

Insurers Not Obligated to Defend in ZIP Code Coverage Suits

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Insurers are increasingly faced with privacy and data-breach related claims. One of the most common issues involves retailers' collections of customer ZIP codes allegedly in violation of statutory or common law privacy laws. When an insured retailer is sued, must its insurer provide a defense under the "personal and advertising injury" policy section? Given the frequency with which such claims are being made, how to respond to these claims is an important issue for insurers.

A Pennsylvania federal court recently analyzed whether OneBeacon America Insurance Company ("OneBeacon") and The Hanover Insurance Group ("Hanover") were obligated to defend retailers Urban Outfitters, Inc. and its subsidiary Anthropologie, Inc. (collectively "Urban Outfitters") in three putative class-action lawsuits challenging Urban Outfitters' collection of customer ZIP codes. *OneBeacon America Ins. Co. v. Urban Outfitters, Inc., et al.*, case number 2:13-cv-05269 (E.D. Penn., May 15, 2014). Applying Pennsylvania law, the court held that neither insurer had a duty to defend Urban Outfitters in any of the three class action lawsuits.

Background

OneBeacon filed a lawsuit seeking a declaration that it was not obligated to defend or indemnify Urban Outfitters in three underlying lawsuits alleging that the retailer violated state statutes and common law privacy rights by gathering ZIP code information while processing credit card purchases. Urban Outfitters joined Hanover as a third-party defendant, seeking insurance coverage. Hanover sought a declaratory judgment that, like OneBeacon, it was not obligated to defend or indemnify the insureds.

The Policies

OneBeacon issued commercial general liability ("CGL") and umbrella policies that were in effect during the period from July 7, 2008 to July 7, 2011. The July 7, 2010 to July 7, 2011 policy was a "fronting" policy for which Hanover was responsible. The OneBeacon policies stated, in pertinent part:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies...

The policies defined "personal and advertising injury" in part as an injury arising out of "[o]ral or written publication of material that violates a person's right to privacy."

Both the CGL and umbrella portions of the policies excluded coverage under a Recording or Distribution of Material or Information exclusion for “[p]ersonal and advertising injury” arising directly or indirectly out of any action or omission that violates or is alleged to violate...[a]ny statute, ordinance or regulation...that [addresses,] prohibits or limits the...[dissemination..., collecting, recording,] sending, transmitting, communicating or distribution of material or information.” The policies also excluded coverage for “Knowing Violation of Rights of Another” which was defined as “[p]ersonal and advertising injury” caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury.’”

Hanover issued CGL and umbrella policies for the periods of July 7, 2011 to July 7, 2013. The Hanover policies defined “personal and advertising injury” as “[o]ral or written publication, [in any manner], of material that violates a person’s right to privacy.”

Like the OneBeacon policies, the Hanover policies contained an exclusion for alleged statutory violations. The policies’ “Recording and Distribution of Material in Violation of Law” exclusion eliminated coverage for:

“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...that addresses, prohibits or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Hancock Lawsuit

In the first lawsuit, *Hancock v. Urban Outfitters, Inc.* (“Hancock”), the plaintiffs alleged that on three occasions, Urban Outfitters requested and collected ZIP codes in violation of the District of Columbia’s Consumer Identification Information law, which states, in relevant part:

- (a) Except as provided in subsection (b) of this section, no person shall, as a condition of accepting a credit card as payment for a sale of goods or services, request or record the address or telephone number of a credit card holder on the credit card transaction form.
- (b) A person may record the address or telephone number of a credit card holder if the information is necessary for the shipment, delivery, or installation of consumer goods, or special orders of consumer goods or services.

The plaintiffs further alleged that Urban Outfitters knew or should have known that the District of Columbia Protection Act makes it illegal to: (1) misrepresent a material fact which has a tendency to mislead; (2) fail to state a material fact if such failure tends to mislead; or, (3) use deceptive representations in connection with the sale of consumer goods.

The complaint stated that Urban Outfitters matched the illegally obtained ZIP code information with customers' names to identify their home and business addresses. Specifically, it alleged that Urban Outfitters used the ZIP code information "for their own pecuniary benefit, including by engaging in direct marketing campaigns without customers' permission."

Urban Outfitters argued to the Pennsylvania court that "personal and advertising injury" coverage was triggered. OneBeacon and Hanover countered that no coverage was triggered because the complaint did not allege a "publication," as required by the policy language. The court agreed with the insurers. Turning to the plain, dictionary meaning of "publication," the court determined that the essence of publication is "promulgation to the public, even to a limited number of people." The court also cited the Pennsylvania case of *Harris by Harris v. Easton Publishing Co.*, 483 A.2d 1377, 1384 (Pa. Super. 1984), which held that "publication" in connection with a claim of invasion of privacy requires that "the matter [be] made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."

The court noted that the Hancock plaintiffs did not allege that the information had been disseminated to others. Instead, the plaintiffs alleged only that Urban Outfitters used their ZIP code information to determine their home and business addresses for its own pecuniary benefit. Because the court held that the complaint did not allege publication, the court did not reach the question of whether the ZIP code data collection constituted a violation of anyone's right to privacy.

