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Cassandra Cole and Kathleen McCullough  
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Insurance for Social Media Liability

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# Insurance for Social Media Liability

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**IMPORTANCE** Nine out of ten adults in the United States use the internet; social media use is widespread and increasing. This created enhanced liability risks for individuals and companies. In light of these increased risks, it is important to consider whether standard CGL and homeowners policies afford coverage for the types of claims that common arise from social media use.

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**OBJECTIVES** The increased risks resulting from widespread social media use were discussed in “Social Media Liability Exposures Part I.” This Part II discusses insurance coverages issues relating to such risks under CGL and homeowners policies, and how courts have addressed those issues, including the relevant policy provisions, whether social media claims fall within the bodily injury and property damage and personal and advertising injury insuring agreements, and whether any exclusions may apply.

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**SUMMARY** Whether a claim involves “bodily injury” or “property damage” is a threshold issue for coverage under Coverage A of the standard CGL policy and Homeowner’s policy. Social media-related claims that allege pure emotional distress, without corresponding physical manifestations, or that allege damage to intangible property, such as intellectual property rights, may not fall within the insuring agreements of these policies. Social media claims often allege intentional conduct, if not intentional harm, which raises the threshold issue of whether the claim alleges an “occurrence” such that coverage is triggered.

To the extent a social media claim falls within the policies’ insuring agreements, the next issue is whether the policies contain exclusions that might apply. Exclusions for expected or intended injury, employer’s liability and electronic data may limit coverage for social media claims. Likewise, exclusions in homeowner’s policies for bodily injury or property damage arising from a home business, professional services, or physical or mental abuse may apply to common social media claims.

Social media-related claims also implicate Coverage B, “personal and advertising injury,” under the CGL policy, which covers certain enumerated offenses. Claims such as such as defamation, invasion of privacy and false or deceptive advertising may constitute one of these offenses, as may certain intellectual property claims, to the extent they relate to the insured’s advertisement. To the extent a social media claim falls within the enumerated offenses covered under Coverage B, there are a number of standard exclusions that may apply to limit or otherwise exclude coverage. These include exclusions for personal and advertising injury arising out of knowing violations of the rights of another, material published with knowledge of falsity, material published prior to the policy period, quality or performance of goods, wrong description of prices, and patent, trademark or trade secret infringement, insured’s in the media business, electronic chatrooms, and unauthorized use of another’s name or product.

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# Insurance for Social Media Liability

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## Abstract

Whether a claim involves “bodily injury” or “property damage” is a threshold issue for coverage under Coverage A of the standard comprehensive general liability (CGL) policy and homeowners policy. Social media-related claims that allege pure emotional distress, without corresponding physical manifestations, or that allege damage to intangible property, such as intellectual property rights, may not fall within the insuring agreements of these policies. Social media claims often allege intentional conduct, if not intentional harm, which raises the threshold issue of whether the claim alleges an “occurrence” such that coverage is triggered.

To the extent a social media claim falls within the policies’ insuring agreements, the next issue is whether the policies contain exclusions that might apply. Exclusions for expected or intended injury, employer’s liability, and electronic data may limit coverage for social media claims. Likewise, exclusions in homeowners policies for “bodily injury” or “property damage” arising from a home business, professional services, or physical or mental abuse may apply to common social media claims.

Social media-related claims also implicate Coverage B “personal and advertising injury” under the CGL policy, which covers certain enumerated offenses. Claims such as defamation, invasion of privacy, and false or deceptive

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advertising may constitute one of these offenses, as may certain intellectual property claims, to the extent that they relate to the insured's advertisement. To the extent a social media claim falls within the enumerated offenses covered under Coverage B, there are several standard exclusions that may apply to limit or otherwise exclude coverage. These include exclusions for personal and advertising injury arising out of knowing violations of the rights of another; material published with knowledge of falsity; material published prior to the policy period; quality or performance of goods; wrong description of prices; and patent, trademark, or trade secret infringement; insured's in the media business; electronic chatrooms; and unauthorized use of another's name or product.

## Introduction

In the U.S., 9 in ten adults use the internet.<sup>1</sup> Narrow the demographic to younger adults, college graduates, and those from high-income homes, and the ratio is even higher.<sup>2</sup> “Social Media Liability Exposures,” the first part of this two-part series, discussed how this near universal use of social media exposes individuals and companies alike to enhanced risks of liability. Claims of defamation, harassment, invasions of privacy, false advertising, employment-related discrimination, and intellectual property violations stemming from social media usage are becoming increasingly more common.

This article discusses the coverage issues with respect to these claims under standard CGL and homeowners policies.<sup>3</sup> Section II, below, addresses the bodily injury and property damage coverage part of CGL and homeowners policies, including the relevant policy provisions, whether social media claims fall within the bodily injury and property damage insuring agreements, and whether any exclusions may apply. Section III considers these issues under the personal and advertising injury coverage part of the CGL policy.

## Coverage for Bodily Injury and Property Damage

This section will discuss whether the social media liabilities identified in “Social Media Liability Exposures” are covered by the “bodily injury” and “property damage” coverage parts of the typical CGL and homeowners policies, as well as whether there are any exclusions in those policies that would bar coverage for social media-related liabilities.

The standard CGL policy contains two main coverage parts—Coverage A and Coverage B. Coverage A insures claims of “bodily injury” and “property damage” arising out of an “occurrence.” The standard homeowners policy similarly contains several different coverage sections, including liability coverage under Coverage E—Personal Liability, which insures claims of “bodily injury” and “property damage.”

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1. <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> (last visited Nov. 6, 2020).

2. *Id.*

3. For the purposes of this discussion, the “standard” CGL policy and homeowners policy refers to Form CG 00 01 12 07 and Form HO 00 03 10 00, respectively, from the Insurance Services Office (ISO). Copies of the standard CGL and homeowners policy forms are attached as Appendix A and Appendix B, respectively. While these forms contain common language found in many CGL and homeowners policies issued by various insurance companies, each insurance policy is different; therefore, it is important to look at the particular language used in a policy in assessing coverage thereunder.



Thus, Coverage A of the standard CGL policy and Coverage E of the standard homeowners policy provide similar coverage.

### *Relevant Policy Language*

The typical CGL policy provides:

#### **Coverage A – Bodily Injury and Property Damage Liability**

##### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages.
- ...
- b. This insurance applies to “bodily injury” and “property damage” only if:
  - (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory.”
  - (2) The “bodily injury” or “property damage” occurs during the policy period...

Similarly, the typical homeowners policy provides:

#### **Coverage E – Personal Liability**

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

1. Pay up to our limit of liability for the damages for which an “insured” is legally liable...
2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent...

The standard CGL and homeowners policies impose two separate obligations on the insurer—the duty to defend and the duty to indemnify. For either duty to attach, there is a threshold question of whether the underlying claim seeks damages for “bodily injury” or “property damage.” Moreover, a “bodily injury” or “property damage” claim must arise from an “occurrence” for there to be coverage.

## Bodily Injury

The typical CGL policy defines “bodily injury” as, “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.” Similarly, the typical homeowners policy defines “bodily injury” as, “bodily harm, sickness or disease, including required care, loss of services, and death that results.” A claim involving cyberbullying that results in suicide clearly would implicate the “bodily injury” requirement. Social media torts often do not allege pure physical harm, but instead seek damages for emotional distress. Therefore, a threshold issue for these claims is whether emotional distress is considered “bodily injury” as that term is used in CGL and homeowners policies.

The majority view is that pure emotional distress, without some corresponding physical manifestation, does not constitute “bodily injury.”<sup>4</sup> Courts have held that where there is no physical injury, contact or pain, there is no bodily injury.<sup>5</sup> Some courts even go so far as to hold that emotional distress, even where the emotional distress results in some physical manifestation, does not constitute “bodily injury.” For example, in *Heacker v. Safeco Ins. Co. of America*,<sup>6</sup> the court held that emotional distress allegedly caused by a policyholder sending disparaging emails to the underlying plaintiff and hacking the underlying plaintiff’s social networking page, did not constitute “bodily injury,” even where the emotional distress allegedly led to physical manifestations of post-traumatic stress disorder (PTSD) and alcoholism. The *Heacker* court reasoned, “[p]hysical manifestations of emotional distress or other related emotional harm may offer insight into the severity or extent of the emotional trauma suffered, but absent some physical, bodily harm, such physical manifestations arise out of and are directly caused by purely emotional injury, which is clearly excluded from coverage.”<sup>7</sup>

In contrast, a minority of jurisdictions do recognize pure emotional distress as “bodily injury.”<sup>8</sup> For example, New York’s highest court found the term “bodily injury” in a CGL policy ambiguous with respect to whether it included emotional distress; therefore, it construed the term broadly in favor of the policyholder, holding, “[t]he categories ‘sickness’ and ‘disease’ in the insurer’s definition not only

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4. See *Keating v. Nat’l Union Fire Ins. Co. of Pittsburg, Pa.*, 995 F. 2d 154 (9th Cir. 1993); *Jefferson-Pilot Fire & Cas. Co. v. Sunbelt Beer Distributors Inc.*, 839 F. Supp. 376 (1993); *Rockgate Mgmt. Co. v. CGU Ins. Inc./PG Ins. Co. of New York*, 88 P. 3d 798 (Kan. Ct. App. 2004); *Lumbermen’s Mut. Cas. Co. v. United Servs. Auto Ass’n*, 528 A. 2d 64 (N.J. Super. Ct. App. Div. 1987).

5. See *Travelers Indem. Co. of Rhode Island v. Holloway*, 17 F. 3d 113 (5th Cir. 1994) (finding, “the phrase ‘bodily injury’ unambiguously excludes the types of nonphysical injuries asserted”); *Nat’l Cas. Co. v. Great Southwest Fire Ins. Co.*, 833 P. 2d 741 (Colo. 1992) (finding that coverage does not apply where there was no alleged, “physical injury, physical contact or pain”).

6. See *Heacker*, 676 F. 3d 724 (8th Cir. 2012).

7. *Id.* at 728.

8. See *Lavanant v. Gen. Acc. Ins. Co. of Am.*, 595 N.E. 2d 819 (N.Y. 1992); *Lanigan v. Snowden*, 938 S.W. 2d 330 (Mo. Ct. App. 1997).

enlarge the term ‘bodily injury’ but also, to the average reader, may include mental as well as physical sickness and disease.”<sup>9</sup>

Thus, depending on the law of the jurisdiction governing the policy at issue, whether a social media claim alleges physical manifestations of emotional distress is potentially dispositive with respect to “bodily injury” coverage under standard CGL and homeowners policies.

