News and information from Media/Professional Insurance,
the global leader in media, cyber, technology, lawyers,
accountants and miscellaneous professional liability insurance.

M/PI Source

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The Next Big Thing

By Russell Hickey

When *The New York Times* revealed last year that it developed filtering software to prevent readers in Great Britain from accessing an article online, many media law experts concluded it signaled a new era in media law.

The filtered story was headlined "Details Emerge in British Terror Case." *The New York Times* made the decision to filter the story based on a requirement in British law that prohibits publication of prejudicial information about a criminal defendant prior to trial. Continued on page 6

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A Letter from the Chairman

Dear Colleague:

As I'm sure everyone knows by now, Media/Pro's acquisition by AXIS was completed on May 1, 2007. After 27 years as an MGA, Media/Pro is now a business unit within the Select Markets Division of AXIS Insurance.

We are confident that this transaction makes us an even more valuable partner to our brokers, policyholders, associations and other colleagues around the world. There are many ways in which our customers will benefit. Chief among them is the combination of Media/Pro with the resources of AXIS PRO, AXIS's E&O facility. Run by Tim Covello, AXIS PRO has tremendous E&O experience, including expertise in underwriting lawyers' and accountants' professional liability insurance, two products not historically underwritten by Media/Pro.

We believe these resources make us one of the most expert and diversified E&O facilities in the world, with global capabilities across a broad array of E&O underwriting disciplines. This depth of expertise allows us to deliver additional value to our relationship with our producers and clients.

Even in the depths of a soft market, this is still a relationship business. These days, it seems, almost any risk can find a home at an attractive price, even if the carrier may not be an expert in the business. We try to distinguish ourselves by adding value, not by reducing price. Whether it's deep industry knowledge, the ability to customize coverage, or the delivery of effective risk management services, we want to be your market of choice for E&O business – even when a new entrant may be offering a cheaper alternative.

Our new partnership with AXIS helps us accomplish that task, by adding additional resources, expertise and flexibility to our already formidable assets. This publication is one way in which we will bring these resources to the marketplace. Look for M/PI Source to cover timely insurance and risk management topics across a broad spectrum of E&O issues. We look forward to the opportunity to demonstrate for you all the things the new Media/Pro can do.

Sincerely,

Leib Dodell
Chairman
Media/Professional Insurance

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Reality Show Releases:
They May Need an "Extreme Makeover"

By Lincoln Bandlow

A reality program will not be a long-time "Survivor" unless it can rely upon having a well-written release signed by participants before going forward with production. It requires more than a legal "Apprentice" or some "Average Joe" to draft such an important document. Many lawyers may think that a standard release is ironclad, but in "The Real World," there may be problems, resulting in litigation that can turn a former reality show participant into "Joe Millionaire." In *Higgins v. Walt Disney*, a California Court of Appeal set forth some "Road Rules" to follow when preparing these releases and help avoid the "Fear Factor" of potential litigation.

In *Higgins*, five participants in an episode of the ABC television program "Extreme Makeover: Home Edition" brought claims against the network, the producers and a company that constructed the home featured in a Makeover episode. Plaintiffs were five siblings (three of whom were minors) whose parents died in 2004, forcing them to move in with friends from their church, the Leomiti family. The producers of "Makeover" learned of these siblings' plight and decided to do a show about them. The relationship between the siblings and the Leomitis soured, and the Leomitis kicked the siblings out of the "Makeover" house.

In the siblings' suit, the network defendants thought they were in the clear because they had the Leomitis provide the siblings with the network's 24-page, single spaced, 72-paragraph release to sign before production of the program began. In the agreement was a provision where the signatory agreed to send any dispute to arbitration. The District Court found the agreement to be unconscionable, therefore not enforceable. That decision was upheld by the U.S. Court of Appeals for the Ninth Circuit. Both courts offer guidance on creating releases that pass muster with the courts.

What lessons can be learned from *Higgins*? You will be more likely to be living "The Simple Life" if you do the following:

1. Make your agreements, if possible, tailored to the particular parties. Include the parties' names and identifying information into the actual document, rather than just handwriting it in (this is fairly simple with modern word processing).

