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• COVERAGE FOR AN INVASION OF A RIGHT TO PRIVACY •

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INTRODUCTION

The Personal and Advertising Liability section of many Commercial General Liability (“CGL”) policies extends coverage to “invasion of a right of privacy”. Particularly in the internet age, policyholders with increasing frequency face claims which either do or are said for the purposes of securing a paid defence to allege a violation of one of four enumerated privacy interests.

The authors anticipate that Canadian insurers will face, with increasing frequency, coverage

demands in respect of underlying litigation that will focus on “invasion of a right of privacy”. We consider in this article jurisprudence which has assessed CGL coverage availability for such an “offence”.

TYPES OF PRIVACY INTERESTS

Prior to reviewing the coverage jurisprudence, we briefly identify privacy interests.

In 1960, the U.S. torts scholar William Prosser identified four distinct forms of invasion of privacy:

- (i) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;
- (ii) public disclosure of embarrassing private facts about the plaintiff;
- (iii) publicity which places the plaintiff in a false light in the public eye; and
- (iv) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.¹

Some provinces, for example British Columbia, Manitoba, Saskatchewan, and Newfoundland and Labrador, have enacted statutes which address privacy.²

Neither Ontario and Alberta have enacted statutes which address the concept of invasion of privacy as a tort. Nor do these provinces seem to recognize a common law tort of “privacy invasion”. However, in Ontario, recent decisions in *Somwar v. McDonald’s Restaurants of Canada Ltd.*³ and *Caltagirone v. Scozzari-Cloutier*⁴ may have moved the province considerably closer to recognizing a cause of action for invasion of privacy.

• In This Issue •

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COVERAGE CLAUSE

(I) "INTRUSION UPON THE PLAINTIFF'S SECLUSION OR SOLITUDE, OR INTO HIS PRIVATE AFFAIRS"

U.S. policyholders increasingly tender to insurers defence of underlying litigation said to involve the personal injury or advertising liability injury offence of "invasion of a right of privacy". In particular, in the last decade, policyholders have submitted in coverage proceedings that the impugned conduct constitutes an intrusion upon a plaintiff's right to seclusion or solitude. Policyholders note that interference with a seclusion or solitude right has been found to constitute privacy interference by a number of U.S. Courts. Policyholders, in particular, have submitted that so-called Blast Fax claims fall within invasion of a right of privacy offence.

1. "BLAST FAX" CLAIMS

The US *Telephone Consumer Protection Act*, 47 U.S.C. 227 ("TCPA") prohibits the transmission of unsolicited fax advertisements to consumers. The Act imposes certain statutory penalties. These penalties are usually assessed on the basis of each fax sent out by a policyholder.⁵

The policyholder, which finds itself the subject of a Blast Fax suit, typically tenders the claim to its CGL insurer. It is submitted that defence and, should liability be imposed, indemnity is payable pursuant to the Personal and/or Advertising Injury section of the CGL policy. In particular it is typically submitted that the communications constitute a violation of a right of privacy. The communication is often said to violate a right to seclusion (intrusion upon the plaintiff's seclusion or solitude) and/or the right to secrecy ("public disclosure of private facts").

A person's right to seclusion is infringed when he or she is disturbed by an unwanted interruption. When an unsolicited fax arrives, the person who receives it has had his or her right to seclusion breached.

The right of a policyholder, named as a defendant in the Blast Fax suit to coverage is dependent, in the first place, upon the precise wording of the CGL policy. For example, Courts have generally interpreted the words "making known to any person or organization written or spoken materials that violates an individual's right of privacy" differently from "oral or written publication, in any manner, of material that violates a person's right of privacy". The former offence definition has been held generally not to trigger a coverage obligation. The latter phrase has frequently been held to require defence of a Blast Fax claim. Of interest, the latter language is gener-

ally employed in the 2005 revision of the IBC Form 2100. In addition the outcome of a coverage demand is frequently dependent upon the Court's determination of whether communication of an unsolicited Blast Fax violates a "right to seclusion" or "right to secrecy".

(a) "Making Known" of Material That Violates a Person's Right of Privacy

In *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*,⁶ the Court held that communication of a fax in violation of the referenced Act cannot satisfy the "making known to any person or organization written or spoken material that violates a person's right to privacy" offence. The conduct did not amount to a violation of a right of privacy. The Court held:

Consider closely the text and context of the operative sentence. It states that coverage exists for advertisements "making known to any person or organization written or spoken material that violates a person's right to privacy." J.A. 43 (emphasis added). It requires undue strain to believe that sending an unsolicited fax ad that has no private information or content (but rather simply advertised fairly the sender's wares) can reasonably be said to "mak[e] known" material that violates a person's right to privacy. It surely seems to us that the plainest and most common reading of the phrase indicates that "making known" implies telling, sharing or otherwise divulging, such that the injured party is the one whose private material is made known, not the one to whom the material is made known.⁷

In *ACS Systems Inc. v. St. Paul Fire and Marine Insurance Company*,⁸ the particular privacy offence required the "making known to any person or organization written or spoken material that violates an individual's right of privacy". In that case, a software company sought coverage in connection with allegations of violations of the *TCPA*. The Court described the difference between the "secrecy" and "seclusion" aspects of the right to privacy:

... [A] person claiming the privacy right of seclusion asserts the right to be free, in a particular location, from disturbance by others. A person claiming the privacy right of secrecy asserts the right to prevent disclosure of personal information to others. Invasion of the privacy right of seclusion involves the means, manner, and method of communication in a location (or at a time) which disturbs the recipient's seclusion. By contrast, invasion of the privacy right of secrecy involves the content of communication that occurs when someone's private, personal information is disclosed to a third person.⁹

The insurer argued that the insuring agreement in question granted coverage for violations of a person's secrecy, but not for invasions of a person's seclusion. The insurer took the position that, since the

content of the faxes did not impinge on the plaintiff's secrecy interest, there could not have been any privacy rights violated which gave rise to coverage entitlement under the CGL policy in question.

Although the Court in *ACS Systems* acknowledged that sending unsolicited faxed advertisements constituted a "making known" of "written ... material" to the recipient, it held that merely making written material known to a recipient could not trigger coverage. The Court explained that coverage is triggered only when the making known of content to a third party violates a person's right of privacy. The Court relied on the decision in *Resource Bankshares* for the proposition that the content of the material is integral to triggering the privacy offence in question for coverage purposes:

Thus the coverage applies to liability for injury caused by the disclosure of private content to a third party — to the invasion of "secrecy privacy" caused by "making known" to a third party "material that violates an individual's right of privacy". The coverage does not apply to injury caused by receipt of an unauthorized advertising fax, because in that case no disclosure of private facts to a third party has occurred: the recipient of an unauthorized advertising fax has no claim that "material that violates an individual's right of privacy" has been "made known" to a third party.¹⁰

The Court held that the content of the material did not violate the plaintiff's privacy interest. Since all that the plaintiff alleged was an invasion of his right to seclusion, coverage under the policy was not triggered:

Nothing in the content of the "written or spoken material" in unsolicited faxed advertisements violated the recipient's secrecy right of privacy. The faxes contained no facts about the recipients, and did not disclose or "make known" any private information about the recipients to third parties. (See *St. Paul Fire and Marine Ins. v. Brunswick Corp.* (N.D. Ill. 2005) 405 F. Supp. 2d 890, 895) Analyzing the same *St. Paul* policy language as that in this appeal, *Resource Bankshares*, supra 407 F. 3d 631, concluded: "It requires undue strain to believe that sending an unsolicited fax ad that has no private information or content (but rather simply advertised fairly the sender's wares) can reasonably be said to 'mak[e] known' material that violates a person's right of privacy... [T]he plainest and most common reading of the phrase indicates that 'making known' implies telling, sharing or otherwise divulging, such that the injured party is the one whose private material is made known, not the one to whom the material is made known."¹¹

In *St. Paul Fire and Marine Insurance Company v. Onvia, Inc.*,¹² where the wording of the privacy offence was "making known to any person or organization covered material that violates a person's

right of privacy”, the Court stated that although the claim might conceivably have alleged some sort of privacy intrusion, it did not contain any allegations respecting the content of the impugned fax transmissions. The Court held that the wording of the offence was not ambiguous and concluded as follows:

... [I]n this case, the offences enumerated in the policy clearly relate to the content of the covered material and an injury to the person whose private information is revealed. In contrast, the gravamen of the complaint in the underlying litigation is the receipt of unsolicited facsimiles in violation of the TCPA and other statutes. The TCPA prohibits only a particular means of transmission; the content is irrelevant.

