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Social Media Liability Exposures

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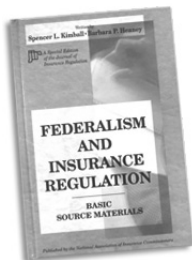
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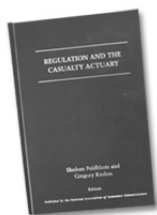
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Social Media Liability Exposures

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Abstract

This article is the first in a two-part series. Part I discusses the rise of social media use and the corresponding increase in liability exposures for individuals and businesses. Part II discusses coverage issues that arise from such exposures under comprehensive general liability (CGL) and homeowners policies.

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I. Introduction

In February 2013, reports estimated that by the end of 2013, approximately 2.7 billion people worldwide would be using the internet.¹ Just five years later, as of December 2018, that number has risen to over 4.1 billion internet users in the world.² The exponential growth of internet users is also reflected in the worldwide growth of social media use. In 2010, statistics estimated that 970 million people across the globe used some form of social media. In 2018, that number has grown to nearly 2.62 billion people, and it is estimated that by 2021, over 3 billion people will be connected to some social media platform.³ The hard numbers on social media use speak for themselves:

- As of the third quarter of 2018, Facebook had 2.27 billion monthly active users.
- As of June 2018, Instagram had 1 billion monthly active users.
 - 80% of Instagram users live outside the U.S.
 - 32% of all internet users are on Instagram.
 - More than 95 million photos and videos are shared on Instagram daily.
- As of the third quarter of 2018, Twitter had 326 million monthly active users.
- LinkedIn has 260 million monthly active users.⁴

Social media's impact is no novel concept in 2019. Indeed, social media use is a commonplace aspect of our everyday lives, and it is pervasive in both personal and commercial/marketing activities. While social media has the ability to bring together like-minded people, facilitate a free exchange of ideas, create and expand markets, and foster a sense of community among users; social media also brings with it an increased exposure to risk. With people increasingly living their lives online, private interactions have become public, enhancing the potential for violations of privacy rights. In addition, what traditionally would involve a face-to-face interaction can now be done through a computer, often under the guise of anonymity. While the physical disconnect between social media users and their audience can encourage a free exchange of ideas, it can also encourage people to cross the line with a false sense of impunity. Social media, however, creates a permanent record from which potential liability may flow.

While social media use may pose an increased risk of liability, the legal issues are not necessarily new—social media is swiftly becoming a common source of claims of defamation, harassment, invasion of privacy, false advertising, as well as employment claims and intellectual property claims.

1. http://www.itu.int/net/pressoffice/press_releases/2013/05.aspx#.UpORecSsgyo (last visited Sept. 30, 2019).

2. <http://hostingfacts.com/internet-facts-stats> (last visited Sept. 30, 2019).

3. *Id.*

4. *Id.*

II. Potential Liability Arising From Social Media Use

Claims that arise from social media use are not unique and tend to involve familiar torts, such as defamation and harassment, invasion of privacy, false advertising, discrimination, employment-related discrimination, and intellectual property infringement. While the elements of these torts and legal theories of recovery have generally remained the same, the use of social media to perpetrate these torts has required courts to consider the nature and prevalence of social media use in evaluating its impact. Social media has increased, and continues to increase, exponentially the potential for liability associated with these traditional torts. This section explores the general elements of claims that tend to arise from social media use, how social media use may give rise to the claims, and examples of cases involving the use of social media.

a. Defamation and Harassment

Social media has the power to turn anyone with an internet connection into a published author. Access to online forums where one can publish their deepest or most innocuous thoughts grows every day. In social media, one can publish comments, criticisms, experiences, thoughts and opinions about people, businesses, politics, religion, public services and more, whether it is on a blog, news website's comment boards, Facebook, Instagram, Twitter, Yelp, Amazon—the ability to critique and/or comment on any topic online is seemingly endless. While there are many benefits flowing from the ease with which social media allows people to share their ideas and opinions with the world, it also increases risk. For one thing, social media allows users to voice their opinions in real time, without the benefit of an editor, time to reflect on what they are writing, or its effect. If people are unhappy about what they read in an online article from their favorite newspaper, they can post about it in the comment section. If they are unhappy with a meal at a local restaurant, they can write a scathing review on Yelp. If they are angry at a former employer, they can post about it on Facebook or Twitter. With social media, it has never been easier for people to broadcast their opinions on anything and everything affecting their daily lives.

Moreover, by taking what otherwise would be face-to-face interactions and making them digital, social media offers the guise of anonymity, making it easier for people to say things that they might otherwise not. One need look no further than the comment section of a favorite blog to find examples of comments that people likely would never make if their name were attached to it. While that anonymity may, in fact, be more illusion than reality—because internet users can be identified by their IP addresses—that has not inhibited people from saying things over social media that they likely would not say if their name was attached to the statement. In addition, social media leaves a permanent record that can be used in litigation. All

of these factors make social media fertile ground for claims of defamation and harassment.

1. Defamation

The Restatement of Torts provides that a statement is defamatory “if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁵ To state a claim for defamation, a plaintiff must allege:

- (a) A false and defamatory statement concerning another.
- (b) An unprivileged publication to a third party.
- (c) Fault amounting at least to negligence on the part of the publisher.
- (d) Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁶

That people are more willing to make statements on social media that they would otherwise not make, and that social media allows such statements to be instantaneously broadcast to the world, makes it especially easy for the first two elements of a defamation claim to be satisfied.