2. Meet with the actual show participants to discuss the contracts, not just with someone who is acting on the potential participant's behalf.

3. Send the contracts out with a separate letter that clearly states (perhaps bolded and underlined) that the person should carefully review each and every page before signing it and that they should contact you if there is any provision they feel that they do not understand. (It is also a good idea to tell all those in the field actually distributing and collecting these agreements that words such as "flip through it" or "take a quick glance at it" or anything like that should not be used in connection with these agreements.)

4. Make sure that there is a reasonable amount of time between when the contract is first provided to the potential participants and when they are required to return it.

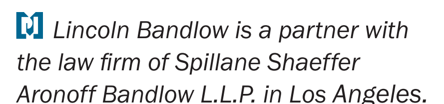
5. You may want to consider including in your letter transmitting the contract a reference to the fact that the contract contains, among other things, a provision requiring that all disputes be submitted to binding arbitration.

6. Have the arbitration provision of the contract placed in its own separately titled section, with the title in bold face.

7. Require the participant to initial the arbitration provision.

8. Although you should make the arbitration provision bilateral, this does not mean that you need give up on preserving your right to seek injunctive relief under the "business realities" of reality programming, which may require such relief to prevent a participant from prematurely disclosing the results of a show. It does not appear that the *Higgins* defendants explained adequately to the Court their need to have the option of seeking such relief. You may want to explain some of these potential "business realities" requiring such an option in the contract itself.

Following these suggestions is a good start for any reality show production company that does not want to end up being "The Biggest Loser." Rather, the brilliance of your release language will make you an "American Idol." Okay, maybe that was a stretch.



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Feedback or story ideas? Please send to mpisource@mediaprof.com.

Avoid the Ramifications of Late Notice

By Emily Caron

Policy holders in search of smooth sailing when presented with a claim should begin their journey by notifying their insurance carriers of the matter as soon as practicable. Failure to provide prompt notice of a claim can result in forfeiture of the very protections a policy holder was relying upon when purchasing a policy. Here are some tips on evaluating when to report a claim, and why it is so important to do so at the earliest stages of a dispute.

This isn't a lawsuit yet, so why report it?

The average policy holder knows that if a lawsuit lands in its lap, it should notify its carrier immediately. But many "claims" do not begin as full-blown lawsuits. A "claim" can be a demand for retraction accompanied by a threat of litigation; it can be a draft lawsuit that has not yet been filed in court; or it can even be a phone call or letter from a client complaining about the quality of services performed. That is because most insurance policies have a definition of "claim" that is broader than the filing of a complaint in a court of law. In most policies, "claim" is defined as something akin to "a demand or suit for money or services." It doesn't stop there. Some policies even require a policy holder to give notice of any circumstance *likely to result* in a claim.

When a claim appears, most policies require that the policy holder "give prompt notice" to the carrier. In providing that notice, it is helpful to include any exchanges that took place in writing or via email or any notes of telephone conversations that are relevant to the dispute. That way, the carrier is involved in the very beginning, and policy holders can consult with a claim handler about the best way to address the situation.

But what if the claim is meritless?

The legal viability of a claim does not bear on a policy's notice requirement. Even if a claim appears frivolous, it is better to err on the side of caution and report it to the carrier. Even meritless lawsuits can be complicated and costly, and in the American system of justice, of course, recovery of attorneys' fees is rare, absent statutory rights to such fees. Generally, carriers would rather be notified of dozens of apparently bogus claims than be left in the dark until one of these claims escalates before it was tendered. Failure to give prompt notice of a claim deprives the carrier of contributing to an early (and, ideally, a less expensive) resolution of a claim.

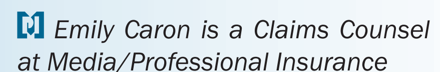
The longer a policy-holder waits before reporting a claim, the more it risks prejudicing itself. While the laws governing a policy holder's obligation to give proper notice of a claim vary from state to state, the ramifications of late notice can be harsh. They include:

- relieving a carrier of its duty to provide a defense to the policy holder;
- relieving a carrier of indemnifying a policy holder for any damages, whether those damages were the result of an adverse jury verdict or a settlement;
- relieving a carrier of paying for any legal fees incurred by the policy holder prior to tender of the claim to the carrier; and/or
- relieving the carrier of applying legal fees incurred prior to tender of the claim to the policy holder's deductible or self-insured retention.