[...]

Furthermore, every other Court that has considered St. Paul’s “advertising injury” policy language has concluded that it does not cover fax-blasting claims. See, e.g., *Resource Bankshares Corp.*, 407 F.3d at 642 (applying nearly identical language and finding no coverage for TCPA claims); *Melrose Hotel Co.*, 432 F.Supp.2d at 504 (applying identical policy language and finding no coverage for TCPA claims); *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 2007 Cal.App. LEXIS 113 (Jan. 29, 2007) (published in relevant part) (holding that both the text of St. Paul’s advertising injury provision and the context in which it appears in the policy confirm that the policy does not provide coverage for TCPA claims). Under these circumstances and pursuant to the plain language of the policy and the first amended complaint, St. Paul did not breach its duty to defend.¹³

In *Melrose Hotel Company v. St. Paul Fire and Marine Insurance Company*,¹⁴ the insured argued that the word “privacy” has several definitions and encompasses both the rights to seclusion and to secrecy. The insured therefore submitted that the word “privacy” was ambiguous and that an insured could not realistically be expected to know that the word would only be given its “secrecy” meaning because of the inclusion in the privacy offence of the words “making known”. The Court outlined the insured’s position as follows:

Melrose ... argues that it could not be expected to read the Policy as requiring that the person to whom the covered material was made known must be different from the person whose privacy rights were violated. (Id. at 22-23.) Melrose contends that the phrase “making known to any person or organization covered material that violates a person’s right of privacy” could reasonably be understood to include a situation whereby the entity whose privacy rights were violated is the same entity to whom the covered material was made known. (Id. at 22.) Accordingly, Melrose’s advertisements need not contain information that violates the privacy rights of

an entity different from the recipient. Rather, the act of faxing itself can violate an entity’s right to privacy and therefore is covered under the Policy.¹⁵

The Court noted that coverage for all of the other advertising injury offences enumerated in the policy in question was triggered by the content of the advertisement, not merely its receipt. Consequently, coverage was not intended to be extended to apply to TCPA violations. The Court concluded as follows:

b. The meaning of “privacy”

The Court concludes that this provision is clear and unambiguous and that Melrose’s actions are not covered by the “advertising injury” provisions of the Policy. First, although the term privacy can imply multiple meanings, that fact alone cannot suffice to create ambiguity. See *Resource Bankshares*, 407 F.3d at 640 (“But, contrary to [plaintiff’s] contentions, this nominal overlap does not necessarily result in ambiguity. Every word in [the policy’s advertising injury provision] contains different meanings, but all read clearly in context.”) (emphasis in original); see also J.C. Penney, 393 F.3d at 363 (“That is, ‘a Court must refrain from torturing the language of a policy to create ambiguities where none exist.’”) (quoting *McMillan*, 922 F.2d at 1075). If multiple definitions alone created ambiguity, insurance policies would either lose all meaning or would devolve into epic tomes.

Second, although the term “privacy” is not defined in the Policy, the term as used in the Policy is clear and unambiguous.

[...]

c. The meaning of “making known to”

... [T]he phrase “making known” suggests a focus on secrecy not present in those policies which define advertising injury offence to include “oral or written publication of material that violates a person’s right of privacy.” *Hooters*, 157 Fed.Appx. at 208. “Making known to any person or organization” implies a disclosure to a third party or divulging of a secret. This stands in contrast with the term “publication”, which can include the simple act of issuing or proclaiming. “Making known to” denotes that Melrose is only covered if the relevant material reveals an item of information that violates a third party’s right to privacy. If a Melrose employee phoned a residence and stated that the hotel had rooms available for \$100 a night, Melrose has not made known to that person information that violates another person’s right to privacy. Melrose has arguably breached the right to be left alone of the person who they phoned. If, however, the Melrose employee called that same residence and revealed personal information about a Melrose customer, Melrose has “made known” or disclosed information that violates the customer’s right to privacy.

Furthermore, by requiring that the covered material be made known to any person or organization but insisting that the covered material violate a person’s right of privacy, the Policy makes clear that the

“making known” can be to a person or a company, but the covered material made known must be violative of an individual’s privacy rights. This further highlights that the Policy covers Melrose for the content of its ads and requires the privacy-invading information be made known to a third party. It is the person whose secret is revealed by the content of the ad, not the person or organization to whom the secret is revealed, that suffers the injury. The phrase “making known to” requires that at least three parties be involved—Melrose, who must be the one disclosing; the recipient of the disclosure; and the person whose private material has been disclosed.

[...]

The Court finds that the clear and unambiguous provision “making known to any person or organization covered material that violates a person’s right of privacy” requires that the content contained in the covered material must violate a person’s right of privacy and must be made known to a third party. Because the Travel 100 Group Complaint contains no such allegations, the “advertising injury liability” portion of the Policy does not cover Melrose’s alleged actions, and St. Paul owes Melrose no duty to defend Melrose under that provision.¹⁶

While the Court acknowledged the existence of decisions finding coverage for *TCPA* violations under advertising injury provisions, it distinguished those decisions from the case before it because the others “considered broader language which could arguably be read to include violations of the right to be left alone, the privacy right protected by the *TCPA*.”¹⁷

(b) “Publication” of Material That Violates a Person’s Right of Privacy

As noted, coverage is not available, in respect of the privacy offence, if the relevant policy language requires the “making known” of material that violates a person’s right of privacy. In contrast, as discussed below, certain Courts have found that insurers are obligated to respond to Blast Fax claims when the offence in question is defined as “a publication of material that violates a person’s right of privacy”. Having said that, certain Courts have concluded, even in the absence of “making known” language, that coverage is not available in respect of these claims.

In *Hooters of Augusta, Inc. v. American Global Ins. Co.*, the privacy offence was defined as “[o]ral or written publication of material that violates a person’s right of privacy”. The Court found that both the right to seclusion and the right to secrecy were protected by this wording. The Court distinguished the holding in *Resource Bankshares* on the basis that the language used to describe the privacy offence in that case was more “tightly-worded” than the policy language it was considering:

... [Resource Bankshares] involved a more tightly worded advertising-injury provision that described the covered activity as “making known to any person or organization written or spoken material that violates a person’s right to privacy.” *Resource Bankshares*, 407 F.3d at 641. This wording seems to have been a significant factor in the Court’s decision. See *id.* at 641–42. The insurance contract in this case, however, refers to “[o]ral or written publication” of such material, which does not suggest the focus on secrecy that “making known” does.¹⁸

In *American States Ins. Co. v. Capital Associates of Jackson County Inc.*,¹⁹ the Court noted the multiple meanings of the word “privacy”:

“Privacy” is a word with many connotations. The two principal meanings are secrecy and seclusion, each of which has multiple shadings. See Restatement (Second) of Torts § 652 (1977); Richard S. Murphy, *Property Rights as Personal Information*, 84 *Geo. L.J.* 2381 (1996). A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion. Some other uses of the word “privacy” combine these senses: for example, a claim of a right to engage in consensual sexual relations with a person of the same sex, or to abort an unwanted pregnancy, has both informational (secrecy) and locational (seclusion) components, with an overlay of substance (the objection to governmental regulation).²⁰

In *American States*, the privacy offence was defined in the following terms “[o]ral or written publication of material that violates a person’s right of privacy”. The insurer insisted the wording protected secrecy but not seclusion. The Court noted:

American States contends that its advertising-injury coverage deals with secrecy rather than seclusion. The language reads like coverage of the tort of “invasion of privacy”, where an oral or written statement reveals an embarrassing fact, brings public attention to a private figure, or casts someone in a false light through publication of true but misleading facts.²¹

Interestingly, the Court commented on the potential wide reach of the wording in question noting:

Perhaps the language reasonably could be understood to cover improper disclosures of Social Security numbers, credit records, email addresses, and other details that could facilitate identity theft or spamming.²²

The *American States* Court concluded that allegations of *TCPA* violations were not covered under the policy under consideration because, as submitted by the insurer, the particular policy wording only cov-

ered infringements of the right to secrecy, not the right to seclusion:

The structure of the policy strongly implies that coverage is limited to secrecy interests. It covers a “publication” that violates a right of privacy. In a secrecy situation, publication matters; otherwise secrecy is maintained. In a seclusion situation, publication is irrelevant. A late-night knock on the door or other interruption can impinge on seclusion without any need for publication. ... To put this differently, [the TCPA] condemns a particular means of communicating an advertisement, rather than the contents of that advertisement-while an advertising-injury coverage deals with informational content.²⁵

In *Erie Ins. Exchange v. Kevin T. Watts, Inc.*,²⁴ *Telecommunications Network Design, Inc. v. Brethren Mut. Ins. Co.*,²⁵ and *Penzer v. Transportation Ins. Co.*,²⁶ where the wording of the privacy offence was identical to that under consideration in *American States*, the reasoning of the *American States* Court was expressly followed.

