SUPREME COURT OF THE STATE OF CONNECTICUT

S.C. 19291

RECALL TOTAL INFORMATION MANAGEMENT, INC., ET AL.
V.
FEDERAL INSURANCE COMPANY, ET AL.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS-APPELLANTS' BRIEF ON THE MERITS

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United Policyholders respectfully submits this *amicus* brief[1] for the Court's consideration because the resolution of this case is highly important to commercial policyholders in Connecticut who rely upon their CGL insurance policies for "personal injury" coverage against claims involving invasions of privacy.

STATEMENT OF INTEREST OF AMICUS CURIAE

United Policyholders ("UP") refers this Court to the more complete Statement of Interest submitted in Amicus Curiae's Application to Appear as, and File Brief of, Amicus Curiae, filed on June 10, 2014. Briefly, UP is a federal 501(c)(3) tax-exempt organization founded in 1991 that is a voice and an information resource for insurance consumers in Connecticut and throughout the United States. Dedicated to educating the public on insurance issues and consumer rights, UP assists and informs disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations, and volunteers support our work. UP does not accept funding from insurance companies. UP is based in California but operates nationwide.

UP has a particular interest in promoting the rights of policyholders and seeing that policyholders obtain the full measure of the insurance they purchase. The question presented in this case is of importance to insurance consumers across the nation, particularly consumers of commercial general liability ("CGL") policies, because data security is continuing to rise as an issue that corporations confront in day-to-day operations. Corporations are required under state laws to take immediate mitigating

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[1] Pursuant to Rule 67-7 of the Connecticut Rules of Appellate Procedure, the undersigned counsel certifies that counsel for no party wrote this brief in whole or in part, and did not contribute to the cost of the preparation or submission of this brief. All costs and fees were paid by United Policyholders.

measures when a data breach occurs, which can cost hundreds of thousands of dollars or more. These corporations, as consumers of commercial general liability policies, reasonably rely upon their commercial general liability insurance – and the personal and advertising injury coverage in particular – to protect them in the event of such a loss. The Connecticut Appellate Court's interpretation of "publication" puts commercial general liability policyholders at risk of having to bear the burden of data breach losses on their own, even if they have already purchased an insurance policy with the expectation of protection. Given the importance of reliable personal injury coverage in an age of frequent data breaches implicating privacy rights,[2] the lower courts' unduly restrictive interpretation and erroneous analysis of the personal injury coverage section needs to be corrected by this Court.

STATEMENT OF FACTS

UP hereby adopts the "Statement of Facts and Nature of Proceedings" set forth in the Brief of the Plaintiff-Appellants, Recall Total Information Management, Inc. and Executive Logistics Services, Inc., filed on May 21, 2014, and refers the Court thereto for a detailed recitation of the facts and history of this case.

ARGUMENT

UP respectfully submits that the Appellate Court committed reversible error when it affirmed the trial court's ruling that there was never a "publication" of the employee data loaded onto the IBM tapes. Unfortunately, the term "publication" (as drafted by insurance

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2 *See* Amaris Elliott-Engel, *Hackers Take Aim At Small Law Firms*, Conn. Law Tribune, May 26, 2014, at 1 (reporting that in "recent months, corporate America has been shaken by several headline-grabbing data breaches.").

companies and used in the "personal injury" and "advertising injury" coverage sections of CGL and umbrella insurance policies nationwide) has spurred substantial litigation. Numerous courts from various jurisdictions have reached opposing interpretations of the phrase "publication"--even under nearly identical factual scenarios.[3] Some courts, even when sitting within the same jurisdiction and seeking to apply the same state law, have disagreed on the correct construction of the term. *See Valley Forge Ins. Co. v. Swiderski,* 359 Ill. App. 3d 872, 834 N.E.2d 562, 573-74 (2005) (refusing to follow the Seventh Circuit's prior construction of the word "publication" and ruling the term was ambiguous). This Court has the opportunity to correct the errors below and lend clarity to the meaning of "publication" in an electronic media age.

A. The Appellate Court Committed Reversible Error in Concluding That There was No "Publication" of IBM Employees' Personal Information

1. For the Purposes of Activating Liability Insurance Policies, There Was "Publication" As That Term is Defined by the *Springdale Donuts* Case

The Appellate Court and trial court committed error when they failed to properly apply the definition of "publication" as previously adopted by this Court to provide the term's meaning. Specifically, in *Springdale Donuts, Inc. v. Aetna Cas. & Sur. Co.*, 247 Conn. 801 (1999), this Court presided over the question of whether the policyholder had personal injury insurance coverage for allegations by underlying claimants that they were the target of "frequent lewd and lascivious remarks" from a fellow employee. The policyholder had

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[3] *Compare Whole Enchilada Inc. v. Travelers Prop. Cas. Co. of Am.*, 581 F. Supp. 2d 677, 697 (W.D. Pa. 2008) (finding no coverage based upon trial court's construction of "publication") *with Park Univ. Enters. Inc. v. Am. Cas. Co. of Reading,* 442 F.3d 1239 (10th Cir. 2006) (finding in favor of coverage based upon appellate court's construction of "publication").

argued to this Court that the remarks made to claimants by their then fellow-employee constituted "oral publication." This Court rejected that argument and held the term "publication" "generally refers to the communication of words to a third person." *Id.* at 810. This Court reasoned that:

> Common sense dictates that a lay person would understand the term "publication" to mean the communication of words to a third person. Because the underlying complaints did not allege "publication" of material to a third party, but instead were based entirely on comments directly made only to the claimants, we conclude that the complaints do not set forth allegations of a personal injury to which the plaintiff's commercial general liability policy applies.

Id. at 810-11. In the context of activating liability insurance policies, the facts of this case meet the criteria for a "publication" set forth by this Court in the *Springdale Donuts* case. The private information contained on the IBM tapes at issue in this case contained words, which were communicated to the person taking possession of the lost tapes without authorization. In this case, that person was a "third party"- not a claimant - in contrast to the facts in *Springdale Donuts.* That the policyholder did not intend to communicate the employee data on the IBM tapes does not mean there was no publication for the purpose of triggering liability insurance. The loss of the unencrypted data on the tapes was a coverage-triggering publication just as it would have been had the employee data been contained in a computer file that was unintentionally attached to an email and sent to a third party. As such, there was a coverage-triggering publication of the IBM employee data consistent with the interpretation of "publication" previously adopted by this Court.

2. The Appellate Court Erroneously Restricted The Definition of "Publication" By Imposing an Access Requirement

The Appellate Court committed error when it ruled that there had to be absolute proof of a third-party having read the employee data on the IBM tapes for there to be

"publication". *Recall Total Info. Mgmt., Inc. v. Fed. Ins. Co.,* 147 Conn. App. 450, 642, 83 A.2d 664, 666-67 (2014). The Appellate Court below effectively held that without proof of access, stolen or lost data could not be considered published. This ruling interpolates conditions that are not part of the insurance policies' personal injury coverage. Coverage-triggering publication of the IBM employee data took place when the policyholder lost the data from its van and a third-party assumed possession of the data. There is no requirement under the policy's definition of coverage-triggering "publication" that the policyholder also prove that the third-party actually read the data in whole or in part. *See Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.,* 432 F. Supp. 2d 488, 503 (E.D.Pa. 2006) (concluding "the term 'publication,' [] can include the simple act of issuing or proclaiming"). *See also Valley Forge Ins. Co. v. Swiderski*, 359 Ill. App. 3d 872, 834 N.E.2d 562, 573-74 (2005) (concluding that the word "publication" was ambiguous and would be construed against the insurer to include material covered under the policy even if not sent to a third party); *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 238 (Tex. App.-Dallas 2004) (holding the word "publish" is generally understood to mean to disclose, circulate, or prepare and issue printed material for public distribution); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365, 1378 n.12 (S.D.Ga. 2003) (holding the word "publication" is ambiguous), *aff'd* 157 Fed. Appx. 201, 2005 U.S. App. LEXIS 26765 (11th Cir. 2005); *W. Rim Inv. Adv. v. Gulf Ins. Co.*, 269 F. Supp. 2d 836, 846 (N.D.Tex. 2003) ("nothing in the CGL policy indicating that the word 'publication' necessarily means communicating the offending material to a third party.").

In *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429, 447 (2010), the California appellate court held that "publication" meant "making known." Specifically, the court in that case reasoned that:

> [T]he provision defined advertising injury to include "making known to any person or organization written or spoken material that violates an individual's right of privacy". . . , whereas State Farm's policies define it as "oral or written publication of material that violates a person's right of privacy." The distinction lies chiefly in the use of the word "publication" rather than the phrase "making known to any person or organization." We find it to be one without a difference. "[P]ublication" is defined as "mak[ing] known."

Id. at 447. In this case, the employee data on the lost IBM tapes was unencrypted. Through the policyholder's actions of losing possession of the employee data tapes to a third party, the private data has been published for the purpose of triggering coverage as it has been made known to a third party. Access to this data can reliably be presumed where the information was unencrypted because it can be read, misused, sold, or altered by the third-party that took possession of it. It can also be copied, transferred, or disseminated further by this third-party to countless others. *See* Conn. Gen. Stat. § 36a-701b(a) (wherein a "breach of security" exists where unauthorized acquisition of unencrypted electronic files containing personal information takes place); *Tabata v. Charleston Area Med. Ctr., Inc.*, No. 13-0766 (W.Va., May 28, 2014) (reversing lower court and holding that plaintiffs had standing for violation of privacy claims where social security numbers and medical data were placed online and an "advanced internet" search could locate that private data even though plaintiffs had no proof that any third party actually has reviewed, misused, or accessed this information). Had the information been published in a newspaper at the very back in the small print classifieds section, there would be no doubt that "publication" would be deemed to have been made (even if there was no proof that

anyone ever read it). An analogous situation exists here as employee data was made known to one or more third parties. It is reversible error to add a requirement for triggering coverage that the policyholder also prove that the private employee information beyond doubt was read, accessed or reviewed. The Appellate Court nevertheless imposes such a requirement under its ruling.

Further, a more than fair inference exists from the factual record that the thief who took possession of the lost employee data tapes reviewed the data (and/or disclosed it to others who would). It is the data, and not the data tapes that are valuable. *See* Scottsdale Memorandum of Law in Support of Motion for Summary Judgment, Appx. to Joint Appellees' Brief at DA-086 (recognizing that losses claimed related to data contained on the tapes, not the tapes themselves). The employee data tapes can be analogized to a safe that is lost or stolen. Whatever party that takes possession of the safe from the original custodian will be presumed to review the contents of the safe, as the common sense inference will always remain that the contents of the safe are far more valuable than the vessel housing them. Similarly, the employee data tapes themselves have minimal value. The personal employee data residing on them, however, is of enormous value.

3. The Appellate Court's Decision Does Not Recognize The Modern Realities of How Electronic Information is Captured and Transmitted

When it appears in a coverage-grant in an insurance policy, the term "publication" needs to be viewed broadly and in an updated context given the common modern means in which information is communicated. *See Kelly v. Figueiredo*, 223 Conn. 31, 36-37, 610 A.2d 1296 (1992) (ruling that "Under well established principles of contract construction, we must 'construe the terms of an insurance policy in favor of insurance coverage because it is the insurance company that has drafted the terms of the policy.'"). Decisions over the last

several years in which "publication" is found for information that is electronically captured and transmitted recognize this. In *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 651 (2004) for example, the court held that insurance coverage was owed to the policyholder where there was a claim that audio and video recording equipment installed at a hotel intercepted the private conversations of an employee through the use of hidden microphones throughout the workplace. The court rejected the insurance company's argument that, because there was no allegation that the statements were communicated to third parties, there was no "publication." The court reasoned that:

> The Westfield policy contains no definition of the word "publication." We find nothing in the policy indicating that the word publication necessarily means transmitting the intercepted communications to a third party, as is required of material in the defamation context. And, even were we to assume publication does require communicating to a third-party, the surveillance monitoring system apparently functioned in such a way that anyone in the manager's office or in Mr. Hicks' home had the ability to listen in on employee conversations. Accordingly, we find that the policy language can reasonably be interpreted such that there would be coverage for the allegations in Mr. Bowyer's complaint, for the oral publication of material that violated his right of privacy.

Similarly, in a case from last year, *Encore Receivable Mgmt. v. Ace Prop. & Cas. Ins. Co.*, Case No. 1:12-cv-297, 2013 U.S. Dist. LEXIS 93513 (S.D.Ohio, July 3, 2013), the court considered whether there was the requisite "publication" under the personal and advertising injury coverage where the policyholder's employees allegedly: (1) recorded various telephone conversations between Hyundai customers and Encore customer service representatives without obtaining the customers' consent; and (2) distributed these recordings internally within Encore for training and quality control purposes.

The *Encore* court rejected the insurance company's argument that there was no oral or written publication "because the records were not distributed outside Hyundai, Encore,

and/or CMG ... ." In ruling against the insurance company's argument that publication requires the distribution of information or news to the public, the court held:

> The courts that have looked at recording in the secrecy context have all read publication very broadly and held that a transmittal or a further dissemination of secret information satisfies publication. The firsthand experience of the communication, the words, the tone, and the cadence are all protected. When the firsthand aspect of the communication is transmitted to the mechanical device, it constitutes publication -- dissemination of that unique aspect of the conversation that the speaker no longer has the ability to control. Here, this Court need not find that the communications were actually disseminated to third parties, because the initial dissemination of the conversation constitutes a publication at the very moment that the conversation is disseminated or transmitted to the recording device. ... Accordingly, this Court need not find that the recordings were disseminated to the public in order to find publication.

Id. at 30-1.

Here, the situation is no different. The private employee information was not placed on newspaper by printing presses, but instead was placed on unencrypted data tapes. This information was published (albeit inadvertently) to at least one third party, who collected the data tapes from the roadside and thereafter misled investigators. The coverage-triggering "publication" occurred because (and when) the policyholder accidentally made available employee information to the third party that took possession of the tapes. The information was unencrypted and thus readable. The record evidence allows for a reasonable inference that such coverage-triggering publication took place given the third-party taking possession of the IBM data tapes with private valuable information.

In the most recent decision on the question of "publication" involving liability insurance coverage for a data breach, *Zurich Am. Ins. Co. v. Sony Corp. of Am.*, No.: 651982/2011, (N.Y. Sup. Ct., Feb. 21, 2014), Sony lost private data to a computer hacker. Sony sought personal injury insurance coverage. Although the New York court ultimately

determined that there was no insurance coverage for Sony,[4] the court rejected the insurance company's argument that there had been no "publication." Applying New York law, the *Sony* court held that once Sony's cloud computer platform was hacked by the cyber thief, there was a "publication." As indicated by the transcript of the argument, the *Sony* court reasoned:

> [INSURANCE COMPANY COUNSEL] But, there is no allegation that the hackers themselves published anything.
>
> THE COURT: That is getting into real subtleties. Because, I look at this as a Pandora's box. Once it is opened, it doesn't matter who does what with it. It is out there. It is out there in the world, that information. And whether or not it's actually used later on to get any benefit by the hackers, that in my mind is not the issue. The issue is that it was in their vault. (Tr., p. 42.)[5]
>
> "When you open up the box, it's the Pandora's box. Everything comes out." (Id.)
>
> So that in the box, [the information] is safe and it is secured. Once it is opened, it comes out. And this is where I believe that's where the publication comes in. It's been opened. It comes out. (Tr., pp. 76-77.)

Here, as in *Sony*, Pandora's box was opened the moment the IBM tapes were lost and taken by the third party. The unencrypted employee information is no longer safe, no longer secure. Connecticut's definition of "publication" needs to reflect this reality.

CONCLUSION

For the reasons set forth above, Amicus Curiae United Policyholders respectfully requests that the Court reverse the decisions of the courts below and find that a "publication" of the employee data did take place and that the Appellees' respective personal injury coverage obligations are thus triggered and owing.

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4 Sony is presently appealing the trial court's ruling of no coverage.

5 Tr. of Proceedings on Feb. 21, 2014.

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CERTIFICATION OF SERVICE

The undersigned certifies that, pursuant to the Rules of Appellate Procedure § 62-7, on the 10th day of June, 2014, a copy of the foregoing was served on the below-listed counsel of record via first class United States mail, postage prepaid:

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the foregoing complies with the requirements of the Rules of Appellate Procedure §§ 66-3, 62-7, and 67-2, that the font is Arial 12, and that all other Appellate rules have been satisfied.

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SHOWING THEIR AGE

FIRMS DEBATE CLAIM OF BEING OLDEST IN THE NATION

The first office building for the firm now known as Howard, Kohn, Sprague & FitzGerald was located at 15 Main St. in Hartford. Early members of the firm included Thomas Clapp Perkins and Charles Enoch Perkins. The photos are on display at the firm's current offices.

BY JAY STAPLETON

It's sort of like the old chicken-or-the-egg riddle. It makes for entertaining debate, but no easy answers.

The debate over which law firm is the nation's oldest has been revived by a recent article in the ABA Journal. The discussion resonates in Connecticut, where the Hartford firm of Howard, Kohn, Sprague & FitzGerald has for many years claimed the title, tracing its roots to 1786, when it was founded by Enoch Perkins.

But that claim was recently given a symbolic good slap to the face when a February article in the American Bar Association publication declared Rawle & Henderson of Philadelphia to be the oldest firm in the country.

To the Journal, it's simple math. Howard Kohn's 1786 launch makes the Connecticut firm 228 years old. But Rawle & Henderson opened on Sept. 15, 1783. That means it will be 231 years old this fall.

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Law Library Lawsuit Settles For $12 Million

MEDIATION EFFORTS BRING END TO LENGTHY DISPUTE THAT INVOLVED SUPREME COURT DECISION

By CHRISTIAN NOLAN

The University of Connecticut School of Law's Thomas J. Meskill Library opened on Jan. 31, 1996. Even though the five-story structure was built in the Gothic Revival style, it was heralded as a state-of-the-art facility. Officials boasted that the $24 million building would last a century.

Left alone, it wouldn't have lasted a decade.

Mold infestation was an immediate problem. Water would rush in every time there were heavy downpours. An independent architectural firm later discovered shoddy workmanship that put the building's granite facade at risk of blowing off.

The contractors that had built the library in Hartford's West End balked at doing repairs. The result was a prolonged legal battle that included a trip to the state Supreme Court, which two years ago issued a landmark construction law decision. The matter was finally resolved on May 21 when the state announced a $12 million settlement with 28 construction firms, architects, designers, inspectors and other defendants.

"This was a tough experience for the law school community," said UConn law school Dean Timothy Fisher. "We

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Hackers Take Aim At Small Law Firms

EXPERTS WARN ATTORNEYS TO TAKE STEPS TO AVOID DATA BREACHES

By AMARIS ELLIOTT-ENGEL

In recent months, corporate America has been shaken by several headline-grabbing data breaches.

Retailer Target's first-quarter profits were down 16 percent after credit card and personal information of millions of its customers was stolen. Daily-deal website LivingSocial was hacked with more than 50 million users impacted. Last week, hackers gained access to the personal data of 145 million of online auctioneer eBay's customers.

Lawyers are among the specialists called in to help with these security crises. But data breach risk doesn't belong to clients alone. Law firms of all sizes risk having client data and other sensitive materials exposed, legal and technical experts say.

In Massachusetts, state officials felt so strongly about the threat to law firms that they've planned a seminar for May 29. An email pitching the program to the state's lawyers says: "Hackers are now targeting small law firms because of the wealth of info in client files that can be used for identity theft—in family law, estate planning, real estate, elder law and other matters. And Mass. law requires you to notify clients of a data breach—do you really want to have to do that?"

Anthony Minchella says Connecticut lawyers shouldn't feel any more comfortable.

The owner of Minchella & Associates in Middlebury and the vice chairman of the Connecticut Bar Association's small firm practice management section, said in an email that "small firms or solos sometimes feel safe from cybersecurity threats, but that is completely false. No business is safe. Practices that obtain sensitive information, such as credit card numbers, often have the entire package of information a cyber-thief would need to steal an identity."

Monique Ferraro, a general practitioner in Waterbury who also runs a forensic technology business and lectures on information tech-

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Firms Should Be Wary About Cloud Storage Of Data

From HACKERS on PAGE 1

nology security, said data breaches can be as simple as the loss of a lawyer's laptop or smartphone that isn't protected by a password. "I see a lot of lawyers who are not securing their data appropriately," Ferraro said.