Even a claim that the policy holder is convinced can be resolved within the deductible should be reported because experience has shown time and again, even simple disputes can snowball into contentious and expensive litigation. A carrier's claims counsel can see hundreds of new claims every year, and can use that experience to help a policy holder resolve all kinds of disputes in an expeditious and cost-conscious manner.

But reporting all claims, even the frivolous ones, will cause premiums to skyrocket, right?

Generally speaking, probably not. Insurance for media, intellectual property, errors and omissions, and cyber is not like, say, car insurance. If a policy holder is involved in a claim where its carrier was forced to pay amounts—whether for legal fees or as damages—in excess of the policy holder's deductible or self-insured retention, then a boost in premium can be expected. But even if a policy holder faces multiple claims that are all resolved without payment by the carrier, it is unlikely to have its premiums modified dramatically, if at all. (Of course, market forces can always cause an increase—or, for that matter, a decrease—in premium levels.)



Emily Caron is a Claims Counsel at Media/Professional Insurance

Partnering for Success

By Jon Van Meter

Blais Excess & Surplus Agency of Texas, Ltd., a specialized insurance brokerage firm, was founded in November 1998 on solid fundamental values, known around their offices as the "Four C's."

The company's 17 employees, spread throughout Dallas, Houston, and Austin, adhere to the principles of Continuity of coverage, Capacity, Coverages, and Cost, or the "Four C's."

"We apply those principles in tandem in everything we do," said President Phil Blais. "On all accounts, whether it's prospecting, renewals, or coverage analysis, the object is to do the best possible job for the client."

There is a 5th C of course—Commission, but Blais says that "plays no role in where we place coverage. We don't focus on commission. It's our feeling that if we take the time to educate the client on the Four C's, it allows us to frame the discussion and reach a positive outcome."

When Blais, who has worked in insurance since graduating from the University of North Texas with a degree in international finance in 1979, was in the process of starting his own agency in the 1990s, he knew he wanted the best people in the industry and people who would also be the best fit for his personality.

"I wanted to work with people whose passions and dreams matched my passion and dreams," he said.

Blais also made a personal assessment before starting the agency.

"I had to check my passion and decide if I had the heart to start something special," he said. "Most businesses fail because people are so caught up in developing business plans that they never ask 'Do you have the passion and energy to do this?' Anyone can write a business plan. You've got to have your heart in this all the way to succeed."

The creation of the agency was methodical, but the operation did not start from ground zero. Vikki Robinson, who is now the managing partner of the Houston office, opened the ARC Houston office in 1988 and built the book which Blais purchased in 1999.

"One of my first bosses told me that in insurance I would never be bored," said Robinson. "And I never have been."

Mark Swope also joined the agency in its early stages. Swope and Blais had partnered in various capacities for several years. Swope was the risk manager for Time, Inc. in the 1980s and placed coverage for the publishing titan with Media/Professional Insurance.

"Since its inception, Media/Professional Insurance has had a passion for the First Amendment," Swope said. "That is one of the defining memories of the company that I remember today."

When forming the agency, Blais also hired Scott Stortzum, now managing partner of the Houston office, upon his graduation with a finance degree at the University of Illinois.

With management in place, the Blais agency set out building a book of business based on sound principles, but it is not a one-stop-shop for all coverages. The Blais Agency readily admits it is not a general market.

"We know a lot about a little," said Swope. "We only work on Directors & Officers, Errors & Omissions, Employment Practices, Fiduciary Liability, Crime & Fidelity, and Kidnap/Ransom. We provide the retail agent with the expertise on these coverages that will allow them to be successful."

