



## Coverage Corner

### Bloggers Beware: Defamation Claims Brought by Public Figure Plaintiffs

It takes thick skin to be in the public eye. As Supreme Court Justice Antonin Scalia once observed, “harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.” (See *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2837, 2010).

But when criticism goes beyond the realm of lawfulness, and includes statements that are libelous or slanderous, how do public figures respond? Mostly they ignore it. Or they say they never heard it in the first place. Sometimes, though, the public figure pushes back and sues for defamation. What happens then?

Well, for one thing, if the alleged defamer is an individual, his or her homeowner’s insurance probably will be in play. Homeowner’s insurance? In a defamation case? Yep. Strange as it may seem, most homeowner’s policies cover claims for defamation and related torts, libel and slander.

These torts and a few others fall within the standard policy’s “personal injury” coverage. Of course, most people will never be sued for defamation. But with the rise of social media activity and special-interest blogging, this coverage is of increasing importance.

As of December 2011, bloggers had suffered \$47 million in adverse defamation judgments. (See *Dan Springer, A \$2.5 Million Libel Judgment Brings the Question: Are Bloggers Journalists?*, *FoxNews.com* (Dec. 22, 2011), available at <http://www.foxnews.com/us/2011/12/22/bloggers-not-journalists/>. In 2009, the total number was only \$17 million.)

While most defendants are media companies and professional journalists

who generally are covered by a media or commercial general liability policy, amateur bloggers and other more casual Internet users are frequent targets.

#### Defamation Coverage

Policyholders and insurers, as well as insurance agents and brokers who deal with homeowner’s policies, should be aware of this coverage. They also should know its limits, as not all defamation claims are covered.

A typical “business activities” exclusion, for example, would preclude coverage if the insured made the defamatory statements for economic gain. Also common is the “knowledge of falsity” exclusion, which would apply if the insured knew what he or she said or typed was false.

But even if an exclusion ultimately may relieve an insurer of liability for an adverse judgment or settlement, the insurer still might be obligated to pay for the insured’s defense. As a general rule, an insurer’s “duty to defend” is much broader than its “duty to indemnify.” When an insured is sued, the duty to indemnify does not arise until the insured loses at trial or settles with the plaintiff. Even then, the insurer can refuse to indemnify the insured if the conduct giving rise to the insured’s liability falls within an exclusion.

By contrast, the duty to defend is triggered whenever the allegations in the plaintiff’s complaint against the insured potentially could result in a covered loss. This is so even if the plaintiff alleges other facts implicating an exclusion that would negate coverage. The duty to defend continues until the insurer can definitively establish the exclusion’s applicability.

Before denying coverage for an insured’s defense, the insurer must be able to prove that the only fair reading of the plaintiff’s

complaint “leads to one inevitable conclusion” — i.e., that the allegations against the insured unmistakably fall

within an exclusion and thus could never result in a covered loss. (See *Burlington Ins. v. Sup. Nationwide Logistics, Ltd.*, 783 F. Supp. 2d 958, 961 (S.D. Tex. 2010))

As a matter of public policy, an insurer usually may not use extrinsic evidence in assessing its duty to defend. The insurer may only compare the allegations in the complaint to the terms of the policy.

If the plaintiff alleges that the insured made a defamatory statement in connection with a nonprofit activity, for instance, the insurer may not invoke the business activities exclusion to deny a defense even if it has reason to believe that the insured in fact was being paid. The insurer possibly could prove this in a contemporaneous declaratory judgment action. But in the meantime, it remains contractually liable for the insured’s defense costs.

#### Intentional Acts Exclusions

These issues come to a head when considering the standard “intentional acts” exclusion. Although defamation commonly is thought of as an intentional tort, most states recognize claims for negligent or reckless defamation.

This means the plaintiff need not prove that the defendant deliberately lied or meant to cause harm.