In *Ace Mortg. Funding, Inc. v. Travelers Indem. Co. of America*,²⁷ the policy defined advertising injury in pertinent part as “oral, written, or electronic publication of material that violates a person’s right of privacy”. The Court held that the policy did not afford coverage for TCPA violations. Claims made against the insured were not based on the publication of the content of the fax messages and consequently did not invade a secrecy-type privacy interest, the only type of privacy interest protected under the policy.

In *St. Paul Fire and Marine Ins. v. Brunswick Corp.*,²⁸ the wording of the advertising injury offence in question was slightly different than was the case in *American States*. The policy in *Brunswick* was one which defined advertising injury in pertinent part as “oral, written, or electronic publication of material in your Advertisement that violates a person’s right of privacy”. This wording was addressed by the Court:

The addition of the words “in your Advertisement” unambiguously demonstrates that to be covered the injury must be a result of the content of the material. Because the underlying complaint does not allege that the “material” in defendants’ advertisement violated plaintiff’s right to privacy, only that the mere sending of the facsimiles, regardless of their content, violated the plaintiff’s rights, the underlying claim is not even potentially within the scope of coverage. Thus, plaintiff has no duty to defend under the advertising injury provision.²⁹

The wording of the privacy offence in *Brunswick* may be compared with that contained in the new IBC Form 2100, which reads as follows:

“Personal and advertising injury” means injury, including consequential “bodily injury”, arising out of one or more of the following offences:
[...]

e. Oral or written publication, in any manner, of material that violates a person’s right of privacy.

Query whether the IBC definition and, in particular, use of the phrase “in any manner” will result in a Court determining that a policyholder accused of Blast Fax violations or similar misconduct (for example unsolicited telephone communications) has entitlement to at least a defence.

In *Park University Enterprises v. American Cas. Co. of Reading, PA.*,³⁰ the privacy offence was defined as “oral or written publication of material that violates a person’s right of privacy”. The Court held that the term “right of privacy” is susceptible to a number of interpretations, including violation of a person’s right to seclusion. Communication of the fax violated a right to seclusion. The definition supported a right of the policyholder to defence.

The Court in *Park University Enterprises* distinguished the facts before it from those at issue in *American States* on the basis that “the intentional nature of the alleged injuries ... appears to have been wholly undisputed” in *American States*.³¹

In *Valley Forge Insurance Company v. Swiderski Electronics, Inc.*,³² the Supreme Court of Illinois was required to determine the scope of coverage available for the alleged violation of privacy rights. The policy in issue employed privacy offence wording identical to that which appears in the 2005 version of IBC Form 2100.

The Court noted that the policy did not define the term “right of privacy”. As such, the term had to be given its plain, ordinary and popular meaning. The Court looked to dictionary definitions and concluded that the term encompasses both the right to secrecy and the right to seclusion:

These definitions confirm that “right of privacy” connotes both an interest in seclusion and an interest in the secrecy of personal information. Accordingly, the policy language “material that violates a person’s right of privacy” can reasonably be understood to refer to material that violates a person’s seclusion. Unsolicited fax advertisements, the subject of a TCPA fax-ad claim, fall within this category.³³

The Court held that fax transmission claims could potentially give rise to advertising injury coverage because the plaintiff alleged a breach of the right to seclusion or a breach of the right to secrecy. The Court noted:

Considering these definitions in conjunction with one another, we believe Rizzo’s TCPA fax-ad claim

potentially falls within the coverage of the policies' "advertising injury" provision. By faxing advertisements to the proposed class of fax recipients as alleged in Rizzo's complaint, Swiderski engaged in the "written *.*.* publication" of the advertisements. Furthermore, the "material" that Swiderski allegedly published, advertisements, qualifies as "material that violates a person's right of privacy", because, according to the complaint, the advertisements were sent without first obtaining the recipients' permission, and therefore violated their privacy interest in seclusion. The language of the "advertising injury" provision is sufficiently broad to encompass the conduct alleged in the complaint. To adopt the insurers' proposed interpretation of it - i.e., that it is only applicable where the content of the published material reveals private information about a person that violates the person's right of privacy - would essentially require us to rewrite the phrase "material that violates a person's right of privacy" to read "material the content of which violates a person other than the recipient's right of privacy". This we will not do.³⁴

The Court expressly declined to follow *American States and Erie Ins. Exchange*, citing the overemphasis placed in those decisions on the notion that "publication" is irrelevant to interference with the right to seclusion, but relevant to infringement of the right to secrecy:

American States and *Erie* ... addressed policy language identical to the language at issue here. *American States*, 392 F.3d at 940; *Erie*, slip op. at 5. *Erie*, of course, relied on *American States*, which hinged considerably on the proposition that "publication" matters in a "secrecy situation," but not in a "seclusion situation." See *American States*, 392 F.3d at 942. This may very well hold true as a general matter in the realm of privacy law. We believe, however, that relying on this proposition as a basis for interpreting the insurance policy language "publication of material that violates a person's right of privacy" is inconsistent with this Court's approach to interpreting insurance policy provisions. Affording undefined policy terms their plain, ordinary, and popularly understood meanings is of central importance to this approach (see, e.g., *Outboard Marine*, 154 Ill.2d at 115, 180 Ill.Dec. 691, 607 N.E.2d 1204; *Central Illinois Light*, 213 Ill.2d at 155-56, 165, 290 Ill.Dec. 155, 821 N.E.2d 206), and doing so here yields the conclusion, as set forth above, that Rizzo's TCPA fax-ad claim potentially falls within the coverage of the policies' "advertising injury" provisions. Accordingly, we decline to follow *American States* and *Erie*.³⁵

In *American Home Assurance Co. v. McLeod USA, Inc.*³⁶ and *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*,³⁷ the privacy offence in question was defined as "[o]ral or written publication of material that violates a person's right of privacy". The

Courts adopted the broader interpretation of the privacy offence and the policy language taken in the *Valley Forge* decision. These Courts preferred the reasoning of the *Valley Forge* Court to that advanced in *American States*.

In *Terra Nova Insurance Company v. Metropolitan Antiques, LLC*,³⁸ the privacy offence was defined as "oral or written publication of material that violates a person's right of privacy". Relying on the holdings in *American States* and *Resource Bankshares*, the lower Court found that the TCPA violations implicated the right to seclusion, not the right to secrecy. The lower Court did not find coverage for such violations. The policy in question did not cover injury resulting from a breach of a person's right of seclusion.

The judgment of the lower Court in *Terra Nova* was reversed. The Appellate Court held that the *American States* decision had been undermined by the holding of the Supreme Court of Illinois in *Valley Forge*. Further, the Court held that the *Resource Bankshares* decision was based on an interpretation of policy language which was different from that used in the policies in question in *Terra Nova*.³⁹ The Court, noting that the insurers could have used more precise language to express their intentions, stated:

The insurers' reasoning that the content of the material, rather than its mere existence, must violate the right of privacy is unpersuasive. In effect, the insurers argue that the policy's definition of injury should be read to say "[o]ral or written publication of material, the content of which violates a person's right of privacy." But New Jersey law is clear that when construing an ambiguous phrase in an insurance policy, Courts should "consider whether clearer draftsmanship by the insurer 'would have put the matter beyond reasonable question.'" *Progressive Ins. Co. v. Hurley*, 166 N.J. 260, 274, 765 A.2d 195 (2001), quoting *Doto v. Russo*, 140 N.J. 544, 557, 659 A.2d 1371 (1995). In other words, had [the insurers] wished their policies to pertain only to violations of privacy created by the content of material, it was incumbent on them to draft explicit policies to that effect.⁴⁰

In *St. Paul Fire and Marine Ins. Co. v. Brother Intern. Corp.*,⁴¹ St. Paul's "making known" wording was again at issue in the context of TCPA Blast Fax complaints. In finding no duty to defend on the part of St. Paul, the Court distinguished *Terra Nova* based on the distinction of policy language. The Court stated that the insured in *Brother* "did not buy insurance policies for seclusion damages; instead, it insured against, among other things, damages arising from violations of content-based privacy, and thus, coverage for a Blast Fax claim is precluded under St. Paul's 'advertising injury' offence".

