

Media Risk Consultants LLC

INDEPENDENT ADVISORS

When Break-Ups Become a Spectator Sport

Valentine's Day has passed, but emotional shockwaves still linger. Valentine's Day, a so called, "expectation holiday," takes a heavy toll on relationships with divorce attorneys reporting a spike in business well before the last of the chocolates have been coaxed from their red satin boxes. As the ranks swell at broken hearts clubs, the media often becomes an unwitting partner – or the solicitous and accommodating host – for spiteful acts of revenge. When Cupid sheaths his arrows to evade the process server, we shake off the rose petals and get back to the business of media liability and insurance.

It's no surprise that the media is society's answer to the pillory and often the retaliatory weapon of choice (for the imbalanced and immature) when relationships break down. Public humiliation and ridicule has long been a popular form of punishment. Classified advertisements have been used to publicize the faults - real or imagined - of former significant others and spouses with the classic, "if I can't have him, no one will want him after I've trashed his reputation" missive. Who can forget the giant posters of YaVaughnie Wilkins and Charles Phillip, a married Oracle executive and adviser to President Obama, that she had posted in Times Square in 2012 and other prominent places to reveal their affair. The posters featured a cozy picture of the couple with the words "Charles & YaVaughnie," along with a link to a website that showed dozens of photos of the pair, as well as love letters and other mementos of their eight-year relationship. For those seeking permanent closure – as in a casket, *Soldier of Fortune* provided a solution with its "Murder for Hire" classifieds placed by mercenaries until multi-million dollar wrongful death and negligent publication verdicts caused the publisher to rethink its advertising policy.

Because break-ups are good for ratings, television producers got into the act by airing programs dedicated to the demise of messy relationships – and even playing matchmaker for unlikely couples destined for failure. In 1995, talk show host, Jenny Jones, and her parent company, Warner Bros., were sued for wrongful death and negligent publication after a gay man, Scott Amedure, revealed during the show that he had a crush on male guest, Jonathan Schmitz. Several days later, Schmitz murdered Amedure citing his public humiliation relating to the broadcast as the catalyst for his crime. The jury awarded Amedure's family \$29 million. Ultimately, the Michigan Court of Appeals reversed the trial court and held that the show "had no duty to anticipate and prevent the act of murder committed by Schmitz three days after leaving the studio."

The immediacy and convenience of the Internet make it the perfect balm for broken, if not crazy, hearts. "Revenge Porn" websites have sprung up allowing users to post amateur intimate and pornographic photos of their exes that can be viewed by paid subscribers. This past January, a class action suit was filed against revenge site, Texxxan.com; its paid subscribers and GoDaddy.com, the

internet service provider. The causes of action sought by the plaintiffs are for invasion of privacy, emotional distress and civil conspiracy. The plaintiffs are seeking all forms of damages from the defendants, including punitive damages, and also seeking to temporarily and permanently restrain further publication of the website.

Because revenge is a dish conveniently served in tweets, bytes, and torrents, social media sites, such as Facebook, YouTube, Craigslist and Twitter, are frequently used to post unflattering remarks and to air other personal grievances. While the lovelorn who post the comments or the embarrassing photos may be liable for any number of personal injury torts, including defamation (provided that the published information is false), invasion of privacy and intentional infliction of emotional distress, the deep-pocket websites and service providers that facilitate the postings face little fear of reprisal because of sweeping immunity provided by Section 230 of the Communications and Decency Act (CDA). The CDA, which was passed in 1996, provides broad protection for internet content and service providers that publish third party sponsored content. Social media sites and revenge sites, such as Texxxan.com, are generally protected from liability because the offending content was posted by third parties.

Despite the protections afforded by the CDA, any internet service provider that allows postings by third parties should have media liability insurance in place to offset defense costs – and any potential exposure for settlement or loss. (Obviously, most underwriters wouldn't touch a revenge porn site with a ten-foot pole so the majority of these sites are likely uninsured.) The same is true of any brick and mortar media entity that allows third parties to disseminate content whether through a classified advertisement or an on-air television or radio rant.

There are some things insurance buyers should look for in a good media policy. Because creative plaintiff attorneys may attempt to plead innovative causes of action, such as civil conspiracy, harassment, cyberharassment or cyberstalking to circumvent CDA and First Amendment protections, traditional "named peril" forms may be inadequate. An "all-risk" or "open peril" wording is better. Because there's a chance that someone may actually sustain injury, the typical media policy's exclusion for bodily injury arising from the content of insured media is a problem. For the same reason, underwriters will be reluctant to grant that coverage for bodily injury. A middle approach that would work for everyone is to provide the insured with defense costs coverage to assert First Amendment and other defenses, but to exclude coverage for indemnity.

Revenge is nothing new, but today's media and social media companies are providing new ways for the jilted to get even. These deep-pocket enablers may be the target of lawsuits and need to be prepared with creative insurance solutions.

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