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Redbox Covers the Nation with Red Box DVD Rental Units, But its CGL Policy Doesn't Cover Redbox

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Companies facing liability for possible violations of privacy protection statutes are continuing to look to their traditional commercial general liability policies (“CGL”) for coverage. But, as Redbox recently discovered, coverage for privacy issues remains a case-by-case question. In its recent CGL coverage dispute, Redbox argued that coverage for an alleged privacy violation was available under Coverage B for “personal injury and advertising injury” which included “[o]ral or written publication, in any manner, of material that violates a person’s right of privacy.” Unfortunately for Redbox, a court did not agree.

National Union filed a declaratory judgment action to deny coverage in connection with the class action against Redbox, alleging that Redbox retained rental and other private personal information of its customers for too long and used this information for Redbox’s marketing purposes in violation of the Video Privacy Protection Act (“VPPA”). *Nat’l Union Fire Ins. Co. v. Coinstar, et al.*, No. 2:13-CV-01014 JCC (W.D. Wash. Feb. 28, 2014). The VPPA prohibits a “video tape service provider” from disclosing personally identifiable information about one of its customers, including rental or sales records for movies, video games, or other materials in a DVD format. (In the underlying action, the court found that Redbox had not violated the VPPA section that would have resulted in a payout for class members. Plaintiffs’ appeal is pending.)

National Union argued that coverage under the personal and advertising injury provision was precluded by an exclusion for any injury that arises from “any act that violates any statute, ordinance or regulation of any federal . . . government . . . that addresses or applies to the sending, transmitting or communicating of any material or information, by any means whatsoever.” Because the Plaintiffs’ sued Redbox for violations of VPPA, National Union argued the exclusion applied.

New Releases Aren't Just For DVD Rentals. "Newer" Policy Language Precludes Redbox Coverage.

Redbox countered that the language of the exclusion at issue should be analyzed in the context of language from previous versions of the exclusion. The older language limited the statutes referred to in the exclusion to Acts, such as the Telephone Consumer Protection Act, which prohibit companies from communicating directly with consumers, and not a privacy protection law like the VPPA.

The District Court agreed with National Union, holding that the plain language of the exclusion is unambiguous and "simply does not contain the language Redbox now desires." Second, the court found that even if it considered the language of the previous version of the exclusion, the prior exclusion did limit itself to statutes that prohibit entities from sending unsolicited communications to consumers, and therefore, even under the old language, the newer VPPA would be included.

The court also rejected Redbox's creative argument that reading the exclusion broadly to cover alleged violations of the VPPA would unfairly lead to coverage exclusions for violations of any statute where liability flows from the publication of information, such as claims based in federal copyright laws and the like. Laws such as the copyright act do not directly address and prohibit "the sending, transmitting or communicating of any material or information," and so would not fall within the exclusion in any event.

Does the Redbox Opinion Shrink Personal and Advertising Injury Coverage?

The Redbox opinion is an example of how traditional CGL coverage provisions play out in today's world where the issues of privacy and protection of PPI are subjects of new legislation and regulation. While the Redbox case deals with the impact of only one of those laws – the VPPA – both insurers and policyholders are increasingly aware of how advances in technology may impact the meaning or scope of an exclusion. New claims for coverage under legacy personal and advertising injury provisions will reveal how the scope of this coverage may change in the future. Policyholders will need to stay alert to these changes in policy language and seek out legal advice to ensure PII risks are covered.