



February 2014

## Connecticut Appellate Court Rules Data Breach Losses Not Recoverable Under General Liability Policy

As cyber attacks and data breaches become more prevalent, companies are evaluating how they not only can respond to a breach, but also potentially recover losses from a data-loss incident. A recent Connecticut Appellate Court decision, *Recall Total Information Management Inc., et al. v. Federal Insurance Company et al.*, 147 Conn. App. 450 (2014), dealt a blow to companies hoping to recover such losses from a general commercial liability policy.

The dispute in *Recall Total Information* arose as follows: IBM hired Recall to transport and store various electronic media belonging to IBM. Recall hired a subcontractor, Executive Logistics, Inc., (Ex Log) to transport the materials under an agreement requiring Ex Log to maintain commercial liability and umbrella policies, which Ex Log obtained from the defendant insurers naming Recall as an additional insured.

During the transport, a cart of tapes fell out of the back of a van near a highway exit ramp. Approximately 130 tapes were removed by an unknown person and never recovered. The tapes contained employment-related data, including social security numbers, for 500,000 past and present IBM employees.

IBM immediately took steps to prevent harm from the dissemination of personal information, including notifying affected employees, establishing a call center to address concerns, and providing credit monitoring services. IBM claimed a cost of \$6 million for these mitigation expenses. IBM made a demand to Recall and after pre-litigation settlement discussions, Recall agreed to fully reimburse IBM. Recall sought indemnification from Ex Log, which, in turn, made claims under the policies. The insurers denied coverage.

After the trial court ruled that the no coverage existed for the data breach losses, plaintiffs appealed, raising two arguments (1) the insurers had a duty to defend Recall/Ex Log during the settlement negotiations and, by failing to do so, waived any right to deny coverage and (2) the claimed losses constituted "personal injuries" under the policies. The relevant language of the policies at issue was identical.

The appellate court rejected both arguments. As to whether the insurers had a duty to defend, the court noted that the policies only had a duty to defend against a "suit" defined as a "civil proceeding . . . [that] includes arbitration or other dispute resolution proceeding." The court held that under the plain meaning of the policy, it cannot construe "suit" or "other dispute resolution proceeding" to include mere settlement negotiations following a demand. To do so the court noted would obliterate the distinction between "suit" and "claim."

Turning to whether the data loss constituted a "personal injury" under the policies, the court first looked to the definition which, in terms of a loss related to privacy, required the "electronic, oral, written or other *publication* of material. . ." (emphasis added by court in decision). In construing this definition, the court relied heavily on the fact that there was no evidence that any of the personal information on the 130 tapes was ever accessed or used for an improper purpose. Thus, in the court's view, the information was never "published." The court noted that IBM, in a letter sent to the affected employees, stated that it had

“no indication” that their personal information has been misused.

Recall/Ex Log also argued that a personal injury existed because certain statutes required IBM to notify employees of the data loss, thereby creating a presumption of a privacy invasion. The court also rejected this argument holding that a notification statute is not akin to a personal injury, and insurance coverage cannot extend to other torts, while similar to those listed in a policy, not specifically enumerated.

*Recall Total Information* is a reminder that companies cannot focus solely on protecting information, but also may be well-advised to develop strategies for recovering losses in the event of a breach. This may include evaluating the availability of cyber liability insurance coverage, keeping in mind key policy exclusions and potential gaps in coverage.

If you have any questions concerning the court’s decision or its legal implications, lawyers in [Robinson & Cole’s Privacy and Data Security Team](#) are happy to assist you.

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