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SEVEN KEY PROVISIONS IN THE RESTATEMENT OF THE LAW: LIABILITY INSURANCE

The American Law Institute recently adopted the Restatement of the Law: Liability Insurance (the Restatement). The general goal of restatements is to clearly formulate the common law and reflect the law as it presently stands or as it might appropriately be stated by courts.

The Restatement has created some controversy. Below are some of the most controversial provisions:

1. Reservation of rights and other coverage letters: Section 15 of the Restatement states that insurers are required to update reservation of rights and other coverage letters within a reasonable period of time after learning of facts that would provide additional bases to contest coverage. Carriers, who typically provide a coverage position letter at the outset of litigation have argued that this provision would create a significant burden throughout the life of a case as new facts and allegations arise.

2. Attorney malpractice: Section 12 of the Restatement states that insurers may be liable for malpractice by defense counsel retained by the insurer if they negligently selected the attorney. Furthermore, insurers may be liable for attorney malpractice if the carrier overrides defense counsel's judgment, leading to a poor outcome for the insured.

3. Claims settlement:

- Section 24 of the Restatement states that insurers are required to make reasonable settlement decisions if there is a risk of an excess judgment.

- Section 25 of the Restatement states that a reservation of rights letter does not relieve the insurer of this reasonable settlement duty, but it does authorize the insured to settle without the carrier's consent.

- Section 27 of the Restatement states that if an insurer breaches the duty to reasonably settle, it may be liable for the resulting, foreseeable harm caused to the insured, including excess judgments and punitive damages, even if excluded by the express terms of the policy.

4. Confidentiality: Section 11 of the Restatement states that insurers do

not have the right to receive information concerning the insured from defense counsel, if that information is protected by the attorney/client privilege, the work product doctrine, or other duties of confidentiality, if the information could be used to benefit the insurer at the expense of the insured. Insurers are concerned about this provision because they depend upon the status reports received from defense counsel to keep abreast of the case and to inform their settlement and defense strategy.

5. Recoupment of defense costs: Section 21 of the Restatement states that insurers cannot recoup defense costs following judicial determinations of no coverage, unless the right to recoup defense costs is expressly provided in the insurance policy. This is consistent with current law in Wisconsin.

6. Bad faith: Section 49 of the Restatement sets forth a two-part test for bad faith – (1) the insurer had no reasonable basis for denying coverage; and (2) the insurer knew it was obligated to provide coverage or recklessly disregarded its obligation.

7. Continuous injury: Section 41 of the Restatement states that where the harm to the claimant is continuous or indivisible over several policy periods (environmental contamination, for example), courts should apportion the liability on a pro rata basis using policy limits; not based on the "all sums" approach. This provision purports to create a national rule in "continuous trigger" cases where, currently, the law differs from jurisdiction to jurisdiction.

If you are interested in discussing the new Restatement, please feel free to contact any member of our insurance team.

FLORIDA COURT FINDS NO COVERAGE FOR DATA BREACH INCIDENT UNDER PERSONAL AND ADVERTISING INJURY COVERAGE

As many readers of this blog already know, our insurance coverage practice monitors courts around the nation for court decisions that might interest our readers. Decisions involving insurance coverage for data breach incidents continue to be of interest, especially where policyholders seek coverage under the “personal and advertising injury” provisions in standard commercial general liability insurance policies.

Late last week, the U.S. District Court for the Middle District of Florida issued another opinion consistent with the nationwide trend that such policies do not provide coverage for insureds who are the victims of, or allegedly cause, data breaches, absent evidence that the insured itself published the sensitive data.

In *St. Paul Fire & Marine Ins. Co. v. Rosen Millennium, Inc.*, Middle District of Florida Case No. 17-CV-540 (J. Mendoza) (Sept. 28, 2018), St. Paul sought a court declaration that its personal and advertising injury coverage form did not provide coverage, defense or indemnity, for a data breach incident allegedly caused by Rosen Millennium, a data security provider. The breach incident caused the credit card information of Rosen Millennium’s customer to be exposed by hackers.

St. Paul’s coverage form provides coverage for various specified offenses, including

“making known to any person or organization covered material that violates a person’s right of privacy.” Rosen Millennium argued that it had received a demand letter alleging that it was negligent, resulting in the exposure of cardholder’s personal information, violating their right of privacy, and seeking damages. These allegations, it argued, qualified for coverage.

The court took care to review existing precedent and found no potential coverage. While no prior decision used the “making known” language found in St. Paul’s policy, the court found that that phrase was synonymous with the term “publication.” Because there was no evidence that Rosen Millennium itself published the sensitive information, there was no potential coverage.

There were a few other interesting aspects of the court’s decision. First, the policy language

requires publication of “covered material” before coverage applies, but does not more specifically describe what type of material might be “covered.” This was not an issue addressed in any length in the court’s opinion, however, because the parties conceded that the credit card information qualified.

In addition, Rosen Millennium argued that coverage was provided because the customers’ loss of the use of their credit cards constituted covered property damage. The court found this issue was not included in the demand letter received by Rosen Millennium and that the issue was not ripe for resolution.

If you are interested in discussing insurance coverage for data breach incidents, or any other insurance coverage issue, you may contact the author at tsmith@gklaw.com.

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JOIN a Top 100 Agency

How we grew from 28 Producers to 95 Producers.

Q: What markets do you have?

A. As the largest independent agency in Wisconsin, RRA has strong carrier relationships. We offer over 50 CL, 30 PL and 45 EB carrier partners.

Q: Will I make more money?

A. Yes, we offer one of the strongest returns to Producers. We pay all office costs including staff salaries. You continue to own your business/book but enjoy all the advantages of being with a larger agency, including profit sharing.

Q: How can I maximize my time?

A. We handle staff management, HR, accounting, IT, rating, office management and other administrative details. This allows Producers to spend more time with their families or growing their book on their terms.

Q: How does carrier contingency work?

A. Producers can share in ALL contingencies. Because of our size, our contingent return is more predictable and stable to our Producers.

Q: Do you have a solid perpetuation plan?

A. Scaling back hours, retiring or planning for the unexpected should be a priority. We help connect Producers with similar interests and backgrounds to develop a buy/sell plan where they are comfortable.

Q: What technology resources do you offer?

A. A dedicated IT department ensures technology resources are performing and the latest tools are being reviewed. We operate on Applied Epic and offer Zywave, AcuComp and HR Workplace Services.

Q: Who owns the book?

A. Simple, the Producer maintains 100% ownership without a non-compete.



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