That Was A Secret! — Insurance Coverage for Privacy Violation Lawsuits

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1 The authors’ views are their own and not those of their firms or their clients. Further, each individual author does not necessarily agree with everything in this paper, which is a joint project and contains sections that were prepared by each of the authors.
I. INTRODUCTION

It seems that every week there is a new story about a company that has been affected by a data breach or claimed privacy violation, resulting in the unwanted disclosure of confidential information, including social security numbers, passwords, credit card numbers, and other personal identification information. Inevitably, these stories are followed by lawsuits—usually class action lawsuits—alleging both common law and statutory damages for actual and future harm resulting from the disclosure of personal identification information. These events have become so common that the lawsuits are being filed within hours of the notice of the disclosure of the personal identification information.

The types of claims involved in such lawsuits are also expanding. Data breach claims seem to be the most abundant and frequent occurrence, and to have the highest profile. One of the most widely publicized events occurred in 2011 when hackers breached Sony’s networks, and accessed the confidential information of more than 100 million users of Sony’s PlayStation Network, Sony Entertainment Online, and Sony Pictures. The cost to address this breach, including responding to regulators and defending against the multitude of class action lawsuits are projected to reach nine figure dollar amounts in these cases.

Other class action lawsuits include those alleging data breach and privacy violations against companies—usually web-based entities—that surreptitiously install hidden “cookies” and other browser history sniffing codes to track and monitor a person’s online activities. The plaintiffs in these cases allege, among others, claims for invasion of privacy, misappropriation of personal information, and in some cases, direct and tangible interference with the operation and use of their computers.

Another type of claim involving privacy violations is the “ZIP code” cases, or the Song-Beverly Act cases (named after a California credit card statute). The Song-Beverly Credit Card Act prevents retailers from collecting personal information when accepting a credit card payment. In the landmark decision Pineda v. Williams-Sonoma Stores, Inc., 51 Cal.4th 524 (2011), the California Supreme Court ruled that retailers could be held liable for violating the credit card act by asking for and obtaining zip code information when accepting credit card payments. The California Supreme Court’s decision has led to a flood of lawsuits alleging privacy violations against retailers over ZIP Code collections throughout California and other states with similar statutes.

The cost to address these breaches and disclosures and to defend against the growing number of class action lawsuits has dramatically increased. And, as the number of breach and privacy violation incidents has increased, many affected companies have turned to historical insurance policies for protection and relief, including standardized commercial general liability (“CGL”) policies. Such policies typically provide broad coverage for defense and indemnity costs for “property damage” as well as “personal injury.” “Property damage” often requires physical injury to tangible property, or loss of use of tangible property that is not physically injured. While “personal injury” coverage extends to several enumerated offenses, the relevant offense for data breach and privacy violations typically is defined to be “oral or written publication, in any manner, of material that violates a person’s right of privacy.” A number of
recurring issues bearing on the extent of coverage CGL policies may provide for the costs incurred in class actions and other lawsuits alleging privacy breaches and violations are explored in turn below.

II. DISCUSSION


Under standard-form CGL policies, coverage for “property damage” is defined to require “physical injury to tangible property, or loss of use of tangible property that is not physically injured.” In some cases, courts have been reluctant to find that electronic data, such as stored personal identification information, qualifies as “tangible property.” In addition, the insurers have begun to adopt more restrictive definitions of “property damage” under CGL policies that expressly exclude electronic data as constituting “tangible property.”

Where the alleged activities involved cyber risk conduct, policyholders have nonetheless been able to secure coverage for data breach and privacy violations under the property damage coverage. For those policies excluding “electronic data” from the definition of “property damage,” insurers typically deny coverage on the basis that the lost personal identification information is not tangible property. Nonetheless, certain data breaches may result in property damage in the form of physical damage to tangible property, such as the use and operation of one’s personal computer. For example, in the hidden “cookie” type cases, the surreptitious loading of hidden codes to track browsing history on personal computers may result in physical destruction or alteration of computer components, and in many cases, prevent the use of one’s computer. If a policyholder can demonstrate that there were allegations of such damage, or actual evidence of such damage, then it can argue that property damage coverage should apply, as the claim does not implicate software and data alone.

