

Publication is not Publishing: Ninth Circuit Says Insurer Must Defend Privacy Suit

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Reversing a district court's grant of summary judgment in favor of the insurer, the Ninth Circuit recently held that an insurer was required to defend a putative class action alleging that the insured retailer collected and sold customers' personal information in violation of California's Song-Beverly Credit Card Act. *Brighton Collectibles, LLC v. Certain Underwriters at Lloyd's London, No. 18-56403, 2:18-cv-01107-JFW-GJS (9th Cir. March 16, 2020)*.

The insured argued that the claim triggered its personal injury coverage, which applies to personal injury caused by an offense arising out of the insured's business, which includes "oral or written publication of material that violates a person's right of privacy." Based on California Supreme Court precedent holding that the overriding purpose of the Credit Card Act is to protect the personal privacy of consumers, the Ninth Circuit found that the class action alleged an invasion of privacy sufficient to trigger the insurer's duty to defend. In so ruling, the court rejected the insurer's assertion that coverage was barred by the policies' exclusions for "advertising, publishing, broadcasting or telecasting done by or for" the insured. The court stated: "The word 'publishing' in this coverage exclusion cannot be read to have the same meaning as the word 'publication' in the personal injury provision. Such a reading would exclude coverage for virtually any publication over which [the insured] might realistically be sued, rendering the policies' express coverage for publications that violate privacy rights practically meaningless."

The court also noted that the "grouping of 'publishing' with 'advertising... , broadcasting or telecasting' in the coverage exclusion suggests that the exclusion applies only to broad, public-facing marketing activities." Consequently, the plaintiff's allegation that the insured sold customer information to select third-party marketers constituted "publication" of the information within the meaning of the personal injury coverage grant, but not widespread public-facing "publishing" within the meaning of the exclusion.

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