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Hartford, Liberty Mutual Units Duck Spyware Suit Coverage

By **Allison Grande**

Law360, New York (September 25, 2015, 9:01 PM ET) -- A Montana federal judge ruled Thursday that Hartford Fire Insurance and three Liberty Mutual subsidiaries do not owe Aspen Way Enterprises coverage for a pair of actions accusing the Aaron's franchisee of spying on customers through rental computers.

In two separate orders granting motions for summary judgment filed by Hartford Fire Insurance Co. and by Liberty Mutual Insurance Corp. subsidiaries American Economy Insurance Co., American States Insurance Co. and General Insurance Co., U.S. District Judge Susan P. Watters found that the insurers do not owe Aspen Way Enterprises Inc. a duty to defend in two underlying actions over software called PC Rental Agent installed on computers it sold or rented to customers that allegedly enabled the company to secretly access and monitor personal information on the computers.

With respect to the underlying proposed class action in Pennsylvania federal court alleging Aspen Way and other Aaron's Inc. franchisees violated the Electronic Communications Privacy Act, Judge Watters found that the action alleged sufficient facts to trigger the duty to defend under both Hartford's and the Liberty Mutual subsidiaries' coverage for "personal and advertising injury" because it involves the transmission of information to a third party.

However, the judge let all of the insurers off the hook for coverage due to "recording and distribution" exclusions in the subject policies that preclude coverage from any suit that alleges a violation of a federal statute that prohibits the transmitting or distribution of material or information.

"The ECPA is a federal statute that prohibits the disclosure or use of intercepted electronic communications," Judge Watters wrote in both opinions. "Since the ECPA is a federal statute as described by the recording and distribution exclusion, the allegation that Aspen Way violated the ECPA by transmitting and collecting personal information is excluded for coverage."

In the case of the Liberty Mutual subsidiaries, the 2010 and 2011 umbrella policies were missing several key words in the exclusion, including "prohibits or limits," but the judge concluded that the insurers had "shown by clear and convincing evidence that omitting the words in the recording and distribution exclusions ... constitutes a mistake" and they should be reformed to mirror the complete exclusion found in the 2012 umbrella policy.

Judge Watters shot down Aspen Way's argument that the exclusion in all of the policies is ambiguous due to its use of he phrase "arising directly or indirectly out of any action or omission."

"The court cannot imagine a reasonable construction of the phrase 'arising directly or indirectly out of any action or omission' that would render the recording and distribution exclusion inapplicable to the [Pennsylvania] action," the rulings said. "Whether the court applies a broad definition or a narrow definition, the action arises out of Aspen Way's alleged violation of the ECPA."

The judge also rejected Aspen Way's claim that the count in the underlying suit for the tort of invasion of privacy triggered coverage, saying that the count and two others had been dismissed in their entirety and that the chance of them being resurrected on appeal were slim.

With respect to the other underlying suit, which was brought by the state of Washington alleging that the installation of PC Rental Agent violated state law, Judge Watters found that Hartford didn't owe coverage because the insurer's last policy with Aspen Way expired on Jan. 1, 2010, and the misconduct alleged by the state began in November 2010.

"In response, Aspen Way concedes that the Hartford policies had expired prior to the alleged conduct," the ruling said. "Accordingly, Hartford did not have a duty to defend the Washington action."

The Liberty Mutual subsidiaries also did not owe coverage for the Washington action because the state did not allege the requisite "publication" to trigger coverage for "personal and advertising injury."

"The crux of the state's complaint was that Aspen Way violated Washington law by collecting and retaining their customers' private data," the opinion said. "The mere act of collection was an alleged violation of Washington law. This is in contrast with the [Pennsylvania] action, where Aspen Way could be held liable under the ECPA for disclosing or transmitting private information to third parties."

The dispute began in January 2014, when American Economy Insurance, American States Insurance and General Insurance filed suit against Aspen Way and Hartford Fire, seeking a declaration that they don't have to defend or indemnify Aspen Way in both cases. They also sought reimbursement from Aspen Way for costs they had already spent defending the underlying suits, a claim which Judge Watters on Thursday ordered them to file a brief about within 14 days.

Hartford Fire cross-claimed against Aspen Way and sought the same declaration sought by the plaintiffs, while Aspen Way cross-claimed against all the insurers for violating the Unfair Trade Practices Act and breaching its contracts, allegations which were dismissed in the opinions issued Thursday.

American Economy Insurance, American States Insurance and General Insurance are represented by Amy Y. Cho and Matthew O. Sitzer of Shook Hardy & Bacon LLP and Brooke B. Murphy of Matovich Keller & Murphy PC.

Aspen Way is represented by Michele L. Braukmann and Adam J. Warren of Moulton Bellingham PC.

Hartford Fire is represented by Laura Jean Hanson of Meagher & Geer PLLP.

The case is American Economy Insurance Co. et al. v. Aspen Way Enterprises Inc. et al., case number 1:14-cv-00009, in the U.S. District Court for the District of Montana.