### *Property Damage*

In addition to coverage for “bodily injury” claims, the standard CGL policy provides coverage for “property damage” claims. The standard CGL policy defines “property damage” as:

“Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it.
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

Likewise, the standard homeowners policy provides coverage for claims of “property damage,” which is defined as follows:

“Property damage” means physical injury to, destruction of, or loss of use of tangible property.

Thus, the definition of “property damage” in both CGL and homeowners policies limits coverage to claims of damage to *tangible* property. Some courts have held that “tangible property” does not include electronic data stored on a computer.<sup>10</sup> The standard CGL policy makes this explicit, providing that:

For the purpose of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on; created or used on; or transmitted to or from computer software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices, or any other media that are used with electronically controlled equipment.

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9. See *Lavanant*, 595 N.E. 2d at 822.

10. See *Am. Online Inc. v. St. Paul Mercury Ins. Co.*, 347 F. 3d 89 (4th Cir. 2003); *Cincinnati Ins. Co. v. Prof. Data Servs. Inc.*, No. Civ.A. 01-2610-CM, 2003 WL 22102138 (D. Kan. July 18, 2003).

Thus, to the extent that a claim involving social media alleges damage to, or loss of use of, software or information stored on a computer or other electronic media (as opposed to the computer or electronic media itself), the claim would likely not be covered under the “property damage” portion of the standard CGL or homeowners policy.<sup>11</sup>

Likewise, courts have held that copyright infringement claims are not covered as “property damage,” because copyrights are not “tangible property.”<sup>12</sup> A claim for property damage arising from copyright infringement was denied in *TIG Ins. Co. v. Nobel Learning Communities Inc.*, because the policy contemplated damage to physical property, that which could be touched, and, “copyrights are intangible items of intellectual property.”<sup>13</sup> As one court has noted, “a copyright itself is intangible, while the medium upon which a copyrighted work is recorded is tangible.”<sup>14</sup> Accordingly, while damage to a copyrighted work may be covered as “property damage,” suits for copyright infringement are not.

### Occurrence

Under the standard CGL policy, in order for there to be coverage, “bodily injury” or “property damage” must result from an “occurrence” taking place during the policy period. Therefore, whether there has been an “occurrence” is a threshold issue for “bodily injury” or “property damage” coverage, regardless of whether the claim arises from the use of social media or in a more traditional context.

An “occurrence” is typically defined in CGL and homeowners policies as an, “accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Courts typically interpret the term “accident” to mean a happening or event that is unintended or unexpected (Russ & Segalla, 2012).<sup>15</sup> However, courts differ on whether an intentional act may constitute an “occurrence”; some courts hold that there can be no “occurrence” where the act that gave rise to the alleged harm was done intentionally,<sup>16</sup> while other courts hold that even where the act that gave rise to the alleged harm was done intentionally, there

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11. See *Recall Total Info. Mgmt. Inc. v. Fed. Ins. Co.*, 2012 WL 469988 (Conn. Super. Ct. Jan. 17, 2012) (holding damage to data contained on electronic media is, “not damage to tangible property” and, “[f]urthermore, data is specifically excluded by the unambiguous policy language”), *aff’d on other grounds* 2014 Conn. App. LEXIS 6 (Conn. App. Ct. Jan. 14, 2014).

12. See *Robert Bowden Inc. v. Aetna Cas. & Sur. Co.*, 977 F. Supp. 1475 (N.D. Ga. 1997); *Rhein Bldg. Co. v. Gehrt*, 21 F. Supp. 2d 896 (E.D. Wisc. 1998).

13. See *TIG Ins. Co. v. Nobel Learning Communities Inc.*, 2002 WL 1340332 (E.D. Pa. June 18, 2002).

14. See *Robert Bowden Inc.*, 977 F. Supp. at 1478.

15. (“As it is used within the definition of an ‘occurrence,’ ‘accident’ connotes a happening or event which is undersigned, unintended, unforeseen or unexpected or cannot otherwise be reasonably anticipated.”).

16. See *State Farm Gen. Ins. Co. v. Frake*, 128 Cal. Rptr. 3d 301, 309 (2d Dist. 2011); *Stellar v. State Farm General Ins. Co.*, 69 Cal. Rptr. 3d 350 (Cal. Ct. App. 2007).

is an “occurrence” if the policyholder did not intend the resulting harm.<sup>17</sup> For example, where the policyholder intentionally hit his friend, causing injuries, but did not intend to cause harm, the policy exclusion would apply, because even though the policyholder did not intend to harm his friend, the act of hitting his friend was intentional and not an accident or unforeseen happening.<sup>18</sup> However, where a tenant was murdered after an assault on the landlord’s property, the court found that even though the assault was intentional, murder is not an “expected or intended” bodily injury from the policyholder landlord’s standpoint; thus, the policy exclusion does not apply.<sup>19</sup> The distinction can be particularly important with respect to the social media claims. Although one could imagine a scenario where a social media claim is brought based on an unintentional act—e.g., someone typing a comment to post on another’s Facebook page, changing their mind about posting the comment, but accidentally hitting “post” anyway—the types of claims that arise in the social media context will generally involve intentional acts. Thus, how a court interprets the term “occurrence” may be dispositive with respect to many social media claims.

For example, in *Heacker*,<sup>20</sup> a policyholder was sued for, among other things, negligent infliction of emotional distress arising from the policyholder’s alleged hacking of the underlying plaintiff’s Facebook page and sending disparaging emails. The policyholder sought coverage under a homeowners policy that provided coverage for “bodily injury” caused by an “occurrence,” which was defined in the policy as an, “accident, including continuous or repeated exposure to substantially the same general harmful conditions.”<sup>21</sup> The court granted the insurer’s motion for summary judgment, holding that there was no “occurrence,” because, “[a] judgment for negligent infliction of emotional distress means that [the policyholder] either did expect—or should have expected—[the underlying plaintiff’s] injuries”; therefore, the claim did not involve, “undersigned, sudden or unexpected events.”<sup>22</sup>

By contrast, some courts have found that an “occurrence” may exist where injuries from social media torts, such as cyberbullying, may be unforeseeable. In *State Farm Fire and Cas. Co. v. Motta*,<sup>23</sup> the policyholder defendants had a homeowners policy with State Farm. The policyholder’s son engaged in a campaign of harassment, bullying and cyberbullying of a female high school student, and even after being punished by his parents (the policyholders) and the school, he continued harassing the other student until she committed suicide. Her parents subsequently filed suit against the policyholder’s son for the wrongful death.<sup>24</sup> State Farm filed a declaratory judgment action asserting that the underlying suit was not covered under

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17. See *Agoado Realty Corp. v. United Int’l Ins. Co.*, 733 N.E. 2d 213, 215 (N.Y. Ct. App. 2000); *Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co. Inc.*, 707 S.E. 2d 369, 371 (Ga. 2011).

18. See *State Farm Gen. Ins. Co.*, 128 Cal. Rptr. 3d at 301, 309.

19. See *Agoado Realty Corp.*, 733 N.E. 2d at 213, 215.

20. See *Heacker*, 676 F. 3d at 724, 726.

21. *Id.* at 727.

22. *Id.* at 728.

23. See *State Farm Fire and Cas. Co.*, 356 F. Supp. 3d 457 (E.D. Pa. 2018).

24. *Id.* at 459.

the parents' homeowners policy, because the girl's death by suicide did not constitute an "occurrence" triggering coverage under the policy.<sup>25</sup> The federal district court determined that State Farm had a duty to defend, because even though the son's actions in texting and cyberbullying the decedent were intentional and not accidental acts, her death by suicide was an "unintended consequence" of his acts, and he could not, "have reasonably foreseen the resulting injury."<sup>26</sup> The court reasoned that it could not, "conclusively find death by suicide is foreseeable from his cyberbullying," because Pennsylvania law generally finds that suicide or attempted suicide, "is not a recognized basis for recovery in a tort claim...because suicide constitutes an independent intervening act *so extraordinary as not to have been reasonably foreseeable by the original tortfeasor.*"<sup>27</sup> Accordingly, the court held that State Farm had a duty to defend the son because the underlying action alleged an "occurrence" as a matter of law.

Courts are split as to whether defamation is "accidental," such that it constitutes an "occurrence." For example, in *Baxter v. Doe*,<sup>28</sup> the court held that a defamation claim arising from statements the policyholder allegedly posted on a website was not covered under the policyholder's homeowners policy, because the alleged conduct did not constitute an "occurrence." The policy at issue defined an "occurrence" as, "an accident, including continuous or repeated exposure to...harmful conditions" resulting in bodily injury or property damage.<sup>29</sup> The court reasoned that because the policyholder was a public official—a former vice president at the University of Louisiana Monroe—the underlying plaintiff would have to establish that the allegedly defamatory statements were made with actual malice in order to state a claim for defamation. The court held that the actual malice requirement, "makes defamation of a public official an intentional tort"; therefore, it was excluded from coverage under the policy's definition of "occurrence."<sup>30</sup>

Similarly, in *Stellar*,<sup>31</sup> the court, focusing on the policyholder's intentional act of making certain statements, held that a claim of defamation was not covered under the policyholder's homeowners policy, because it did not arise out of an "occurrence." Specifically, the policyholder allegedly made several defamatory statements, including sending an email to a third party and publishing a posting on the internet, that the underlying plaintiff was on drugs, had a gambling problem, and was a pedophile.<sup>32</sup> The underlying complaint alleged that the policyholder had made these statements, "willfully with the wrongful intention of injuring" the underlying plaintiff.<sup>33</sup> The court held that there was no duty to defend under the policyholder's

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25. Id. at 460, 463.

