

“Negligent Publication” Does Not Include False Advertising or Negligent Misrepresentation

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The United State Court of Appeals for the Ninth Circuit, applying California law, has held that a professional liability policy including coverage for "negligent publication" did not include coverage for class action lawsuits alleging negligent misrepresentation, false advertising and related counts. *Sony Computer Entm't Am., Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007 (9th Cir. 2008). The court interpreted "negligent publication" to mean only a tort in which the publication of material encourages or instructs readers to engage in harmful conduct. The court further held that a carve-back in a policy exclusion for false advertising did not independently provide coverage.

The insured video game manufacturer sought coverage under a multimedia professional liability policy for class action lawsuits alleging that the video game manufacturer's product suffered from design defects that rendered the games unable to operate as advertised. The class action complaints set forth causes of action for breach of express and implied warranties, fraud, negligent misrepresentation, bad faith, violations of state consumer protection law, false advertising and unfair business practices. The policy provided coverage for "those amounts that [the video game manufacturer] is legally obligated to pay as damages . . . resulting from any claim . . . during the policy period for [the video game manufacturer's] wrongful act in the business of the insured." "Wrongful act" was defined to include defamation, invasion of privacy or publicity, infringement of copyright, title, slogan, trademark, or trade dress, unfair competition, unauthorized use of name or likeness, unintentional failure to credit on a matter, and defective advice, incitement, or negligent publication.

The video game manufacturer argued that the false advertising and negligent misrepresentation claims in the underlying lawsuits alleged negligent publication. According to the video game manufacturer, the term "negligent publication" in the policy referred to "a communication of information to the public, lacking or exhibiting a lack of due care or concern." The court rejected this definition, finding it inconsistent with the context of the policy as a whole. If "negligent publication" were defined as the insured suggested, the court explained, "the terms would be broad enough to subsume virtually all of the other wrongful acts defined in the policy." The court surveyed case law from other jurisdictions interpreting the term "negligent publication" and determined that "[t]hough the cases do not yield one clear definition . . . no case uses the term as

expansively as [the video game manufacturer] suggests."

The court then concluded that, in the context of the policy at issue, the term "negligent publication" should be defined "as a narrow tort in which the publication of material leads the reader to commit a harmful act." The court observed that this definition was consistent with the policy's other language because the term "negligent publication" was placed next to defective advice and incitement, two wrongful acts similar to "negligent publication," as the court defined it. The court accordingly determined that the underlying class actions did not allege "negligent publication" because they did not allege that the video game manufacturer "published material that led readers to engage in a harmful act, nor did they allege that [the video game manufacturer] engaged in any actions typified by the body of case law discussing 'negligent publication.'"

The video game manufacturer also argued that the insurer had a duty to defend it pursuant to carve-back in a policy exclusion. The exclusion disallowed coverage for claims "arising out of false advertising or misrepresentation in advertising" but provided that the insurer "will defend suits alleging any of the foregoing conduct until there is a judgment, final adjudication, adverse admission or finding of fact against [the video game manufacturer]." The court held that this carve-back could not establish coverage that did not exist under the policy's affirmative coverage grants. "A 'carve back' within an exclusionary provision," the court explained, "merely restores already-existing coverage." The video game manufacturer argued that if the insurer had no duty to defend false advertising claims, the carve-back had no purpose. The court disagreed, pointing out that the exception "could apply to claims that alleged false advertising in conjunction with a covered wrongful act, such as . . . infringement of copyright or trade dress." The court concluded that "because there is no coverage under the insuring provisions of [the policy], there is no coverage under the carve-out for defense of false advertising."