The Court noted that every Court, which had considered a St. Paul policy in these circumstances, concluded that its privacy offence did not apply to TCPA-based "Blast Fax" claims. Similarly, it noted that all of the cases cited by the insured in support of coverage had interpreted advertising injury provisions which were different and distinguishable from the St. Paul "making known" provision.

(II) "OTHER INTRUSIONS OF A PLAINTIFF'S SECLUSION OR SOLITUDE"

Solitude or seclusion is the hallmark of the right to privacy. Policyholders have sought coverage under the advertising or personal injury section of the CGL policy where the underlying litigation does not allege TCPA violations.

For example, in *Allstate Ins. Co. v. Dana Corp.*,⁴² the liability policy in question covered injury arising out of "invasion of rights of privacy". The insured brought an application for declaratory judgment seeking coverage in connection with allegations that it had permitted the entry of contaminants onto the underlying plaintiff's property. The contaminants allegedly violated the plaintiff's right of seclusion thus triggering Personal Injury coverage.

The Court held that the invasion of a plaintiff's right to privacy takes the form of intrusion upon the occupants "physical solitude or seclusion as by invading his home or conducting an illegal search". The entry of contaminants onto the plaintiff's land did not constitute an invasion of privacy of the kind for which coverage was to be provided under the policy. The Court noted that coverage would not have been provided if the insured had been alleged to have launched a missile onto the plaintiff's property.⁴³

In *St. Paul Fire & Marine Ins. Co. v. Green Tree Financial Corp.-Texas*,⁴⁴ mobile home purchasers made claims against the insured alleging wrongful debt collection, negligence, and a violation of legislation prohibiting deceptive trade practices. The Court held that the purchasers' allegations focusing upon the insured's placement of numerous rude and abusive telephone calls to them and to their family members potentially stated a cause of action for invasion of privacy. The CGL policy at issue provided personal injury coverage for "written or spoken material made public which violates an individual's right of privacy". The abusive phone calls violated a right of seclusion or solitude.

In *Nova Casualty Co. v. Able Construction, Inc.*,⁴⁵ the principal of a developer/contractor filed restrictive covenants on lots on which a home was built. The home was then sold to the plaintiffs. The plaintiffs then began to operate a psychotherapy business from the

home. Subsequently, the architectural committee of the subdivision informed the plaintiffs that restrictive covenant barred the operation of the psychotherapy business and demanded that they cease running it. The plaintiffs refused, claiming that the developer/contractor principal had assured them that the subdivision's restrictive covenants would allow them to operate the psychotherapy business from their home. The architectural committee then proceeded to file an action against the plaintiffs. A Court ordered them to stop operating the business from their home.

The plaintiffs sued the developer/contractor for misrepresentation. The developer/contractor, seeking coverage under its CGL policy, argued that the misrepresentation alleged against them fell within the concept of invasion of privacy. The plaintiff homeowners were not able to conduct themselves "in a private manner" in their home. The alleged misrepresentation had led to a Court order requiring them to alter their lifestyle within their home. There was a privacy infringement.

The Court held that coverage was not available to the developer/contractor. Specifically the underlying allegations did not fall within the advertising injury concept of "oral or written publication of material that violates a person's right of privacy". To find that the misrepresentation allegations fell within the privacy right would be to expand the definition of invasion of privacy beyond recognition.

In *Cornhill Ins. PLC v. Valsamis, Inc.*,⁴⁶ the privacy provision in question provided coverage for injury arising from a "publication utterance ... in violation of an individual's privacy". The Court held that in order for one to state a claim amounting to an invasion of the right to privacy on the basis of "intrusion", there must have been "an intentional intrusion upon the solitude or seclusion of another or his private affairs or concerns that is highly offensive to a reasonable person". The Court took the position that this type of invasion of privacy "is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones or spying". Since the underlying plaintiff made no such allegation in her complaint, alleging only that offensive comments and inappropriate advances had been made towards her, a cause of action for invasion of privacy had not been made out under Texas law. There was no coverage under the CGL policy for personal injury arising out of a publication or utterance in violation of an individual's right to privacy.

In *Allstate Ins. Co. v. Ginsberg*,⁴⁷ an employer sought coverage under the Personal Injury section of the CGL policy. The employer was accused by the em-

ployee of engaging in inappropriate conduct inclusive of sexual touching and sexually aggressive comments. The policyholder submitted that such conduct fell within the invasion of privacy offence. The Court held that the allegations did not fall within any of the four enumerated privacy categories. In particular there was not a claim advanced alleging intrusion of a right of seclusion or solitude. The offence required evidence of intrusion into a place for which there is a reasonable expectation of privacy. Such "place" does not include a body part. Coverage was denied to the employer.

(III) "PUBLIC DISCLOSURE OF EMBARRASSING PRIVATE FACTS ABOUT THE PLAINTIFF"

Policyholders have also sought coverage, under the privacy offence, alleging that the underlying allegations fall within the privacy category of public disclosure of embarrassing private facts.

In *Marleau v. Truck Ins. Exchange*,⁴⁸ the CGL policy contained a typical personal injury privacy offence. Specifically personal injury arising from "oral or written publication of material that violates a person's right to privacy" constitutes an offence. The policyholder was alleged to have intentionally inflicted emotional distress upon the plaintiff. The policyholder submitted that it was entitled to a defence under the personal injury section of the CGL policy. Verbal statements constituted a public disclosure of private facts about the plaintiff. The verbal disclosure also painted the plaintiff in a "false light". The Court dismissed the policyholder's claim for coverage. The privacy category in question requires that the facts disclosed be wrongful and false. The underlying litigation did not allege that the statements said to have been communicated by the policyholder were in fact false or wrong.⁴⁹

In *Ananda Church of Self Realization v. Everest Nat. Ins. Co.*,⁵⁰ the policy in question provided coverage for personal injury arising out of "[o]ral or written publication of material that violates a person's right of privacy". The underlying litigation involved allegations of trespass onto private property and review of private documentation. The policyholder sought coverage under the personal injury section of the CGL policy. After listing the four violations of privacy actionable under California law, the Court held that only one, public disclosure of private facts, was covered by the policy in question. The Court held:

[The language of the coverage provision], which we find clear and unambiguous, covers only oral or written publications which violate a plaintiff's right to privacy. Allegations of privacy intrusion, such as placing the plaintiffs under surveillance, trespassing onto their property, and stealing or reading private

documents are not publications, and thus are not even potentially covered by the policy.

[...]

A layperson reading [the coverage provision in question] would have no reasonable expectation that its coverage extended to privacy claims not involving publication or disclosure of private facts.⁵¹

In *Lextron, Inc. v. Travelers Cas. and Sur. Co. of America*,⁵² the insured was a veterinary products distributor. The insured's president sued the CGL insurer for breach of contract and bad faith for refusing to defend an action brought against the company by one of their customers. The customer complained of the sale of defective vaccines. The customer alleged, in retaliation, the insured president had attempted to persuade a bank to call the customer's loans immediately. The president suggested if it did not do so, the customer could do harm to the bank.

The privacy offence was defined to include "[o]ral or written publication of material that violates a person's right to privacy". The Court held that because the customer alleged that the president only "publicized" his opinion to one person, the bank's representative, the allegations in question failed to satisfy the breach of privacy requirement. The customer's private matters were not sufficiently publicized. There was not a claim advanced respecting another's private life.⁵³

(IV) "PUBLICITY WHICH PLACES THE PLAINTIFF IN A FALSE LIGHT IN THE PUBLIC EYE"

As referenced, conduct which places the underlying plaintiff in a false light violates a right of privacy. To be more precise, public commentary depicting the underlying plaintiff in a false light violates one of Prosser's four privacy categories. Policyholders in the United States have sought coverage alleging the underlying litigation contains complaints said to portray the plaintiff in a false light.

A word of caution is required. A submission that coverage entitlement exists under the "breach of privacy offence" because underlying allegations complain that a plaintiff was placed "in a false light" may not be available in Canada. At least one Court has stated, unequivocally, that no cause of action based on "false light invasion of privacy" exists in Canada.