26. Id. at 463.

27. Id. at 463 (quoting *McPeake v. William T. Cannon, Esquire, P.C.*, 553 A. 2d 439, 441 (Pa. 1989)).

28. See *Baxter*, 868 So. 2d 958 (La. Ct. App. 2004).

29. Id.

30. Id. at 961.

31. See *Stellar*, 69 Cal. Rptr. 3d at 350.

32. Id. at 351–352.

33. Id. at 352.

homeowners policy, because the underlying claim did not arise from an “occurrence.” The court reasoned that defamation is an intentional tort requiring that the defendant intend to publish the defamatory statement, and, “[a]n accident...is never present when the insured performs a deliberate act...where the insured intended all of the acts that resulted in the victim’s injury, the event may not be deemed an “accident” merely because the insured did not intend to cause injury.”<sup>34</sup>

The Western District of Washington reached a similar conclusion in *State Farm Fire and Cas. Co. v. El-Moslimany*,<sup>35</sup> where the policyholders sought coverage under their homeowners policy in connection with an underlying defamation suit. The underlying plaintiff claimed that the policyholders engaged in a, “knowing, intentional and malicious campaign of defamation” and a, “relentless course of conduct designed and intended to publicly embarrass, humiliate and destroy [claimant] through the perpetuation of intentional falsehoods.”<sup>36</sup> The policyholders allegedly published their defamatory statements in response to online articles about the claimant in Facebook posts and a blog the policyholders maintained specifically designed to talk about the claimant.<sup>37</sup> The underlying complaint’s defamation allegations were pled broadly to seek liability, in the alternative, to the extent that the policyholders acted “negligently.”<sup>38</sup> The court held that the inclusion of terms like “negligently” and “reckless” in the complaint did, “not alter the clearly deliberate nature of the conduct alleged.”<sup>39</sup> Accordingly, the court held that the allegations, “reveal no ambiguity” and, “provide[d] no conceivable basis for coverage under State Farm’s policy,” and such could not be deemed an “occurrence” under the policy, because the complaint alleged, “a course of intentional conduct, the result of which cannot be reasonably described as unforeseen, involuntary, unexpected or unusual.”<sup>40</sup>

In contrast, in *Tortoso v. MetLife Auto & Home Ins. Co.*,<sup>41</sup> the court held that there was an issue of fact precluding summary judgment where the policyholder, who allegedly disseminated fliers containing defamatory statements about coworkers, argued that he did not have knowledge of the falsity of the information contained on the fliers, because he had distributed them without reading them first and did so at the request of his employer. The court held that if the policyholder could show that he distributed the fliers without knowledge of their falsity and without intent to cause harm, the requirement of an “occurrence” would be satisfied.<sup>42</sup> In *Sletten & Brettin Orthodontics LLC v. Continental Cas. Co.*,<sup>43</sup> the court held that under Minnesota law, underlying claims for defamation arising out

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34. Id. at 354.

35. See *State Farm Fire and Cas. Co.*, 178 F. Supp. 3d 1048 (W.D. Wash. 2016).

36. Id. at 1052.

37. Id.

38. Id.

39. Id. at 1057.

40. Id. at 1059–60.

41. See *Tortoso*, 799 N.Y. S. 2d 506 (N.Y. App. Div. 2005).

42. Id. at 278–79.

43. See *Sletten & Brettin Orthodontics LLC*, 782 F. 3d 931 (8th Cir. 2015).

of the policyholder posting defamatory comments online about a rival dentistry triggered coverage under a CGL policy in the first instance for “injury” arising out of an “occurrence,” but the policy’s exclusion for “expected or intended” injuries barred coverage for the defamation claims.

Similar issues are raised with respect to other torts that can arise from the use of social media. For example, the court in *Board of Educ. of E. Syracuse-Minoa Cent. School Dist. v. Continental Ins. Co.*<sup>44</sup> held that claims of sexual harassment and discrimination brought against a policyholder did not constitute an “occurrence” under the policy, because, “[t]here is nothing accidental about [such] charges.”<sup>45</sup> The court reasoned, “[w]hile the complaint contains allegations that ‘the [policyholder] knew or should have known of the complained of conduct’ and ‘failed to stop or prevent such conduct,’ those allegations do not change the gravamen of the complaint from one alleging intentional acts and violations of Federal and State statutes to one involving negligent conduct.”<sup>46</sup>

Similarly, in *Am. Western Home Ins. Co. v. Lovedy*,<sup>47</sup> the court held that a claim of disabilities discrimination did not arise out of an “accident”; therefore, there was no “occurrence” triggering coverage under the policyholder’s CGL policy. In this case, the underlying plaintiff alleged that the policyholder—an owner/operator of a lodge—advertised on its website that its facilities had, “all the up-to-date conveniences to make your stay most comfortable,” but nonetheless denied the underlying plaintiff, “access to, and ... full and equal enjoyment of goods, services, facilities, and/or benefits,” at the policyholder’s lodge, in violation of the Americans with Disabilities Act of 1990 (ADA), by having, “various facility and access barriers, including: steep, blocked, and inaccessible ramps and pathways and insufficient markings and signage for disabled parking.”<sup>48</sup> The underlying complaint also alleged that the policyholder’s website advertisement constituted an unfair or deceptive act or practice under state consumer protection laws.<sup>49</sup> The court held that the underlying complaint did not allege an “occurrence” that is an “accident,” because, “the layout of the [policyholder’s lodge] cannot be termed an ‘accident’ ... [r]ather, the layout of the [lodge], including any barriers, was intentional.”<sup>50</sup> Likewise, the court held that the alleged statements made on the policyholder’s website did not constitute an “occurrence” because, “claims for willful violations of the [state consumer protection laws] are not covered under a policy which excludes bodily injury or property damage intended from the standpoint of the policyholder.”<sup>51</sup>

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44. See *Board of Educ. of E. Syracuse-Minoa Cent. School Dist.*, 604 N.Y. S. 2d 399 (N.Y. App. Div. 1993).

45. *Id.*

46. *Id.*

47. See *Am. Western Home Ins. Co.*, No. 4:06-cv-8, 2006 WL 3740874 (E.D. Tenn. Dec. 15, 2006).

48. *Id.* at \*1.

49. *Id.* at \*2.

50. *Id.* at \*10.

51. *Id.* at \*11.



In contrast, courts have held that discrimination claims that do not require a showing of intent may constitute a covered “occurrence.” For example, in *American Management Assoc. v. Atlantic Mut. Ins. Co.*,<sup>52</sup> the policyholder sought coverage for an age discrimination claim brought against it by a former employee. After the insurer denied coverage for the claim, the policyholder settled the underlying suit and commenced a declaratory judgment action against the insurer. The policyholder argued that although the underlying complaint alleged intentional discrimination, the allegations also stated a claim for “disparate impact” discrimination, which need not be intentional.<sup>53</sup> The court held that the complaint alleged sufficient facts to state a prima facie claim for disparate impact discrimination, which does not require a showing of intent; therefore, the insurer had a duty to defend.<sup>54</sup>

### *Exclusions*

Once it has been established that a social media claim falls within the insuring agreement of a CGL or homeowners policy—i.e., the claim alleges “bodily injury” or “property damage” arising from an “occurrence”—the next step is to examine whether any exclusions apply. Although the insuring agreements of the typical CGL and homeowners policies are similar with respect to coverage for “bodily injury” and “property damage,” each type of policy has its own set of exclusions that may apply.

#### **CGL Coverage A Exclusions**

The standard CGL policy contains several exclusions to the coverage afforded by Coverage A. This section discusses exclusions that may be applicable to the types of claims that involve the use of social media.

##### ***Expected Or Intended Injury***

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured.

In contrast to the definition of an “occurrence,” which under the broad interpretation of some courts requires the act or acts that led to the policyholder’s alleged liability be “accidental” or unintended, the expected or intended exclusion focuses on whether the resulting injury was either expected or intended from the standpoint of the policyholder. As a result, even where the act or acts that caused

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52. See *American Management Assoc.*, 641 N.Y. S. 2d 802 (N.Y. Sup. Ct. 1996) *aff’d*, 234 A. D. 2d 112 (N.Y. App. Div. 1997).

53. According to the court, to state a claim for “disparate impact” discrimination, a plaintiff must, “allege, at a minimum, that the employer utilized a facially neutral criterion which resulted in selecting applicants for hire or promotion in a significantly discriminatory pattern.” *Id.* at 806.

54. *Id.*

the alleged injury were done intentionally, if the consequences of those acts were unintended, then the exclusion will not apply.<sup>55</sup>

### ***Employer's Liability***

“Bodily injury” to:

- (1) An “employee” of the insured arising out of and in the course of:
  - (a) Employment by the insured.
  - (b) Performing duties related to the conduct of the insured’s business.
- (2) The spouse, child, parent, brother or sister of that “employee” because of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of injury...

This exclusion is particularly relevant given the prevalence of social media in the workplace. For example, suppose an employee logs on to her Facebook page from her office during the workday and makes allegedly defamatory comments on another employee’s Facebook page. Would a subsequent claim for defamation against the employer be covered under the employer’s CGL policy? The “arising out of” language would seem to indicate that the exclusion would apply only if the alleged conduct bore some relationship to the employment of the policyholder. For example, if the employer encouraged its employees to use social media to promote its business, then the employee’s allegedly defamatory or harassing comments would arguably fall within the exclusion, because the use of social media was part of the employee’s, “duties related to the conduct of the insured’s business.” However, a different result might be obtained if the employer has a policy prohibiting the employee from using social media at the workplace. In this case, the employer could argue that the employee was not acting within the scope of her employment; therefore, the claim does not “arise out of” her employment. However, courts typically have interpreted the term “arising out of” in the employer’s liability exclusion broadly, applying the exclusion even in situations where some of the

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55. See *City of Johnstown, N.Y. v. Bankers Std. Ins. Co.*, 877 F. 2d 1146, 1150 (2d Cir. 1989) (“In general, what makes injuries or damages expected or intended rather than accidental are the knowledge and intent of the insured. It is not enough that an insured was warned that damages might ensue from its actions or that once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, ‘intended’ by the insured because the insured knew that the damages would flow directly and immediately from its intentional act.”). (Citations omitted).

underlying conduct occurs outside the workplace.<sup>56</sup> For example, in *Board of Educ. of E. Syracuse-Minoa Cent. School Dist.*, the court held that the sexual harassment and retaliatory discharge claim excluded despite, “[t]he fact that the principal committed some of the alleged acts of sexual harassment away from the school.”<sup>57</sup> Similarly, in *Meadowbrook Inc. v. Tower Ins. Co.*, the court held that the hostile workplace sexual harassment claim involving some conduct allegedly occurring outside the workplace was excluded because, “[a]lthough the plaintiffs alleged instances of *conduct* that occurred outside ‘the course and scope’ of their employment, the *injuries* allegedly caused by these instances were directly related to the creation of a hostile work environment.”<sup>58</sup>

Also, consider the case of *Blakey v. Continental Airlines Inc.*,<sup>59</sup> where an employee sued her employer for gender discrimination arising out of comments posted on an online message board for employees. Claims of workplace discrimination such as this likely would be excluded from coverage because the employee’s alleged injury “arises from” her employment by the policyholder.<sup>60</sup>

### ***Personal and Advertising Injury***

“Bodily injury” arising out of “personal and advertising injury.”