Connecticut has put businesses of all types on notice that they have to take safeguards to prevent data breaches. Unfair trade practice charges can be brought against companies and organizations if they expose personal information like Social Security numbers, credit card numbers and driver's license numbers. And lawyers must provide notice to their clients and the Office of the Attorney General if they've suffered a data security breach.

There are at least three other ways that data breaches can occur, says Ellen Giblin, lead privacy and data security counsel with the Ashcroft Law Firm in Boston and manager of the data breach response team for clients.

Hackers can keep pinging away at a law firm's information security apparatus until they break in. They can use an insider to provide them with sensitive information. Or they can "socially engineer" their way past IT security protocols by using phishing scams that entice lawyers to respond to fraudulent emails which, in turn, provide entree to their firms' electronic data.

Under the law, law firms are considered to be vendors, and vendors are required to have the appropriate "administrative, physical and technological safeguards in place" to ensure data security, Giblin said.

"It's important for law firms to always safeguard and keep confidential their client information, whether it's to protect attorney-client privilege" or to follow federal, state or other laws enacted to protect privacy and confidential information.

Middlebury attorney Anthony Minchella said that 'small firms or solos sometimes feel safe from cybersecurity threats, but that is completely false. No business is safe.'

Protecting Client Data

Not even the experts agree on how to best protect client data.

Lawyers Dan Siegel and Molly Gilligan, whose company, Integrated Technology Services, advises small and midsized law firms, said the best practice is to store client data with a cloud vendor on the Web and on a hard drive in one's legal office.

It's the practice they use in their own businesses. Siegel, who is based in the Philadelphia suburbs, and Gilligan, a Quinnipiac University School of Law graduate now based in Maine, are using a remote case management system so they can work together in a law practice as well as in their technology business.

Cloud vendors can provide better security than what a smaller law firm typically can come up with on its own, Siegel said.

But lawyers must do their due diligence and ensure that the vendor's terms of service acknowledge that the data belongs to the client, and not the vendor or the law firm, Siegel said. Lawyers should only use vendors that store the data in the U.S., he said.

The agreement with a cloud vendor also should cover what happens if the vendor goes out of business, Siegel said. If that happens, Siegel's firm has the encrypted data backed up on a hard drive, he said.

Connecticut bar officials have not issued an ethics opinion on whether it's appropriate for lawyers to entrust client data to a cloud-computing service where the data is accessed over the Internet via a web browser, according to a tally by the American Bar Association. New York and Massachusetts have released ethics opinions on the topic; both jurisdictions require that lawyers exercise reasonable care in putting client data on the cloud.

Ferraro, however, does not recommend using cloud vendors, saying that law firms should be leery about trusting an outside company with such sensitive client information. "If you have control of your data," she said, "you have control over your data."

If lawyers choose to go the cloud route, Ferraro says they should get client consent before storing their data remotely. She prefers that lawyers store their own files, making sure they are encrypted. She recommends that attorneys install a self-encrypting hard drive on their computers.

Heidi Alexander, a law practice adviser with the Massachusetts Law Office Management Assistance Program, said that Dropbox, one of the most popular cloud providers, may not be the safest and most secure vendor to use because it has experienced some data breaches of its own. She, too, said that encryption is the best way to protect documents. She added that attorneys should make sure that passwords are strong and unique.

Both Ferraro and Giblin recommend a number of other data security policies. They said law firms should have policies that forbid the use of computers for a personal purpose. Along the same lines, Ferraro said lawyers should have separate business and personal smartphones. Those phones should be password-controlled and include features that allow their digital contents to be erased from a remote location in case they are lost or stolen.

'Matter of Time'

A law firm is going to experience a data breach and get into hot water, Ferraro and Giblin predicted.

Even though lawyers are supposed to notify their clients of data breaches under Connecticut law, "they don't do it and it's just a matter of time before this implodes upon itself," Ferraro said. There will be class action lawsuits or criminal investigations, she said.

Giblin predicts federal action at some point against a law firm. The Federal Trade Commission has prosecuted data security breaches as an unfair trade practice, she said. "If they haven't gone after a law firm, they will," Giblin said.

Hackers can keep pinging away at a law firm's information security apparatus until they break in. They can use an insider to provide them with sensitive information. Or they can 'socially engineer' their way past IT security protocols by using phishing scams.

Gilligan said that there is a balance to be struck between security and efficiency with technology. Lawyers need to take reasonable steps to use technology to protect their clients' data, Gilligan said; but technology also is about "making your office more efficient and better able to serve your clients. There is a trade-off." ■

Connecticut lawyers can watch a video recording of the May 29 Boston program on "Data Security For Small Firms" by visiting the website of the Social Law Library at www.soclaw.com.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2014 Term

No. 13-0766

LARRY TABATA, SHIRLEY CHANCEY,
WILLIAM WELLS, DONALD R. HOLSTEIN, JR., AND KAY KIRK,
Plaintiffs Below, Petitioners

v.

CHARLESTON AREA MEDICAL CENTER, INC., AND
CAMC HEALTH EDUCATION AND RESEARCH INSTITUTE, INC.,
Defendants Below, Respondents

Appeal from the Circuit Court of Kanawha County
Honorable James C. Stucky, Judge
Civil Action No. 11-C-524

REVERSED AND REMANDED

Submitted: April 23, 2014
Filed: May 28, 2014

Sean W. Cook, Esq.
Meyer Ford Glasser & Radman
Charleston, West Virginia
Attorney for Petitioners

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Nathan I. Brown, Esq.
Jenna E. Hess, Esq.
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Attorneys for Respondents

The Opinion of the Court was delivered PER CURIAM.

JUSTICE KETCHUM dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "This Court will review a circuit court's order granting or denying a motion for class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure* [1998] under an abuse of discretion standard." Syl. pt. 1, *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003).

2. "Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court." Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

3. "A patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information." Syl. pt. 4, *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 446 S.E.2d 648 (1994).

4. "The right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right

the unwarranted invasion or violation of which gives rise to a common law right of action for damages." Syl. pt. 1, *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958).

5. "A declaration in an action for damages founded on an invasion of the right of privacy, to be sufficient on demurrer, need not allege that special damages resulted from the invasion." Syl. pt. 2, *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958).

6. "An 'invasion of privacy' includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." Syl. pt. 8, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983).

7. "In West Virginia, a legally protected interest in privacy is recognized. *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958)." Syl. pt. 2, *Cordle v. Gen. Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984).

8. "The party who seeks to establish the propriety of a class action has the burden of proving that the prerequisites of Rule 23 of the West Virginia Rules of Civil Procedure have been satisfied." Syl. pt. 6, *Jefferson Cnty. Bd. of Educ. v. Educ. Assoc.*, 183 W. Va. 15, 393 S.E.2d 653 (1990).

9. "Nothing in either the language or history of Rule 23 of the *West Virginia Rules of Civil Procedure* [1998] gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Syl. pt. 6, *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003).

10. "Before certifying a class under Rule 23 of the *West Virginia Rules of Civil Procedure* [1998], a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – and has satisfied one of the three subdivisions of Rule 23(b). As long as these prerequisites to class certification are met, a case should be allowed to proceed on behalf of the class proposed by the party." Syl. pt. 8, *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003).

11. "The 'commonality' requirement of Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* [1998] requires that the party seeking class certification show that 'there are questions of law or fact common to the class.' A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of "commonality" is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members." Syl. pt. 11, *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003).

12. "The 'typicality' requirement of Rule 23(a)(3) of the *West Virginia Rules of Civil Procedure* [1998] requires that the 'claims or defenses of the representative parties [be] typical of the claims or defenses of the class.' A representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Rule 23(a)(3) only requires that the class representatives' claims be typical of the other class members' claims, not that the claims be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." Syl. pt. 12, *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003).

Per Curiam:

The petitioners herein and plaintiffs below appeal the June 24, 2013, order of the Circuit Court of Kanawha County that denied their motion for class certification in their action against Respondents Charleston Area Medical Center, Inc. (hereinafter "CAMC") and CAMC Health Education and Research Institute, Inc. (hereinafter "CAMC Health Foundation"). The petitioners alleged below that the respondents are responsible for placing the petitioners' personal and medical information on a specific CAMC electronic database and website which was accessible to the public. After reviewing the parties' arguments, the circuit court's order, and relevant portions of the appendix, we reverse and remand for proceedings consistent with this opinion.

I. FACTS

In February 2011, the petitioners and other patients of CAMC received a letter from CAMC notifying them that certain of their personal and medical information contained on a database operated by CAMC accidentally was placed on the Internet. According to the respondents, this database "contained the names, contact details, Social Security numbers, and dates of birth of 3,655 patients, along with certain basic respiratory care information." The respondents explained that this information could be exposed if someone were to conduct an advanced internet search. In addition, the

respondents offered all the patients whose data was potentially exposed a full year of credit monitoring at CAMC's cost.[1]

Subsequently, the petitioners and plaintiffs below, Larry Tabata, William Wells, Donald R. Holstein, Jr., Kay Kirk, and Shirley Chancey, filed an action in the Circuit Court of Kanawha County individually and on behalf of a class of persons similarly situated against Respondents CAMC and CAMC Health Foundation for the placement of their personal and medical information on the Internet.[2] In their complaint, the petitioners asserted causes of action for breach of duty of confidentiality; invasion of privacy – intrusion upon the seclusion of the petitioners; invasion of privacy – unreasonable publicity into the petitioners' private lives; and negligence. The petitioners also filed a motion for class certification pursuant to Rule 23 of the West Virginia Rules of Civil Procedure in which they alleged that they are members of a class that consists of at least 3,655 individuals.

Discovery revealed that the petitioners and respondents are not aware of any unauthorized and malicious users attempting to access or actually accessing their information, and they are not aware of any of the 3,655 affected patients having any

[1] It appears that the information remained on the Internet from September 2010 until February 2011.

[2] The petitioners originally filed their complaint in March 2011. They then filed an amended complaint in December 2011, in which they added CAMC Health Foundation as a named defendant.

actual or attempted identity theft. Further, the petitioners have not suffered any property injuries or sustained any actual economic losses. Finally, the petitioners are not aware if any other potential class members have sustained such injuries.

In its June 24, 2013, order denying class certification, the circuit court found that the petitioners have not met their burden of showing commonality, typicality, and predominance of common issues of law or fact for the purposes of class certification under Rule 23 of the *West Virginia Rules of Civil Procedure*. Significantly, the circuit court also found that the petitioners lack standing to bring their claims because they have failed to show that they have suffered a concrete and particularized injury that is not hypothetical or conjectural. The petitioners now appeal the circuit court's order denying class certification.

II. STANDARD OF REVIEW

The circuit court determined below that the petitioners do not have standing to sue the respondents. The question of standing is a legal issue which this Court reviews *de novo*. *See Zikos v. Clark*, 214 W. Va. 235, 237, 588 S.E.2d 400, 402 (2003) (stating that standing is a "legal matter[] subject to de novo review in this Court").

The circuit court also found that the petitioners do not meet the prerequisites for class certification under Rule 23 of the Rules of Civil Procedure. This issue is governed by this Court's opinion in *In re W. Va. Rezulin Litigation*, 214 W. Va.

52, 585 S.E.2d 52 (2003), which is the definitive law of this Court on class certification under Rule of Civil Procedure 23.[3] With regard to our review of the circuit court's ruling on class certification, we held in syllabus point 1 of *Rezulin* that "[t]his Court will review a circuit court's order granting or denying a motion for class certification pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure* [1998] under an abuse of discretion standard." With these standards in mind, we now proceed to address the issues in this case.

III. DISCUSSION

A. Standing

The threshold inquiry for this Court's consideration is whether the circuit court erred in finding that the petitioners, as named plaintiffs below, lack standing. This Court has defined standing as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002), *quoting* Black's Law Dictionary 1413 (7th ed. 1999). With regard to the elements of standing, we have held:

> Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact" – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be

[3] The circuit court's findings and the respondents' assertions that this Court has modified its holdings in *Rezulin* are inaccurate.

> likely that the injury will be redressed through a favorable decision of the court.

Syl. pt. 5, *Id.*

The circuit court determined that the petitioners lack standing because they have not suffered a concrete and particularized injury. The circuit court's determination is based in substantial part on the petitioners' contention below that the common injury that they share with the proposed class members is the increased risk of future identity theft. The circuit court reasoned that a prospective injury does not meet the requirement for standing of a concrete injury but rather is conjectural.

We agree with the circuit court that the risk of future identity theft alone does not constitute an injury in fact for the purpose of showing standing. However, in their complaint, the petitioners also asserted causes of action for breach of confidentiality and invasion of privacy. This Court recognized a cause of action for a doctor's breach of confidentiality in syllabus point 4 of *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 446 S.E.2d 648 (1994), in which we held that "[a] patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information." *See also* syl. pt. 3, *R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W. Va. 712, 735 S.E.2d 715 (2012) (holding that "[c]ommon law tort claims based upon the wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996"). In

recognizing this cause of action, this Court in *Morris* quoted with approval the following language:

> [I]n addition to the duty of secrecy, there arises the duty of undivided loyalty. Should a doctor breach either of these two duties, the law must afford the patient some legal recourse against such perfidy. We should not suffer a wrong without a remedy, especially when the wrong complained of involves the abuse of a fiduciary position.[4]

Morris, 191 at 432, 446 S.E.2d at 654, *quoting Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 799 (N.D. Ohio 1965) (additional citations omitted) (footnote added).

Applying our law on standing to the petitioner's breach of confidentiality claim, we find that the petitioners, as patients of CAMC, have a legal interest in having their medical information kept confidential. In addition, this legal interest is concrete, particularized, and actual. When a medical professional wrongfully violates this right, it is an invasion of the patient's legally protected interest. Therefore, the petitioners and the proposed class members have standing to bring a cause of action for breach of confidentiality against the respondents.

In addition, the petitioners allege a cause of action for invasion of privacy. In syllabus point 1 of *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958), this Court held that "[t]he right of privacy, including the right of an individual to be let alone

[4] In syllabus point 1 of *State ex rel. Kitzmiller v. Henning*, 190 W. Va. 142, 437 S.E.2d 452 (1993), this Court held that "[a] fiduciary relationship exists between a physician and a patient."

and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common law right of action for damages." Significantly, in syllabus point 2 of *Roach*, this Court held that "[a] declaration in an action for damages founded on an invasion of the right of privacy, to be sufficient on demurrer, need not allege that special damages resulted from the invasion." More recently, this Court has held that "[a]n 'invasion of privacy' includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." Syl. pt. 8, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1984). Finally, we indicated in syllabus point 2 of *Cordle v. Gen. Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984), that "[i]n West Virginia, a legally protected interest in privacy is recognized. *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958)."

Application of our law to the facts of this case indicates that the petitioners have standing to bring a cause of action for invasion of privacy. The petitioners and proposed class members have a legal interest in privacy which is concrete, particularized, and actual. Therefore, they have standing to bring a cause of action against the respondents for the alleged invasion of that legal interest.

B. Prerequisites of Class Certification

Having determined that the petitioners have standing to bring causes of action for breach of confidentiality and invasion of privacy, we now turn our attention to the circuit court's determination that the petitioners failed to show the requirements for bringing a class action.

In addressing this issue, we first note that "[t]he party who seeks to establish the propriety of a class action has the burden of proving that the prerequisites of Rule 23 of the West Virginia Rules of Civil Procedure have been satisfied." Syl. pt. 6, *Jefferson Cty. Bd. of Educ. v. Educ. Ass'n*, 183 W. Va. 15, 393 S.E.2d 653 (1990). We are also mindful that

> [n]othing in either the language or history of Rule 23 of the *West Virginia Rules of Civil Procedure* [1998] gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.

Syl. pt. 6, *In re W. Va. Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52 (2003).[5] Finally,

> Before certifying a class under Rule 23 of the *West Virginia Rules of Civil Procedure* [1998], a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a)[6] –

[5] During oral argument before this Court, counsel for CAMC and CAMC Health Foundation argued that the petitioners are not able to show that their private information was publicized for the purpose of an invasion of privacy claim because discovery revealed that no unauthorized users have accessed the website on which the private information appeared. While such evidence certainly is relevant to the merits of the petitioner's claims, it is not pertinent to the issue of class certification.

[6] Rule of Civil Procedure 23(a) provides:

numerosity, commonality, typicality, and adequacy of representation – and has satisfied one of the three subdivisions of Rule 23(b).[7] As long as these prerequisites to

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> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[7] According to Rule 23(b):

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) The prosecution of separate actions by or against individual members of the class would create a risk of
> (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relieve [sic] or corresponding declaratory relief with respect to the class as a whole; or
> (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of

> class certification are met, a case should be allowed to proceed on behalf of the class proposed by the party.

Syl. pt. 8, *Id.* (footnote added). In the instant case, the circuit court found that the petitioners failed to show that they have satisfied the requirements of Rule 23 for the certification of their proposed class. Specifically, the circuit court found that the petitioners failed to meet the requirements of commonality and typicality in Rule 23(a) and the requirement of predominance of common issues of law or fact under Rule 23(b). This Court will now proceed to address each of these prerequisites.

1. Commonality

First, the circuit court found that the petitioners have failed to show commonality among the claims of the petitioners and the proposed class members. In syllabus point 11 of *Rezulin*, 214 W. Va. 52, 585 S.E.2d 52, this Court held:

> The "commonality" requirement of Rule 23(a)(2) of the *West Virginia Rules of Civil Procedure* [1998] requires that the party seeking class certification show that "there are questions of law or fact common to the class." A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement. The threshold of "commonality" is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members.

We further explained in *Rezulin* that

> [c]ommonality requires that class members share a single common issue. However, not every issue in the case

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> concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

> must be common to all class members. The common questions need be neither important nor controlling, and one significant common question of law or fact will satisfy this requirement. In other words, the class as a whole must raise at least one common question of law or fact to make adjudication of the issues as a class action appropriate to conserve judicial and private resources.

214 W. Va. at 67, 585 S.E.2d at 67 (quotations, brackets, and citations omitted). This Court finds that in the instant case the claims of the petitioners and the proposed class members arise from the same set of facts and are governed by the same law. Further, there are common questions such as whether the respondents' conduct breached the duty of confidentiality that a doctor owes a patient and whether the conduct invaded the privacy of the petitioners and the proposed class members. Having found the existence of a common nucleus of operative fact and law and common issues, we believe that the circuit court abused its discretion in determining that the petitioners failed to meet the commonality requirement for class certification.

2. Typicality

The circuit court also found that the lack of typicality prevents class certification. In syllabus point 12 of *Rezulin*, this Court held:

> The "typicality" requirement of Rule 23(a)(3) of the *West Virginia Rules of Civil Procedure* [1998] requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." A representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. Rule 23(a)(3) only requires that the class representatives' claims be typical

> of the other class members' claims, not that the same be identical. When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment.

214 W. Va. 52, 585 S.E.2d 52. As a practical matter, this case fits the definition of typicality between the petitioners and proposed class members. The petitioners' claims arise from the same event that gives rise to the claims of the proposed class members which is the disclosure by the respondents of petitioners' personal and medical information on the Internet. Also, the claims of the petitioners and proposed class members are based on the same legal theories: breach of confidentiality and invasion of privacy. Therefore, this Court concludes that the circuit court erred in finding that the petitioners failed to meet the typicality requirement for class certification under Rule of Civil Procedure 23(a)(2).

3. Predominance of Common Issues of Law or Fact

Last, the circuit court found that individual issues regarding damages, causation, and adequate remedies will predominate over common issues of law or fact at trial so that Rule 23(b)(3) is not met. Regarding the issue of predominance of issues, this Court has explained:

> The predominance criterion in Rule 23(b)(3) is a corollary to the "commonality" requirement found in Rule 23(a)(2). While the "commonality" requirement simply requires a showing of common questions, the "predominance" requirement requires a showing that the common questions of law or fact outweigh individual questions.

> A conclusion on the issue of predominance requires an evaluation of the legal issues and the proof needed to establish them. As a matter of efficient judicial administration, the goal is to save time and money for the parties and the public and to promote consistent decisions for people with similar claims. The predominance requirement is not a rigid test, but rather contemplates a review of many factors, the central question being whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.

Rezulin, 214 W. Va. at 71-72, 585 S.E.2d at 71-72 (quotations and citations omitted). When this Court applies these guidelines to the instant facts, it is clear that common issues of law predominate over individual questions. Simply put, all of the proposed class members are in the same position. Their causes of action are the same and they arise from the same event. Also, there is no evidence of unauthorized access of their personal and medical information, no evidence of actual identity theft, and no evidence of economic injury arising from the alleged wrongdoing. Rather, all of the proposed class members allege that their interests in confidentiality and privacy have been wrongfully invaded by the respondents. Therefore, this Court finds that common questions of law and fact predominate over individual issues for the purpose of class certification under Rule 23(b)(3).

