

Chapter 13

MEDIA LIABILITY INSURANCE

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Are all media liability policies created equal? Media liability policies differ not only in price, but in quality as well. When shopping for a media liability policy, the following provisions should be reviewed closely.

The Insuring Agreement: Most media liability insurance policies contain an insuring agreement that lists the media perils the policy will cover. The list should be worded broadly to include any form of defamation, invasion of privacy, and infringement on intellectual property. Torts such as infliction of emotional distress and outrageous conduct, which are often plead in conjunction with defamation, should also be listed. In addition, because journalists can incur liability before a story is aired or published, newsgathering torts such as trespass, eavesdropping and false arrest should be included.

Coverage for errors and omissions in the content of material published or broadcast should be provided in the insuring agreement of the main policy or by endorsement. This would provide coverage for claims arising from misstatements in price, erroneous instructions that lead to bodily injury and related mistakes.

Reimbursement of attorney fees incurred by the media in fighting third party subpoenas for source identities or material is another coverage made available by some carriers. In light of the more frequent and vigorous subpoenas of journalists, this protection is becoming all the more valuable to media companies and should be considered when purchasing a media liability policy.

Some policies have attempted to shortcut a broad listing of covered perils by agreeing to cover any negligent act, error or omission. Such wording is deficient because many of the perils journalists face involve allegations of intentional misconduct. For example, defamation and invasion of privacy are intentional torts.

The coverage agreements in conjunction with the policy's schedule typically specify what media activities are covered. Care should be taken to negotiate a policy schedule that is broad enough to include all media activities of a risk. Given the pervasiveness of the Internet, media liability policies should be examined to determine the extent of coverage provided for online publications, distributions, newsgathering and related cyber activities. Coverage should be sought for blogs maintained by journalists within the scope of their employment and with the knowledge and consent of their media employer.

The coverage agreements should also be examined to determine whether the policy is an occurrence or claims made form. Occurrence forms offer broader coverage because they apply to any publication or broadcast made during the policy period regardless of when the claim is made or suit is brought.

The insuring agreement should agree to cover claim expenses, including defense costs, as well as any settlement or judgment. Suits against journalists are vigorously defended because of the First Amendment considerations at stake. Consequently, defense costs comprise a substantial amount of what media liability insurers pay out on their policies. Indeed, a study conducted in 2004 found that defense costs comprise between 75-80% of all paid media liability losses. Any policy that does not include coverage of defense costs is not providing total coverage.

A purchaser of media liability insurance should be aware of the difference between DWL (defense within the limits) and DOL (defense outside the limits) coverage. DWL policies generally provide less coverage than DOL policies because with DWL policies defense costs draw down the amount of policy limits available to pay any settlement or judgment. On the other hand, with DOL policies defense costs do not erode the limits available to pay a settlement or judgment.

For example, if \$1 million is incurred in defending a case under a DWL policy that has limits of \$5 million, \$4 million is left to pay a settlement or judgment. Under the same set of circumstances, the full \$5 million in policy limits would remain available under a DOL policy.

A trade off that is often found with the broader defense costs coverage provided by DOL policies is a selection of counsel provision that gives the insurer the right to employ counsel and control the defense. By comparison, DWL policies typically provide the insured the right to select counsel, subject to approval by the insurer. The media liability insurance consumer should carefully weigh the pros and cons of DWL and DOL forms and make the selection that best fits their needs.

Exclusions: As with any other type of insurance, the exclusions in media liability insurance policies should be examined closely. The media liability insurance consumer should be wary of provisions that exclude claims arising out of the unauthorized use of material. Virtually every infringement or misappropriation action includes allegations or unauthorized use of material, and such exclusions severely undercut the value of the coverage afforded.

The most important exclusion to look for in a media liability insurance policy is a punitive damage exclusion because punitive damages often comprise the lion's share of runaway verdicts entered against journalists. For example, in a \$58 million verdict against a Dallas television station, \$41 million of the award was punitive damages and in a \$220 million verdict against a newspaper with national distribution, \$200 million was punitive damages.

