

CHAPTER THIRTEEN

PRIVACY

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PRIVACY

§ 13.1 INTRODUCTION

Over a century ago, two Harvard law students wrote a law review article following the history of tort law with regards to protections for personal injury as well as property damage. Samuel D. Warren and Louis D. Brandeis, in their article entitled *The Right to Privacy*, published in 4 Harv. L. Rev. 193-220 (1890), considered “whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual.” Warren and Brandeis postulated that such a right should be protected by tort law.

Over time, the common law right to privacy developed into the four basic torts as set out by Prosser in the Second Restatement of Torts at §§ 652A-652I (1977):

- appropriation,
- intrusion,
- public disclosure of private facts, and
- false light.

These torts will be addressed in detail below. As technological advances have been made, the risk of having one’s right to privacy invaded has increased exponentially and the ability to broadcast this privacy invasion has become instantaneous and global with the development of the Internet.

However, as the Minnesota Supreme Court recognized, “the common law is not composed of firmly fixed rules. Rather ... [it] is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men.” See *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998) (citing *State ex rel. City of Minneapolis v. St. Paul, M. & M. Ry. Co.*, 98 Minn. 380, 400-01, 108 N.W. 261, 268 (1906).)

Now recognized in most jurisdictions, the invasion of privacy “has two main aspects: (1) the general law of privacy, which affords a tort action for damages resulting from an unlawful invasion of privacy, and (2) the constitutional right of privacy which protects personal privacy against unlawful governmental invasion. The general law of the right of privacy, as a matter of tort law, is mainly left to the law of the states....” See *Renwick v. News and Observer Publishing Co.*; *Renwick v. Greensboro Daily News*, 310 N.C. 312, 312 S.E.2d 405, 411 (N.C. 1984) cert. denied.

§ 13.2 DEVELOPMENT OF PRIVACY TORT

13.2.1 Common Law

The concept of the right “to be left alone” in United States legal history can be found all the way back to the Supreme Court case, *Wheaton v. Peters*, 33 U.S. 591, 634 (1834) (“[the] defendant asks nothing — wants nothing, but to be let alone until it can be shown that he has violated the rights of another.”) Warren and Brandeis used this concept in their *The Right to Privacy* article and Brandeis subsequently used it in his dissent in *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (the first wiretapping

case.) The Georgia Supreme Court, however, was the first to expressly declare a common law “right to privacy.” In *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (Ga. 1905), the Georgia Supreme Court held that the ‘right of privacy has its foundation in the instincts of nature,’ and is therefore an “immutable” and “absolute right” derived from natural law.

Most states have accepted some or all of the Prosser four privacy torts at various times in the last few decades. These torts were not recognized in Minnesota until Minnesota Supreme Court Chief Justice Blatz ruled in the 1998 *Lake v. Wal-Mart Stores* case that Minnesota recognized the privacy torts of appropriation, intrusion upon seclusion and public disclosure. Chief Justice Blatz wrote that, “[w]e decline to recognize the tort of false light publicity at this time. We are concerned that claims under false light are similar to claims of defamation, and to the extent that false light is more expansive than defamation, tension between this tort and the First Amendment is increased.” *Lake*, 582 N.W.2d at 235. Prior to the *Lake* ruling, Minnesota was not held to have a common law right to claim an invasion of privacy. *Berg v. Minneapolis Star & Tribune Co.*, (D.C. Minn. 1948) (holding Minnesota had no invasion of privacy protection under statute or common law) and *Hendry v. Conner*, 303 Minn. 317, 226 N.W.2d 921 (1975) (the law of Minnesota has never recognized a cause of action for invasion of privacy).

As noted by the Minnesota Supreme Court in its *Lake* decision, the “invasion of privacy” tort is recognized by the majority of jurisdictions. *Lake*, 582 N.W.2d at 235. “Although New York and Nebraska courts have declined to recognize a common law basis for the right to privacy and instead provide statutory protection, we reject the proposition that only the legislature may establish new causes of action. The right to privacy is inherent in the English protections of individual property and contract rights and the “right to be let alone” is recognized as part of the common law across this country.” *Lake*, 582 N.W.2d at 234-235. According to J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1.5[E] (1997), judicial acceptance of the four distinct torts that comprise the general right of privacy is “universal.”

Some states, like New York, chose to codify a right to protection from the “invasion of privacy.” “While the courts of other jurisdictions have adopted some or all of these torts, in this State the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law; we have no common law of privacy.... Balancing the competing policy concerns underlying tort recovery for invasion of privacy is best left to the Legislature, which in fact has rejected proposed bills to expand New York law to cover all four categories of privacy protection.” See *Talmor v. Talmor*, 185 Misc.2d 293, 712 N.Y.S.2d 833, 836 (N.Y. Sup. 2000).

The invasion of privacy tort, even if codified by state statute, generally does not apply to corporations. “We have said that G.L. c. 214, § 1B, protects against the ‘disclosure of facts about an individual that are of a highly personal or intimate nature.’ ... A corporation is not an ‘individual’ with traits of a “highly personal or intimate nature.” Cases from other jurisdictions unanimously deny a right of privacy to corporations.” See, *Warner-Lambert Co. v. Execuquest Corp.*, 427 Mass. 46, 691 N.E.2d 545, 548 (Mass. 1998) (citations omitted). The specific concept of “personal privacy,” at least as a matter of common law, does not apply to corporations and does not apply in the context of a Freedom of Information Act request as a justification for withholding information. *FCC v. AT&T, Inc.*, 131 S.Ct. 1177, 11 Cal. Daily Op. Serv. 2701 (U.S. 2011).

13.2.2 Statute

Although the privacy tort law is based on common law, the United States has enacted certain federal statutes which provide for additional privacy protections. The recent privacy statutes are targeted at certain regulated entities to ensure that the corporate entities develop minimum standards to protect an individual's right to privacy. Two of these statutes were aimed at regulated industries: financial institutions and health care providers. In both cases, the concern was that, with the advent of the internet and the ease at electronically transmitting information, these two types of entities could potentially put their customer's private information at risk. The laws were drafted to provide guidelines for regulated entities of the minimum security standard to protect "personally identifiable information" or "PII" under the Gramm-Leach-Bliley Act for financial institutions, or "protected health information" or "PHI" under the Health Information Portability & Accountability Act for health care providers.

13.2.2.1 Health Information Portability & Accountability Act

In 1996, Congress passed the Health Information Portability & Accountability Act ("HIPAA") as Public Law 104-191. The privacy rule under HIPAA was published in December 2000 and required regulated entities to implement standards to protect and guard against the misuse of individually identifiable health information. Although they have since been amended, the privacy rules identify when individually identifiable information may be: (i) used or disclosed; (ii) shared with others; (iii) protected from unauthorized disclosure; and (iv) the right of the individual to review and/or correct the information. See 45 C.F.R. Parts 160, 162, and 164. HIPAA was drafted with two component parts enacted serially, the Privacy Rule and the Security Rule. See 13.7.1, *infra*. HIPAA was subsequently amended by the HITECH Act enacted as part of the 2009 American Recovery and Reinvestment Act which extended privacy obligations to business associates and increased obligations with regards to notification of privacy breaches.

