

The Coverage Inkwell

Emerging Coverage Issues in Intellectual Property, Privacy,
and Cyber Liability



Joshua A. Mooney
mooneyj@whiteandwilliams.com

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COVERAGE B: A Person Is Not A Company

Here's an interesting question: does "oral or written publication of material that violates a person's right of privacy" include privacy rights of a corporation? (And, yes, some courts believe that business have rights of privacy, including the right of seclusion. *E.g., Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, Pa.*, 442 F.3d 1239, 1247 (10th Cir. 2006); *Owners Ins. Co. v. European Auto Works, Inc.*, 2011 WL 3847469, at *3 (D. Minn. Aug. 30, 2011).)

This is not a mere "if a tree falls in the woods..." type of question, for the answer can have a significant impact on litigation as rights of privacy claims become more boilerplate, whether in the context of cyber liability, claims of unlawful collection of PII, or media/mass marketing lawsuits. This week, in *Sportsfield Specialties, Inc. v. Twin City Fire Ins. Co.*, -- N.Y.S.2d --, 2014 WL 1491514 (N.Y.A.D., 3d Dep't Apr. 17, 2014), the New York Appellate Division addressed the issue as a matter of first impression, holding that "oral or written publication of material that violates a person's right of privacy" in a general liability policy does not include a corporation's right of privacy. The court reasoned its decision on the wording of the definition for "personal and advertising injury."

In *Sportsfield*, plaintiff, a sports equipment company, hired a competitor's employee who was subject to a non-compete agreement and an electronic rights agreement that imposed various restrictions upon him, including the use/dissemination of proprietary information. *Id.* at *1. The competitor commenced litigation, alleging tortious interference with contract and business relations, unfair and deceptive trade practices, and misappropriation of trade secrets. The insured's CGL carrier denied coverage; the insured never provided notice to its umbrella carrier. The underlying action went to verdict, where a jury held the insured liable for \$3.2 million. *Id.* *Sportsfield* then contacted both its CGL and umbrella carrier for indemnity coverage, and commenced coverage litigation shortly thereafter. *Id.*

The CGL policy defined "personal and advertising injury" to include injury arising out of both the insured's "[o]ral or written publication of material that violates a person's right of privacy." The umbrella carrier had a similar definition for "advertising injury." *Id.* at *2. The insured argued that the term "person" included both individuals and corporations, and that the misdeeds alleged in the underlying complaint broadly implicated its competitor's "right of privacy." *Id.* The New York trial court rejected the argument, and the Appellate Division affirmed.

As a general matter, the Appellate Division agreed with the insured that the term "person" can be construed broadly to include both persons and corporations. However, the court flatly rejected the insured's argument that the general definition for "person" was the issue before it. *Id.* Instead, the

court explained that the issue of the case was whether the term “person” can “reasonably be construed to include a corporate entity” when read “in the context of the underlying insurance policies.” *Id.*

Observing that the offense “[o]ral or written publication of material that violates a person’s right of privacy” is sandwiched in between two offenses that expressly reference misdeeds against both a person and an organization (i.e., slander of a person’s or organization’s products, and copying of a person’s or organization’s advertising idea), the court concluded that the omission of the term “organization” in the privacy offense was deliberate. The court explained:

As Supreme Court aptly observed, the offense at issue—the “[o]ral or written publication of material that violates a person’s right of privacy”—is sandwiched between two other offenses in Twin City’s policy that make express reference to misdeeds perpetrated against either a person or an organization, thereby suggesting that the omission of any reference to an organization from the subject offense was intentional [citations omitted].

Id. at *2 (emphasis in original). This omission, according to the court, demonstrated that the privacy offense was not meant to apply to companies and corporations.

As a second reason, the court also held that the alleged claims for tortious interference with contract and business relations, unfair and deceptive trade practices and misappropriation of trade secrets do not allege a violation of a person’s right of privacy. The court held:

To be sure, the complaint in the underlying action alleged conduct on the part of plaintiff that extended beyond the misappropriation of trade secrets and, in general, encompassed the acquisition and/or use of confidential and proprietary information belonging to its competitor. However, equating those allegations with an invasion of the competitor’s “right of privacy” ignores both the competitor’s status as a corporate entity [citations omitted] and the historically personal nature of privacy rights in general [citations omitted].

Id. at *3. The court also noted, without analysis, that all of the allegations in the underlying complaint fell under the knowing violation exclusion, breach of contract exclusion, and/or the intellectual property exclusion. *Id.*

What does this case mean? There are two key points to take from this case: (1) the court’s limitation of the term “person” in general liability policies to exclude companies and corporations and (2) the court’s use of all of the enumerated offenses in the definition of “personal and advertising injury” to limit and better define the scope of a single offense. Too often, insurance provisions are read in a vacuum. Here, the *Sportsfield* court rejected that approach and read each offense not in isolation, but in context together. Questions and comments are welcome.

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Joshua A. Mooney | Counsel

1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395

Direct 215.864.6345 | Fax 215.399.9613

mooneyj@whiteandwilliams.com | whiteandwilliams.com

Assistant: Dana Genovese | 215.864-6331



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