Potentially relevant allegations were made in the various Sony data breach cases. For example, in one such case, the putative class alleged that “Plaintiffs seek damages to compensate themselves and the Class for their loss (both temporary and permanent) of use of their PlayStation consoles . . . .” The allegations that the event surrounding the loss of data also impacted the use of the plaintiff’s hardware should be considered loss of use of tangible property for purposes of determining whether property damage coverage should apply.

The U.S. Court of Appeals for the Eighth Circuit addressed a similar issue and considered a similar set of allegations in Eyeblaster, Inc. v. Federal Ins. Co., 613 F.3d 797 (2010). The dispute in Eyeblaster involved a complaint in which the claimant “alleg[ed] that Eyeblaster injured his computer, software, and data after he visited an Eyeblaster website.” Regarding the issue of whether the loss of one’s computer constitutes use of tangible property, the Eighth Circuit held that alleged computer freezes, random error messages, slowed performance and crashes, and ads based on past internet surfing history constituted property damage in the form of loss of use of tangible property sufficient for coverage under a traditional CGL policy coverage.


Policyholders have also had some success pursuing coverage for data breaches as “personal or advertising” injuries. “Personal or advertising” injuries encompass a policyholder’s liability for intentional torts enumerated in the CGL policy, including publication of material that violates a person’s right to privacy, that slanders or libels another, or disparages another’s goods, products, or services. To obtain coverage for a data breach, a policyholder must demonstrate that it engaged in advertising activity,
that the claim against it included a publication that violated another’s right to privacy, and that there is a causal nexus between injury arising from the offense and the advertising activity.

Under CGL policies, “advertisements” include notices that are broadcast or published to the general public about the policyholder’s goods, products, or services to attract customers or supporters. The term typically is defined to include material posted on the internet, but only on the portions of websites aimed at attracting customers for the policyholder’s goods, products, or services. Insurers have disputed whether data breaches qualify as publications and whether they violate another’s right to privacy. Some courts have interpreted the publication requirement broadly, holding that a policyholder disclosing data to only one person or entity is entitled to coverage. In other cases, courts have held that the disclosure need not even reach an outside party. In other words, information disclosed within a company to the policyholder’s personnel was “published” for purposes of policy coverage.

Courts are split on the issue of whether a privacy violation has occurred. Courts disagree about whether the underlying lawsuit against the policyholder must expressly allege a violation of the third party’s right to privacy. Most courts focus not on the specific allegations, but on the third party’s perception of the alleged misconduct as an invasion of privacy; whereas, other courts have required the underlying allegations to include violations of privacy laws analogous to the offenses enumerated in the advertising injury policy provisions.

Most courts favor policyholders in determining whether the third party has a privacy right in the accessed data and whether there is a sufficient nexus between the policyholder’s advertising activity and the underlying offense. Thus, in general, policyholders have been successful in obtaining coverage for data breaches and alleged privacy violations pursuant to the “advertising injury” provisions of standardized CGL policies.

Those holdings are critical in the context of data breaches. Data breaches consist of situations in which private information has been publicized to third parties. Therefore, the standard insuring agreement in CGL policies relating to personal and advertising injury can be argued to be broad enough to encompass a data breach.

The case law on the availability of indemnity coverage under such CGL policies is continuing to evolve—and as set forth below, there are other hurdles to seeking indemnity coverage—however, the allegations in these class action lawsuits may be sufficient to trigger the potential for coverage and provide a defense for these lawsuits. The high cost to defend these lawsuits may ultimately dwarf the actual harm or damages suffered by those who allegedly lost personal identification information.

C. Issues Bearing on Whether An Attorney Fee Award to Plaintiffs’ Class Counsel In Cases Alleging Privacy Violations Is Recoverable As Defense Costs

In addition to covering the policyholder’s own defense costs, another issue that may arise in class actions and other cases involving data breaches and other alleged privacy violations is whether standardized CGL forms obligate the insurer to cover the plaintiffs’ counsel’s attorney fees as defense costs when the policyholder is required to pay such fees as part of a judgment or settlement. The dispute in such cases turns upon construction of the “supplementary payments” provisions of such CGL policies, which typically obligate the insurer to pay various enumerated expenses as part of its duty to defend, including “costs taxed against the insured” in a suit.

