

'Data Breach' Class Action Not Covered Under CGL Policy

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A Florida federal district court, applying South Carolina law, has held that a claim arising out of a data breach alleging that an insured failed to safeguard personal information did not trigger personal and advertising injury coverage under a commercial general liability policy. *Innovak Int'l, Inc. v. The Hanover Ins. Co.*, No. 8:16-cv-2453-MSS-JSS (M.D. Fla. Nov. 17, 2017).

The insured, a software developer, suffered a data breach. As part of that incident, hackers gained access to Social Security numbers, addresses, telephone numbers, dates of birth, and other personal information of a large number of individuals. Later, the insured was sued in a putative class action. It sought coverage under its CGL policy, which afforded coverage for "personal and advertising injury," defined in relevant part to include "injury ... arising out of ... [o]ral or written publication, in any manner, of material that violates a person's right of privacy." The insurer denied coverage, and the insured brought suit.

In the coverage action, the court granted summary judgment in favor of the insurer. The court ruled that "the only plausible interpretation" of the personal and advertising injury coverage was that "it requires the insured to be the publisher" of the sensitive material. Here, the insured was alleged to have been passively negligent in failing to safeguard information. The court also ruled that even if "indirect publication" by the insured would be sufficient to trigger coverage, there had been no publication at all, and the mere fact that hackers obtained information was not a proxy for finding "publication."

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Practice Areas

Privacy, Cyber & Data Governance

Innovak underscores that companies should not generally rely on traditional CGL insurance to cover "cyber"-related risks. Instead, along with technical safeguards, vendor due diligence, and appropriate contractual mechanisms, organizations should purchase specialized "cyber" coverage to manage their risks for these growing exposures. "Cyber" insurance, both for first-party and third-party coverages, is widely available in the marketplace and increasingly purchased by organizations of all types and sizes.