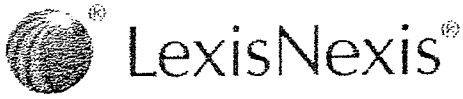
In sum, we underscore that the scope of this opinion is narrow. We hold only that the circuit court erred in finding that the petitioners lack standing and that the circuit court abused its discretion in ruling that the petitioners failed to meet the requirements for class certification of commonality, typicality, and the predominance of

common issues of law or fact. This Court makes absolutely no determination regarding the merits or the lack thereof of the petitioners' causes of action for breach of confidentiality and invasion of privacy such as whether the petitioners have adduced evidence sufficient to prove the elements of these causes of action.

IV. CONCLUSION

For the reasons set forth above, this Court reverses the June 24, 2013, order of the Circuit Court of Kanawha County that denied the petitioners' motion for class certification, and we remand this case to the circuit court for proceedings consistent with this opinion.

Reversed and remanded.



Caution
As of: Jun 09, 2014

ENCORE RECEIVABLE MANAGEMENT, INC., et al., Plaintiffs, vs. ACE PROPERTY AND CASUALTY INSURANCE COMPANY, et al., Defendants.

Case No. 1:12-cv-297

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

2013 U.S. Dist. LEXIS 93513

July 3, 2013, Decided
July 3, 2013, Filed

PRIOR HISTORY: *Encore Receivables Mgmt. v. Ace Prop. & Cas. Ins. Co., 2013 U.S. Dist. LEXIS 33995 (S.D. Ohio, Mar. 12, 2013)*

COUNSEL: [*1] For Encore Receivable Management, Inc., Convergys Customer Management Group, Inc., Encore Receivable Management, Inc., Encore Receivable Management, Inc., Plaintiffs, Counter Defendants: David Paul Kamp, LEAD ATTORNEY, Jean Geoppinger McCoy, WHITE GETGEY & MEYER CO LPA, Cincinnati, OH; Adam S Ziffer, Burt M Garson, Robin L Cohen, PRO HAC VICE, Kasowitz, Benson, Torres & Friedman LLP, New York, NY.

For American Guarantee Insurance Company, Defendant: Crystal L Maluchnik, Steven G Janik, LEAD ATTORNEYS, Janik L.L.P, Cleveland, OH; Keith W Schneider, Maguire & Schneider LLP, Columbus, OH.

For American Home Assurance Company, Defendant: Christopher Michael Ryan, LEAD ATTORNEY, Jennifer Bilz, McCormick Barstow, LLP, Cincinnati, OH; Patrick Fredette, PRO HAC VICE, McCormick Barstow, Cincinnati, OH.

For Continental Casualty Company, Defendant: Joseph W Borchelt, LEAD ATTORNEY, Reminger & Reminger Co. LPA, Cincinnati, OH; Karen W Howard, PRO HAC VICE, Colliau Elenius Murphy Carluccio Keener & Morrow, Chicago, IL.

For Federal Insurance Company, Defendant: D John Travis, LEAD ATTORNEY, Gallagher, Sharp, Fulton & Norman, Cleveland, OH; Gary L Nicholson, LEAD ATTORNEY, Gallagher Sharp, Cleveland, [*2] OH.

For St. Paul Fire and Marine Insurance Company, Discover Property and Casualty Company, Discover Property and Casualty Company, St. Paul Fire and Marine Insurance Company, Defendants, Counter Claimants: Paul David Eklund, LEAD ATTORNEY, Davis and Young Co., L.P.A., Cleveland, OH; Laura A Brady, William T. Corbett, Jr., PRO HAC VICE, Drinker Biddle & Reath LLP, Florham Park, NJ.

For ACE Property and Casualty Insurance Company, Defendant: Michael R Goodstein, LEAD ATTORNEY, Sabrina Christine Haurin, Bailey Cavalieri LLC, Columbus, OH.

JUDGES: Timothy S. Black, United States District Judge.

OPINION BY: Timothy S. Black

OPINION

ORDER GRANTING PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. 66)

This civil action is before the Court on Plaintiffs'[1] cross-motion for partial summary judgment (Doc. 66)[2] and the parties' responsive memoranda (Docs. 82, 111, 112, 115, 116, 118, 122, 136, 137).[2] The Court heard extensive oral argument on June 11, 2012.

1 Plaintiffs include Encore Receivable Management, Inc. ("Encore") and Convergys Customer Management Group, Inc. ("CMG") (collectively "Plaintiffs").

2 While the motion for summary judgment was filed as against Ace Property & Casualty Company ("ACE"), additional Defendants [*3] Federal Insurance Company ("Federal"), Discover Property and Casualty Insurance Company ("Discover"), St. Paul Fire and Marine Insurance Company ("St. Paul"), American Home Assurance Company ("American Home"), and American Guarantee & Liability Insurance Company ("American Guarantee") join in opposing the motion.

I. BACKGROUND FACTS AND PROCEDURAL POSTURE

Plaintiffs commenced this action seeking a declaration of insurance coverage in connection with two lawsuits, one captioned *Wheelock v. Hyundai Motor America, et al.*, No. 30-2011-00522293 (Superior Ct. Cal. Nov. 14, 2011) (the "Wheelock Action") and the other captioned *Knell v. Encore Receivable Management, Inc.*, No. 12cv426 (S.D. Cal. Feb. 16, 2012) (the "Knell Action"). Plaintiffs Convergys Customer Management Group Inc. ("CMG") and Encore Receivable Management, Inc. ("Encore") filed suit seeking coverage for the *Wheelock* and *Knell* Actions under four different commercial umbrella liability policies (the "Policies") issued by Defendant ACE. Convergys bought primary, umbrella, and excess insurance coverage from the respective defendants. (Doc. 1 at ¶¶ 16-20).

Primary policies were issued by Discover for October 1, 2005 to October 1, [*4] 2011, and by Old Republic Insurance Company ("Old Republic") for October 1, 2011 to October 1, 2012. (*Id.* at ¶ 22). The 2009-2012 primary policies contained an endorsement (the "Recording Exclusion") which modified coverage "to exclude liability arising from the recording of information or material in violation of law." (*Id.* at ¶ 24). Umbrella policies were issued by American Home for October 1, 2005 to October 1, 2008, and by ACE for October 1, 2008 to October 1, 2012. (*Id.* at ¶ 23). The umbrella policies did not have a "Recording Exclusion." (*Id.* at ¶ 25). Excess policies were issued by American Guarantee, Continental, Federal, and St. Paul for coverage of Convergys and its subsidiaries, including the plaintiffs Encore and CMG. (*Id.* at ¶ 26).

The *Knell* Action alleges that Encore operated a call center, and that Encore employees allegedly recorded various telephone conversations between Hyundai customers and Encore customer service representatives without obtaining the customers' consent, and that these recordings were then distributed internally within Encore for training and quality control purposes.[3] Similarly, the *Wheelock* Action alleges that Hyundai operated a call center and [*5] allegedly recorded various telephone conversations between Hyundai customers and Hyundai customer service representatives without obtaining the customers' consent.[4]

3 Knell specifically alleged that in February 2012, she initiated a confidential phone conversation with Encore employees or agents that was "recorded, monitored, and/or eavesdropped upon by Defendant" without consent. (Knell Complaint at ¶¶ 9, 10). Knell proposed to represent a class comprised of: "All persons in California whose inbound and outbound telephone conversations were monitored, recorded, eavesdropped upon and/or wiretapped without their consent by Defendant" within four years of the filing of the Complaint. (*Id.* at ¶ 16). The *Knell* matter was resolved in Encore's favor after the plaintiffs discovered that the phone number at issue was not registered to Encore. (Corbett Dec., Ex. D). Therefore, the only amounts at issue in the coverage action with respect to *Knell* are the costs of defense that Encore incurred prior to its dismissal.

4 The *Wheelock* action was filed not against Plaintiff CMG, but against its contractual partner, Hyundai, for which Hyundai has demanded defense and indemnification from CMG based upon [*6] the contract between the two. Specifically, Hyundai makes that demand pursuant to an agreement, effective January 1, 2009, wherein CMG agreed to provide call center services to Hyundai and the parties agreed "to defend, indemnify and hold each other harmless to the extent held liable for certain alleged wrongful acts or omissions of the other." (*Id.* at ¶¶ 34-35). Specifically, *Wheelock* seeks to represent a class of plaintiffs comprised of "[a]ll persons located in California who, at any time during the applicable limitations period preceding the filing of this compliant through the date of resolution, participated in a telephone conversation with Hyundai customer service using a cellular or cordless tel-

ephone and whose calls with Hyundai customer service were recorded by Defendants without notice." (Corbet Dec. at ¶ 21).

The "Insurance Coverage At Issue" is "the ACE Umbrella Policies." (Doc. 66 at 15). These policies state that ACE has a "duty to defend the 'insured' against any 'suit' seeking damages for... 'personal and advertising injury', even if groundless, false or fraudulent, to which this insurance applies... 3. When damages sought for... 'personal and advertising injury' are [*7] not covered by 'underlying insurance' or any 'other insurance', or any applicable self-insured retention has been exhausted by the payment of 'loss' covered by this policy." (*Id.* at 16).

Plaintiffs contend that the *Knell* and *Wheelock* Actions "are not covered by 'underlying insurance'" -- that "[t]he primary policies purchased by Convergys to cover the 2009 to 2012 policy years each contain a 'Recording and Distribution of Material or Information in Violation of Law Exclusion' endorsement that excludes coverage for the *Knell* and *Wheelock* Actions because they constitute claims arising from the recording of information in violation of law", and that the Plaintiffs are "entitled to summary judgment holding that ACE has an immediate duty to defend" because "[t]he failure of ACE's arguments to support a dismissal of this action makes one additional fact crystal clear: the Actions are at least potentially covered under the terms of the ACE Policies." (Doc. 66 at 30). Plaintiffs argue that as long as there is a question of fact regarding whether the claims are covered, ACE must pay for Plaintiffs' defense as a matter of law because any question of fact serves only to confirm that the Underlying [*8] Actions at least "potentially" fall within the policy coverage.

Defendants maintain that Plaintiffs have provided no evidence, and have not pointed to any allegations in the *Wheelock* or *Knell* Actions, demonstrating that the recordings at issue in either of the lawsuits were distributed or shared with anyone besides Hyundai, Encore, or CMG employees. Defendants claim that in Ohio, "publication," which is the threshold trigger to coverage at issue here, requires distribution of information to the public at large in the context of insurance policies covering "personal and advertising injuries."

Plaintiffs filed this action for damages against ACE and for declaratory judgment against the remaining Defendants. ACE moved to dismiss the complaint and the other defendants moved for judgment on the pleadings. Plaintiffs cross-moved for partial summary judgment to enforce ACE's duty to defend. The Court denied all of Defendants motions, but permitted the parties to submit additional briefing in connection with Plaintiffs' motion regarding ACE's duty to defend. Plaintiffs' motion for partial summary judgment is now ripe for resolution.[5]

5 The parties agreed to an initial stay of discovery pending [*9] a ruling on all pending motions or a settlement or final judgment in the *Wheelock* Action. (Doc. 77 at 1-2). To date, no settlement or final judgment has been reached in the *Wheelock* Action, and the Court has yet to rule on all pending motions. Thus, no discovery has been conducted to date.

II. UNDISPUTED FACTS[6]

6 *See* Docs. 71 and 83.

The Knell Action

1. On or about February 16, 2012, Encore was sued in the United States District Court for the Southern District of California (the "*Knell* Action"). The *Knell* civil complaint alleges that on or about February 15, 2012, the underlying plaintiff called Encore, and that her conversation was recorded, which she did not know until she asked the Encore representative at the end of the call whether their conversation was being recorded and was told that it was. (Doc. 46, Ex. D at ¶ 9).

2. The complaint also alleges that Encore employed and/or caused to be employed certain equipment on the telephone lines of all of its employees, officers, directors and managers which it "utilized to overhear, record, and listen to each and every incoming and outgoing telephone conversation over said telephone lines." (Doc. 46, Ex. D at ¶¶ 29-30).

3. The plaintiff claims [*10] that Encore violated her right of privacy by "eavesdropping" on calls, and asserts claims for: (1) violation of *California Penal Code § 637.2*, which prohibits, among other things, the recording of calls without notice to and the consent of the caller to the recording; (2) common law invasion of privacy; (3) negligence; and (4) violations of the California Business and Professions Code. (*Id.* at ¶ 49; First, Second, Third and Fourth Claims for Relief). In addition to injunctive relief, the complaint seeks as damages in connection

with those claims: (1) the $5,000 per violation in statutory damages provided by California privacy law; (2) "general damages according to proof"; and (3) "special damages according to proof." (*Id.* at Prayer for Relief).

The Wheelock Action

4. On or about November 14, 2011, a putative class action was filed in the Superior Court of the State of California (the "*Wheelock* Action"). The class action allegations of the *Wheelock* First Amended Complaint state that the action has been brought against Hyundai Motor America ("Hyundai"), along with DOES 1 through 10, on behalf of a putative class consisting of "[a]ll persons located in California who, at any time during [*11] the applicable limitations period preceding the filing of this complaint through the date of resolution, participated in a telephone conversation with Hyundai customer service using a cellular or cordless telephone and whose calls with Hyundai customer service were recorded by Defendants without notice." (Doc. 46, Ex. C).

5. CMG operated a call center in Utah for Hyundai, at which it recorded certain calls for quality control purposes, from on or around January 1, 2006 to on or around March 2012. (Doc. 67 at ¶ 2).

6. The agreements between CMG and Hyundai include a qualified obligation for each party to defend, indemnify and hold the other party harmless subject to the terms of the agreements. (*Id.* at ¶ 3).

7. CMG employees, who were not participants on the recorded phone calls at issue in the *Wheelock* Action, subsequently listened to some of the phone calls for quality assurance and training purposes. (*Id.* at ¶ 9).

8. Hyundai had access to the recordings and could request that the audio file for any call be forwarded to it at any time. (*Id.* at ¶ 8).

9. Hyundai employees also participated in meetings during which they listened to call recordings and evaluated the quality of the calls. (*Id.* [*12] at ¶ 7).

10. On or about November 23, 2011, after being sued in the *Wheelock* Action, Hyundai demanded that CMG defend, indemnify and hold Hyundai harmless, and assume Hyundai's defense of the *Wheelock* Action (the "Hyundai Demand"). (*Id.* at ¶ 10).

The Insurance Coverage At Issue

11. Convergys purchased the ACE Umbrella Policies in which ACE specifically promised to:

> Pay on behalf of the 'insured' those sums in excess of the 'retained limit' that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies.

(Doc. 46, Ex. A at § I.A).

12. "Personal and advertising injury" is expressly defined to include injury "arising out of" several types of offenses, including "oral or written publication, in any manner of material that violates a person's right of privacy." (*Id.* at §VII.R.5).

13. The term "publication" is not defined in the ACE Policies. (*Id.* at §VII.R.5).

14. The ACE Umbrella Policies also promise to provide Convergys and its subsidiaries with a defense to claims that potentially fall within the coverage of the

policy, but which are not covered under the terms of the primary policies, [*13] stating that the insurer shall have the:

> duty to defend the 'insured' against any 'suit' seeking damages for . . . 'personal and advertising injury', even if groundless, false or fraudulent, to which this insurance applies: . . . 3. When damages sought for 'bodily injury', 'property damage' or 'personal and advertising injury' are not covered by 'underlying insurance' or any 'other insurance', or any applicable self-insured retention has been exhausted by the payment of 'loss' covered by this policy.

(*Id.* at §III.A).

15. The "Unsolicited Communications" exclusion precludes coverage for liabilities arising out of communications "in which the recipient has not specifically requested the communication" and "to communications which are made or allegedly made in violation of . . . [a]ny statute, ordinance or regulation, other than the TCPA or CAN-Spam Act of 2003, which prohibits or limits the sending, transmitting, communicating or distribution of material or information." (*Id.* at § V.V.3).

16. The Criminal Acts exclusion precludes "'Personal and Advertising Injury' arising out of a criminal act committed by or at the direction of the 'insured." (*Id.* at § V.Q.4).

17. The ACE Policies define [*14] the "Products-completed operations hazard" as applicable to certain claims for "bodily injury" or "property damage" -- but not "Personal and Advertising Injury" which is the injury for which Encore and CMG seek coverage. (*Id.* at § VII.T).

18. The primary policies purchased by Convergys to cover the 2009 to 2012 policy years each contain a "Recording and Distribution of Material or Information in Violation of Law Exclusion" endorsement that excludes coverage for claims arising from the recording of information or material in violation of law: This insurance does not apply to 'Personal and advertising injury' arising directly or indirectly out of any action or omission that violates or is alleged to violate . . . [a]ny federal, state or local statute, ordinance or regulation [other than certain irrelevant exceptions] that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information. (Doc. 68, Exs. 1-3 (Exclusion No. CG 00680509)) ("The Recording Exclusion")).

19. As a result of this Recording Exclusion, the primary policies do not provide coverage for the *Knell* and *Wheelock* Actions. [*15] (*Id.*)

20. The ACE Umbrella Policies contain no Recording Exclusion. (*See generally* Doc. 46, Ex. A).

The Claims for Coverage

21. On December 12, 2011, Convergys provided notice to ACE of the *Wheelock* Action. (Doc. 46 at 7).

22. On March 23, 2012, ACE denied Plaintiffs' claim. (Doc. 46 at 9).

III. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett. 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986);*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex, 477 U.S. at 323.* All facts and inferences must be construed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).*

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific [*16] facts showing that there is a genuine issue for trial." *Anderson, 477 U.S. at 248 (1986).*

IV. CHOICE OF LAW

A federal court sitting in diversity in Ohio applies Ohio choice-of-law principles. *Borden, Inc. v. Affiliated FM Ins. Co., 682 F. Supp. 927, 928 (S.D. Ohio 1987).* In insurance contract actions, Ohio follows the Restatement's test for determining which jurisdiction has the "most significant relationship to the transaction and the parties." *Ohayon v. Safeco Ins. Co., 91 Ohio St. 3d 474, 2001 Ohio 100, 747 N.E.2d 206, 209 (Ohio 2001).* In this analysis, Ohio "considers the place of the making, particularly the place of delivery and the place of payment of the first premium as largely determinative of the law to be applied." *River Servs. Co. v. Hartford Accident & Indem. Co., 449 F. Supp. 622, 625 (N.D. Ohio 1977).*[7]

> 7 Convergys is an Ohio corporation with its principal place of business in Ohio. The policies by the defendant insurers were all issued in Ohio. (Doc. 46, Ex. 1 at 1, 49, 101; Doc. 46-2 at 51). For example, Discover (located in Illinois) delivered its policies, which applied to "all [Convergys] locations," at its address in Cincinnati, Ohio (Doc. 115, Corbett Dec., Ex. F). St. Paul (located in Minnesota) also [*17] delivered its policies, which contain no location restriction, to Convergys in Ohio. (*Id.*, Ex. H). These factors afford Ohio the "most significant relationship." *River Servs., 449 F. Supp. at 625.*

Upon review of the relevant facts, Ohio law controls here to the extent there is a conflict between the laws of California and Ohio. California has no relationship to the contracts of insurance; it is merely the venue of the underlying *Knell* and *Wheelock* actions.[8]

> 8 Plaintiffs concede that Ohio law potentially applies because the first named insured, Convergys, and Plaintiff CMG are each Ohio corporations with their principal places of business in Ohio; but Plaintiffs maintain that California law also potentially applies because each of the underlying lawsuits at issue was filed in California and allege, *inter alia*, California statutory violations. However, Plaintiffs maintain that because the substantive law of both Ohio and California are identical on all of the issues raised by this motion, the Court need not make any choice of law in connection with its resolution. *Andersons, Inc., v. Consol, Inc.., 185 F. Supp. 2d 833, 836 (N.D. Ohio 2002).*

V. ANALYSIS

A. Threshold Issues

ACE maintains that [*18] there are two threshold issues the Court should consider before addressing the duty to defend.

