

Defamation

Factual background

A weekly suburban newspaper publishes a feature story about rising sexual promiscuity among high school students. The story, entitled "Teen Sex in the Suburbs," recounts the sexual activities of several pseudonymous teenagers who attend area high schools. The front-page story is accompanied by a large color photograph, which was taken at a local prom and depicts three teenage boys and two girls socializing. The photo caption includes this disclaimer: "The individuals pictured are unrelated to the people or events described in this story." The story reports: "Oral sex is the new second base. When it comes to sexual experimentation, high school is the new college. The prom is no longer even remotely the traditional night of sweet discovery or coming of age. And sex is the new kissing." The story further describes the prevalence of teenagers participating in casual sexual encounters with different partners.

Litigation proceedings

One of the girls in the prom-scene photograph sues the newspaper for defamation, alleging that the juxtaposition of her picture with the headline and the text of the story falsely implied that she had engaged in sexually promiscuous conduct. The publisher moves to dismiss, asserting that, because of the disclaimer beneath the photograph, the publication was not reasonably capable of conveying the alleged defamatory implication. The dismissal is granted, but is reversed on appeal because the appellate court finds that the disclaimer is "easy enough to overlook." A reasonable reader might think the plaintiff was one of the teens whose promiscuous behavior was described, the appellate court concludes, and therefore the article is susceptible to the alleged defamatory meaning.

Outcome

Following remand to the trial court and eight months of discovery, the parties reach a settlement for \$250,000 at a court-ordered settlement conference.

Costs

The total cost of litigating this case would be expected to be approximately \$425,000. Defense Cost Payment: \$425,000; Indemnity Payment: \$250,000; Total Loss: \$675,000. [This loss scenario is based loosely on *Stanton v. Metro Corp.*, 438 F.3d 119 (1st Cir. 2006).]

False light

Factual background

A midsized daily newspaper publishes a series of reports on a politically connected construction company that was employed on numerous government transportation contracts. In one article, the newspaper accurately reports that the company's founder had "shot and killed his wife . . . with a 12 - gauge shotgun" just days after he had "filed for divorce but then had the case dismissed." The article explains, however, that "officials determined that the shooting was a hunting accident," and it further describes the circumstances of the shooting. The story also correctly notes that the shooting led a federal judge to extend the company founder's probation period for a mail-fraud conviction because his possession of a shotgun had violated the terms of probation.

Litigation proceedings

The company founder brings suit in state court against the newspaper for tortious interference with contract and "false light" invasion of privacy, asserting that, although the facts reported were true, the newspaper's presentation created a false implication that he had murdered his wife. The trial court rejects a statute of limitations defense for the false light claim, holding that the time bar on libel claims did not apply to false light actions. Discovery proceeds for a year and a half, and the defendants move for summary judgment. The court dismisses the tortious interference claim but allows the false light claim to proceed.

These scenarios each are based on a real case or claim and, although not all of them involved Hiscox insureds, they are illustrative of the losses media companies routinely experience. Stated loss and defense costs are either actual, based on public sources or authorized disclosures, or closely estimated. The types of claims illustrated generally fall within the initial scope of coverage afforded by the typical Hiscox media liability policy form, but whether and to what extent a particular claim would ultimately be covered depends on the specific policy wording and the actual facts relevant to the claim.

Loss Scenarios for Newspaper Publishers

Outcome

Following a two-week trial, the jury awards the plaintiff \$18.3 million in compensatory damages for reputational losses suffered by his company. The jury deadlocks on the punitive damages issue. A re-trial on the punitives issue is twice aborted. The trial court later dismisses the punitive-damages claim as a sanction for the plaintiff's violation of a court order. On appeal, the court reverses the jury verdict based on its conclusion that the statute of limitations for libel claims should apply to false light claims. Plaintiff appeals that conclusion to the state supreme court.

Costs

At this point, after more than six years of litigation, the newspaper has incurred defense costs of over \$3.7 million. [This loss scenario is based on *Anderson v. Gannett Co.*, No. 06-2174 (Fla. 2007).]