In *Parasiuk v. Canadian Newspapers Co.*,⁵⁴ the Manitoba Court of Queen's Bench held that there does not exist a common law tort of "false light invasion of privacy". Nor does any statute permit an action to be advanced on the premise that the underlying conduct placed the plaintiff in a false light. Rather, the Manitoba Court stated that the concept of "false light" privacy breach had "been fabricated in

the markedly different social, constitutional and legal framework of the United States".⁵⁵ A "false light" tort did not exist in Manitoba.

Canadian insurers do provide coverage to policyholders who undertake business in the United States. Courts in American jurisdictions have recognized that conduct which publicly places a plaintiff in a false light constitutes violation of a right of privacy. Policyholders, facing such underlying litigation, have sought coverage under the breach of privacy offence.

The *Marleau v. Truck Ins. Exchange*⁵⁶ case was previously referenced. In addition to seeking coverage under the seclusion category, the policyholder alleged that the underlying plaintiff complained the policyholder's conduct placed the plaintiff in a false light. The Court disagreed holding that an invasion of the right of privacy by placing a plaintiff in a false light required both that the statements be false and that they be publicized to third parties. In the underlying litigation no allegations of publicity were advanced. CGL coverage was not available to Marleau.⁵⁷

In *Cort v. St. Paul Fire and Marine Ins. Companies, Inc.*,⁵⁸ the insured sued their liability insurer for bad faith and breach of contract. The insurer had refused to defend an underlying lawsuit brought by artists against the insured who had covered up the artists' mural on a wall of the insureds' building. The Court stated that under California law, false light invasion of privacy "is the wrong inflicted by publicity which puts the plaintiff ... in a false but not necessarily defamatory position in the public eye". The Court held that a false light privacy claim required the invasion of some type of privacy interest, and that the right of privacy must concern one's own peace of mind. In the Court's opinion, the insureds failed to explain how covering a publicly displayed mural constituted invasion of a privacy interest held by the artists. The artists' complaint did not allege conduct which fall within the concept of false light invasion of privacy.

In *Lextron, Inc. v. Travelers Cas. and Sur. Co. of America*,⁵⁹ the privacy offence extended coverage to "[o]ral or written publication of material that violates a person's right to privacy". The Court held that the customer's allegations did not state a claim for false light invasion of privacy. To fall within this privacy category, it was essential that the matter published concerning the plaintiff not be true. There was no allegation that the reported conversation between the insured's president and the bank's representative was false.⁶⁰

(V) E. "APPROPRIATION, FOR THE DEFENDANT'S ADVANTAGE, OF THE PLAINTIFF'S NAME OR LIKENESS"

There has been limited judicial consideration of whether coverage is available under the privacy of-

fence for underlying claims asserting the appropriation of the plaintiff's likeness.

In *Superformance Intern., Inc. v. Hartford Cas. Ins. Co.*,⁶¹ an insured manufacturer of replica automobiles brought an action seeking a declaration that its insurer had a duty to defend it in a trademark infringement suit. The policy provided coverage for personal and advertising injury arising out of an "oral or written publication of material that violates a person's rights of privacy". Virginia law governed the dispute. Legislation in that jurisdiction limited claims for invasion of privacy to "any person whose name, portrait, or picture is used without having first obtained the written consent of such person ...". The underlying complaints did not contain allegations that the insured had used the name, portrait, or picture of one of the plaintiffs in any manner. As such, the facts as alleged did not support a claim based upon invasion of privacy. No personal injury or advertising coverage was available.

OTHER INVASION OF PRIVACY CLAIMS

(I) A. CLAIMS FOR EMPLOYMENT DISCRIMINATION/SEXUAL HARASSMENT

Innovative policyholders' counsel have endeavoured to secured coverage under the invasion of privacy offence for claims involving employment discrimination or sexual harassment.

In *Transamerica Ins. Co. v. KMS Patriots, L.P.*,⁶² the plaintiff in the underlying action complained of alleged discriminatory comments made by a superior. The policyholder sought coverage under its CGL policy alleging that the conduct fell within an invasion of privacy offence. The Court held that the comments identified in the pleading did not amount to "unreasonable, substantial, or serious interference" with the employee's right of privacy. In the circumstances the statutory definition of invasion of privacy could not be satisfied. There was no coverage entitlement.

In *Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*,⁶³ an employee brought a sexual harassment suit against her employer. The employee alleged that her employer negligently inflicted severe emotional distress through its extreme and outrageous conduct and discriminatory actions. As well, the employee lost her professional reputation. The employer sought coverage under a CGL policy which defined the personal injury offence as "[o]ral or written publication of material that violates a person's right to privacy". The Court determined that the insurer was obligated to defend. The allegations potentially fell within the invasion of privacy offence.

In *Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co.*,⁶⁴ the Court held that allegations of intimidation and harassment contained in a sexual discrimination and retaliatory discharge action brought by an employee did not constitute personal injury arising out of a "publication or utterance in violation of an individual's right of privacy". Thus the allegations did not satisfy the invasion of privacy requirements in the jurisdiction issue.

In *Cornhill Ins. PLC v. Valsamis, Inc.*,⁶⁵ it was held that, under Texas law, a claim of sexual harassment did not constitute a "publication or utterance ... in violation of an individual's privacy". Coverage was not available under the privacy offence of the policy in question.

In *Owners Ins. Co. v. William Benjamin Trucking, Inc.*,⁶⁶ the CGL policy in question defined personal injury as injury arising out of, among other things, the "[o]ral or written publication of material that violates a person's right of privacy". The Court stated that the plaintiff employee did not allege that the employer had invaded his privacy. Rather, the plaintiff merely alleged that the actions of the employer constituted "an outrageous invasion of [the plaintiff's] personal rights". The plaintiff had not amended his complaint to state which personal rights were violated by the employer or to state clearly that the employer had invaded his rights to privacy. The Court held that the plaintiff's Complaint did not allege a personal injury as defined in the relevant policy.

(II) B. ALLEGATIONS OF VIOLATIONS OF U.S. FAIR CREDIT REPORTING ACT

In *Pietras v. Sentry Insurance Company et al.*,⁶⁷ the insurer was alleged to have violated its duty to defend its insured in a suit based on violations of the *Fair Credit Reporting Act*, 15 USC. § 1681 et seq. ("FCRA").

The underlying plaintiff filed a class action suit against the insured car dealership alleging violations of the *FCRA*. In particular it was alleged the class representative received a mailed solicitation from the insured stating that she had been pre-approved for an automobile loan. The solicitation stated that the insured had obtained the plaintiff's credit information and relied on it in making an offer of credit to the plaintiff. The plaintiff claimed that the insured had wrongfully accessed her and other class members' credit information in violation of the *FCRA*.

The insured had been issued a policy which provided coverage for damages arising out of "personal and advertising injury" caused by "oral or written publication of material that violates a person's right

of privacy". The car dealership tendered the defence of the *FCRA* to its insurer. The insurer denied coverage, contending that the policy did not provide coverage for the underlying complaint. The insured's mailed solicitation did not violate the recipient's privacy rights or constitute publication.

The insurer took the position that the mailed solicitations did not implicate privacy rights because they did not contain any personal credit information about the class members. The Court held that the purpose of the *FCRA* was to protect the consumer's right of privacy by prohibiting the disclosure of consumer credit information except if that information is obtained for a permissible purpose. The entity requesting the data must certify to a consumer credit reporting agency before it can obtain the consumer's credit information, that a permissible purpose exists. One such permissible purpose is to make what is termed a "firm offer of credit" to the consumer.

The class action complaint sufficiently alleged that the insured obtained the class members' credit information for a non-permissible purpose. The insurer cited the *TCPA* case of *American States* for the proposition that privacy rights are implicated only in the event that a claimant's personal information is disseminated.

In the Court's view, *American States* was not good law in view of the subsequent release of the *Valley Forge* decision. In *Valley Forge*, the Court concluded that the plain meaning of the term "right of privacy" encompassed both a secrecy privacy interest and a seclusion privacy interest.

In this *FCRA* case, as in *Valley Forge*, the policy in question defined "advertising injury" as "oral or written ... publication ... of material that violates a person's right of privacy". The insurer took the position that the "publication" element was not present in the underlying complaint. In the Court's view, "even if [the insured's] solicitations did not contain personal credit information, they still implicated the consumers' right to privacy protected by the *FCRA* — the right not to receive credit solicitations sent without a permissible purpose". The Court noted that it had been held in *Valley Forge* that a single fax transmission to a single recipient constituted publication thereof.