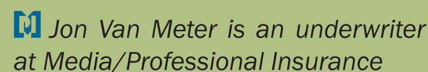
This experience affords Blais Excess a unique insight into the Professional E & O markets, especially cyber risks. Today, the Blais company has grown to over $75 million in premium volume.

"Overall in the market, I still see a product provided by a few select carriers with the expertise in underwriting and claims," Stortzum said. "The forms are in a continual state of evolution. I don't envision a day anytime soon when there is an ISO form for Cyber Tech."

As Robinson said, "This is a complex coverage option, and we specialize in it. Sometimes I talk to an agent or assistant and their eyes glaze over and I have to guide them through the process. The increasing number of claims and potential activity makes it to our advantage to be specialists."

With an office scheduled to open in San Francisco in October, Blais Excess is taking its special brand of service and experience and branching outside of Texas.

The reason for the success, Blais says, is that "we have fun. We are not just punching a clock at 8 and 4:30. We enjoy what we do and in the end that benefits our clients."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The Next Big Thing...

Continued from the front page

The *Times* wrote an article explaining why it made the decision to filter the article. Essentially, the *Times* took the British law restricting free speech into consideration because Great Britain did have an otherwise free press, unlike some other more oppressive countries.

The New York Times' decision was voted as "The Next Big Thing" in media law at the Media Law Resource Center's Bi-Annual Conference. Henry Hoberman, Senior Vice President, ABC, Inc., described the process as "Geo-filtering." Hoberman also expressed his concern that the *Times*' decision was a harbinger of things to come.

During a panel discussion about the top 10 media stories that could be "The Next Big Thing," Hoberman said it was possible that courts and legislatures throughout the world will increasingly permit content litigation against American media to be adjudicated pursuant to their own country's laws, resulting in the withering of global publishing and the establishment of "geo-filtering" as the norm. (For a complete list of the panel's Top 10, please see the Sidebar.)

Lee Levine, of Levine Sullivan Koch & Schulz LLP, moderated the panel and agreed with Hoberman's opinion that geo-filtering would likely become the norm.

"This is a function of the fact that to be profitable, media companies must go global," Levine said. "It is not likely that non-Western countries are ever going to adopt media-friendly laws, but media companies still want to do business there."

It is incumbent upon American media companies to realize they can be subjected to laws in other countries that are not as pro-freedom-of-speech, and thus tailor their activities accordingly.

The filtering software that the *Times* used was created by adapting existing technology normally used for targeted marketing. In effect, the software created geographic zones based on Internet Protocol addresses. By restricting access for certain IP addresses, certain content could be made unavailable to certain users.

By limiting access, in theory, American media companies could limit liability exposures by prohibiting access in certain foreign countries. In the case of *The New York Times*, the story potentially ran afoul of laws guaranteeing a fair trial. Other laws, such as defamation laws, have caused publishers to geo-filter.

The Media Law Resource Center's Top 10

1. Geo-filtering
2. Citizen Journalism
3. Indecency
4. Portable Content
5. Regulation of Truth
6. Commercial Speech
7. Internet Prior Restraints
8. De-Nationalization of Defamation
9. Net Neutrality
10. U.K. Defamation Law

Source: The Media Law Resource Center. Media/Professional Insurance also thanks the panel's co-moderator Lee Levine, of Levine Sullivan Koch & Schulz, for providing the complete list.

In February, *The National Enquirer* decided to begin restricting access to its website in the United Kingdom. That decision came after it settled a dispute with Cameron Diaz, who sued *The National Enquirer* in the United Kingdom—where libel laws are more plaintiff-friendly. Diaz was able to bring the lawsuit in the United Kingdom despite the fact that the article in question had been viewed only 279 times from United Kingdom internet addresses.

"There is so much exposure that, unless the publisher has deep pockets, geo-filtering is the only option," said Niri Shan, of Taylor Wessing in London.

In 2002, the application of foreign laws against American media companies that publish on-line became a real concern after the High Court of Australia decided *Gutnick -v- Dow Jones*. In *Gutnick*, the High Court of Australia held that Dow Jones had effectively published its article in Australia by making it available on-line. This subjected Dow Jones to Australian defamation law, which does not have the same free speech protections that are guaranteed under the First Amendment.