1. Whether CMG is an insured

CMG is not expressly named as a party in the *Wheelock* complaint and therefore Defendants maintain it is not an insured. However, CMG is a Doe defendant in *Wheelock*, which is supported by the fact that CMG is expressly defending the matter. While CMG does not appear on the record, counsel appears in court for hearings and are actively defending the case. A defendant who is not expressly named in a complaint may still give rise to a duty to defend. *See, e.g., Century Surety Co. v. Polisso, 139 Cal. App. 4th 922, 940-44, 43 Cal. Rptr. 3d 468 (Cal. Ct. App. 2006)* (holding that there was a duty to defend where wife was not named in the complaint, but based on her actively defending the case, it was obvious that there was going to be the potential that she would be liable for coverage).

Accordingly, the Court finds that there is sufficient evidence at this stage in the litigation that CMG is an insured.

2. Applicable policy

In Ohio, an insured prosecuting an insurance coverage action has the burden of establishing that coverage exists under a policy for a particular claim. *Inland Rivers Serv. Corp v. Hartford Fire Ins. Co, 66 Ohio St. 2d 32, 418 N.E.2d 1381, 1382 (Ohio 1981).* [*19] Therefore, Plaintiffs have the burden of alleging facts sufficient to establish that their loss was within the scope of coverage of the 2009-2012 ACE Policies under which they seek coverage. *State Farm Fire & Cas. Co. v. Hiermer, 720 F. Supp. 1310, 1314 (S.D. Ohio 1988).*

Plaintiffs fail to specify the policy under which they seek coverage for the *Knell* and *Wheelock* Actions and instead cite three different ACE policies spanning three

different policy years. Plaintiffs believe they are entitled to summary judgment under each of the three policies. Plaintiffs decline to pick one specific policy because if there is a dispute of fact as to the class period in the underlying action, it may affect what policy Plaintiffs choose. Thus, ACE claims Plaintiffs have failed to comply with their duty and, as a result, have failed to establish that they are entitled to coverage as a matter of law.

Regardless of whether there are questions of fact relating to which of the policies must pay or how much each policy must pay, Plaintiffs may seek their full defense costs from any of the ACE umbrella policies triggered for the three policy years between October 1, 2009 and October 1, 2012. "An insurer has [*20] an absolute duty to defend an action when the complaint contains an allegation in any one of its claims that could arguably be covered by the insurance policy, even in part and even if the allegations are groundless, false or fraudulent...Once an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint, even if they bear no relation to the insurance-policy coverage." *City of Sharonville v. Am. Employers Ins. Co., 109 Ohio St. 3d 186, 2006 Ohio 2180, 846 N.E.2d 833, 837 (Ohio 2006).*[9] Limiting an insurer's defense obligation for a partially covered claim would be irreconcilably inconsistent with Ohio's black letter law requiring an insurer to provide a full defense to a non-covered claim as long as the underlying complaint alleges one potentially covered claim.

> 9 *City of Sharonville* is a Section 1983 civil action against police officers who covered up a murder over many years with various acts in furtherance of the conspiracy. The court determined that the duty to defend is indivisible -- as long as they can invoke the duty to defend against the given insurance policy, that duty is indivisible. *Id.*

When a continuous occurrence spans multiple policy periods, "the [*21] insured is entitled to secure coverage from a single policy of its choice that covers 'all sums' incurred as damages 'during the policy period,' subject to that policy's limit of coverage." *Goodyear Tire & Rubber Co v. Aetna Cas & Sur. Co., 95 Ohio St. 3d 512, 2002 Ohio 2842, 769 N.E.2d 835, 841 (Ohio 2002).* Therefore, Plaintiffs are entitled to seek their full indemnity for settlements or judgments and their costs of defense in both underlying actions from any of the three ACE umbrella policies triggered by those losses.

B. ACE's duty to defend

Plaintiffs allege that ACE has an immediate duty to defend and pay the costs of defending the Actions. Specifically, an insurer whose policy includes a duty to defend must immediately undertake the defense of a potentially covered action until such time as it is able to establish as a matter of law that there is no possibility of coverage. *Grange Mut. Cas. Co. v. Rosko, 146 Ohio App. 3d 698, 2001 Ohio 3508, 767 N.E.2d 1225, 1230 (Ohio App. 2001).* The fact that the insurer may ultimately have a defense to coverage does not relieve it of its obligation to pay defense costs as they are incurred until and unless it can establish the applicability of that defense as a matter of law and fact. *Motorists Mut. Ins. Co. v. Trainor, 33 Ohio St. 2d 41, 294 N.E.2d 874, 878 (Ohio 1973).*[10]

> 10 *See* [*22] *also Ohio Gv't Risk Mgmt. Plan v. Harrison, 115 Ohio St. 3d 241, 2007 Ohio 4948, 874 N.E.2d 1155, 1160 (Ohio 2007)* (holding that insurers owe a duty to defend if the allegations in the underlying complaint are "not clearly and indisputably outside of the contracted policy coverage.").

Accordingly, an insurer may not defeat a motion for summary judgment on the duty to defend by establishing the existence of issues of disputed fact with respect to whether the claim is covered under the policy, or by asserting that only some of the alleged claims fall within the coverage of the policy. *Ins. Co. of Pa. v. Vimas Painting Co., No. 4:06cv1048, 2007 U.S. Dist. LEXIS 34401 (N.D. Ohio May 10, 2007).* In granting the policyholder a declaration of the duty to defend on a motion for summary judgment, the Court recognized:

> The allegations in this count of the complaint at a minimum potentially or arguably state a claim covered by the policy and thus Plaintiff has a duty to defend the entire lawsuit...Accordingly the Court DECLARES as a matter of law that Plaintiff has a duty to defend Defendant against all claims in the King case at this point because the second cause of action in the King Lawsuit potentially or arguably states a claim [*23] covered by the 'occurrence' or 'accident' portion of the policy.

Id at 26. If an issue of fact exists as to the question of coverage, the policy holder is entitled to summary judgment enforcing its right to a defense. In other words, the duty to defend is a broad scope. "Where the insurer's duty to defend is not apparent from the pleadings in the action against the insured, but the allegations do state a claim which is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim."

Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St. 3d 177, 9 Ohio B. 463, 459 N.E.2d 555 (Ohio 1984).

C. Personal and Advertising Injury

The ACE Policies provide that ACE has a duty to defend the insured against any "suit" seeking damages for a "personal and advertising injury." (Doc. 46-1 at 12, 60; Doc. 46-2 at 3, 60). "Personal and advertising injury" is defined in the ACE policies to mean: "Injury...arising out of ...[o]ral or written publication, in any manner, of material that violates a person's right of privacy." (Doc. 46-1 at 26, 74; Doc. 46-2 at 17, 74). ACE claims that it does not have a duty [*24] to defend the lawsuits because the records were not distributed outside Hyundai, Encore, and/or CMG, so there was no requisite "oral or written publication," required in order to establish a "personal and advertising injury" within the meaning of the ACE Policies. (Doc. 46-1 at 26, 74; Doc. 46-2 at 17, 74).

Specifically, ACE maintains that "publication," as that term is used in the ACE Policies requires the distribution of information or news to the public. *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc., 182 Ohio App. 3d 311, 2009 Ohio 2270, 912 N.E.2d 659, 666 (Ohio App. 2009)* (an insured's distribution to potential customers -- *i.e.*, the public -- of unsolicited advertisements via facsimile constitute "publication of material that violates a person's right of privacy" within the meaning of the insured's commercial general liability policy).[11] ACE maintains that the plaintiffs in the underlying actions do not premise their claims upon any "oral or written publication" by the insured.[12] Therefore, according to ACE, those actions do not either arguably or actually seek damages because of injury arising out of the "personal and advertising injury" offense of "oral or written publication, in any manner, of material that violates [*25] a person's right of privacy."

11 The term "publication" is not defined in the policy. *See also Bowyer v. Hi-Lad, Inc., 216 W. Va. 634, 609 S.E.2d 895, 912 (W.Va. 2004)* ("The [] policy contains no definition of the word 'publication.' We find nothing in the policy indicating that the word publication necessarily means transmitting the intercepted communications to a third party, as is required of material in the defamation context.").

12 The *Knell* complaint notes that the complained-of conduct, which is alleged to violate the class members' right to privacy, consists of "recording," "monitoring," "eavesdropping," "wiretapping," "overhearing," and/or "listening to" telephone conversations with class members. (Knell Compl. at ¶¶ 7, 9, 11, 12, 13, 14, 16, 20). The common questions in the complaint include "[w]hether Defendant's policy of recording, wiretapping, eavesdropping upon, and/or monitoring incoming and/or outgoing calls constitutes an invasion of privacy[.]" (*Id.*) The *Wheelock* complaint explains that the lawsuit "arises out of Defendants unlawful practice of recording calls to [Hyundai's] customer service line without first obtaining customer consent." (Wheelock Am. Compl. at ¶ 1). Specifically, [*26] that the defendants' practice of "recording telephone conversations without caller consent" violates the *California Penal Code § 630, et seq.* (*Id.* at ¶ 2).

1. What is Publication

Defendants argue that eavesdropping is not an act of communication to the public, but rather an invasion of seclusion accomplished by a non-communicative act. *See, e.g., Kimmel v. Goland, 51 Cal. 3d 202, 271 Cal. Rptr. 191, 793 P.2d 524, 529 (Cal. 1990)* (holding that the recording of confidential phone conversations could not be characterized as either a publication or broadcast of information and denominating "the invasion of privacy resulting from...eavesdropping" as "noncommunicative conduct"). "Implicit in the *Ribas* decision was the distinction between injury allegedly arising from communicative acts, *i.e.*, the attorney's testimony, and injury resulting from noncommunicative conduct, *i.e.*, the invasion of privacy resulting from the attorney's eavesdropping." *Id. at 529* (citing *Ribas v. Clark, 38 Cal. 3d 355, 212 Cal. Rptr. 143, 696 P.2d 637 (Cal. 1985)).* The court reiterated that "[h]ere park management seeks statutory damages under Penal Code *section 637.2* not for injuries arising from the broadcast and publication of private conversations, but for the recording of them." [*27] *Id.* *Kimmel* expressly found the nature of the conduct (non-consensual telephonic recording and eavesdropping) that is penalized by the California Penal Code sections at issue to be noncommunicative" conduct that is distinct from the "broadcast and publication of private conversations." *793 P.2d at 528-29.*[13]

13 In *Kimmel*, an attorney made surreptitious recordings of the defendants' telephone conversations in anticipation of litigation, then argued that his actions were protected by the California litigation privilege. To deny applicability of the privilege, the court characterized his conduct as "noncommunicative" but did so *within the meaning of the privilege* -- not within the meaning of an insurance policy or the California privacy statute. What potentially drove the decision, however, was the court's desire to condemn the conduct of the attorney: "Guided by oath, duty and obligation, the lawyer's path avoids the vices

from which the virtuous abstain. Thus, it ill suits the profession to seek immunity for injuries inflicted while engaged in legal warfare under the protective tarpaulin of the privilege for 'judicial proceedings.'" *Id. at 531.* The *Kimmel* court's determination that the act [*28] of recording a conversation falls outside of the litigation privilege has no more limiting effect on the meaning of the undefined policy term "publication" than do the limited defamation definitions of that term rejected by the court in *Dandy-Jim.* That is particularly true given the fact that more than two decades after the *Kimmel* holding, California courts continue to recognize that the act of recording constitutes the dissemination of information to an unannounced third-party listener. *See, e.g. Kight v. Cashcall, Inc., 200 Cal. App. 4th 1377, 1389, 133 Cal. Rptr. 3d 450 (Cal. 2011).*

While *Dandy Jim* has some language that references dictionary definitions of the word "publication" that include the concept of "to the public,"[14] *Dandy Jim* was not looking at whether right of privacy of seclusion claims were covered, because there was no secret that was disseminated or published in that case. Therefore, *Dandy Jim* does not address what constitutes a publication in the context of a secrecy claim. Moreover, *Dandy-Jim* illustrates that a "third party" requirement is not synonymous with a "to the public" requirement. One pertains to the identity of the recipient of the disclosure, while the other pertains to the [*29] breadth or scope of the disclosure. The "third party" portion of the *Dandy-Jim* decision holds merely that the insured's communication need not be made to a recipient other than the person whose privacy rights were allegedly violated (as in defamation) in order for a "publication" to be found. *Id. at 666.*[15]

14 Any ambiguity in an undefined policy term must be construed in favor of coverage. *See, e.g., Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co., 691 F.3d 821, 826 (6th Cir. 2012).*

15 The insured in *Dandy-Jim* allegedly faxed unsolicited advertisements to multiple claimants for three years, and was sued for violation of the Telephone Consumer Protection Act ("TCPA"), *47 U.S.C. § 227, et seq. 912 N.E.2d at 661-62.* The insurer argued no "publication" occurred because "publication" requires disclosure to a third party and the fax communications "were sent directly to the claimants, not to any third person or parties." *Id. at 666.* The court disagreed, finding that "publication" does not mean "communicating the offending material to a third party." *Id.* However, the court went on to find that "faxed advertisements are an act of 'publication' in the ordinary sense of the word." The court considered [*30] court definitions of "publication," each of which indicated that "publication" involves a communication of information "to the public." *Id.* It found a "publication" was alleged because "[b]y faxing advertisements to the claimants, as alleged in the complaint, Dandy-Jim 'published' the advertisements by communicating information to the public and distributing copies of the advertisements to the public." *Id.*

In contrast, *Lens Crafters Inc. v. Liberty Mut. Fire Ins. Co., No. 04-1001, 2005 U.S. Dist. LEXIS 47185, at *35-36 (N.D. Cal. Jan. 20, 2005),* found that secret information does not have to be widely disseminated in order to constitute publication. The courts that have looked at recording in the secrecy context have all read publication very broadly and held that a transmittal or a further dissemination of secret information satisfies publication. The firsthand experience of the communication, the words, the tone, and the cadence are all protected. When the firsthand aspect of the communication is transmitted to the mechanical device, it constitutes publication -- dissemination of that unique aspect of the conversation that the speaker no longer has the ability to control.[16] Here, [*31] this Court need not find that the communications were actually disseminated to third parties, because the initial dissemination of the conversation constitutes a publication at the very moment that the conversation is disseminated or transmitted to the recording device.

16 *See, e.g., Ribas v. Clark, 38 Cal.3d 355, 212 Cal. Rptr. 143, 696 P.2d 637 (Cal. 1985)* ("[S]uch secret monitoring denies the speaker an important aspect of privacy of communication -- the right to control the nature and extent of the firsthand dissemination of his statements.").

Accordingly, this Court need not find that the recordings were disseminated to the public in order to find publication.[17]

17 Even if Plaintiffs were required to prove that the recordings were disseminated to the public, they have done so. In the *Knell* complaint there is an allegation that the recorded communications were listened to and eavesdropped on which is a clear allegation that there was further dissemination. (*Id.* at ¶ 12). Further, Mr. Hunsaker's affidavit maintains that the conversations at issue in the *Wheelock* action were, in fact, disclosed to both CMG and Hyundai employees who were not participants in the original calls. (Hunsaker Aff. at ¶¶ 7-9). Because the allegations [*32] in the *Wheelock* complaint state a claim

> which is potentially or arguably within the policy coverage -- invasion of right of privacy -- they are entitled to utilize "matters well outside the four corners of the pleadings" to establish the potential for coverage that triggers an insurer's duty to defend. *City of Willoughby Hills, 459 N.E.2d at 558*. The existence of the potential for coverage sufficient to warrant consideration of matters outside the pleadings undermines the notion that, based upon undisputed facts, Plaintiffs cannot state a claim for coverage.

D. Prior Publication Exclusion

Next, ACE maintains that it does not have a duty to defend because the alleged "publication" of the allegedly unlawfully recorded telephone conversations first took place before the beginning of the ACE policy periods.[18] The ACE Policies only apply to "personal and advertising injuries" if the offense causing the injury takes place during the "policy period." (Doc. 46-1 at 10, 58; Doc. 46-2 at 1, 58). All damages that arise from the same "publication" are considered to arise out of the same "occurrence," regardless of the frequency, repetition, or number of "publications," and regardless of the number [*33] of claimants. (Doc. 46-1 at 26, 74; Doc. 46-2 at 17, 74). The ACE Policies state that there is no coverage for "'[p]ersonal and advertising injury' arising out of oral or written publication of material whose first publication took place before the beginning of the 'policy period'" (the "First Publication Exclusion"). (Doc. 46-1 at 18, 66; Doc. 46-2 at 9, 66). Courts have applied first (or prior) publication exclusions where the allegations contained in the underlying actions indicate that the publication of the allegedly injurious material first occurred before the beginning of the policy period. *Transp. Ins. Co v. Pa. Mfrs.' Ass'n Ins. Co., 346 Fed. Appx. 862, 867 (3rd Cir. 2009)*.

> 18 Plaintiffs claim that the publication of the unlawful records at issue in the *Wheelock* Action commenced on January 1, 2006 (Doc. 1 at ¶¶ 34, 36), over two years prior to the ACE policy periods which cover the period from October 1, 2008 to October 1, 2012. (Docs. 46-1 and 46-2). The publication of the recordings at issue in the *Knell* Action, which commenced on February 16, 2008 (Doc. 1 at ¶ 28-29; Doc. 46-5 at ¶ 16), also pre-dates the inception of the ACE Policies.

The prior or first publication exclusion [*34] bars coverage only for personal or advertising injury arising out of publication "of material whose first publication took place before the beginning of the 'policy period.'" (Doc. 46, Ex. 1 at 176). However, here, each individual telephone call constituted new material -- the caller's individual confidential information -- published for the first time when it was recorded during the call. For example, the fact that Sally Smith's confidential information was published when recorded during a call made in 2006 is thus wholly irrelevant to the question of when John Doe's confidential information was first published by recording his call, because the two calls do not constitute publication of the same material. Therefore, claims by the putative class members in the underlying actions who first telephoned Plaintiffs' call center after the commencement of the ACE coverage in 2008 are not subject to the prior publication exclusion.[19]

> 19 In the cases upon which Defendants rely (*see, e.g., John Deere Ins. Co. v. Shamrock Indus., Inc., 696 F. Supp. 434, 441 (D. Minn. 1988)*; *Ringler Assocs. Inc. v. Md. Cas. Co., 80 Cal. App. 4th 1165, 1183, 96 Cal. Rptr. 2d 136 (Cal. Ct. App. 2000)*), the policyholder made the same substantively [*35] false or slanderous statements or infringed the same trademark or patent both before and after the policy period.

For example, in *Applied Bolting Tech. Prods., Inc. v. U.S. Fid. & Guar. Co., 942 F. Supp. 1029 (E.D. Pa. 1996)*, the court held that "the only dispositive issue under this exclusion is whether the injurious advertisement was 'first published' prior to coverage." Moreover, the court in *Applied Bolting* focused precisely on the content of the pre and post-coverage publications, holding that the exclusion applied because the pre-coverage advertisements contained the same offending phrase as the post-coverage advertisement. *Id. at 1036* (policyholder's advertisements and materials contained identical false claim that "all DTIs made to ASTM F959-94a" both before and after the policy period).[20]

> 20 Similarly, in *Taco Bell Corp. v. Cont'l Cas. Co., 388 F.3d 1069, 1072 (7th Cir. 2004)*, a design firm alleged that the policyholder, Taco Bell, had misappropriated its deal for an advertising campaign centered on a Chihuahua obsessed with Taco Bell food. The ad campaign first aired prior to the policy period, but the advertisements during the policy period added additional elements which the [*36] design firm claimed included separately infringing material. *Id. at 1072-1073*. The insurer, Zurich, argued that it was not obligated to provide Taco Bell with a defense, because the ad campaign as a whole began airing prior to the commencement of its policy, and the prior publication exclusion therefore barred coverage for the claim. Judge Posner rejected that argument:

> Zurich is wrong. Wrench's complaint alleges -- and the duty of an insurance company to defend against a suit against its insured is determined by the allegations of the complaint in that suit rather than by what is actually proved... - that those later commercials appropriated not only the "basic idea" ("Psycho Chihuahua") but other ideas as well that are protected by Michigan's common law of misappropriation, like the idea of the Chihuahua's poking its head through a hole at the end of the commercial....Who knows whether it's really protected by Michigan law...But that is not the issue. The charge of misappropriation of the idea of the Chihuahua's head popping out of a hole is a claim of advertising injury, meritorious or not; and Taco Bell bought insurance against having to pay the entire expense of defending against [*37] such claims.

Id. at 1073.

Where, as in the instant case, the underlying complaints would allow proof of publication of new material during the policy period, the insurer may not avoid its duty to defend simply because the publications were part of a "continuing course of conduct." *CNA Cas. of California v. Seaboard Surety Co., 176 Cal. App. 3d 598, 222 Cal. Rptr. 276 (Cal Ct. App. 1986)* (holding insurer under 1969 policy must defend despite prior publication exclusion where the underlying complaint "merely alleges that [the policyholder's] entire course of conduct commenced 'as early as 1966,'" but would allow proof of separate defamatory statements after 1969).