The United States Department of Health & Human Services drafted a guideline on HIPAA and noted that HIPAA's "Privacy Rule establishes, for the first time, a foundation of Federal protections for the privacy of protected health information. The Rule does not replace Federal, State, or other law that grants individuals even greater privacy protections, and covered entities are free to retain or adopt more protective policies or practices." See the United States Department of Health & Human Services' website on "Protecting the Privacy of Patient's Health Information" at <http://www.hhs.gov/news/facts/privacy.html>.

13.2.2.2 Gramm-Leach-Bliley Act

In 1999, Congress passed the Financial Modernization Act, commonly referred to as the Gramm-Leach-Bliley Act ("GLBA"). The GLBA also had two component parts: the Financial Privacy Rule and the Safeguards Rule. "The Financial Privacy Rule requires covered entities (i.e. financial institutions) to provide their customers with written privacy policies which explain the company's use of private information. In addition, customers have the right to limit some, but not all, of such use with third parties." See Kathryn A. Andresen, *THE LAW AND BUSINESS OF COMPUTER SOFTWARE*, (West Services, Inc., 2007-2011) Chapter 6, § 6:3. Under the Privacy Rule, the customer has the right to "opt out" of sharing his/her PII with a third party. The Safeguard Rule required the

regulating agencies to draft regulations setting the standards to protect PII using administrative, technical and physical safeguards. See 15 U.S.C. § 6801(b) (2006); see also 13.7.2, *infra*.

13.2.3 Constitutional Right

The Fourth Amendment protects an individual's right to privacy, but this right is limited to the most intimate aspects of human affairs. Both rights to privacy (Fourth Amendment and common law) require a reasonable expectation of privacy. The Fourth Amendment right does not undermine the common law tort right:

“The Majority’s reliance upon authority involving the application of the Fourth Amendment to the United States Constitution to support the dismissal of a claim arising under the common law tort of intrusion upon seclusion, most notably *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), is misplaced. It is true that claims arising under either the Fourth Amendment or the tort of intrusion upon seclusion involve a violation of one’s right of privacy. See, e.g., *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr.S.D.N.Y.2005) (“[A] right of privacy is recognized under both the common law, see Restatement (Second) of Torts 652B (1977) (discussing the tort of ‘intrusion upon seclusion’), and the Fourth Amendment to the United States Constitution. In both cases, the aggrieved party must show a reasonable expectation of privacy.”)”

DeBlasio v. Pignoli, 918 A.2d 822, 830 fn3 (Pa.Cmwlth. 2007).

However, “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’” *Katz v. United States*, 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

These two privacy rights are not equal:

“The constitutional right of privacy is not to be equated with the common law right recognized by state tort law. Thus far only the most intimate phases of personal life have been held to be constitutionally protected. . . . Applying this limited doctrine of constitutional privacy, the federal courts have generally rejected efforts by plaintiffs to constitutionalize tortious invasions of privacy involving less than the most intimate aspects of human affairs.”

McNally v. Pulitzer Pub. Co., 532 F.2d 69, 70-71 (8th Cir. 1976).

As with common law rights, the Fourth Amendment right to privacy requires a reasonable expectation of privacy, there is no reasonable expectation of privacy when the information is in the public record. *McNally*, 532 F.2d at 77 (“Whatever the scope of the constitutional right of privacy in terms of the dissemination of information by one person regarding another person, it is clear that ‘the interests in privacy fade when the information involved already appears on the public record.’”).

The Federal Tort Claims Act provides for a discretionary-function exception which precludes government liability for certain acts. The exception does not apply, however, to allegations of violations of Constitutional rights. See 28 U.S.C. § 2680(a) (2006) (defining discretionary-function exception to FTCA); *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir.), cert. denied, 479 U.S. 849, 107 S.Ct. 175, 93 L.Ed.2d 111 (1986) (noting that discretionary-function exception would not apply if complaint alleged that federal agents violated plaintiff's constitutional rights in course of investigation, because federal agents do not possess discretion to commit such violations).

So government actors may receive qualified immunity from claims of invasion of privacy when such actions do not violate clearly established law:

‘The threshold inquiry in a qualified immunity analysis decided on a motion for summary judgment is whether the plaintiff has alleged facts sufficient to establish a constitutional violation.’ This inquiry is made first so that even if the right asserted is not clearly established, a determination that it was violated might ‘set forth principles which will become the basis for a holding that a right is clearly established.’

. . . This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Hill v. McKinley, 311 F.3d 899, 902-904 (8th Cir. 2002) (citations omitted.)

The touchstone for a Fourth Amendment right is reasonableness. *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (C.A.9 (Cal.), 2008). As acknowledged by the Ninth Circuit in *Quon*,

“The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored.” *Quon*, 529 F.3d at 904.

The Ninth Circuit concluded in *Quon*, notwithstanding a department policy about the right to inspect email or text messages, an employee had a reasonable expectation of privacy as to text messages on his employer purchased pager based on the department’s information policy of not actually reviewing such messages. *Quon*, 529 F.3d at 907. This was subsequently overturned by the Supreme Court, which held that the departmental policy made the subsequent search reasonable and not a violation of the Fourth Amendment. *Ontario v. Quon*, 130 S. Ct. 2619 (2010).

13.2.4 Damages

One who has established a cause of action for invasion of his privacy is entitled to recover damages for:

- (a) the harm to his interest in privacy resulting from the invasion;
- (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
- (c) special damage of which the invasion is a legal cause.

See RESTATEMENT (SECOND) OF TORTS § 652H (2007).

Comment:

a. A cause of action for invasion of privacy, in any of its four forms, entitles the plaintiff to recover damages for the harm to the particular element of his privacy that is invaded. Thus one who suffers an intrusion upon his solitude or seclusion, under § 652B, may recover damages for the deprivation of his seclusion. One whose name, likeness or identity is appropriated to the use of another, under § 652C, may recover for the loss of the exclusive use of the value so appropriated. One to whose private life publicity is given, under § 652D, may recover for the harm resulting to his reputation from the publicity. One who is publicly placed in a false light, under § 652E, may recover damages for the harm to his reputation from the position in which he is placed.

RESTATEMENT (SECOND) OF TORTS § 652H (2007).

Additionally, a plaintiff may also recover damages for emotional distress or special damages which can be proven. Of the four privacy torts, false light invasion of privacy claims must be specifically pled and actual damages shown. RESTATEMENT (SECOND) OF TORTS § 652H Comment (2007). Actual damages do not have to be shown as “special damages or out of pocket losses necessarily, as evidence of injury to standing in the community, humiliation, or emotional distress [are] sufficient.” *West v. Media General Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (identifying damages permitted for a “false light” tort claim). See also *Hoffman v. Capital Cities/ABC, Inc.*, No. CV 97-3638 (C.D. Cal. Jan. 22, 1999) (ordering magazine to pay \$1.5 million in actual damages for publishing actor's electronically altered photograph as part of an article on new spring fashions and authorizing punitive damages in addition to actual damages); *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002), cert. denied, 123 S. Ct. 557 (2002).

While parties may restrict their damages within a contract, setting that limitation does not generally apply to tort claims. Even if a corporate entity included a cap on damages and/or other limitation of liability provision in its contract with an individual, if the corporate entity was regulated under either HIPAA or GLBA, the obligations to meet those statutory standards would still exist. The reason is that both of these privacy statutes were enacted to create a self-enforcement mechanism for regulated entities. The entity is responsible for establishing its own privacy and security policies and these two regulations hold them responsible for the obligations in those policies with respect to PII or PHI of the consumers.

