

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE HANOVER INSURANCE COMPANY,

Plaintiff,

v.

URBAN OUTFITTERS, INC., et al.,

Defendants.

Civil Action No. 2:12-cv-03961-TON

URBAN OUTFITTERS, INC., et al.,

Third-Party Plaintiffs

v.

ONEBEACON AMERICA
INSURANCE COMPANY,

Third-Party Defendant.

[PROPOSED] ORDER

AND NOW, this ____ day of _____, 2013, upon consideration of the Motion for Judgment on the Pleadings of The Hanover Insurance Company and all responses thereto, IT IS HEREBY ORDERED that the motion is denied.

BY THE COURT:

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE HANOVER INSURANCE COMPANY,

Plaintiff,

v.

URBAN OUTFITTERS, INC., et al.,

Defendants.

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v.

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Third-Party Defendant.

**ORAL ARGUMENT
REQUESTED**

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

I. INTRODUCTION

The sole issue raised by Hanover is whether this Court can determine conclusively that the “first publication” exclusion in the relevant insurance policies bars coverage for *all* of the conduct alleged in the Navajo Plaintiffs’ complaint. Any fair reading of the complaint, together with the attached exhibits, reveals that Hanover’s attempt to avoid coverage is misguided and, at best, premature.

It is true that much of the Navajo Plaintiffs’ complaint refers to Urban Outfitters’s alleged use of the words “Navajo” and “Navaho” and associated marks in its product advertising. It is also true that the complaint alleges the use of these words first began in March of 2009, prior to

the effective date of the policies at issue here. But, the allegations of wrongdoing are not confined to use of the Navajo Plaintiffs' names and marks. The 36-page complaint alleges a wide array of allegedly injurious advertising that infringed upon or diluted the Navajo Plaintiffs' marks or was otherwise unfair and anti-competitive. The complaint is utterly silent as to when much of this allegedly improper advertising took place. The Court thus cannot conclude, as Hanover urges, that all of the claims are necessarily barred by the "first publication" exclusion.

The complaint also alleges injury resulting from Urban's advertising of products such as a Vintage Woven Bag, Vintage Heishi Bead Earrings, Vintage Beaded Belt Buckle, and a Palmedo Blanket Bag, to name just a few. The Navajo Plaintiffs are careful to note that their complaint merely cites examples and does not purport to be an exhaustive list. The Navajo Plaintiffs' complaint does not say when these products were first offered or when the advertising associated with them took place. Hanover seems to believe that because these advertisements fall under the same category of injurious conduct (*i.e.*, misleading the consumer as to product origin), the first publication exclusion applies as long as one of the advertisements took place prior to the beginning of the relevant policy period. As the complaint and attached exhibits make clear, however, the publications for each of these products are unique. The words used to advertise the handbag, for example, are different than the words used to describe the belt buckle. Thus, in the absence of specific allegations as to when these individual products were first advertised, it cannot be determined whether the Navajo Plaintiffs' injury results from material first published prior to the beginning of the policy period.

Moreover, even to the extent that the advertising associated with these products is "similar" to a prior publication, the exclusion does not apply. Contrary to the arguments advanced by Hanover, in order for the exclusion to apply to "similar" publications, the exclusion

must say so explicitly. Hanover could have used exclusion language that would have applied where the prior publication was “similar” to prior publications, but it elected not to. Hanover cannot now broaden the exclusion to cover advertising that is plainly outside the scope of the exclusion.

While some of the Navajo Plaintiffs’ injury may well arise out of the “publication of material whose first publication took place before the beginning of the policy period,” it cannot be determined that *all* of its injury arises from prior publications. Taking into account not only the allegations of the Navajo Plaintiffs, but also the fact that “[j]udgment on the pleadings is, of course, not lightly to be given,” *Moss v. School Dist.*, 33 F.R.D. 518, 519 (E.D. Pa. 1963), it follows that the Court should reject Hanover’s effort to avoid coverage and deny its motion.