The prior publication exclusion only applies to the extent that the material is the same before and after. Here, the material is a particular phone conversation and the material differed from conversation to conversation. Moreover, the duty to defend expands to all liability in a given suit.[21] The allegation here is that there is a class of people who made these calls and whose rights were violated. Once the duty to defend is triggered, ACE has a duty to defend the entire suit, even presumably uncovered calls.[22]

21 Obviously, to the extent ACE is entitled [*38] to seek contributions from other carriers, it may do so.

22 For example, there is some possibility that an individual's telephone call was reordered in 2008 or 2009, during ACE's policy period, but that s/he did not discover it until 2010 or 2012. ACE must defend against all of the claims.

Therefore, because ACE cannot establish that the claims alleged in the underlying actions fall solely and exclusively within the scope of the prior publication exclusion, it does not apply at this stage in the litigation.

E. Professional Services Exclusion

Next, ACE claims that it has no duty to defend because the alleged "personal and advertising injuries" at issue arise out of the provision of professional services and there is no coverage under the ACE Policies for "personal and advertising injury' arising out of the providing of or failing to provide any services of a professional nature." (Doc. 46-1 at 44, 94; Doc. 46-2 at 41, 90).

The policies do not define "services of a professional nature," or the word "professional." Under black letter Ohio law, an undefined exclusionary term must be narrowly construed against the insurer. *King v. Nationwide Ins. Co., 35 Ohio St. 3d 208, 519 N.E.2d 1380, 1383 (Ohio 1988)*. Ohio courts [*39] have long held that an exclusion for liabilities arising out of the provision of professional service cannot be broadened or morphed into a general exclusion for all liabilities arising out of the policyholder's work.

Plaintiffs' business -- the operation of customer call centers on behalf of its clients -- does not constitute "professional services" like those performed by lawyers or doctors to which courts apply the exclusion. *See, e.g., Cincinnati Ins. Co. v. Am. Line Builders Apprenticeship Training Program, 93 Ohio App. 3d 392, 638 N.E.2d 1047, 1049 (Ohio App. 1994)* (exclusion did not bar coverage for claims arising from the electrocution of a student in a trade school while under the supervision of a school instructor because "[t]o include teachers, educational-type professionals, or linesmen in the policy's definition of 'professional' would amount to the construction of an ambiguous term liberally in favor of [the insurer], which is not justified in this case."). Thus, Defendants' broad interpretation of the undefined term "professional services" is inconsistent with Ohio precedent.

Accordingly, the professional services exclusion is inapplicable.

F. Contractual Liability Exclusion

ACE maintains that [*40] it does not have a duty to defend Hyundai in the *Wheelock* Action because Hyundai is not an insured under the ACE Policies. (Doc. 46-1 at 1, 49, 101; Doc. 46-2 at 51). ACE argues that CMG bases its claims against it on an agreement that CMG entered into with Hyundai under which CMG agreed to defend and indemnify Hyundai for certain of CMG's wrongful acts or omissions for which Hyundai may be held liable. (Doc. 1 at ¶¶ 34-35). This is exactly was ACE claims its Contractual Liability Exclusion was designed to exclude. Pursuant to that exclusion, there is no coverage under the ACE Policies for "personal and advertising injury" for which an insured has assumed liability in a contract or agreement. (Doc. 46-1 at 18, 66; Doc. 46-2 at 9, 66). The agreement between CMG and Hyndai is an agreement by which CMG agreed to assume Hyundai's liability. (Doc. 1 at ¶ 34) ("Pursuant to an agreement effective January 1, 2009 (the "Agreement"), CMG provided call center services to Hyundai, including but not limited to the recording of certain calls for quality control purposes, from on or around January 1, 2006 to in or around March 2012. In the Agreements, the parties each agreed to defend, indemnify [*41] and hold each other harmless to the extent held liable for certain alleged wrongful acts or omissions of the other.").

In *Burlington Ins Co. v. PMI Am., Inc., 862 F. Supp. 2d 719, 738-739 (S.D. Ohio 2012)*, the Court recognized that contractual liability exclusions like in the ACE Policies are designed to exclude coverage -- when the insured assumes liability through a hold harmless or indemnification agreement. "Liability insurance policies not infrequently contain provisions specifically excluding from coverage liability assumed by the insured under a contract not defined in the policy. Such provisions, which may be referred to as "contractual exclusion clauses," deny the coverage generally assumed by a liability policy in cases in which the insured in a contract with a third party agrees to save harmless or indemnify such third party. *Id. at 739* (quoting 12 Couch on Insurance § 44A:35 at 55 (2d Ed. 1981)). Accordingly, ACE claims that it has no obligation to defend Hyundai in the *Wheelock* Action, and no obligation to reimburse CMG for defense costs it has allegedly paid to Hyundai in connection with the *Wheelock* Action.

However, because CMG would be liable for the operation of its call [*42] centers even absent its agreement with Hyundai, the exclusion does not apply by its terms which provide it does not apply to "liability for damages that the insured would have in the absence of the contract or agreement." (ACE Ex. A, § V.C.1). Specifically, CMG, as the operator of the call centers at issue, is the Doe defendant named in the *Wheelock* action and therefore ACE owes CMG an immediate duty to defend. *Century Surety Co v. Polisso, 139 Cal. App. 4th 922, 952, 43 Cal. Rptr. 3d 468 (Cal. App. 2006)* (where insurer has a "duty to defend any 'suit' seeking [covered] damages" that the "insured becomes legally obligated to pay," the possibility that the policyholder may become liable for a judgment in the existing suit sufficient to trigger the insurer's duty to defend).

Therefore, the contractual liability exclusion is inapplicable.

G. Criminal Act Exclusion

The plaintiffs in both underlying actions allege violations of *California Penal Code Section 630, et seq*, which criminalizes recordings made without consent and authorizes fines and jail time for violations. *See Cal. Pen Code §§ 632(a)* and *632.7*.[23] Accordingly, Defendants argue that all of the allegations in the underlying actions constitute "criminal [*43] acts" under the California Penal Code and therefore coverage is barred by the Policies' criminal act exclusions.

> 23 The *Knell* complaint alleges violation of *§ 632*: "Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, ...shall be punished by a fine not exceeding two thousand five hundred dollars, or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment...." The *Wheelock* complaint relies on *§ 632.7*, which provides the same punishment for recorded cellular phone calls. The authority for the private rights of action asserted in these suits is Penal Code *Section 637.2*, which provides that "[a]ny person who has been injured by a violation of this chapter may bring an action against the person who committed the violation." Therefore, any action brought by a private party under *§ 637.2* must prove criminal conduct under *§ 630 et seq.* to recover.

Defendants' policies bar coverage for "personal and advertising injury" "arising out of a criminal act committed by or at [*44] the direction of the insured." The question, then, is whether the acts for which the underlying plaintiffs seek recompense are "criminal." *Allstate Ins. Co. v. Cutcher, 920 F. Supp. 796, 798 (N.D. Ohio 1996)*.[24] In the instant case, Plaintiffs' acts are "defined as criminal" by the California Penal Code. *Kimmel, 793 P.2d at 530*. A violation of *California Penal Code § 632* is a "criminal offense punishable by fine or imprisonment, or both." *Id.*

24 In *Cutcher*, the insured argued that because he was a minor and would not be prosecuted criminally for the conduct at issue, the "criminal acts" exclusion did not apply. *920 F. Supp. at 798*. The court held that regardless of the offender's age, the Ohio criminal code defines certain crimes and "[t]hose definitions describe the acts which can result in criminal liability." *Id.* Therefore, while "for a variety of reasons, conviction may...be avoided, even though the perpetrator committed the acts defined as criminal by the statute," the exclusion barred coverage for the defined acts. *Id.*

Ohio recognizes the enforceability of criminal act exclusions, warning only that broad exclusions must not be read to exclude coverage for merely negligent acts that [*45] have been criminalized. *Am. Family Mut. Ins. Co. v. Scott, No. 07-CA-28, 2008 Ohio 1865, 2008 Ohio App. LEXIS 1589, at *9 (Ohio App. Apr. 18, 2008)*. Such exclusions preclude coverage for civil claims premised upon criminal conduct. *See State Farm Fire & Cas. Co. v. Condon, 163 Ohio App. 3d 584, 2005 Ohio 5208, 839 N.E.2d 464, 468 (Ohio Ct. App. 2005)* (where insured was criminally prosecuted for gross abuse of a corpse, separately-brought civil claims based on same conduct were barred from coverage by exclusion for "personal injury arising out of the willful violation of a penal statute."). The exclusion's application does not turn on whether the insured has been convicted of a crime. *Cutcher, 920 F. Supp. at 798* (noting that the insured may not be prosecuted criminally for any number of reasons, but that "do[e]s not remove the defendant's conduct from the statutory definition [of the crime] as found" in the criminal statute).[25]

25 *See, e.g., Allstate Ins. Co. v. Miller, 732 F. Supp. 2d 1128, 1141 (D. Hawaii 2010)* (addressing "criminal acts" exclusion and finding "[p]olicy's plain language does not require a criminal charge or conviction and coverage is determined through the Underlying Lawsuit's factual allegations").

The *Knell* action was [*46] dismissed without payment because the plaintiff in that case learned that the phone number sued upon was not one of Encore's phone numbers. Nonetheless, ACE has a duty to defend and insure against any suit, even if groundless, false, or fraudulent. In *Knell*, there was no finding that Encore had committed a criminal act because the case was dismissed without payment. In fact, Encore never even received a phone call that was alleged to fall within the penal code provision. Similarly, *Wheelock* may be dismissed for the same or for any other variety of reasons. There may never be a finding that CMG engaged in a criminal act in the *Wheelock* case. Accordingly, whether CMG committed a criminal act in *Wheelock* is a disputed issue of fact. Whether or not the penal code violation that gives rise to civil liability constitutes a criminal act or not is irrelevant at this stage. The fact that it is an open question renders the criminal act exclusion inapplicable.

V. CONCLUSION

Accordingly, for the foregoing reasons, Plaintiffs' cross-motion for partial summary judgment (Doc. 66) is **GRANTED**, and, finding that there is no just cause for delay, the Court orders entry of final judgment establishing that [*47] ACE has an immediate duty to defend, and pay the costs of defending, Plaintiffs in the *Knell* Action and the *Wheelock* Action.

ACE shall immediately undertake the defense of these potentially covered actions until such time as it is able to establish as a matter of law that there is no possibility of coverage, which showing ACE has not yet achieved in the present case. *Grange Mut. Cas. Co. v. Rosko, 146 Ohio App. 3d 698, 2001 Ohio 3508, 767 N.E.2d 1225, 1230 (Ohio App. 2001)*. The fact that the insurer may ultimately have a defense to coverage does not relieve it of its obligation to pay defense costs as they are incurred until and unless it can establish the applicability of that defense as a matter of law and fact. *Motorists Mut. Ins. Co. v. Trainor, 33 Ohio St. 2d 41, 294 N.E.2d 874, 878 (Ohio 1973)*.

IT IS SO ORDERED.

Date: 7/3/13

/s/ Timothy S. Black

Timothy S. Black

United States District Judge

FILED: NEW YORK COUNTY CLERK 02/24/2014 INDEX NO. 651982/2011
NYSCEF DOC. NO. 522 RECEIVED NYSCEF: 02/24/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. Justice PART 48

Index Number : 651982/2011
ZURICH AMERICAN INSURANCE
vs
SONY CORPORATION OF AMERICA
Sequence Number : 014
PARTIAL SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn for summary judgment denied
X mtns for summary judgment granted.
The reasons for the decision & order are set forth on the 2/21/14 record and are incorporated herein for all purposes.
If Zurich directed to order the transcript & submit it to the Court to be so ordered.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/21/14

JEFFREY K. OING, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART - 48

----------X

ZURICH AMERICAN INSURANCE COMPANY,
Plaintiff

INDEX NUMBER:
651982/2011

-against-

SONY CORPORATION OF AMERICA, SONY COMPUTER ENTERTAINMENT AMERICA LLC, SONY ONLINE ENTERTAINMENT LLC, SONY NETWORK ENTERTAINMENT INTERNATIONAL LLC, SONY NETWORK ENTERTAINMENT AMERICA, INC., MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA , NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., ACE AMERICAN INSURANCE COMPANY, XL INSURANCE COMPANY LIMITED-IRISH BRANCH, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, A-K INSURANCE COMPANIES (FICTITIOUS DEFENDANTS) and L-Z INSURANCE COMPANIES (FICTITIOUS DEFENDANTS),
Defendants

----------X

60 Centre Street
New York, New York 10007
February 21, 2014

BEFORE:
HONORABLE: Jeffrey K. Oing, JSC

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Delores Hilliard
Official Court Reporter

- OFFICIAL COURT REPORTER

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Proceedings

COURT CLERK: Index Number 651982/2011.

In the matter of Z U R I C H A M E R I C A N I N S U R A N C E C O M P A N Y versus S O N Y C O R P O R A T I O N O F A M E R I C A, et al.

THE COURT: Okay. The Court has before it the matters of Zurich American Insurance Company versus Sony Corporation of America, et al. Index number 651982 of 2011.

I have before me motion sequence number four, which is a motion by -- Fourteen. I am sorry, motion sequence number 14, which is a motion by the defendants, Sony Corporation of America, SCA and Sony Computer Entertainment America, SCEA for partial summary judgment on its first cross claim and first counter claim for a declaration that the defendant, Mitsui Sumitomo Insurance Company of America and Zurich are obligated to the defendant in the underlying lawsuits arising out of a data breach suffered by The Play Station network, Sony On-Line Entertainment Network, in April of 2011.

I also have within motion sequence number 14, Zurich and Mitsui's cross motion pursuant to CPLR 3212 for declarations that I have no duty to the defendant, SCEA and SCA, respectively.

Appearances for the record. For the plaintiff.

MR. COUGHLIN: Good morning, your Honor. Kevin Coughlin on behalf of Zurich American.

Proceedings

THE COURT: For the defendants.

MR. FORESTA: Good morning, your Honor. Stephen Foresta from Orrick, Herrington and Sutcliffe on behalf of the Sony defendants. With me is Richard De Natale and Peri Mahaley, also from Orrick , Herrington and Sutcliffe.

THE COURT: And for Mitsui.

MR. MARSHALL: Robert Marshall on behalf of the defendant and cross complaint, Mitsui Sumitomo Insurance Company of America.

I also have with me Amy Klie.

THE COURT: Okay. And you, sir?

MR. KELLY: Robert Kelly for Zurich, as well.

THE COURT: Okay. Thank you.

Since you're in the well you might as well tell me what your appearances are.

MR. VOSES: Marc Voses from the firm of Nelson Levine de Luca & Hamilton on behalf of National Union Fire Insurance Company, Pittsburg P.A., in opposition to the motion.

MR. CORBETT: William Corbett on behalf of Ace America Insurance Company.

MS. THEISEN: Paula Weseman Theisen on behalf of St. Paul Fire Insurance Company in opposition to the motion.

THE COURT: I know I have other motions pending.

Since this one was keyed up first I think the

resolution of this motion may take care of the other motions that are sort of percolating out there.

The way I look at it, after we have done this today I would suggest that we let the dust settle on how this plays out. And then for you folks we will give you a control date. Then, at that point we will figure out what we should do next in terms of how we go about taking care of this case.

So, having said that , okay, we all know what the underlying facts are in this case.

There was a data breach of large scale proportions which was eclipsed now by the Target data breach, I think.

But, suffice it to say there is the lawsuit that is in California that is going forward.

There was an amended consolidated complaint. It was dismissed.

But, then the plaintiffs, the class action filed another complaint.

The Federal Court dismissed certain of those claims. But, suffice it to say, it is still alive and percolating out there in California, right, the underlying complaint?

MR. COUGHLIN: Barely so, but alive.

THE COURT: Why don't you do this first. Let's talk about the exclusion.

Because, the way I look at it why talk about coverage if at the end of the day if I do find coverage there is an exclusion that kicks in and gets rid of all of that. So, I want to do the exclusion first.

But, the first thing I want to talk about is Mitsui's argument with respect to SCA is not named in the amended class action complaint.

Is that your argument?

MR. MARSHALL: That's correct, your Honor.

THE COURT: Did you take a look at the policy endorsement of your insurance contract?

MR. MARSHALL: Which endorsement, your Honor?

THE COURT: The one that I have here which listed Sony Network Entertainment Incorporated International LLC as well as Sony Online Entertainment LLC.

MR. MARSHALL: Yes, they are still the defendants.

That is subject to a separate motion for summary judgment we filed which has not been briefed yet.

THE COURT: But, they are named. Right.

So, your argument in here about how there is an issue about whether or not there is coverage at all because they are not a policyholder, did I misread that argument?

MR. MARSHALL: No.

Our argument is that the underlying litigation does not trigger the defense.

And we are responding to, they brought the motion only on behalf of SCA, not on behalf of Sony Online or Sony Network Entertainment.

So, our argument is that the underlying litigation does not trigger the personal advertising injury offense.

If that is true, then the other motion becomes a mere formality because it is the same underlying litigation.

MR. De NATALE: Your Honor, we think that the underlying case does clearly cover the privacy coverage that triggered that duty to defend.

THE COURT: You represent all of the Sony entities, right?

MR. De NATALE: That's correct.

THE COURT: So, it doesn't matter if you pick and choose who you prep. The issue is still, my guy has a policy. The fact that I went with one of my clients as opposed to the other affiliate client, it doesn't matter.

I mean, the bottom line is we have got coverage or at least we are arguing that we have coverage. And everybody that is supposed to be on these policies is there.

MR. De NATALE: That's correct.

THE COURT: That's the bottom line.

MR. De NATALE: If there has been any claim it is a duty to end the entire case. We would have later proceedings about how much they have to pay for allocation.

But, that is not before The Court today.

THE COURT: The sense I get is that the vehicle is probably the wrong vehicle. But, nonetheless, it is still one of the vehicles in my lot that I'm pursuing.

And at the end of the day, Judge, the bottom line is that we are going to argue there is coverage. It doesn't matter who pushes the argument, either the parent corporation or the subsidiary. But, we are all covered at the end of the day.

MR. De NATALE: That is our argument, your Honor.

THE COURT: So, that's for the argument later on with respect to the coverage. I just wanted to get that out of the way in terms of exclusions now.

We have one thing where Zurich is saying there is an internet type business exclusion that applies.

Before we get started, I just want to get for the record, Zurich's insurance policy and the Mitsui are identical? I looked through both of them.

MR. COUGHLIN: No. There are differences to that. They were issued separately to different entities.

THE COURT: That's okay. I'm talking about the policy language that is at issue.

MR. COUGHLIN: There is a lot of overlap on the standard wording, the insurance grants, that sort of thing. You're correct in that way.

Proceedings

THE COURT: The particularities that you're disputing or at least arguing about today are identical?

MR. COUGHLIN: Correct.

THE COURT: That is important.

So, tell me why in terms of the internet type business? And that would be falling under the B coverage. B1, J,1,2 and 3.

MR. COUGHLIN: Your Honor, would you mind if I took the podium?

THE COURT: Whatever is convenient for you.

MR. COUGHLIN: It is necessary for my eyesight.

THE COURT: Mine, too.

MR. COUGHLIN: Your Honor, let me start, if I may, with the issue of the exclusion which obviously follows, as it must, the issues with respect to the insurer's view that there is a total absence of publication here and coverage B doesn't apply.

THE COURT: Putting that aside for the minute.

MR. COUGHLIN: Yes. The issue with the exclusion is wrapped up, your Honor, with other issues that have brought us here today that cannot be ignored.

And that is, the Zurich policy as well as the Mitsui policy was never intended to cover cyber losses.

THE COURT: You know, whatever your intent is, the bottom line is that I'm restricted to what the policy terms

are.

So, you can say intent. We only get to intent if I find there is an ambiguity.

If there is no ambiguity I don't have to go to the intent aspect of what you insurance companies thought you were providing and what the policyholders thought they were getting.

So, the bottom line is I just have to look at what we have here.

MR. COUGHLIN: I agree, your Honor.

THE COURT: So, hearing for the record what the exclusion says, personal and advertising injury, this is excluded. Personal and advertising injuries committed by an insured whose business is.

One and two are out. It is three, which says an internet search access content or service provider.