§ 13.3 INVASION OF PRIVACY BY APPROPRIATION

While appropriation generally means using another's name or likeness for one's own use or benefit, Minnesota has held that such a right to privacy has "not been extended beyond the protection of celebrities because a 'celebrity's property interest in his name and likeness is unique.'" *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970); see also Prosser, *RESTATEMENT SECOND OF TORTS*, § 652C (1977).

The Fifth Circuit held:

Tortious liability for appropriation of a name or likeness is intended to protect the value of an individual's notoriety or skill. * * * [T]he appropriation tort does not protect one's name per se; rather, it protects the value associated with that name.

Kovatovich v. K-Mart Corp., 88 F. Supp. 2d 975, 986 (D. Minn. 1999) (citing *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994).)

13.3.1 Requires Intent to Benefit

The invasion of privacy through appropriation requires the defendant intended to benefit from such use, but such intent does not need to be pecuniary. Citing the Restatement (Second) of Torts, the Minnesota Supreme Court held that appropriation applies 'when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained in not a pecuniary one.' *Faegre & Benson, LLP v. Purdy*, 367 F. Supp. 2d 1238, 1247-48 (D. Minn. 2005) (citations omitted).

The use of a name or likeness, without an intention to benefit, is not protected by the tort of appropriation. See *RESTATEMENT (SECOND) OF TORTS*, § 652C, comment (d) (1977). Therefore, incidental use is not protected. *Kovatovich*, 88 F. Supp. 2d at 987 (citations omitted).

Additionally, appropriation claims cannot involve a defendant who appropriates a plaintiff's name for a newsworthy purpose. *Id.*

The Restatement (Second) of Torts, notes that the common form of appropriation is for a commercial purpose, but the District of Minnesota in the *Gregerson* case acknowledged that the benefit is not limited to commercial purpose. *Gregerson v. Vilana Financial Inc*, 2008 WL 451060 (D.Minn. Feb. 15, 2008). The District of Minnesota in *Gregerson* did not preclude increased web traffic as a benefit under the claim of appropriation, but found that the defendant failed to show either an increase in web traffic or a casual connection between the increased web traffic and the purported appropriation. *Gregerson*, 2008 WL 451060 at *10.

13.3.2 Affirmative Defenses

13.3.2.1 Consent

Consent is an affirmative defense, but a tort action for appropriation may be maintained for a broadcast of a person's image without consent. *Zacchini v. Scripps-Howard*

Broadcasting Co., 433 U.W. 562, 97 S.Ct. 2849 (1977) (holding broadcast of the whole performance of a “human cannonball” without consent could be tried under an invasion of privacy tort claim.)

However, the courts have held that even though a plaintiff voluntarily provides private information, consent may then be withdrawn so long as the revocation is given sufficiently in advance of publication. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1126 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

Consent is not presumed, nor a claim of appropriation preempted by a contractual relationship between the parties. *Rivell v. Private Health Care Systems, Inc.*, 520 F.3d 1308, 1310 (C.A.11 (Ga.), 2008). While a contract may be used to support a defense of consent, it is not an automatic preclusion of the tort of appropriation otherwise properly pled. *Id.*

13.3.2.2 Individual Not Identified

An action for appropriation requires use of a name or likeness which identifies the individual. An affirmative defense is that the “appropriation” does not name the individual.

However, even if the individual is not identified, an action for appropriation may be maintained if a pseudonym identifies the individual. *Faegre*, 367 F. Supp. 2d at 1248 (citing *McFarland v. Miller*, 14 F.3d 912, 922 (3d Cir. 1994) (holding New Jersey law prohibits appropriation of a celebrity's nickname); *Ackerman v. Ferry*, No. B143751, 2002 WL 31506931, at *18-19 (Cal. Ct. App. Nov. 12, 2002) (unpublished) (holding that California's appropriation statute covered appropriation of pseudonyms because “[n]icknames and pen names are names”); *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129, 137 (1979) (holding that plaintiff stated a *prima facie* case for common law appropriation of his well known nickname, Crazylegs, because “[a]ll that is required is that the name clearly identify the wronged person”).)

Even a slogan or catch-phrase may be sufficient to “identify” the individual and give rise to a claim of appropriation. *See Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983) (Recognized catchphrase as identifiable attribute considered part of celebrity's right of publicity. “If the celebrity's identity is commercially exploited, there has been an invasion of the right whether his name or likeness is used.”)

13.3.2.3 Standing

The individual claiming appropriation must have standing to make the claim. As noted earlier, a corporation may not claim an invasion of privacy based on appropriation. An employer, however, has standing to assert the collective privacy rights of its employees. *Faegre & Benson, LLP v. Purdy*, 447 F. Supp. 2d 1008, 1018 (D. Minn. 2006) (citing *Minneapolis Fed'n of Teachers, AFL-CIO, Local 59 v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 109-10 (Minn. Ct. App. 1994).)

§ 13.4 INTRUSION UPON SECLUSION

The invasion of privacy by intrusion upon seclusion is as often associated with electronic or mechanical intrusion (i.e. wiretap or video surveillance) as it is with physical intrusion. There must be secret or private matter which is obtained through unreasonable means. The tort of

intrusion upon seclusion is defined by Prosser in the Restatement Second of Torts § 652B, “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” See also *Fletcher v. Price Chopper Foods*, 220 F.3d 871, 875 (8th Cir. 2000).

“The Restatement (Second) of Torts § 652B (1981) generally discusses this tort and includes as examples opening private and personal mail (cmt .B) or surreptitiously recording telephone conversations without the other party's knowledge (illustration 3).” *Gates v. Wheeler*, 2010 WL 4721331 *5 (Minn.App 2010). Note, however, that this tort will not be considered in a petition for a harassment restraining order unless specifically pled. *Johnson v. Michels Property Groups, LLC*, 2010 WL 3545820 (Minn.App.2010).

In an attempt to expand the scope of an Intrusion Upon Seclusion claim, one plaintiff claimed that the “intrusion” in a public setting was nonetheless a violation on the basis that he plaintiff was a “captive audience” and had no recourse. *Snyder v. Phelps*, 131 S.Ct. 1207, 1212, 79 USLW 4135, 11 Cal. Daily Op. Serv. 2774 (U.S.2011). The Supreme Court held that the captive audience doctrine is used sparingly and did not extend to the context in *Snyder* where anti-homosexual picketers followed their First Amendment rights to free speech just outside of the cemetery area during a funeral’s memorial service for a service member. The captive audience doctrine was clarified by the Supreme Court in a case involving an anti-pandering statute that a homeowner could send a request to the Postmaster General to be removed from a mailing list for materials deemed offensive. The mail order companies brought suit that such a statute infringed their right of free speech under the First Amendment. The Supreme Court held that the captive audience doctrine means that a homeowner has to have the means to control or remove themselves from the context of speech they find offensive. For example, a radio or television program could be turned off, but in the receipt of mail, a homeowner was deemed a captive audience with no ability to remove themselves from the offensive speech unless the speech could be terminated at the mailbox:

“If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even ‘good’ ideas on an unwilling recipient. That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. *See Public Utilities Comm. of District of Columbia v. Pollak*, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (U.S.1952). The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.”

Rowan v. Post Office Dept., 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (U.S.1970).