Particularly in class action cases, where attorney fee awards involving millions of dollars may be involved, the potential value of such “supplementary payments” coverage can be quite substantial. CGL policies often prescribe that defense costs are payable in addition to policy limits, and such policy provisions may obligate the insurer to pay defense costs that far exceed policy limits.
Policyholders generally contend their liability for the opposing party’s attorney fees qualifies for coverage under a CGL policy as “supplementary payments” on the basis that the fees constitute a “cost taxed against the insured.” Insurers denying such coverage typically contend that such fees are not “costs” and, when the policyholder incurs liability for them pursuant to a settlement agreement instead of a verdict and order of judgment, that such fees are not “taxed.” In evaluating such arguments, many courts have undertaken a two-part analysis, first addressing whether the attorney fees were “taxed,” and, if so, determining whether the fees are “costs.”

1. Whether An Award of the Class Counsels’ Attorney Fees Qualifies As Having Been “Taxed”

When a policyholder becomes obligated to pay the opposing party’s attorney fees pursuant to a fee-shifting statute or rule, many courts have concluded that such attorney fee awards qualify as having been “taxed.” See, e.g., Ferrell v. W. Bend. Mutual Ins. Co., 393 F.3d 786, 796 (8th Cir. 2005) (concluding “that the attorney’s fee award was part of the ‘costs’ taxed against the insured . . . in the underlying lawsuit” because the Arkansas statute upon which the attorney’s fee award was based prescribed that “the prevailing party may be allowed a reasonable attorney’s fee to be assessed by the court and collected as costs”); R.W. Beck & Associates v. City & Borough of Sitka, 27 F.3d 1475, 1484–85 (9th Cir. 1994). These courts have reasoned that such coverage is consistent with a lay policyholder’s reasonable interpretation of “taxed,” which includes the judicial levying of an assessment. See, e.g., R.W. Beck & Assocs., 27 F.3d at 1484–85. Policyholders may invoke the reasoning of such cases as supporting the argument class counsels’ attorney fees awards qualify as “supplementary payments” in cases involving alleged privacy violations under the FCRA and other statutes that contain fee-shifting provisions entitling the plaintiffs to recover their attorneys.

When the policyholder enters into a settlement obligating it to pay the opposing party’s attorney fees, rather than being required to pay such a fee award pursuant to a judgment entered under a fee-shifting statute, disputes have arisen about whether such a payment can qualify as having been “taxed” under a “supplementary payment” provision. In this context, at least one state appeals court concluded that the term “taxed” is ambiguous, reasoning that, as defined by Merriam-Webster’s Collegiate Dictionary, the term could mean “to judicially assess the amount of costs,” “levying a tax on,” or “making an onerous demand on.” Employers Mut. Cas. Co. v. Phila. Indem. Ins. Co., 169 Cal. App. 4th 340, 348–49 (2008) (quoting Merriam–Webster’s Collegiate Dictionary at 1208 (10th ed. 1999)). The court then held that the broader of these definitions encompasses “lev[y][ing] of an assessment.” Id. When construed broadly, the court held, the term “taxed” encompasses the policyholder’s liability for costs by virtue of a settlement agreement with a third-party claimant—irrespective of whether the policyholder enters into the settlement agreement after judgment or before. See id. (citing Prichard v. Liberty Mutual Ins. Co., 84 Cal. App. 4th 890 (2000)). Accord St. Paul Fire & Marine Ins. Co. v. Hebert Constr., Inc., 450 F. Supp. 2d 1214, 1234 (W.D. Wash. 2006).

2. Whether An Award of Class Counsels’ Attorney Fees Qualifies As “Costs”

2 There also is precedent supporting the argument that such payment of class counsel fees may qualify as “damages” covered by an insurer’s indemnity obligation. See, e.g., Hyatt Corp. v. Occidental Fire & Cas. Co. 801 S.W.2d 382, 393-94 (Mo. Ct. App. 1990) (recognizing that “[i]t is common class action practice for the defendants in a class action settlement to agree to pay [class] plaintiffs’ attorneys’ fees and expenses as the court may award,” and concluding that “[s]uch an award . . . [a]s indistinguishable from a damages award for coverage purposes”). But see Sullivan County, Tenn. v. Home Indem. Co., 925 F.2d 152 (6th Cir. 1991).
When the policy in question defines the term “costs,” courts generally hold that the policy’s definition controls whether another party’s attorney fees for which the policyholder becomes liable qualify for coverage under a “supplementary payments” provision. Most CGL policies, however, do not define the term “costs.” In the absence of such a definition, courts have split as to whether the term “costs” encompasses such attorney fees.