II. FACTS

A. The Navajo Plaintiffs Allege Urban Caused “Advertising Injury”

On February 28, 2012, The Navajo Nation, Diné Development Corporation and the Navajo Arts and Crafts Enterprise (collectively “the Navajo Plaintiffs”) sued Urban Outfitters, Inc., and related entities.¹ The Navajo Plaintiffs alleged that certain of Urban’s products and advertising activities harmed the Navajo Plaintiffs by infringing upon its trademarks, among other things.

Much of the Navajo Plaintiffs’ complaint relates to Urban’s alleged use of the name “Navajo” or “Navaho” in its product descriptions and advertising, which the Navajo Plaintiffs allege began as early as March 2009. The Navajo Plaintiffs also claim injury resulting from a series of more general advertising that did not necessarily include use of the word “Navajo” or

¹ These entities include UO.com, LLC, Urban Outfitters Wholesale, Inc., Anthropologie, Inc., Anthropologie.com, LP, Free People of PA, LLC, and FreePeople.com, LLC. They are referred to collectively as “Urban.”

“Navaho.” The allegations pertaining to these general advertising activities do not specify when the activity began, and it cannot be determined from the complaint when such activities began.

For example, in paragraph 71, the Navajo Plaintiffs allege that Urban has sold products using terms such as Native American, American Indian, or Tribal:

Defendant is a non-Indian that has offered for sale and sold products in an Indian style, motif, or design using the terms “Native American,” “American Indian,” Tribal,” and the name of a particular Indian Tribe without qualifying the usage of such terms, confusing consumers and causing customers to believe they are being offered or purchasing authentic Indian-made products when in fact the Defendant’s products are not authentic Indian-made products.

Navajo Am. Comp. at ¶ 71. The complaint does not identify what products Urban has allegedly sold using these more general descriptors, when Urban began to sell them, or even what the designs, styles or particular Indian tribes were.

Similarly, paragraph 74 alleges the use of “Native American” and “Indian” identifiers on Urban’s website:

On its website, Defendant used or uses search or identifier terms such as “Native American,” “Indian,” Navajo,” or a name of a particular Indian Tribe, harming Plaintiffs, and consumers falsely suggesting its products are authentic Indian-made products, and creating confusion in the marketplace.

Id. at ¶ 74. The Navajo Plaintiffs attached an exhibit to the complaint identifying a small sample of products, but it does not identify all of the products or specify when Urban began to advertise or sell them.²

Paragraph 77 provides as follows:

² Paragraph 75 also references the attached Exhibit C, which identifies additional products and advertising that allegedly caused injury to the Navajo Plaintiffs.

Defendant's products which are the subject of this Amended Complaint are in a traditional Indian style, and are composed of Indian motifs and Indian designs, but are without identifier terms or labels. A consumer may find these products using search terms "Indian," "Native American," "Tribal" or "Navajo," which falsely suggests they are Indian products. Defendant's marketing, displaying, and retailing such products, which include, but are not limited to, Defendant's "Saddle Blanket Bag" and "Magical Feather Bag" with its overall line of suggested Indian products, as they are or have been displayed for online marketing and retailing at Defendant's website in such a manner to convey these false suggestions, are attached hereto collectively as Exhibit E. *The exhibits attached hereto are illustrative, not exhaustive, and only include webpages. Plaintiff alleges Defendant engaged in its unlawful acts in its stores and catalogs in addition to its online stores. Further violations will be found through discovery.*

Id. at ¶ 77 (emphasis added). Exhibit E does not identify all of the products or specify when Urban began to advertise or sell them. In addition, Exhibit E makes it clear that the advertisements for each of the products are distinct. *See Ex. E.*

The Navajo Plaintiffs also generally alleged that Urban marketed its products using the name "Indian," *id.* at ¶ 108, that Urban misappropriated the Navajo Plaintiffs' "advertising ideas and styles of doing business," *id.* at ¶ 115, and that Urban disparaged the Navajo Plaintiffs' products. *Id.* at ¶ 116; *see also id.* at ¶ 117-19. But, here again, the Navajo Plaintiffs' Amended Complaint is devoid of any allegations as to when this activity occurred.