For example, in *Too Much Media, LLC v. Hale*,⁷ a software manufacturer that developed software to allow adult entertainment websites to track access to affiliated websites brought a claim against an individual for allegedly posting defamatory comments about the company on an online message board related to the adult entertainment industry.⁸ The posts allegedly insinuated that the company was involved in criminal activity and had improperly benefitted financially from a security breach of its software.⁹ The defendant argued that her message board postings were protected under New Jersey’s Shield Law, which provides protection from liability for news reporting, because she was functioning as a journalist. The court disagreed, holding, “[w]e do not find that online message boards are similar to the types of news entities listed in the statute, and do not believe that the Legislature intended to provide an absolute privilege in defamation cases to people who post comments on message boards.”¹⁰

In another example, *Clay Corporation v. Colter*,¹¹ the plaintiff, a car dealership, sued the brothers of a former employee for defamation for statements made on Facebook and Twitter. After the former employee was fired from the car dealership, her brothers allegedly created a Facebook page and Twitter account, from which they made statements claiming that the plaintiff had unlawfully discriminated

5. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

6. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

7. 20 A.3d 364 (N.J. 2011).

8. *Id.* at 368.

9. *Id.* at 368–70.

10. *Id.* at 368.

11. NOCV2012-01138, 2012 WL 6554752 (Mass. Super. Ct. Dec. 11, 2012).

against their sister because she had brain cancer.¹² The defendants moved to dismiss the complaint on the ground that the suit violated Massachusetts’s “anti-SLAPP,” or strategic lawsuit against public participation, statute, which bars suits or claims against a party based on that party’s “exercise of its right to petition under the constitution of the United States or of the commonwealth.”¹³ The court noted, “[o]rganizing or participating in a boycott or picketing for the purpose of directly or indirectly influencing a government official or body—including such activities conducted online or through social media—would therefore constitute petitioning activity that is protected by the anti-SLAPP statute.”¹⁴ The court, however, denied the motion to dismiss, holding that the social media activity in question was not directed at a government official or body; but, rather, it was intended to produce a purely commercial result—the boycott of a private business. Therefore, the anti-SLAPP statute was inapplicable.¹⁵

Even law firms are not safe from the potential for liability arising out of their use of social media. For example, a recent action, *Bock & Hatch, LLC v. McGuireWoods, LLP*, involved allegedly false and defamatory statements made by McGuireWoods in an article posted on a blog run by the firm (Chiem, 2014). Bock & Hatch alleges that the article entitled, “Integrity & Adequacy of Counsel – Creative Montessori Learning Centers v. Ashford Gear LLC” misstated the district court’s findings in a case in which Bock & Hatch represented the plaintiffs.¹⁶ The article described alleged misconduct on the part of Bock & Hatch that led to the Seventh Circuit Court of Appeals to vacate class certification in that case.¹⁷ Specifically, the article stated that Bock & Hatch promised to keep certain information confidential, when, in fact, it intended to use the information to file a number of class action lawsuits, and the District Court found that Bock & Hatch’s conduct lacked integrity.¹⁸ Bock & Hatch, in its lawsuit against McGuireWoods, alleged that the article was false and defamatory in misrepresenting Bock & Hatch’s actions in the underlying lawsuit and in misrepresenting the findings of the District Court.¹⁹

Claims involving online defamation continue to proliferate, requiring courts to delve further into the both the tradition elements and defenses associated with such claims. In *Nunes v. Rushton*,²⁰ author Rachel Nunes brought suit against another author, Tiffanie Rushton, alleging claims of defamation, copyright infringement, false advertising, and harassment, which arose out of an online campaign Rushton instituted against Nunes after Nunes accused her publicly of plagiarizing Nunes’

12. *Id.* at *1.

13. *Id.* at *2.

14. *Id.* at *3.

15. *Id.* at 3–4.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. 299 F. Supp. 3d 1216 (D. Utah March 9, 2018).

novels.²¹ As to the defamation claims, Rushton posted on various online forums, both as herself and using over fifteen “sock puppet” accounts to criticize both Nunes personally, as well as her works.²² Rushton’s online comments ran the gamut from calling Nunes a “fraud,” to claiming that Nunes had harassed Rushton and was trying to scam her readers into supporting her claims against Rushton, etc.²³ After considering the nature of all of the online statements made by Rushton, the court dismissed Nunes’ defamation claims outright, ultimately finding that the majority of the comments were statements of “opinion” and/or would have been understood to “be no more than rhetorical hyperbole.”²⁴

For website operators, the federal Communications Decency Act (CDA) contains a safe harbor from defamation claims based on the comments that others post on their websites by providing, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²⁵ The safe harbor, however, is not entirely safe for website operators, as multiple courts have held that website operators may be liable for defamatory postings by users of their websites if they “encourage” users to make defamatory posts.

In *Jones v. Dirty World Entertainment Recordings, LLC*,²⁶ the court held, “a website owner who intentionally encourages illegal or actionable third-party postings to which he adds his own comments ratifying or adopting the posts becomes a ‘creator’ or ‘developer’ of that content and is not entitled to immunity.”²⁷ In that case, the defendant company and its operator were sued by the plaintiff for allegedly defamatory posts made on the website about the plaintiff. Specifically, website users posted comments about the sexual habits of the plaintiff, a Cincinnati Bengals cheerleader, on the defendants’ website <https://thedirty.com>. The website operator then added his own taglines to the posts, which were displayed on one page as a single story. The plaintiff repeatedly requested that the posts be removed, and the defendants refused. The plaintiff eventually filed a lawsuit, and the website operator claimed immunity under the CDA. The court found that the website operator had not been “neutral with respect to the offensiveness of the content,” and that by adding taglines to the allegedly defamatory postings, he had “effectively ratified and adopted” them.²⁸ The District of Maryland reached a similar conclusion with respect to the limited nature of CDA immunity in deciding a motion to dismiss another defamation lawsuit filed against the same website in *Hare v. Richie*.²⁹ In that case, the court found that the CDA “was not meant to create a lawless no-man’s-

21. *Id.* at 1222–23.

22. *Id.* at 1222.

23. *Id.* at 1230.

24. *Id.* at 1232 (quoting *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6, 14 [1970]).

25. 47 U.S.C. § 230(c)(1)(2012).

26. 965 F. Supp. 2d 818 (E.D. Ky. 2013).

27. *Id.* at 820.

28. *Id.* at 823.

