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Advanced Issues in Insurance Coverage

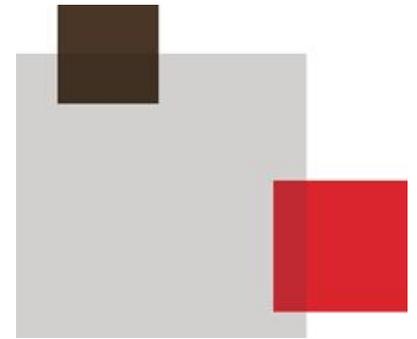
*The Elon Musk Problem: Insurance
Coverage for When Your Company
Goes Viral*

Anastasia Wade, Esq.



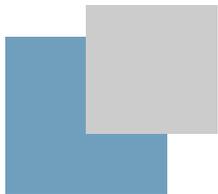
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THE ELON MUSK PROBLEM: INSURANCE COVERAGE FOR WHEN YOUR COMPANY GOES VIRAL

ANASTASIA J. WADE



COLLECTIVE EXPERIENCE . COLLABORATIVE CULTURE . CREATIVE SOLUTIONS

COMMERCIAL GENERAL LIABILITY INSURANCE (CGL)

ISO CGL PROVISION

- Coverage B – Personal and Advertising Injury Liability: “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.”

WHAT IS ADVERTISING INJURY

- **ISO FORM Definition:** “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.
- The definition includes notices published on the internet or similar electronic means of communication and on the portion of an insured’s website that is about the insured’s goods, products or services for the purposes of attracting customers or supporters. This could include social media websites, such as Facebook, Twitter, and Instagram

WHAT IS ADVERTISING INJURY



Offenses that are considered advertising injuries:

1. 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;
2. Oral or written publication in any manner of material that violates a person's right of privacy;
3. The use of another's advertising idea in your "advertisement"; or
4. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

DEFAMATION

- Includes a false statement that is published or spoken about an identifiable person or entity that causes harm
- Malice is required if the statement is about a public official or figure
- Slander is defamation by oral publication and libel is defamation by written publication

DISPARAGEMENT

- Similar to defamation, but involves a comparison that detracts or discredits the products or services of another based on false statements
- Some caselaw suggests that advertising only about your own product can impliedly disparage another's product

INVASION OF PRIVACY

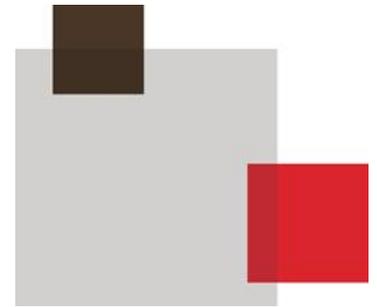
- Includes misappropriation of another's likeness or name, intrusion into the private affairs of another, false light publicity, and publication of private facts
- Publication of private facts can be a claim even if the information is true and not defamatory
- False light publicity claims and publication of private facts claims must relate to an advertisement, i.e., to attract customers

TRADE DRESS INFRINGEMENT



- Trade Dress refers to a product's total image, including the size, shape, color, texture, graphics, or even sales techniques. The total image must be unique enough to cause an ordinary consumer to identify the product as coming from a single source
- The ISO form only provides coverage for infringement of trade dress in advertising.
- Trade dress inherently involves advertising.
- May open the door to coverage of certain patent infringement claims.

SLOGAN INFRINGEMENT



- Slogan is a brief attention-getting phrase used in advertising or promotion. E.g., “Just do it,” “I’m lovin’ it” “Eat Fresh” “Melts in your mouth, not in your hands”
- Although usually more than one word, slogans can include one word that combines two words. *See N. Coast Med., Inc. v. Harford Fire Ins. Co.*, Case No. 13-CV-03406-LHK, 2014 U.S. Dist. LEXIS 20701 (N.D. Cal. Feb. 17, 2014)
- To be covered, both parties must use the trademarked phrase as a slogan. *See Palmer v. Truck Ins. Co.*, 21 Cal.4th 1109, 988 P.2d 568 (1999)

COPYRIGHT INFRINGEMENT



- To establish copyright infringement you must prove two elements:
 1. Ownership of a valid copyright and
 2. Copying of elements of the work that are original
- Copyright infringement is a strict liability offence.
- CGL policies generally exclude copyright damages except for those that are considered “personal and advertising” injuries. This is not something that is always determined in the underlying litigation.
- Includes photos of copyrighted images or product designs included in an advertisement, but does not include copyrighted products where the actual copyrighted material is not displayed in the advertisement.

MISAPPROPRIATION OF TRADE SECRETS



Ohio's Uniform Trade Secrets Act defines "trade secret" as "any information, including . . . any business information or plans, financial information, or listing of names . . . that satisfies both of the following:

- (1) it derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.C. 1333.61(D).

A trade secret can include an advertising idea.

MISAPPROPRIATION OF TRADE SECRETS



- Trade secrets are potentially covered under a CGL advertising injury provision if the trade secrets used are “secret ideas for advertising the products and services.” *Westfield Ins. Co. v. Factfinder Mktg. Research, Inc.*, 168 Ohio App.3d 391 (1st Dist. 2006)
- For this coverage, the trade secret must be utilized in the actual advertisement and does not include the method of analyzing the market or to whom the advertisement is directed.
- Use of a company’s trade secret customer list to send focused advertising is not a covered advertising injury because the trade secret is not incorporated into the advertisement.