Now, the question then becomes is Sony or any of the Sony defendants here falling into that category.

MR. COUGHLIN: The answer for today, your Honor --

THE COURT: For today?

MR. COUGHLIN: Is that SCEA is an entity that fits within 3. Because, Sony decided to only move against my client on that entity.

That was a decision they made. So, it is not in front of your Honor today.

And what is interesting --

THE COURT: You know what, that is interesting that you say that, but for today.

I don't know how you folks want to do it, but I just want to be done with this. There is no today, tomorrow or yesterday.

I mean, I've got the Sony defendants all here. I have all of the insurance carriers here.

So, it is not going to change anything from today or tomorrow if I don't talk about whether or not the defendants, the Sony defendants, fall within the category of paragraph 3 altogether.

MR. De NATALE: Your Honor --

MR. COUGHLIN: The problem --

THE COURT: Hang on.

MR. COUGHLIN: The problem that Sony has put on your Honor's desk this morning --

THE COURT: Well, I think you're all guilty of that.

MR. COUGHLIN: Well, your Honor, respectfully, no.

They chose to move on only two entities. The SCA, parent against Mitsui and SCA against Zurich.

We were, frankly, somewhat mystified that they did it, too. But, they did it.

THE COURT: This is a summary judgment motion, so

that I can search the record.

So that as long as they are named, as long as they are a named defendant in this case when you move under 3212 I can do a lot of things. I'm not restricted to just the pleadings like a 3211 motion. I can search the record.

And I cannot stick my head in the sand and ignore something when it is jumping out at me.

MR. COUGHLIN: Your Honor, I'm happy to address our view of that.

Sony has taken positions that seem to focus exclusively on SCEA and to the omission of the other entities factually.

But, I'm happy to deal with section 3. Because, your Honor, we don't think there is any question that Sony, and I will use Sony Corp., SCA, SCEA, fits squarely into section 3 of that exclusion.

And what is interesting, your Honor, it wasn't until the summary judgment briefs that we see that the SCEA entities are now alleging it is not to them, technically. And we are really not an entertainment company, we are something else.

But, what is striking here is the public pronouncements by SCEA and Sony after the cyber breach where they were inundated with their concern about the ultimate risk here which thankfully has been de-risked substantially.

But, in those first months they issued press release after press release about who they are, what they do.

They were terribly concerned because members of Congress were crying out for an investigation. And the chairman of SCEA put a submission to them in the form of a letter describing who they are.

THE COURT: So, what you are saying then is because the defendant, SCEA, is moving for summary judgment and not the other Sony defendants, we are talking about SCEA, SCA. So that you are saying that there may be opportunities of, if I would rule, if you were not to prevail in that argument here that it is included under paragraph 3, you are saying that later on you may have an opportunity again because of the way this is teed up to argue that the other Sony defendants if they move that they may fall under paragraph 3.

MR. COUGHLIN: Well, your Honor, it is this way.

It is because the Sony entities have taken a view in the briefing that SCEA didn't have specific responsibility for the servers, for the Play Station network business, etc.. It is in their briefs that way. So, they tried to carve that out.

The other problem confronting us this morning is we believe all of their public statements, their pronouncements

where they are trying to get a handle on this problem from a public relations point of view, an over all legal view was it is SCEA. We are an internet content provider. We provide all sorts of access, Hulu, Netflix, all of these other things through the Play Station network to our subscribers.

And it is absolutely clear in those pronouncements.

THE COURT: Let me ask you in response to that question then, that that is sort of like a 3rd party service that they are doing. So, you're arguing that they fall under this paragraph 3 exclusionary language.

But, that's not the only thing they do.

They also do, according to The Federal Court's decision, which is at 2014 Westlaw 223677, that they also do in addition to what you just said, which is a 3rd party services provider.

MR. COUGHLIN: By the way, respectfully, I did not agree with that. I did not say it was a 3rd party service, your Honor.

THE COURT: I'm just using that. I'm using that analogy from what The Federal Court said here. This is how The Federal Court describes what Sony does.

Sony develops and markets the Play Station portable hand-held devices, PSP and the Play Station 3 conscle PSP, collectively, consoles and all consoles.

Both consoles allow users to play games, connect to the internet and access, Qriocity -- Q-R-I-O-C-I-T-Y.V

MR. COUGHLIN: Qriocity.

THE COURT: Qriocity. Sony Online Entertainment Services and the Play Station network PVS and collectively through the PSN, which is offered to consumers free of charge. Users can engage in multiple on-line games. And for additional one time fees the PS allows users to purchase video games, add on content defined as Mapsters, demos movies and movies selectively down-loaded. Users can also access various prepaid 3rd party services by connecting to Sony Online Services via their consoles or computers including Netflix, MLV, Dot TV and NSHL game center, collectively, 3rd party services.

Then, this goes on to say, before establishing a PSN Qriocity and/or SOE account plaintiffs and other consumers are required to enter into terms of identifying users with Sony and agree to Sony's privacy policy as part of this registration process.

Plaintiffs and their consumers were required to advise Sony with personal identification information including their names, mailing addresses, e-mail address, birth dates, credit and debit card information, card numbers, expiration dates and security code and log-in credentials, collectively, with personal information.

Proceedings

Now, I'm looking at that description of what Sony does. This is now in a decision. So, factually, I'm just looking at that for some guidance.

It sounds like they do more than being an internet search, or access, or content or service provider. They are sort of a hybrid. They do a lot of things.

MR. COUGHLIN: They certainly do, your Honor.

THE COURT: This policy doesn't say --

It's very clear as to what it says. It doesn't go on and say, and any other hybrid type of situation.

It's very clear. It lists 3 or 4 instances of internet search, which clearly this description doesn't fall into an internet search. Internet access, okay, internet access.

But, for internet access they do a lot of things, not just pure access.

For example as to Google or some other Internet Explorer, it is not content based in the sense that it is not just there for static information. And it is not a service provider in the sense that, oh, yes, it does service provide, but it allows people who pay up to play games on their Play Stations. So that it is sort of a hybrid.

It doesn't fall into any of these categories here at all.

MR. COUGHLIN: Well, respectfully, Judge, I think

it is a content provider. It is a service provider.

THE COURT: In what way?

MR. COUGHLIN: And the case law says it doesn't have to be the only business. It has to be a principal business.

THE COURT: That's not what this says. That is not what your policy said.

MR. COUGHLIN: Your Honor --

THE COURT: Where is it in this, your policy, in that paragraph that you say it is principally what you do?

MR. COUGHLIN: It is not there, Judge.

THE COURT: Okay.

MR. COUGHLIN: But --

THE COURT: And we know what the exclusionary language is.

The Court looked at that very carefully. Because, exclusionary language in a policy is strictly construed.

And if there is an ambiguity with respect to an exclusionary language the ambiguity is resolved in favor of the policyholder. That is pretty clear.

So that when you talk about that I would like you to point out in paragraph 3 where you get that principal language.

I looked at that policy. I didn't see it.

There was a lot of reading last night. Magnifying

glass work.

MR. COUGHLIN: Judge, the problem, Judge, and let me stay just inside of the policy and let me stay with what Sony has said outside of their briefs.

Our exhibit 16 to our motion, my affidavit, Sony describes the SCEA entity.

And they describe it, and it's on page two, that they operate the Play Station network, which is the access point.

THE COURT: Right.

MR. COUGHLIN: And it is a computer entertainment system and its on-line and network services, The Play Station network.

What I'm coming back to there in this problem, your Honor, for the reason that their on-line product and service, which is a significant component to their business, which if you look at the words of our policy -- and I don't, respectfully, believe it is just three. I think it is also paragraph two, sub-paragraph two.

THE COURT: Sub-paragraph two provides, designing or determining content of web sites for others.

MR. COUGHLIN: Yes. For their subscribers. Therein designing the Hulu and the Netflix, those are components.

They have come up with games. They have all

on-line products. A whole menu.

And your Honor, that is --

THE COURT: But, again, you don't have the word principally, principally designing or determining. It is doing a lot of things on this platform that they have.

MR. COUGHLIN: That's correct. This on-line platform, Judge.

So, that on-line platform, which is without doubt from their own witnesses a significant part of their business. Not the exclusive. We have never said that.

But, to say that unless it is the only part of their business the exclusion should not apply, I think misreads the intent of the words.

THE COURT: No. That's not misreading the intent of the words. That is just reading it on face value what the words say.

Because, there are issues in terms of these policies here.

And what you're asking me to do is you're asking me to read this, these straight forward words, unambiguous words. You're asking me to read this your way of saying that, well, it doesn't mean that's exclusively what they have to do, but principally what they have to do.

There is no such wording in here that says, either principally or exclusively.

Proceedings

But, you're asking me to read this that way.

MR. COUGHLIN: Correct.

THE COURT: And I cannot read this that way. That's not what it says.

MR. COUGHLIN: Your Honor, what Zurich is asking is that that exclusion be applied to the stated business of SCEA. That is our position, your Honor.

THE COURT: Okay.

MR. COUGHLIN: Not their's, our's.

THE COURT: Your response?

MR. De NATALE: Your Honor, this is an exclusion we are talking about. So, it has to be written out.

Zurich has a burden of proof to put in facts.

What they have done, they have pulled some statement out of a letter taken out of context and using it as some kind of admission.

We put facts in the record about what SCEA Sony Computer does. They make the Play Station.

The first Play Station that came out wasn't even connected to the internet.

THE COURT: I know.

MR. De NATALE: Most people still use it as a stand-alone product.

It does have wi fi access. But, we showed in our papers, in fact, 90 percent of the company's revenues have

nothing to do with the internet or its profits have nothing to do with the internet.

The exclusion has to be applied on a company by company basis.

THE COURT: Yes.

What about their argument? He is saying that you're moving under this summary judgment, but SCA and SCEA and not the other Sony defendants.

So, for today only we are only going to be talking about this exclusionary language.

MR. De NATALE: I will be candid about that.

We brought this motion on behalf of two companies that we thought under no possible conception should be within the internet business exclusion.

We thought we would get a quick hearing. We were hoping to avoid any discovery.

The insurers insisted on taking all of this discovery and went through all of our files to try to prove the internet business exclusion.

They weren't able to come up with anything.

MR. MARSHALL: Your Honor --

THE COURT: Easy there, counsel. Relax.

MR. De NATALE: But, our motion seeks to establish coverage for all of the entities.

MR. MARSHALL: That's not --

Proceedings

MR. De NATALE: Counsel, give me the courtesy, please.

THE COURT: You've had too much coffee. Relax. I give everybody an equal opportunity to be heard.

MR. De NATALE: Our motion seeks to establish the underlying cases allege a publication of private material.

THE COURT: I don't want to get into that now.

MR. De NATALE: That would apply to everyone.

But, on the exclusion we only moved on behalf of the two companies who under no conceivable way fall within the exclusion.

Later in the case they can try to show that the other two Sony defendants fall within the exclusion.

I think they will fail. But, that would be an open issue later in the case.

MR. MARSHALL: I think he clarified it.

Procedurally, Sony filed its motion for partial summary judgment on behalf of two entities, only. They weren't seeking coverage from all Sony entities.

They did so because they thought they had the best chance to avoid the exclusion on those two entities.

THE COURT: Okay.

MR. MARSHALL: After they filed that motion The Court allowed us to conduct discovery with respect to application of the exclusion.

Proceedings

So, that's why this is being briefed in two stages. Meaning, SCA, SCEA first. And then later we filed a motion for a summary judgment with respect to the on-line company and the network company. Because, there was discovery ongoing. And that's why it's separate.

So, that hearing should not decide coverage with respect to the on-line entity.

THE COURT: So far the issue that I have in front of me with respect to the exclusion is limited to SCA and SCEA.

And any ruling I make at this point on going forward even with respect to coverage, even with respect to-- I mean, when we get into the arguments with the coverage issue it's only as to, as Mr. Coughlin indicated being pressed, is only involving SCA and SCEA; correct?

MR. MARSHALL: Okay. I'm fine with that, your Honor.

THE COURT: This is evolving into a situation where, okay, if I have it for another day it will be teed up for another argument. It will be teed up for another argument.

MR. De NATALE: One last application.

SCA, Sony Corporation of America, there is no argument with respect to the exclusion. For SCA, Sony Corporation of America, the exclusion is irrelevant.

Proceedings

THE COURT: SCA. But, SCEA is in the mix. That's where Zurich is making the argument.

MR. MARSHALL: SCA had nothing to do with the network issues, so we don't make any arguments.

THE COURT: You know, I've heard the arguments here. I'm not convinced at this point that paragraph three that is involved here or paragraph two that is involved here with respect to -- I mean, paragraph two.

Let me just say this right here. It says, right here, I am sorry to repeat it for the record.

J, the heading for J is insurance in media and internet type businesses. Personal and advertising injury committed by an insured whose business is, and paragraph two, is being put in play, designing or determining content of web sites for others. Or three, and internet search access content or service provider.

I've heard the arguments here. And when you read this there is no qualifying language in this exclusionary clause here. It doesn't say principally. It doesn't say exclusively. It just lays out the words here in front of me. And it's very clear.

Under the facts that I have for SCEA, the defendant SCEA, it is clear. It is not just this.

Paragraph two and paragraph three does not come into mind at this point.

Proceedings

Because, I'm looking at The Federal Court's decision in terms of the description. Because, The Federal Court in The Judge's decision, Judge Battaglia's decision, a very thoughtful decision, he defines or at least he sort of describes what SCEA does. Because, he names SCEA right in the beginning of describing who the defendants are in this case.

And it gives me the sense that this is a hybrid situation where it does a lot of things, SCEA. It is not just limited to what is going on here in this exclusionary language.

So that when you don't have the qualifying language of exclusively or principally, although Mr. Coughlin, counsel is arguing that that's what is at play here, I'm not going to read in a term here that doesn't belong.

So, under those circumstances I don't find that SCA is not involved or implicated in this issue here.

But, I don't find SCEA falls within the exclusionary language that is set forth in this policy that I have in front of me.

As I said earlier, the case law is very clear. When you come to the exclusionary language it is read very strictly. It is construed strictly. There is no, I do not find any ambiguity here.

Under those circumstances, I don't find the

exclusion of J2 or J3 applicable to the defendant SCEA.

So, that's my decision with respect to that first issue.

Let's turn to the second issue, recording and distribution of material or information in violation of the law of exclusion.

That is your argument. That is Mitsui's argument, isn't it?

MR. MARSHALL: No.

THE COURT: I thought you wrote that in your demand for denial for coverage? No?

MR. MARSHALL: That's not the basis for our summary judgment motion.

THE COURT: That was in your denial letter. But, that's not being pressed here?

MR. MARSHALL: That is not part of our motion for summary judgment.

THE COURT: Then, the next one is the criminal acts. Same thing?

MR. MARSHALL: Not part of the issue.

THE COURT: That's not part of it, either? I just wanted to get that out there.

MR. MARSHALL: I can probably kind of cut to the chase, your Honor.

The only basis upon which Mitsui moves for partial

summary judgment is the fact that the publication of the personal advertising injury offense is not satisfied by the allegations of the underlying litigation.

THE COURT: All right. We are going to get to that in a minute. That's how we are going to get to the heart of it.

I have taken care of all of the exclusion stuff. Now, we are going to get to the coverage stuff here.

And I will turn to the Sony defendants to start that argument as to why they think there is coverage under this policy for what we have here.

MR. De NATALE: Thank you, your Honor.

For more than 20 years insurance companies in The United States have sold general liability policies just like the ones your Honor has before it that include coverage for privacy claims.

The clauses there are written broadly. It's intended to cover many types, a wide variety of privacy torts.

The clause has no limitations or restrictions that depend upon who makes the disclosure, how the material is disclosed or to how many people the material is disclosed.

And under New York law, since it is part of an insurance clause it must be issued broadly.

That's what the courts have done. The courts have

applied that clause to that wide variety of situations where there is a disclosure of private information or unauthorized access to private information.

In the year 2000 the language of this clause was expanded to make clear that it covered the internet. And that's the nature of insurance.

The world changes. New torts are being alleged all of the time. And old policies have to be adopted to cover new situations.

THE COURT: All right.

The provision here that is in dispute is in the definition section.

MR. De NATALE: Yes.

THE COURT: That's in the definition section 5.

We go to paragraph 14. And I will state for the record what paragraph 14 says.

Paragraph 14. (Reading). Personal and advertising injury means injury including consequential bodily injury arising out of one or more of the following offenses which provides, which there is coverage for.

A, false arrest, detention or imprisonment.

B, malicious prosecution.

C, the wrongful eviction from wrongful injury into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or

on behalf of its owner, landlord or lessor.

D, oral or written publication in any manner of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services.

E, oral or written publication in any manner of the material that violates a person's right of privacy.

And F, the use of another's advertising idea in your advertisement.

G, infringing upon another's copyright, trade, dress or slogan in your advertisement.

And that is it. Right? That is it.

So, the focus now is, the dispute that we have here is the definition or is focused on E, which is oral or written publication in any manner of material that violates a person's right or privacy.

The case law out there is clearly, or at least not clearly, but having to do with pollution cases.

I haven't seen any data breach case of this magnitude involving this kind of policy.

And the courts haven't addressed this yet. It seems like this is the first one that has come up.

MR. De NATALE: Your Honor, there have been cases addressing all kinds of similar issues, unauthorized access.

THE COURT: Not like this nature where you had a

hacking into the system.

MR. De NATALE: I agree.

THE COURT: But, a lot of the other cases that we have seen have talked about environmental impact, pollution cases.

They all basically say it is not the 3rd party act that gets you coverage, but it has to be the policyholder/insurer's acts for you to get coverage, for coverage to apply.

MR. De NATALE: So, your Honor, the pollution cases that you're talking about are under section C, the wrongful injury prong. And nothing to do with the privacy prong.

If you see under section C, your Honor, there are additional words in that provision that say committed by or on behalf of owner, landlord or lessor. That is usually the policyholder.

In section C they added words saying the offense has to be committed by the policyholder.

THE COURT: But, aren't there cases out there that said - I looked at some, I don't remember what they are - but they kind of grouped A through E together and said this all has to be done by a policyholder. It cannot be affording coverage when this happens when a third party intervenes or does something.

MR. De NATALE: Your Honor, only under The County

of Columbia case. The cases don't say that under the privacy prong.

I think each one has to be considered separately.

This is a duty to the defendant motion.

And your Honor is well aware that the duty to defendant is exclusively broad in New York. Coverages are read broadly and the complaints are read broadly, here's what we have been sued for. In the underlying cases there are many, many examples.

The chief complaint says that Sony disclosed private information to unauthorized parties and invaded plaintiff's privacy.

The Deiter (phonetics) case says the same thing.

The complaint says that millions of customers had their financial data compromised and had their privacy rights violated.

There are five other complaints that say the same thing.

The John's (phonetics) complaint says this action is brought to address the defendant, Sony's, violations of consumers right of privacy. There are five other cases that say the same thing.

The NBL (phonetics) case, when it was all consolidated in a multi-district proceeding says that Sony breached the duty of care to protect personal information

from being disclosed to unauthorized parties and placed sensitive information in the hands of cyber hackers.

The amended NBL complaint, the most recent one, in four different places says the class members have suffered a loss of privacy.

These are the allegations, your Honor.

THE COURT: But, you're looking at those allegations in a vacuum. Because, the totality is that the hackers, that your security features weren't sufficient to prevent hackers from coming in and getting access.

While the plaintiffs have to say that you guys breached the duty to them, I mean, they are not going to sue the hackers because they cannot find the hackers. They can find the guy that had all of the information. That's you.

So, they are coming in and they hacked into your security system.

So, Sony is the victim here.

MR. De NATALE: We are the victim, but being sued.

THE COURT: You're being sued by others.

But, the question is, does this policy prevent, does this policy provide you coverage for you being the victim rather than being the perpetrator.

MR. De NATALE: Right.

So, we are being sued on this allegation that we collected people's private information, implemented security

factors that they claimed was inadequate that resulted in that disclosure of millions of people.

THE COURT: But, you didn't disclose. It wasn't your act of disclosure. Someone broke into your --

Who used the analogy of a bank robber going into a bank and taking money as being an unauthorized ATM withdrawal?

I mean, that is not your fault.

MR. De NATALE: And the policy grants coverage for publication in any manner of material that violates the right of privacy.

It doesn't say it has to be publication by the policyholder. It says in any manner.

And I think that is inconsistent with -- If they wanted to write a clause that says publication committed by the policyholder they could have done that. That's what they did in section C.