29. Civil Action No. ELLH-11-3488, 2012 U.S. Dist. LEXIS 122893 (D. Md. Aug. 29, 2012).

land on the Internet,” and by allegedly posting his own comments on each defamatory posting by a third party, the website’s operator was potentially taking himself out of the scope of immunity granted by the CDA.³⁰ Similarly, in *Huon v. Denton*,³¹ the Seventh Circuit reversed the underlying District Court’s dismissal of defamation claims that the plaintiff, Huon, asserted against Gawker, Inc. and Jezebel, holding that the CDA immunity did not apply where employees of the website allegedly encouraged and invited potentially defamatory comments on an online article relating to the plaintiff’s acquittal of rape charges.

The nature of social media, which publishes content for the world to see, makes it a fertile ground for defamation claims. As these examples illustrate, even seemingly innocuous or protected online activity, such as blogging about a recent court decision or hosting comments made by others, can create defamation exposure.

2. Harassment

In addition to, and often overlapping with, defamation claims, social media has given rise to claims of various forms of harassment. One of the most high-profile examples of social media harassment has become known as “cyberbullying” (Hoffman, 2010). While bullying certainly is nothing new, social media has taken bullying from school playgrounds, hallways and cafeterias to cyberspace, providing a broad, public platform for harassment. Cyberbullying may encompass any number of common law or statutory claims,³² including claims under state or federal hate crimes laws and anti-discrimination laws, as well as common law torts protecting against emotional harm, such as intentional or reckless infliction of emotional distress. The Restatement of Torts provides that:

An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.³³

Claims such as intentional or reckless infliction of emotional distress can be accompanied by a defamation claim in cyberbullying cases. For example, in *D.C. v. R.R.*,³⁴ the court rejected an argument that cyberbullying was simply “jocular humor,” that was entitled to First Amendment protection. In this case, the plaintiff, a 15-year old aspiring musician and entertainer maintained a website promoting his career, which included an open comments section. Several of the plaintiff’s classmates made a number of homophobic comments and threats of physical

30. *Id.* at *40–54.

31. 841 F.3d 733 (7th Cir. 2016).

32. A majority of the states have enacted laws prohibiting bullying, including cyberbullying. Links to the various state laws are available at <https://www.stopbullying.gov/laws/index.html>.

33. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 46 (2012).

34. 182 Cal.App.4th 1190 (2010).

violence directed at the plaintiff in the comments section of his website,³⁵ causing the plaintiff to withdraw from his school and move to a different school district.³⁶ The plaintiff subsequently sued the students who posted the comments and their parents, alleging defamation, intentional infliction of emotional distress, and claims under California's hate crimes law.³⁷ The court refused to strike the lawsuit under California's anti-SLAPP statute,³⁸ which protects against lawsuits designed to chill free speech, holding that the defendants had not shown that the speech was protected speech; and, even if it were protected speech, it was not made in connection with a public issue, as required for protection under the statute.³⁹

In contrast, in *Finkel v. Dauber*,⁴⁰ the plaintiff, a high school student, brought a defamation suit against several classmates who created a Facebook page on which they posted a series of sexually-explicit comments about the plaintiff, including, among other things, that the plaintiff had contracted AIDS and was involved in bestiality.⁴¹ The court found that the Facebook comments were not actionable statements of fact, instead finding that the comments were nothing more than "puerile attempts by adolescents to outdo each other," such that a reasonable person would not have believed the comments to be true.⁴²

Online harassment claims have also given rise to statutory harassment and discrimination claims, including under Title VI of the federal Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, against the institutions and schools that fail to respond to reports of cyberbullying by and between students. In *Estate of Olsen v. Fairfield City School District Board of Education*,⁴³ the family of a deceased student who committed suicide after being bullied, abused and cyberbullied by classmates, both in person and heavily through social media, sued the school district. The plaintiff sought to hold the school district liable under various theories of liability, but the plaintiff specifically alleged that the school's failure to reasonably investigate and respond to the decedent's and her family's complaints of cyberbullying violated Title VI and Title IX.⁴⁴ The family also asserted common law claims of negligence and wrongful death against the school district. In denying the school district's motion to dismiss these claims, the Southern District of Ohio allowed the plaintiffs to proceed on the statutory and common law negligence and wrongful death claims, finding that the evidence and allegations of cyberbullying were "so severe, pervasive, and objectively offensive," and the

35. *Id.* at 1200.

36. *Id.* at 1201.

37. *Id.*

38. Cal. C.P.P. § 424.16 (West 2011).

39. 182 Cal.App.4th at 1210.

40. 906 N.Y.S.2d 697 (N.Y. Sup. Ct. 2010).

41. *Id.* at 698–701.

42. *Id.* at 701–03.

43. 341 F.Supp.3d 793 (S.D. Ohio 2018).

44. *Id.* at 799.

school's alleged failure to conduct any investigation in response to reports of bullying and cyberbullying was unreasonable.⁴⁵

Colleges and universities are similarly not immune to potential exposure resulting from online harassment by and between students. In *Feminist Majority Foundation v. Hurley*,⁴⁶ the Fourth Circuit Court of Appeals similarly denied motions to dismiss filed by the defendants, which included various administrators at the University of Mary Washington, against claims arising out of online harassment of students by other students.⁴⁷ Plaintiffs were members of an on-campus feminist organization, who claimed that they were sexually harassed online, primarily by members of the University's rugby team, via a social media platform called Yik Yak (now defunct).⁴⁸ The harassment was reported to school administrators, and plaintiffs ultimately brought suit against the University, alleging Title IX discrimination arising out of the online harassment and the school's alleged failure to respond.⁴⁹ In evaluating the Title IX claims, the Court specifically held that the student-on-student sexual harassment might be imputed to the school (an element in proving a Title IX claim), because:

Although the harassment was communicated through cyberspace, the Complaint shows that [the University] had substantial control over the context of the harassment because it actually transpired on campus. Specifically, due to Yik Yak's location-based feature, the harassing and threatening messages originated on or within the immediate vicinity of the [University] campus. In addition, some of the offending Yaks were posted using the University's wireless network, and the harassers necessarily created those Yaks on campus. Moreover, the harassment concerned events occurring on campus and specifically targeted [University] students.⁵⁰

In another case involving online harassment at a university, in *Harbi v. Massachusetts Institute of Technology*,⁵¹ the plaintiff, a resident of France, was enrolled in online courses provided through a partnership between the Massachusetts Institute of Technology (MIT) and Harvard University. The plaintiff created a Facebook group for one of the online courses taught by an MIT professor, who also joined the Facebook group. The plaintiff and the MIT professor began communicating via the Facebook group and via email, and those communications eventually turned intimate and sexual in nature.⁵² Toward the end of the online

45. *Id.* at 804.