Copyright infringement

Factual background

A major metropolitan newspaper prints a review of a new nonfiction book at the invitation of the book's publisher, which had sent the newspaper an advance copy. The book recounts the lives of four 20th century authors who shared a common religious faith that influenced their writings. To illustrate the review, the newspaper reprints a photograph of one of the writers that was included in the book. The picture, taken twenty years earlier by a freelance photojournalist, had been published in the book with the permission of the photographer and is designated therein as a copyright-protected work owned by the photographer. In reprinting the photograph, the newspaper credited the photographer and the book as the source of the photograph.

Litigation proceedings

Following publication of the review, the photographer sues the newspaper for copyright infringement and violation of the Digital Millennium Copyright Act, which prohibits removal or alteration of copyright management information (e.g., identifying information about the copyright owner). After completing discovery, the newspaper moves for summary judgment. The trial court defers ruling on the DMCA issues and rejects the newspaper's defense to the infringement claim, which is that making use of the photograph in a book review is akin to quoting from the book and should be permitted as a "fair use." The case proceeds to trial.

Outcome

Following the close of plaintiff's evidence, the court rules that plaintiff has failed, as a matter of law, to establish a DMCA violation. Defense of the infringement claim proceeds, and the issue is submitted to the jury, which returns a defense verdict on "fair use" grounds. No appeal is taken.

Costs

The total cost of litigating this case, which included substantial motions practice and spanned more than a year and a half, would be expected to exceed \$1.7 million. [This loss scenario is based on *Harris v. San Jose Mercury News*, No. 3:04-cv-05262 (N.D. Cal. 2006).]

Misappropriation of name or likeness

Factual background

On an unseasonably warm winter day, a newspaper photographer snaps a picture of an urban streetscape, which the paper then runs as a prominent "stand alone" photo on the front page. There is limited news value in the photograph, in that it does not depict a noteworthy event, but the picturesque photo of a bustling city street nonetheless adds a vibrant visual element to the center of Page One. Unbeknownst to the paper, one of the men prominently featured in the picture has a strong religious objection to being photographed, believing that use of his picture violates a biblical prohibition against graven images. Reproductions of the front page later appear as an incidental part of an advertising campaign for the paper.

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Loss Scenarios for Newspaper Publishers

Litigation proceedings

The man subsequently sues for misappropriation of his likeness, demanding damages and an injunction against further publication. He also requests a preliminary injunction to stop the newspaper from using the photograph during the pendency of the suit, which would force the newspaper to pull its advertising. The court orders expedited briefing on the preliminary injunction. Although the court expresses doubts about the merits of the misappropriation claim, it finds that the plaintiff would suffer irreparable harm from continued publication of the photo and that equitable considerations justify an order temporarily preventing further use of the photograph for advertising purposes. The newspaper appeals the order granting the preliminary injunction, and the plaintiff cross-appeals the denial of his request for a blanket injunction against any publication of the photograph. The appellate court affirms the limited injunction.

Outcome

After a brief period of fairly intense discovery, the parties reach a settlement agreement, under which the newspaper agrees not to make any further commercial use of the photograph and to pay plaintiff's legal expenses.

Costs

At the point the case is resolved, the newspaper has incurred \$435,000 in defense costs. Defense Cost Payment: \$435,000; Indemnity Payment: \$275,000; Total Loss: \$710,000. [This loss scenario is based loosely on *Nussenzweig v. DiCorcia*, 814 N.Y.S. 2d 891 (N.Y. Sup. Ct. 2006).]

Error and omission

Factual background

As part of its Internet-only content, available only to subscribers who have passwords, a suburban newspaper publishes an online column called "Technology Investing." The column regularly offers assessments of the relative value of stocks in tech companies. At the end of each column, in small type, is a disclaimer: "Technology Investing' is not a substitute for individualized financial advice. Readers should make personal investing decisions based upon an independent analysis of value and risk or in consultation with a professional adviser." To attract subscribers to the Web site, the newspaper promotes the column through "house ads" as a value-added feature. A reader who wants to become a more savvy investor sees an ad and subscribes so he can access the "Technology Investing" column online. He makes investment decisions consistent with the columns' recommendations and analysis. In particular, the reader holds onto stock in a large software company when the price is dropping because of growth projections in the column that prove to be overstated. As a result, his shares lose value and he eventually sells at a significant loss.

Litigation proceedings

The reader sues the newspaper in state court for breach of contract, negligence, negligent misrepresentation, deceptive trade practices and fraud. The complaint alleges that plaintiff relied on the column for research and information in making investment decisions and that he followed the column's advice believing he would realize substantial returns on those investments.