B. Urban's Insurance Program and Hanover's Claims

OneBeacon issued commercial general liability and umbrella coverage for the period of July 7, 2008 through July 7, 2010. According to Hanover, for the policy year beginning July 7, 2010, OneBeacon issued a "fronting policy" providing both commercial general liability coverage and umbrella coverage. Although the policy was written on a OneBeacon form, Hanover asserts that it is the insurer on the risk for that policy year under an agreement with

OneBeacon. For the policy year beginning July 7, 2011, Hanover issued commercial general liability and commercial umbrella policies to Urban.

Shortly after the Navajo Plaintiffs filed their action, Urban sought coverage from One Beacon and Hanover. Hanover agreed to defend and is defending Urban subject to a reservation of rights. But now Hanover has sought a declaration that it has no obligation to defend or indemnify Urban under the 2010 fronting policies or the 2011 Hanover policies. In its Complaint, Hanover alleges that the entirety of the Navajo Plaintiffs' action is "premised upon [Urban's] actions in connection with the sale or advertising of the various products using the 'Navajo' or 'Navaho' names and/or Indian styles or motifs." Hanover Comp. at ¶ 7. Hanover further claims that the Navajo Plaintiffs' Amended Complaint alleged that "the offending advertising materials have been published 'since at least March 16, 2009.'" *Id.* at ¶ 12. Based on the Policies' "first publication" exclusion, Hanover stated that it "has no potential duty to indemnify, and thus no duty to defend" Urban in regard to the Navajo Plaintiffs' action. *See id.* at ¶ 19.

C. Hanover's Motion for Judgment on the Pleadings

On February 11, 2013, Hanover brought its Motion for Judgment on the Pleadings. As admitted by Hanover, the sole issue raised by its Motion³ is the applicability of the Policies' "first publication" exclusion. *See* Brief at 3. The entirety of Hanover's Motion focuses on four of the 133 paragraphs of the Navajo Plaintiffs' Amended Complaint. *See* Mot. at ¶ 6. The

³ Hanover claims that it has attached to its Complaint "[a]n undisputedly authentic red-lined version of the" the Navajo Plaintiffs' Amended Complaint. Motion at ¶ 2. Not only is it unclear what an "authentic red-lined version" is, but Urban, in its Amended Answer, denied that Hanover had attached to its Complaint a true and correct copy of the Navajo Plaintiffs' Amended Complaint. *See* Am. Ans. at ¶ 6. For some unknown reason, Hanover repeatedly refers to Urban's Answer even though Urban timely filed an Amended Answer in this action.

language is worth quoting: Hanover says that “[i]t is alleged in the Amended Complaint in the underlying action that the offending advertising materials have been published ‘since at least March 16, 2009’ (*See, e.g.*, Paras 2, 37, 41 and 78)”. *Id.*

In its Brief, Hanover again looks to those same four paragraphs and concludes that all of injurious publications were first published prior to the beginning of Hanover’s policy – despite the fact that there are no time-of-publication allegations for much of the wrongful conduct, and the fact that much of the wrongful conduct remains unspecified. At its essence, Hanover’s Motion relies on placing all of Urban’s alleged acts into two categories. The first category relates to the Navajo Plaintiffs’ claim Urban used the “Navajo” and “Navaho” names and marks since March, 2009. *See id.* at 10 (citing Navajo Am. Comp. ¶¶ 2, 37, 41). The second category relates to the Navajo Plaintiffs’ allegations that Urban falsely suggested its goods were “Indian-made, an Indian product, a product of an Indian tribe, or the product of an Indian arts and crafts organization resident within the United States” *Id.* (citing Navajo Am. Comp. ¶ 78). Hanover contends that it is the category of the alleged bad act and not what was actually published that controls when determining the application of the “first publication” exclusion. As with Hanover’s Complaint, Hanover alleges that because these categories of alleged activity began in March, 2009, that the policies’ “first publication” exclusions apply to preclude coverage altogether; indeed, to allow Hanover to abandon a defense it undertook. *See* Brief at 15.