In view of the foregoing, the Court held that the *FCRA* allegations in the underlying complaint fell within the "advertising injury" provision in the policy in question. Consequently, the insurer had a duty to defend the insured.

In *Zurich American Ins. Co. v. Fieldstone Mortg. Co.*,⁶⁸ the underlying plaintiff brought action alleging that the insured improperly accessed and used the plaintiff's and others' credit information, thereby violating the *FCRA*. He alleged that in 2005 and during

the two years which preceded his filing of his action, he received “pre-screened” offers from the insured offering him the opportunity to refinance his mortgage. He alleged that the “pre-screening” was based on information contained in his consumer credit report, which had been accessed without his consent and without a permissible purpose under the *FCRA*.

The Court stated that the *FCRA* was enacted to ensure “that consumer reporting agencies exercise their grave responsibilities with ... a respect for the consumer’s right to privacy”.

The insurer relied on the *TCPA* decision in *Resource Bankshares* to support its submission that the policy in question only covered allegations of invasion of secrecy privacy rights, not seclusion privacy rights.

The Court held it would be difficult for the underlying plaintiff to prove his case under the *FCRA* without reference to the content of the solicitations of which he complains. The Court stated:

It is not solely the manner of the solicitation that forms the crux of [the underlying plaintiff’s] complaint; it is the action that undergirds the message’s content: the unauthorized accessing of his credit records. Indeed, the Fourth Circuit cites, as a possible category of privacy interests, “informational privacy, or ‘control over the processing-i.e., the acquisition, disclosure and use-of personal information.’” *Resource Bankshares*, 407 F.3d at 640 n. 9. As both the [insurer] and [the insured point out], it would be difficult for the underlying plaintiff to prove his case without introducing the content of the letters he received, because in order to prove his *FCRA* claim, he would have to show that the solicitations did not include a firm offer of credit such that any unpermitted access to his credit records would be forgiven.⁶⁹

In *American Family Mut. Ins. Co. v. C.M.A. Mortg., Inc.*,⁷⁰ the decisions in both *Pietras and Fieldstone Mortg.* were considered and their reasoning accepted. The Court concluded:

A reasonable person who reads the advertising injury provisions of these policies would conclude that coverage exists for a claim arising out of the mailing of a solicitation letter that was triggered by a violation of the privacy protection rights established in *FCRA*. The policy provides that it covers liability for “[o]ral or written publication, in any manner, of material that violates a person’s right of privacy.” The phrase, “in any manner,” leaves no room for equivocation.⁷¹

(III) C. INDUCING OTHERS TO VIOLATE ANOTHER’S RIGHT OF PRIVACY NOT COVERED

In *Butts v. Royal Vendors, Inc.*,⁷² it was held that allegations that an employer had induced a physician to breach his fiduciary duty towards one of the employer’s employees did not fall within personal injury coverage for “[o]ral or written publication of

material that violates a person’s right of privacy”. The Court found that in order for coverage to be available pursuant to this provision, the employee would have had to allege that the employer published material that invaded the employee’s privacy. However, a fair reading of the employee’s complaint suggested that the employer induced a third party physician to publish material that violated the employee’s right of privacy. As the complaint did not allege that the employer itself published the material, coverage was not available.

(IV) D. COVERAGE AVAILABLE ONLY FOR VIOLATIONS OF RIGHT TO PRIVACY OF NATURAL PERSONS, NOT ORGANIZATIONS

In *Fibreboard Corp. v. Hartford Accident & Indemnity Co.*⁷³ the Court held that an organization does not enjoy privacy rights:

... [W]e concur with Hartford that the plaintiffs in the underlying cases have no protectable privacy interest because they are corporations, partnerships and public entities, not natural persons. “The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded.” (Rest.2d Torts, § 6521, com. a, at p. 403.) “A corporation, partnership or unincorporated association has no personal right of privacy.” (Id., com. c, at p. 403.) Therefore, as a matter of law the plaintiffs pursuing the underlying claims cannot state a cause of action for invasion of privacy.⁷⁴

In *Heritage Mut. Ins. Co. v. Advanced Polymer Technology, Inc.*,⁷⁵ the insured argued that the plaintiff company’s allegations of invasion of privacy were covered as injury arising from “oral or written publication of material that violates a person’s right of privacy”. The Court did not agree. The Court’s reasoning was based in part on its conclusion that coverage for invasion of the rights of privacy under the insurance policy in question applied only where the privacy rights at issue were those of an individual and not of an organization.

In *Ananda Church of Self Realization v. Everest Nat. Ins. Co.*,⁷⁶ the relevant invasion of privacy provision provided coverage for personal injury arising out of “[o]ral or written publication of material that violates a person’s right of privacy”. The Court refused to find coverage in relation to the publication of facts embarrassing to a law firm because “neither a law firm nor any other business entity possesses a cause of action for violation of the right of privacy”, since such right is vested exclusively in natural persons.

The Court added that although the two individual plaintiffs had a right to privacy, none of the documents stolen could have disclosed shameful facts

about the private life of either of them because they were all “law firm documents” which revealed only “confidential attorney-client communications and other private information in their case files ...” It was stressed that the documents were *firm* documents stolen from the *firm’s* business premises and pertaining to internal affairs of the *firm*. In the opinion of the Court, any disclosure of these documents to others could not have revealed “truthful but embarrassing private facts” about either individual plaintiff’s past, much less facts which the average person would find offensive or objectionable.⁷⁷

(V) E. MISAPPROPRIATION OF TRADE SECRETS NOT COVERED UNDER “INVASION OF PRIVACY” OFFENCE

In *Winklevoss Consultants, Inc. v. Federal Ins. Co.*,⁷⁸ the Court noted that no Court had ever held that trade secret misappropriation fell within the offence of “oral or written publication of material that violates a person’s right of privacy”.⁷⁹

(VI) F. GATHERING AND DISSEMINATING PERSONAL INFORMATION BEYOND DISCLOSED TERMS COULD VIOLATE RIGHTS

In *State Farm Fire and Cas. Co. v. National Research Center for College and University Admissions*,⁸⁰ the insured was a private research firm that conducted surveys of high school students and distributed the results to colleges and universities for recruitment and admissions purposes. The Federal Trade Commission (“FTC”) commenced an investigation into the insured’s funding and its use of survey data for commercial purposes which were not disclosed to students. In addition, state attorneys general investigated the insured to determine whether there was compliance with state consumer protection laws. The FTC and the state attorneys general alleged that the insured had made misleading representations in the survey. Further, it had shared students’ information in violation of the insured’s own privacy statement.

The insured looked to its business liability policy for coverage. The policy in question stated that the insurer would cover personal injury or advertising injury arising out of “oral or written publication of material that violates a person’s right of privacy”.

The insurer submitted that no violations of privacy had been alleged against the insured. The Court disagreed holding that both the FTC and the state attorneys general had alleged injury for invasion of privacy. The Court concluded:

Gathering and disseminating personal information beyond disclosed terms arguably violates “privacy”, as evidenced by the “Privacy Statement” at the bot-

tom of the [insured’s] surveys. State Farm objects at length that the gravamen of the investigating entities’ complaints is “misrepresentations”, but the Policy covers occurrences which result in personal injury or advertising injury. The claims against the [insured] allege such occurrences.⁸¹

(VII) G. MEANING OF “PUBLICATION”

In *Western Rim Investment Advisors, Inc. v. Gulf Insurance Co.*,⁸² the advertising injury provision at issue covered “[o]ral or written publication of material that violates a person’s right of privacy”. The Court considered the “publication” requirement of the offence in question in the *TCPA* case before it holding:

The Court agrees that “publication” is a term of art when used in defamation causes of action, connoting that the defamatory statements must be communicated to a third party before they are actionable. “Publication,” however, does not necessarily carry the same baggage when employed in the context of invasion-of-privacy torts. An invasion-of-privacy claim based on intrusion upon seclusion, for instance, does not require that its factual underpinnings include an allegation of publication to a third party. Furthermore, there is nothing in the CGL policy indicating that the word “publication” necessarily means communicating the offending material to a third-party. Consequently, the Western Rim entities’ alleged acts of faxing the advertisements to the Monarch plaintiffs may constitute a written publication. For purposes of determining whether Gulf has a duty to defend, “may” would be enough.⁸³

In *TIG Insurance Co. v. Dallas Basketball, Ltd.*,⁸⁴ the insurer argued that petitions alleging *TCPA* violations did not state there was any “publication” of the material at issue as required by the definition of advertising injury in the policies in question. The insurer contended that the meaning of the “publication” was limited when used in the context of invasion of privacy claims to mean publication of material to third parties which wrongfully discloses private facts.

