
THE POLICYHOLDER ADVOCATE/IP COUNSELOR

NEWSLETTER

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HEWLETT-PACKARD AWARDED \$51 MILLION JUDGMENT AGAINST INSURER

HP Counsel, Gauntlett & Associates, Now Seeks Bad Faith Against Insurer

Federal District Court Judge James Ware found on May 14, 2008 that ACE Insurance Company owed Hewlett-Packard more than fifty-one million dollars in defense expenses, prejudgment interest and costs for defending an antitrust counterclaim under “advertisers’ injury” coverage. The judge then credited ACE with a partial payment during the suit of \$11.7 million. Gauntlett & Associates’ David Gauntlett and James Lowe represented HP in the federal suit in San Jose.

David Gauntlett noted that HP was not only awarded 100% of its requested litigation expenses paid to outside counsel including the expenses of prosecuting HP’s affirmative claims because they were shown to be necessary for the defense of the antitrust claims, but HP also recovered the expense of its in-house counsel time based on reasonable market rates.

HP had initiated suit against Nu-kote for patent infringement, trademark infringement, and false advertising claims arising from Nu-kote’s infringement of cartridge and ink technology and use of deceptive packaging mimicking HP’s trade dress for inkjet printer cartridges. Gauntlett successfully argued that the costs incurred in prosecuting the patent and trademark infringement claims were “reasonable and necessary” as defense costs to respond to Nu-kote’s antitrust counterclaims related to advertising. HP plans to appeal a court ruling that it could not recover defense expenses of the counterclaim that occurred before the defense was tendered to the insurer.

DISSENT CHALLENGES COURT’S OPINION THAT “NEGLIGENT PUBLICATION” RELATES TO A NARROW TORT RELATING TO “DEFECTIVE ADVICE” OR “INCITEMENT”

Sony Computer Entm’t Am., Inc. v. American Home Assur. Co., ___ F.3d ___, 2008 WL 2736012 (9th Cir. (Cal.) 2008) (Hall, Schroeder; dissent by Bybee)

Affirming district court Judge Hamilton, the court found no duty to defend arising out of negligent misrepresentation, false advertising under Cal. Bus. & Prof. Code § 17500, unfair business practices under Bus. & Prof. Code § 17200, and other related claims.

At issue was the meaning of the term “negligent publication,” undefined in the AISLIC policy or in lay or legal dictionaries or in a California statute. The court noted:

Sony argues that the term “negligent publication” should have a broad meaning which it derives from stringing together the dictionary definitions of “negligent” and “publication.” According to Sony, “negligent publication” in the AISLIC policy refers to “a communication of information to the public, lacking or exhibiting

a lack of due care or concern.” Sony argues that this definition, broad enough to include the false advertising and negligent misrepresentation claims in the *Kim/Kaen* lawsuits, is the plain meaning of the term.

Id. at *4.

The court disagreed. Accordingly, the court contended that the ordinary and popular sense of the word was not derived from an examination of dictionary definitions because it was not contextually available. “Negligent publication” is enumerated among other torts and thus refers to a narrow tort relating to defective advice and incitement, not a broad tort distinct from those terms. *Id.* at *5.

However, the court’s supposition is demonstrably erroneous as disparagement, harm to the character or reputation of any person or entity, interference with rights of privacy or publicity, unauthorized use of name or likeness, unintentional failure to credit on a matter, and defective advice and incitement and negligent publication are clearly not simple torts with clearly defined *prima facie* elements. Rather, the offenses use generic and lay language. To adopt the court’s interpretation is to add words of limitation not set forth in the policy under the guise of construing context.

Nor does the context analysis the court relies on support such a narrow interpretation. The court also makes the supposition that the negligent publication definition that Sony offers would give it too broad an amplitude and make other offenses redundant. Not so. Sony’s definition would not dovetail with liability for defamation, infringement of copyright, nor a number of the other offenses listed.

The court also sought to define the policy based on the fact that it was labeled a media liability policy and thus must be limited to the kind of claims normally faced by media publishers such as defamation and copyright infringement.

Again, the court reads in words of limitation not set forth in the policy based on its supposition as to what the parties might have intended that the insurer did not bother to craft into the language. The purported case law the court cites is tort law, not construction of other media liability policies, inventing a tort of negligent publication which is not borne out by the authorities that it cites. And indeed, the court’s definition of negligent publication made it redundant of the definition of placing another in a false light, which is one of the offenses necessarily implicated by coverage for invasion of privacy.

It is no surprise that “negligent publication,” as the court deduces it as an actionable tort, has not been construed to encompass liability like that identified by Sony. Nor need this matter. There is no rule that requires the court to define what torts the carrier may have envisioned covering under broad generic language. Indeed, previous case law from courts of appeal, including the *Lebas* decision from Judge Croskey, often describes offenses, such as “misappropriation of advertising ideas or style of doing business,” that are not limited in scope to any particular tort but may encompass a range of wrongful behavior.

Case law elsewhere is fully in accord with this notion. Indeed, the conjecture that insurers must have intended to limit their coverage to torts where they clearly did not select limited tort language has the court simply rewriting the policy for the insurer’s benefit. The court thus concluded, at *8:

[W]e hold that the term “negligent publication” in the AISLIC policy refers to a very narrow tort in which the publication of material encourages or instructs readers to engage in harmful conduct. We reject Sony’s expansive definition as inconsistent with the context of the policy as a whole and unsupported by the case law. Sony, a sophisticated purchaser, clearly could have purchased coverage for product defects or false advertising – indeed, Sony previously held an insurance policy with AISLIC that covered “any error or omission, misstatement, misleading statement or misinterpretation” – yet the policy at issue in this lawsuit did not include such coverage.