This exclusion excludes from Coverage A the types of claims that would be covered under Coverage B, which is discussed in detail below. Thus, to the extent that a social media tort is covered under Coverage B, it would not also be covered under Coverage A.

### ***Electronic Data***

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices, or any other media that are used with electronically controlled equipment.

Although the current version of the standard CGL policy defines “tangible property” to exclude electronic data, there is also a separate exclusion for damage to electronic data that would potentially apply.

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56. See *Board of Educ. of E. Syracuse-Minoa Cent. School Dist.*, 604 N.Y. S. 2d 399; *Meadowbrook Inc.*, 559 N. W. 2d 411 (Miss. 1997).

57. See *Board of Educ. of E. Syracuse-Minoa Cent. School Dist.*, 604 N.Y.S.2d 399.

58. See *Meadowbrook, Inc.*, 559 N. W. 2d 411 (emphasis in original).

59. See *Blakey*, 751 A. 2d 538 (N.J. 2000).

60. See Civil Action No. 10-123-KSF, 2010 WL 5391533 (E.D. Ky. Dec. 21, 2010).

### Homeowners Coverage E Exclusions

As with the standard CGL policy, there are several exclusions to the coverage afforded by Coverage E in the standard homeowners policy that are potentially implicated by social media torts.

#### *Expected Or Intended Injury*

“Bodily injury” or “property damage” that is expected or intended by an “insured,” even if the resulting “bodily injury” or “property damage”:

- a. Is of a different kind, quality or degree than initially expected or intended.
- b. Is sustained by a different person, entity or property than initially expected or intended...

This exclusion is like the one in the standard CGL policy “Expected or Intended Injury” mentioned above. The exclusion focuses on whether the alleged injury, not the act that allegedly caused the injury, was either expected or intended from the standpoint of the policyholder. However, the homeowners exclusion is potentially broader, in that it explicitly applies even where the resulting injury was different, or sustained by a different person, than was expected or intended.

#### *“Business”*

- a. “Bodily injury” or “property damage” arising out of or in connection with a “business” conducted from an “insured location” or engaged in by an “insured,” whether the “business” is owned or operated by an “insured” or employs an “insured.”

This Exclusion E.2 applies, but is not limited to, an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed or implied to be provided because of the nature of the “business”...

“Business” is defined as:

- a. A trade, profession or occupation engaged in on a full-time, part-time or occasional basis.
- b. Any other activity engaged in for money or other compensation, except the following:
  - (1) One or more activities, not described in (2) through (4) below, for which no “insured” receives more than \$2,000 in total compensation for the 12 months before the beginning of the policy period.

- (2) Volunteer activities for which no money is received, other than payment for expenses incurred to perform the activity.
- (3) Providing home day care services for which no compensation is received, other than the mutual exchange of such services.
- (4) The rendering of home day care services to a relative of an “insured.”

The purpose of the “Business” exclusion in the typical homeowners policy is to exclude from coverage business risks that are not typically associated with the operation and maintenance of one’s home and to relegate coverage of business risks to commercial policies.<sup>61</sup> In determining the applicability of the exclusion, most courts look to whether the activity that gave rise to the injury had two elements: “(1) continuity or regularity of the activity; and (2) a profit motive, usually as a means of livelihood, gainful employment, earning a living, procuring subsistence or financial gain, a commercial transaction or engagement.”<sup>62</sup> As “business” is defined to include, among other things, activities engaged in on a, “full-time, part-time or occasional basis,” and, “any other activity engaged in for money or other compensation,” the activity that gave rise to the alleged injury need not be related to the policyholder’s principal business in order for the exclusion to apply.<sup>63</sup>

In the context of social media, this means that the standard homeowners policy may not cover, for example, a free-lance writer or blogger who is sued for publishing

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61. See *Allstate Ins. Co. v. Hallman*, 159 S. W. 3d 640, 645 (Tex. 2005) (“[A]s numerous courts have recognized, the purpose of the business pursuits exclusion is to lower homeowners insurance premiums by removing coverage for activities that are not typically associated with the operation and maintenance of one’s home.”); *Erickson v. Christie*, 622 N. W. 2d 138, 140 (Minn. Ct. App. 2001) (“The function of a business pursuits exclusion is to confine the homeowners policy coverage to nonbusiness risks and to relegate business coverage to a commercial policy.”).

62. See *Allstate Ins. Co.*, 159 S. W. 3d at 644; *Showler v. Am. Mfrs. Mut. Ins. Co.*, 690 N.Y. S. 2d 369 (N.Y. App. Div. 1999) (“To constitute a business, there must be two elements: ‘first, continuity, and secondly, the profit motive.’”); *Sun Alliance Ins. Co. of Puerto Rico, Inc. v. Soto*, 836 F. 2d 834, 836 (3d Cir. 1988) (“[A]ctivity encompassed within a ‘business pursuits’ exclusion in an insurance policy requires two elements. The first is continuity, or customary engagement in the activity. The second, profit motive, may be shown by such activity as a means of livelihood, a means of earning a living, procuring subsistence or profit, commercial transactions or engagements.”); Russ, L.R., and T.F. Segalla, 2012. “Couch on Insurance, 3d” § 128:13; *Blomdahl v. Peters*, 367 Wis. 2d 748 (Ct. App. Wis. Feb. 4, 2016) (UNPUBLISHED) (holding that business pursuits exclusion in a homeowners policy applied to bar coverage for underlying disparagement claims arising out of online statements made by insureds about a claimant’s business, where the “animosity between [the parties] arose out of and was in connection with their business dispute, and the record discloses no other nonbusiness basis for these statements.”).

63. Some courts have held that the exclusion only applies to activities involving the policyholder’s principal business. See *Brown v. Peninsular Fire Ins. Co.*, 320 S. E. 2d 208, 210 (Ga. Ct. App. 1984). However, this is the minority approach and has been rejected where the policy at issue (as in the standard homeowners policy discussed in this article) defines “business” broadly to include part-time or occasional business activities. See *Allstate Ins. Co. v. Harkleroad*, No. 409CV011, 2010 WL 2076941 (S.D. Ga. May 24, 2010) (rejecting argument that exclusion only applied to activities in connection with a policyholder’s principal business, where policy at issue defined business to include “part-time activity”).

allegedly defamatory statements online, if the statements were made as part of the policyholder's "business" of publishing material online for money. Likewise, the host of a blog that earns money through advertising may find coverage for claims arising from the blog's content excluded. To the extent that the policyholder does not receive or seek any remuneration for her social media activities; however, then the exclusion would likely not apply to claims arising out of that activity.

### ***Professional Services***

"Bodily injury" or "property damage" arising out of the rendering of or failure to render professional services.

The policy does not define the term "professional services." As a result, courts differ on what types of services constitute "professional services" for the purpose of the exclusion. A similar professional services exclusion in a Directors and Officers (D&O) insurance policy was interpreted broadly in *Tagged Inc. v. Scottsdale Ins. Co.*<sup>64</sup> In that case, the policyholder operated a social networking website that targeted teenagers, encouraging them to use the website to, "meet and form other relationships with new people."<sup>65</sup> The site contained several representations assuring users and their parents that the site was safe for minors and that members were barred from, "engaging in certain inappropriate conduct such as uploading sexually explicit content or content harmful to minors."<sup>66</sup> The site was investigated for alleged false advertising and false and deceptive acts by the office of the state attorney general, which found that the website contained a number of examples of inappropriate content, including child pornography.<sup>67</sup> The policyholder subsequently entered into a settlement agreement with the attorney general's office and tendered a claim for reimbursement from its insurer for costs associated with the investigation and settlement. The insurer disclaimed coverage on the basis of, among other things, an exclusion in the D&O policy for, "any Claim alleging, based upon, arising out of, attributable to, directly or indirectly resulting from, in consequence of, or in any way involving the rendering or failing to render professional services."<sup>68</sup> The court held that the term "professional services" was broader than, "'those so-called learned professions,' such as medicine, law or engineering," and included those services, "arising out of a vocation, calling, occupation or employment involving specialized knowledge, labor or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual."<sup>69</sup> Applying this definition, the court found that the claim fell within the exclusion, because the policyholder, "as the operator of a website, provides professional services in determining and regulating the content of that site because

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64. See *Tagged Inc.*, Civil No. JFM-11-127, 2011 WL 2748682 (S.D. N.Y. May 27, 2011).

65. *Id.* at \*1.

66. *Id.*

67. *Id.* at \*2.

68. *Id.* at \*1.

69. *Id.* at \*4.

this activity is not merely incidental to the site's everyday operations."<sup>70</sup> Moreover, the court noted that the policyholder decided to advertise its efforts to protect minors, and, "decisions regarding advertising tactics clearly constitute professional services."<sup>71</sup>

Under the broad definition of "professional services" in the *Tagged Inc.* case, several social media-related activities could be excluded, such as the operation and management of a social media website, social media advertising, and even blogging. As these activities could be characterized as "mental or intellectual," rather than "physical or manual," and arguably require some form of specialized knowledge, they potentially come within the exclusion.

However, some courts have taken a narrower view of the exclusion, interpreting the term "professional" in the exclusion to refer to those persons who, "belong to a learned profession or whose occupations require a high level of training and proficiency."<sup>72</sup> Under this narrow interpretation, social media claims would likely not come within the exclusion.

### ***Sexual Molestation, Corporal Punishment, or Physical or Mental Abuse***

"Bodily injury" or "property damage" arising out of sexual molestation, corporal punishment, or physical or mental abuse...

Although this exclusion is invoked most often in the context of child abuse claims, courts have held that it is not limited to that context. For example, in *Auto-Owners Ins. Co. v. Am. Cent. Ins. Co.*, the court held that the exclusion is not limited to the child-abuse context, and the allegations of emotional distress caused by fraternity hazing fall within the exclusion.<sup>73</sup> Accordingly, the exclusion potentially applies to a number of social media torts, including defamation and intentional or reckless infliction of emotional distress, to the extent that the claims can be characterized as alleging "bodily injury" arising from "mental abuse."

