

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

VIRTUAL BUSINESS ENTERPRISES, )  
LLC d/b/a STEWART MANAGEMENT )  
CO., a Delaware limited liability Company, )  
and ) C.A. No. 07C-12-070 MMJ  
GORDON W. STEWART, )  
)  
Plaintiff, )  
)  
v. )  
)  
MARYLAND CASUALTY COMPANY, )  
a Maryland corporation, )  
)  
Defendant. )

Submitted: March 31, 2010

Decided: April 9, 2010

On Defendant's Motion for Summary Judgment. **DENIED.**

**OPINION**

John S. Spadaro, Esquire, Roger D. Landon, Esquire, Wilmington Delaware,  
Murphy Spadaro & Landon, Attorneys for Plaintiff Stewart Management  
Co. *et al.*

Marc S. Casarino, Esquire, William L. Doerler, Esquire, Wilmington,  
Delaware, White & Williams LLP, Attorneys for Defendant Maryland  
Casualty Co.

**JOHNSTON, J.**

Two Griffin Corporation Services employees left to join plaintiff Stewart Management Company (“SMC”). SMC contacted a number of Griffin’s clients through the newly-acquired employees. Griffin filed suit in the Court of Chancery alleging, among other claims, deceptive trade practices. SMC requested that its insurer, Maryland Casualty Company, provide a defense. The liability insurance policy provided coverage for “personal and advertising injury.”

Maryland Casualty disclaimed coverage. SMC subsequently settled the Chancery action and then filed suit in the Superior Court to recoup the expenses incurred in defense of the Chancery action. Maryland Casualty filed a Motion for Summary Judgment, arguing that the client contacts were not “advertisements” as defined by the insurance policy. Maryland Casualty argues, in the alternative, that because SMC and its employees knowingly made disparaging remarks regarding the competitor’s goods, products, or services, the communications specifically were excluded from coverage.

### **FACTS**

Plaintiff Stewart Management Company provides domicile management services, independent directors, registered agent

services, and company formation services within the state of Delaware for out-of-state clients. Griffin Corporate Services (“Griffin”) provides accounting, registered agent, domicile and other related services to assist out-of-state clients establish a nexus with, and maintain a physical presence in Delaware.

Before April 1, 2004, Griffin was entirely owned by Delaware Trust Capital Management, Inc., an indirect subsidiary of Wachovia Corporation. At that time, both Francis Jacobs and Joan Dobrzynski were Delaware employees of Griffin.

In December 2003, Wachovia notified potential buyers that it was accepting bids for the sale of Griffin. SMC submitted a bid for Griffin on January 5, 2004. Wachovia did not accept SMC’s bid. On April 1, 2004, Wachovia sold Griffin to Corporation Service Company.

Before and after the notice of sale, SMC attempted to hire away Griffin’s employees, including Jacobs and Dobrzynski. For a period after the sale, Jacobs and Dobrzynski declined SMC’s overtures and continued their employment with Griffin.

Following the sale, Griffin’s new management asked Jacobs and Dobrzynski to continue in their existing positions. Dobrzynski, as

a result of a meeting with Griffin's new management, believed she had two days to make a decision. She also believed that management would require her to sign a non-compete agreement if she chose to continue her employment, but would not provide any assurance that her job would remain even if she elected to sign the agreement.

Because of her perceived uncertainty surrounding her continued employment, Dobrzynski contacted SMC about a position. SMC sent Dobrzynski an offer, which Dobrzynski accepted. On April 16, 2004, Dobrzynski resigned from her position at Griffin.

Following Griffin's sale, Jacobs contacted SMC regarding possible employment. A representative from SMC offered Jacobs a position on April 5, 2004. During a meeting on the following day, a representative from Griffin asked Jacobs to sign a non-compete agreement by April 13, 2004. Like Dobrzynski, the agreement caused Jacobs to worry about his job security. On April 11, 2004, he decided to accept SMC's employment offer. Jacobs resigned from his position at Griffin shortly thereafter.

At the end of her last day at Griffin, Dobrzynski sent an e-mail, written with the help of her new employer, notifying her Griffin clients of her resignation. The following day, April 17, 2004,

Dobrzynski e-mailed her previous clients using a list of client e-mail addresses she recorded from memory. In her e-mail messages, she again informed her former clients of her resignation from Griffin. Further, Dobrzynski noted that she had since joined SMC. She stated that she was “doing [her] best to ensure that [her clients] experience as little disruption in service as possible.” Dobrzynski asked her former clients to contact her “as soon as possible to discuss how to best continue [their] service without disruption.”

