

Insurance Coverage Update Pennsylvania

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For any questions on the topics
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No Coverage For Claims Under FACTA

In a case of first impression, the United States District Court for the Western District of Pennsylvania issued a Memorandum Opinion on September 29, 2008, holding that alleged violations of the Fair and Accurate Credit Transactions Act ("FACTA") are not within the coverage of commercial general liability policies issued by Travelers. Whole Enchilada, Inc. v. Travelers Property Cas. Co. of Am., No. 07-1533. Whole Enchilada, a group of restaurants, was sued in a class action for failing to truncate the last five digits and/or the expiration date of a customer's credit card on the receipt provided to the customer at the point of sale as required under FACTA, 15 U.S.C. § 1681. Whole Enchilada demanded a defense and indemnification from Travelers, which had issued two commercial general liability policies. Travelers declined coverage.

Whole Enchilada sought coverage under the personal injury or advertising injury liability offense of an "oral, written or electronic publication of material that appropriates a person's likeness, unreasonably places a person in a false light or gives unreasonable publicity to a person's private life." This definition was contained in Travelers' WEB XTEND Liability Endorsement.

Whole Enchilada first argued that the WEB XTEND Liability Endorsement did not effectively negate the standard provision in the base policy which defined "personal and advertising injury" to mean injury arising out of "oral or written publication, in any manner, of material that violates a person's right of privacy." Whole Enchilada argued that the conflicting provisions should be interpreted in accordance with the policyholder's reasonable expectations resulting in the base policy language being enforced. The Court disagreed, finding that the clear and unambiguous provisions of the endorsement expressly replaced the base coverage language. The Court also rejected Whole Enchilada's attempt to invoke the reasonable expectations doctrine, noting that alleged reasonable expectations for coverage cannot overcome clear and unambiguous policy language.

Whole Enchilada next argued that the printing of the information prohibited under FACTA on a receipt handed to the customer at the point of sale constituted a "publication" under the policy. Travelers argued that the term "publication" could not mean handing a receipt to a single person, nor handing it to someone who already knew the information printed on it. Interpreting words of the policy in their "natural, plain and ordinary sense" as required under Pennsylvania law, the Court noted that the dictionary defines "publication" as "to generally make known" or "to disseminate to the public." As such, the Court found that the underlying complaint alleged only that the information printed on the receipt was handed to a class member at the point of sale and did not allege that the cardholder's information was in any way made generally known, announced publicly, disseminated to the public, or released for distribution. Thus, the Court found there was no coverage for the FACTA claims under the "publication of material that appropriates a person's likeness. . . or gives a reasonable publicity to a person's private life" offense.

Although it decided there was no publication, the Court went further and addressed several other arguments raised by Whole Enchilada. Whole Enchilada contended that the credit card number and expiration date constitute private financial information that is part of a person's "identity" and therefore is an interest in the

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exclusive use of a person's own "likeness." Thus, Whole Enchilada argued that such information "appropriates a person's likeness." The Court was unimpressed, finding that the argument not only stretched the provision beyond the plain language of the policy, but also stretched beyond any reasonable expectation of coverage. Following Pennsylvania law, the Court held that appropriation of a person's likeness is the use of a person's actual physical likeness to the benefit of the defendant without permission. The FACTA claim did not allege that Whole Enchilada appropriated the semblance or likeness of class members.

The Court also rejected the notion that printing the customer's credit card number or expiration date on their receipt gave "unreasonable publicity to a person's private life." "Publicity" in that clause required the matter to be made public "by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become public knowledge." The underlying complaint did not allege that Whole Enchilada displayed plaintiffs' credit card information to the public or took any act designed to disseminate that information to the public at large.

Finally, the Court held that the statutory damages of not less than \$100.00 and not more than \$1,000.00 for a

willful violation sought by the underlying plaintiffs under 15 U.S.C. § 1681n did not constitute "damages" under the Travelers policies. The Court found that the term "damages" in the policy is a technical term involving awards of compensation for legal injuries sustained. The Court distinguished "statutory" damages from the legal meaning of "damages," which are damages provided under the common law. The Court held that in order for coverage to exist under the policy, the underlying complaint must allege that the damages sought are compensation for injury. Since the complaint only alleged potential harm, and therefore no damage, the statutory damage was not within the coverage of the policy. Additionally, the Court followed well-settled Pennsylvania law that coverage for punitive damages is against public policy, and thus would not fall within the coverage of the policy.

Having found no duty to defend, the Court held that there could not be any duty to indemnify as a matter of law.

Travelers was represented by Alan S. Miller and Kelly A. Williams at Picadio Sneath Miller & Norton, P.C. and Chuck Spevacek and William M. Hart at Meagher & Geer.♦

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