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Insurance Coverage & BAD FAITH LITIGATION

Conn. Takes Center Stage in Cybercoverage Debate

Courts to decide whether commercial policies cover data breaches

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In *Recall Total Information Management v. Federal Insurance* and *Travelers v. P.F. Chang's China Bistro,* Connecticut courts have taken center stage in the ever-evolving debate over whether commercial general liability (CGL) insurance covers certain cyberrisks.

In *Recall,* the Connecticut Supreme Court must decide under what circumstances the theft of data constitutes a "publication" under a CGL policy. (*Recall v. Federal Insurance,* 147 Conn. App. 450 (2014), cert. granted, 2014 Conn. LEXIS 76 (March 5, 2014)). The case involves an increasingly common scenario in today's technology-driven environment: the loss and/or theft of electronic hardware containing sensitive information. In this case, a third-party storage vendor lost 130 data tapes belonging to IBM when they fell off the back of a truck, were taken by an unknown person and were never recovered. IBM incurred $6 million of costs and expenses resulting from the loss of the tapes, for which it was indemnified by its vendor, Recall. In turn, Recall reimbursed IBM and pursued its transportation vendor, Executive Logistics Inc. The two resolved their dispute and pursued Executive's insurer, Federal Insurance Co., which denied the claim, arguing that the "publication of material, in any manner, that violates a person's right of privacy" coverage under a CGL policy requires a showing of "access," and because there was no evidence anyone "accessed" the information on the tapes, there was no "publication."

Federal's arguments in *Recall* are routinely raised by carriers throughout the country when trying to avoid coverage for costs associated with cyberrisks. In siding with Federal, the Connecticut Appellate Court concluded that "access" is a prerequisite to publication because one must have access to information in order to publish it. The court also reasoned that the facts of *Recall* did not demonstrate the requisite level of access to the information (as opposed to accessing the information by taking the tapes) and thus there was no publication. Those same arguments should not succeed in front of the Connecticut Supreme Court.

First, "publication" is undefined and, because the insurance company drafted the policy, any lack of clarity is construed in favor of coverage. Thus, "publication" should not be construed so narrowly that it ignores the factual context and retroactively imposes an otherwise irrelevant and unintended limitation on coverage. Rather, the mere theft of the tapes should qualify as a publication because the theft of the tapes removed the data from the exclusive possession of Recall and placed it in the possession of a party from whom it should have remained private.


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A recent decision from a Virginia federal court assessed a similar dynamic and reached the correct conclusion. In *Travelers Indemnity v. Portal Healthcare Solutions*, 2014 U.S. Dist. LEXIS 110987 (E.D. Va. Aug. 7, 2014), the court held that posting confidential medical information online, even without evidence that anyone ever viewed the information, constitutes a "publication" because "[p]ublication occurs when information is 'placed before the public,' not when a member of the public reads the information placed before it."

Likewise, in *Recall,* IBM entrusted Recall with exclusive control over the data tapes containing employee information for which there was no backup. When these tapes were taken out of Recall's control by

an unauthorized third party, a "publication" occurred. See, e.g., *Zurich American Ins. v. Sony,* No. 651982/2011 (N.Y. Sup. Ct. Feb. 21, 2014) (where hackers stole consumer information from Sony's PlayStation Network, and the court reasoned that even though there was no evidence that the information was used, its removal from a secure location by an unauthorized party constituted "publication").

'In Any Manner'

Second, the insurance industry's historic modification of standard form CGL language to encompass cyber-related risks evidences that a CGL policy provides coverage for data-related losses. Under Recall's policy, for example, "personal injury" is defined as "oral or written publication of material, *in any manner*, that violates a person's right of privacy." (Emphasis added.) The Insurance Services Office Inc. (ISO), the pseudo-legislative body that drafts standard coverage forms in response to the demands of the insurance industry, specifically implemented the "in any manner" language in 2001 in order to expand the CGL policy's ability to respond to Internet and electronic publications.

Moreover, in response to the rise in cyber-related claims and recognizing the potential for coverage under standard CGL forms, ISO has made efforts to curtail this coverage. These efforts include the creation of an endorsement with the sole purpose of eliminating the relevant "publication" language. If, as the insurance industry contends, there is no coverage for data-related losses under a CGL policy, these changes would be unnecessary. Connecticut courts agree, and recognize that such changes are evidence that coverage was available prior to the exclusions being implemented. *R.T. Vanderbilt v. Hartford Accident & Indem.,* 2014 Conn. Super. LEXIS 699 (Conn. Super. Ct. March 28, 2014).

In siding with the insurance company, the Connecticut Appellate Court concluded that 'access' is a prerequisite to publication because one must have access to information in order to publish it.

Interestingly, one item that was not considered by the trial or appellate courts is the source of the expenses incurred by IBM, and later Recall. Both courts recognized that the term "publication" was not defined by the policy and looked to other resources for a definition. The trial court relied on a definition related to defamation cases, while the appellate court referenced the dictionary. Both courts failed, however, to look to the statutes under which IBM and Recall were required to make payment. Had the courts done this, they would have noted that IBM and Recall were required, by statute, to incur costs for the protection of individuals whose personal information was exposed, in other words published. Had there been no exposure (i.e., a publication), there would have been no need to incur costs complying with the statutes.

Oral argument is scheduled to take place in December.

Debit Cards

In the shadow of *Recall,* another cyberrisk suit has come to Connecticut. In June, P.F. Chang's was notified of a data breach involving 7 million customer credit/debit cards from 33 stores in 18 states over a period of nine months. Following the breach, several class action lawsuits emerged alleging that the breach was caused by P.F. Chang's failure to safeguard customer information (including debit and credit card numbers) collected as part of its business. P.F. Chang's CGL carrier, Travelers, filed suit in the Connecticut federal district court seeking to avoid coverage for expenses related to these lawsuits.

Traveler's alleges that the data breaches do not trigger "personal and advertising injury" coverage—the same argument in *Recall*—thus, foreshadowing another "publication" debate. "Personal injury" is defined by the policy as "injury, other than 'advertising injury', caused by one or more of the following offenses: … (5) Oral or written publication, including publication by electronic means, of material that: … (c) Discloses information about a person's private life." The class actions' allegations against P.F. Chang's, that customer credit and debit card information obtained as part of P.F. Chang's business was stolen by a third party because of P.F. Chang's failure to adequately safeguard the information, should qualify.

P.F. Chang's and *Recall* have the potential to set new boundaries for CGL cyberrisk coverage, reinforcing the importance of the outcome of these cases and likely placing Connecticut at the forefront of cyberrisk coverage litigation. ■

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