III. ARGUMENT

A. Standard of Review

Under Federal Rule of Civil Procedure 12(c), “judgment will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” *See* Fed. R. Civ. P. 12(c). In this context, a court “must view the facts presented in the pleadings and the inferences to be drawn therefrom in the light

most favorable to the nonmoving party.” *Rosenau v. Unifund Corp.*, 539 F.3d 218, 221 (3d Cir. 2008) (quoting *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 290-91 (3d Cir. 1988)). Stated differently, “a judgment on the pleadings is only proper if ‘no set of facts could be adduced to support the [non-movant’s] claim for relief.’” *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980).

B. The Duty to Defend Is Broad

It is black letter law in Pennsylvania that there is a “broad duty to defend.” *St. Paul Reinsurance Co. v. Bottoms Up*, 2002 U.S. Dist. LEXIS 12136, at *5 (E.D. Pa. May 10, 2002); *Am. & Foreign Ins. Co. v. Jerry’s Sport Ctr., Inc.*, 2 A.3d 526, 543 (Pa. 2010) (noting “[t]he broad duty to defend that exists in Pennsylvania”).⁴ This duty to defend is determined solely by the four corners of the complaint. *See, e.g., Jerry’s*, 2 A.3d 526, 541 (Pa. 2010) (“The question of whether a claim against an insured is potentially covered is answered by comparing the four corners of the insurance contract to the four corners of the complaint”). Importantly, when reviewing the complaint to determine if there is coverage, the allegations “are to be taken as true and liberally construed in favor of the insured.” *CAT Internet Sys. v. Providence Wash. Ins. Co.*, 153 F. Supp. 2d 755, 759 (E.D. Pa. 2001).

It must be emphasized that all doubts as to coverage are to be “resolved in favor of the insured.” *Travelers Prop. Cas. Co. of Am. v. Mericle*, 2010 U.S. Dist. LEXIS 90394, at *17 (M.D. Pa. Aug. 31, 2010). Thus, if any ambiguity exists whatsoever in the policy, it must be construed in favor of the insured. *See, e.g., Houghton v. Am. Guar. Life Ins. Co.*, 692 F.2d 289, 291 (3d Cir. 1982) (“any ambiguity in the policy *must* be construed against the insurer, and in a

⁴ In its Motion and Brief, Hanover maintains that Pennsylvania law applies. *See* Hanover Motion at 6-7 (citing Pennsylvania law on duty to defend). Urban agrees.

manner which is more favorable to coverage.”) (emphasis in original; internal quotations omitted).

Further, policy exclusions are read in favor of the insured. Not only must potential exclusions must be strictly construed against the insurer, *West American Ins. Co. v. Lindepuu*, 128 F. Supp. 2d 220, 227 (E.D. Pa. 2000), but the burden is on the insurer to prove the applicability of an exclusion. *See, e.g., A.G. Allebach, Inc. v. Hurley*, 540 A.2d 289, 292 (Pa. Super. 1988).

Taking into account the four corners of the complaint and construing all ambiguous terms and exclusions against the insurer, there merely needs to be only one “potentially covered” claim to trigger coverage. *See, e.g., Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 746 (3d Cir. 1999); *CAT Internet*, 153 F. Supp. 2d 755, 759 (E.D. Pa. 2001). Thus, all that is required for there to be a “potentially covered” claim is that the complaint “comprehend[] an injury which may be within the policy.” *Cadwallader v. New Amsterdam Casualty Co.*, 152 A.2d 484, 488 (Pa. 1959) (citing *Lee v. Aetna Cas. & Sur. Co.*, 178 F.2d 750 (2d Cir. 1949)). This standard takes into account that a complaint may not be clear as to the actual underlying facts or its ultimate theory of damages, but as long as an issue for which there is coverage remains a possibility, there is a requirement for coverage. *Id.*

C. The “First Publication” Exclusion Does Not Preclude Coverage for Urban

The “first publication” exclusion does not necessarily preclude coverage for all of the injury alleged in the Navajo Plaintiffs’ complaint. First, even though the Navajo Plaintiffs allege that Urban first began to use the terms “Navajo” and “Navaho” in its advertising as early as March of 2009, that is not the only alleged conduct giving rise to the Navajo Plaintiffs’ complaint. Indeed, the Navajo Plaintiffs allege injury arising out of a series of more general

advertisements that falsely led customers to believe they were purchasing genuine Indian products. The Navajo Plaintiffs, however, are silent as to when these advertisements began. Second, even to the extent that this general advertising is similar to the Navajo Plaintiffs' advertising, the policies' restrictive "first publication" exclusion does not apply.