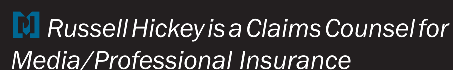
According to Levine, *Gutnick* was an important indication that there was not going to be a global consensus as to which laws would apply—whether it is the laws of the publisher's domicile or those of the plaintiff's location.

With Gutnick, the jurisdiction argument in foreign countries became much easier once the article had been published on the Internet. In conjunction with plaintiffs' lawyers seeing U.K. laws as an opportunity, the resulting forum-shopping is inevitable.

Last summer, Britney Spears sued *The National Enquirer* in Northern Ireland after the paper claimed Spears' marriage to Kevin Federline was in trouble. The choice of Northern Ireland seemed mostly motivated by the historical trend of higher damage awards for libel claims than in England.

Of course, as Shan noted, forum-shopping has not been confined to U.S. celebrities. Russian tycoons and wealthy Middle Easterners have taken advantage of the U.K. libel laws.

The decisions to prevent access to content in foreign countries raise important questions for any company with a website—foremost being whether the company is publishing any content that could run afoul of foreign laws. Of course, like all technologies, geo-filtering is not 100 percent effective. The logical follow-up question, then, would be whether courts will mandate geo-filtering as technological advances make geo-filtering more effective. That is to be determined.



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Global Uncertainty

Illustrating the world-wide exposure media companies face is the Ninth Circuit Federal Court of Appeals case of *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme.* Two French human rights groups filed suit against Yahoo in Paris, seeking to stop Yahoo from enabling the sale of Nazi memorabilia in France. French law prohibits possession and sale of Nazi related items. The French court found in favor of the French human rights groups, and ordered that Yahoo take all necessary measures to block French access to auctions selling Nazi memorabilia. Yahoo did not appeal the decision of the French court, and began the process of complying with the French court's order. However, Yahoo did file suit in U.S. federal court in California asking the court declare the French decision unenforceable in the U.S. The eleven appellate judges were divided in their opinions. Three judges found that they had no jurisdiction over the dispute. Three additional judges found that Yahoo had complied in large part with the French order, so there was no active controversy. With the combined opinions of these six judges, there stood a six judge majority voting for dismissal of the case. This case shows that a company's internet activities may subject them to liability in other countries, and U.S. courts may be disinclined to intervene.

Risky Business

Amusing but true stories from today's insurance world

Workout by Honda?

An E & O carrier recently received an inquiry for a quote for an entrepreneur who has developed a CD to use in the car with exercises to be done while driving. The applicant was looking specifically for coverage for the inevitable claims that will arise from the car accidents that will occur as a result. Keep your eyes on the road, people!

Creative Judging

Recently, a Texas bankruptcy judge took an attorney to task for a poorly written and incoherent motion filed in the judge's court. The judge issued an "Order Denying Motion for Incomprehensibility" in response to counsel's motion entitled "Defendant's Motion to Discharge Response to Plaintiff's Response to Defendant's Response Opposing Objection to Discharge." The judge took the unusual step of citing the 1995 Adam Sandler movie, "Billy Madison," applying some descriptive language from the film to the motion in question. The judge said that the motion was "...one of the most insanely idiotic things I've ever heard; ... at no point in your rambling, incoherent response was there anything that could even be considered a rational thought; ... everyone in the room is now dumber for having listened to it...." Apparently, he's not one to mince words.

Honor Thy Mother (but honor thy likeness more)

During the last election, Mina Brees was campaigning for a spot on the Texas Court of Appeals. In her campaign advertising, she used footage of her son, which is not all that uncommon among candidates for office. However, Mina's son is Drew Brees, quarterback for the New Orleans Saints. She received a demand from her son's attorneys ordering her to "cease and desist" the use of her son's likeness without his consent because it was "an infringement of his personal rights, property rights and common law trademark rights." She stopped using that ad, and began running a different one featuring a different son, Reid, who apparently does not guard his "rights" so judiciously.

If you have an amusing story to share, please send it to mpisource@mediaprof.com

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