While the Federal Torts Claim Act (“FTCA”), 28 U.S.C. §§ 2671-80 allows tort claims to be brought against the government, it expressly provides exceptions for certain tort claims for which the government may not be held liable. The invasion of privacy tort by intrusion, however, is not a listed exception under the FTCA so this claim may be brought. *Raz v. U.S.*, 343 F.3d 945 (8th Cir. 2003). “Minnesota courts have never recognized a cause of action for invasion of privacy in the context of police conduct.” *Seivers v. City of Minneapolis*, 2011 WL 284486 *6 (D.Minn. 2011).

13.4.1 Requirements to Prove

Privacy torts include intrusion upon seclusion. *Gates*, 2010 WL 4721331 *5 (Minn.App.2010). “This tort has three elements: (a) an intrusion; (b) that is highly offensive; and (c) into some matter in which a person has a legitimate expectation of privacy.” *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 745-46 (Minn.App.2001).

A common practice of investigators to use surveillance and other tactics does not defend against a claim of intrusion upon seclusion where the conduct would be deemed highly offensive to a reasonable person. *Kohn v. Unumprovident Corp.*, 2008 WL 4787556 *9 (E.D.Pa. 2008). While acknowledging prior cases holding investigation into phone records as not necessarily offensive, the actual calling of the numbers on those records and/or pretending to be the plaintiff, may be deemed offensive. *Kohn*, 2008 WL 4787556 at *10.

The Middle District of Pennsylvania concurred that while investigation tactics may intrude, such tactics may be subject to an invasion of privacy or intrusion upon seclusion tort claim where the investigator conceals his identity or passes out falsehoods to mask the true purpose may be found by a jury as offensive and knowledge that the intrusion was unwelcome. *Tanzosh v. InPhoto Surveillance, Kroll, Inc.*, 2008 WL 4415693 *8 (M.D.Pa. 2008).

13.4.1.1 Intent to Intrude

This requires: (1) the existence of a secret and private subject matter, (2) the plaintiff's right to keep that subject matter private, and (3) the obtainment by the defendant of information about that subject matter through unreasonable means (e.g., eavesdropping or spying). *Thomas v. Corwin*, 483 F.3d 516, 531 (8th Cir. 2007); *see also* RESTATEMENT (SECOND) OF TORTS, § 652B cmt. b (1977); and *Milke v. Milke*, 2004 WL 2801585, *4 (D. Minn. 2004) (holding that taping a telephone conversation without notice constituted an intrusion.)

The tort of intrusion upon seclusion requires the acquisition of private information through “unreasonable means.” *See Thomas*, 483 F.3d at 531. The Eighth Circuit reasoned: “[a] plaintiff cannot establish the defendant's use of ‘unreasonable means’ to obtain information if a defendant obtains such information in the ordinary course of business or in response to a discovery request during litigation.” *Thomas*, 483 F.3d at 532.

13.4.1.2 Highly Offensive to a Reasonable Person

There is no liability unless the interference with the plaintiff's seclusion is substantial. RESTATEMENT SECOND OF TORTS § 625(b) cmt. D (2007). There is a preliminary determination of ‘offensiveness’ which is decided by the court:

. . . Factors for the court to consider include the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded. . .

. . .The question of what kinds of conduct will be regarded as a ‘highly offensive’ intrusion is largely a matter of social conventions and expectations.

Bauer v. Ford Motor Credit Co., 149 F. Supp. 2d 1106, 1109 (D. Minn. 2001) (citations omitted.) See also *Swarthout v. Mutual Service Life Ins. Co.*, 632 N.W.2d 741 (Minn. Ct. App. 2001).

Minnesota requires an objectively based threshold degree of ‘repugnance’ to sustain a claimed intrusion on seclusion. *Fabio v. Credit Bureau of Hutchinson, Inc.*, 210 F.R.D. 688 (D. Minn. 2002). For the invasion of privacy by intrusion, “questions about the reasonable person standard. . . become questions of law if reasonable persons can draw only one conclusion from the evidence.” *Swarthout*, 632 N.W.2d at 745.

13.4.1.3 Matter Over Which Has Reasonable Expectation of Privacy

Minnesota requires the individual claiming intrusion upon seclusion to have a reasonable expectation of privacy. An individual does not have a “reasonable” expectation of privacy for information which is otherwise public. See *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. (Minn.) 2002). The Minnesota Court of Appeals also discussed reasonable expectations of privacy in its *Torgrimson* case in 2002. *State v. Torgrimson*, 637 N.W.2d 345 (Minn.App. 2002), review denied (Minn. Mar. 19, 2002).

It is a question of fact whether there is a reasonable expectation of privacy. Some actions are now deemed “unreasonable,” like the surreptitious recording of a telephone conversation:

While Minnesota courts have yet to fully delineate the contours of this tort, the Restatement specifically mentions surreptitious recording of telephone conversations as an example of the tort of intrusion upon seclusion. Restatement (Second) of Torts, § 652B, comment b and illustration 3. Other jurisdictions recognizing this privacy tort acknowledge that conduct similar to defendant's would constitute an invasion.

Milke, 2004 WL 2801585 at *4 (citations omitted).

“Some courts have concluded that a person has a lesser or no reasonable expectation of privacy when using an employer's email system. See, e.g., *Smyth v. Pillsbury Co.*, 914 F.Supp. 97, 100-01 (E.D.Pa.1996). Others have found a reasonable expectation when the employee accessed a private, web-based account on the company's server, rather than using the employee's company account. See *Convertino v. U.S. Dep't Justice*, 674 F.Supp.2d 97, 110 (D.D.C.2009). Still others examine whether the employer had a clear company policy. See *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr.S.D.N.Y.2005). The court in *In re Asia Global* formulated a test to measure the expectation of privacy: (1) is there a corporate policy; (2) does the company monitor employee email use; (3) do third parties have a right of access; and (4) did the corporation notify the employee

or did the employee know about the use and monitoring policies? *Id.*”
Gates, 2010 WL 4721331 *6.

Minnesota courts have assessed certain situations in which a person has a reasonable expectation of privacy. The Minnesota Court of Appeals in its *Perez* case cited some examples:

“In *Bryant*, the Minnesota Supreme Court reasoned that an occupant of a public restroom could reasonably expect the degree of privacy that the design of the restroom assures through partitioned toilet stalls with doors. *Bryant*, 287 Minn. at 210-11, 177 N.W.2d at 803. The Court held that evidence obtained through police surveillance using a vent above the closed-off toilet stall violated the defendants' constitutional rights. *Id.* at 205-06, 212, 177 N.W.2d at 801, 804. In *Ulmer*, we held that an individual had a reasonable expectation of privacy when using a partitioned urinal based on the restroom's design and that the defendant was guilty of interference of privacy when he leaned over the partition to watch someone use the urinal. *Ulmer*, 719 N.W.2d at 215-16.” *State of Minn. v. Perez*, 779 N.W.2d 105 (Minn.App.2010).

The *Perez* case, however, is the first instance in which a Minnesota court assessed such expectations within a marital relationship. *Perez*, 779 N.W.2d 105. Citing both Iowa and Texas precedents, the court quoted:

“[N]othing in common law suggests that the right to privacy is limited to unmarried individuals. When a person goes into the privacy of the bedroom, he or she has a right to the expectation of privacy in his or her seclusion. As a spouse with equal rights to the use and access of the bedroom, it would not be illegal or tortious as an invasion of privacy for a spouse to open the door of the bedroom and view a spouse in bed. However, the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse.” *Perez*, 779 N.W.2d 105 (citations omitted).

