged hiring of a competitor's employees and use of a confidential customer list. The court held that the complaint did not allege "personal and advertising injury". The court explained that the complaint did not allege the use of the plaintiff's advertising plans, schemes, or designs in contacting customers, nor did the complaint allege that the insured misappropriated any of their advertising strategies. The complaint also did not allege that the plaintiff was injured by the copying of the plaintiff's customer list or other trade secrets in an "advertisement," nor did the complaint allege that the insured publically disseminated the customer list or proprietary business information. The court further held that the IP exclusion applied to preclude coverage because at least one of the counts alleged an excluded intellectual property claim. Accordingly, the court held that no coverage was owed.

In *Sentinel Ins. Co. v. Beach for Dogs Corp.*, No. 17 C 1501, 2017 WL 6570079 (N.D. Ill. Dec. 21, 2017) (applying Illinois law), the insured was sued by the plaintiff for trademark infringement, violation of the Illinois Uniform Deceptive Trade Practices Act and violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act in connection with the insured's use of door hangers. The insured argued that the IP exclusion did not apply because the complaint asserted a claim for copying the plaintiff's layout and design of its door hanger separate from

the complaint's allegation of trademark infringement. The court held that pursuant to the language of the "absolute" IP exclusion, the existence of trademark allegations precluded coverage for the entire lawsuit. Accordingly, no duty to defend was owed.

In *Catlin Specialty Insurance Co. v. Tegol Inc.*, 3:14-CV-00607-GCM-DCK, 2017 WL 252290 (W.D.N.C. Jan. 19, 2017) (applying North Carolina law), the insured was sued after the plaintiff learned that it was using the same mark on its motorcycle gear. The court held that the IP exclusion precluded coverage because the complaint did not allege any conduct that could be extricated from the trademark infringement allegations. The court stated that although the complaint alleged a claim for trade name infringement, such claim was pursued only to protect the plaintiff's trademark interest. The court also found that the phrase "Rebel Helmets" did not constitute a slogan because it was a mark that designated a particular brand of the plaintiff's products, not a motto about the plaintiff's product or a short phrase repeatedly used for advertising purposes. Accordingly, the court held that no duty to defend was owed.

In *High 5 Sportswear, Inc. v. H5G, LLC.*, 237 F. Supp. 3d 674 (S.D. Ohio 2017) (applying Wisconsin law), the insured was sued for trademark infringement and cyber squatting. The court found that the marks at issue (i.e. High Five, High 5 Sportswear and High 5) were not slogans or trade dress. With respect to the IP exclusion, the court found that the complaint alleged claims for trademark infringement and cyber squatting, not infringement of trade dress or slogan. Thus, the exception to the IP exclusion was not applicable and the IP exclusion applied to preclude coverage. Accordingly, no duty to defend was owed.

I. Media & Internet Business Exclusion ("Media Business Exclusion")

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 ("ERP Exclusion")

In *Standard Gen. L.P. v. Travelers Indem. Co. of Connecticut*, No. 17CV0548, 2017 WL 3601181 (S.D.N.Y. Aug. 18, 2017) (applying New York law), the insured was sued for defamation, false light, "unfair business acts" and false advertising after the insured made a statement to the press falsely claiming that the plaintiff was terminated for cause based on an independent, third-party investigation into the plaintiff's alleged misconduct. The court held that the statement did not constitute an "advertisement" because the statement was not about the insured's goods, products, or services, and thus, the complaint did not allege an "advertising injury." However, the court found that the complaint alleged "personal injury." The

court also found that the ERP exclusion did not apply because the exclusion did not clearly and unmistakably apply to situations where the injured party lacks any employment relationship with the insured. Accordingly, the court held that a duty to defend was owed.

O. Professional Services Exclusion

In *Caveo, LLC v. Citizens Insurance Company of America, Inc.*, No. 15-CV-6200, 2017 WL 2672297 (N.D. Ill. June 21, 2017) (applying Illinois law), the insured was sued for engaging in a scheme and conspiring with the plaintiff's former employees for their employ with the insured, using the plaintiff's confidential, proprietary, trade secret and copyrighted material, interfering with the plaintiff's customer relationships and growing its competing business by capturing the plaintiff's customers. The complaint alleged that the insured's employee led a webinar that incorporated the plaintiff's copyrighted material. The court found that the Professional Services exclusion did not preclude coverage. The court explained that although some specialized knowledge may have been required for the insured to create a webinar, such was not enough to invoke the Professional Services exclusion. Accordingly, coverage was owed under the policy.

P. Distribution of Material in Violation of Statute ("Distribution of Material Exclusion")

In *Am. Econ. Ins. Co. v. Hartford Fire Ins. Co.*, 695 Fed. Appx. 194 (9th Cir. 2017) (applying Montana law), the insured was sued in two actions (i.e. Washington and Byrd Suits), which alleged that the insured used spy software to track customers by secretly taking photographs using the laptop's webcam, capturing keystrokes, and taking screenshots. The court held that the Byrd Suit triggered coverage because it "alleged that information collected by the software was transmitted to third parties," but that coverage was not triggered by the Washington Suit because it failed to specifically allege that the insured published private material. However, the court held that the Distribution of Material exclusions contained in the subject policies precluded coverage. Thus, no duty to defend was owed.

In *American Family Mutual Insurance Co. v. St. Louis Heart Center, Inc.*, No. 4:15CV1544 JCH, 2017 WL 4076072 (E.D. Mo. Sept. 17, 2017) (applying Missouri law), the insured was sued for violations of the TCPA. The court found that the Distribution of Material in violation of statutes exclusion precluded coverage for claims based on violations of the TCPA. Thus, the court found that no duty to defend was owed.

In *Hartford Cas. Ins. Co. v. Ted A. Greve & Assocs., P.A.,* No. 3:17CV183-GCM, 2017 WL 5557669 (W.D.N.C. Nov. 17, 2017) (applying North Carolina law), the insured was sued for violating the federal Driver's Privacy Protection Act ("DPPA") after the insured obtained information from police reports and mailed an advertisement for legal services to the plaintiffs. The court held that the "statutory violation" exclusion barred coverage because the right of privacy at issue in the underlying action was solely a creature of federal law. The court held also

held that the Distribution of Material exclusion precluded coverage as the alleged violations of the DPPA fell directly within the scope of the exclusion. Thus, there was no duty to defend.

Q. Defects or Errors in Testing

R. Entertainment Industry Exclusion

S. Section 533 of the California Insurance Code

In *First One Lending Corp. v. The Hartford Casualty Insurance Co.*, No. SACV 13-01500 AG(DFMx), 2017 WL 1018305 (C.D. Cal. Apr. 12, 2017) (applying California law), the insured was sued for violation of the Lanham Act and common law unfair competition based on its operation of a fraudulent mortgage scam. The court found that the complaint alleged facts showing that the insured's acts potentially disparaged the plaintiff's goods, products, or services. The court held that the insured's inherently harmful acts of illegally charging up-front fees to homeowners seeking mortgage advice were uninsurable under Section 533 of California's Insurance Code. Accordingly, no duty to defend or indemnify was owed.

T. Business Pursuits