1. The Complaint Is Silent As to When Much of The Allegedly Harmful Advertisements Were First Published.

In its Motion and Brief, Hanover contends that the "first publication" exclusion precludes coverage because all of the allegedly offending advertising began as early as March 16, 2009. *See, e.g.*, Brief at 10. That is a mischaracterization of what the pleadings actually say. It is true that the Navajo Plaintiffs' complaint explicitly states that the use of "Navajo" and "Navaho" began in 2009. But the complaint does not say that all of the offending advertising began that early. Two examples illustrate the point.

First, the Navajo Plaintiffs' complaint alleges in Paragraphs 70 through 80 that Urban sold, displayed, and advertised a variety of products that falsely suggested they were of Indian origin. For example, in paragraph 71, the Navajo Plaintiffs allege that Urban has sold products "in an Indian style, motif, or design using the terms "Native American," "American Indian," [and] "Tribal." Paragraph 74 alleges the use of "Native American" and "Indian" identifiers on Urban's website, suggesting the products are of Indian origin. Further, Paragraph 77 alleges that Urban advertised products "composed of Indian motifs and Indian designs" but those allegations are without identifier terms or labels. The complaint is utterly silent on when any of this occurred.

Second, the exhibits to the Amended Complaint also identify a multitude of products and related advertising but, apart from advertising that incorporates the word "Navajo" or "Navaho," the Amended Complaint does not specify precisely when any of the advertising for these

individual products took place or began. Thus, Exhibit E identifies a “Vintage Woven Handbag” and “Vintage Heishi Bead Earrings,” which were advertised on Urban’s website. The complaint does not specify when either of these products were first offered for sale or first advertised. It therefore is improper to conclude, as Hanover apparently does, that both were first advertised prior to July 7, 2010, the effective date of the Hanover policy.

The complaint does not aver when all of the products identified on the exhibits were first advertised or offered for sale. Nor does it say that all of them were offered for sale and advertised at the same time. Because each product is advertised individually with its own unique description, it is therefore necessary to determine when each product was advertised before a conclusive coverage assessment can be made. Upon a full review of the facts developed in discovery, it may turn out that some portion of the Navajo Plaintiffs’ complaint is covered even if other portions of the complaint are not. As the Court knows, if any part of the complaint is potentially covered, Hanover owes a defense.

Thus, if the Vintage Woven Handbag, for example, was first advertised prior to July 7, 2010, coverage for injury arising from that advertising likely will not be covered. However, if the Vintage Heishi Bead Earrings were first advertised after July 7, 2010, the exclusion will not apply to the earrings, whether or not it applies to the handbag. As Exhibit E demonstrates, these two products necessarily involved advertising that was distinct from one another. *See* Ex. E. The earrings are described as “small discs or tube shaped beads made of organic shells” that originate “from Santo Domingo Pueblo Indians in New Mexico.” The handbag is described as a “Native Indian woven bag with yarn tassels” and a “floral printed fabric.” Even if it is determined that one of these products was advertised prior to the beginning of the policy period,

the first publication exclusion will not necessarily bar coverage for harm resulting from publications associated with the other product because the two publications are very different.

Hanover attempts to apply the exclusion broadly to all advertising relating to product origin⁵ just because the first product-origin advertising may have taken place prior to the policy period. But, the exclusion plainly applies to “*material* whose first publication” took place before the beginning of the policy period. The exclusion thus applies only where the “material” is the same. It makes no difference that a prior publication may have falsely led consumers to believe they were authentically Indian-made if the prior publication used different material than the later advertisement. The complaint does not allege, and there is no basis to presume, that each of the products referenced in the complaint or identified in Exhibits C and E – all of which were distinct in their design and description – was advertised as early as 2009. The broad-brush approach that Hanover uses to avoid coverage for products allegedly using the Navajo Plaintiffs’ mark does not apply to products whose distinct advertising may have been first published after the beginning of the policy period.