46. 911 F.3d 674 (4th Cir. 2018).

47. *Id.* at 679.

48. *Id.* at 680–81.

49. *Id.*

50. *Id.* at 687.

51. Civil Action No. 16-12394, 2017 WL 3841483 (D. Mass. Sept. 1, 2017).

52. *Id.* at *1.

course, the professor intimated that the plaintiff would not successfully complete the course unless their online communications continued.⁵³ The plaintiff later filed a lawsuit against MIT and the professor, alleging Title IX discrimination and other state law claims arising out of the professor's online harassment.⁵⁴ Defendants filed motions to dismiss. The Court dismissed the Title IX discrimination claims on the ground that Title IX protections only extend to persons "in the United States," and the plaintiff was a "French student, studying in France," and had "no relevant history of physical presence in the United States."⁵⁵ However, the Court denied dismissal of the negligence claims against MIT and the professor, finding the complaint sufficiently alleged facts that the defendants owed a duty to the plaintiff and potentially breached that duty.⁵⁶

While bullying is nothing new, the ubiquity of social media use, particularly among young people, means that the frequency of cyberbullying claims is likely to continue increasing. Moreover, as the *Feminist Majority Foundation* and *Harbi* cases illustrate, it is not only the bullies that face potential exposure.

b. Invasion of Privacy

The rise of social media has spawned a serious debate about the role of privacy in the modern internet age. On the one hand, issues concerning data privacy amongst social media users, particularly involving data mined by Facebook, have erupted in the past couple of years, evolving into numerous class action lawsuits against and a federal investigation of Facebook. (Fontana & Romm, 2018). While these data privacy issues are at the forefront of current events and discussions regarding legal and privacy issues in social media, these issues are beyond the scope of this particular article and presentation. The invasion of privacy issues addressed herein relating more narrowly to individual privacy tort claims, as opposed to the larger issues regarding the responsibility of social networking sites to protect user information.

That being said, Twitter, Facebook and other social networking sites have allowed people to make public virtually every detail of their lives and interactions with others. The public nature of social interactions through social media certainly increases the potential for invasion of privacy-related liability. Social media also makes it far easier to publicly broadcast private information about another person, thus increasing not only the potential for claims, but also the potential damages when a claim is brought.

The Restatement of Torts recognizes four distinct torts falling within the umbrella of invasion of privacy. These torts include intrusion upon seclusion,⁵⁷

53. *Id.* at *2.

54. *Id.* at *3.

55. *Id.* at *4.

56. *Id.* at *8–9.

57. RESTATEMENT (SECOND) OF TORTS § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns,

appropriation of name or likeness,⁵⁸ publicity given to private life,⁵⁹ and publicly placing a person in a false light.⁶⁰ While each tort is distinct, they generally concern an individual's right "to be let alone."⁶¹

One such social media-related invasion of privacy claim was made in *Yath v. Fairview Clinics, N.P.*⁶² In that case, an employee of the defendant, a health clinic, who was also a relative of the plaintiff's husband, without authorization accessed the plaintiff's medical file out of curiosity after seeing the plaintiff in the clinic.⁶³ After learning from the medical file that the plaintiff had visited the clinic to be screened for sexually-transmitted diseases related to a new sexual partner, the employee told this information to the plaintiff's sister-in-law, who, in turn, told it to plaintiff's husband.⁶⁴ In addition, the employee and the sister-in-law allegedly created a MySpace page called "Rotten Candy" (the plaintiff's first name is Candice), which posted information about the plaintiff from the medical file, including that the plaintiff had a sexually-transmitted disease and that she had cheated on her husband.⁶⁵ The plaintiff brought a claim against the health clinic for invasion of privacy. The lower court granted the health clinic's motion for summary judgment on the ground that the temporary posting of data from the plaintiff's medical file on MySpace failed to meet the "publicity" requirements of a claim for invasion of privacy, which, under the relevant state law, required a showing, "(1) a defendant gave 'publicity' to a matter concerning [plaintiff's] private life, (2) the publicity of private information would be highly offensive to a reasonable person, and (3) the matter is not of legitimate concern to the public."⁶⁶ The lower court reasoned that the MySpace page was only accessed by a small number of people and was only available for 24 to 48 hours.⁶⁷ The appellate court affirmed, but on different grounds. The appellate court first found that even though only a few people viewed the MySpace page and it was only available online for a short period of time, the information was nonetheless made public for anyone to view, and, thus, the

is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

58. *Id.* at § 652C ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.").

59. *Id.* at § 652D ("One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.").

60. *Id.* at § 652E ("One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.").

61. *Id.* at § 652A.

62. 767 N.W.2d 34 (Minn. Ct. App. 2009).

63. *Id.* at 38.

64. *Id.* at 38–39.

65. *Id.* at 39.

66. *Id.* at 42.

67. *Id.* at 43.