Dobrzynski spoke with a number of clients the following week and informed them about her new employer. She indicated to some of these clients that Griffin soon would be changing both its address and officer structure. She also conveyed her opinion that SMC was a better place for her to work. For those clients who chose to retain her services, Dobrzynski, with the assistance of SMC, prepared a form letter (the “Form Solicitation”) wherein the client notified Griffin in writing that the client would move its business to SMC.

At the time of his resignation, Jacobs was on vacation. Representatives from SMC drafted and sent a resignation letter to Griffin on his behalf. The letter informed Griffin that Jacobs’ resignation was effective immediately. Jacobs did not contact any of

his clients, prior to his resignation, regarding his upcoming resignation.

On April 17, 2004, Jacobs compiled, from memory, a list of his former clients. He forwarded that list to SMC who located each client's e-mail address and returned a database of those addresses to Jacobs. Jacobs then attempted to e-mail each of these former clients, but due to an unknown technological malfunction, was unable to do so. Jacobs also included a solicitation letter, similar to that sent by Dobrzynski, to these e-mail messages asking each former client to contact him "as soon as you can to discuss how to best continue your service without disruption." After his first attempt failed, Jacobs made no other attempts to contact his former clients.

### ***The Court of Chancery Action***

On April 22, 2004, Griffin filed a complaint in the Court of Chancery against SMC, Jacobs, and Dobrzynski. Griffin alleged that the parties had committed tortious interference with Griffin's business and contractual relationships, engaged in deceptive trade practices, and schemed to steal Griffin's clients in breach of Dobrzynski's and Jacobs' fiduciary duties.

In an amended complaint, Griffin alleged that SMC drafted “misleading solicitations . . . designed to trick Griffin’s clients to switch to SMC.” Griffin claimed that the “clear intent of [the initial solicitations] was to start the process of soliciting Griffin’s Clients, and to suggest that the service provided to Griffin’s Clients would be disrupted unless they promptly called Jacobs and Dobrzynski . . . .”

Griffin also asserted that the Form Solicitation suggested to Griffin’s clients that to avoid “any interruption in service,” they should “‘CHECK APPROPRIATE BOXES’ stating that they [wanted] Dobrzynski to continue to provide services. The Solicitation, however, [did] not notify Griffin’s Clients that, by electing to maintain their relationship with Dobrzynski, the Clients [were] purportedly agreeing to switch from Griffin to SMC and [breach] their Service Agreement with Griffin.”

### ***Maryland Casualty Disclaims Coverage***

Under a 2003 policy (“Policy”), Maryland Casualty agreed to “pay those sums that the insured becomes legally obligated to pay as damages because of ‘personal and advertising injury’” up to a limit of \$1,000,000.00. The Policy obligated Maryland Casualty to defend

SMC and its representatives against any suit seeking “personal and advertising injury” damages.

SMC requested Maryland Casualty defend and indemnify SMC, Jacobs, and Dobrzynski against Griffin’s Chancery Court claims. On December 13, 2004, Maryland Casualty disclaimed coverage after reviewing the Policy and Griffin’s complaint.

In the disclaimer letter, Maryland Casualty stated that Griffin’s complaint alleged that SMC, *et al.* “misappropriated trade secret information including the names of the plaintiff’s clients and information useful to the plaintiff in its business relationship with its clients.” Maryland Casualty denied coverage on the basis that SMC’s alleged “misappropriation” was not the result of advertising and, therefore, no duty to defend had arisen under the Policy’s “Personal and Advertising Injury Liability” clause. Maryland Casualty also informed SMC that the nature of SMC’s alleged trade secret infringement specifically was excluded from coverage.

On June 6, 2005, SMC requested that Maryland Casualty reconsider the denial of coverage. In this letter, SMC stated that under Delaware law, an insurance company may not deny coverage without conducting a factual investigation regarding the claims. SMC



attached Griffin's amended complaint and noted that Griffin did not allege any trade secret infringement. SMC also argued that "advertising injury" included "oral or written publication of material that . . . disparages a person's or organization's goods, products or services; . . ."

On August 30, 2005, an attorney responded on behalf of Maryland Casualty. The attorney also disclaimed coverage. He stated that courts frequently have refused to find coverage for disparagement where, as in Griffin's Complaint, no cause of action for disparagement, libel, or slander had been plead.