Some media liability insurers have explicitly excluded the coverage of punitive damages. Other insurers have relied on malicious acts exclusions to avoid coverage of punitive damages. Even if such exclusions are not present, a media liability insurer may attempt to skirt coverage of a punitive damages award after it has been rendered by citing case state law and statutes that relieve an insurer of its obligation to pay punitive damages.

Definitions: An alternative approach to the coverage of punitive damages, and the one most favorable to insureds, is one in which the insurer affirmatively brings punitive damages within coverage, usually through the policy's definition of damages. In conjunction with this, an insurer may also warrant through a letter of intent that it will not raise the issue of the insurability of punitive damages to avoid paying a claim, and that it will go to court on behalf of the insured in the unlikely event that another party raises the issue. The media liability insurance consumer should investigate thoroughly a carrier's position on covering punitive damages before purchasing a policy.

Increasingly media liability suits are being brought abroad and in many foreign jurisdictions an unsuccessful defendant will have to pay a plaintiff's attorneys fees and costs. Sometimes these costs can be quite substantial. Accordingly, media liability policies should be examined to determine whether awards of such fees and costs are covered under the definition of damages or some other policy provision.

Another key aspect of any media liability policy is its definition of insured. A media liability policy should include as insureds under the policy any stringers, freelancers, and other independent contractors providing material to the named insured. This helps to promote unity and efficiency in defending litigation brought jointly against a media company and one of its stringers or freelancers.

"Assumed under contract" is another important definition to look for in a media liability policy. This provision provides coverage for indemnity and hold harmless obligations taken on by an insured in distribution and related media contracts where another party is purchasing the rights to content of the insured.

Defense and Settlement: The defense and settlement provision of the policy should allow the policyholder input on selection of defense counsel so that the policyholder can be confident that the defense counsel selected will have expertise in and sensitivity to First Amendment issues. The defense and settlement section of a media liability policy should also provide the policyholder a voice in any settlement. No insurer is willing to give the policyholder exclusive control of settlement, but some insurers are willing to give the policyholder a say. Having input on settlement is vital to the media liability policyholder because without it, an insurer could settle a meritless or defensible suit purely for the sake of economics and thereby undercut the integrity and reputation of the insured. Along with these policy provisions, the expertise of a media liability insurer's claims department should be evaluated. Given the complex and unique nature of media liability claims, it is preferable to have claims attorneys who specialize in media law handling such claims as opposed to adjusters or attorneys without knowledge and experience in the area.

Policy Conditions: There are several provisions of special importance in the Conditions section media liability policies. Some media liability policies have retraction provisions that give the insurer sole discretion over or controlling influence on the decision to retract. Other media liability policies are more responsive to the professional concerns journalists have about retraction and place the decision in the hands of the insured.

All media liability policies contain a general cooperation clause that mandates the insured shall assist in obtaining witnesses. This can be used by an insurer to require reporters to reveal confidential sources, which raises serious ethical and legal problems for journalists. Some media liability policies have removed this threat by providing a special section in the conditions that provides the insured sole discretion over the decision to divulge a confidential source and warrants that the refusal to divulge a confidential source shall not prejudice coverage under the policy.

An endorsement that is sometimes placed on broadcasters' liability policies that should be avoided is one that limits or excludes coverage for call-in shows or other live programming if certain delay devices are not used. Other insurers do not have such restrictive provisions relating to delay devices and view the presence or absence of such devices as a rating consideration only.

A final policy provision that should be examined closely is the one that relates to the territory of the policy. Because plaintiff's attorneys increasingly are bringing media liability suits in foreign jurisdictions to avoid strong defenses established

under the First Amendment, a good media liability insurance policy applies to suits brought anywhere in the world.

When considering the purchase of a media liability insurance policy, it is critical to review the policies under consideration because, as the foregoing illustrates, all media liability policies are not created equal.

(Note: This article is intended to provide general information on media liability insurance. It is not intended to address or warrant coverage of any particular claim circumstance. Coverage of particular circumstances is determined by the specific policy of insurance in questions.)