But, what they wrote in a clause that says publication in any manner, I think that's inconsistent with reading an implied requirement here that it has to be by the policyholder.

New York law doesn't allow implied exclusions.

THE COURT: F and G is also new, too. Because, I think, virtually all of the cases that I looked at dealt with A through E. No one talked about F and G.

Proceedings

I think F and G is a new insert in the CGL that hasn't been discussed yet.

MR. De NATALE: There used to be a separate, a separation of advertising injury and personal injury. They were combined together and F and G got added.

THE COURT: But, the interplay, I was curious to see what the interplay was or how courts review having F and G. How that would impact any of the A through E type of discussions that we have.

MR. De NATALE: Your Honor, may I point you to another provision?

I have a hand-out here, if that would be helpful to The Court, that blows up the language.

MR. COUGHLIN: I want to see the exhibit.

MR. De NATALE: It is section 1B of the policy.

THE COURT: 1B in the front?

MR. De NATALE: Yes, in the personal and advertising.

(Handed)

THE COURT: Hang on a second.

(Peruses)

THE COURT: Yes, I've got it.

MR. De NATALE: The reason this is important, your Honor, is that I want to be clear.

There are expressed requirements contained in this

coverage part A. They are here in paragraph 1B.

It says the insurance applies to personal and advertising injuries caused by an event or arising out of a business.

That is one requirement. It has to arise out of a business.

But, only if the offense was committed in the coverage territory. In the coverage territory, which is defined to be for internet offenses any part of the world.

And third, it has to be during the policy period. That's the third requirement.

It doesn't say by the policyholder. It doesn't say it has to be intentional and not negligent.

If the insurers wanted to write express requirements this is the place to put them.

They put three in here. We have met all three.

And now they are trying to re-imply restrictions in requirements which are just not in the text.

New York law doesn't let you do that.

THE COURT: But, you know, the problem with that argument is that when you say this insurance applies to, quote, "personal and advertising injury," unquote, what is that defined as?

You go here and look at paragraph 14 and that defines it. So, everything in paragraph 14 gets thrown in.

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MR. De NATALE: Absolutely.

But, no where in 1B or 14 does it say it has to be by the policyholder. It just doesn't say that.

And you know, we use an example --

THE COURT: This doesn't say that. But this is a CGL policy that you've already said it's an insurance policy that insures the policyholder against its acts or acts of its employees or affiliates. You know, this covers all of those for their acts.

So that you're telling me now that that's not what it is? It actually embraces actions from 3rd parties in a hacker situation?

MR. De NATALE: The coverage for your acts, your Honor. But, it covers you for acts of negligence.

CGL policies traditionally covers you for acts of negligence.

If someone falls on your premises you haven't pushed them over.

THE COURT: By that argument, doesn't that expand the liability of the insurance company?

That's not what they bargained for. They are bargaining with the policyholder.

MR. De NATALE: Your Honor, absolutely, it's what they bargained for. It turns insurance on its head.

Insurance typically covers your negligence. When

someone slips and falls because your sidewalk is wet or when you build improperly and something falls down, that is negligence. And you're covered for your negligence.

THE COURT: That's why if you have those kinds of situations -- Let's go to construction contracts, for example.

You know, a contractor takes out an insurance. The insurance policy is not going to cover the sub. The sub has to name the contractor in their policy.

MR. De NATALE: But, the contractor can sue for the sub's negligence. The contractor is covered, it is. That's section 8 of property damage.

But, under section B, absent some express language that bars coverage for negligence, and there isn't any, it should be covered, your Honor.

And all of the other restrictions that they just want to, they turn the insurance on its head by reading this narrowly.

Let's talk about the word publication, which has been a big focus in that case.

The insurers say publication means only one thing, wide spread disclosure to the general public in the sense of a public announcement or a publication of a book or magazine. Those are meanings of the word.

But, there are other meanings of the word that are

narrower and simple and have the straight forward meaning of a disclosure, a statement or a disclosure.

If you look at Nisarrels (phonetics), we cite in our brief synonyms for publication are to disclose or simple disclosure. Black Law dictionary.

THE COURT: The term publication is very broad. I think the term disclosure is more narrow.

Disclosure is something where I think the person that has the information does something to disclose. I means, that's something.

Publication, I think, contemplates a situation where anybody and everybody can sort of get something out there, like the defamatory statements.

You have a publication. It is not necessarily the person that is actually doing the defaming that publicizes. Somebody else can pick it up and publicize it. Then, that person who actually wrote the piece can be sued for defamation. But, they didn't publish it. Somebody else published it and they got it out there. That's how you link up in terms of publication.

In my mind it's more broad. It doesn't necessarily mean that it is restricted to the actual wrong doer or tort feasor.

But, disclosure is a little bit different, a little more narrow.

MR. De NATALE: I think you can have a negative publication and you certainly can in a defamation context. That's the immediately previous paragraph that your Honor saw the same phrase, publication in any manner is used in a defamation clause and also used in the proxy clause. This must mean more or less the same thing.

And the restatement of defamation, your Honor, under the very interesting example of a cartoonist who wrote a defamatory cartoon and leaves it on his desk where co-workers go by and see it. And they see this person is defamed. That's a negligent publication of defamatory material, because the person allowed access to that defamatory material to others. And the victim was then defamed.

THE COURT: You know, the Butts case, the West Virginia case, it is not so bad what this says.

I mean, I know, you didn't --

MR. De NATALE: We don't like this.

THE COURT: You know, you should not be so quick to not like this. Because, what this did here is very interesting.

They talked about D and E in their decision.

The standard for D, the publication was not done by the defendant company. The publication was done by the doctor and an employee. More specifically, the doctor who

themselves published anything.

THE COURT: That is getting into real subtleties.

Because, I look at it as a Pandora's box. Once it is opened it doesn't matter who does what with it. It is out there. It is out there in the world, that information.

And whether or not it's actually used later on to get any benefit by the hackers, that in my mind is not the issue. The issue is that it was in their vault.

Let's just say to visualize this, the information was in Sony's vault. Somebody opened it up. It is now, this comes out of the vault. But, whether or not it's actually used that is something, that's separate.

On the one hand it is locked down and sealed. But, now you have opened it up.

You cannot ignore the fact that it's opened for everyone to look at.

So, that in the sense, that is why I had the discussion with counsel about publication versus disclosure. Publication is just getting it out there. Whether or not if this were in the box, still there is no publication.

When you open up the box, it's The Pandora's box. Everything comes out.

MR. MARSHALL: But, the information was stolen.

THE COURT: I know the information was stolen.

But, the way I look at it the information was

stolen, so that in itself is something that is out of the box. It is no longer in the box.

MR. MARSHALL: There is a New York case that tells you what publication is.

THE COURT: With a data breach situation?

MR. MARSHALL: Very similar. A hacking situation.

THE COURT: What is the case?

MR. MARSHALL: It was in our brief, Lunney versus Broad Prodigy Services Company.

THE COURT: Hold on a second. I think I might have it.

MR. De NATALE: Do you have a copy, counsel?

MR. MARSHALL: It is in our brief.

THE COURT: Hold on a second.

(Peruses)

THE COURT: You have got to like the decision when it starts out by saying, some infantile practical joker. You have got to like that.

(Peruses)

THE COURT: It says right here, the plaintiff now seeks monetary damages as compensation for the emotional distress which I consequently suffered not from the originator of this low brow practical joke, but instead from The Prodigy Services Company, hereinafter, Prodigy. The company which in effect furnished the medium through which

the offensive message was sent.

That's not the case here. That is not a hacking case.

MR. MARSHALL: Someone broke into Prodigy's system, created a fictional e-mail account and then transmitted obscene e-mails and put them on the bulletin board.

It's very similar.

THE COURT: That's breaking into or that's hacking into a system to send a message.

This is different. This is hacking into a system and getting information out.

One is using that system to transmit. The other, in my case here, is breaking into a system to get information.

This is not a getting information. This is giving information.

MR. MARSHALL: Well, if anything is publication it would have been hacking in hand, then transmitting information out to the public, which is Prodigy. Right?

That's more close to publication than stealing information.

THE COURT: No. That I would tend to agree The Court seeing that may not be a -- you're hacking into a system to get information out. That's less likely.

That's very different from my situation where, you

know, I've got something locked down in a box and sealed, at least I believe it is, for no one to get into. And all of a sudden someone pops it out and this just gets out.

Those are apples and oranges types of facts here. I'm not so sure I'm agreeing with that argument.

But, I think Mr. Coughlin wants to respond now.

MR. COUGHLIN: I've been waiting patiently.

Your Honor, I want to start with a comment that my adversary made when he was arguing about the clause in this definition. And he called it an exclusion.

It is not an exclusion.

THE COURT: No, it is not.

MR. COUGHLIN: It is what I would characterize as a gate keeper issue.

It is part of the insurance grant which Sony has the burden to satisfy.

THE COURT: It's a coverage portion.

MR. COUGHLIN: It is the insuring grant. You're absolutely right.

THE COURT: I'm not disputing that.

MR. COUGHLIN: Let's look at the history of this.

In their opening brief Sony says there was a publication.

And I refer you to a couple of words and a couple of the 50 odd class actions which have that word.

But, at the same time they were arguing in the consolidated class action that we didn't do anything wrong. We didn't disclose anything. We didn't publish anything. We did nothing. We are a victim, as your Honor has characterized this.

And they cited for The Court a number of cases which have dealt with that clause and the oral or written publication issue.

Every one of those cases that they cited to you included a finding by The Court that there was a necessary and affirmative act by the insured.

And the reason that's important, Judge, and I want to get --

THE COURT: That's all of the pollution cases.

MR. COUGHLIN: No, Judge. That has nothing to do with this point right here.

My adversary talked about slips and falls, and bodily injury and all of the rest of that.

Third party liability is addressed in part A of a general liability policy. And it protects an insured for 3rd party negligence and injury.

However, the personal injury section has specific enumerated torts which all have intention as part of their requirements.

And although Sony would like to ignore The County

of Columbia case, The Court of Appeals in that decision said you have to have intentional affirmative conduct by the insured here.

THE COURT: I know in that Columbia County case it has to do with a pollution case.

MR. COUGHLIN: But, The Court went on, Judge, though. The facts of that case dealt with seepage of pollution.

But, in that opinion The Court made it clear in their discussion of the personal injury section of the policy the view, which is the national view, that there must be affirmative conduct, action by the policyholder for that to kick in.

THE COURT: There we are talking about 14C; correct?

MR. COUGHLIN: No, Judge. With all due respect, they went beyond that.

Sony would like you to believe that that is all they did.

But, The Court, and I refer you to page 628. And they are talking about D.

THE COURT: Page 628? Hold on a second.

Got it.

MR. COUGHLIN: It is the last page of the decision, your Honor.

THE COURT: Yes.

MR. COUGHLIN: Evidence that only purposeful acts acting were to fall within the purview of the personal injury endorsement is provided in part by examining the types of torts, plural, enumerated in the endorsement in addition to wrongful entry/eviction and invasion.

And then they go on to say, false arrest, detention, imprisonment, malicious prosecution, defamation and invasion of privacy by publication.

Read, and I'm quoting, "Read in the context of these other enumerated torts the provision here could not have been intended to cover the kind of indirect and incremental harm that results from property injury from pollution."

The importance of that clause, Judge, to this case is significant.

And Judge, the other part that I think is very important is the total shift --

Would you like me to wait, Judge?

THE COURT: Yes. Give me a second. I'm just looking at something.

(Peruses)

THE COURT: Here's the question I have for you on that Columbia case.

It says here, we agree with The Appellate Division

that coverage under the personal injury endorsement provision in question was intended to reach only purposeful actions undertaken by the insured or its agents.

Then, this goes on to say, evidence that only purposeful acts were to fall within the purview of the personal injury endorsement provided, in fact, by examining the types of torts enumerated in the endorsement in addition to wrongful injury, eviction, invasion, false arrest, detention, and malicious prosecution, defamation and invasion of privacy by publication.

In the context of these other enumerated torts the provisions could not be intended to cover the kind of indirect nor incremental harm that results from property injury from pollution.

I looked at that. And that's what I said earlier. I mentioned this to counsel earlier.

There is case law that lumps A through E together. Right? It's a policyholder.

The only way you're going to get coverage or the only way this is coverage, the policyholder has to commit these acts under A through E.

MR. COUGHLIN: Respectfully, they don't lump them together, Judge.

This is such a unique grant of coverage. They separated out.

Proceedings

THE COURT: But, they ultimately say, it's the policyholder that has to do it; right?

MR. COUGHLIN: There is no question. The Court of Appeals is in a main stream on that.

THE COURT: Here's the question I have for you.

Looking at that, F and G, that we have here now, they didn't talk about. But, we have that F and G here now.

Counsel is saying that at some point there was some shifting of the policy, some sort of changing. But, in any case, F and G is in here in this definition section. Okay.

All right. So, F says "The use of another's advertising idea in your advertisement." That's in quotes. Or G, "Infringing upon another's copyright, trade, dress or slogan in your advertisement." And that's in quotes.

So, I thought, okay. What does advertisement mean?

So, you go back to the beginning of advertisement. And where it says in advertisement, it's very interesting what it says in section 5, 1. Advertisement, in quotes, "Means a notice that is broadcast or published to the general public or specific market segment about your goods, products or services for the purpose of attracting customers or supporters for the purpose of this definition."

A, notices in a publication include material placed on the internet or similar electronic means for communication.

And B, regarding the web sites, only that part of the web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

When I looked at that definition of advertisement, that doesn't say anywhere that it says by the policyholder. That says, generally speaking.

I mean, not even generally speaking. It says, advertisement. It doesn't say that you, the policyholder.

MR. COUGHLIN: You have got to go back to the start. The personal injury section talks about the insured's business.

This has nothing to do with this case, Judge, nothing.

THE COURT: That has a lot to do with the case. Because, I'm trying to figure out whether or not E, that is at issue here, requires that it has to be committed by the policyholder or it can be read the way it is written to include not only the policy holder's acts but other people's acts.

MR. COUGHLIN: With all due respect, it is not written that way.

And The Court of Appeals, which is governing law, recognized that it has to be an affirmative act.

THE COURT: I understand that. But, The Court of

Appeals did not have F and G in front of it.

MR. COUGHLIN: Judge, you don't have F and G in front of you.

It is not, respectfully, it is not an issue in that case.

THE COURT: You know, when I make this an issue this becomes an issue.

That's what I have in front of me.

Look, it is not Orwellian where I can say it doesn't exist, and I'm not going to look at it and I'm just going to limit myself to what you put in front of me.

I'm an educated fellow, I can read everything.

I cannot look at these policy provisions in a vacuum and say this is what it is, I don't care what the other clause says. That is not how you read policies.

MR. COUGHLIN: Judge, Sony is invoking coverage through the oral or written publication clause.

THE COURT: Right. And the fight between you two now is that you are saying that E means it has to be conduct by, has to be perpetrated or performed by a policyholder.

They are arguing saying, no, that is not how it is read. It can include not just us but other actions or acts by other people.

That's what the fight is.

MR. COUGHLIN: Well, truthfully, Judge, they are

arguing both.

In their opening brief they argue they satisfied the publication requirement. Because, they pulled a couple of words out and they cited a whole bunch of cases to you.

All of them require, however, purposeful conduct.

THE COURT: I'm not so sure I agree with them saying that they are the publication. That they published it. Okay. That is one aspect.

MR. COUGHLIN: That is part one.

In the reply they shifted gears completely.

To satisfy their burden they are now saying, ignore the oral or written publication issue. Replace the word publication with disclosure of personal information.

And your Honor brought up the "in any manner."

In any manner is a clause that affects the publication issue. It is not disclosure of personal information in any manner. It doesn't modify that phrase. It modifies the prior one just on sentence construction.

But, the idea, and this goes back to some comments your Honor made on the exclusion section, the idea that you can ignore words in a contract and say we are going to ignore the oral or written phrase, we're going to white it out. We don't like the idea of publication. So, we are going to call it disclosure now. And we are going to read just disclosure of personal information, which could be by

anybody anywhere, that is not what this coverage provides.

And the words negligent disclosure, that is not on this part of the policy, your Honor.

But, everybody knows there is no coverage under part A of the policy.

THE COURT: The thing I look at in terms of the County of Columbia case, they don't use the wording in any manner anywhere in their description. So, I don't know if they had that issue in front of them with the phrase, in any manner. That's number one.

Number two, with respect to the coverage provision in A, under A for bodily injury and property injury, there is no personal and advertising injury in there. Right?

MR. COUGHLIN: Judge, that's not a part of the case. They acknowledge.

THE COURT: I know. But, you brought it to my attention.

MR. COUGHLIN: I didn't. They did.

THE COURT: Okay. Whoever brought it to my attention, it is not there.

So, I'm only focusing on the coverage B.

MR. COUGHLIN: Correct.

THE COURT: I'm not so sure that in any manner can be just read the way you're reading this.

Why would you put in any manner? If you wanted to

keep it simple and not even make this more complicated than it is? You could have just left it alone and done what the West Virginia court did and just have it like that without using "in any manner."

Why all of a sudden? How can I ignore in any manner?

MR. COUGHLIN: You don't need to ignore this, Judge. You put this where it belongs.

THE COURT: Wait a minute. When you say where it belongs, I'm not putting this anywhere. I'm just reading it the way it is here.

It says oral or written publication in any manner of material that violates a person's right of privacy.

MR. COUGHLIN: Correct. Oral or written publication in any manner.

THE COURT: So, what does that mean to you?

MR. COUGHLIN: This means that there are many ways to publicize it. An oral or written publication in any way.

It doesn't mean you can replace the word publication with disclosure. And it doesn't mean --

THE COURT: I agree with you. That's fine.

MR. COUGHLIN: Well, they cannot get beyond that issue, your Honor.

But, also, you don't apply it the way the sentence structure is drafted to the disclosure of personal

information. It does not apply there. It applies to the prior clause.

And I think it's clear there.

And there are cases, Judge, around the country. And there are a handful of them. Every one of those cases recognized they had to find a publication that was caused by the policyholder. And there are like 7 or 8.

In their opening brief they cite a bunch. We cite many of them for the same proposition.

THE COURT: Those publications had to do with defamation, though, right?

MR. COUGHLIN: No. These are data disclosure cases, Judge. All of them, every one of them is data disclosure case.

Judge, can I just point out a case that I think answers your question from The Federal Circuit, The 11th Circuit?

THE COURT: These are all cases outside of state, though. Therefore, not guidance in the sense that I can look at to see where I want to go with them.

MR. COUGHLIN: Correct, Judge. But, I was answering your direct question.

In our brief we point out that in the Creative Hospitality Ventures case The Court ruled the phrase, in any manner, merely expands the category of publications such as

e-mails, handwritten letters and perhaps blast factors covered by the policy.

THE COURT: What is the cite of the case? What is the name of the case?

MR. COUGHLIN: I am sorry. It's Creative Hospitality Ventures versus US Liability Insurance Company.

THE COURT: Do you have a copy? I don't have that.

MR. COUGHLIN: I don't have it with me, your Honor.

MR. MARSHALL: Yes, your Honor.

We are going to pull out the whole case.

THE COURT: A piece meal of it. Okay.

MR. MARSHALL: Yes. Cited in our brief, your Honor.

(Handed)

THE COURT: I am not sure I understand what they are trying to say.

"We likewise reject the ETL argument that the phrase in any manner expands the definition of publication to include the provision of a written receipt."

And then they go on to say, The District Court noted the phrase "in my manner" merely expands the categories of publications such as e-mails, handwritten letters and perhaps blast factors covered by the policy. But, the phrase cannot change the plain meaning of the underlying terms of publication.

So, why isn't a written receipt a publication?

I mean, it looks like an inconsistency there.

MR. COUGHLIN: No. Because, they took the written receipt as being a disclosure from the, I believe it was that cash register backed out into the public to the person who gave the credit card.

THE COURT: Okay.

An argument is, the way this is set up, an oral or written publication in any manner is the medium in terms of how that's being transmitted.

MR. COUGHLIN: Yes. We view that's how that has to be read.

The problem, Judge, is the theory that Sony is urging you to adopt requires you to take out the oral or written publication part of the enumerated defense and just put in the word disclosure in any manner of personal information. Which is, by the way, in that case, absolutely applies to the hackers.

And that is not what this coverage was intended to do.

And The Court of Appeals, I know they don't like the case, but The Court of Appeals made it clear what their version of the personal injury protection or coverage grant is, Judge.

And it is so special, Judge. Because, it is so

different than the 3rd party liability cases.

