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# A Summary of Am. Economy Ins. Co., et al. v. Aspen Way Enterprises, Inc., et al.

A RECENT CASE INVOLVING COVERAGE RELATING TO THE INTERNET OF THINGS

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## I. Introduction

The "Internet of Things" ("IoT") describes the network of objects that contain equipment that allow those objects to collect and exchange data.[1] The phrase is not a new concept but is becoming increasingly relevant to insurers and professionals in the insurance industry. IoT can increase or decrease risk. On the one hand, an insurer's ability to create a profile for an insured using a compilation of information from various reliable sources will increase an insurer's ability to accurately assess the insured risk. For example, an insurer can confirm that a purported non-smoking insured who visits a gas station once a day and lives close to his/her workplace is likely a smoker.[2] Healthcare insurers also may have an avenue to manage the risk on an ongoing basis for those insureds that use wearable tracking devices, such as a FitBit, by rewarding the insured for healthy activities with reduced premiums.[3] If successful in synthesizing the additional information, insurers may be able to offer less expensive products with an improved loss ratio.[4]

On the other hand, an insurer could face exposure for unanticipated risks caused by the implications of IoT, such as liability for spyware. Spyware used to secretly gather a consumer's data can violate a consumer's right to privacy. Insurers can combat this type of exposure by including policy exclusions. In a recent decision, the District Court for the District of Montana awarded summary judgment to a group of insurers and found those insurers had no duty to defend Aspen Way Enterprises ("Aspen Way") based on a recording and distribution exclusion.[5]

## II. Background Facts

### Aspen Way Rented Computers that Secretly Collected Data

Aspen Way, a franchisee of Aaron's, Inc., operates rent-to-own stores in several states. Aspen Way was sued in two separate lawsuits arising out of its installation of software called "PC Rental Agent" onto computers rented and sold to its customers. Aspen Way customers, Crystal and Brian Byrd, leased one of the computers. In 2010, an Aspen Way manager went to the Byrds' residence to repossess the computer. The manager showed

Brian Byrd a photograph taken with the computer's webcam that showed him using the computer.

The Byrds later discovered that the photograph was taken using PC Rental Agent, an undetectable software product designed by DesignWare. The software enabled the installer to remotely install "Detective Mode."

[1] Internet of Things, https://en.wikipedia.org/wiki/Internet_of_Things (last visited Oct. 20, 2015).

[2] Reinsurance Rendez-Vous: Data Tools Help Identify Risks, http://insurancejournal.com/news/international/2014/09/18/340956.htm (last visited Sept. 28, 2015).

[3] Insurers See Impact from Wearable Devices Within 2 Years, http://www.insurancejournal.com/news/national/2015/05/06/367020.htm (last visited Sept. 28, 2015).

[4] Reinsurance Rendez-Vous: Data Tools Help Identify Risks, http://insurancejournal.com/news/international/2014/09/18/340956.htm (last visited Sept. 28, 2015).

[5] *Am. Economy Ins. Co., et al. v. Aspen Way Enterprises, Inc., et al.*, Case 1:14-cv-00009-SPW, United States District Court for the District of Montana, Billing Division, Sept. 25, 2015 [ECF No. 88].

Once Detective Mode was installed, the installer could secretly take photographs using the computer's webcam, capture keystrokes, and take screenshots. Detective Mode then sent that data to DesignWare, which forwarded the data to the installer.

The "Byrd Lawsuit"

The Byrds sued based on the collection of their private and confidential data, including private emails, keystroke logs for usernames and passwords, bank and credit card statements, Social Security numbers, and webcam photos (the "Byrd Lawsuit"). The Byrds claimed that 800

customers were affected. In the Third Amended Class Action Complaint, the Byrds sued Aaron's franchisees for violations of the Electronic Communications Privacy Act (the "ECPA"), conspiracy to violate the ECPA, invasion of privacy, and aiding and abetting invasion of privacy. Aaron's filed a motion to dismiss, which the Court granted in part. The only surviving claim was the ECPA claim. Aspen Way demanded that its insurers provide coverage for the Byrd Lawsuit. The 2010-2012 insurers (collectively, "Liberty Mutual") agreed to defend under a reservation of rights.

The "Washington Lawsuit"

On October 28, 2013, the State of Washington (the "State") sued Aspen Way seeking injunctive and other relief (the "Washington Lawsuit"). The State claimed that Aspen Way installed PC Rental Agent and Detective Mode and relayed information without notifying customers. The State sued for violations of Washington's Consumer Protection Act based on material misrepresentations and unfair collection of private information, violations of Washington's Computer Spyware Act based on collection of private information and failure to provide customers with the opportunity to decline the software installation, and unfair collection and disclosure of private information. On February 4, 2015, the State and Aspen Way entered into a Consent Order. Aspen Way did not admit wrongdoing but agreed to an injunction and agreed to reimburse the State $150,000. Liberty Mutual paid the settlement but reserved the right to seek reimbursement.