### ***The Superior Court Action***

Griffin and SMC settled the Chancery action on November 2, 2005, without Maryland Casualty's participation. On December 10, 2007, SMC filed suit in Superior Court seeking coverage under the Policy and payment of expenses incurred in defense of the Chancery action. On December 15, 2009, Maryland Casualty filed a Motion for Summary Judgment. SMC filed a response on February 25, 2010 and the Court heard argument on March 1, 2010. The parties filed supplemental submissions on the issues of waiver and estoppel.

## **ANALYSIS**

### ***Summary Judgment Standard***

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.<sup>1</sup> All facts are viewed in a light most favorable to the non-moving party.<sup>2</sup> Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.<sup>3</sup> When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.<sup>4</sup>

### ***Duty to Defend***

When determining an insurer's duty to indemnify and/or defend a claim asserted against a policy holder, the Court will look to the allegations in the underlying complaint to decide whether the action against the policy holder states a claim covered by the policy.<sup>5</sup> Generally, an insurer's duty to defend is broader than its duty to

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<sup>1</sup> Super. Ct. Civ. R. 56(c).

<sup>2</sup> *Hammond v. Colt Industries Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

<sup>3</sup> Super. Ct. Civ. R. 56(c).

<sup>4</sup> *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

<sup>5</sup> *Am. Ins. Group v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 829 (Del. 2000) (“The rationale underlying this principle is that the determination of whether a party has a duty to defend should be made at the outset of the case, both to provide the insured with a defense at the beginning of the litigation and to permit the insurer, as the defraying entity, to control the defense strategy.”).

indemnify an insured.<sup>6</sup> An insurer has a duty to defend where the factual allegations in the underlying complaint potentially support a covered claim.<sup>7</sup> The insurer will have a duty to indemnify only when the facts in that claim are actually established.<sup>8</sup>

The Court generally will look to two documents in its determination of the insurer's duty to defend: the insurance policy and the pleadings of the underlying lawsuit.<sup>9</sup> The duty to defend arises where the insured can show that the underlying complaint, read as a whole, alleges a risk potentially within the coverage of the policy.<sup>10</sup>

The insured bears the burden of proving that a claim is covered by an insurance policy.<sup>11</sup> Where the insured has shown that a claim is covered by an insurance policy, the burden shifts to the insurer to prove that the event is excluded under the policy.<sup>12</sup>

### ***Advertising Injury***

The Policy provides coverage for damages incurred due to an “advertising injury.” Maryland Casualty argues that because Jacobs

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<sup>6</sup> *Liggett Group, Inc. v. Ace Property and Cas. Ins. Co.*, 798 A.2d 1024, 1030 (Del. 2002).

<sup>7</sup> *DynCorp v. Certain Underwriters at Lloyd's, London*, 2009 WL 3764971, at \*3 (Del. Super.).

<sup>8</sup> *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 197 (Del. 2009) (“As a general rule, ‘decisions about indemnity should be postponed until the underlying liability has been established’ because a declaration as to the duty to indemnify ‘may have no real-world impact if no liability arises in the underlying litigation.’”) (quoting *Molex Inc. v. Wyler*, 334 F.Supp.2d 1083, 1087 (N.D. Ill. 2004)).

<sup>9</sup> See *KLN Steel Products Co., Ltd. v. CAN Ins. Cos.*, 278 S.W.3d 429, 434 (Tex. App. 2008).

<sup>10</sup> *Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974).

<sup>11</sup> *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

<sup>12</sup> *State Farm Fire & Cas. Co. v. Hackendorn*, 605 A.2d 3, 7 (Del. Super. 1991).

and Dobrzynski's solicitation letters were not published to the public at large, and instead published only to a select number of Griffin's clients, they do not qualify as "advertisements," and any resulting injuries are not covered under the Policy.

Under standard rules of contract interpretation, the Court must determine the signatories' intent from the language of the contract.<sup>13</sup> Delaware adheres to the objective theory of contract interpretation.<sup>14</sup> The Court will look to the "most objective indicia of that intent: the words found in the written instrument."<sup>15</sup>

If the contract is unambiguous, the Court will interpret the contract according to the "ordinary and usual meaning" of its terms.<sup>16</sup> A contract is ambiguous if it is "reasonably susceptible of two or more interpretations or may have two or more different meanings."<sup>17</sup> Where the Court determines that contract language is ambiguous, the Court will "apply the doctrine of *contra proferentem* and construe ambiguous terms and provisions against the drafting party."<sup>18</sup>

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<sup>13</sup> *Kaiser Alum. Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996).