13.4.2 Affirmative Defenses

13.4.2.1 Public Property

If the alleged “intrusion” was done on public property, it is likely that the claim of invasion of privacy will fail. The Ninth Circuit held that the publication of a videotape made in a public place was a valid defense to the claim of intrusion upon seclusion where only a brief clip was played and no personal details were reported. *Deteresa v. American Broadcasting Companies, Inc.*, 121 F.3d 460, 461, 465, *cert. denied*, 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed.2d 1090 (1998).

13.4.2.2 Consent

Consent is also an affirmative defense to the claim of intrusion upon seclusion. *Cox v. Hatch*, 761 P.2d 556, 563, 564 (Utah 1988) (holding consent to a photograph precluded a claim of intrusion upon seclusion.)

However, the courts have held that even though a plaintiff voluntarily provides private information, consent may then be withdrawn so long as the revocation is given sufficiently in advance of publication. *Virgil*, 527 F.2d at 1126.

13.4.2.3 Common Custom

Any intrusion which is deemed to be customary or common usage is not actionable. When a reporter took a photograph of a fire victim at the request of the fire marshal that had run out of film, the Florida Supreme Court held there was no invasion of privacy because it is customary for reporters to accompany public officials to disaster scenes. *Florida Publishing Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977).

13.4.2.4 Waiver

The right to have your privacy protected by not allowing intrusion upon seclusion is a right which may be waived. A waiver is a 'voluntary and intentional relinquishment or abandonment of a known right.' *Montgomery Ward & Co. v. County of Hennepin*, 450 N.W.2d 299, 304 (Minn. 1990). A plaintiff may waive his right to privacy through conduct manifesting a clear intent to do so. *Milke*, 2004 WL 2801585 *4 (citing *Anderson v. Low Rent Housing Comm'n of Muscatine*, 304 N.W.2d 239, 249 (Iowa 1981) (limited public statements not a waiver); *Black v. City and County of Honolulu*, 112 F. Supp. 2d 1041, 1053-54 (D. Haw. 2000) (being friendly to surveillance officers not a waiver)). The defendant bears the burden of proof on waiver. *Black*, 112 F. Supp. 2d at 1054.

§ 13.5 PUBLIC DISCLOSURE

The invasion of privacy by public disclosure is the publication of non-newsworthy, private facts about an individual that would be highly offensive to a reasonable person. See Prosser, RESTATEMENT SECOND OF TORTS § 652D (1997), ("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.")

"The Minnesota Supreme Court first recognized the tort of invasion of privacy by publication of private facts in *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn.1998). To succeed, a plaintiff must demonstrate that (1) the defendant gave "publicity to a matter concerning the private life" of the plaintiff; and (2) "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." *Lake*, 582 N.W.2d at 233." *Danforth v. Star Tribune Holdings Corporation*, 2010 WL 4286242 *4 (Minn.App.2010). In the *Danforth* case, the court analyzed both the newsworthiness of the information and the offensiveness as follows:

"The statements of which appellant complains did not concern his private life: every fact mentioned in the article is already in the public record of appellant's criminal trial and the subsequent appellate decisions. Additionally, while appellant's behavior might be highly offensive to a reasonable person, the publication of that behavior, after appellant has been convicted for it, is not offensive. And the facts surrounding a convicted child molester's attempts to have his conviction

reversed fall squarely within the realm of legitimate public concern, regardless of the merit of the convict's claims." Danforth, 2010 WL 4286242 *5.

13.5.1 Requirements to Prove

13.5.1.1 Publicity

The invasion of privacy by publication requires that "the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Tureen v. Equifax, Inc.*, 571 F.2d 411, 417 (8th Cir. 1978) (citing RESTATEMENT SECOND OF TORTS § 625D (1997) comment.) Merely communicating something to a third party does not constitute the "publicity" required for this tort.

Additionally, "the majority of state and federal courts to consider this issue have held that communication to a few people is not sufficient publicity to state a cause of action under this [public disclosure] tort." *C.L.D. v. Wal-Mart Stores, Inc.*, 79 F. Supp. 2d 1080 (D. Minn. 1999) (citations omitted.)

Minnesota courts have held that disclosure to a few people may still qualify as publicity for the tort of intrusion upon seclusion. This issue is a question of fact to be decided and the "appropriate consideration includes the nature of the private fact and the harm to which the plaintiff is exposed as a result of the dissemination as well as the breadth of disclosure." *Bodah v. Lakeville Motor Express, Inc.*, 649 N.W.2d 859, 865 (Minn. Ct. App. 2002) ("*Bodah I*").

"[T]he Minnesota Court of Appeals recently referred to the definition of publicity from the Restatement comment, relied on by the District of Minnesota in *C.L.D.*, as 'a high threshold' and stated that 'the *C.L.D.* case does not limit the reach of the *Lake* decision nor does *C.L.D.* constrain this court from reaching an appropriate disposition in this or other cases.'"

Phillips v. Grendahl, et al, 312 F.3d 357 (8th Cir. 2002) (citing *Bodah I*).

If the element of publicity cannot be shown, a court does not need to address the other elements. *Robins v. Conseco Finance Loan Co.*, 656 N.W.2d 241 (C.A. Minn. 2007).

Posting private information in a shop window constitutes "publicity" according to the *Restatement (Second) of Torts* (at cmt. a, illus. 2). See also *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 968, 971 (1927) (exemplifying 'publicity' under the Restatement-posting a 5-by 8-foot notice calling attention to a customer's overdue account in a show window of an automobile garage constitutes publicity); *Biederman's of Springfield, Inc. v. Wright*, 322 S.W.2d 892, 898 (Mo.1959) (holding that loud declarations of indebtedness in a public restaurant constituted 'publicity').

With the advent of the Internet, it is even easier to post private information in a way that constitutes "publicity". See *Purdy v. Burlington N. & Santa Fe Ry. Co.*, No. 98-833, slip op. at 6 (D. Minn. Mar. 28, 2000) (concluding that if Purdy were to publish 800 employees' salaries and social

security numbers on the Internet, the employees would likely succeed on an invasion of privacy claim). *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 554 (Minn. 2003) (“*Bodah II*”).

Some information is easily recognized as private: “Social security numbers are broadly recognized as confidential information.” *Bodah I*, 649 N.W.2d at 862. The Ninth Circuit explained the nature of social security numbers and recognized that their uniqueness lends itself to abuse if disclosed. *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). The Minnesota Court of Appeals continued in *Bodah I*, that despite the confidential nature of social security number, they are disclosed in a wide range of contexts and misappropriation is a risk. *Bodah I*, 649 N.W.2d at 863. *See also, Meyerson v. Prime Realty Services, LLC*, 7 Misc. 3d 911, 796 N.Y.S. 2d 848 (N.Y. Sup. 2005) (holding that “in relation to a private transaction, this court may well adopt a bright line standard that a social security number is *prima facie* privileged information, with the privilege to be asserted only after the demanding party demonstrates entitlement to confidential information. While the privilege must give way as required by statute, regulation or court order, in ordinary circumstances, the person who holds the social security number appears to be free to decline disclosure.”)

Additionally, private information required for the performance of a service or is the normal course of business is not likely to be deemed “publicity” for purposes of a tort claim for invasion of privacy:

[T]he communication of information to other insurers is not equivalent to a communication to the general public or to a communication to a group of persons large enough to permit the matter to be regarded as substantially certain to become one of public knowledge. In the absence of such undue publicity there is no actionable violation.