At one end of the spectrum, the Idaho Supreme Court has held that “costs” unambiguously encompass a policyholder’s payment of a third party’s attorney fees. See Mut. of Enumclaw v. Harvey, 772 P.2d 216, 220 (Idaho 1989). The court relied upon Webster’s Third New International Dictionary for the definition of “costs” as “expenses incurred in litigation,” and reasoned that the “plain, ordinary and popular meaning of ‘costs’ is the expense of litigation which includes attorney fees.”

At the other end of the spectrum, the U.S. District Court for the District of Hawaii, applying Hawaii law, has held that “costs” unambiguously excludes attorney fees. See CIM Ins. Corp. v. Masamitsu, 74 F. Supp. 2d 975, 993 (D. Haw. 1999). [The “supplementary payments” provision before that court explicitly encompassed “costs taxed” against the policyholder but, like most “supplementary payment” provisions, was silent as to whether “costs taxed” include “attorney fees awarded.”] Among other things, this reasoning can be argued to be inconsistent with the generally recognized principles of policy interpretation that coverage-granting provisions are to be construed broadly in favor of coverage. No reported Hawaii state court decision has yet to evaluate the merits of this federal district decision under Hawaii law.

In contrast, courts in a number of jurisdictions have taken a middle ground, holding that the term “costs” includes attorney fees only when the law or contractual provision authorizing their recovery so specifies. See, e.g., Hoang v. Monterra Homes (Powderhorn) LLC, 129 P.3d 1028, 1038 (Colo. Ct. App. 2005), rev’d sub nom. on other grounds, Hoang v. Assurance Co. of Am., 149 P.3d 798 (Colo. 2007); Ferrell v. W. Bend Mut. Ins. Co., 393 F.3d 786, 795–96 (8th Cir. 2005) (“The Arkansas statute upon which the attorney’s fee award was based states that ‘[i]n any civil action to recover on [a] . . . breach of contract, . . . the prevailing party may be allowed a reasonable attorney’s fee to be assessed by the court and collected as costs.’ Thus, we conclude that the attorney’s fee award was part of the ‘costs’ taxed against the insured, Hi–Tech, in the underlying lawsuit.” (citation omitted)), Fla. Patient’s Compensation Fund v. Moxley, 557 So. 2d 863, 864 (Fla. 1990) (“[F]ees recoverable by statute are regarded as costs only when specified as such by the statute which authorizes their recovery.”); Littlefield v. McGuffey, 979 F.2d 101, 104–05 (7th Cir. 1992) (“Costs can include attorney’s fees and expenses either if a statute provides for it or if the parties so agree in a valid contract . . . . Here, the four words ‘exclusive of attorney’s fees,’ inserted into the policy after the word ‘costs,’ would have accomplished State Farm’s [the insurer’s] goal. In the absence of this qualification, the district court correctly decided that the insurance policy’s coverage of costs included attorney’s fees.”).

D. Issues Bearing on Indemnity Coverage for Statutory Damages

1. Statutory Damages under the TCPA and Other Privacy-Related Statutes

Even where an insurer agrees to pay for the cost of defense, often under reservation of rights, another common battleground issue is whether statutory damages claimed in such suits are covered and give rise to a right of indemnity under the policy. Plaintiffs in data breach and privacy violation class actions often allege both common law claims, such as invasion of privacy, and claims under various statutes implicated by privacy concerns. When bringing statutory claims, class plaintiffs often rely on the statutory minimum damages provisions as an alternative to attempting to prove actual damages. Such requests for statutory minimum damages lie at the center of the controversy between insurers and policyholders over who will pay for the class settlement.
Examples of statutes that provide for statutory damages that are often relied on by class plaintiffs include the following:

- **Telephone Consumer Protection Act ("TCPA")**—damages of $500 for each violation; $1,500 where intentional;
- **Federal Credit Reporting Act ("FCRA")**—damages of $100 to $1,000, plus punitive and actual damages and attorney fees, for willful violation;
- **Fair and Accurate Credit Transactions Act ("FACTA")**—damages from $100 to $1,000 for willful violation;
- **California Song-Beverly Credit Card Act**—“penalty” of up to $1,000 per transaction.