“publicity” requirement of invasion of privacy was satisfied.⁶⁸ However, the appellate court found that the plaintiff had not demonstrated that the defendant health clinic or its employees were involved in creating the MySpace page.⁶⁹

In most instances, and as discussed above, social media sites themselves, like Facebook, Instagram and Twitter, are immune from invasion of privacy claims under the federal Communications Decency Act (CDA). However, such immunity does not extend to claims against individual users. In general, courts are in agreement that, notwithstanding the individual’s privacy settings, any information a person posts about themselves on social media is not protected as “private.” As illustrated in the *Yath* case, however, issues arise when others post information on social media about an individual without that person’s authority or consent.

c. Employment Claims

Social media has become commonplace in the employment setting. For example, social media can play a crucial role in the hiring process, as companies use social networking sites to attract and screen candidates for employment.⁷⁰ In addition, as any look around the typical office will confirm, employee use of social media in the workplace is pervasive (Bass, 2012). The ubiquity of social media in the workplace raises serious issues regarding potential liability for employers. In particular, social media creates an environment for potential liability over which employers may have very little control. For example, while monitoring employee interactions at the water cooler may be relatively easy, monitoring employee interactions over social media, especially interactions that take place outside working hours or from an employee’s home or mobile device, is likely to be much more expensive and difficult, if possible. Nonetheless, employee use of social media may give rise to potential employer liability.

For example, social media was the catalyst for a discrimination claim in *Blakey v. Continental Airlines, Inc.*⁷¹ In that case, a female pilot brought suit against her employer, Continental Airlines, for sexual harassment and hostile work environment after fellow Continental pilots posted allegedly harassing gender-based messages on a message board for Continental employees available through Continental’s computer system. The court held that the fact that the message board was not physically located in the workplace was immaterial; to the extent that Continental derived a benefit from the message board, and was aware of harassment

68. *Id.*

69. *Id.*

70. A survey by CareerBuilder found that two out of three companies admitted to using social networking sites to research job candidates. See *Thirty-Seven Percent of Companies Use Social Networks to Research Potential Job Candidates, According to New CareerBuilder Survey*, PR Newswire, <http://www.prnewswire.com/news-releases/thirty-seven-percent-of-companies-use-social-networks-to-research-potential-job-candidates-according-to-new-careerbuilder-survey-147885445.html> (last visited Dec. 28, 2012).

71. 751 A.2d 538(N.J. 2000).

occurring on the message board, Continental could not simply disregard the conduct.⁷²

Similarly, in *Amira-Jabbar v. Travel Services, Inc.*,⁷³ the plaintiff brought a hostile work environment claim against her former employer after coworkers had allegedly posted racist comments about a picture that was taken of the plaintiff at a company outing in the comments section of a Facebook page. The defendant argued that it could not be liable for the comments made on Facebook, because the Facebook page belonged to an individual employee, not the employer, and the employee had no authority to act on the employer's behalf with respect to the Facebook page.⁷⁴ The plaintiff argued that the employer was liable for the comments made on the Facebook page, because it allowed its employees to post photos and comments on Facebook during company time and for company purposes.⁷⁵ The court ultimately granted the employer's motion to dismiss, holding that the Facebook incident, and several other alleged incidents, were too isolated to establish a hostile work environment, and that the employer had promptly investigated the incidents and taken remedial measures, including blocking employee access to Facebook from office computers.⁷⁶

Social media use also formed the basis of the claims alleged in *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*⁷⁷ In that case, the plaintiff was suspended from her job as a nurse, allegedly based on posts she made on her Facebook page. The plaintiff limited access to her Facebook page to only her "friends" on the social media website. One of her "friends," however, included a co-worker, who, after reading a post the plaintiff made regarding a shooting at the United States Holocaust Memorial Museum, sent screen captures of the post to their employer. The post insinuated that the shooter, who himself was shot by security guards, should have been left to die by Washington, DC paramedics. After reading the post, the plaintiff's employer suspended her with pay, on the ground that the comment reflected a "deliberate disregard for patient safety." The plaintiff brought suit against her employer alleging, among other things, a violation of the federal Stored Communications Act (SCA), which is intended to protect electronic communications that are configured to be private.⁷⁸ The court first found that non-public Facebook posts are covered by the SCA. However, the court held that the

72. *Id.* at 552 ("[E]mployers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace.").

73. 726 F. Supp.2d 77 (D.P.R. 2010).

74. *Id.* at 83.

75. *Id.*

76. *Id.* at 86-87.

77. 961 F. Supp. 2d 659 (D. N.J. 2013).

78. Specifically, the SCA provides that whoever, "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters or prevents the authorized access to a wire or electronic communication while in electronic storage in such a system" shall be liable for damages. 18 U.S.C. § 2701(a); 18 U.S.C. § 2707.

SCA’s “Authorized User Exception,” which provides that the SCA, “does not apply with respect to conduct authorized . . . by a user of that service with respect to a communication of or intended for that user,”⁷⁹ applied in this case, because the plaintiff’s Facebook post was accessed by a co-worker who was granted permission to view the post by virtue of being the plaintiff’s Facebook “friend.” The court noted that the co-worker who sent a screen capture of the post to the plaintiff’s employer had done so voluntarily, and the employer had not solicited or encouraged the co-worker to send the post.⁸⁰

In *Jackson v. Walgreen Co.*,⁸¹ the plaintiff was discharged from his employment at Walgreens after the plaintiff had posted a pornographic video on a male coworker’s Facebook page, and in a comment on the post referenced two female employees in connection with the video (although the female employees did not actually appear in the video itself).⁸² Walgreens terminated the plaintiff for violating the company’s Social Media Policy, and the plaintiff brought suit against Walgreens after he was denied unemployment benefits.⁸³ The Missouri appellate court found that violation of an employer’s Social Media Policy constitutes employee misconduct, in violation of the employer’s rules, warranting disqualification of unemployment benefits.⁸⁴

Social media presents another medium by which co-workers interact, which opens up employers to potential liability for those online interactions. Moreover, as people regularly post their personal views online—views that they may not otherwise express while at work—these online interactions are fraught with potential risks.

d. False Advertising Claims

In 2018, it was estimated that social and digital media generated 44%, or approximately \$237 billion, of all advertising dollars spent worldwide, and that number is expected to grow to 51%, or approximately \$240 billion, in 2019 (Liedke, 2019). The exponential growth in social media advertising can be attributed to a number of factors: 1) social media users tend to fall within key advertising demographics; 2) social networking sites allow advertisers to target groups of people who share similar characteristics and preferences; and 3) social media allows companies to directly interact with customers in real-time, offering a more personal, interactive experience than traditional print or broadcast advertising. Certain aspects of social media, however, increase the potential for liability. The interactive nature of social media can sometimes blur the line between the company and the consumer, with the company encouraging the consumer to generate and share content about

79. 18 U.S.C. § 2701(c) (2012).