Your Honor brought up the construction defect cases, which as we all know New York County is a unique animal in that litigation in the country.

But, those cases, Judge, and the AI issues between the subs and the generals and the owners, etc, they all stay in part A. And they have absolutely no applicability to this problem.

This is a limited grant of coverage by definition, which is what The Court in County of Columbia was saying.

And your Honor, it is consistent with the cases nationally, the cases on the data breach issue and the violation issues that are springing up around the country, every one of them.

And I'm saying 100 percent of them have required an affirmative act by the policyholder and a publication. Every one of them.

That's why, Judge, Sony flipped in their reply and said, we are getting away from the publication issue. Forget it. We said that, no, we are going to go only at the disclosure of personal information issue.

And by the way, Judge, they don't cite one case in support of that issue, because there isn't one out there.

This is a gate keeper issue. This is one that they cannot get into the coverage without satisfying.

And as The Court of Appeals said over and over again, in insurance contracts you have to apply all the terms.

The only way they get here is to replace the terms.

THE COURT: Okay. Let me ask Mitsui one question.

Why did you add data breach exclusion after the fact if you believed this wasn't covered in this language?

MR. MARSHALL: We would never have expected to even be in this litigation.

I mean, to equate publication with the theft of information is such an extraordinary expansion of the policy that one would never even contemplate that we would be in this battle.

There was no, it didn't alter the premium. We didn't pull any coverage. There was no carve-out in the exclusion. It was simply meant to clarify the intent of the policy.

But, that policy is not at issue here. The policy at issue says oral or written publication.

And I need to pose a rhetorical question. That is, what is the oral or written publication?

MR. De NATALE: May I respond, your Honor?

THE COURT: I'll give you a minute.

MR. MARSHALL: I pose that rhetorical question because the argument has been the language or the phrase,

"in any manner," somehow expands it to the notion of the theft of information or inadequate security.

But, the only court in the country that squarely addresses the "in any manner" language is The 11th Circuit in the Creative Hospitality case. That is the only case in the country.

And they say, and quite clearly and I think quite logically, that the "in any manner" language is meant to go to like you said, the media of the publication. It doesn't weed out the publication.

Furthermore, your Honor mentioned the advertising injury cases as support for the proposition that, hey, there may be situations here where it doesn't require conduct by the policyholder. Well, the case law does not say that.

And in our brief on page 24 we direct your Honor to case law addressing that. Micon Sales Incorporated versus Diamond State Insurance Company, which cited to the reported California decision.

This involved the lawsuit against the insured for manufacturing clothing wrongfully bearing the plaintiff's trademark and against a retailer for advertising and selling the infringed clothing.

The insured argued that the claim implicated advertising coverage on the basis that it reasonably could have expected coverage to the extent of advertising

activities of others even though there was no allegation that the insured engaged in advertising activity.

The Court rejected that. The Court said that construing provisions to the acts of the 3rd party who was not privy to the contract cannot be considered an obviously reasonable expectation.

And in denying coverage The Court found the liability insurance purchase to protect against actions of the insured, not remote 3rd parties.

So, also, in the advertising injury context the courts have ruled this requires affirmative conduct by the insured, which we do not have here.

Moreover, every case that SCA cites in support of their position, every case they cite in support of their provision that has to do with the invasion of privacy involved the affirmative purposeful transmittal of material by the party against whom liability is asserted.

THE COURT: You know --

MR. MARSHALL: Affirmative purposeful transmittal of information.

THE COURT: You know, the oral and written publication in any manner phrase, I understand what the defense counsel -- I mean, plaintiff's counsel is arguing.

Well, before I say anything, why don't you tell me your response.

Proceedings

MR. De NATALE: If I may, your Honor. I'm glad your Honor mentioned the exclusion in the next Mitsui policy, the 2012 policy.

It shows that insurers knew how to exclude risk when they want to. When they want to exclude things they do. And that is what they did after the data breach.

What I hear here is that we are struggling mightily to put words in the policy that just aren't there.

The policy doesn't say it has to be by the policyholder.

THE COURT: The point that I'm hearing very clearly is that oral written publication in any manner, it talks about the medium in getting the case that discusses that.

MR. De NATALE: I see that case and that's not what it says.

Your Honor says correctly that would create a pollution in saying that it is saying that in any manner means in any media.

They could have written that. They could have said oral or written publication in any media.

It says, in any manner.

When I read in any manner this sounds to me whether this be negligent or intentional.

It says publication in any manner. To me that says whether this be by the policy holder or whether the policy

holder's negligence allows someone else to make the publication.

THE COURT: That's interesting that you make that point.

That First Department case where they make this distinction in that construction case where it had to do with acts and omission versus negligent acts and omission, they did not, The First Department held they didn't use the word negligent acting and omissions. Therefore, it is only merely acts and omissions that count that determines whether or not there is coverage.

That drops it down to a lower threshold. Because, when you talk about negligent acting and omissions you would have to go through all of the breach of duty and proximate cause.

If you just drop it down to just merely acts and omission that's a simpler thing to get over. Whether there was an act or omission that the trier of facts has to find to trigger coverage.

That's interesting. This doesn't say negligent or intentional. It just says in any manner.

MR. De NATALE: The County of Columbia case, I think the insurers are putting too much weight on that case.

THE COURT: But, the problem with that is that this entire policy it talks about, it's very policyholder

oriented.

Everything talks about the policyholder has to do this, the insured has to do that; this, that.

Now, we get down to this one area here where you are saying, no, that does not mean insured only. It means anybody.

So that you're asking me in that sense now to carve-out this little island for you saying, well, in this one particular -- never mind what you read throughout this entire policy which just says insured, insured, insured, here. And there are also provisions later on talking about third party acts.

But, when you get to this anything provision here, and I was pointing out F and G and how there was a dichotomy there and there might be a problem. When you point to E you say that has to be treated differently, like the tail wagging the dog.

MR. De NATALE: We are not.

These policies cover a policy hold. When you buy insurance it's the claim made against you. If you are sued for these kinds of offenses you're covered.

And you can be sued as a principal, as a respondent. You can be sued because you allowed someone else to do something.

If the claim against you is for defamation, or for

privacy or for copyright infringement, you can negligently infringe on somebody's copyright.

It's the claim against you that is covered , not necessarily your own conduct.

You can be liable for a claim, you're entitled to a defense.

THE COURT: Mr. Coughlin, isn't the medium to be arguably the hackers themselves or the medium that transmitted or publicized all of this information?

MR. COUGHLIN: No. Because, it is the manner in which the policyholder and its affirmative act published the information. That is the difference here, Judge.

The hackers, the criminals have no tie to Sony.

So, no. It cannot fit within that shoehorn.

THE COURT: Where does it say it has to be tied to Sony? Where does it say that the publication --

MR. COUGHLIN: The oral or written publication by every interpretation deals with the specific affirmative act by the policyholder.

Every one, every court in the country that has dealt with it, your Honor, has found that.

MR. De NATALE: That is not true.

MR. COUGHLIN: Excuse me. May I have the floor?

THE COURT: Hold on. You guys didn't hear what I said. You will get your opportunity.

Proceedings

MR. COUGHLIN: Your Honor, the oral or written publication goes to an enumerated tort under the personal injury coverage.

Every court that has looked at it says that the oral or written publication has to be by the policyholder. Every one of them. There is no exception.

THE COURT: But, those courts on a large scale data breach as this would say the same thing?

Is that what you're arguing?

MR. COUGHLIN: Absolutely.

We know now, Judge, that this case has been seriously de-risked.

That's not an issue. It is not relevant to the coverage issue. It's not relevant at all, respectfully. The disclosure --

And by the way, Sony knows they have a real problem with the oral or written publication issue. Because, in their opening brief to you that was all over their brief.

And their justification was to pull out the word publication from a couple of the complaints and ignore New York law that says you look to the gravamen of the problem.

But, then they see our reply, our responsive brief where we even point out that every case they cited to you in support of their publication issue actually supports insurers.

So, in the reply, their response, they flipped. Completely put aside publication. We are not arguing that. We are now substituting disclosure, the word, and taking out oral or written publication. And they only want that phrase to read, disclosure of personal information.

MR. MARSHALL: I have an answer for your Honor to your question.

THE COURT: What is that?

MR. MARSHALL: That is, The Court has addressed a data breach of this magnitude.

THE COURT: Yes?

MR. MARSHALL: It's an unpublished decision from Connecticut. It is called, Recall Total Information Management versus Fed Insurance Company, 2012 Westlaw, 469988.

And in that case a cart containing electronic media fell out of a transport van near a highway. So, it was under the control of the insured that it fell out of the van.

The cart and, approximately, 130 computer data tapes containing personal information for more than 500,000 IBM employees were then removed by an unknown person and never recovered.

The insured was then sued for that negligence.

And in that case The Court found that there was no

publication.

So, that is a data breach of the magnitude we are dealing with here.

And I think it's very important to understand that every case cited by Sony in support of the proposition that negligent security can be equated with publication, again, involved affirmative conduct by the insured. Every one of their cases.

And if this Court were to hold that these underlying data breach claims implicate the oral or written publication offense you would, essentially, weed out the first phrase of that offense. It would become meaningless.

Because, if that is covered then somebody that breaks into this courthouse and steals the confidential pleadings filed in this case, if that occurred then this court would be deemed to have published the information.

That is what we are dealing with here. We are dealing with the theft of information.

Moreover, the hackers themselves aren't alleged to have published. There is no oral or written publication.

MR. De NATALE: Your Honor, if I may?

Counsel keeps saying things that are just not right.

You have to address them. There are cases from around the country that have found that in situations of

passive access to information or inadvertent access to information can be a publication within the meaning of that policy case.

The Barrier (phonetics) case from West Virginia, a hotel installed surveillance cameras to a certain part of the hotel that could be accessed from the manager's office.

THE COURT: That was all of the policyholders.

MR. De NATALE: But, hear me out.

The Court said, installing the cameras was a violation. But, also the fact that there were people who could inadvertently see those clients and see the recordings, that was a publication.

THE COURT: The primary actor in the case was the policy holder?

MR. De NATALE: I think we are parsing this too fine.

In the NWN case from Oklahoma, the company had baby monitors installed in confidential counseling sessions. And the court found that the fact that that could be overheard by other people in the waiting room accessed, being overheard, that kind of passive access amounted to a publication.

THE COURT: The publication, you know, the issue I don't think it's that difficult here.

But, the question that I have, the hard question

that counsel keeps driving home you cannot get around.

His argument is, if I were to find that E allows for coverage for 3rd party acts, the hackers, I would be essentially rewriting this contract, the insurance contract. And expanding liabilities that they said that the coverage, expanding coverage when it was never contemplated.

MR. De NATALE: With all due respect, I think the after the fact argument --

The Lens Crafter's case from California, the matter personally involved, one of the issues in the Lens Crafter's case was when you went into Lens Crafter's and had your eyes examined.

THE COURT: Hold on a second.

(Short pause)

THE COURT: Go ahead.

MR. De NATALE: One of the issues in the Lens Crafter's case was when you went into Lens Crafter's and gave your eye exam to your optometrist there was another person sitting in the room who was not authorized to be there. That person didn't do anything but listen. That person heard you disclose your confidential information and had unauthorized access to that confidential information.

That was deemed to be a publication within the meaning of the privacy law.

It's a situation where passive access is not an

affirmative act. The only person speaking is the patient.

But, the passive access by the unauthorized person gave rise to a claim that it was covered under the privacy clause.

THE COURT: The Court said there was coverage.

That's a situation where they were inside Lens Crafter's and Lens Crafter's themselves let someone unauthorized sit in that room.

You know, we are getting really far away from the actual facts in the case that I have versus the facts in your case.

I mean, that is not a situation where you got the information, the patient's information and then someone on the outside is hacking into the Lens Crafter's computer system and taking all of that information.

MR. De NATALE: I'm saying, these are cases of passive access not purposeful by the policyholder.

There is no case on point either way. There is not a single case that says a massive data breach.

If I could make one other point.

In a duty to defend case, this isn't ultimate coverage.

Your Honor is well aware of how broad the duty to defend is.

I hear a struggling mightily to read words into the

policy that aren't there.

Committed by the policyholder, section C says that. Section G does not say that.

And we are looking at the underlying complaints and they are saying, yes, it says publication.

We have been sued in underlying cases for invasion of privacy, violation of privacy rights, disclosing confidential information. And I don't think we have to work that hard to establish that we are entitled to a defense absent some clear language.

THE COURT: But, it is your burden when you have to decide coverage.

MR. De NATALE: But, the policy has to be read broadly. That's their burden.

THE COURT: Mitsui made a good point. What is the oral written aspect of this publication?

MR. De NATALE: The publication here is that the information was reviewed due to Sony's alleged negligence.

THE COURT: What was oral or written about this?

MR. De NATALE: Oral or written includes electronics. That's absolutely clear.

The insurer cannot contest that. And their policy says that.

The publication was the hacking, taking and copying and potentially putting on the cyber black market the

information of millions and millions of customers.

They are taking that from Sony. That's a release of information, disclosure of information, an inadvertent publication of private information of millions of customers.

The policy says publication in any manner. And when someone else gets into your system and releases information into the internet, that's a publication.

And in the absence of clear language in the policy that excludes that kind of act we have coverage. And we have a defense.

MR. MARSHALL: With all due respect, your Honor, we are not trying to read into the policy exclusions that don't exist. We are asking --

THE COURT: We are trying to figure out coverage.

Let's get the terms correct here. The terms are not interchangeable.

This is all strictly a coverage issue here that I have to figure out whether or not I'm going to agree with the plaintiff Zurich or the defendant Sony with respect to this coverage issue.

MR. MARSHALL: Yes.

THE COURT: That is the bottom line.

MR. MARSHALL: And the bottom line is that we are asking The Court to preserve the language as written.

We are asking The Court to not gloss over the oral

or written publication language.

This would be a very different case, and I would admit this would be a very different case had Sony negligently posted personal information on line which was then accessible to third parties. It would be a totally different case.

But, that's not what happened here.

What happened here was information was stolen.

And to equate publication with the theft of information is to essentially say, I'm going to ignore the word publication. Because, no definition of publication includes theft.

THE COURT: Okay. Mr. Coughlin, your response?

MR. COUGHLIN: I have nothing further, your Honor. Thank you for your time.

THE COURT: All right. I have heard the argument. I'm giving you a decision and order right now. Because, I think it's important enough that it needs to seek Appellate review as quickly as possible.

You know, there is that struggle here with respect to paragraph E here, 14E, oral or written publication in any manner of material that violates a person's right of privacy.

It is clear that the courts have passed on portions of this type of coverage here and required that the

coverage, for coverage to actually get triggered it would have to be, the acts have to be conducted or perpetrated by the policyholder.

What I'm being asked now, and the cases are clear about that, the policyholder has to act. And it's very limited circumstances.

The West Virginia court is one of them.

The Butts case has limited the instance where it says it would be a 3rd party with respect to the dissemination or publication of slanderous material. That's the case where they took a little bit of a twist there.

But, at the bottom here, the bottom line is the question of whether or not paragraph E requires, or at least coverage is only available when it is performed or done, undertaken by the policyholder or the policyholder's affiliates and employees and so forth.

In this case here I have a situation where we have a hacking, an illegal intrusion into the defendant Sony's secured sites where they had all of the information.

That information is there. It's supposed to be safeguarded. That is the agreement that they had with the consumers that partake or participated in that system.

So that in the box it is safe and it is secured. Once it is opened, it comes out.

And this is where I believe that's where the

publication comes in. It's been opened. It comes out. It doesn't matter if it has to be oral or written.

We are talking about the internet now. We are talking about the electronic age that we live in. So that in itself, by just merely opening up that safeguard or that safe box where all of the information was, in my mind my finding is that that is publication. It's done.

The question now becomes, was that a publication that was perpetrated by Sony or was that done by the hackers.

There is no way I can find that Sony did that.

As Mitsui's counsel said, this would have been a totally different case if Sony negligently opened the box and let all of that information out. I don't think we would be here today if that were the case.

This is a case where Sony tried or continued to maintain security for this information. It was to no avail. Hackers got in, criminally got in. They opened it up and they took the information.

So, the question then becomes is that something of the kind that is an oral or written publication in any manner.

You know, I heard the arguments going back and forth.

I am not convinced that that is oral or written

publication in any manner done by Sony.

That is an oral or written publication that was perpetrated by the hackers.

In any manner, as Zurich's counsel pointed out, means oral or written publication in any manner. It is the medium. It is the kind of way it is being publicized. It's either by fax, it is either by e-mail, either by so forth. But, it doesn't define who actually sends that kind of publication.

And in this case it is without doubt in my mind, my finding is the hackers did this.

The 3rd party hackers took it. They breached the security. They have gotten through all of the security levels and they were able to get access to this.

That is not the same as saying Sony did this.

But, when I read E, E can only be in my mind read that it requires the policyholder to perpetrate or commit the act.

It does not expand. It cannot be expanded to include 3rd party acts.

As we are going back and forth, back and forth, the policy could be read this way and that way, the bottom line is it is written the way it is written.

And my finding is when you read oral or written publication in my manner, that talks about the kind of way

that it is sent out there and disseminated in the world.

It doesn't talk about who is actually doing that dissemination for that sort of a publication.

In my mind that does not alter the policy language here that covers an insured policyholder for their acts or for their negligence and so forth.

I cannot help but think that if you look at the entire policy, when I focus on this area here, paragraph E, that that has to take a different approach. That now, all of a sudden, the policy in general takes a different approach and includes acts by 3rd parties.

That's not what this says. It is just not what this says. And I cannot read it to say that.

And if I were to read it to include that , that would run into what we had discussed or argued earlier. That would be expanding coverage beyond what the insurance carriers were entering into or knowingly entering into.

That's not an expansion of coverage that I'm willing to permit under the language, of the clear language that we have here.

They had to go back and forth. But, I cannot read this in any other way than that this requires the policy holders to act. Okay.

So, under these circumstances my finding, as I said earlier, is that paragraph E that is at issue in that case

requires coverage or provides coverage only in that situation where the defendants, Sony, SCA or SCEA, commits or perpetrates the act of publicizing the information.

In this case, they didn't do that. This was done by hackers, as I said.

And that is my decision and order.

The declaration is that there is no coverage under this policy for SCA or SCEA as a result of the hacking that was done with respect to the data breach in the underlying action.

So, that is, the motion, the motion for summary judgment by SCA, SCEA is denied.

The cross motion by Zurich and Mitsui is granted.

And the declaration is under paragraph E of this policy that I have in front of me today.

Paragraph E requires an act by or some kind of act or conduct by the policyholder in order for coverage to be present.

In this case my finding is that there was no act or conduct perpetrated by Sony, but it was done by 3rd party hackers illegally breaking into that security system. And that alone does not fall under paragraph E's coverage provision.

That's my decision and order.

So, I guess to finish that up there is no duty to

defend by following that through.

Since this is something that is of a declaration, I am sufficient to have it the way it is set out here.

If you want to memorialize it and put it in a clearer language or order for me to sign, I'm happy to do that.

MR. COUGHLIN: Do you have a preference?

THE COURT: Why don't we leave it like this. Because, I think it is going to require immediate Appellate authority. So, you're Sony.

MR. COUGHLIN: I prevail. I will do the order.

THE COURT: You order the transcript. I will so order it. You will have it for your records.

I will put on the gray sheets that it is decided. I will put down that the motion is denied. Cross motion is granted. So, you will have an appealable order if you need to seek Appellate review right away. So, you don't have to wait for the transcript.

MR. MARSHALL: While we are on the record, may I ask Sony a question?

That is, given The Court's ruling and the fact that Mitsui moved on the same basis with respect to SOE and SNEI, does Sony wish to continue with this litigation and continue briefing that similar motion?

THE COURT: I'll answer for them.

Proceedings

I think that that is something that you guys have to talk about outside of the courtroom. I won't put that on the record.

The dust will settle. You guys will have your work cut out for you in the next few weeks.

I'll let the dust settle on this.

Check with my part clerk to give you a control date as to where we are going to go with this. Okay?

Thank you. Have a good weekend.

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Certified to be a true and accurate transcription of said stenographic notes.

Official Court Reporter

3/3/14

Order No. 651982/11

mtn seq no. 14

So Ordered

JEFFREY K. OING
J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZURICH AMERICAN INSURANCE COMPANY, Plaintiff, -against- SONY CORPORATION OF AMERICA, et al. Defendants.	**Index No.: 651982/2011** Commercial Part 48 (Oing, J.)

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