Wilson v. Colonial Penn Life Ins. Co., 454 F. Supp. 1208, 1213 (D.C. Minn. 1978) (citing RESTATEMENT (SECOND) OF TORTS § 652D, comment a (1971).)

13.5.1.2 True

The invasion of privacy by publication requires that the disclosed information be true. This element distinguishes this tort from the tort of defamation. *Lake*, 582 N.W.2d at 235.

13.5.1.3 Offensive to Reasonable Person

The protection afforded to the plaintiff’s interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens. If the disclosure would not be offensive to a “reasonable person” based on the plaintiff’s own circumstances, then the action may not be maintained. RESTATEMENT (SECOND) OF TORTS § 652D, Cmt (a) (1971). However, even if a publication is true, it is not enough that it would be offensive to a reasonable person if the subject-matter is a valid concern of the public. RESTATEMENT (SECOND) OF TORTS § 652D, Cmt (b) (1971).

13.5.2 Affirmative Defenses

13.5.2.1 Public Benefit/Interest

Publication of information that is a valid concern of the public does not constitute an invasion of privacy tort claim under publication. “Permissible publicity (of) information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life. Thus, the life history of one accused of murder, together with such heretofore private facts as may throw some light upon what kind of person he is, his possible guilt or innocence, or his reasons for committing the crime are a matter of legitimate public interest.” *Logan v. District of Columbia*, 447 F. Supp. 1328 (D.C. D.C. 1978).

Broadcasting footage of the remains of an abducted child’s skull did not support a private facts action by the child’s family because the discovery of the remains was a matter of public interest. *Armstrong v. H & C Communications Inc.*, 575 So.2d 280 (Fla. Dist. Ct. App. 1991).

13.5.2.2 Newsworthiness

The publication of a person’s name or picture in connection with a news or historical event which is of a valid public interest does not constitute an actionable invasion of the right of privacy. The court in *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491, 496 (1939), in addressing the same question, stated that:

. . . while the general object in view is to protect the privacy of private life, nevertheless, ‘to whatever degree and in whatever connection a person's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.’ In connection with what constitutes news regarding matters of public or general concern, it is said in *Associated Press v. International News Service*, that news is said to have ‘that indefinable quality of interest, which attracts public attention’; while the court in *Jenkins v. News Syndicate Co.*, defines news as a ‘report of recent occurrences.’

Hurley v. Northwest Publications, Inc., 273 F. Supp. 967, 976 (D.C. Minn. 1967).

“One’s private affairs may wittingly or unwittingly become public, as often happens when litigation ensues.” *Hurley*, 273 F. Supp. at 975 (citation omitted). The line between newsworthy and non-newsworthy is based on customs and community standards. *Virgil*, 527 F.2d at 1126.

13.5.2.3 Consent

The invasion of privacy by publication cannot be maintained if the publication was with consent. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.W. 562, 97 S.Ct. 2849 (1977) (holding broadcast of the whole performance of a “human cannonball” without consent could be tried under an invasion of privacy tort claim.) See also *Rosko v. Times Publishing Co. Inc.*, 19 Med. L. Rptr. 1766 (Fla. Cir. Ct. 1991).

However, the courts have held that even though a plaintiff voluntarily provides private information, consent may then be withdrawn so long as the revocation is given sufficiently in advance of publication. *Virgil*, 527 F.2d at 1126.

The Minnesota Court of Appeals confirmed in its *Anderson* opinion, that consent is an absolute defense to a tort claim of invasion of privacy. *Anderson v. Mayo Clinic*, 2008 WL 3836744 (Minn.App. Aug 19, 2008). The Court in *Anderson* noted that a written consent is assessed under rules of contract construction. While acknowledging that such consent may be limited in time or geography, the Court concluded there was no such limit on the written consent in the *Anderson* case.

13.5.2.4 Qualified Privilege

If a person injects himself into a matter of public concern, it may constitute an affirmative defense of “qualified privilege”. An Iowa case from 1961 held “by interjecting himself into a matter of public concern and by criticizing the actions of public officials and requesting certain action had invited or at least excused comment and criticism from those who held other views.” *Haas v. Evening Democrat Co.*, 252 Iowa 517, 107 N.W.2d 444 (1961). See also *Rees v. O'Malley*, 461 N.W.2d 833, 838-839 (Iowa 1990) (holding that action did not rise to level of interjection into a matter of public concern).

13.5.2.5 Event Took Place in Public

Publication as a matter of public record for information with the public has a valid concern does not constitute an invasion of privacy. *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 78-79 (8th Cir. 1976); cf. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (holding information from public records is absolutely privileged.)

A photograph taken in a public place does constitute an invasion of privacy. *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145 (S.D. Fla. 1990). It's possible, however that the commercial use of the image might still qualify as appropriation.

See also *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982), *aff'd in part, rev'd in part on other grounds*, 801 F.2d 46 (2d Cir. 1986) (holding that videotaping from a public entrance of a company is a semi-public area still visible to the public and therefore defensible.)

§ 13.6 FALSE LIGHT

Although similar to libel or defamation, the invasion of privacy by false light means publicity of private information with malice or with reckless disregard for the truth thereby creating a deliberately false and misleading impression of the person that is highly offensive to a reasonable person. Publicity placing person in false light is defined by Prosser in the Restatement Second of Torts § 652E (1995); “[o]ne 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.”

The United States Supreme Court first considered the parameters of false light invasions of privacy in *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (holding actual malice standard required as counter balance to First Amendment right to free speech).

Although this tort is not recognized in Minnesota, the Eighth Circuit has acknowledged this tort under Missouri law. *Gore v. Trans World Airlines*, 210 F.3d 944, 951 (8th Cir. 2000) (citing *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 478 n. 5 (Mo.1986) (en banc)).

Even states which have not expressly precluded this tort have not always incorporated it. “In no case has a Florida appellate court affirmed a judgment for the plaintiff in a false light invasion of privacy case. And, with the apparent exception of the Heekin case, no Florida appellate court has upheld a complaint on the ground that it states a cause of action for invasion of privacy based on the false light theory.” *Gannett Co., Inc. v. Anderson*, 947 So.2d 1 (Fla.App. 1 Dist. 2006). Some states have expressly included a false light tort. *West v. Media General Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (holding that “false light” should be recognized as a distinct, actionable tort).

13.6.1 Requirements to Prove

13.6.1.1 Publicity

As with the other privacy torts, a claim of false light invasion of privacy requires private information to be publicized. The ‘publicity’ required for the invasion of privacy tort of false light publicity is identical to that required for publication of private facts.” *Bodah II*, 663 N.W.2d at 554 fn3 (citing *Restatement (Second) of Torts* § 652E cmts. a, b, illus. 1-5 (1977)). Also, such information must be unreasonably obtained. *Gore*, 210 F.3d 944.

