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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Policyholders' Hack Coverage Hopes Surge With Landry's Win

By **Shane Dilworth**

Law360 (July 26, 2021, 3:05 PM EDT) -- The Fifth Circuit's ruling that an insurer must defend a hospitality company in a $20 million data breach suit brought by JPMorgan Chase Bank's payment processing arm was a booster shot for policyholders seeking coverage for similar breaches under commercial general liability policies.

The 5th Circuit ruled Wednesday that an insurer for Landry's must cover its defense of a $20 million data breach suit. (solarseven / iStock)

In Wednesday's **precedential ruling** in Landry's Inc. v. Insurance Company of the State of Pennsylvania, a two-judge appeals court panel held that the term "publication" can be broadly defined to include the passing on of information or making data publicly available in order to warrant a defense under a CGL policy.

The decision means the insurance company must defend Landry's in a suit by JPMorgan Chase's Paymentech LLC, which is seeking to pass the buck for assessments it had to pay Visa and MasterCard after hackers accessed payment card information at numerous Landry's-owned restaurants, casinos and hotels.

The appeals panel's expansive definition of publication has counsel for policyholders applauding, while causing attorneys for insurance companies to be skeptical.

"I think the court's opinion is an exercise in gymnastics that could probably give Simone Biles a run for her money," said Joshua Mooney of Kennedys LLC, who represents insurers.

Conversely, Barnes & Thornburg LLP's Scott Godes, who represents policyholders, countered that the Fifth Circuit panel "gave a thorough and thoughtful analysis of publication that is in every CGL policy and addressed arguments regularly

raised by insurers."

The core of the dispute between Landry's and its insurer was a policy provision providing that coverage is available for claims arising out of the "oral or written publication, in any manner," of content that violates a person's privacy rights.

Mooney said the court's interpretation of the phrase "publication, in any manner" is concerning because it expanded the definition and the scope of the word publication. That phrase, Mooney said, refers to the format of the publication, whether it be via mail, email, facsimile or other means.

The Fifth Circuit panel held that publication happened in two circumstances in Landry's case. The first occurred when hackers made Landry's customers' credit card information available. The second instance took place when the hackers used that information to make fraudulent purchases.

Mooney said the Third Circuit's **ruling** in OneBeacon Am. Ins. Co. v. Urban Outfitters, Inc., a case he litigated, and the Eleventh Circuit's decision in Creative Hospitality Ventures, Inc. v. United States Liability Ins. Co., addressed the meaning of the phrase "in any manner," and its effect on the term "publication" with more detail and analysis than the Fifth Circuit. Both decisions cut in favor of insurers.

On the other hand, Josh Gold of Anderson Kill, who represents policyholders, told Law360 the Fifth Circuit "got it right" in its definition of publication. He also said the finding is consistent with the Fourth Circuit's **influential holding** in Travelers Indemnity Co. v. Portal Healthcare Solutions.

In Portal, the Fourth Circuit found the insurer had to defend a medical records company in two class actions over a data breach that caused customers' medical information to be accessible by unauthorized users online.

"There's great consistency between the two decisions even though you've got different circumstances," Gold said.

But Kathy J. Maus, the partner in charge of Butler Weihmuller Katz Craig LLP's Tallahassee, Florida, office, told Law360 that while she thought the arguments by Landry's were creative, the "ruling was surprising because data breach is not what a CGL policy is intended to cover."

Maus, who represents insurers and is also chair of the insurance law committee for DRI-Voice of the Defense Bar, said it is a novel situation for a data breach to be equated with possible "publication," but also noted the decision is limited to the insurer's duty to defend, and not its duty to indemnify the policyholder for any potential settlement or judgment.

The other notable portion of the Fifth Circuit's ruling involved its finding that the violation of the Landry's customers' privacy rights was covered by Landry's CGL policy. The insurer unsuccessfully argued that coverage was triggered only if Paymentech brought claims sounding in tort, rather than the contract-based claims it actually asserted against Landry's.

In rejecting this contention, Circuit Judge Andrew Oldham wrote the policy "contains none of these salami-slicing distinctions."

Policyholder representatives say the Fifth Circuit panel was correct in this finding because coverage should be construed broadly.

"The whole purpose of insurance is to insure," said Gold of Anderson Kill. "The takeaway for policyholders is that coverage under personal injury insurance is to be broadly construed, not narrowly construed."

"The court said we are not rewriting the insurance to be narrower than what is actually on the printed page, which was a good analytical approach and rationale if you're a policyholder," Gold explained.

Barnes & Thornburg's Godes echoed that sentiment, saying if "the policy language can be construed to cover the event, it will."

However, Mooney of Kennedys said that from a causation standpoint, neither the "but-for" nor proximate cause standards support the court's decision. The but-for standard requires that a plaintiff's injury would not have occurred in the absence of a particular act — here, the data breach against Landry's. Meanwhile, the proximate cause standard requires that an act be the primary cause of the plaintiff's injury.

"I think the data breach is a little bit too tenuous of a cause of the loss to meet the 'arising out of' language the court relies on," he said.

As a published decision from a federal appeals court, the Landry's ruling is expected to have a significant impact, according to attorneys.

Godes said the decision shines a light on "silent cyber," meaning that some policies provide coverage for cyber security risks and losses even though they are not marketed that way.

And Gold explained that the ruling will be helpful because, in recent years, insurers have started to shift on what policies will

provide coverage for personal injury claims rooted in cybersecurity incidents.

"The decision just tells you that when you're looking down the barrel of a $20 million lawsuit, it's very nice to have that coverage in whatever insurance product you can find it," he said.

--Editing by Roy LeBlanc.
