

The Coverage Inkwell

Emerging Coverage Issues in Intellectual Property, Privacy,
and Cyber Liability



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RECALL TOTAL: DISCUSSING (SORT OF) THE MEANING OF PUBLICATION IN A DATA BREACH CASE

Year 2014 already is filled with stories of cyber data breaches, theft of personal information, and class action lawsuits. We all know about the Target data breach – about 40 million of us know it too well. Last week, Niemen Marcus confirmed that it, too, suffered a data breach in December 2013. Meanwhile, media reports are filled with rumors that other large retailers are preparing to make similar announcements. More class action lawsuits will follow, that we can be sure of. (For those who have not read my colleague Randy Maniloff's WSJ Op-Ed piece on the class actions lawsuits filed against Target, it is well worth your read. It can be found here:

<http://www.coverageopinions.info/Press/WallStreetJournalJan2014.pdf>. A more analytical Maniloff opinion is found here: <http://coverageopinions.info/Vol3Issue1/Target.html>. Both are great reads.)

Do data breach lawsuits allege "oral or written publication, in any manner, of material that violates a person's right of privacy" to implicate coverage under a general liability policy? The issue is hotly debated; although, ISO drafters likely will quench that fire when ISO's anticipated policy exclusions, which make clear that data breaches are not covered by general liability insurance, roll out this year (likely in May 2014). In the meantime, the debate continues, and a big part of that debate centers over the meaning of "publication."

My observation is that, for many courts, the meaning of "publication" seems to hinge upon the nature of the privacy invasion at issue. The more personal the invasion, the more likely courts will construe the term broadly. A *Coverage Inkwell* issue on this topic, in follow-up to an article I wrote for Gen Re last month, will be coming shortly.

In the meantime, a case just came out on Tuesday, *Recall Total Info. Management, Inc. v. Fed. Ins. Co.*, -- A.3d --, 2014 WL 43529 (Conn. App. Ct. Jan. 14, 2014), that addressed whether a data breach case constituted a *publication* of material that violates a person's right to privacy under a general liability policy. Given that there are few published cases addressing this topic, the case is generating some buzz.

In that case, Recall entered into a records storage agreement with International Business Machines (IBM), whereby Recall agreed to transport and store various IBM electronic media and records. *Id.* at

*1. Recall subcontracted transportation services for the work to a company called Ex Log. *Id.*

In February 2007, Ex Log dispatched a van to transport IBM computer tapes offsite from an IBM facility. During the transport, a cart containing the tapes fell out of the back of the van near a highway exit ramp. (Honestly, they don't write this stuff on TV.) Before Ex Log realized what happened, approximately 130 of the tapes had been removed from the roadside by an unknown person and have never been recovered. *Id.* The tapes contained personal identification information for approximately 500,000 past and present IBM employees, including social security numbers, birthdates, and contact information. *Id.* An important fact too note: the tapes apparently were of such that they could not be read by personal computers or other machines accessible to the average person. *Id.* at *6.

Nevertheless, upon notification of the incident, IBM went into crisis management mode, and undertook steps to prevent harm from any dissemination of the information. IBM notified potentially affected employees, established a call center to answer inquiries regarding the lost data, and provided one year of credit monitoring to those who could be affected by the lost data. *Id.* at *1. The total costs of these steps were more than \$6 million. *Id.* IBM negotiated a settlement with Recall for the full amount of the loss, who in turn, demanded indemnification from Ex Log. *Id.* Ex Log (and Recall) sought coverage under a general liability policy; the insurer denied coverage and litigation ensued. The trial court, defining "publication" to mean disclosure to a third party, held that because there was no evidence that a third party had accessed the information on the tapes, there was no publication to implicate coverage. *Id.* at *6. The Appellate Court of Connecticut affirmed. *Id.* at *2.