These statutory amounts can obviously multiply quickly in class actions, setting up battles over who is responsible for paying the enormous settlements. These disputes raise issues such as whether these statutorily proscribed amounts are “damages” as that term is used in insurance policies, or whether they are more in the nature of fines or penalties. Even if such amounts can properly be characterized as “damages,” issues also arise over whether they are akin to punitive damages and are thus uninsurable as a matter of public policy in many jurisdictions.

The approaches to resolving these disputes are varied, and indicate that courts, along with policyholders and insurers, will continue to grapple with these issues over the coming years.

The issue of coverage for such amounts arises under many types of insurance policies. Policyholders often seek coverage for these class actions under CGL policies, which provide coverage for “damages” for property damage and/or personal or advertising injury. Certain specific technology/data breach liability policies, as well as standard professional liability policies that are also sometimes implicated, often provide coverage for “Loss,” a term commonly defined in such policies as “monetary judgments and monetary settlements which the Insured is legally obligated to pay.” Such policies also typically expressly exclude from the definition of “Loss” any “criminal or civil fines or penalties imposed by law.”

While any analysis of whether coverage exists for statutory amounts must begin with the language of the statute, it does not end there. Take for example the California Song-Beverly Credit Card Act, which places limitations on retailers’ ability to request or record personal information when dealing with credit card transactions. Many class actions have been filed for alleged violations of this statute, such as cases alleging that the retailer requested customers’ zip code or telephone number. Unlike some of the other statutes protecting such privacy rights, the Song-Beverly Act subjects violators to “civil penalties” of up to $250 for a first violation and $1,000 for each subsequent violation.

Insurers likely will argue that a policy providing coverage for “damages” or even “judgments” or “settlements” and also containing exclusionary language for fines or penalties should not be required to pay amounts awarded under the Song-Beverly Act, which specifically labels such amounts as “penalties.” And looking at the corollary, the fact that other statutes that expressly refer to their remedies as “damages” does not simply lead to the conclusion that these amounts are “damages” as used in the context of an insurance policy, such as a CGL policy that provides coverage simply for “damages.”

Using the label applied by the statute does not necessarily end the inquiry. Certain courts have held that where an insurance policy does not define the term “fine or penalty,” it is ambiguous and must be interpreted in favor of the policyholder. See, e.g., *Carey v. Employers Mut. Cas. Co.*, 189 F.3d 414 (3d Cir. 1999); *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 R.3d 876 (8th Cir. 2005). And some of the early cases involved situations in which the amounts imposed for which
coverage was sought were paid to a governmental entity rather than a private plaintiff, and arrived at different results. Compare Wellcome v. The Home Ins. Co., 849 P.2d 190 (Mont. 1993) (no coverage and policy not ambiguous; sanctions imposed on attorney for violating court order were to impose a punishment) with 189 F.3d 414 (coverage; surcharge imposed by township was to compensate the township and was not a penalty).

Similar problems arise even where a statute calls a remedy “damages.” While not decided in the privacy context, there is precedent that can be argued to support the contention that an award of damages might not be “damages” under an insurance policy. In Bank of the West v. Superior Court, 2 Cal.4th 1254 (1992), for example, recovery was sought under California Business & Professions Code § 17200, the California Unfair Business Practice statute. The California Supreme Court held, among other things, that the statute did not authorize an award of damages, as disgorgement was the only nonpunitive monetary remedy available under the statute. Reasoning that disgorgement was not “damages” for insurance purposes, the court concluded that no coverage was available under the policy. Based on this reasoning, insurers may argue that the mere fact that monetary amounts are available under a statute, even if the statute uses the term damages, does not mean that it constitutes “damages” the way that word is used in an insurance policy.

None of this precedent, however, has specifically addressed awards under a statute calling the remedy a “penalty.” When a statute calls a remedy a “penalty,” and a policy expressly excludes coverage for “penalties,” the questions thus may remain whether coverage may depend upon a determination of ambiguity or intent of the provision, or the compensatory or remedial nature of the remedy.

