

Personal and Advertising Injury, Controlling Interest Endorsement Coverage Update

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Personal and Advertising Injury – Fifth Circuit (Texas Law)

Landry's, Inc. v. Ins. Co. of the State of Penn.

--- Fed. Appx. ---, 2021 WL 3075937 (5th Cir. July 21, 2021)

The plaintiff, Landry's Incorporated (Landry's), filed a declaratory judgment action against its insurer, Insurance Company of the State of Pennsylvania (ICSOP), as a result of ICSOP's denial of Landry's request for a defense in underlying data-breach litigation. The U.S. Court of Appeals for the Fifth Circuit held that ICSOP had a duty to defend Landry's based on the allegations in the complaint against Landry's.

Landry's is a Houston-based company that operates retail properties, including restaurants, hotels and casinos. A data breach occurred across 14 Landry's locations involving the unauthorized installation of a program on its payment-processing devices. The program was designed to search for data from credit cards' magnetic strips as the information was being routed through the payment-processing systems run by a branch of JPMorgan Chase Bank called Paymentech. Due to the data breach, Paymentech was liable to Visa and MasterCard for over \$20 million in damages. When Landry's refused to indemnify Paymentech pursuant to a Select Merchant payment card processing agreement, Paymentech filed suit against Landry's for breach of contract.

In turn, Landry's sought coverage from ICSOP. The policy at issue provided that ICSOP "will pay those sums that [Landry's] becomes legally obligated to pay as damages because of 'personal and advertising injury'" and "will have the right and duty to defend [Landry's] against any 'suit' seeking those damages." The policy defined "[p]ersonal and advertising injury" as "injury ... arising out of" various offenses, including "[o]ral or written publication, in any manner, of material that violates a person's right of privacy." ICSOP denied its duty to defend Landry's, stating that none of the personal injury offenses were implicated by the allegations in the Paymentech complaint.

The appellate court first concluded that the parties intended the broadest possible definition of "oral or written publication," including "even merely 'exposing or presenting [information] to view.'" In the appellate court's view, the Paymentech complaint alleged that Landry's "published" its customers' credit-card information in two ways – by exposing the data to hackers and by the hackers' use of the

credit-card data to make fraudulent purchases. The appellate court also concluded that the data-breach litigation arose out of violations of a person's right of privacy. Thus, the appellate court concluded that ICSOP had a duty to defend Landry's.

By: Joshua LaBar

Controlling Interest Endorsement – Indiana

Technicolor USA Inc. v. Insurance Co. of N. Am.

No. 49D01-1810-PL-040578 (Ind. Super. Jul. 19, 2021)

The Marion County Indiana Superior Court in Indiana granted summary judgment to a group of insurers, finding that they had no duty to reimburse the insured for defense costs in an underlying class-action lawsuit in Taiwan.

XL Insurance Co. (XL), Zurich American Insurance Co. (Zurich), Allianz Global Risks US Insurance Co. (Allianz), and American Guarantee and Liability Insurance Company (American Guarantee) issued various primary, umbrella and excess liability insurance policies to Technicolor USA Inc. (Technicolor USA). The policies contained a controlling interest endorsement that could potentially provide additional insured status to Technicolor SA, Technicolor USA's parent company, but only to the extent that a claim arose out of Technicolor SA's "financial control of" Technicolor USA. The policies also contained endorsements that limited the coverage territory of the policies.

In 2004, a group of former employees of Technicolor USA's subsidiary in Taiwan commenced a class action lawsuit, seeking damages for alleged exposure to toxic chemicals while working at a facility owned by Technicolor USA's subsidiary. Technicolor USA commenced a lawsuit against its insurers seeking defense and indemnity for the 2004 class action lawsuit.

In 2016, a second class action was filed by former employees who were unable to join the first class action. Technicolor USA and various subsidiary and parent companies commenced the instant lawsuit against their insurers, including XL, Zurich, Allianz and American Guarantee in 2018. In the second class action lawsuit, the Taiwanese court found that Technicolor USA was not responsible for any of the alleged damages sustained by the class members.

Based on that factual finding, the trial court in the coverage action found that there was no coverage for Technicolor SA. Specifically, the court found that "[b]ecause the findings of the Taiwan District Court established that Technicolor USA was not responsible for any of the damages that occurred at

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[the subsidiary's] Taiwan plants, Technicolor SA's liability cannot possibly arise out of its financial control over Technicolor USA," as required by the controlling interest endorsement. Accordingly, the trial court found that Technicolor SA was not an additional insured and was precluded "from seeking coverage under any primary policies with applicable controlling interest endorsements as a matter of law."

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