The policy at issue defined "personal injury" in part as "injury, other than bodily injury, property damage or advertising injury, caused by an offense of ... electronic, oral, written or other *publication* of material that ... violates a person's right to privacy." *Id.* at *5 (emphasis in original). The disputed issue was whether there was a "publication." *Id.* at *6. Recall and Ex Log argued that the theft of the information itself constituted a publication to implicate coverage:

...plaintiffs allege: "*[b]y virtue of the loss and theft of the IBM tapes ... the personal information that was stored on the tapes, including social security information and other private data, has been published to the thief and/or other persons unknown ... thereby subjecting [the plaintiffs] to potential claims and liability ... including liability for the cost of notifying the persons whose data was lost and for providing credit monitoring services to persons who requested it.*"

Id. at *6 (emphasis added).

The appellate court disagreed. The issue was not whether the tapes had been lost, but whether the information contained on the tapes had been accessed. Because there was no evidence that the information had been accessed, there was no alleged publication:

On the basis of our review of the policy, we conclude that personal injury presupposes *publication* of the personal information contained on the tapes. Thus, the dispositive issue is not loss of the physical tapes

themselves; rather, it is whether the information in them has been *published*. The plaintiffs contend that the mere loss of the tapes constitutes a publication, and has alleged that the information was *published* to a thief As the complaint and affidavits are entirely devoid of facts suggesting that the personal information actually was accessed, there has been no publication.

Id. at *6 (emphasis in the original).

Notably, the court declined to expound upon the meaning of “publication.” Noting that the term has different meanings for different privacy rights, the court concluded that because there was no evidence that the information on the tapes had been accessed, there was no publication under any definition of the term. *Id.* *6, n.8. The court explained:

Regardless of the precise definition of publication, we believe that access is a necessary prerequisite to the communication or disclosure of personal information. In this regard, the plaintiffs have failed to provide a factual basis that the information on the tapes was ever accessed by anyone.

Id. Further bolstering the court’s conclusion was the fact that the parties had stipulated that none of the IBM employees affected had been injured: “Moreover, because the parties stipulated that none of the IBM employees have suffered injury as a result of the tapes being lost, we are unable to infer that there has been a publication.” *Id.*

Finally, the court held that costs incurred for notification, as required by statutes in the wake of a data breaches, do not constitute “personal injury”:

Essentially, the plaintiffs contend that when such a notification statute is triggered, there has been an invasion of privacy. We disagree with this logic.

* * *

In this case, IBM claims to have suffered a loss of more than \$6 million related to the alleged compliance with these notification statutes. While we do not speculate as to whether these expenditures were required by law, we conclude that they do not constitute a personal injury as defined in the policy. These notification statutes simply do not address or otherwise provide for compensation from identity theft or the increased risk thereof, they merely require notification to an affected person so that he may protect himself from potential harm. Accordingly,

merely triggering a notification statute is not a substitute for a personal injury.

Id. at *7.

What does this case mean? On the one hand, the holding in *Recall Total* is somewhat limited by its facts. Because there was no evidence that the information on the IBM tapes had been accessed, the court held that there was no “publication,” no matter the meaning of the term. In most data breach cases, however, there *is evidence* that someone accessed the stolen data, either by means of hacking or with the assistance of an inside company employee. Thus, for many cases, *Recall Total* may be distinguished on its facts.

On the other hand, the case highlights problems with the meaning of publication. For instance, the trial court employed the meaning of publication as used in the tort of defamation. The “publication” element in a right of privacy/publicity given to private life tort, however, is much more stringent. Most states, following the *Restatement*, require a dissemination of the information to the public at large or to so many people that it is substantially certain that the information will become generally known. The appellate court never seemed to consider such a stringent requirement; although, it did not have to because of the unique facts of the case.

Nevertheless, some may choose to characterize this case as one requiring a very low threshold for the “publication” element of “personal and advertising injury” in the context of a data breach claim. Given the paucity of published data breach coverage cases, this decision may get more attention than it merits.

Questions and comments are welcome.

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