Even where a statute expressly refers to the remedy as damages, such as the TCPA or FCRA, disputes arise over whether such awards are properly covered as “damages” under an insurance policy. Courts considering such questions have done so with varying methodology, analyzing either the intent of the statutory remedy or the intent of the policy language.

Approaching the issue with respect to the intent of the statutory remedy, for example, the court in Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc., 401 F.3d 876 (8th Cir. 2005), considered whether the $500 statutory damages under the TCPA were excluded under a “fines or penalties” exclusion of the policy. The court held that the statute had both a remedial and punitive purpose, and since they were in party compensatory, they were not “penalties.”

A state appellate court in Missouri recently held, however, that the $500 statutory minimum damage under the TCPA is penal in nature and is not covered under a CGL policy. See Olsen v. Siddiqi, 371 S.W.3d 93 (Ct. App. Mo. 2012). The court, as the court in Universal Underwriters, held that the TCPA was both remedial and penal in nature, stating that “[w]here a statute is remedial in one part and penal in another, it should be considered as penal when enforcement of the penalty is sought. Where the sum given by the statute is called damages by it, the fact will not prevent its being a penalty to be recovered by a penal action, if such is its real nature.” 371 S.W.3d at 97. The Olsen court thus focused on the specific remedy sought by the plaintiffs. Since the class plaintiffs opted to recovery of statutory damages, the court held that they were penal in nature and were not “damages” under the policy.

Another approach is to consider the issue by parsing the policy language. While CGL policies provide coverage for “damages,” professional liability policies often utilize broader language, and cover “damages, judgments or settlements.” Thus, putting aside the question of whether statutory damages are “damages,” if a verdict results in a judgment or there is a settlement, is it even necessary to determine the nature of the statutory damages, or are they simply covered? Based on other standard exclusionary language in such policies, some courts have concluded that the answer to this question is not so simple, and that further examination is necessary. In Flagship Credit Corp. v. Indian Harbor Ins. Co, 2012 WL 2299484 (5th Cir. 2012), for example, the court considered whether statutory damages for violation of
the Texas Business and Commerce Code were covered under a policy that provided coverage for “Loss.” Although this term was defined to include “damages, judgments, settlements, or other amounts,” the policy also excluded “fines, penalties or taxes imposed by law” from this definition. The court applied the canon of policy construction of *noscitur a sociis*, which requires that the meaning of each word in a group be consistent with the meaning of the other words. The court noted that the word “penalty” was grouped with “fines” and “taxes,” and held that since “fines” and “taxes” are paid to a government, then “penalties” only includes amounts paid to a government. The Fifth Circuit thus reversed a finding of the District Court that had found the amount not to be covered as it was a “penalty.”

Another approach has been to consider whether such statutory damages are punitive damages and thus not covered. A CGL policy provides coverage for “damages,” without modification. Many states, however, do not permit coverage for punitive damages, and CGL policies also often exclude coverage for punitive damages. The intent of statutory damage can be determinative of coverage, but again the results are not uniform.

In *Standard Mut. Ins. Co. v. Lay*, 975 N.E.2d 1099 (Ill. App. Ct. 2012), the court considered coverage for a settlement of a TCPA class action suit under a CGL policy. The court analyzed the $500 statutory damage, noting that the cost to the recipient of an unwanted fax is much less than $500, and the purpose of the liquidated damage was thus to deter future sending of unwanted faxes by shifting the cost and imposing penalties. As such, it is a penalty and in the nature of punitive damages and is not insurable. See also *Olsen v. Siddiqui*, 371 S.W.3d 93 (Ct. App. Mo. 2012) (while not equating the damage to punitive damages, held that they were penal in nature and not covered “damages”).

Other courts have considered and rejected this approach. In *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 912 N.E.2d 659 (Ct. App. Oh. 2009), the court held there was no evidence that the $500 statutory damages under the TCPA was intended to be punitive by Congress. Instead, the court held that the purpose of the statutory damage provision “is to ‘liquidate uncertain actual damages and to encourage victims to bring suit to redress violations.’” The court thus found that the TCPA was remedial and the statutory damages were not punitive damages. See also *Penzer v. Transportation Ins. Co.*, 545 F.3d 1303 (11th Cir. 2008) (TCPA provides for $500 statutory damage and treble damages for willful or knowing conduct, indicating that statutory damages not intended to be punitive damages); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565 (Mass. 2007)(TCPA $500 damages are to compensate plaintiffs for hard to quantify business interruption losses and are not punitive damages.)