The Court noted that the policies at issue did not define the term “publication”, and that a term not defined by a policy must be given its plain, ordinary, and generally accepted meaning. In the Court’s view, the word “publish” “is generally understood to mean to disclose, circulate, or prepare and issue printed material for public distribution”. Consequently, the Court declined to interpret the term “publication” to mean only the communication of material to a third party, holding that the distribution of advertising to facsimile machine owners was a “publication” of the said material.

In *National Fire Ins. Co. of Hartford v. NWM-Oklahoma, LLC, Inc.*,⁸⁵ the insured weight loss center was alleged to have invaded the privacy of its customers by listening in to employer and customer

conversations through use of a baby monitoring system, violating a federal wiretap statute in the process. The insured's liability policy covered personal injury "arising out of oral publication of material that violates a person's right of privacy".

The insurer took the view that "publication" entailed communication of information to third parties other than the participants. The underlying action contained no allegation of communication to third parties, alleging only that the defendant employer listened in on conversations involving the plaintiffs. Because the statements made were never communicated outside the company, the insurer contended that they had not been published. The insurer took the position that the plaintiffs' allegations did not fall within the meaning under the relevant policy of "personal injury" or "advertising injury" arising out of a violation of privacy rights.

The Court held:

In the case at bar, the baby monitoring system would function in a way that anyone in the offices [the] employees, or anyone near the baby monitor (such as defendant's customers), would have had the ability to listen in on the employee and customer conversations. Therefore, even if the term "publication" were to be construed as argued by [the insurer], that is, to communicate information to third parties other than the corporate participants, the allegations in the underlying action would arguably fall within the "personal injury" coverage of the insurance policy.⁸⁶

In *Bowyer v. Hi-Lad, Inc.*,⁸⁷ a hotel employee sued the owner of the hotel, alleging that the owner had conducted illegal oral surveillance in violation of applicable wiretapping and electronic surveillance legislation. The hotel owner had intercepted the employee's private conversations through the use of hidden microphones.

The hotel owner's CGL policy defined personal and advertising injury as including injury arising from "oral or written publication of material that violates a person's right to privacy". The insurer argued that no "publication" had occurred because there were no allegations that the employee's statements were communicated to anyone other than the insured hotel owner's officers and employees. The Court disagreed, noting that the policy did not define "publication" nor did it contain terms requiring that the term necessarily entail the transmission of the intercepted communications to a third party. The Court discussing the meaning of "publication" concluded:

And, even were we to assume publication does require communicating to a third-party, the surveillance monitoring system apparently functioned in a way that anyone in the manager's office or in [the hotel supervi-

sor's] home had the ability to listen in on employee conversations. Accordingly, we find that the policy language can reasonably be interpreted such that there would be coverage for the allegations in [the employee's] complaint, for the oral publication of material that violated his right of privacy.⁸⁸

(VIII) H. MOTIVES UNDERLYING INCEPTION OF THE COMPLAINT NOT DETERMINATIVE OF COVERAGE

In *State Farm Fire and Cas. Co. v. Martinez*,⁸⁹ a state attorney general brought an action against the insured business owner alleging that he engaged in the unauthorized practice of law as well as in deceptive, unconscionable acts and practices in violation of state consumer protection legislation. The insured sought coverage under his business liability policy for a personal injury "arising out of oral or written publication of material that violates a person's right of privacy".

The insured's submissions seeking coverage were innovative. In relation to the allegation that he had illegally practiced law, the insured stated that since he was not an attorney, he was not bound by rules of professional conduct governing client confidentiality. As a result, anything told to him by one of his clients was subject to being published; which would in turn be a violation of that client's "right of privacy" and which was being enforced via the attorney general's lawsuit.

The Court did not accept this argument. The Court noted that the attorney general's action against the insured was in relation to the unauthorized practice of law, and was not an action on behalf of a client claiming a violation of that client's right to privacy. The proper inquiry to make is whether the unauthorized practice of law is an explicitly or implicitly covered injury under the liability policy in question. It is not proper to speculate as to the attorney general's motives in bringing the suit. The Court concluded that the unauthorized practice of law did not fit within any of the coverage grants contained in the relevant policy, namely personal injury, advertising injury, bodily injury or property damage.

The insured advanced a similar argument in relation to his alleged violations of consumer protection legislation, which legislation provided that a deceptive act included "the wilful use, in any oral or written representation, of exaggeration, falsehood, innuendo or ambiguity as to a material fact". The Court held that none of these allegations fell within coverage in the insured's liability policy.

CONCLUSION

Canadian Courts have not frequently been required to consider the availability or not of coverage for invasion of privacy. Having said that, Canadian insurers,

particularly those underwriting policy holder activity within the United States, can anticipate demands for coverage focused on the right of privacy offence. Growth of policyholder demand for coverage focused on assertions that the underlying litigation alleges violation of rights of privacy will find its way to Canada. The increase of electronic communications, widespread telephone solicitation, circulation of credit data and other conduct as well as an increased focus on the protection of privacy presages a growth in underlying litigation focused on protection of consumer rights. In turn policyholders will assert a right to coverage for these underlying complaints alleging, in particular, violation of a right of secrecy and seclusion.

Review of American jurisprudence suggests that the present IBC 2005 CGL form makes use of relatively broad offence language. Such language leaves open the question of whether innovative policyholder arguments, particularly in respect of the defence obligation, will trigger coverage under the right of privacy offence. Query whether this offence requires further “refinement” intended to limit the extent to which coverage may be available for, among other things, unsolicited mass communications.

[*Editor’s Note:* Mark G. Lichty’s practice is restricted to insurance and reinsurance matters, emphasizing coverage issues involving commercial property, commercial liability, directors and officers, homeowners and financial services policies.

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¹ W.L. Prosser, “Privacy” (1960) 48 Cal. L. Rev. 383 at 389.

² *Privacy Act*, R.S.B.C. 1996, c. 373, *The Privacy Act*, C.C.S.M., c. P125, *The Privacy Act*, R.S.S. 1978, c. P-24, *The Privacy Act*, R.S.N.L. 1990, c. P-22.

³ *Somwar v. McDonald’s Restaurants of Canada Ltd.*, [2006] O.J. No. 64, 263 D.L.R. (4th) 752 (Ont. S.C.J.).

⁴ *Caltagirone v. Scozzari-Cloutier*, [2007] O.J. No. 4003, 2007 CarswellOnt 6753 (S.C.J.).

⁵ Mark G. Lichty and Marcus B. Snowden, *Annotated Commercial General Liability Policy*, looseleaf (Aurora, ON: Canada Law Book, 1997) at 26A-13 - 26A-14

⁶ *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631 at 641 (4th Cir. 2005), cert. denied 546 U.S. 978 (2005).

⁷ *Ibid.*

⁸ *ACS Systems, Inc. v. St. Paul Fire and Marine Insurance Company*, 147 Cal.App.4th 137 (2007).

⁹ *Ibid.* at 148-149.

¹⁰ *Ibid.* at 150.

¹¹ *Ibid.* at 150-151.

¹² *St. Paul Fire and Marine Insurance Company v. Onvia, Inc.* Slip Copy, 2007 WL 564075 (W.D. Wash.).

¹³ *Ibid.* at 5.

¹⁴ *Melrose Hotel Company v. St. Paul Fire and Marine Insurance Company*, 432 F.Supp.2d 488 (E.D. Penn. 2006), aff’d sub nom. Subclass 2 of Master Class of Plaintiffs Defined and Certified in January 30, 2006 and July 28, 2006, 503 F.3d 339 (3d Cir. 2007).

¹⁵ *Melrose Hotel Company v. St. Paul Fire and Marine Insurance Company*, 432 F.Supp.2d 488 (E.D. Penn. 2006), aff’d sub nom. Subclass 2 of Master Class of Plaintiffs Defined and Certified in January 30, 2006 and July 28, 2006, 503 F.3d 339 (3d Cir. 2007) at 497 (F. Supp.2d).

¹⁶ *Supra* note 14 at 501-504.

¹⁷ *Ibid.* at 503.

¹⁸ *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 57 Fed.Appx. 201, 208 (C.A. 11 Ga. 2005).

