

Featured Article

Privacy Liability - Are You Covered? Part 1 of 4 in a Series [\(Back to Top\)](#)

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Potential corporate privacy exposures are inherent in the way most corporations do business. Any executive traveling with a laptop computer containing personally identifiable data represents a potential privacy exposure for his corporation. Every retailer is subject to suit when individual customer credit card information appears on a receipt or is collected on a website.

While privacy concerns abound, companies are often slow to assess the nature and extent of their privacy exposures and realize the limited protections inherent in technological innovations and standard general liability insurance policies. This failure leaves many companies exposed to substantial penalties, as well as remedial and recovery costs when a privacy breach occurs.

Coverage for Privacy under CGL Policies

The standard general commercial liability (CGL) policy provides coverage for some privacy liabilities. This coverage lies in the section of the policy which states that the insurer is obligated to pay damages because of "personal injury" or "advertising injury." While CGL policy forms vary, "personal injury" is generally defined as "injury, other than 'bodily injury', arising out of one or more of the following offenses: false imprisonment, malicious prosecution, wrongful eviction, or slander or libel that tarnish a person's products or services or right of privacy." "Advertising injury" generally includes "injury arising out of one or more of the following offenses:" slander or libel that tarnish a person's products or services or right of privacy, misappropriation of advertising styles or ideas, or copyright infringement.

The communications forming the basis of an "advertising injury" must be disseminated to the general public in either written or oral form. Similarly, there is a publication element to a "personal injury" offense, as the statement or action harming a person's character, reputation or position in the community must occur publicly.

Testing the Scope of "Personal Injury" Coverage for Privacy Disputes

Companies and their insurers are currently litigating the "personal injury" provisions of a CGL policy in two arenas: blast faxes and data mining. Blast fax cases involve civil liability for unsolicited, mass dissemination of advertising material via fax machines. Data mining cases involve companies gathering supposedly secret customer information from their websites for the purpose of preparing marketing strategies. In both coverage litigations, the key issue has been the interpretation of the word 'publication.'

Privacy has two strands: secrecy and seclusion. Secrecy concerns the transmission of private information, while seclusion concerns the right to be left alone. Insurers argue that the use of the term 'publication' in the policy means that the coverage responds solely to secrecy liability, and not seclusion. Insurers also assert that 'publication' also requires an affirmative action by the alleged tortfeasor to make the private information available, as opposed, for example, to losing a laptop. As discussed below, courts are split on this issue.

Blast Fax Cases

Pursuant to the Telephone Consumer Protection Act (TCPA), [47 U.S.C. § 227](#), enacted in 2003, a company that sends out blast faxes is liable for damages of up to \$500 per fax. Since companies may send out millions of unsolicited faxes, a blast fax bar has developed that seeks out recipients of blast faxes and then sues the companies that sent them. Those companies then

seek insurance coverage. While some insurers have agreed to defend such cases, others have refused, leading to a large number of reported decisions. The courts have split on whether these claims are covered under a CGL policy, with the crucial issue being whether publication to a third party is necessary to trigger coverage under the policy's "advertising injury" provision.

Among the leading cases is *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, [407 F.3d 631](#) (4th Cir. 2005), in which the insured sought a declaration that its insurer had a duty to defend an underlying blast fax class action lawsuit alleging violation of the TCPA. Resource alleged coverage based upon two policy provisions - one dealing with coverage for "property damage" and the other dealing with coverage for damages resulting from an "advertising injury offense." 407 F.3d at 634. St. Paul denied coverage for the litigation under both policy provisions.

The Fourth Circuit Court of Appeals held that the lawsuit alleged a violation of "seclusion" privacy, whereas the advertising injury coverage in the policy only protected "secrecy" privacy. The court noted that the policy provides coverage for damages resulting from "making known to any person or organization written or spoken material that violates a person's right of privacy" and that here, the unsolicited faxes did not contain any private information harmful to a third party. 407 F.3d at 634. Moreover, the court noted that to constitute an advertising injury offense, the harmful content must be made known to a third party. *See also Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co.*, [432 F. Supp.2d 488, 504](#) (E.D. Pa. 2006) ("[T]he clear and unambiguous ['making known' provision] . . . requires that the content contained in the covered material must violate a person's right of privacy and must be made known to a third party.")