In that regard, harassment claims would likely be excluded, as they allege injury arising out of "mental abuse." For example, in *Heacker v. Am. Family Mut. Ins. Co.*,<sup>74</sup> the court held that an exclusion for, "'bodily injury,' 'property damage' or 'personal injury,' which arises out of ...[s]exual activity or conduct, corporal punishment, or physical or mental abuse," applied to claims of intentional and negligent infliction of emotional distress arising out of a policyholder making harassing phone calls and sending harassing emails and text messages, because the policy, "clearly and unambiguously excludes coverage for emotional distress or

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70. *Id.* at \*6.

71. *Id.*

72. See *Evanston Ins. Co. v. Budget Group Inc.*, 199 F. App'x 867 (11th Cir. 2006) (holding car rental business was not engaging in "professional services," as that term is used in exclusion to a CGL policy).

73. See *Auto-Owners Ins. Co.*, 739 So. 2d 1078 (Ala. 1999).

74. See *Heacker*, No. 09-4270-CV-W-GAF, 2011 WL 124301 (W.D. Mo. Jan. 14, 2011).

similar injuries arising from emotional harm.”<sup>75</sup> Similarly, the court in *Sentry Claims Service v. Botwick*<sup>76</sup> held that an exclusion in a homeowners policy for liability arising out of “mental abuse” precluded coverage for a lawsuit filed against the policyholder alleging that the policyholder, “‘intentionally and maliciously’ subjected the plaintiff to a pattern of abuse for the purpose of causing her to suffer emotional distress.”<sup>77</sup> Likewise, the court in *Sanchez v. Davoudi*<sup>78</sup> held that a similar exclusion for liability, “arising out of any sexual molestation, corporeal punishment, or physical or mental abuse” applied to claims of sexual harassment in the workplace, hostile work environment, and intentional infliction of emotional distress.<sup>79</sup> The underlying plaintiff alleged that the policyholder touched her inappropriately, made inappropriate sexual comments, and threatened her.<sup>80</sup> The court granted summary judgment for the insurer, finding that the underlying suit, “involves claims of sexual harassment and intentionally inflicted emotional distress, which by our reading of the policy, in its plainest terms, falls under this exclusion.”<sup>81</sup> In *Universal N. Am. Ins. Co. v. Colosi*,<sup>82</sup> the court granted the insurer’s motion for summary judgment, finding that the sexual molestation exclusion in a homeowners policy barred coverage for claims asserted against a high school student and his parents for allegations that the student burned a girl’s genital region with a lighter while she was unconscious, and such acts were captured on a cell phone and broadcast over social media.

Moreover, courts have interpreted the “arising out of” phrase in this exclusion broadly, holding that the exclusion applies to claims alleging that policyholders are vicariously liable for the acts of their children.<sup>83</sup>

Courts have also held that the intent of the alleged tortfeasor is not relevant in determining whether the exclusion applies; i.e., even negligent conduct, or conduct lacking the requisite mental state, is excluded if it falls within one of the enumerated categories of conduct in the exclusion (e.g., sexual molestation, corporal

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75. Id. at \*5, 9.

76. See *Sentry Claims Service*, No. CV030477960S, 2004 WL 1463004 (Conn. Super. Ct. June 8, 2004).

77. Id. at \*4 (“[T]he insurance policy issued by the [plaintiff] expressly states that coverage ‘[d]oes not apply to bodily injury or property damage...,’ which ‘[arises] out of sexual molestation, corporal punishment, or physical or mental abuse.’ As noted above, [the underlying plaintiff] is bringing a claim against the defendant for intentional infliction of emotional distress. Based on the aforesaid precedent, this exclusion, by itself, precludes any obligation on the part of the plaintiff to defend in the underlying action.”).

78. See *Sanchez*, No. 1-01-61, 2001 WL 919514 (Ohio Ct. App. Aug. 15, 2001).

79. Id. at \*3.

80. Id.

81. Id.

82. See *Universal N. Am. Ins. Co.*, 322 F. Supp. 3d 1071 (D. Nev. 2018).

83. See *Covenant Ins. Co. v. Sloat*, No. 385786, 2003 WL 21299384 (Conn. Super. Ct. May 23, 2003); *Allstate Ins. Co. v. Bates*, 185 F. Supp. 2d 607 (E.D. N.C. 2000); *St. Paul Fire & Marine Ins. Co. v. Schrum*, 149 F.3d 878 (8th Cir. 1998); *Universal N. Am. Ins. Co.*, 322 F. Supp. 3d 1071, 1077 (D. Nev. 2018).



punishment, or physical or mental abuse).<sup>84</sup> For example, in *Merrimack Mut. Fire Ins. Co. v. Ramsey*, despite Plaintiff Ramsey's mental illness that prevented him from developing intent and/or being aware of his actions, his repeated stabbing of an uninvited guest in his home constitutes physical abuse in the policy exclusion, and the exclusion applies.<sup>85</sup> Similarly, in *Westfield Ins. Co. v. Holland*, the court found that regardless of Holland's lack of intent in molesting an elderly woman, his actions constituted molestation by law, and thereby preclude coverage.<sup>86</sup>

## Personal and Advertising Injury Coverage Under CGL Policies

The section above considered coverage for social media torts under the bodily injury and property damage coverage parts of the standard CGL and homeowners policies. The standard CGL policy contains another insuring agreement, Coverage B, which provides coverage for "personal and advertising injury." This section discusses the relevant policy provisions of Coverage B, whether social media torts fall within the insuring agreement, and whether any exclusions may apply.

### *Relevant Policy Provisions*

The standard insuring agreement of Coverage B provides that the insurer:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result...
- b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business, but only if the offense was committed in the "coverage territory" during the policy period.

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84. See *Merrimack Mut. Fire Ins. Co.*, No. X10UWYCV074014573S, 2008 WL 4150021 (Conn. Super. Ct. Aug. 12, 2008); *Westfield Ins. Co.*, Civ. Act. No. 07-5496, 2008 WL 5378267 (E.D. Pa. Dec. 19, 2008).

85. See *Merrimack Mut. Fire Ins. Co.*, No. X10UWYCV074014573S, 2008 WL 4150021 (Conn. Super. Ct. Aug. 12, 2008).

86. See *Westfield Ins. Co.*, Civ. Act. No. 07-5496, 2008 WL 5378267 (E.D. Pa. Dec. 19, 2008).

“Personal and advertising injury,” in relevant part, is defined as follows:

14. “Personal and advertising injury” means injury, including consequential “bodily injury,” arising out of one or more of the following offenses:
  - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.
  - e. Oral or written publication, in any manner, of material that violates a person’s right of privacy.
  - f. The use of another’s advertising idea in your “advertisement.”
  - g. Infringing on another’s copyright, trade dress or slogan in your “advertisement.”

The term “advertisement,” as it is used in Coverage B, is defined as follows:

1. “Advertisement” means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
  - a. Notices that are published include material placed on the internet or on similar electronic means of communication.
  - b. Regarding websites, only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

### *Coverage for Social Media Torts Under Coverage B*

Many of the social media torts discussed above potentially fall within the scope of Coverage B’s “personal and advertising injury.” Whereas Coverage A insures “bodily injury” and “property damage” arising out of an “occurrence,” Coverage B insures damages caused by certain enumerated offenses (Ostrager & Newman, 2013).<sup>87</sup> In contrast to Coverage A, Coverage B, for the most part, addresses intentional acts. As discussed above, while some social media torts can potentially arise from negligent or reckless conduct, claims such as defamation, harassment and discrimination, as well as many intellectual property claims, either require a showing of intent, or ultimately involve intentional conduct. Accordingly, these

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87. (“[I]t is well-established that CGL coverage for personal injury and advertising injury depends on whether the injury for which coverage is sought arises from the commission of the offenses enumerated in the various policy definitions of “personal injury” and “advertising injury.”)

torts fall more naturally within Coverage B than Coverage A. As with Coverage A, Coverage B imposes both a duty to defend a covered claim and a duty to indemnify.

The first step in assessing whether a particular claim is covered under Coverage B is to determine whether the claim constitutes one of the offenses enumerated in the definition of “personal and advertising injury.”

### Defamation

Offense “d” in the definition of “personal and advertising injury,” is described as, “oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.” Defamation claims fall within this offense.<sup>88</sup> In *Cincinnati Ins. Co.*, where a CGL policy included coverage for, “oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services,” the court held, “[d]efamation and disparagement are explicitly covered.”<sup>89</sup> The fact that allegedly defamatory statements are made through social media, as opposed to physical print, is irrelevant, as the standard policy explicitly provides coverage for claims arising from publication “in any manner.”<sup>90</sup>

### Invasion of Privacy

Offense “e” is described as, “[o]ral or written publication, in any manner, of material that violates a person’s right of privacy.” Although the policy refers only to the “right of privacy,” not all invasions of privacy may be covered. Some courts have drawn a distinction between the privacy interest of seclusion and the privacy interest of secrecy, holding that the policy language described above applies only to claims involving the privacy interest of secrecy. For example, in *Am. States Ins. Co. v. Capital Assocs. of Jackson Co. Inc.*,<sup>91</sup> the court held that a claim seeking damages for the alleged sending of unsolicited facsimile messages in violation of the federal Telephone Consumer Protection Act (TCPA) did not constitute “advertising injury” under a CGL policy. The policyholder in that case argued that the claim was covered as an, “[o]ral or written publication of material that violates a person’s right of privacy.”<sup>92</sup> The insurer, on the other hand, argued that the sending of unsolicited facsimile advertisements does not violate the recipient’s right to privacy; therefore, it was not covered “advertising injury” as that term is defined in the policy.<sup>93</sup> The court held for the insurer, reasoning that although the statute that the policyholder allegedly violated was ostensibly intended to protect “privacy,” the term “privacy”

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88. See *Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co.*, 260 F. 3d 742, 744–45 (7th Cir. 2001).

89. *Id.*

90. See J.G. Browning et al., *The Impact of Social Media on Personal Lines* at 6 (Swiss Re 2011) (commenting that addition of “in any manner,” language “removed any doubt that [coverage] is intended [for] remarks made in emails, blog postings and social networks”).

91. See *Am. States Ins. Co.*, 392 F. 3d 939 (7th Cir. 2004).

92. *Id.* at 940.

