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PERSPECTIVE

Ruling breaks new ground for CGL policy data breach coverage

By Peter Selvin

A recent case from the 5th U.S. Circuit Court of Appeals breaks new ground on the question of whether a commercial general liability policy provides coverage for damages arising from a data breach caused by a third-party hacker. *Landry's Incorporated v. Insurance Company of the State of Pennsylvania*, 4 F. 4th 366 (5th Cir. 2021). In brief, the court in *Landry's* held that there was coverage for a data breach where the insured was sued by a credit card processing company for breach of contract.

Landry's operated retail properties including restaurants, hotels and casinos. Paymentech, a branch of JPMorgan Chase Bank, processed Visa and MasterCard payments to those properties. Paymentech's agreements with Visa and MasterCard required that it indemnify Visa and MasterCard for data breach losses. Landry's agreement with Paymentech required it to follow certain payment brand rules, comply with certain security guidelines and indemnify Paymentech for any assessments, fines or penalties stemming from any breach by Landry's of those payment brand rules.

Between 2014 and 2015, 14 of Landry's locations suffered a data breach. The data breach was caused by malware on its payment-processing devices. The malware retrieved personal information from millions of Landry's customers, resulting in unauthorized credit card charges.

Visa and Mastercard levied approximately $20 million in assessments against Paymentech as a result of the data breach under their agreements. Paymentech in turn filed suit against Landry's for breach of the Landry's Paymentech agreement. Paymentech alleged that Landry's violated the payment brand rules, which led to the data breach, which in turn led to Visa's and MasterCard's respective assessments. Paymentech further alleged that Landry's was obligated under its agreement with Landry's to pay the approximately $20 million collectively assessed by Visa and MasterCard.

Landry's liability policy provided coverage for injuries arising from "oral or written, in any manner, of material that violates a person's right of privacy." Landry's tendered the Paymentech suit to its liability carrier which denied coverage. Landry's filed suit against its carrier and the trial court granted summary judgment to the carrier. The trial court held that the Paymentech complaint did not allege a "publication" because it asserted only that a third party had hacked into the credit card processing system and stole customers' credit card information. The trial court also held that the Paymentech complaint did not allege a "violation of a person's right of privacy" because that complaint involved the payment processor's contract claims, not the cardholders' privacy claims.

The 5th Circuit reversed. It held that Landry's "published its customers' credit card information — that is, exposed it to view." It further held that the Paymentech complaint implicated the "violation of a person's right to privacy." "It does not matter that Paymentech's legal theories sound in contract rather than tort. Nor does it matter that Paymentech (rather than the individual customers) sued Landry's. Paymentech's alleged injuries arise from the violations of customers' right to keep their credit-card data private."

Importantly, *Landry's* breaks new ground because it departs from the line of cases which have held that disclosure of confidential information in a data breach arising from a third party's (such as a hacker's) conduct will not be covered. *See, e.g., Zurich Am. Ins. Co. v. Sony*, 2014 WL 3253541 (N. Y. Sup. Ct. Feb. 24, 2011); *Innovak International v. Hanover Insurance Company*, 280 F. Supp.3d 1340 (M.D.Fla.2017); *St. Paul Fire & Marine Insurance Company v. Rosen Millennium, Inc.*, 6:17-cv-540 (M.D. Fla. 2018) (finding that data breaches caused by third parties are not covered under CGL policies). The theory underlying these case is that a third party's misappropriation and disclosure of confidential information does not constitute a "publication" by the insured.

By contrast, it is fairly well established that in the data breach context that a disclosure of confidential information by the insured without the intervention of a third party will constitute a "publication" sufficient to fall within coverage. *Travelers Indemnity Company v. Portal Healthcare Solutions*, 35 F.Supp.3d 765 (E.D. Va. 2014), *aff'd*, 644 Fed. Appx. 245 (4th Cir. 2016); *Evanston Ins. Co. v. Gene by Gene, Ltd.*, 155 F.Supp. 3d 706, 708 (S.D. Tex. 2016) (insured published DNA results on its website without the affected individual's consent).

Portal Healthcare is illustrative of this line of cases. In that case, Portal (a company specializing in the electronic safekeeping of medical records for hospitals) entered into a contract with Glen Falls Hospital for the storage of its patients' records. Evidently by mistake, Portal caused or allowed patient records to be accessible, viewable, copyable and downloadable from the internet without security restrictions. A class action against Portal on behalf of patients was filed. Portal tendered the class action complaint to its carrier which denied coverage.

In the ensuing coverage lawsuit between Portal and its carrier, the court granted Portal's motion for summary judgment. The court held that Portal's allowing or causing this disclosure constituted a "publication." Rejecting the carrier's argument that there was no "publication" because it was not alleged that persons other than the patients themselves had viewed the medical records, the court noted that "publication occurs when information is 'placed before the public,' not when a member of the public reads the information placed before it. By Travelers' logic, a book that is bound and placed on the shelves of Barnes & Noble is not 'published' until a customer takes the book off the shelf and reads it. Travelers' understanding of the term 'publication' does not comport with the term's plain meaning, and the medical records were published the moment they became accessible to the public via online search."

Landry's is pro-policyholder decision because it expands the concept of "publication" to include instances where disclosure as a result of a third party's conduct (as distinct from the insured's own conduct, as was the case in *Portal Healthcare*) will qualify as "publication" for purposes of coverage under a CGL policy. It remains to be seen whether other courts will adopt this approach. ■

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