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Court adopts narrow definition of "Negligent Publication"

By Samuel H. Ruby

In Sony Computer Entertainment America, Inc. v. American Home Assurance Co., 2008 WL 2736012 (C.A.9 (Cal.), 2008), the Ninth Circuit Court of Appeals defined the term "negligent publication" in a media liability policy as "a narrow tort in which the publication of material encourages or instructs readers to engage in harmful conduct."

The lawsuit resulted from the insurers' failure to indemnify and defend Sony in a class action suit alleging product defects in the Sony PlayStation 2 video game system. Sony PlayStation users asserted false advertising and negligent misrepresentation claims revolving around Sony's statements in press releases, advertising, product packaging and instruction manuals that the PlayStation 2 would function as a DVD player as well as a game player. In fact, the PlayStation 2 did not play all DVDs.

The policy covered damages arising out of "wrongful acts," which it defined to include "defective advice, incitement, or negligent publication." Sony argued that "negligent publication" should have a broad meaning to include literally any "communication of information to the public, lacking or exhibiting a lack of due care or concern." Under that very broad interpretation, Sony contended, American Home should have defended Sony against the false advertising and misrepresentation claims in the class action suit.

The court rejected Sony's expansive interpretation. The court said that the "placement of 'negligent publication' within the policy suggests that the term refers to a narrow tort relating to defective advice and incitement, not a broad tort distinct from those terms." The court reasoned that interpreting "negligent publication" in this manner is consistent with case law and the context of a media liability policy's limited coverage provisions. In view of its interpretation, the court concluded that the class action suit against Sony did not allege "negligent publication."

Update: The opinion is now published as 532 F.3d 1007.