13.6.1.2 Disclosure Would Be Highly Offensive to a Reasonable Person

The New Mexico Appellate Court held that a plaintiff “has shown facts from which a jury could conclude that he was placed in a ‘false light’ ... [that] would be highly offensive to a reasonable person.” *RESTATEMENT (SECOND) OF TORTS* § 652E(a) (1977); *see Larsen v. Philadelphia Newspapers, Inc.*, 375 Pa.Super. 66, 543 A.2d 1181, 1189 (Ct.) (false light claim may be established where true information published if the information tends to imply falsehoods), *appeals denied*, 520 Pa. 597 and 520 Pa. 606, 552 A.2d 251 and 552 A.2d 252 and 552 A.2d 968 (1988), and *cert. denied*, 489 U.S. 1096, 109 S.Ct. 1568, 103 L.Ed.2d 935 (1989); *Jonap v. Silver*, 1 Conn. App. 550, 474 A.2d 800, 806 (Ct. 1984) (jury verdict sustained where there was evidence that defendants caused letter to be published in a magazine that attributed to plaintiff views that were not his own and that there was a major misrepresentation of his character, history, activities, or beliefs).” *Moore v. Sun Pub. Corp.*, 118 N.M. 375, 881 P.2d 735 (N.M. App. 1994).

13.6.2 Affirmative Defenses

13.6.2.1 Truth

“[T]he essential element of untruthfulness differentiates ‘false light’ from the other forms of invasion of privacy and many times affords an alternate remedy for defamation even though it is not necessary for a plaintiff to prove that he or she was defamed.” *Anderson v. Low Rent Housing Commission of Muscatine*, 304 N.W.2d 239 (Iowa 1981).

While some courts require that the statement be untrue, (*see Baker v. Burlington Northern, Inc.*, 99 Idaho 688, 587 P.2d 829 (1978); *Rinsley v. Brandt*, 446 F. Supp. 850 (D.Kan.1978); *Logan v. District of Columbia*, 447 F. Supp. 1328 (D. D.C. 1978) (no action if “substantially true”)), a true statement may be actionable where it tends to imply a falsehood (*see Larsen*, 543 A.2d at 1189).

“Although in this category [of a “false light” tort] actual truth of statements is not necessarily an issue, a false impression relayed to the public, is.” *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737 (Okl. 1980).

The courts have the discretion to distinguish between slight inaccuracies and purposeful untruths:

We agree with the appellant that minor inaccuracies and fictionalized dialogue will not alone defeat the privilege granted to truthful publications of public interest. The district court here, however, specifically instructed the jury to ignore minor inaccuracies and required them to find ‘substantial’ falsity. In light of the evidence outlined above and the unobjectionable instructions, we believe that the jury was entitled to accept plaintiff’s view that the article as a whole presented a substantially false and distorted picture of him and his relationship with his wife.

Varnish v. Best Medium Pub. Co., 405 F.2d 608 (C.A.N.Y. 1968) (citations omitted).

13.6.2.2 Public Interest

It is an affirmative defense against a claim of false light invasion of privacy to show a valid public interest in the information published. “With few exceptions, the cases hold that once a person’s activities become a matter of public interest, he usually cannot revert to a private status.” *McCormack*, 613 P.2d at 742.

13.6.2.3 Not Offensive to Ordinary Persons

A false light invasion of privacy claim must be based on a disclosure which is offensive to a reasonable person. “Appellant also argues that there was no showing that the article was offensive to persons of ordinary sensibilities, as required by Pennsylvania law. Pennsylvania has held, however, in a case quite similar to this one, that this issue is peculiarly within the competence of the jury. We cannot say as a matter of law that the Enquirer article would not be offensive to a person of ordinary sensibilities.” *Varnish*, 405 F.2d at 612 (citation omitted).

13.6.2.4 No Malice

Although the Supreme Court in the *Hill* case stated that malice must be shown, whether that malice must be actual or implied was not definitively decided. “[T]he question of whether in false-light cases the plaintiff must allege and prove ‘actual malice’ has been left open. We conclude, however, in light of the admonition of *Leopold v. Levin* to proceed with caution, that in false-light cases it is not necessary to distinguish between private and public figures, as is required in some defamation cases, and we, accordingly, adopt the ‘actual malice’ approach of the Restatement.” *Lovgren v. Citizens*

First Nat. Bank of Princeton, 126 Ill.2d 411, 534 N.E.2d 987 (Ill. 1989). See also *Colbert v. World Pub. Co.*, 747 P.2d 286 (Okla. 1987).

Whether or not malice can be shown through reckless disregard of the falsity of the information is not clear. The Tenth Circuit held that: “In order to establish reckless disregard, Plaintiff must demonstrate actual knowledge of probable falsity. ‘The only extent that an investigation enters into the consideration of the premises is if the investigation is made and through it, actual knowledge is imparted.’” *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714 (10th Cir. 2000).

13.6.2.5 Waiver

As with the other rights of privacy, a false light invasion of privacy claim may be waived.

The right of privacy may be lost by express or implied waiver by the complaining party. Waiver is generally defined as the voluntary and intentional relinquishment of a known right. For implied waiver to exist, the intention of the party alleged to have waived his or her rights must be clear from the party’s conduct. Normally the question of waiver is one for the jury; however, where the evidence is not in dispute, the question becomes one of law for the court.

Anderson v. Low Rent Housing Commission of Muscatine, 304 N.W.2d 239 (Iowa 1981) (citations omitted).

13.6.2.6 Consent

Consent is an affirmative defense to a false light invasion of privacy claim as it is with the other privacy torts. *Zacchini*, 433 U.W. 562, 97 S.Ct. 2849 (1977). However, the courts have held that, even though a plaintiff voluntarily provides private information, consent may then be withdrawn so long as the revocation is given sufficiently in advance of publication. *Virgil*, 527 F.2d at 1126.

§ 13.7 PUBLIC DISCLOSURE: FEDERAL REGULATIONS

13.7.1 HIPAA

HIPAA’s Privacy Rule requires a regulated entity (i.e., a health care provider) to protect medical records and other protected health information, regardless of whether it is communicated in writing, both electronic and paper, or orally. HIPAA requires covered entities to have written privacy policies, employee training and a privacy officer appointed.

The HIPAA Security Rule focuses on minimum standards covered entities have to take with regards to protected health information (“PHI”).

13.7.1.1 Regulated Entities

Covered entity means:

- (1) A health plan.
- (2) A health care clearinghouse.
- (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter.

See 45 C.F.R. § 160.103 (2007).

13.7.1.2 Obligations to Protect

There are two main requirements under HIPAA for a covered entity: (i) it must have a privacy policy and right for the patient to review/correct PHI under the Privacy Rule; and (ii) it must meet the minimum security standards to protect PHI under the Security Rule.

The Privacy Rule establishes certain patient protections as well as healthcare provider obligations:

Patient Protections:

- Access to medical records – right to have a copy and correct information, but healthcare providers may charge for the copying and have 30 days from the request to provide;
- Notice of privacy practices – healthcare providers need to have written privacy policies and obtain some form of acknowledgment that the patient has had a chance to review it; patients may restrict disclosure from the healthcare provider’s standard policy;
- Limits on use of personal medical information – outside of treatment purposes, PII is limited to the amount of information needed for a particular purpose (i.e. billing an insurer);
- Prohibition on marketing – specific patient permission prior to use of PII for marketing;
- Stronger state laws – creates a national “floor” of rights, but states may provide for stronger confidentiality protections;
- Confidential communications – can request that healthcare providers take reasonable steps to keep information confidential; and
- Complaints – may be filed directly with the healthcare provider or with the Office of Civil Rights of HHS.

Healthcare Providers:

- Written privacy procedures;
- Employee training and privacy officer;
- Public responsibilities; and

- Equivalent requirements for public and private providers.