¹⁹ *American States Ins. Co. v. Capital Associates of Jackson County Inc.*, 392 F.3d 939 (7th Cir. Ill. 2004).

²⁰ *Ibid.* at 941.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.* at 942-943.

²⁴ *Erie Ins. Exchange v. Kevin T. Watts, Inc.* Slip Copy, 2006 WL 3776255 (S.D.Ind.).

²⁵ *Telecommunications Network Design, Inc. v. Brethren Mut. Ins. Co.*, 2007 WL 3760745 (Pa.Com.Pl. 2007).

²⁶ *Penzer v. Transportation Ins. Co.*, 509 F.Supp.2d 1278 (S.D.Fla. 2007).

²⁷ *Ace Mortg. Funding, Inc. v. Travelers Indem. Co. of America* Slip Copy, 2008 WL 686953 (S.D.Ind.).

²⁸ *St. Paul Fire and Marine Ins. v. Brunswick Corp.*, 405 F.Supp. 2d 890 (N.D. Ill. 2005).

²⁹ *Ibid.* at 895.

³⁰ *Park University Enterprises, Inc. v. American Cas. Co.*, of Reading, Pa., 442 F.3d 1239 (10th Cir. 2006), aff’g 314 F.Supp. 2d 1094 (D. Kan. 2004).

³¹ *Ibid.* at 1246.

³² *Valley Forge Insurance Company v. Swiderski Electronics, Inc.*, 223 Ill.2d 352 (Ill. 2006).

³³ *Ibid.* at 368.

- ³⁴ *Ibid.* at 368-369.
- ³⁵ *Ibid.* at 378-379.
- ³⁶ *American Home Assurance Co. v. McLeod USA, Inc.*, 475 F.Supp.2d 766 at 768 (N.D.Ill. 2007).
- ³⁷ *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 2007 WL 2608559 (N.D.Ill).
- ³⁸ *Terra Nova Insurance Company v. Metropolitan Antiques, LLC*, 2006 WL 280967 (Mass.Super.), rev'd 869 N.E.2d 565 (Mass. 2007).
- ³⁹ In Resource Bankshares, "advertising injury" was defined in pertinent part as "[m]aking known to any person or organization written or spoken material that violates a person's right of privacy."
- ⁴⁰ *Terra Nova Insurance Company v. Metropolitan Antiques, LLC*, 869 N.E.2d 565, 574 (Mass. 2007), rev'g 2006 WL 280967 (Mass.Super.).
- ⁴¹ *St. Paul Fire and Marine Ins. Co. v. Brother Intern. Corp.*, 2007 WL 2571960 (D.N.J. 2007).
- ⁴² *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001).
- ⁴³ *Ibid.* at 1057.
- ⁴⁴ *St. Paul Fire & Marine Ins. Co. v. Green Tree Financial Corp.-Texas*, 249 F.3d 389 (C.A.5 (Tex.) 2001).
- ⁴⁵ *Nova Casualty Co. v. Able Construction, Inc.*, 983 P.2d 575 (Utah 1999).
- ⁴⁶ *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80 (C.A.5 (Tex.),1997).
- ⁴⁷ *Allstate Ins. Co. v. Ginsberg*, 351 F.3d 473 (C.A.11 (Fla.) 2003).
- ⁴⁸ *Marleau v. Truck Ins. Exchange*, 37 P.3d 148 (Or. 2001).
- ⁴⁹ *Ibid.* at 153-154.
- ⁵⁰ *Ananda Church of Self Realization v. Everest Nat. Ins. Co.*, 2003 WL 205144 (Cal.App. 3 Dist. 2003).
- ⁵¹ *Ibid.* at para. 5.
- ⁵² *Lextron, Inc. v. Travelers Cas. and Sur. Co. of America*, 267 F.Supp.2d 1041 (D.Colo. 2003).
- ⁵³ *Ibid.* at 1047-1048.
- ⁵⁴ *Parasiuk v. Canadian Newspapers Co.*, [1988] M.J. No. 30, [1988] 2 W.W.R. 737 (Man. Q.B.).
- ⁵⁵ *Ibid.* at para. 3.
- ⁵⁶ *Marleau v. Truck Ins. Exchange*, 37 P.3d 148 (Or. 2001).
- ⁵⁷ *Ibid.* at 153-154.
- ⁵⁸ *Cort v. St. Paul Fire and Marine Ins. Companies, Inc.*, 311 F.3d 979 (C.A.9 (Cal.) 2002).
- ⁵⁹ *Lextron, Inc. v. Travelers Cas. and Sur. Co. of America*, 267 F.Supp.2d 1041 (D.Colo. 2003).
- ⁶⁰ *Ibid.* at 1047-1048.
- ⁶¹ *Superformance Intern., Inc. v. Hartford Cas. Ins. Co.*, 203 F.Supp.2d 587 (E.D.Va. 2002).
- ⁶² *Transamerica Ins. Co. v. KMS Patriots, L.P.*, 52 Mass.App.Ct. 189 (2001).
- ⁶³ *Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*, 699 A.2d 1153 (Me. 1997).
- ⁶⁴ *Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co.*, 124 N.C.App. 232 (1996).
- ⁶⁵ *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80 (C.A.5 (Tex.) 1997).
- ⁶⁶ *Owners Ins. Co. v. William Benjamin Trucking, Inc.*, 2005 WL 1398836 (Ohio App. 9 Dist. 2005).
- ⁶⁷ *Pietras v. Sentry Insurance Company et al.* Slip Copy, 2007 WL 715759 (N.D. Ill 2007).
- ⁶⁸ *Zurich American Ins. Co. v. Fieldstone Mortg. Co.*, Slip Copy, 2007 WL 3268460 (D.Md. 2007).
- ⁶⁹ *Ibid.* at 4.
- ⁷⁰ *American Family Mut. Ins. Co. v. C.M.A. Mortg., Inc.*, Slip Copy, 2008 WL 906230 (S.D.Ind. 2008).
- ⁷¹ *Ibid.* at 5.
- ⁷² *Butts v. Royal Vendors, Inc.*, 202 W.Va. 448 (1998).
- ⁷³ *Fibreboard Corp. v. Hartford Accident & Indemnity Co.*, 16 Cal.App.4th 492 (Cal.App.1.Dist. 1993).
- ⁷⁴ *Ibid.*
- ⁷⁵ *Heritage Mut. Ins. Co. v. Advanced Polymer Technology, Inc.*, 97 F.Supp.2d 913 (S.D.Ind. 2000).
- ⁷⁶ *Ananda Church of Self Realization v. Everest Nat. Ins. Co.*, 2003 WL 205144 (Cal.App. 3 Dist. 2003).
- ⁷⁷ *Ibid.* at para. 7.
- ⁷⁸ *Winklevoss Consultants, Inc. v. Federal Ins. Co.*, 991 F.Supp. 1024 (N.D.Ill. 1998).
- ⁷⁹ See, e.g., *Heritage Mut. Ins. Co. v. Advanced Polymer Technology, Inc.*, 97 F.Supp.2d 913, 934 (S.D.Ind. 2000).
- ⁸⁰ *State Farm Fire and Cas. Co. v. National Research Center for College and University Admissions*, 445 F.3d 1100 (C.F.A.8 (Mo.) 2006).
- ⁸¹ *Ibid.* at 1103.
- ⁸² *Western Rim Investment Advisors, Inc. v. Gulf Insurance Co.*, 96 Fed.Appx. 960 (5th Cir.2004), aff'g 269 F.Supp.2d 836 (N.D.Tex.2003).
- ⁸³ *Western Rim Investment Advisors, Inc. v. Gulf Insurance Co.*, 96 Fed.Appx. 960 (5th Cir.2004), aff'g 269 F.Supp.2d 836 (N.D.Tex.2003) at 846-847 (F.Supp.2d).
- ⁸⁴ *TIG Insurance Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 238-39 (Tex.App.2004).
- ⁸⁵ *National Fire Ins. Co. of Hartford v. NWM-Oklahoma, LLC, Inc.*, 2008 WL 697298 (W.D.Okla. 2008).
- ⁸⁶ *Ibid.* at 8.
- ⁸⁷ *Bowyer v. Hi-Lad, Inc.*, 16 W.Va. 634 (2004).
- ⁸⁸ *Bowyer v. Hi-Lad, Inc.*, 16 W.Va. 634 (2004) at 651.
- ⁸⁹ *State Farm Fire and Cas. Co. v. Martinez*, 26 Kan.App.2d 869 (2000).