

Negligent Publication Limited to Tort Claims Like Defamation and Misappropriation

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In an unpublished decision, the United States District Court for the Northern District of California granted summary judgment to an insurer, holding that the undefined term "negligent publication" as used in a multimedia professional liability policy "should be more narrowly construed to refer to that category of tort claims typified by defamation and misappropriation claims." *Sony Computer Entertainment Am Inc. v. Am. Home Assurance Co.*, C04-0492, 2005 WL 3260483 (N.D. Cal. Dec. 1, 2005).

The policy at issue covered "wrongful acts," including "defective advice, incitement, or negligent publication." The policyholder was sued for a defect in its video game. The court rejected the insured's proposed broad interpretation of "negligent publication," noting that the policy excluded coverage for misrepresentation and false advertising, which would be included if "negligent publication" were interpreted broadly. The court found the insured's interpretation "non-sensical" and unsupported by United States Court of Appeals for the Ninth Circuit case law, which has limited the term to torts such as misappropriation and defamation. Applying this construction, the court held that the underlying claims for false advertising, misrepresentation, breach of warranty and fraud were not covered. Similarly, the court determined that allegations based on product defects did not constitute claims for negligent publication.

The court then rejected the policyholder's argument that an exception to the false advertising and misrepresentation exclusion providing that the insurer would "defend suits alleging [false advertising or misrepresentation in advertising] until there is a judgment, final adjudication, adverse admission or finding of fact against [the policyholder] as to such conduct" created coverage for defense costs. The court explained that "as both the case law and review of the policy language makes clear, neither [the exclusion] nor the so-called 'exception' . . . applies unless coverage under the . . . policy may be invoked in the first instance."