



SELECTIVE
Insurance

Selective Insurance Company of America
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April 14, 2005

Certified Mail/Return Receipt Requested

Mr. Robert Sparks, Esq.
Sparks & Craig, LLP
6862 Elm St. Suite 360
McLean, VA 22101

Re: *Raymen v. United Seniors Association Inc.*

Dear Mr. Sparks:

This will acknowledge receipt of the captioned complaint presented to Selective Insurance Company (Selective) for a coverage determination under the Commercial General Liability and Commercial Umbrella policy number S1372503 written by Selective for your client United Seniors Association, Inc. (USA).

The complaint filed in United States District Court for the District of Columbia asserts four causes of action: 1) libel; 2) misappropriation; 3) false light; and 4) intentional infliction of emotional distress. Plaintiff asserts in paragraph 10 that USA, doing business as USA Next, caused a photograph of plaintiffs, Richard M. Raymen and Steven B. Hansen, to be published from February 15, 2005 to February 21, 2005 "on the website of the publication called *The American Spectator* as part of a paid advertisement (the "Advertisement")..." Plaintiffs assert that this picture, which depicts plaintiffs dressed in tuxedos engaged in a kiss, was taken on March 3, 2004, while plaintiffs were waiting on line with 300 other gay couples to take wedding vows under Oregon's newly enacted same-sex marriage law. Plaintiffs assert that the picture was printed, apparently with plaintiffs' approval, in Portland's newspaper, *The Tribune*. Plaintiffs assert in paragraph twelve that USA Next admitted to *The Tribune*, *Editor & Publisher*, and *CNN* that it lacked the right to use the photograph containing plaintiff's image. The Advertisement is described in paragraph 13 as showing the picture of plaintiffs engaged in a kiss, next to a picture of an American soldier. Underneath both pictures is the caption "The Real AARP Agenda." A green check mark is superimposed over the plaintiff's picture while a red "X" is superimposed over the picture of the American soldier. The Advertisement allegedly provides a hotlink to USA's website. Plaintiffs assert generally that USA had no right to use the photo; that such use of the photo is an invasion of plaintiff's right of privacy; that the suggestion that plaintiffs are

unpatriotic or non-supportive of the military constitutes libel and/or false light; that such conduct rises to the level of intentional infliction of emotional distress. Paragraph thirty-six states that “USA Next ... published the defamatory statement in the Advertisement maliciously, with knowledge of its falsity or with reckless disregard as to the falsity of the statement.” Similarly, paragraph fifty-five states that USA Next “published the false statement in the Advertisement maliciously, with knowledge of its falsity or with reckless disregard as to the falsity of the statement and the false light in which the plaintiffs would be placed.” In paragraph fifty-nine plaintiffs assert that USA Next “intended to cause or knew with substantial certainty that they would cause plaintiffs severe emotional distress.” Plaintiffs seek: 1) injunctive relief; 2) for USA to “relinquish to the plaintiffs all direct and indirect profits and advantages derived by each of them through their use of plaintiffs’ image and otherwise”; 3) a retraction of the alleged defamatory statement; 4) compensatory damages; and 5) exemplary or punitive damages.

Selective will offer a defense to USA, subject to the following reservations, because it finds that the complaint triggers coverage under the definition of “personal and advertising injury” in the Commercial General Liability form CG 00 01 10 01. This form provides the insured with coverage for \$1,000,000. As we will discuss below there is no coverage available to USA under the Commercial Umbrella policy form CXL 4 04 03.

We direct your attention to the *Commercial General Liability Coverage Form, CG 00 01 10 01*. We find that the complaint does not trigger *Coverage A Bodily Injury and Property Damage Liability* because it does not assert that an “occurrence,” “bodily injury,” or property damage” as defined in the policy. Please let us know should you require further elucidation with regard to this conclusion.

Selective finds that the complaint does, however, trigger a duty to defend under *Coverage B Personal and Advertising Injury Liability*. “*Personal and advertising injury*” is defined in *Section V-Definitions* as follows:

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

d. Oral or written publication, 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;

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

“Bodily Injury” is defined in the same section to mean “*bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time*.” Selective finds that the cause of action for libel triggers policy coverage under definition 14. d., while the causes of action for misappropriation and false light trigger a duty under definition 14. e. Selective has therefore assigned the defense of this matter to James Johnson at the law firm of Semmes, Bowen & Semmes, (410)

539-5040. This defense is subject to the following reservations with regard to coverage.

