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## Advertising Mistakes Can be Costly for Publishers and Broadcasters

By P. Blake Keating, Vice President, Claims — First Media

*media·insights is published periodically by OneBeacon Professional Partners to address the broad scope of exposures faced by our agents' and brokers' clients, as media-related companies scramble to meet the public's appetite for information, news and entertainment in an increasingly litigious society. This issue of media·insights recounts legal liabilities publishers and broadcasters may incur from advertisements they accept and offers thoughts regarding smart practices for mitigating risk exposures.*

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Publishers and broadcasters may face legal liability from the content of advertisements placed by businesses or individuals. All advertisements, including classified advertisements, should undergo editorial scrutiny as to potentially defamatory, embarrassing or infringing content.

Courts have held that publishers and broadcasters can be sued under a negligence theory if the ads were either created by the media entity or were created by a third party, but not

reviewed by the media entity. Publishers and broadcasters have a duty to investigate advertising content that is problematic on its face. In such situations it is wise risk management to involve in-house or outside counsel. Additionally, advertisers may initiate litigation for breach of contract or infringement upon First Amendment rights when their advertisements are rejected.

Publishers, broadcasters, advertisers, and advertising agencies have all been sued for economic loss and/or personal injury arising from the distribution of advertising. Advertisements may include misleading product comparisons or problematic photographs. In a recent case, a paid model under contract objected to her photograph later being used in a particular type of advertisement for which she was not aware. In this claim for false light invasion of privacy, the model's photograph was used in association with a public service announcement for the treatment of a communicable disease.

Advertisements for plastic surgery may give rise to litigation from the use of patient photographs. A publisher and a plastic surgeon, who published photographs of patients in his advertisements, were both sued by a woman for misappropriation and invasion of privacy arising from the "before" and "after" photographs of her nose job. There was not a hold-harmless agreement in place with the advertiser, who refused to defend or indemnify the publisher. The case was ultimately settled, but not before

incurring significant legal expense. Because plastic surgeons have become prolific advertisers and often publish photographs of patients in their advertisements, it is important that such advertisers warrant that releases have been procured for photographs, and that such warranties are backed by a promise to defend and indemnify the publisher.

Media companies have also been sued as contributory infringers for the unknowing publication of trademarked and copyrighted marks. A newspaper and advertiser were both sued for the use of the golden Oscar Statuette in a print ad to promote the advertiser's award-winning "best service".

Classified advertisements can also give rise to litigation when individuals use them to get even. A Southern California newspaper unwittingly published a classified ad placed by a woman, who had recently been spurned by her significant other. In her advertisement, which identified the former boyfriend by name, she accused him of morally reprehensible conduct and financial mismanagement. Needless to say, he was not amused and brought a defamation claim, which later settled.

Publishers and broadcasters who create advertisements for third parties may face additional liability exposure for errors or omissions caused by in-house advertising departments. For example, wrong telephone numbers and incorrect bar codes have been published or

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broadcast in advertisements. In one such scenario, a person who ran a business from his home was inundated with phone calls arising from the broadcast of his phone number instead of the correct number for the advertiser's call center. Advertising clients should always have the final "sign off" of advertisements with heightened diligence in respect to the review of bar codes, names, phone numbers and addresses.

Such cases should make all publishers and broadcasters aware of the substantial risk of loss arising from advertisements. Advertising content should always be reviewed by both the advertiser and media company to minimize exposure to liability. It is also a good practice to require advertisers to execute hold-harmless agreements inuring to the benefit of the publisher or broadcaster. Media companies should involve in-house or outside counsel in the review of potentially problematic advertising content.

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**OneBeacon**  
PROFESSIONAL PARTNERS

OneBeacon Professional Partners  
30 Tower Lane Avon, CT 06001  
tel 860.773.6150  
[www.onebeaconpro.com](http://www.onebeaconpro.com)