



2018 CLM Annual Conference
March 14, 2018 – March 16, 2018
Houston, Texas

SOCIAL MEDIA: AM I LIABLE? AM I COVERED?

I. The Landscape

Social media has ushered in a whole new landscape of liabilities and coverage issues for the insurance professional. Social media provides unprecedented opportunities to communicate with other individuals and businesses and to advertise ones services. But in doing so, it changes our perception of traditional legal theories of liability such as defamation, intentional infliction of emotional distress, invasion of privacy and copyright and trademark infringement.

There was a time when a court could simply analyze whether a written or oral representation could give rise to the tort of slander or libel. Advertising injury was defined solely in terms of advertising content in written publications, television or radio. Following the explosion of different media outlets for the expression of ideas, opinions, or advertising content, it is difficult to anticipate where one's liabilities may arise.

II. Causes of Action

There are a number of potential causes of action. These include, but are not limited to, Defamation, including both Libel and Slander, Invasion of Privacy, Intentional Infliction of Emotional Distress and Copyright or Trademark Infringement. Damages include General Damages, Special Damages, Nominal and Punitive. The latter requires a willful and malicious injury to reputation. This is often a key point of contention in social media litigation.

III. Defenses

Traditional defenses to these causes of action include Truth, Consent, Protected Speech and Privileged Speech, both absolute and conditional.

IV. Coverage Under Personal Insurance Policies

If an insurance professional is named personally in one of the above discussed causes of action, he or she will look first to his or her personal insurance for a defense

and, if necessary, indemnity. Most insurance professionals have personal insurance policies initially covering their residence or rental property which also provides liability insurance. This is a natural first step to pursue coverage. However, these policies are intended to cover personal exposures only, and often have exclusions for business pursuits or professional services.

Even if the act at issue is not business or professional related, there is still the issue of whether the act constitutes an "occurrence" which is a common condition precedent to coverage in personal insurance policies. An occurrence is generally defined as an accident which requires non-intentional conduct and in many instances conduct which has injury which is not anticipated or expected by the policyholder.

Even if the conduct constitutes an occurrence, or the policy insuring agreement requires only an event, there are commonly exclusions for acts intended by the insured or an insured. These exclusions can limit coverage for an individual.

If an individual is posting at work or in the context of an individually owned business or profession, other policy exclusions for business pursuits and professional services may apply. An individual may agree in a contract or other agreement in their business to assume certain liabilities of third parties which may include social media torts. Many personal insurance policies will have exclusions for liability assumed by contract or for liability arising out of the breach of a contract.

V. Business Owner Policies

Many small businesses are insured under businessowner policies otherwise known as "BOP's." These policies are a hybrid of commercial property and commercial liability insurance and written in a single form which is intended for use by small businesses or professions.

Businessowner policies have added specific policy language with respect to social media exposures in recent years. In addition, businessowner policies contain standard personal injury/advertising injury exclusions which are also found in the commercial general liability form. While these coverages do not require an occurrence as a condition precedent to coverage they do have certain insuring requirements to trigger coverage in the first instance and exclusions regulating the scope of coverage provided.

Business owner policies also can include certain coverages by endorsement, such as employer's liability and professional liability for small businesses. These coverage grants are usually written on a claims made basis and while they can often provide broader coverage by virtue of defining the triggering event as only "an event", because they are claims made, they need to be carefully reviewed to ensure that they coordinate with the coverages in the named policy form.

VI. Commercial General Liability Policies

These policies cover all business entities from small DBA's up to large international corporations. The same coverage concerns arise under the CGL as the

personal lines and businessowner policies, namely, whether the social media liability constitutes a covered occurrence or falls within the separate coverage grant for a personal and advertising injury. Although there is not a lot of case law for this growing exposure, those decisions that have been rendered have generally been favorable to insurers, finding no coverage for a variety of social media exposures. This is generally due to the fact that many of these forms and clauses were written prior to the explosion of social media activity and exposure. The challenge for a policy holder is to make a claim for coverage on a 21st century exposure with 20th century policy forms. The Insurance Services Organization ("ISO"), has promulgated numerous forms in the past several years addressing this gap.

VII. Conclusion

Insurance professionals, attorneys, and their employees are engaging in social media activity both at home and in the workplace. Even the most prudent individual can be tripped up in social media activity and exposed to liabilities that he or she may never have anticipated.

Personal and commercial lines policies are struggling to keep up with the changing nature of liability. From a coverage standpoint, insurers are seeking to innovate new products which respond to these new risks. From a risk management standpoint, carriers must ensure they are not covering exposures that are not reasonably underwritten. It is important to be aware of your personal and commercial policy forms as well as those potential risks which may ensue from your social media activity.

We hope that this presentation provided a broad overview of both the liabilities and coverages so that the prudent insurance professional or attorney can manage their behavior on social media.