80. 961 F. Supp. 2d at 669–71.

81. 516 S.W.3d 391 (Mo. Ct. App. 2017).

82. *Id.* at 392.

83. *Id.*

84. *Id.* at 394.

the company or its products, in hopes of creating buzz or having the content “go viral.” By ceding some control over advertising content to consumers, companies may be exposing themselves to increased risk for the resulting consumer-generated content.

As with traditional print and broadcast advertising, social media advertising is subject to regulations and restrictions against false or deceptive advertising, including under various state laws, and federal regulations.⁸⁵ In particular, private claims of false or deceptive advertising typically are brought under the federal Lanham Act, which provides that:

85. For example, in 2009, the Federal Trade Commission issued revised guidelines regarding the use of endorsements and testimonials in advertising, providing, “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.” 16 C.F.R. § 255.5 (2009). The regulations cite two examples that specifically address the use of endorsements through social media:

Example 7: A college student who has earned a reputation as a video game expert maintains a personal weblog or “blog” where he posts entries about his gaming experiences. Readers of his blog frequently seek his opinions about video game hardware and software. As it has done in the past, the manufacturer of a newly released video game system sends the student a free copy of the system and asks him to write about it on his blog. He tests the new gaming system and writes a favorable review. Because his review is disseminated via a form of consumer-generated media in which his relationship to the advertiser is not inherently obvious, readers are unlikely to know that he has received the video game system free of charge in exchange for his review of the product, and given the value of the video game system, this fact likely would materially affect the credibility they attach to his endorsement. Accordingly, the blogger should clearly and conspicuously disclose that he received the gaming system free of charge. The manufacturer should advise him at the time it provides the gaming system that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance.

Example 8: An online message board designated for discussions of new music download technology is frequented by MP3 player enthusiasts. They exchange information about new products, utilities, and the functionality of numerous playback devices. Unbeknownst to the message board community, an employee of a leading playback device manufacturer has been posting messages on the discussion board promoting the manufacturer's product. Knowledge of this poster's employment likely would affect the weight or credibility of her endorsement. Therefore, the poster should clearly and conspicuously disclose her relationship to the manufacturer to members and readers of the message board.

Id.

Any person who, on or in connection with any goods or services ... , uses in commerce any word, term, name, symbol, device, any combination thereof, any false designation of origin, false or misleading description of fact, or false or misleading representation or fact, which—

...

- (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services or commercial activities, shall be liable in a civil action by any such person who believes that he or she is likely to be damaged by such act.⁸⁶

There are a number of examples of claims under the federal Lanham Act arising out of allegedly false or deceptive advertising on social media. For example, in *Doctor's Associates, Inc. v. QIP Holders, LLC*,⁸⁷ sandwich chain Subway brought suit against its competitor Quiznos for false advertising under the federal Lanham Act in connection with Quiznos' web-based contest that asked consumers to submit videos demonstrating why their product was superior to Subway's, which were subsequently posted on Quiznos' website. Subway alleged that the advertisements falsely portrayed Subway's sandwiches and that Quiznos was responsible for their content, even though the videos were made by consumers. The court rejected Quiznos' argument that it could not be liable under the federal Lanham Act because the videos were made by consumers, holding that Quiznos' ads constituted "commercial advertising and promotion" under the federal Lanham Act; therefore, they were actionable. The court also held that there were issues of fact regarding whether Quiznos merely published the consumer videos or instead was actively responsible for the creation and development of the allegedly disparaging statements, such that it would not be entitled to immunity under the CDA.

In *Doe v. Friendfinder Network, Inc.*,⁸⁸ the plaintiff sued the defendant, who operated a number of affiliated social networking sites, including AdultFriendFinder, which advertised itself as, "the World's largest SEX and SWINGER Personal Community," for, among other things, false advertising under the federal Lanham Act.⁸⁹ The plaintiff alleged that someone, without her knowledge, had created a profile on the defendant's social media site under the name "petra03755" that included various biographical and personal information, including her sexual proclivities, such that the profile identified the plaintiff as

86. 15 U.S.C. § 1125(a)(1) (2012).

87. Civil Action No. 3:06-cv-1710, 2010 WL 669870 (D. Conn. Feb. 19, 2010).

88. 540 F.Supp.2d 288 (D. N.H 2008).

89. *Id.* at 292.

“petra03755” to her community.⁹⁰ The plaintiff alleged that the defendant used portions of the “petra03755” profile as “teasers” on internet search engines and advertisements on third-party websites, thus falsely communicating to consumers that the plaintiff was a member of the site and deceiving consumers into registering for the site in order to meet the plaintiff. The court denied the defendant’s motion to dismiss the federal Lanham Act claims, holding that the plaintiff has adequately alleged false advertising under the federal Lanham Act, by alleging that the defendant made unauthorized use of the plaintiff’s identity, creating the false and allegedly harmful impression that the plaintiff was affiliated with the defendant.⁹¹

Another case, *Bluestar Management, LLC v. The Annex Club, LLC*,⁹² involved a plaintiff and defendant, which each owned and operated rooftop clubs located across the street from Wrigley Field in Chicago, from which customers can watch the baseball games.⁹³ The plaintiff alleged, among other things, that the defendant made false advertisements in violation of the federal Lanham Act by attempting to pass off the plaintiff’s rooftop club as its own by paying for a website to host a “sponsored result” advertisement that used a picture of the plaintiff’s rooftop club alongside a link to the defendant’s website. The plaintiff also alleged that the defendant had falsely represented on the defendant’s Facebook page that Cubs fans could “[e]njoy a fantastic unobstructed view of Wrigley Field and the Chicago Cubs from any one of our three new state of the art facilities,” despite the fact that one of the defendant’s rooftop clubs was closed for business. The court held that the plaintiff had adequately pleaded a claim for false advertising under the federal Lanham Act.