<sup>14</sup> *Sassano v. CIBC World Mkts. Corp.*, 2008 WL 2267008, at \*5 (Del. Ch.).

<sup>15</sup> *Id.*

<sup>16</sup> *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

<sup>17</sup> *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1196.

<sup>18</sup> *Kuhn Const., Inc. v. Diamond State Port Corp.*, 2010 WL 779992, at \*2 (Del.).

Under “Coverage B. Personal and Advertising Injury Liability,”

SMC’s insurance policy states, in part:

1. Insuring Agreement

- a. We [Maryland Casualty] will pay those sums that the insured [SMC] becomes legally obligated to pay as damages because of “personal and advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “personal and advertising injury” to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or “suit” that may result . . . .

The Policy defines “personal and advertising injury” as the “[p]ublication, in any manner, of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.” The Policy also defines “Advertisement,” in part, as “a notice that is broadcast or published to the general public or specific market segments about . . . goods, products or services for the purpose of attracting customers or supporters.” This definition includes “materials placed on the Internet or on similar electronic means of communication.”

Because the Policy does not expressly define the terms “published” or “publication,” the Court must look to ordinary and usual meanings.<sup>19</sup> Black’s Law Dictionary defines “publish” as “[t]o distribute copies (of a work) to the public.”<sup>20</sup> Black’s Law Dictionary also defines “publication” as “the act of declaring or announcing to the public.”<sup>21</sup>

The Policy expressly defines “advertisement” as publication to “specific market segments,” including publication “on the Internet or on similar electronic means of communication.” The Policy differentiates “specific market segments” from the general public, evidencing the parties’ intent to include communications to small groups. Courts routinely have held that one party’s communication of defamatory statements about a second party to a third party constitutes “publication.”<sup>22</sup>

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<sup>19</sup> *Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1195.

<sup>20</sup> Black’s Law Dictionary (8th ed. 2004).

<sup>21</sup> *Id.*

<sup>22</sup> See *McCleester v. Mackel*, 2008 WL 821531, at \*22 (W.D. Pa.) (“In cases involving merely a codified version of common law defamation, a defamatory statement made by one individual about another to a third person is generally considered to be a “public” statement) (citing *Nichols v. Moore*, 477 F.3d 396, 399 (6th Cir. 2007) (noting that, under Michigan law, a plaintiff need only establish that the defendant made an unprivileged, defamatory communication to a third party); *Schindler v. Seiler*, 474 F.3d 1008, 1010 (7th Cir. 2007) (explaining that, under Wisconsin law, a plaintiff must establish that the defamatory statement was “communicated by speech, conduct or in writing to a person other than the person defamed”); *Ruzicka Electric & Sons, Inc. v. International Brotherhood of Electrical Workers*, 427 F.3d 511, 522 (8th Cir. 2005) (using the term “publication” to refer to the communication element to a cause of action for defamation under Missouri law)).

In *John Deere Ins. Co. v. Shamrock Indus., Inc.*,<sup>23</sup> John Deere, the insurer, brought a declaratory action requesting the United States District Court find no duty to defend or indemnify an insured in a concurrent action.<sup>24</sup> The insurance policies in question required Deere to defend the insured against suits alleging “advertising injury.”<sup>25</sup>

Generally, the policies defined “advertising injury” as an injury arising out of an offense occurring in the course of the named insured’s advertising activities, if the injury arose out of libel, slander, defamation, violation of right of privacy, or a number of other offenses.<sup>26</sup> The Court found the term “advertising injury” ambiguous and construed the contract against the insurer, noting that if the insurer wished to limit covered advertising activities to “wide dissemination of materials,” it could have expressly provided so in its policy.<sup>27</sup>

In this case, the Court finds that the Policy’s definition of “advertisement” clearly and unambiguously includes electronic communications sent to a segment of the market that is smaller than the public at large. Although the definition of “personal and

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<sup>23</sup> 696 F. Supp. 434 (D. Minn. 1988).

<sup>24</sup> *John Deere Ins. Co.*, 696 F. Supp. at 435.

<sup>25</sup> *Id.* at 437.

