

Law360

July 24, 2014

Unconventional Cyber Case Gets Md. High Court's Attention

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Much recent attention on insurance for cyber risks has focused on risks created by hacking and the victim's resulting liabilities for breach of privacy. The focus has been on protecting against liability arising from the disclosure of personal identifiable information captured by hackers breaking into a system. There are other cyber risks, however, and companies seeking insurance need to be sure that these less publicized risks are covered as well. With some insurers incorporating broad exclusions in their policies and seeking to exclude cyber liability from coverage, insurance purchasers need to look closely at their coverages to be sure that expected protection remains. Thus, for example, the focus on personal injury coverage has been on whether it protects against hacking events such as those at issue in *Zurich v. Sony*, while little concern has been expressed regarding whether that coverage protects against other types of breach of privacy claims that might occur as a result of everyday cyberactivities. One example is the liability for privacy violations that may result from publications on a website. Those liabilities have been traditionally been covered under the personal injury provision of a liability policies.

Springer v. Erie Insurance Exchange, a recent decision from Maryland's highest court, provides an example of just such a claim. The case concerned claims for defamation and invasion of privacy by false light arising out of publications on a website by an insured. When the subject of those opinions alleged defamation and breach of privacy by false light, the insured sought coverage under the personal injury provisions of an Erie Insurance Company "Ultracover HomeProtector" policy, which, among other things, provided coverage for injury arising out of "libel, slander or defamation of character." Erie, however, denied any coverage obligation, contending that the claims were excluded under the policy's exclusion for injuries arising out of "business pursuits." The Maryland Court of Appeals disagreed and held that the "business pursuits" exclusion applies only where there is a continuity of the insured's alleged business interests and a profit motive.

Background

J.G. Wentworth is a business specializing in purchasing structured settlements and annuities from individuals. Wentworth contended that Springer and the Sovereign Funding Group, a company also engaged in purchasing structured settlements and annuities, posted statements about Wentworth on two websites, jgw-sucks.com and jgwentworth-scam.com, to spread defamatory and false-light information in an attempt to lure customers away from Wentworth. Springer was the CEO of Sovereign Funding Group, and Wentworth alleged that Springer had sought, through the websites, "to mislead and misrepresent facts to the public, unfairly and

deceptively compete, defame, disparage and tortuously interfere with the business interests of J.G. Wentworth.” Wentworth claimed that Springer and Sovereign Funding “used the websites ... to distribute negative content about J.G. Wentworth” to “damage [its] business reputation.” Among other things, Wentworth alleged, the posts linked Wentworth’s name to the word “scam” in a large number of Internet articles, seeking to create a belief that Wentworth was a scam.

Based on these allegations, Wentworth brought suit in 2011 against David Springer and the Sovereign Funding Group in the Circuit Court for Frederick County, Maryland. When Springer contacted his insurer, Erie, seeking a defense in the Wentworth action under the terms of his “Ultracover HomeProtector” insurance policy, Erie refused to provide a defense, stating that coverage was barred by, inter alia, the policy’s “business pursuits” exclusion. This exclusion barred coverage for “personal injury arising out of business pursuits of anyone we protect” and defined “business as “any full-time, part-time or occasional activity engaged in as a trade, profession or occupation, including farming.”

In light of Erie’s disclaimer, Springer retained his own lawyer to defend the Wentworth action, and initiated a declaratory judgment action against Erie, seeking a declaration that Erie was obligated to defend him and that Erie had breached its duty by failing to do so.

The trial court agreed with Erie’s contention that there was no coverage. It concluded that because Springer’s alleged conduct originated from his motive to gain an unfair business advantage, his actions were “for the purpose of a livelihood or profit” and therefore within the scope of the “business pursuits” exclusion. Springer appealed to the intermediate appellate court, and the Court of Appeals of Maryland granted certiorari on its own initiative. The Court of Appeals of Maryland reversed.

The Court of Appeals held that the “business pursuits” exclusion does not apply to the conduct at issue in Wentworth’s complaint. Although the policy contained a definition of “business,” the court noted that the policy did not define “business pursuits.” The court therefore adopted the analysis of other jurisdictions to interpret the phrase, and held that it required a showing by the insurer of both continuity of business and a profit motive in order to trigger the exclusion. According to the court, the continuity of business component requires a finding that an individual has engaged in continuous or regular activity for the purpose of earning a livelihood. Additionally, the profit motive component requires a showing that the activity is undertaken for a monetary gain.

In adopting this analysis, the court emphasized that the implicit purpose of the exclusion is to remove from a homeowner’s policy a type of coverage that would normally fall within a commercial liability policy. The court ultimately found that there was no evidence of continuity of business where the complaint had alleged that Sovereign Funding Group was no longer a viable business entity. Moreover, the complaint alleged no facts regarding Springer’s profit motive. The court held, therefore, that the alleged facts failed to support application of the “business pursuits” exclusion, and remanded to the trial court for further proceedings.

Springer echoes the general rule that the duty to defend must be construed liberally in favor of the policyholder, particularly where critical policy terms are left undefined. The decision also reiterates the widely held view that coverage should be interpreted broadly, whereas exclusions to coverage must be construed narrowly. Furthermore, Springer illustrates how the particular facts of each claim are critical to a proper application of any policy exclusion, with an exclusion's narrow potential application turning directly on whether the facts of each case satisfy all of the exclusion's requisite elements. Finally, it arises out of an example of a cyberliability breach of privacy, unrelated to a hacking event, and demonstrates that there is coverage for such liability under standard policy forms.