As Seventh Circuit Judge Richard Posner explained:

“[D]efamation is often not intended or expected to injure anyone. The defamer may have made a good-faith though inadequate attempt to conceal the victim’s name, may



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have thought the victim's reputation already impaired beyond possibility of further damage, or the most common case, may have thought the defamatory statement true, in which event there would be no injury in a legal sense." (See *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 746, 7th Cir. 2001).

Since the plaintiff usually can prevail without proving intent, there almost always will be a duty to defend. Otherwise, the scope of the intentional acts exclusion would be so broad as to render the coverage for defamation illusory.

It is for this reason that in most insurance-related defamation cases we reviewed from across jurisdictions, the insurer could not rely on an intentional acts or similar exclusion to deny the insured a defense.

## Most homeowner's policies cover claims for defamation and the related torts, libel and slander.

### Public Figures

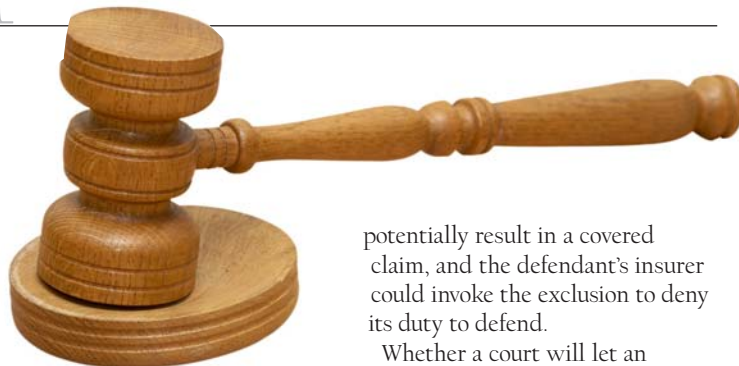
The analysis, however, does not end here. If the plaintiff is a public figure, such as a politician, celebrity, or prominent businessman, the insurer may be able to invoke the intentional acts exclusion to

deny not only its duty to indemnify, but also its duty to defend. This is so because for a public figure plaintiff, a showing of mere negligence or recklessness will not suffice.

Under the First Amendment, a public figure may not recover damages for a defamation-type tort "unless clear and convincing evidence proves that a false and defamatory statement was published with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285-86, 1964).

A public figure plaintiff therefore must prove either actual intent, or at a minimum, "reckless disregard," which in this context means acting with "a high degree of awareness of the probable falsity of the statement or [with] serious doubts as to the publication's truth." (See *St. Amant v. Thompson*, 390 U.S. 727, 731, 1968).

The actual malice inquiry "is thus a subjective one, focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication." (See *Kipper v. NYP Holdings Co., Inc.*, 912 N.E.2d 26, 29, N.Y. 2009). The plaintiff must establish that the defendant knew his or her statement was false, or that the defendant subjectively intended for the statement to cause harm. Either way, the allegations in the plaintiff's complaint, if proven, necessarily would trigger the intentional acts exclusion. The plaintiff's complaint could not even



potentially result in a covered claim, and the defendant's insurer could invoke the exclusion to deny its duty to defend.

Whether a court will let an insurer disclaim the duty to defend in a defamation suit filed by a public figure plaintiff remains to be seen. We could not find a case addressing the intentional acts exclusion in this context. But as blogging and other forms of amateur online journalism become more and more prevalent, anyone who buys or sells homeowner's insurance should know about the intentional acts exclusion and its impact on the defamation coverage.

## With the rise of social media activity and special-interest blogging, defamation coverage is of increasing importance.

Most people probably don't read every word of their homeowner's policies. So they may not know that defamation claims are covered. Many insurers may not yet realize they have grounds for denying that coverage either. But they undoubtedly will learn.

Insurance agents and brokers need to be vigilant when explaining policy terms to prospective insureds. After all, policyholders whose claims are denied often look to their agents or brokers for indemnity. To protect themselves, agents and brokers not only should highlight for their clients the "personal injury" provisions specifying defamation as a covered claim, but they also should clarify how those provisions interplay with the intentional acts and other potentially applicable exclusions. ■

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