Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Sony Deal Emboldens Insureds In Data Breach Coverage Rows

By **Jeff Sistrunk**

Law360, Los Angeles (May 01, 2015, 7:21 PM ET) -- While Sony Corp. of America's settlement with Zurich American Insurance Co. in litigation over the PlayStation Network cyberattack forestalls long-sought appellate guidance on data breach coverage, experts say the deal will encourage policyholders to fight harder for coverage in similar disputes.

The entertainment giant and insurers Zurich and Mitsui Sumitomo Insurance Co. disclosed the resolution of the coverage case in court documents filed Thursday, two months after a New York appeals panel heard arguments in Sony's challenge to a landmark trial court decision freeing the insurers from covering the breach.

Both policyholder and insurer-side attorneys had eagerly awaited the panel's opinion in the case, which dealt with key issues regarding the availability of coverage for data breaches under commercial general liability policies.

While terms of the deal weren't publicly released, some attorneys say that the insurers' decision to settle may indicate they weren't confident that the lower court's decision would be upheld. According to Roberta Anderson, a partner at K&L Gates LLP, the Sony settlement shows that there is "valuable potential coverage" for data breaches under CGL policies.

"The Sony case illustrates that the insurance industry has made it clear that insurers do not want to cover data breach under CGL or other legacy types of insurance coverage," Anderson said. "But that doesn’t mean policyholders should take 'no' for an answer. And if they fight, there is good opportunity for a favorable settlement."

In the case, Judge Jeffrey K. Oing ruled from the bench that hackers' theft of confidential data on tens of millions of Sony PlayStation users constituted a “publication” of private information, as required by the relevant insurance policy, but that the cyberattack nonetheless did not trigger the insurers’ obligation to defend Sony from resulting litigation.

On appeal, Sony asserted that Judge Oing had erred when he found that coverage couldn’t be triggered through the actions of third parties — in this case, the hackers. According to the company, the policy provided coverage for publication of the information “in any manner,” regardless of whether the publication was carried out by the policyholder or by a third party.

Zurich countered that the term “in any manner” refers to the medium used for publication, not to what

party is doing the dissemination. The publication has to be carried out by the policyholder for coverage to apply, the insurer said.

"The issue that the trial court decision turned on — whether the information must be published by the policyholder, as opposed to a hacker, for example — seemed to be ripe to be reversed," said Greg Podolak, head of Saxe Doernberger & Vita PC's cyberrisk practice. "Zurich may have felt like they had some exposure and didn't want to risk it."

Without an appeals court opinion in the Sony case, there remains little appellate authority on cyberrisk coverage issues, and only a handful of state and federal court decisions dealing with those issues — some of which of which were resolved in favor of policyholders.

A scant few cases touching on data breach coverage have yielded appellate-level decisions, including the case of Recall Total Information Management Inc. v. Federal Insurance Co., in which a Connecticut appeals court axed coverage for more than $6 million in losses from a mishap that exposed the sensitive information of IBM Corp. employees. The Connecticut Supreme Court heard arguments in that case late last month.

Following the Sony settlement, the Recall Total case and others will become focal points in the realm of cyber coverage litigation, according to attorneys.

"Given the few cases touching upon coverage for cyber-related claims, any additional jurisprudence would be welcomed — especially for policyholders who need to make decisions about how best to protect against this area of significant risk," said Joshua Gold, head of Anderson Kill PC's cyber insurance coverage group.

The potential applicability of the Sony trial court decision in data breach coverage cases is unclear, especially given the existence of rulings in other jurisdictions favoring policyholders, according to attorneys.

"The trial court's decision was not consistent with interpretations of the same language made by other courts," said Linda Kornfeld, a partner at Kasowitz Benson Torres &Friedman LLP. "That decision remains an outlier trial court decision in New York that should not have precedential impact if a court in another state, or even another part of New York, were to consider the same issue."

Still, carriers will continue to rely on the decision in arguing against data breach coverage under CGL policies, given the dearth of other case law and the fact that other judges are likely to be familiar with the case, attorneys say. Policyholders, on the other hand, "will minimize the Sony ruling as an unpublished decision of a trial court," saidSmith Anderson partner John Jo.

Joshua A. Mooney, co-chairman of White & Williams LLP's cyber insurance group, said it is difficult to draw correlations between various data breach cases because the underlying facts can be different, especially when it comes to determining if there was a requisite publication.

"For the privacy issue addressed in Sony, courts in other jurisdictions can look to privacy coverage decisions outside the context of data breaches to resolve the issue," Mooney said.

According to Anderson, while coverage for data breaches under CGL policies is unclear, it is "clearly available."

"It may be a tough road — in a different jurisdiction, it may have been a different story and easier for Sony to get coverage," Anderson said. "But if policyholders demonstrate determination and take the gloves off and fight, they may walk away with a significant victory."

Ultimately, the Sony case's true legacy may lie in the impact of the intense publicity surrounding the litigation, according to Mooney.

"The decision showed companies that they can't expect general liability policies to cover data breaches; they need cyber insurance," Mooney said. "Sony was a Super Bowl ad for cyber insurance. This case, and the Target breach perhaps, represent the watermark for where the market shifted and companies realized that they have cyberrisk and need cyber insurance."

The increasing prevalence of cyber-specific insurance products, coupled with the fact that many CGL carriers have begun introducing cyber exclusions into their policies, have led some industry observers to question the long-term importance of rulings in cases such as Sony. However, disputes will continue to rage over data breach coverage under CGL policies that were issued before the cyber exclusions were introduced, as well as the scope of those exclusions in newer policies, according to attorneys.

"Not every policy sold will have what the insurance industry hopes is a silver bullet exclusion," said Barnes & Thornburg LLP partner Scott Godes. "And I do not share the insurance industry's view that any exclusion is a silver bullet for coverage. There will be questions about whether any new exclusion applies. In addition, there may be opportunities for policyholders to seek a defense upon past insurance policies that do not have those exclusions."

In addition, some of the issues involved in Sony and other cyber coverage cases may eventually become important in the context of litigation over stand-alone cyberrisk policies, Podolak said.

"Courts will have to look to some precedent for guidance, and this is what's going to exist," Podolak said. "Decisions like this could have an impact for some time to come."

--Editing by Kat Laskowski and Philip Shea.