93. *Id.*

in the insurance policy was more limited.<sup>94</sup> Specifically, the court held that “privacy” has two principal meanings—secrecy and seclusion—and the term “privacy,” as used in the policy, was intended to cover claims involving secrecy only:

The structure of the policy strongly implies that coverage is limited to secrecy interests. It covers a “publication” that violates a right to privacy. In a secrecy situation, publication matters; otherwise, secrecy is maintained. In a seclusion situation, publication is irrelevant.<sup>95</sup>

The court further explained that the sending of an unsolicited facsimile that did not contain any “publication” of information about the underlying plaintiff potentially violated the plaintiff’s right to seclusion, but it did not implicate its right to secrecy.<sup>96</sup> Accordingly, the court held that the claim was not seeking damages arising from the “publication of material that violates a person’s right of privacy,” as that phrase is used in the policy at issue.<sup>97</sup>

However, the *Am. States Ins. Co.* decision appears to be the minority rule, and it has been criticized by a number of courts. These courts typically find that the term “publication,” as used in Coverage B, either includes sending private messages, because the right to privacy includes the right to be left alone, or the policy language is ambiguous; therefore, it should be construed against the insurer to include sending private messages.<sup>98</sup>

Although the issue has largely been addressed in the context of sending unsolicited facsimile messages, an analogy can be drawn to the sending of messages via social media. For example, if a policyholder sends an allegedly harassing private message via Facebook, a claim for intentional infliction of emotional distress based upon that message may not be covered under the *Am. States Ins. Co.* rule, because it only implicates the underlying plaintiff’s privacy right of seclusion. In contrast, if a policyholder posts private information about a person on that person’s Facebook “wall,” a claim based upon the post likely would be covered, because it implicates the underlying plaintiff’s privacy right of secrecy.

### False or Deceptive Advertising Claims

As discussed above, the term “advertisement” is defined broadly in the standard CGL policy to include material placed on the internet. However, the enumerated offenses relating to a policyholder’s “advertisements” in the standard CGL policy

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94. *Id.* at 942.

95. *Id.*

96. *Id.*

97. *Id.*; *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F. 3d 631 (4th Cir. 2005).

98. See *Valley Forge Ins. Co. v. Swiderski Elecs. Inc.*, 834 N.E. 2d 562 (Ill. App. Ct. 2005); *Park Univ. Enters. Inc. v. Am. Cas. Co. of Reading, PA*, 314 F. Supp. 2d 1094 (D. Kan. 2004); *Hooters of Augusta Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365 (S.D. Ga. 2003); *Western Rim Inv. Advs. Inc. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836 (N.D. Tx. 2003).

are limited to claims involving intellectual property; i.e., the use of another's advertising idea or infringement of another's copyright, trade dress or slogan. However, not every claim relating to a policyholder's use of social media advertising involves alleged infringement of intellectual property rights. For example, suppose a customer sues a company for violating state unfair or deceptive trade practices laws for falsely representing its products or services on the company's Facebook page. This claim likely would not be covered under the standard CGL policy, because it does not fall within any of the enumerated offenses listed in Coverage B.<sup>99</sup> Likewise, a lawsuit by a competitor under the Lanham Act, which alleges that the policyholder misrepresented the quality or effectiveness of the policyholder's own product in an online advertisement, would likely not be covered, because it does not allege disparagement of another's products, nor any infringement of advertising ideas or intellectual property.<sup>100</sup>

In contrast, a claim filed by a competitor of a policyholder under the Lanham Act alleging that the policyholder disparaged the competitor's product on its Facebook page may potentially come within Coverage B as an, "oral or written publication, in any manner, of material that disparages a person's or organization's goods, products or services." Likewise, a competitor's allegations that a policyholder violated the Lanham Act by using social media advertisements to confuse consumers into thinking that the policyholder's product was actually the competitor's product would likely be covered, as "[t]he use of another's advertising idea in your 'advertisement,'" or as infringement of copyright, trade dress or slogan.

### Intellectual Property Claims

Coverage B includes two offenses related to a policyholder's use of intellectual property: (1) offense "f" is described as, "[t]he use of another's advertising idea in your 'advertisement'"; and (2) offense "g" is described as, "[i]nfringing on another's copyright, trade dress or slogan in your 'advertisement.'" As an initial matter, in order for an intellectual property claim to fall within either of these offenses, the claim must relate to the policyholder's "advertisement." The term "advertisement" is defined broadly to include material that is, "placed on the internet or on similar electronic means of communication"; thus, advertisements made on social media websites would fall within the definition of "advertisement" in the standard CGL policy. However, for a particular publication to be considered an "advertisement,"

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99. See *Am. Western Home Ins. Co.*, No. 4:06-cv-8, 2006 WL 3740874 (E.D. Tenn. Dec. 15, 2006) (holding claims arising out of an allegedly unfair and deceptive advertisement on a policyholder's website, "do not fall within the definition of 'personal and advertising injury' set forth in the policy").

100. See *Total Call Intern'l, Inc. v. Peerless Ins. Co.*, 104 Cal. Rptr. 3d 319 (Cal. Ct. App. 2010) (claim under the Lanham Act by competitor of calling card company alleging that a policyholder misrepresented in advertising the number of minutes provided by its calling cards, was not covered under the advertising injury section of a CGL policy, where the claim alleged only that the policyholder misrepresented its own goods, and not that the policyholder disparaged the competitor's goods in some way).

it must be about the policyholder's goods, products or services and must be made for the purpose of attracting customers.<sup>101</sup>

In addition, in order for there to be coverage for an intellectual property claim, there must be a causal connection between the advertisement and the injury alleged. For example, in *Const. Mgmt. Sys. Inc. v. Assurance Co. of Am.*,<sup>102</sup> the policyholder sought coverage under Coverage B of its CGL policy for a copyright infringement suit alleging that the policyholder used the underlying plaintiff's copyrighted architectural plans and technical drawings in constructing homes, which were subsequently marketed by real estate brokers.<sup>103</sup> The policy at issue provided "advertising injury" coverage for "infringement of copyright, title or slogan," "committed in the course of advertising your goods, products or services..."<sup>104</sup> The insurer argued disclaimed coverage on the ground that there was no connection between the alleged injury—i.e., the alleged infringement of copyright—and the policyholder's advertisements; i.e., the marketing of the homes by real estate brokers. The court agreed, noting that there was nothing in the record to suggest that the policyholder advertised the allegedly infringing drawings to the public; therefore, "[b]ecause [the underlying plaintiff's] claim of infringement, even when read broadly, is based upon the construction of the homes rather than their advertisement ... [the insurer] did not have a duty to defend..."<sup>105</sup>

In contrast, in *AMCO Ins. Co. v. Lauren-Spencer Inc.*,<sup>106</sup> the court held that a claim for copyright infringement was covered under the "personal and advertising injury" coverage portion of the policyholder's policy. In that case, the underlying plaintiff sued the policyholder for allegedly infringing upon the underlying plaintiff's copyrighted jewelry designs by selling jewelry of the same designs at trade shows and on the internet as if they were the policyholder's own designs. The policyholder also allegedly used images of the copyrighted designs in brochures and on its website. The insurer argued that there was no coverage for the claim because,

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101. See ISO Form CG 00 01 12 07 at 12 ("'Advertisement' means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.").

102. See *Const. Mgmt. Sys. Inc.*, 23 P. 3d 142 (Idaho 2001).

103. *Id.* at 144.

104. *Id.* at 143–44.

105. *Id.* at 145 ("The complaint does not suggest that CMS violated Woodside's copyright through advertising. Rather, the gravamen of Woodside's complaint is that CMS used the copyrighted plans and drawings to construct houses. There appears no allegation that the copyrighted plans and drawings were used to advertise the homes, nor any suggestion that advertisements or other promotional literature contributed in any way to the infringement of Woodside's copyright. Indeed, the only reference to advertising found in the complaint is a reference to 'marketing' found in the prayer for relief. This reference, however, does not suggest that an 'advertising injury' was alleged in the Woodside complaint. Neither does it imply that advertising activities in any way caused the harm."); *Feldman Law Group P.C. v. Liberty Mut. Ins. Co.*, 819 F. Supp. 2d 247 (S.D. N.Y. 2011) ("[T]here must be some casual connection between the injury alleged and the advertising activities of the insured. When an action stems from alleged misappropriation of a product, rather than an advertising concept, the claim can no longer be fairly characterized as alleging advertising injury."), *aff'd* 476 Fed. Appx. 913 (2d Cir. 2012).

106. See *AMCO Ins. Co.*, 500 F. Supp. 2d 721, 729 (S.D. Ohio 2007).

“although [the underlying complaint] pleads multiple theories of recovery, the trust of that litigation is that the [policyholder] infringed on [the underlying plaintiff’s] copyrights by copying his jewelry and selling them as [the policyholder’s own] designs. Thus...there is no coverage because the policy applies only to infringement in an insured’s advertisement and not to other copyright infringement.”<sup>107</sup> The court rejected the insurer’s, “attempts to distinguish between advertising that contains copyrighted photographs and advertising that contains photographs of copyrighted designs,” holding that the underlying complaint, “targets both alleged copying of the products involved and the alleged advertising of copyrighted material. As the [policyholder] correctly points out, [the underlying plaintiff’s] property rights are a bundle of rights and include the right to preclude others from advertising his images...”<sup>108</sup>

Thus, in the *HarperCollins Publishers, LLC v. Gawker Media LLC* case (granting a preliminary injunction to Harper Collins (the publisher of Sarah Palin’s book) where 21 pages of the book were posted on a Gawker blog prior to the book’s publication) discussed at length in Part I of this Article, for example, it is not enough that the underlying complaint alleged that the policyholder published the plaintiff’s copyrighted work without authorization.<sup>109</sup> For there to be “personal injury” coverage for the copyright infringement claim, there must be an allegation that the copyright infringement occurred in the policyholder’s “advertisement.” To the extent that the unauthorized use of the copyrighted work occurred only on the policyholder’s blog, a court likely would find that the claim is not covered, because the copyrighted work was not used in an “advertisement.” However, if the complaint alleged that pages of Sarah Palin’s copyrighted book were released in advertisements directing people to the policyholder’s blog, there would likely be coverage, because the complaint would include allegations of copyright infringement in an advertisement.

### *Exclusions Applicable to Coverage B*

As with Coverage A, there are a number of exclusions to Coverage B that are potentially applicable to social media torts. These exclusions are discussed below.

#### ***Knowing Violation of Rights of Another***

“Personal and advertising injury” caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict “personal and advertising injury.”

The two primary requirements of this exclusion are that the policyholder: (1) have knowledge that the act would violate the rights of another; and (2) have

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107. Id. at 727–28.