In *L.A. Taxi Coop., Inc. v. Uber Technologies, Inc.*, the plaintiff alleged that Uber, the transportation network that operates exclusively through a smart phone app, engaged in false advertising based upon statements and representations on Uber’s website and other online platforms concerning Uber’s more “rigorous” safety and driver screening standards.⁹⁴ The court dismissed the plaintiff’s federal Lanham Act claims relating to statements that Uber representatives made to certain media outlets in online articles and journals about the company, because such did not constitute “commercial speech” under the federal Lanham Act. However, the Court refused to dismiss false advertising claims against Uber arising out of various statements in its online advertisements regarding its safety standards.

Vitamins Online, Inc. v. HeartWise, Inc.,⁹⁵ also involved federal Lanham Act claims. In this case, the plaintiff alleged that HeartWise improperly had employees vote on and review the plaintiff’s products on Amazon.com, Inc. (Amazon), which increased the likelihood that potential customers would see positive reviews of its products first and negative reviews last. The plaintiff claimed that such practices

90. *Id.*

91. *Id.*

92. No. 09 C 4540, 2010 WL 2802213 (N.D. Ill. July 12, 2010).

93. *Id.* at *1.

94. 114 F.Supp.3d 852 (N.D. Cal. 2015).

95. 207 F. Supp. 3d 1233 (D. Utah 2016) (vacated for additional expert discovery to be conducted, May 11, 2017).

were unfair competition and false advertising under the federal Lanham Act because it unfairly manipulated Amazon customer review system. The court denied the defendant's motion for summary judgment, finding that there were issues of fact as to whether the defendant's conduct constituted false advertising under the federal Lanham Act.

Social media lowers barriers to entry and creates opportunities for "viral" advertising, making it easier and cheaper for companies to advertise their products and services to a large audience. As the cases discussed above demonstrate, however, social media advertising also creates an increased exposure to claims of false advertising.

e. Intellectual Property Claims

Social media may also give rise to claims of infringement of intellectual property rights. By allowing users to instantly share content, such as videos, photographs and other files, social media makes it easy for users to improperly use copyrighted material. The sheer number of social media users sharing content online means that the risk of copyright infringement claims is significant.

Copyright is governed by the federal Copyright Act of 1976, which protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁹⁶ Section 106 of the federal Copyright Act provides that:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

96. 17 U.S.C. § 102(a) (2012). The Copyright Act further provides, "works of authorship" include the following categories:

- (1) literary works.
- (2) musical works, including any accompanying words.
- (3) dramatic works, including any accompanying music.
- (4) pantomimes and choreographic works.
- (5) pictorial, graphic and sculptural works.
- (6) motion pictures and other audiovisual works.
- (7) sound recordings.
- (8) architectural works.

Id.

- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁹⁷

Section 501 of the federal Copyright Act provides the owner of a copyright with a private right of action against anyone who infringes the copyright owner's exclusive rights in the copyrighted work.⁹⁸

One highly publicized example of copyright infringement arising from social media use is *HarperCollins Publishers, LLC v. Gawker Media LLC*.⁹⁹ In that case, the publisher of former vice presidential candidate Sarah Palin's book, "America By Heart," brought a copyright infringement suit against a blogger who posted 21 pages of Sarah Palin's book on the popular website Gawker Media several days prior to the release date of the book.¹⁰⁰ The blogger argued that the blog post constituted "fair use"¹⁰¹ and, therefore, was not a violation of the publisher's copyright.¹⁰² Granting the publisher's motion for a preliminary injunction, the court held that the publisher was likely to succeed on the merits of the claim, because the blog posting

97. 17 U.S.C. § 106 (2012).

98. 17 U.S.C. § 501 (2012).

99. 721 F. Supp. 2d 303 (S.D.N.Y. 2010).

100. *Id.* at 304–05.

101. The "fair use" defense is codified in the Copyright Act, which provides that:

[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

(2) the nature of the copyrighted work.

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (2012).

102. 721 F. Supp. 2d at 306.

did not constitute “fair use,” where the post contained minimal commentary and simply copied, verbatim entire pages of the book.¹⁰³

In addition to copyright infringement, trademark infringement claims can arise from social media use. As discussed above, social media advertising has become critical for many businesses. With the increased use of social media for advertising, however, comes increased potential for claims of trademark infringement arising from that advertising. Federal trademark claims are governed by the federal Lanham Act, which provides that:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, ...

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.¹⁰⁴

Courts have addressed trademark claims arising from social media use. For example, in *Fortune Hi-Tech Marketing, Inc. v. Isaacs*,¹⁰⁵ an employer, which operated a direct sales company that markets products and services to customers through the use of independent representatives, sued a former independent representative for various claims, including misappropriation of mark and trademark infringement under the federal Lanham Act.¹⁰⁶ Prior to being terminated, the independent representative created a social networking website for independent representatives, as well as other websites that provide online training to independent representatives who were members of the social networking website.¹⁰⁷ According to the employer, the independent representative misappropriated the company’s trademarks and services marks and sought to profit from the company’s name and goodwill through operation of the websites, which used the employer’s name and logos.¹⁰⁸ The claim was ultimately submitted to arbitration, and the former employee agreed to take down the websites.

103. *Id.*

104. 15 U.S.C. § 1125(a)(1) (2012).

105. Civil Action No. 10-123-KSF, 2010 WL 5391533 (E.D. Ky. Dec. 21, 2010).

106. *Id.* at *1.