<sup>26</sup> *See Id.*

<sup>27</sup> *Id.* at 440.

advertising injury” may allow for an interpretation requiring widespread publication, the Court will not read the contract in a manner that will contradict another part of the contract.<sup>28</sup>

Because the Policy provides coverage for publications made to “specific market segments” without defining the size of the market segments, the Court finds the Policy vague only on this point and construes it against the insurer. As a result, the Court finds that the term “personal and advertising injury” includes the publication of slanderous, libelous, or disparaging material to a small market segment comprised of selected clients.

### *Disparagement*

In its motion, Maryland Casualty argues that even if Jacobs’ and Dobrzynski’s communications fall within the meaning of the term “publication,” the Policy provides coverage for only those publications that slander, libel, or disparage a person or organization’s goods, products, or services; and the Chancery complaint does not allege that the communications did any of the three.

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<sup>28</sup> See *Counsel of the Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002) (“A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole.”); *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at \*4 (Del.Ch.) (“It is, of course, a familiar principle that contracts must be interpreted in a manner that does not render any provision ‘illusory or meaningless.’”).



The Delaware Supreme Court has outlined three principles to determine whether an insurer has a duty to defend an insured:

- (1) where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured;
- (2) any ambiguity in the pleadings should be resolved against the carrier; and
- (3) if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises.<sup>29</sup>

The term “disparage” is not defined in the Policy. Thus, the Court must look to the ordinary and usual meaning of the word. The American Heritage Dictionary defines “disparage” as to “speak of in a slighting or disrespectful way; belittle, ... to reduce in esteem or rank.”<sup>30</sup> Merriam-Webster similarly defines “disparage” as “to lower in rank or reputation; ... to depreciate by indirect means (as invidious comparison); speak slightly about.”<sup>31</sup> Black’s Law Dictionary defines “disparagement” as a “derogatory comparison of one thing with another,” or the “act or an instance of castigating or detracting from the reputation of, esp. unfairly or untruthfully,” and a “false and

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<sup>29</sup> *Pacific Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1254-55 (Del. 2008) (internal citations omitted).

<sup>30</sup> *The American Heritage Dictionary of the English Language, Fourth Edition*, <http://dictionary.reference.com/browse/disparage> (accessed: March 30, 2009).

<sup>31</sup> *Merriam Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/disparagement> (accessed March 30, 2009).

injurious statement that discredits or detracts from the reputation of another's property, product, or business.”<sup>32</sup>

Griffin’s amended complaint alleged, among other causes of action, that SMC, Jacobs, and Dobrzynski engaged in deceptive trade practices that caused a “likelihood of confusion or of misunderstanding” as to Jacobs’ and Dobrzynski’s affiliation, connection or association with Griffin, and as to who was going to be providing services to Griffin’s clients.

The Delaware Legislature has provided plaintiffs a cause of action for disparagement of goods, services, or business under the Delaware Deceptive Trade Practices Act where the disparagement is due to false or misleading representation of fact.<sup>33</sup> In its complaint, Griffin alleged that SMC, Jacobs, and Dobrzynski attempted to “mislead Griffin’s Clients in an effort to induce them to terminate their relationship with Griffin, and switch to their new employer.” Griffin clearly alleged a misrepresentation of fact on the part of the insureds.

However, even in the absence of this allegation, the Policy provides coverage where a publication “disparages a person’s or

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<sup>32</sup> Black's Law Dictionary (8th ed. 2004)

<sup>33</sup> 6 *Del. C.* § 2531(a)(8).

organization's goods products or services." Coverage is not limited to only those instances of disparagement under the Delaware Deceptive Trade Practices Act. The burden to identify a distinction between disparagement as generally defined and disparagement under the Delaware Deceptive Trade Practices Act falls upon the insurer. In this case, Maryland Casualty did not include such a distinction within the Policy.

The complaint also alleged that SMC, *et al.* "[e]ngaged in other conduct that [created] a likelihood of confusion or misunderstanding with regard to the services provided to Griffin's Clients." Griffin claimed that Jacobs and Dobrzynski attempted to "mislead Griffin's Clients in an effort to induce them to terminate their relationship with Griffin, and switch to their new employer." Griffin's complaint also alleged that Jacobs and Dobrzynski attempted to improperly poach Griffin's former clients by suggesting that "the service provided to Griffin's Clients would be disrupted unless [the Clients] promptly called Jacobs and Dobrzynski."

