Advertising Injuries: Defamation and Right of Publicity

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

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

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

- It must be a false statement and defamatory statement concerning another
- The false statement must be communicated/published to a third party
- The person making the false statement must be at least negligent in doing so²; and
- The false statement must have caused harm to the subject of the statement (or otherwise be actionable irrespective of harm).³ Where the policy language can be construed to require the insurer to defend or indemnify the policyholder for a claim of defamation, such is generally required.⁴

This type of insurance policy also covers the right of publicity, where a policyholder faces liability for alleged unauthorized appropriation of another individual’s identity for commercial purposes. The right of publicity pertains to commercial use of another individual’s name, likeness, and persona. Many states have enacted statutes that allow an individual to regulate use of their public image so that it cannot be used by someone else without their permission in commercial ventures, such as for advertising or selling products or services.⁵ The right of publicity exists under the broader legal umbrella of privacy, but may also involve intellectual property law, a category that includes copyrights and trademarks. The common theme between the two is the legal protection against unfair use of an image or idea that is closely associated with another commercial entity. Although the majority view is that every individual has the right of publicity⁶, most legal disputes arise over the unauthorized use of celebrities’ names and likenesses, since they are often used in advertisements.

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

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

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

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

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

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

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


8. *Id*


10. *Id*


12. (11th Cir. 2002). 12 *Id.*, 304 F.3d at 1196.


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

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

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

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