

## Insurers Needn't Cover Spyware Suits, 9th Circ. Affirms

By **Jeff Sistrunk**

*Law360, New York (May 26, 2017, 6:52 PM EDT)* -- The Ninth Circuit on Friday affirmed that subsidiaries of Hartford and Liberty Mutual don't have to cover a pair of lawsuits accusing an Aaron's franchisee of spying on customers through rental computers, finding that all of the underlying allegations either don't fall within the terms of the insurers' policies or are subject to exclusions.

In a brief opinion, a three-judge panel of the appellate court agreed with U.S. District Judge Susan P. Watters that neither Liberty Mutual units American Economy Insurance Co., American States Insurance Co. and General Insurance Co. of America nor Hartford subsidiaries Hartford Fire Insurance Co. and Hartford Casualty Insurance Co. owe Billings, Montana-based Aaron's franchisee Aspen Way Enterprises Inc. a defense in the underlying actions.

The two suits, a proposed class action filed in Pennsylvania and a suit brought by the state of Washington, generally allege that a software program Aspen Way installed on computers it sold or rented to customers, PC Rental Agent, enabled the company to secretly access and monitor users' personal information. The insurers agreed to defend Aspen Way while reserving their rights to later challenge coverage, then initiated the instant suit in Montana federal court in early 2014.

In a September 2015 decision, Judge Watters found that the Pennsylvania action, which claimed violations of the Electronic Communications Privacy Act, alleged sufficient facts to trigger the duty to defend under both Hartford's and Liberty's coverage for "personal and advertising injury" because it involves the transmission of information to a third party. However, the judge found that the insurers were released from any coverage obligations due to "recording and distribution" exclusions in the policies that preclude coverage for any suit alleging a violation of a federal statute that prohibits the transmitting or distribution of material or information.

With respect to the Washington action, which claimed 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. The judge further ruled that Liberty 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.

After holding that neither Hartford nor Liberty Mutual had a duty to defend Aspen Way in the underlying actions, Judge Watters issued a subsequent decision permitting the insurers to recoup nearly \$500,000 in defense and indemnity payments they had already made on the Aaron's franchisee's behalf.

Montana law allows insurers to recoup defense costs once an underlying action against a policyholder is narrowed down to uncovered claims, according to court papers.

The Ninth Circuit panel agreed with the district judge's reasoning on all points and rejected Aspen Way's assertion that Montana law shouldn't have been applied to the insurers' reimbursement claim, saying the Aaron's franchisee hadn't sufficiently raised that argument before the lower court.

Attorneys for Aspen Way and the insurance companies did not immediately respond to requests for comment late Friday.

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

Hartford is represented by Jonathan Freiman of Wiggin & Dana.

The Liberty Mutual insurers are represented by Amy Y. Cho and Matthew O. Sitzer of Shook Hardy & Bacon LLP.

The case is American Economy Insurance Co., et al. v. Aspen Way Enterprises Inc., et al., case number 16-35059, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Allison Grande. Editing by Joe Phalon.