2. The Appropriate Standard for the Policies’ “first publication” Exclusion Where Materials Are the Exact Same Materials

It is anticipated that Hanover will argue that the “first publication” exclusion applies to all products as long as the advertising was substantially similar to an advertisement first published prior to the effective date of the policy. As discussed above, that argument – if it is made – disregards the plain language of the advertising identified in the complaint. Moreover,

⁵ In its brief, Hanover references paragraph 78 of the Amended Complaint, which alleges that Urban “has advertised [a]t least since March 16, 2009” products suggesting that they were Indian-made.

any such argument would be inconsistent with the exclusion, which only applies where the publication is exactly the same as the prior publication.

As if the narrow language of its exclusion did not exist, Hanover asserts that “most courts have held that prior publication exclusions unambiguously bar coverage where the offending advertising materials published before the policy period were either the same, or ‘substantially similar’ [to] those published afterward, regardless of whether different or additional injuries occurred before and after the effective date of coverage.” Brief at 11. Hanover concedes that there is “no controlling Pennsylvania state court authority on this subject,” but it fails to note persuasive authority from a Pennsylvania federal court that the policy must explicitly reference “similar” material to be applied as broadly as Hanover wants.

Some forms of the standard “first publication” exclusion apply “if the first injurious publication . . . of the *same or similar material*” occurred prior to the policy period. *See, e.g., Forum Ins. Co. v. Ranger Ins. Co.*, 1992 U.S. Dist. LEXIS 11360, *40-41 (N.D. Ill. July 27, 1992) (emphasis added). Other forms, like those at issue here, omit any reference to “similar” material. In *Int’l Comm’n Materials, Inc. v. Employer’s Ins. Of Wausau*, 1996 U.S. Dist. LEXIS 21825 (W.D. May 29, 1996), the court in the Western District of Pennsylvania held that the exclusion does not apply to similar publications unless the exclusion says so explicitly. In that case, the plaintiff insured had been sued by a competitor for infringing on the competitor’s trade dress beginning prior to the policy period of the relevant policy. Wausau sought to avoid coverage based on the “first publication” exclusion, which was identical to the exclusion here. Wausau argued that the “first publication” exclusion applied because the overall advertising theme, of which the offending advertisements were part, began prior to its policy period. The court rejected this argument, stating that “[i]f Wausau had intended that the exclusion apply to

advertising campaigns or material that is ‘similar to’ material published before the inception of the policies, it could have provided such language.” *Wausau*, 1996 U.S. Dist. LEXIS 21825, at *13.

Courts in other jurisdictions have reached the same conclusion. For example, in *Taco Bell Corp. v. Continental Cas. Co.*, 388 F.3d 1069 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit held that the “first publication” exclusion would not apply unless the difference between the pre- and post-publications are “so slight as to be immaterial.” *Id.* at 1073. In that case, the insurer asserted that the exclusion should apply to Taco Bell’s entire “Chihuahua with an attitude” advertising campaign, which was allegedly stolen from the advertising agency that created it. *Id.* The court rejected the insurer’s position because the later iterations also included “subordinate” ideas that were incorporated into later commercials. *Id.* The court noted that although Taco Bell had allegedly misappropriated the idea of the Chihuahua prior to the policy period, Taco Bell was alleged to have misappropriated other ideas as well, constituting “fresh wrongs” apart from the idea originally misappropriated. *Id.*

The decisions in *Wausau* and *Taco Bell* support Urban’s position here. The Navajo Plaintiffs have alleged that Urban has advertised a series of products, each with unique descriptions, that improperly suggest the products are authentically Indian-made. But, Hanover’s attempt to put these allegations into one category does not mean that the publications for each of the goods that fall into that category are the same. Even if one or more products were first advertised prior to the effective date of the policy, the Amended Complaint does not allege that *all* of them were first advertised prior to the effective date, and the exhibits to the Amended Complaint help to demonstrate the diversity of descriptions and designs for Urban’s goods. The

exclusion will only apply if the offending advertising is exactly the same, and it is immaterial that these alleged wrongs may bear some similarity to one another.