The Court finds that these allegations fall within the ordinary meaning of disparagement. The communications set forth a *prima facie* case of defamation. Because of Jacobs' and Dobrzynski's

suggestions that the services provided by Griffin would be disrupted or discontinued, the Court finds that the underlying complaint clearly alleges that the communications could potentially have lessened Griffin's rank, reputation or esteem, giving rise to Maryland Casualty's duty to defend.

***Knowing Infliction of Personal and Advertising Injury***

The Policy excludes from coverage any injuries “[c]aused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury.’” As a final argument, Maryland Casualty suggests that SMC, Jacobs, and Dobrzynski intentionally attempted to confuse and mislead Griffin's clients, thus triggering the coverage exception.

Because many commercial liability policies expressly cover intentional torts, many courts have held that these policies “should not be interpreted as taking back with one hand what it gave with another, by excluding coverage of those torts because they are intentional.”<sup>34</sup>

The instant policy expressly covers certain slander, libel, and

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<sup>34</sup> *Cincinnati Ins. Co. v. Eastern Atlantic Ins. Co.*, 260 F.3d 742, 746 (7th Cir. 2001) (citing *Hurst-Rosche Engineers Inc. v. Commercial Union Ins. Co.*, 51 F.3d 1336, 1345-46 (7th Cir. 1995); *Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co.*, 832 F.2d 1037, 1045 (7th Cir. 1987; *North Bank v. Cincinnati Ins. Cos.*, 125 F.3d 983, 986-87 (6th Cir. 1997)).

disparagement. To allow the insurer to exclude all intentional torts due to knowing or intentional conduct merely because they are classified as such would render coverage illusory. The Court finds that the exclusionary clauses are better interpreted as excluding not all intentional torts. Instead, tortious conduct should be excluded when there is an intent to injure or an expectation of injuring.

The complaint contended that the insureds published misleading communications. However, there remains the possibility that, despite a desire to lure away Griffin's clients, SMC, *et al.* either inadvertently disparaged Griffin's goods, products, or services, or did so without knowledge that the communications would violate Griffin's rights.

The coverage exclusion requires both knowledge by the insured that the act would violate the rights of another and knowledge that the act would inflict "personal and advertising injury." Although the insured may have had this requisite knowledge, that information is not clear from the underlying pleading. The test for the duty to defend remains contingent on whether the factual allegations in the underlying complaint potentially give rise to coverage. The Court finds that Maryland Casualty had a duty to defend.

***Raising an Issue in Summary Judgment not Raised in Original  
Disclaimer***

In its Response to Maryland Casualty’s Motion for Summary Judgment, SMC argues that the motion fails in because an insurer may deny coverage on only the grounds set forth in its original disclaimer letter.<sup>35</sup> Because the Court finds that Maryland Casualty may not deny coverage for the reasons set forth in this opinion, the Court will not address the issues of waiver or estoppel.

**CONCLUSION**

The Court finds that the definition of “advertisement” found in the Policy clearly and unambiguously includes the electronic communications the insureds sent to a small group of selected Griffin clients. As a result, the Court finds that the term “personal and advertising injury” includes the publication of slanderous, libelous, or disparaging material to that small group of selected clients.

The Court also finds that the allegations in the Chancery complaint set forth a *prima facie* case of defamation or disparagement

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<sup>35</sup> SMC cites to *Nathan Miller, Inc. v. Northern Ins. Co. of New York*, 39 A.2d 23 (Del. Super. Ct. 1944) for the statement that “the insurer waives all other possible grounds,” when it denies coverage in a disclaimer letter. This quotation is not found within the text of *Nathan Miller, Inc.* The Court cautions the parties regarding the citation of quotations found only through the “natural language” filter of a legal database and of placing citations in a manner that suggests direct precedent where none exists. Quotations are proper only for exact language of a case. Quotations taken from other media, but attributed to prior Delaware case law, provide neither authoritative nor persuasive precedent for the Court.

because the offending communications potentially could have lessened Griffin's rank, reputation or esteem. Therefore, the Court finds that the allegations in the Chancery complaint gave rise to Maryland Casualty's duty to defend.

The duty to defend arises whenever the factual allegations in the underlying complaint potentially give rise to coverage. The underlying Chancery pleadings do not state a knowing intent to injure sufficient to form a basis for denial of coverage.

**THEREFORE**, Defendant's Motion for Summary Judgment is hereby **DENIED**.

**IT IS SO ORDERED.**

/s/ Mary M. Johnston  
The Honorable Mary M. Johnston