## III. The Coverage Lawsuit

Liberty Mutual (2010-2012 insurers) sued Aspen Way for a declaration regarding coverage for the Byrd and Washington Lawsuits. Aspen Way's 2006-2009 insurers (collectively, "Hartford") intervened.

The Insurance Policies

The Hartford policies covered "personal and advertising injury," which was defined as "…injury, including consequential 'bodily injury', arising out of one or more of the following offenses: …Oral or written publication, in any manner, of material that violates a person's right of

privacy." The Hartford policies also contained a Recording and Distribution Exclusion which excluded coverage for:

> "Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:
>
> …(c) Any statute, ordinance or regulation, other than the TCPA or CAN- SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

The Liberty Mutual primary policies included coverage for "personal and advertising injury." "Personal and advertising injury" was defined as "injury, including consequential 'bodily injury', arising out of one or more of the following offenses: …Oral or written publication in any manner, of material that violates a person's right of privacy…" The primary policies also contained a Recording and Distribution Exclusion that in connection with Coverage B excluded coverage for:

> "Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:
>
> …(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, *that addresses, prohibits, or limits* the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

The 2010 and 2011 umbrella policies contained a similar exclusion but with a clerical error in that the phrase "addresses, prohibits, or limits" was omitted. As a result, the exclusion did not make sense. The 2010 and 2011 umbrella policies also contained a notice that provided that the Recording and Distribution Exclusion was intended to "more explicitly exclude liability coverage for … injury arising out of any action or omission that violates, or is alleged to violate … federal, state or local statute,

ordinance or regulation concerning disposal and dissemination of personal information." The notice was not part of the policies and stated that the wording of the policies trumped the notice. The 2012 umbrella policy contained a corrected Recording and Distribution Exclusion. The 2012 umbrella policy also included a notice to the policyholders that confirmed the exclusion added language that was mistakenly omitted from the original version.

Coverage under the Liberty Mutual Policies

Liberty Mutual moved for summary judgment on its claims arguing that both lawsuits did not allege "personal and advertising injury" and even if they did, coverage was excluded by the Recording and Distribution Exclusions. Liberty Mutual also sought reformation of the policies regarding the clerical error in the umbrella policies.

The Court began by analyzing whether the Byrd Lawsuit alleged "personal and advertising injury," which included "[o]ral or written publication … of material that violates a person's right of privacy." "Publication" was not defined in the policies but dictionaries define "publication" as disclosure to the public. The Court recognized that other courts had found that "public" could mean disclosure to any third party and not necessarily the general public. The Court noted that this liberal interpretation of the word "public" was consistent with Montana's strong policy of construing insurance policy terms in favor of the insured. The Court found that the Byrd Lawsuit alleged sufficient facts to trigger Liberty Mutual's duty to defend because the Byrds alleged that the software collected their private information and transmitted it to unknown persons and locations. The Byrds further alleged that the transmission caused them injury and increased risk of fraud and identity theft.

Even if coverage was triggered, the Court found that the 2010 and 2011 umbrella policies should be reformed to make the Recording and Distribution Exclusions consistent. The Court then found that the exclusion applied because the ECPA is a federal statute that prohibits the disclosure or use of intercepted electronic communications, and the Byrds claimed that Aspen Way violated the ECPA by collecting and

transmitting personal information. Aspen Way unsuccessfully tried to argue that the phrase "arising directly or indirectly out of any action or omission" rendered the provision ambiguous. The Court could not imagine a reasonable construction of the phrase that would render the exclusion inapplicable to the facts. The Court similarly found that Hartford had no duty to defend Aspen Way in the Byrd Lawsuit.

The Court also found that Liberty Mutual had no duty to defend the Washington Lawsuit because there was no "personal and advertising injury" because the State did not allege "publication." The State alleged that Aspen Way collected and retained their customers' private data and misrepresented and failed to warn customers, deceptively collected private information, remotely installed the problematic program and failed to allow the customers to withhold consent. This finding was in contrast to the Byrd Lawsuit, in which Aspen Way could be held liable under the ECPA for disclosing or transmitting private information to third parties.

In connection with the Washington Lawsuit, Hartford's argument was slightly different. Hartford argued that it had no duty to defend because the last Hartford policy expired on January 1, 2010, and the State argued that Aspen Way's wrongful conduct began in November 2010. Aspen Way conceded that the Hartford policies expired before the wrongful conduct. As such, the Court found that there was no duty to defend.

The Aspen Way matter is an excellent example of new areas of risks for insurers in connection with data collection and spyware but also demonstrates that insurers can contract around these risks by including the appropriate exclusions in their insurance policies.