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California Insurance Law Update

Susan Firtch **September 2011**

Intellectual Property Rights Exclusion Applies to Claims for Misappropriation of Likeness Under "Personal and Advertising Injury" Coverage.

On August 25, 2011, the Second Appellate District of the California Court of Appeal held in Aroa Marketing, Inc. v. Hartford Insurance Company of the Midwest [1] that a policy exclusion for "personal and advertising injury" arising out of any violation of intellectual property rights applied to a claim for misappropriation of likeness, diminution of marketability and publicity value, and deprivation of the right of publicity.

Aroa hired a model, Tara Radcliffe, to film an exercise video to be used at a consumer electronics show ("CES") and on CES' website. Radcliffe discovered that Aroa was also using her image and likeness in connection with other products and other media outlets, and demanded payment for that use. After Aroa refused to pay her, Radcliffe sued Aroa for using her likeness to sell and market products beyond what was allowed under her contract.

Hartford insured Aroa under a policy that afforded "personal and advertising injury" coverage. The policy defined "personal and advertising injury" to include publication of "material that violates a person's right of privacy." Hartford declined Aroa's tender of Radcliffe's action, and Aroa filed suit. Hartford demurred on the grounds that the claim was one for the "right of publicity," not "right of privacy," and that the policy's exclusion for "personal and advertising injury" arising out of any intellectual property rights or laws precluded coverage. The trial court granted Hartford's demurrer without leave to amend.

The appellate court affirmed. In the absence of an exclusion, the claim would be covered as "personal and advertising injury" for violation of the right to privacy because the common law right of publicity derived from the law of privacy, and is one of four distinct privacy torts. [2] However, an exclusion for "personal and advertising injury" arising out of "any violation of any intellectual property rights, such as copyright, patent, trademark, trade name, trade secret, service mark or other designation of origin or authenticity," precluded coverage.

The court rejected Aroa's argument that, because the right of publicity was not expressly listed in the intellectual property rights exclusion, the exclusion did not apply. The exclusion applies to "any violation" and is expressly nonexclusive. The intellectual property rights exclusion "clearly applies to bar claims based on the right of publicity, as that right has been held to be an intellectual property right."

The court also rejected Aroa's contention that a common law misappropriation of likeness claim implicated more than Radcliffe's right to publicity, and was or could have been based upon an injury to Radcliffe's feelings or peace of mind. Radcliffe did not make such allegations. Instead, she sought compensation for the unauthorized use of her likeness after Aurora refused to pay her for such use, alleging that Aroa deprived her of her right of publicity. Therefore, the common law misappropriation claim was a right of publicity claim for which the intellectual property rights exclusion precluded coverage.

Susan E. Firtch specializes in advising insurers on their rights and obligations under insurance policies for all types of lawsuits. Ms. Firtch can be reached at 510.835.6709 or sfirtch@burnhambrown.com.

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[1] Aroa Marketing, Inc. v. Hartford Insurance Company of the Midwest, 2011 Cal. App. Lexis 1116, __ Cal. App. 4th __ (2011).

[2] Those torts are intrusion upon seclusion; public disclosure of private facts; publicity which places the plaintiff in a false light; and appropriation, for defendant's advantage, of the plaintiff's name or likeness (which is referred to as "right of publicity").