However, in *Park Univ. Enterprises, Inc. v. Amer. Casualty Co. of Reading, PA*, [442 F.3d 1239](#) (10th Cir. 2006), the Tenth Circuit Court of Appeals issued a contrary holding, finding coverage under both the property damage and advertising injury parts of a CGL policy for claims stemming from the distribution of unsolicited blast faxes. With respect to the advertising injury provision, the court reasoned that the dual meaning of the word "privacy" created an ambiguity in the policy with respect to that term. The court stated that it was reasonable to construe "privacy" either to include the right to be left alone, or as the right to seclusion, noting that Congress contemplated such a broad view of privacy when enacting the TCPA. The court also embraced a broad construction of the term "publication" as the act of "bringing before the public" or "announcing, "which the court held would include the faxing of information to the plaintiff class. [442 F.3d at 1250.](#)

Data Mining Cases

Data mining cases involve a variation on the same theme. In these cases, customers bring class actions asserting invasion of privacy. The insurers then deny coverage because of the lack of publication to a third party. In such cases, courts have held that publication by one person to another within the insured company is sufficient to trigger coverage. In a leading case, *Netscape Communications Corp. v. Federal Ins. Co.*, No. C 06-0198 JW, [2007 BL 134368](#) (N.D. Cal. 2007), the court held that information downloaded from users and transmitted to persons at Netscape and AOL satisfied the personal injury offense of "making known" information to any "person or organization," and did not require widespread dissemination. Similarly, in *Zurich Amer. Ins. Co. v. Fieldstone Mortgage Co.*, No. CCB-06-2055, [2007 BL 152416](#) (Dist. Ct. MD 2007), the court held that where a mortgage company improperly accessed and used individuals' credit information in violation of the [Fair Credit Reporting Act](#) to provide "pre-screened" offers, the claim was covered, since publication did not need to be to a third party.

Coverage for Privacy under Cyber Liability Policies

As demonstrated by the cases above, the publication requirement of the advertising injury provision of a CGL policy is problematic for many privacy claims. The insurance industry has responded to the flurry of privacy liability claims by crafting new insurance policies that provide very broad protection. Cyber liability policies can provide protection against liabilities related to privacy and computer system breaches of security, including liability arising from disclosures by

vendors or service providers holding credit card information. These policies can be extended to cover notification costs required by state laws and costs of credit monitoring that must often be provided to credit card holders. Insurers have also added coverage for regulatory defense costs, fines and penalties arising from certain statutes.

A cyber liability policy generally will define "privacy liability" very broadly, in order to include claims for theft or misuse of personally identifiable non-public information on computer systems by a third party or an employee of the insured, or any claim arising out of a failure by the insured to comply with its own internal privacy policy. The inclusive privacy liability definitions in cyber liability policies are designed to avoid the issue of 'publication' and provide coverage for both the secrecy and seclusion strands. The policy generally provides broad coverage for both online and offline information, and for information on laptops and other media, even if lost or stolen offsite. The policy also covers claims alleging use of spyware, spam, or other intrusive technology. As to damages, the coverage includes fines and penalties, duty to notify costs, costs to remedy reported compliance deficiencies, and credit monitoring services for third parties at risk because of lost personal information.

Unlike traditional liability and property policies, no standard form cyber or privacy policy exists. Rather, a company can purchase a policy that only provides privacy coverage, or instead choose a policy that provides coverage for a variety of cyber risks, including intellectual property infringement, destruction of data, or disruption of computer service by hackers. A company can pick and choose among these coverages to customize a policy that fits its needs, combining coverage for risks traditionally separated into liability and property policies. We can only wait to see if the insurers live up to their promises concerning these new policies, or if policyholders will need to resort to litigation to enforce their rights.

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