3. Cases Cited by Hanover Do Not Support Hanover's Position

A few comments about Hanover's cases may be useful as they reveal just how far Hanover has gone in trying to abandon its duty to defend Urban. First, unlike *Wausau*, none of the cases cited by Hanover apply Pennsylvania law. *See Applied Bolting Tech. Prods., Inc. v. U.S. Fid. & Guar. Co.*, 942 F. Supp. 1029 (E.D. Pa. 1996) (applying Vermont law); *Interlocken Int'l Camp., Inc. v. Markel Ins. Co.*, 2003 LEXIS 3249 (D.N.H. Mar. 4, 2003) (applying New Hampshire law); *Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 203 F. Supp. 2d 587 (E.D. Va. 2002) (applying Virginia law); *Kim Seng Co. v. Great Am. Ins. Co.*, 179 Cal. App. 4th 1030 (Cal. Ct. App. 2009) (applying California law); *Ringler Assocs., Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165 (Cal. Ct. App. 2000) (applying California law).

Second, the holdings of the cases cited by Hanover are essentially non-sequiturs when applied to the scenario presented by the Amended Complaint. For instance, three of the five cases cited by Hanover stand for the unremarkable proposition that the "first publication" exclusion applies when the insured has used the exact same phrase or word to advertise its products both before and after the relevant policy period. *See Applied Bolting*, 942 F. Supp. at 1034, 1036 (underlying lawsuit alleged insured improperly indicated that "all DTIs made to ASTM F959-94a" and that this was done prior to the policy period); *Kim Seng*, 179 Cal. App. 4th at 198 (underlying lawsuit alleged only the improper use of "Que Huong" prior to the policy period); *Interlocken*, 2003 LEXIS 3249, at *1, 2 (underlying lawsuit alleged use of "Interlocken" in internet domain, name, website and advertising prior to policy period).

The fourth case cited by Hanover, *Superformance*, stands for the similarly unremarkable proposition that a lawsuit filed prior to a policy period is not covered by that policy. *See*

Superformance, 203 F. Supp. 2d at 589-90 (noting initial complaint filed on December 19, 2000 and insurance policy purchased on March 10, 2001). Even though an amended complaint was subsequently filed, the court noted that it contained “almost all of the exact same factual language and restates the first six counts verbatim.” *Id.* Therefore, the “first publication” exclusion applied. *Id.*

Finally, the last case relied upon by Hanover, *Ringler*, dealt with the “first publication” exclusion in the context of a defamation claim. *See Ringler*, 80 Cal. App. 4th at 1178. As the court in that case observed, defamation claims presented unique challenges because a defamatory statement requires that the “‘gist or sting’ of the statement [be] true or false ... in *substance*.” *Id.* at 1182 (emphasis in original). Based on this peculiarity of defamation law, *i.e.*, that the substance of the statement controlled, the court held that the “first publication” exclusion would preclude coverage where “substantially the same material” was published prior to the policy period. *Id.* (“For this reason, we interpret the language of the Policy exclusion at issue”). In this case, of course, the Navajo Plaintiffs have not alleged that Urban made any defamatory statements so this standard is inapplicable.

IV. CONCLUSION

The “first publication” exclusion does not preclude coverage for Urban for at least two reasons. First, the exclusion must be read to preclude coverage only where the “same” material is at issue because the Policies do not include language precluding “similar” material and the exclusion must be construed against Hanover. Second, the allegations of the Navajo Plaintiffs clearly set forth “fresh wrongs” that are not alleged to have occurred at any specific time. As a result, Urban respectfully requests that this Court deny Hanover’s Motion for Judgment on the Pleadings.

Dated: March 7, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2013, the foregoing Defendants' Opposition to Plaintiff's Motion for Judgment on the Pleadings was electronically filed using the CM/ECF System, and notice was given to all parties using this system.

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