108. Id. at 728.

109. 721 F. Supp. 2d 303 (S.D.N.Y. 2010).

knowledge that the act would inflict “personal and advertising injury.” In determining whether the exclusion applies, courts will look to the allegations of the underlying complaint; if the complaint alleges that that act that gave rise to the injury was done negligently or recklessly, then the exclusion will not bar the insurer’s duty to defend. For example, courts have rejected arguments that the exclusion precludes coverage for claims of trademark and copyright infringement under the Lanham Act, even where the underlying complaint alleges that the infringement was willful, because willful conduct is not required to recover under the Lanham Act.<sup>110</sup> In *Central Mut. Ins. Co. v. Stunfence Inc.*, the plaintiff recovered damages for trademark infringement even where he failed to prove intentional or willful conduct by the defendant because intent and willful conduct are not required by the Lanham Act.<sup>111</sup> Likewise, in *Park Univ. Enters. Inc.*, the court rejected the argument that exclusion barred coverage for a claim alleging violation of statute prohibiting the unsolicited sending of facsimile messages, where the underlying complaint, “does not allege only that [policyholder] knew that the facsimile was unsolicited [but] also alleges that [policyholder] should have known that the facsimile was unsolicited.”<sup>112</sup> However, in *Educ. Training Sys. Inc. v. Monroe Guar. Ins. Co.*, the court held that the exclusion applies to an underlying claim of trademark infringement under the Lanham Act, where, “the actor knew of the trademark, knew that his use of the trademark would cause confusion...and knew that harm could result from his intended act. All that is missing is the subjective knowledge that the conduct itself is in violation of the provisions of federal law, and that must, for reasons of public policy, be imputed to the actor.”<sup>113</sup>

#### ***Material Published with Knowledge of Falsity***

“Personal and advertising injury” arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

In applying this exclusion to the types of claims that can arise in the context of social media usage, courts have focused on whether the allegations of the complaint state a claim for conduct that does not require intent. For example, in *AMCO Ins.*

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110. See *TIG Ins. Co. v. Nobel Learning Communities Inc.*, No. CIV.A. 01-4708, 2002 WL 1340332 (E.D. Pa. June 18, 2002) (where a court in underlying action could award damages for non-willful infringement, exclusion inapplicable to defeat duty to defend); *Landmark American Ins. Co. v. Blue Bay Construction LLC* CIV. A. H-15-2309, 2017 WL 6886101 (S.D. Tex. March 15, 2017) (applying Texas’ eight-corners rule, which requires liberal construction of the pleadings in favor of coverage, the complaint’s alternative allegations that defamatory comments were not made with the insured’s knowledge would render exclusion for knowing violation of rights of another inapplicable).

111. See *Central Mut. Ins. Co.*, 292 F. Supp. 2d 1072, 1082 (N.D. Ill. 2003).

112. See *Park Univ. Enters. Inc.*, 314 F. Supp. 2d 1094, 1110 (D. Kan. 2004).

113. See *Educ. Training Sys. Inc.*, 129 S.W. 3d 850 (Ky. Ct. App. 2003).



*Co. v. Inspired Techs. Inc.*,<sup>114</sup> a policyholder sought coverage under a CGL policy for an unfair competition claim brought under the Lanham Act. The policyholder manufactured masking tape, which it advertised using, among other things, online photographs and videos showing a side-by-side comparison with a competitor's product purportedly demonstrating the poor performance of the competitor's product. The competitor filed suit, alleging that the advertisements constituted false advertising in violation of the Lanham Act because the policyholder had: (1) doctored purported "actual photos" of its product; and (2) failed to ensure the accuracy of its comparative tests.<sup>115</sup> In the coverage action, the insurer argued that the, "material published with knowledge of falsity" exclusion applied, because the complaint alleged that the policyholder willfully used false advertising. The court rejected the insurer's argument, noting, "[t]o prevail on an unfair-competition claim under the Lanham Act, a plaintiff need not prove that a defendant knew that its advertisements were false," and holding that the underlying complaint's allegation that the policyholder's advertisements were misleading because the policyholder failed to ensure the accuracy of the comparative tests did not allege willfulness.<sup>116</sup>

Similarly, in *Park Place Entm't Corp. v. Transcontinental Ins. Co.*,<sup>117</sup> the court held that even where an underlying complaint alleges that defamatory statements were made knowingly and intentionally, such that, if true, coverage would be excluded, an insurer may still have a duty to defend if the underlying plaintiff could prevail on a claim of defamation *per se* or negligent or reckless defamation, because those claims do not require a showing of intent or knowledge. A similar decision was reached in *Landmark American Ins. Co.*,<sup>118</sup> wherein the court held that because the complaint broadly alleged that online defamation and disparagement by the policyholders occurred negligently or without knowledge of the falsity of the statements, the exclusion did not apply to bar coverage.

#### ***Material Published Prior to Policy Period***

"Personal and advertising injury" arising out of oral or written publication of material, whose first publication took place before the beginning of the policy period.

This exclusion raises several issues in the context of social media. Imagine, for example, someone receives an email containing a particularly damaging and false rumor about someone else, and the person who receives the email subsequently repeats the substance of the email in a post on her blog. If the email was sent prior to the policy period, and the blog post was made after the policy period, would a claim for defamation based on the blog post be covered? Take a second example—

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114. See *AMCO Ins. Co.*, 648 F. 3d 875 (8th Cir. 2011).

115. *Id.* at 882.

116. *Id.*

117. See *Park Place Entm't Corp.*, 225 F. Supp. 2d 406 (S.D. N.Y. 2002).

118. See *Landmark American Ins. Co.*, CIV. A. H-15-2309, 2017 WL 6886101 (S.D. Tex. March 15, 2017).

a policyholder re-tweets during the policy period a defamatory statement that was originally tweeted by someone else prior to the policy period. Would an action based on the re-tweet be covered? What if the policyholder's tweet did not simply re-tweet the defamatory statement, but instead was an original tweet that contained a similar defamatory statement as the original tweet that pre-dated the policy period? Although it appears that courts have yet to address the application of the exclusion in these social media-related circumstances, case law outside the social media context is instructive.

Courts differ, for example, on how broadly to interpret the term "material" with respect to whether the prior publication of "material" triggers the exclusion. In *Ringler Assocs. Inc. v. Maryland Cas. Co.*,<sup>119</sup> the court interpreted the exclusion broadly, rejecting the argument that the exclusion applied only to "verbatim republications," and holding that the word "material" in the exclusion, "means any provably false and defamatory idea, claim, charge, assertion, contention, accusation, or allegation *of fact*, that is stated either orally or in writing"; therefore, the exclusion bars, "coverage of republication of any identifiably defamatory 'material' whenever the first publication of *substantially the same material* occurred before the inception of the policy period, without regard to whether or not the defamatory material is literally restated in precisely the same words."<sup>120</sup> The court thus held that the exclusion applied where there was no evidence that the underlying claim involved statements that "differed in substance" from allegedly defamatory statements made by the policyholder prior to the policy period.<sup>121</sup>

In contrast, in *Taco Bell Corp. v. Continental Cas. Co.*,<sup>122</sup> the court, interpreting the exclusion liberally in favor of the policyholder, rejected the insurer's argument that the exclusion applied where the same "theme" was published prior to the policy period. In that case, the policyholder, Taco Bell, sought coverage for claims that it stole the idea for the Taco Bell Chihuahua used in its commercials. The Chihuahua was first used in a commercial that aired prior to the policy period, and it was used in several other commercials that were first aired during the policy period. The insurer argued that because the Chihuahua "theme" was first used by Taco Bell prior to the policy period, the prior publication exclusion applied. The court rejected this argument, holding, "[a]lthough the overall 'theme' of Taco Bell's advertising campaign revolved around the [Chihuahua] mascot...the relevant 'material' subject to the [prior publication] exclusion in any given case will consist of a particular

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119. See *Ringler Assocs. Inc.*, 96 Cal. Rptr. 2d 136 (Cal. Ct. App. 2000).

120. *Id.* at 150 ("It is not a particularly onerous matter to identify and distinguish one libel or slander from another, based on the *substance* of the disparagement and the nature of the defamatory assertions made. On the other hand, by limiting the scope of the exclusion to verbatim replications of the precise same words and phrases, [the policyholder's] interpretation would effectively render the exclusion meaningless.").

121. *Id.* at 152.

122. See *Taco Bell Corp.*, No. 01C0438, 2003 WL 1475035 (N.D. Ill. March 17, 2003).

Chihuahua-themed commercial produced under the direction of, and aired by, Taco Bell.”<sup>123</sup>

In addition, courts are split as to whether the exclusion applies to intellectual property claims as well as defamation or invasion of privacy claims. Some courts have held that the exclusion applies only to defamation and invasion of privacy claims, because the exclusion references “oral or written publication of material,” which only appears in the offenses related to defamation and invasion of privacy in the definition of “personal and advertising injury,”<sup>124</sup> and not in the offenses dealing with infringement of intellectual property rights.<sup>125</sup> Other courts have held that the exclusion applies to all of the enumerated personal and advertising offenses.<sup>126</sup>

***Quality or Performance of Goods—  
Failure to Conform to Statements***

“Personal or advertising injury” arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your “advertisement.”

This exclusion has been held to apply to claims arising from representations made on a company’s website. For example, in *Am. Western Home Ins. Co. v. Lovedy*,<sup>127</sup> the court held that a claim of unfair and deceptive trade practices was excluded by the “Quality or Performance of Goods” exclusion, where the

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123. *Id.* at \*8–9; *Park Place Entm’t. Corp. v. Transcontinental Ins. Corp.*, No. 01 Civ. 6546. 2003 WL 1913709 (S.D. N.Y. April 18, 2003) (exclusion only applies if prior publication is substantially like the material published during the policy period).

124. That is, offenses “d” and “e,” which are stated as: d) [o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services; and e) [o]ral or written publication, in any manner, of material that violates a person’s right of privacy...

125. See *Irons Home Builders Inc. v. Auto-Owners Ins. Co.*, 839 F. Supp. 1260, 1264–65 (E.D. Mich. 1993) (“The exclusion provision refers to the ‘oral or written publication of material.’ It mimics the provisions of the policy that relate to advertising injury involving libel, slander, and invasion of privacy...The clear implication is that the exclusion provision relied upon by Auto-Owners merely limits the coverage for advertising injury that arises from those three particular torts.”); *Adolfo House Distrib. Corp. v. Travelers Prop. and Cas. Ins. Co.*, 165 F. Supp. 2d 1332, 1342 (S.D. Fla. 2001).