See Andresen, THE LAW AND BUSINESS OF COMPUTER SOFTWARE, (West Services, Inc., 2007-2011) Chapter 6 § 6:7.

13.7.1.3 Contractual Considerations

The following draft contract provisions could be used in a Business Associate Agreement:

Definitions. Capitalized terms used, but not otherwise defined, in this Agreement shall have the meanings given them in HIPAA. For convenience of reference, the definitions of “Individually Identifiable Health Information” and “Protected Health Information” as of the Effective Date are as follows:

“Individually Identifiable Health Information” means information that is a subset of health information, including demographic information collected from an individual, and (i) is created or received by a healthcare provider, health plan, employer, or health care clearinghouse; and (ii) relates to the past, present, or future physical or mental health or condition of an individual; the provision of healthcare to an individual; or the past, present, or future payment for the provision of health care to an individual; and (a) that identifies the individual, or (b) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

“Protected Health Information” means Individually Identifiable Health Information that Business Associate receives from COMPANY or from another business associate of COMPANY or which Business Associate creates for COMPANY which is transmitted or maintained in any form or medium. “Protected Health Information” shall not include education records covered by the Family Educational Right and Privacy Act, as amended, 20 U.S.C. §1232g, or records described in 20 U.S.C. §1232g (a)(4)(B)(iv), or employment records held by COMPANY in its role as employer.

Obligations and Activities of Business Associate.

“Non-disclosure.” Business Associate will not use or disclose Protected Health Information other than as permitted or required by this Agreement or as required by law or as otherwise authorized by COMPANY. Business Associate may access and use Protected Health Information only while on the COMPANY premises or at Business Associate’s place of business through a secured VPN connection. Business Associate shall not remove, transport, transmit or download Protected Health Information from the COMPANY premises unless approved in advance in writing by COMPANY. In cases where COMPANY approves release of Protected Health Information off the COMPANY

premises, Business Associate agrees that the terms of the attached Information Security Schedule shall be applicable.

“Safeguards.” Business Associate will use appropriate safeguards to prevent use or disclosure of the Protected Health Information other than as provided for by this Agreement. Business Associate will develop, implement, maintain and use appropriate administrative, technical and physical safeguards to preserve the integrity, availability and confidentiality of and to prevent non-permitted or violating use or disclosure of Protected Health Information, including electronic Protected Health Information that Business Associate creates, receives, maintains or transmits on behalf of COMPANY. Business Associate will document and keep these safeguards current and, where applicable, comply with the terms of the attached Information Security Schedule.

13.7.2 Gramm-Leach-Bliley Act

13.7.2.1 Regulated Entities

“Financial institution means any institution the business of which is engaging in financial activities as described in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)). An institution that is significantly engaged in financial activities is a financial institution.” 16 C.F.R. § 313.3(k) (2007). For details on examples of what constitutes a “financial institution” and what does not, *see* 16 C.F.R. § 313.3(k)(2) and (3) (2007).

13.7.2.2 Obligations to Protect

The Privacy Rule requires a privacy policy to be developed by the financial institution which tells its consumers:

- (1) The categories of nonpublic personal information that you collect;
- (2) The categories of nonpublic personal information that you disclose;
- (3) The categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information, other than those parties to whom you disclose information under §§ 313.14 and 313.15;
- (4) The categories of nonpublic personal information about your former customers that you disclose and the categories of affiliates and nonaffiliated third parties to whom you disclose nonpublic personal information about your former customers, other than those parties to whom you disclose information under §§ 313.14 and 313.15;
- (5) If you disclose nonpublic personal information to a nonaffiliated third party under § 313.13 (and no exception under §§ 313.14 or 313.15 applies to that disclosure), a separate statement of the categories of information you disclose and the categories of third parties with whom you have contracted;
- (6) An explanation of the consumer's right under § 313.10(a) to opt out of the disclosure of nonpublic personal information to nonaffiliated third parties, including the method(s) by which the consumer may exercise that right at that time;

(7) Any disclosures that you make under section 603(d)(2)(A)(iii) of the Fair Credit Reporting Act (15 U.S.C. 1681a(d)(2)(A)(iii)) (that is, notices regarding the ability to opt out of disclosures of information among affiliates);

(8) Your policies and practices with respect to protecting the confidentiality and security of nonpublic personal information; and

(9) Any disclosure that you make under paragraph (b) of this section.

See 16 C.F.R. § 313.6 (2007).

The Privacy Rule mandates that such privacy policies must be sent to consumers annually and must identify the consumer's right to opt out of any sharing of such PII to third parties. See generally 16 C.F.R. § 313, Subpart A (2007).

The Safeguards Rule requires companies to develop a written information security plan that describes their program to protect customer information. The plan must be appropriate to the company's size and complexity, the nature and scope of its activities, and the sensitivity of the customer information it handles. As part of its plan, each company must:

- designate one or more employees to coordinate its information security program;
- identify and assess the risks to customer information in each relevant area of the company's operation, and evaluate the effectiveness of the current safeguards for controlling these risks;
- design and implement a safeguards program, and regularly monitor and test it;
- select service providers that can maintain appropriate safeguards, make sure your contract requires them to maintain safeguards, and oversee their handling of customer information; and
- evaluate and adjust the program in light of relevant circumstances, including changes in the firm's business or operations, or the results of security testing and monitoring.

See The FTC's FINANCIAL INSTITUTIONS AND CUSTOMER INFORMATION:COMPLYING WITH THE SAFEGUARDS RULE at <http://www.ftc.gov/bcp/online/pubs/buspubs/safeguards.shtm>.

13.7.2.3 Contractual Considerations

Generally, the confidentiality provision of a covered entity's contract will address the service provider's obligation not only to maintain the confidentiality of the customer PII, but also expressly acknowledges that the service provider will comply with all applicable laws, including GLBA. A sample of such a provision might be:

"Consumer Information." Confidential Information also includes Consumer Information as defined above. Consultant acknowledges that various

international, federal and state laws and regulations regulate the privacy and security of Consumer Information. Consultant represents, warrants, and covenants that (i) it shall comply with any applicable laws and regulations regarding the privacy and security of Consumer Information; (ii) it shall maintain the confidentiality of Consumer Information; (iii) it shall not use Consumer Information except as necessary to fulfill its obligations under this Agreement; (iv) it shall not disclose Consumer Information to third parties except at the specific written direction of COMPANY; (v) it has in place now and will on a continuing basis maintain appropriate physical, technical and administrative safeguards (including safeguards identified in written guidelines provided by COMPANY), to protect Consumer Information from unauthorized access and to enable COMPANY to comply with applicable laws and regulations regarding the privacy and security of Consumer Information, including but not limited to 16 C.F.R. Part 314.

§ 13.8 CONCLUSION

It is now well accepted that a person has a right to privacy under both common law and statute. The right to privacy is generally only deemed infringed based upon an intentional act. A person may, however, waive a right to object or expressly consent to having his or her privacy invaded. The First Amendment right to free speech trumps a right to privacy, so privacy claims may be defeated where the publication of private information is newsworthy based on a legitimate public interest.

With the advent of the Internet, the United States government felt compelled to respond to the ease and breadth of disclosure risk due to electronic communications. These statutes focused on the protection of private information held by regulated entities. Under GLBA, banks and financial institutions are held accountable for the protection of personally identifiable information, while under HIPAA, healthcare providers must protect personal health information.