Outcome

Following almost a year of discovery, the trial court grants the paper's motion for summary judgment. The court holds that, because the column is offered to the general public (albeit for a fee) and provides information that is not specifically tailored to the financial situation of any individual subscriber, the First Amendment precludes liability for publication of nondefamatory, negligently untruthful information. The plaintiff appeals the decision, raising a variety of procedural and substantive objections. The appellate court affirms the summary judgment order and denies the plaintiff's subsequent motion for rehearing.

Costs

The total cost of litigating this would be expected to be in the range of \$630,000. [This loss scenario is based on *Reynolds v. Murphy*, 188 S.W.3d 252 (Tex. Ct. App. 2006).]

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Public disclosure of private facts

Factual background

A metropolitan newspaper dispatches a photographer to cover the funeral of a National Guardsman who was killed during the Iraq War and became the first battlefield fatality for the state's Guard in fifty years. The soldier's family, through the funeral home, authorizes the press to attend the memorial service, which is held in a high school gymnasium in the soldier's hometown and is attended by a number of public officials, including the state's governor. The funeral home instructs reporters and photographers to remain in a designated area in the rear of the auditorium, not to take pictures of the casket when it is open, and not to attempt to interview family members. At the end of the service, the casket is moved to the back of the auditorium and opened so that mourners can pay their respects as they exit. When the governor pauses to view the body, the photographer takes a picture in which the dead soldier's face is clearly visible. The newspaper subsequently runs the poignant photo, sells the rights to reprint it to other media outlets, and enters it in a photojournalism contest.

Litigation proceedings

The soldier's family sues the newspaper and photographer in federal court for invasion of privacy based on the publication of private facts. They also bring related claims for intentional infliction of emotional distress, fraud, and unjust enrichment. The newspaper files a motion to dismiss, which is rendered moot when plaintiffs file an amended complaint. Following an expedited three-month discovery period, the newspaper moves for summary judgment. With the motion pending, pretrial preparations proceed over a two-month period.

Outcome

Two weeks before the trial is scheduled to commence, the court grants summary judgment. Plaintiffs appeal the order, which is affirmed because the plaintiffs had "opened up the funeral scene to the public eye" and thus could not establish that the newspaper disclosed private information by publishing the photograph.

Costs

The total cost of litigating this case through the trial and appellate courts would be expected to be in the range of \$550,000. [This loss scenario is based on *Showler v. Harper's Magazine Foundation*, No. 06-7001 (10th Cir. March 23, 2007).]

Breach of scope of a license

Factual background

A freelance photographer approaches a major metropolitan newspaper with an offer to sell a unique photograph that he had taken of a high-ranking public official. The photo offers an unusual behind-the-scenes image of the official, who rarely is photographed outside of tightly scripted public events. The photographer emphasizes that he was able to gain such exclusive access to take the picture because the official's aides trust him. The newspaper, intending to use the photo for an upcoming profile on the official, agrees to pay the photographer \$1,000, plus expenses for the right to reprint the photo. The licensing agreement imposes no specific conditions other than the price and a limitation on the number of times the photo could be used. Shortly thereafter, the paper learns of an adulterous affair between the official and a female aide, who is pictured in the background of the photograph. The paper runs the photograph on the front page, cropped to highlight the official and the aide, along with a story about the scandal.

Litigation proceedings

The photographer sues the newspaper for copyright infringement, unfair competition, conversion, fraud, and tortious misappropriation of good will. The thrust of the claims is that the newspaper, by publishing the photograph alongside an unflattering story about the official and by cropping the photo severely, exceeded "the scope and authority of the limited license." As a result, the complaint alleges, the plaintiff's relationship with the official's aides and his general professional reputation have been severely impaired. The newspaper prevails on a motion to dismiss, but the plaintiff subsequently files an amended complaint. The discovery period extends over nine months, following which the newspaper files a motion for summary judgment.

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Loss Scenarios for Newspaper Publishers

Outcome

The motion is granted. Plaintiff files a notice of appeal but agrees to abandon the appeal in exchange for a modest settlement and the newspaper's agreement to give up its award of \$17,500 in taxable costs.

Costs

At the point the case is resolved, the newspaper has incurred \$438,500 in defense costs. [This loss scenario is based loosely on *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225 (S.D.N.Y. 2000).]