126. See *Tradesoft Technologies Inc. v. Franklin Mut. Ins. Co. Inc.*, 746 A. 2d 1078 (N.J. Super. Ct. 2000) (“[T]he first-publication exclusion must be read to apply to the entire definition of ‘advertising injury,’ which includes...‘infringement of copyright, title or slogan.’”); *United Nat. Ins. Co. v. Spectrum Worldwide Inc.*, 555 F. 3d 772, 777–78 (9th Cir. 2009) (“[B]ased on a plain reading of the insurance policy, we find that the United first publication exclusion is unambiguous and that it clearly applies to infringement claims.”); *Applied Bolting Tech. Products Inc. v. U.S. Fidelity & Guar. Co.*, 942 F. Supp. 1029, 1037 (E.D. Pa. 1996) (“In my view, the first-publication exclusion must be read to apply to the entire definition of ‘advertising injury,’ which includes the offenses of ‘misappropriation of advertising ideas or style of doing business’ and ‘infringement of copyright, title or slogan.’”).

127. See *Am. Western Home Ins. Co.*, No. 4:06-cv-8, 2006 WL 3740874 (E.D. Tenn. Dec. 15, 2006).

policyholder allegedly represented on its website that its facilities had, “all the up-to-date conveniences to make your stay most comfortable,” but where the policyholder allegedly failed to provide handicap accessible facilities to the underlying plaintiff.<sup>128</sup> The court found that claims arising from the alleged failure of the policyholder’s facilities to conform to the statements regarding its facilities made on the policyholder’s website fell within the exclusion.

There is nothing in the language of the exclusion that would indicate that similar claims arising from representations made in a policyholder’s advertisements made through social media, as opposed to claims made on the policyholder’s website, would not also be excluded. As social media has become an important tool for businesses to advertise their products and services, policyholders should be aware that this exclusion may preclude coverage for claims arising out of the policyholder’s representations about its goods and services made using social media.

#### ***Wrong Description of Prices***

“Personal and advertising injury” arising out of the wrong description of the price of goods, products or services stated in your “advertisement.”

Like the “Quality or Performance of Goods” exclusion, this exclusion addresses representations made in a policyholder’s “advertisements.” To the extent that a claim arises out of an incorrect description of the price of goods or services in the policyholder’s advertisement, it would fall within this exclusion.

#### ***Infringement of Copyright, Patent, Trademark or Trade Secret***

“Personal and advertising injury” arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another’s advertising idea in your “advertisement.”

However, this exclusion does not apply to infringement, in your “advertisement,” of copyright, trade dress or slogan.

This exclusion effectively eliminates coverage for intellectual property claims, except for those claims that specifically fall within the two enumerated offenses dealing with a policyholder’s “advertisements”; i.e., the use of another’s advertising idea in the policyholder’s advertisement and infringement of another’s copyright, trade dress or slogan in the policyholder’s advertisement. As a result, trademark

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128. Id. at \*11.

infringement claims are excluded from coverage, as well as any intellectual property claim not arising from the policyholder's "advertisement."<sup>129</sup>

### *Insureds in Media and Internet Businesses*

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting.
- (2) Designing or determining content of websites for others.
- (3) An internet search, access, content or service provider.

While this exclusion could potentially apply to any policyholder that uses social media to advertise its goods or services, courts have interpreted similar exclusions narrowly to apply only to those policyholders whose *primary* business is listed in the exclusion.<sup>130</sup> For example, in *State Auto Property and Cas. Ins. Co.*, the policyholder, Nissan Computer Corporation (NCC) was sued by Nissan Motor Company Ltd. (Nissan) for trademark infringement in connection with the NCC's use of the domain name *www.nissan.net*. Among other things, Nissan alleged that the NCC was selling advertising on its website to automobile companies, which Nissan alleged was intended to confuse customers, "into thinking that these ads and links were...somehow affiliated with Nissan."<sup>131</sup> The NCC's insurance policy excluded advertising injuries arising out of an, "offense committed by an 'insured' whose business is advertising."<sup>132</sup> The NCC's insurer argued that this exclusion precluded coverage for the underlying claim. The court disagreed, holding, "[a]lthough NCC sold advertising space on its websites, its principal business was computer sales and services. Accordingly, the Business of advertising Exclusion does not excuse Travelers from its obligation to defend NCC."<sup>133</sup>

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129. See *Hugo Boss Fashions Inc. v. Fed. Ins. Co.*, 252 F. 3d 608 (2d Cir. 2001) (holding exclusion barred coverage for trademark infringement suit); *Native American Arts Inc. v. Hartford Cas. Ins. Co.*, 435 F. 3d 729 (7th Cir. 2006) (same); *Parameter Driven Software Inc. v. Mass. Bay Ins. Co.*, 25 F. 3d 332 (6th Cir. 1994) (same).

130. See *State Auto Property and Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F. 3d 249, 261 (5th Cir. 2003) ("[T]he logical interpretation is that the Business of Advertising exclusion 'applies to insureds whose primary, essential, chief or principal business' is advertising."); *Am. Emp'rs Ins. Co. v. DeLorme Pub. Co. Inc.*, 39 F. Supp. 2d 64, 81 (D. Me. 1999) (same); *Penn Nat. Ins. Co. v. Group C Communications Inc.*, No. L-134-09, 2011 WL 3241491 (N.J. Aug. 1, 2011) ("[F]or the exclusion to apply, the insured's primary business must fall within one of the excluded business types.>").

131. See *State Auto Property and Cas. Ins. Co.*, 343 F. 3d. at 252.

132. *Id.* at 261.

133. *Id.*

### ***Electronic Chatrooms or Bulletin Boards***

“Personal and advertising injury” arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

This exclusion is relatively new and has not yet been tested in courts, but it raises several potential issues with respect to social media. One is whether a particular social media site can be considered an “electronic chatroom or bulletin board.” These terms are not defined in the standard policy. As a result, one could argue, on the one hand, that a social media site such as Twitter, for example, is not a “chatroom or bulletin board,”; therefore, claims arising from the use of Twitter would not fall within the exclusion. On the other hand, one could argue that Twitter, even if not technically a “chatroom or bulletin board,” essentially functions as a chatroom because it provides an online forum for real-time communications, in much the same way as a chatroom; therefore, it should be treated as such for the purposes of the exclusion.

Another issue raised by the exclusion is whether the policyholder seeking coverage, “hosts, owns, or...exercises control,” over the social media site. While a person likely would not be considered to “host” or “own” their Facebook page, they do “exert control” over what is posted to their Facebook page; therefore, claims arising from a policyholder’s posts to her own Facebook page would likely fall within the exclusion. However, the exclusion would likely not apply to a claim arising out of a post that a policyholder makes on someone else’s Facebook page, as the policyholder does not “exercise control” over the other person’s page.

### ***Unauthorized Use of Another’s Name or Product***

“Personal and advertising injury” arising out of the unauthorized use of another’s name or product in your email address, domain name or metatag, or any other similar tactics to mislead another’s potential customers.

Courts have interpreted this exclusion narrowly to apply only to “misdirection” tactics designed to divert customers to the policyholder by using another’s name or product. For example, in *AMCO Ins. Co. v. Lauren-Spencer Inc.*, the court held that exclusion, “on its face targets tactics used to mislead another’s potential customers in a narrow way...[This] exclusion targets misdirection tactics. Using another’s name or product in an email address or metatag is a means of obscuring identity and drawing traffic.”<sup>134</sup> The court thus rejected the insurer’s argument that the catch-all phrase, “or any other similar tactics to mislead another’s potential customers,” brought within the exclusion a claim for copyright infringement arising out of the policyholder’s alleged use of copyrighted photographs in brochures and on its website, holding, “sometimes stealing a design is just stealing a design without

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134. See *AMCO Ins. Co.*, 500 F. Supp. 2d at 734 (S.D. Ohio 2007).

trying to mislead as to identity.”<sup>135</sup> Likewise, in *Continental Western Ins. Co. v. Pimentel & Sons Guitar Makers Inc.*,<sup>136</sup> the court held that the exclusion was not applicable where the underlying complaint alleged that the policyholder displayed the underlying plaintiff’s mark on its website, but there were no allegations that the policyholder used the mark in an email address, domain name or metatag, or any other similar tactics to mislead potential customers.<sup>137</sup>

## Conclusion

Social media continues to be an important and ubiquitous tool for individuals and businesses. With the expansive use of social media spanning every aspect of our everyday lives, both personal and commercial, has come a corresponding increase in liability exposure. In this unprecedented time, where tens of millions of Americans are “locking down” in their homes, there has been a rapid growth in the use of social media. Between 46% and 51% of adults in the U.S. are using social media more since COVID-19 began.<sup>138</sup>

With the growing prevalence of social media-based torts, users are quickly learning that posting comments from “behind the screen” does not mean they are anonymous. Comments can be traced to them, and they can be subject to claims of harassment, defamation, invasion of privacy, false advertising, discrimination, and intellectual property infringement. Indeed, even where a social media post is made on a private page—one which only the poster’s “friends” can see—courts have still found that to be a public posting.<sup>139</sup>

As the discussion above illustrates, the standard CGL and homeowners policies may leave several gaps in coverage for social media-related liability. As some courts have found coverage for social media-based torts, the proliferation of these claims makes it likely that future CGL and homeowners policies will contain even more restrictions on coverage for social media liability. Therefore, it is critical that both insurers and policyholders are aware of the risks posed by social media and the scope of coverage for such liabilities under traditional insurance products.

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135. Id.

136. See *Continental Western Ins. Co.*, No. CIV. 05-0067 RB/RLP, 2005 WL 6332339 (D. N.M. Nov. 16, 2005).

137. Id. at \*7.

138. <https://www.businessinsider.com/2020-us-social-media-usage-report> (last visited Nov. 12, 2020).

139. See *Yath v. Fairview Clinics N.P.*, 767 N.W. 2d 34 (Minn. Ct. App. 2009).

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# Journal of Insurance Regulation

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Cummins, J. David and Richard A. Derrig, eds., 1989. *Financial Models of Insurance Solvency*, Norwell, Mass.: Kluwer Academic Publishers.

Manders, John M., Therese M. Vaughan and Robert H. Myers, Jr., 1994. “Insurance Regulation in the Public Interest: Where Do We Go from Here?” *Journal of Insurance Regulation*, 12: 285.

National Association of Insurance Commissioners, 1992. *An Update of the NAIC Solvency Agenda*, Jan. 7, Kansas City, Mo.: NAIC.

“Spreading Disaster Risk,” 1994. *Business Insurance*, Feb. 28, p. 1.

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