In a backhanded way, the court clarifies that where an insured could have purchased broader coverage and had in the past, its decision to not do so must be read to limit the scope of the policy before it. This turns on its head the typical rules that place the burden on the insurer to write appropriate policy language, especially where a narrower form of policy was available but not selected by a particular insurer. See *Fireman’s Fund Ins. Cos. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 115 Cal.

Rptr. 2d 26 (2001). The court also rejected suggestions that the applicable exclusions clarified the scope of the coverage from which the exclusion took away possible coverage.

In a thoughtful dissent, Judge Bybee disagreed with the construction of the AISLIC policy. Critically, the dissent's analysis is not addressed in the majority opinion. The dissent noted at *13 that the phrase "negligent publication" is not a term but a phrase made up of two individual words that have meaning both individually and in combination:

Turning to the dictionary, the word "negligent" means "lacking or exhibiting a lack of due care or concern." Webster's II New College Dictionary 732 (1999). The word "publication" means "communication of information to the public." *Id.* at 895, 51 Cal.Rptr.2d 566. Given the ordinary meaning of those words, a layperson might properly understand that the phrase "negligent publication" means something like "communication of information to the public lacking or exhibiting a lack of due care or concern."

Id. at *13.

Such a meaning obviously dovetails with coverage for false advertising in a number of cases. The court found that an exclusion can clarify an ambiguity in an insuring clause in favor of coverage. *American Alternative Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 37 Cal. Rptr. 3d 918, 924 n.2 (2006) ("Unquestionably, it may be considered part of the general circumstances impacting an insured's objectively reasonable expectations as to the scope and extent of coverage under a policy."). *Id.* at *14:

Exclusion P provides contextual evidence for the phrase "negligent publication" within the affirmative coverage section of the AISLIC policy. If there was no affirmative coverage for false advertising or misrepresentation in advertising then the policy would have no need for an exclusion specifying that those claims were not covered. Why recite that certain acts are expressly excluded from the policy if they were never covered in the first place?

At best, in the dissent's view, the majority's interpretation leaves Exclusion P meaningless and the other contra-indications referenced by the majority send mixed signals. Although the dissent does not take issue with the tort-focused analysis of the majority, had it done so the context arguments would not survive scrutiny. The dissent also was "puzzled" as to why cases that "do not yield one clear definition of 'negligent publication' should be seen as a limited set." *Id.* at *15:

I am unaware that Sony missed any secret deadline after which a term may no longer be used in new judicial contexts, and the possible usages for the term is closed to the conjunction of the ways in which it had thus far been used.

In a telling part of the opinion, Judge Bybee states at *14:

I fear that in the course of implementing the common law system, we have become so adept at looking to judicial cases to obtain the solutions to the challenges we encounter, that we have come to believe that even when determining the ordinary and popular meaning of words, the solution is to be found in case law.

PUBLICATIONS BY DAVID A. GAUNTLETT

David A. Gauntlett is the author of *Insurance Coverage of Intellectual Property Assets* published by Aspen Law & Business. The book and supplements are available for \$160.00 plus tax where applicable; shipping and handling are free when full payment is enclosed with the order. To order, call Aspen Law & Business at **1-800-638-8437**.

UPCOMING PUBLICATIONS BY DAVID A. GAUNTLETT

Mr. Gauntlett continues to be a contributing author to L.M. Brownlee's *Intellectual Property Due Diligence in Corporate Transactions* § 12A (West 2007) and the soon-to-be-published *Intellectual Property Assets: Banking and Due Diligence* handbook (West 2008). Also soon to be published is a book on IP assets (West 2008), which features material from an interview of Mr. Gauntlett conducted by Tod Zuckerman for the *US Insurance Law Report*.

The Licensing Journal regularly features articles written by Mr. Gauntlett, the latest entitled *Can Antitrust Violations Premised on Covered "Personal and Advertising Injury" Offenses Create a Defense Duty When Indirect Injury is Asserted?*

UPCOMING SEMINARS ON INSURANCE COVERAGE AND INTELLECTUAL PROPERTY WHERE DAVID A. GAUNTLETT IS SPEAKING OR ATTENDING

August 7-12, 2008	American Bar Association 2008 Annual Meeting - New York, New York - Attending
September 10-13, 2008	ABA Section of Labor & Employment Law 2nd Annual CLE Conference - Denver, CO - Attending
September 21-23, 2008	2008 Intellectual Property Owners Association Meeting - San Diego, CA - Attending
February 4, 2009	American Intellectual Property Lawyer Association online Monthly Online Meeting - Presenting - "Procurement and Use of Insurance to Address Intellectual Property Lawsuits"
March 5-7, 2009	2009 American Bar Association Insurance Coverage Seminar - Tucson, AZ - Presenting - "The Right to Independent Counsel and How It Impacts the Defense of Business Tort Claims in all Its Manifestations"
April 19-23, 2009	Risk and Insurance Management Society, Inc. Annual Conference - Orlando, FL - Attending

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GAUNTLETT & ASSOCIATES – THE POLICYHOLDER ADVOCATE

Gauntlett & Associates specializes in policyholder insurance coverage and litigation re copyright, antitrust, patent, trademark, trade secret, business and general coverage disputes, including:

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If you have a topic you would like to see addressed in future issues, please feel free to contact us with your suggestions.

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