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Ohio Federal Court's Broad Definition of "Publication" Could Have Cyber Coverage Consequences

In *Encore Receivable Management, Inc. v. ACE Property and Casualty Insurance Company*, No. 12-297, 2013 WL 3354571, at *13 (S.D. Ohio July 3, 2013), an Ohio federal court held that an umbrella insurer had a duty to defend its insured, which was alleged to have recorded telephone conversations without consent. The insured, Encore Receivable Management, Inc. and its related entities (collectively, "Encore"), operated call centers for an automobile manufacturing company. *Encore Receivable Mgmt., Inc.*, 2013 WL 3354571, at *1. Underlying claims filed against the insured alleged that it recorded various telephone conversations with customers without obtaining their consent. *Id.* The insured allegedly distributed these recordings internally for training and quality control purposes. *Id.* Parties filed two class action lawsuits against the insured in California alleging, *inter alia*, invasion of privacy, negligence, and violations of California statutory law. *Id.* at *2–3.

The insured's primary insurance policies excluded coverage for liability arising out of the recording of information in violation of law. *Id.* at *1. Its umbrella policies, however, did not contain a similar exclusion. *Id.* Encore sought coverage under these umbrella policies because the allegations against it constituted "personal and advertising injury," which was defined in the umbrella policies to mean "injury . . . arising out of . . . oral or written publication, in any manner, of material that violates a person's right of privacy." *Id.* at *4.

The umbrella insurer claimed that it owed no duty to defend the insured. *Id.* at *2. The insurer argued that there was no "oral or written publication" because the insured did not distribute the recordings to the public. *Id.* at *8.

In determining whether a "publication" occurred, the court relied on the reasoning in *LensCrafters, Inc. v. Liberty Mutual Fire Insurance Co.*, No. C 04-1001 SBA, 2005 WL 146896 (N.D. Cal. Jan. 20, 2005). The underlying claim at issue in *LensCrafters* involved eye exam patients alleging LensCrafters disclosed their confidential medical information. *LensCrafters, Inc.*, 2005 WL 146896 at *1. LensCrafters had its employees participate in eye exams for the purposes of offering patients its products and services. *Id.* at *7. It tendered the lawsuit to its insurer, which declined coverage on the basis that there was no "publication" of the medical information sufficient to trigger its coverage obligations. *Id.* Finding that the term "publication" was ambiguous in the insurer's policy and referencing that California constitutional and statutory law created privacy rights for medical information that could be violated by an unauthorized or "less-than-public" dissemination of such information, the *LensCrafters, Inc.* court held that the insurer had a duty to defend the insured. *Id.* at *8–9.

Similarly, the *Encore Receivable* court found that secret information need not be widely disseminated to constitute publication. *Encore Receivable Mgmt., Inc.*, 2013 WL 3354571, at *9. The court stated:

> The courts that have looked at recording in the secrecy context have all read publication very broadly and held that a transmittal or a further dissemination of secret information satisfies publication. The firsthand experience of the communication, the words, the tone, and the cadence are all protected. When the firsthand aspect of the communication is transmitted to the mechanical device, it constitutes publication—dissemination of that unique aspect of the conversation that the speaker no longer has the ability to control. Here, this court need not find that the communications were actually disseminated to third parties, because the initial dissemination of the conversation constitutes a publication at the very moment that the conversation is disseminated or transmitted to the recording device.

Id.

The court concluded by stating that it "need not find that the recordings were disseminated to the public in order to find publication." *Id.* Notwithstanding this statement, the court went on to discuss in a footnote that dissemination to the public had occurred because the underlying complaints alleged that the recorded communications were "eavesdropped on" and were disclosed to employees who were not participants in the original calls. *Id.* at 9 n.17.

This decision could have significant implications in the realm of cyber coverage, especially in the context of data breaches or hacking claims. Although *Encore Receivable* involved an umbrella policy, many CGL policies contain language similar to that in the umbrella policy in that case.

CGL insureds faced with these types of claims often assert that a data breach constitutes "personal and advertising injury" because it represents a publication of material that violates a person's right to privacy. Insurers typically respond that such claims lack the requisite "publication" because the information obtained in a data breach does not reach the public. The *Encore Receivable* decision now offers such insureds a rebuttal argument; specifically, that the publication of secret information occurs once the ability to control its dissemination is lost.

Subsequent decisions will undoubtedly test the *Encore Receivable* court's rationale in the cyber context. The decision may be distinguished on several factual grounds—most notably that the case involved an unauthorized recording and "publication" of a conversation obtained in a secrecy context, as opposed to exposure of personally identifiable information.

Further, one could distinguish the case on the basis of the alleged surreptitious nature of how the information was gathered by the insured and the manner in which the "breach" occurred. Additionally, the *LensCrafters* case upon which the *Encore Receivable* court based its finding addressed the privacy expectations of medical information, an area where California constitutional and statutory law conferred a heightened "right of privacy" to individuals. *LensCrafters*, 2005 WL 146896, at *8.

Nevertheless, because the court found a duty to defend, the *Encore Receivable* decision will appeal to CGL policyholders in data breach or hacking claims. CGL insurers, thus, should be aware of the holding—and its potential limitations—when comparing their policies to claims involving cyber issues.

About the Author

Timothy R. Lessman is an attorney in *SmithAmundsen*'s Chicago office. Mr. Lessman has experience representing domestic and international insurers, and reinsurers in matters ranging from claims management to coverage dispute resolution via litigation, arbitration, and mediation. He has handled complex insurance and reinsurance coverage disputes involving both domestic and international policy forms. Additionally, he has experience with a variety of claims, including mass torts, environmental liability, product liability, cyber liability, employers and professional liability, government entity liability, and construction defect. Prior to his legal career, Mr. Lessman worked as a legislative aide in both the Colorado House of Representatives and the British House of Commons.

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