

Regulatory/Law

Cyber Concerns

Retailer's installation of spyware on computers sold to customers led to lawsuits involving insurance companies.

A recent photo of Mark Zuckerberg, Facebook's founder, showed that he covered his laptop camera with tape. I thought that was odd, but then I saw the most recent insurance coverage decision concerning cyber liability, the Ninth Circuit Court of Appeals' decision in *American Economy Insurance Co. v. Aspen Way Enterprises*. Now, my laptop camera is covered with tape. And I'm sensitive to another cyber coverage issue, an exclusion that bars coverage when the injury arises out of a statute that concerns the distribution or transmission of material.

In *American Economy*, the policyholder ran "rent-to-own" stores. When the policyholder sold computers, it secretly installed software that allowed it to take photographs with the computer's webcam, capture keystrokes and take screen shots.

The software was hidden, but one customer found it. Customers sued alleging invasion of privacy. Their case ultimately came down to a violation of the Electronic Communications Privacy Act (ECPA). The ECPA is a federal statute that prohibits the disclosure or use of intercepted electronic communications.

The store sought coverage from its insurers.

The insurers asserted that coverage was barred by the recording and distribution exclusion. This provision excluded coverage for "personal and advertising injury arising directly or indirectly out of any action or omission that violates ... any federal, state or local statute"



By
Alan Rutkin

The policyholder really failed to show any specific ambiguity, and the court held that a simple cry of 'ambiguity' is not enough to defeat a clear restriction.

The courts sided with the insurer and enforced the exclusion. The courts' reasoning will be helpful to insurers both on this issue and other similar issues.

The policyholder asserted the argument often raised when coverage is clearly barred: ambiguity. But, the policyholder really failed to show any specific ambiguity, and the court held that a simple cry of "ambiguity" is not enough to defeat a clear restriction. The trial court, quoting helpful precedent, wrote that "ambiguity does not exist because a claimant says so"

The policyholder also challenged the language within the exclusion limiting it to injuries "arising directly or indirectly" out of the statute. But the court rejected the policyholder's argument because it found that it "cannot imagine a reasonable construction ... that would render the recording and distribution exclusion inapplicable...." The court reached this conclusion despite also writing that "'arising out of' is inherently ambiguous in the insurance context."

The appellate court, the Ninth Circuit, affirmed the trial court.

This case leaves us with three broad takeaways.

First, insurers should not be intimidated by ambiguity arguments.

Second, insurers can win causation arguments. Causation has been a frequent issue in coverage cases concerning computers. But the policies in other cases often required "direct" causation, while this case required "direct or indirect," a more relaxed causation requirement.

The final takeaway applies to policyholders as well as insurers: Beware of your laptop's camera!

BR

Best's Review columnist **Alan Rutkin** is a partner at Rivkin Radler in Uniondale, N.Y. He can be reached at alan.rutkin@rivkin.com.