Dremak Lawsuit

Plaintiffs in the *Dremak v. Urban Outfitters, Inc.* ("Dremak") lawsuit alleged that on at least eight occasions, Urban Outfitters "systematically and intentionally" violated California's Song-Beverly Credit Card Act of 1971 ("Song-Beverly Act"), which prohibits the "misuse of personal identification information for...marketing purposes." Specifically, the Song-Beverly Act states that businesses may not:

Request or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.

For purposes of this section "personal identification information," means information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number.

The complaint in the *Dremak* case alleged that Urban Outfitters violated the Song-Beverly Act by requesting personal identification information, including ZIP codes, and then recording that information in its electronic databases. The complaint further alleged that Urban Outfitters shared the ZIP code information with third parties (including vendors and retailers) or sold it to them for marketing purposes, without informing its customers. Plaintiffs also included common law claims for negligence, violation of privacy, and intentional intrusion on seclusion, but those claims were dismissed, leaving the statutory claim as the only one in the case.

Urban Outfitters argued that the allegations in the complaint supported a recovery for invasion of privacy. OneBeacon and Hanover contended that the complaint did not allege an invasion of privacy, and that it also failed to allege publication or damages. Unlike the decision in the *Hancock* case, the court agreed with Urban Outfitters. The court found the allegation that Urban Outfitters disseminated information broadly to third parties, although generalized, was a sufficient allegation to fall within Pennsylvania's definition of "publication" in the context of an invasion of privacy claim.

Next, OneBeacon and Hanover argued that "to the extent the plaintiffs do complain about privacy concerns, these complaints focus on the right to seclusion." They further argued that ZIP code information is not private. The court disagreed with the insurers' reasoning, and held that the complaint's allegations turned on the private nature of the plaintiffs' ZIP codes.

In support of its ruling, the court cited a California Supreme Court case which analyzed the Song-Beverly Act. The California court had concluded, "In light of the statute's plain language, protective purpose, and legislative history, we conclude that a ZIP code constitutes 'personal identification information' as that phrase is used" in the statute. "Thus, requesting and recording a cardholder's ZIP code, without more, violates the Credit Card Act." *Big 5 Sporting Goods Corp. v. Zurich American Ins. Co.*, 957 F.Supp.2d 1135, 1138 (C.D. Cal. 2013) (quoting *Pineda v. Williams-Sonoma Stores, Inc.*, 246 P.3d 612, 614 (Cal. 2011)).

The insurers next argued that, because the complaint alleged a statutory violation and all common-law claims had been dismissed, the remaining allegation fell within the policy's exclusions. As noted, both the OneBeacon and Hanover policies contained identical exclusions, which stated:

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate...[any] statute, ordinance or regulation...that addresses, prohibits or limits the...dissemination,...collecting, recording, sending, transmitting, communicating or distribution of material or information.

The court agreed. It held that, because the allegations of the complaint arose out of the "alleged violation of the statutory right to privacy that prohibits collecting or recording information, the exclusions bar coverage under the policies."

Miller Lawsuit

Plaintiffs in the third lawsuit, *Miller v. Urban Outfitters, Inc.* (“Miller”), alleged that Urban Outfitters violated a Massachusetts statute prohibiting unfair and deceptive business practices by recording ZIP code information and using that data for its own marketing and promotions, include sending junk mail to plaintiffs. The plaintiffs also claimed damages from the loss of the commercial value of the data, and sought restitution for its misappropriation.

The statute at issue in Massachusetts is very similar to the California Song-Beverly Act and states, in pertinent part:

No person, firm, partnership, corporation or other business entity that accepts a credit card for a business transaction shall write, cause to be written or require that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction form. Personal identification information shall include, but shall not be limited to, a credit card holder’s address or telephone number.

Like the California court, the Massachusetts Supreme Judicial Court held that a ZIP code qualifies as “personal identification information” within the meaning of the statute.

The Pennsylvania court analyzed the alleged privacy violations and distinguished them from the alleged violations set forth in *Dremak*, the California case. In *Miller*, the plaintiffs alleged that Urban Outfitters collected the information to send “unsolicited marketing and promotional materials, or ‘junk mail,’ to customers.” Plaintiffs alleged that they suffered injury by receiving the mail, which they characterized as a “breach of their privacy.” Plaintiffs did not, however, allege that the information had been published to a third party.

The court turned to case law set forth in other Pennsylvania cases and held that the policies limit the term “privacy” to “interests in secrecy” and not “intrusions upon seclusion” as alleged in plaintiffs’ complaint. As a result, the court held that neither the OneBeacon nor the Hanover policies provide defense coverage for the violations alleged in the complaint.

Conclusion

Privacy and data-breach related claims are a constantly-evolving area of the law. Although *OneBeacon America Ins. Co. v. Urban Outfitters, Inc., et al.* provides a thorough analysis of statutory claims regarding retailers’ collection of ZIP codes, it is yet to be seen how courts will rule on common law privacy claims.