Such was the result under CGL policies that offered no coverage for punitive damages. Coverage for punitive damages is sometimes offered under professional liability policies, if the law of the jurisdiction under which the policy is to be construed permits such coverage. Under such policies, if the insurer has specifically elected to provide coverage for damages that are punitive in nature, coverage for statutory damages could be available even in jurisdictions holding that such damages are the equivalent of punitive damages.

Interestingly, even courts that have taken consistent positions as to whether statutory damages are the equivalent of punitive damages disagree on the issue of whether the treble damages provisions are covered or are punitive in nature. In *Motorists Mutual*, the Ohio court held that punitive damages are to punish for intentionally malicious acts. Since no showing of intentional malice is required to obtain treble damages under the TCPA, there is no public policy prohibiting insurance coverage for such treble damages. In *Terra Nova Ins. Co.*, however, despite finding that the $500 statutory damages were not “punitive damages,” the Massachusetts Supreme Court held that if damages above $500 were awarded pursuant to the treble damages provision, “such an increase would amount to punitive damages and would not be covered.”
Regardless of whether they are labeled punitive damages or not, the availability of statutory “damages” for intentional or willful conduct brings into question the ability of the policyholder to obtain coverage for such amounts. Some states have codified the principle that insurance is not available to provide coverage for intentional harm inflicted by an insured, such as California in its Insurance Code Section 533, which provides that “an insurer is not liable for a loss caused by the willful act of the insured.” Courts differ on the question of what constitutes a “willful and knowing” violation of such statutes, such as the TCPA and FACTA. Some courts hold that a defendant must know that its actions violate the statute, while others hold that a plaintiff only has to show that the defendant knowingly engaged in the conduct in issue, such as sending the unsolicited fax. How that issue is determined in a specific will clearly have an impact on a policyholder’s claim for coverage for any amounts awarded for any such willful or knowing violations.

2. Statutory Damages under the Health Insurance Portability and Accountability Act and the Health Information Technology for Economic and Clinical Health Act

While not necessarily arising in the context of class actions, much attention has been given to privacy concerns in the area of medical records, which is governed by the Health Insurance Portability and Accountability Act ("HIPPA"). HIPPA provides for the imposition of penalties by the Secretary of Commerce against entities found to have violated the statute. There is no private right of action under HIPPA, and the penalties are paid to the Secretary of Commerce, thereby generating little dispute that such amounts would be fines or penalties, and such amounts would in any event never be part of any private action, class or otherwise.

However, the Health Information Technology for Economic and Clinical Health ("HITECH") Act, signed in 2009 and whose provisions took effect in 2011, deals with electronic health records and adopts privacy issues raised by HIPPA. The HITECH Act has remedy provisions making certain amounts recoverable in an action by a State Attorney General. Since such an action can be maintained only by a State Attorney General, there will be no private class actions seeking such amounts.

But, at least one such action has been commenced under HITECH, seeking damages under the provisions of the Act. HITECH provides for the recovery in such an action of damages calculated by multiplying the number of violations by $100, certain limitations on the total damages in any year. HITECH also permits the court, in its discretion, of awarding costs and attorneys’ fees to the State.

Since the statute is relatively new and few such actions have been commenced, the issues surrounding the availability of coverage for such a case, beyond defense costs, have not yet been tested. It is interesting to note, however, that given the remedies offered by the statute, future actions under HITECH could have implications for coverage of both prevailing party attorney fees and statutory damages sought in such actions.

III. CONCLUSION

With the number of class action suits, as well as the magnitude of settlements in such cases, ever increasing, insurers and policyholders increasingly find themselves locked in disputes over the existence of coverage for such suits. While the first step is often a battle to determine whether coverage exists for the enormous costs of defending the policyholders in these class actions, that is not the end of the fight. Disputes also will continue to arise about the extent to which a policyholder’s liability for class counsels’ attorney fees may be recoverable as defense costs or otherwise. The question of whether an the award of statutory damages under various privacy-related statutes also will continue to be litigated. If past experience is any guide, courts will continue to reach conflicting conclusions with respect to the proper resolution of such disputes.