We direct your attention to *Coverage B Personal and Advertising Injury Liability, 1. Insuring Agreement*. This section provides that Selective “will pay those sums that the insured becomes legally obligated to pay as damages...” The complaint prays for injunctive relief and disgorgement of gains, profits and advantages. Injunctive relief and disgorgement/restitution are generally considered equitable remedies rather than legal “damages” that would be recoverable under the insurance policy. The complaint does, however, assert compensatory, exemplary and punitive damages. The assertion of compensatory damages triggers coverage. To the extent that exemplary or punitive damages may be insured under the public policy of the state law deemed to be controlling in this case, such damages *may* be covered. Selective reserves its rights to assert the damages issues discussed in this paragraph as the case further develops.

We now direct you to *Coverage B Personal and Advertising Injury Liability, 2. Exclusions*. This section provides:

This insurance does not apply to:

a. Knowing Violation of Rights of Another

“Personal and advertising injury” caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict “personal or advertising injury.”

b. Material Published with Knowledge of Falsity

“Personal and advertising injury” arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

Should it be determined over the course of this litigation that either, or both of these exclusions apply Selective reserves the right to decline coverage and withdraw from the defense of this matter.

We now direct your attention to the Advertisers’ Exclusion form CXL 11 04 03. This form provides as follows:

This endorsement modifies insurance provided under the following:

COMMERCIAL UMBRELLA LIABILITY COVERAGE FORM

This insurance does not apply to “personal or advertising injury” arising out of the preparation, utterance, or dissemination of advertising material of any nature by or for the insured for others.

The definition of “personal and advertising injury” in the Commercial Umbrella Liability Coverage form CXL 4 04 03, is found in Section V-Definitions, and it is for the purposes of this case, the same definition as in the Commercial General Liability Coverage form cited above. Thus the Commercial Umbrella Liability Coverage form will provide no coverage to USA in this matter.

The Motion for Judgment requests an award for punitive damages. Punitive or exemplary damages are damages, which are awarded to punish a defendant for engaging in willful, malicious, fraudulent or other lines of unlawful conduct. The VA punitive damages statute states:

VA Insurance Code

§ 38.2-227. Public policy regarding punitive damages.

It is not against the public policy of the Commonwealth for any person to purchase insurance providing coverage for punitive damages arising out of the death or injury of any person as the result of negligence, including willful and wanton negligence, but excluding intentional acts. This section declares existing policy.

(1983, c. 353, § 38.1-42.2; 1986, c. 562.)

Selective Insurance Company would like to note that any award of punitive or exemplary damages for intentional acts is outside the scope of the coverage provided by Selective Insurance Company. We call this to your attention and recommend you seek legal counsel to protect your own interest in this matter. Any fee associated with that legal counsel would not be paid by Selective Insurance Company and would be borne by you.

The policy of insurance with the Selective Insurance Company, policy number S1372503, effective 1/1/05-1/1/06, provides a limit of liability of \$1,000,000 per occ. The possibility always exists that, as the result of a trial, a verdict could be rendered in excess of the above amounts. As such, be advised you that you have the right to your interest in this matter. While all necessary steps will be taken for the protection of your interests, this is to advise you that you may, at your own expense, employ personal counsel to protect your interest over and above the limits of your policy with this company.

Selective Insurance Company reserves the right to assert any term, condition, provision and/or exclusion contained in the policy whether or not such term, condition, provision and/or exclusion is specifically referred to herein, as the case progresses and new facts or assertions are developed. This letter, any request for information, or any other act on Selective Insurance Company’s part during its investigation of this matter should not be construed as a waiver of any rights or defenses available to Selective Insurance Company under the policies.

Selective requires information regarding the relationship, if any, between USA, Inc., and USA Next. Plaintiff asserts that USA Next was operating as a “dba” of

USA Inc. Please provide whatever information you have with regard to the relationship between these entities.

Selective will also need to know the relationship between USA Inc., and codefendant Mark Montini. Please provide us with all contracts, agreements, and any other documents detailing the relationship between these two entities.

Should you have any questions or have additional information to provide to help us with our coverage analysis or defense of this matter, please feel free to contact me. We look forward to working with you on this matter.

Sincerely,

Penny Hamilton
Litigation Claims Specialist

cc: McLean Insurance Agency
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