PRIOR PUBLICATION EXCLUSION



- Purpose of the Prior Publication Exclusion is to exclude coverage when the wrongful behavior began prior to the effective date of the insurance policy.
- Damages arising from the same “publication” typically are considered to arise out of the same “occurrence.”
- If materials published are merely a republication of material first published prior to the coverage, then the exclusion applies.
- Courts look to whether the language or mark used during the policy period is substantially similar to the language or mark used prior to the policy period.

PRIOR PUBLICATION EXCLUSION



- Courts evaluate the Complaint and extrinsic evidence to determine if there is any undisputed facts regarding when the publication began and if the publication is substantially similar to the marks or language published prior to the policy.
- Courts focus on the alleged wrongful acts – if the wrongful behavior began prior to the insurance policy date is the same wrongful behavior occurring during the policy period, then the exclusion applies.

KNOWING VIOLATION EXCLUSION



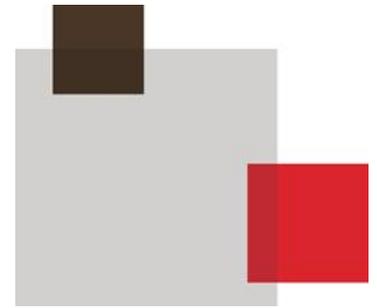
- This exclusion is applicable when the resulting harm was caused by or at the direction of an insured with knowledge that the action would violate another's rights.
- If the allegations in the complaint provide for the possibility the insured may not have knowledge of the violation, then the exclusion does not apply to the duty to defend.
- Knew or should have known language in a complaint allows for a finding of negligence and not the requisite intent for the exclusion to apply.
- However, a finding of willfulness does not necessarily encompass knowing conduct – it could mean reckless or wanton.
- If even one allegation does not require intent, then the exclusion does not apply to the duty to defend.

KNOWING VIOLATION EXCLUSION



- Potential conflicts of interest between the insurer and insured may arise depending on the claims asserted and the intent required by those claims. These issues may give rise to a stay in order to protect the insured's interests.
- As long as some claims set forth in the complaint survive the knowing violation exclusion, the insurer has a duty to defend although the duty to indemnify may be excluded.
- Here, it will depend on the language of the complaint. The claims alleged do not all require intent to prove a violation. However, if such intent is alleged in the complaint, a court is likely to find that the knowing violation exclusion applies to the duty to defend.

KNOWLEDGE OF FALSITY EXCLUSION



- Knowledge of falsity excludes coverage for advertising injury claims “arising out of oral or written publication of material by or at the direction of the insured with knowledge of its falsity.” *Westfield Ins. Co. v. Factfinder Mktg. Research, Inc.*, 168 Ohio App.3d 391, 2006-Ohio-4380, 860 N.E.2d 145, at P 37.

ELECTRONIC CHATROOMS OR BULLETIN BOARDS



- Antiquated wording, but may still apply to social media
- Requires the insured to host, own, or exercise control over the chatroom or bulletin board
- Social media focus is on whether insured actually controls the social media page
- Not actually applied in court yet

EMPLOYMENT PRACTICES LIABILITY INSURANCE (EPLI)

DISCRIMINATION ISSUES



- EPLI can protect against claims of discrimination, sexual harassment and wrongful firing
- Harassment can arise from social media posts targeted at certain employees
- Does not cover negative comments between co-workers but may protect the employer if it is sued for failing to prevent the harassment
- Does cover negative comments about an employee that are posted by a manager

DIRECTOR'S AND OPERATORS INSURANCE (D&O)

A, B, OR C

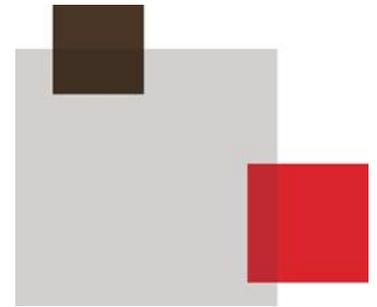
- Coverage normally split into Side A, Side B, or Side C coverage
- Side A provides coverage for directors and officers in the event the company cannot due to insolvency or statute preventing it from indemnifying its executives
- Side B provides coverage for the company for its indemnification of directors and officers
- Side C provides coverage for the company for losses it directly sustains and usually only covers “securities claims” and often requires a directors or officer to also be a subject of the investigation

COVERAGE FOR WRONGFUL ACTS



- D&O policies provide coverage for wrongful acts committed by directors and officers, including false and misleading statements, breach of fiduciary duty, misappropriation of assets, misuse of funds, fraud, etc.
- With more visible directors and officers on social media, D&O insurers are starting to review their coverage, but have not yet caught up to the risk associated with the wide range of social media.

REPUTATIONAL RISK



- When a director or officer is highly visible, the reputation of the company can rise or fall with the reputation of the particular director or officer
- Many D&O policies include sublimit for crisis management to help restore a business's reputation
- The sublimit is often inadequate to fully address the negative impact a single viral post can make on a company's reputation

FRAUD EXCLUSION

- Coverage excluded for intentional dishonest, fraudulent, or criminal acts as well as willful violations of statutes and regulations
- Under this exclusion, an insurer may have to provide defense costs against a claim of fraud, but will not be required to provide indemnification if the court concludes that the director or officer is liable for fraud. *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562 (5th Cir. 2010)

PERSONAL PROFIT EXCLUSION



- Excludes coverage for claims claims base upon the insured gaining any personal profit or advantage to which it was not entitled
- Requires the director or officer to personal benefit without being entitled to the benefit, so it excludes claims where the director or officer benefits simply by being a shareholder in the company
- Included to prevent the insured from gaining a windfall