107. *Id.*

108. *Id.*

In *Eppley v. Iacovelli*,¹⁰⁹ a surgeon who had registered his name as a trademark filed suit against a former patient who had accused the doctor of botching her facelift procedure for false designation under the federal Lanham Act for allegedly using the doctor's name and likeness on social networking and other websites to create the impression that the sites were created or authorized by the doctor. The court found that the surgeon's allegations amounted to "passing off" in violation of the federal Lanham Act.

In *Asanov v. Legeido*,¹¹⁰ an employer sued a former employee for trademark infringement under the federal Lanham Act after the former employee allegedly falsely represented on LinkedIn that he was the owner of a new company that was formed by the employer. The former employee argued that he never represented that he was the owner of the company, but, rather, that the LinkedIn posting was the result of an "apparent error in the LinkedIn profiles database search index."¹¹¹ The court ultimately dismissed the claims of the plaintiff, who was acting *pro se*, because the plaintiff failed to comply with a prior order requiring the plaintiff to retain counsel and file an amended complaint.

In *Multi Time Machine, Inc. v. Amazon.com, Inc.*,¹¹² Multi Time Machine, Inc. (MTM), a manufacturer of watches, sued Amazon for trademark infringement under the federal Lanham Act, claiming that, even though MTM did not sell its watches on Amazon consumers could still search for MTM's products on Amazon, and the search function would display MTM's trademark as a search query, but provide customers with alternative or suggested searches and products (competitors' products) to purchase on Amazon.¹¹³ The court granted Amazon's motion for summary judgment, which was affirmed on appeal, finding that the results of a search for MTM products were clearly labeled with the competitors' names, marks and product information, and did not use MTM's mark or name, thus eliminating any possible consumer confusion.

As social media use increases, it is likely that intellectual property claims will likewise increase, as social media gives users a platform to publish commentary and content regarding protected intellectual property of others to a wide audience.

III. Conclusion

The rapid proliferation of social media use should not come as a surprise. It allows people to express their views publicly in ways that previously were not possible. The ability to publish content easily and at little to no cost unquestionably benefits millions of individuals and companies. However, the aspects of social media that make it so popular and beneficial—the ability to publish content to a

109. No. 1:09-cv-386-SEB-DML, 2010 WL 3282574 (S.D. Ind. Aug. 17, 2010).

110. No. 3:07-1288, 2008 WL 4814261 (M.D. Tenn. Oct. 31, 2008).

111. *Id.* at *4.

112. 804 F.3d 930 (9th Cir. 2015).

113. *Id.* at 933.

wide audience quickly and cheaply—also increase the potential exposure that individuals and companies face for the types of claims discussed above.

The increase exposure created by social media raises important issues about whether such exposure is covered under traditional CGL and homeowners policies. These issues are discussed in Part II of this series, which will be published in the next issue of the *Journal of Insurance Regulation* (JIR).

References

- Bass, D., 2012. "Facebook, Zynga Luring Employees to Hog Bandwidth at Work Hours," *Bloomberg*, accessed at <https://www.bloomberg.com/news/articles/2012-01-17/bandwidth-hogging-on-corporate-networks-grows-as-workers-post-to-facebook>.
- Chiem, L., 2014. "McGuire Woods Sued for Libel by Chicago Firm," *Law360*, accessed at <http://www.law360.com/articles/501983/mcguirewoods-sued-for-libel-by-chicago-firm>.
- Fontana, F., 2018. "Lawsuits Against Facebook Over Data Privacy Issues Are Piling Up", *TheStreet*, accessed online at <https://www.thestreet.com/story/14536213/1/everyone-who-is-suing-facebook-for-cambridge-analytica.html>.
- Hoffman, J., 2010. "Online Bullies Pull Schools Into the Fray," *The New York Times*, accessed at <http://www.nytimes.com/2010/06/28/style/28bully.html>.
- Hosting Facts. "Internet Stats & Facts for 2019," accessed at <http://hostingfacts.com/internet-facts-stats>.
- International Telecommunication Union, 2013. "ITU Releases Latest Global Technology Development Figures," accessed at http://www.itu.int/net/pressoffice/press_releases/2013/05.aspx#.XfpSM_IKhjV.
- Liedke, L., 2019. "100+ Internet Statistics and Facts for 2019," accessed at <https://www.websitehostingrating.com/internet-statistics-facts/>.
- PR Newswire, 2012. "Thirty-Seven Percent of Companies Use Social Networks to Research Potential Job Candidates, According to New CareerBuilder Survey," accessed at <http://www.prnewswire.com/news-releases/thirty-seven-percent-of-companies-use-social-networks-to-research-potential-job-candidates-according-to-new-careerbuilder-survey-147885445.html>.
- RESTATEMENT (SECOND) OF TORTS (1977), *American Legal Institute*.
- Romm, T., 2018. "It's About Time: Facebook Faces First Lawsuit From U.S. Regulators After Cambridge Analytica Scandal," *The Washington Post*, accessed at <https://www.washingtonpost.com/technology/2018/12/19/dc-attorney-general-sues-facebook-over-alleged-privacy-violations-cambridge-analytica-scandal/>.
- U.S. Department of Health and Human Services. "Laws, Policies & Regulations," accessed at <https://www.stopbullying.gov/laws/index.html>.

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Cummins, J. David and Richard A. Derrig, eds., 1989. *Financial Models of Insurance Solvency*, Norwell, Mass.: Kluwer Academic Publishers.

Manders, John M., Therese M. Vaughan and Robert H. Myers, Jr., 1994. “Insurance Regulation in the Public Interest: Where Do We Go from Here?” *Journal of Insurance Regulation*, 12: 285.

National Association of Insurance Commissioners, 1992. *An Update of the NAIC Solvency Agenda*, Jan. 7, Kansas City, Mo.: NAIC.

“Spreading Disaster Risk,” 1994. *Business Insurance*, Feb. 28, p. 1.

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