SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

ZURICH AMERICAN INSURANCE COMPANY, Plaintiff-Respondent, -against- SONY CORPORATION OF AMERICA and SONY COMPUTER ENTERTAINMENT AMERICA LLC, Defendants-Appellants, and MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Defendants-Respondents, and SONY ONLINE ENTERTAINMENT LLC, SONY NETWORK ENTERTAINMENT INTERNATIONAL LLC, SONY NETWORK ENTERTAINMENT AMERICA INC., ACE AMERICAN INSURANCE COMPANY, XL INSURANCE COMPANY LIMITED – IRISH BRANCH and GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, Defendants.	New York County Index No. 651982/2011 **E** **NOTICE OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Albert L. Wells dated January 16, 2015, and upon all papers, pleadings and proceedings had herein, the undersigned shall move this Court at a Motion Term thereof at the Courthouse located at 27 Madison Avenue, New York, New York, 10010, on February 3, 2015, at 10:00 in the forenoon, or as soon thereafter as counsel can be heard, for an order granting leave to the

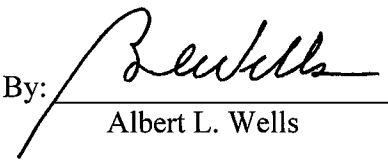
undersigned to serve and file a brief in *Amicus Curiae* in support of the Plaintiff-Defendants' brief; and for such other, further and different relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b) and 22 NYCRR 600.2(a)(5), answering affidavits, if any, are required to be served upon the undersigned no later than seven days before the return date of this motion.

Dated: New York, New York
January 16, 2015

Respectfully submitted,

COVINGTON & BURLING LLP

By: 
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

ZURICH AMERICAN INSURANCE COMPANY, Plaintiff-Respondent, -against- SONY CORPORATION OF AMERICA and SONY COMPUTER ENTERTAINMENT AMERICA LLC, Defendants-Appellants, and MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Defendants-Respondents, and SONY ONLINE ENTERTAINMENT LLC, SONY NETWORK ENTERTAINMENT INTERNATIONAL LLC, SONY NETWORK ENTERTAINMENT AMERICA INC., ACE AMERICAN INSURANCE COMPANY, XL INSURANCE COMPANY LIMITED – IRISH BRANCH and GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, Defendants.	New York County Index No. 651982/2011 E **AFFIRMATION OF ALBERT L. WELLS IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

ALBERT L. WELLS, pursuant to CPLR 2106, affirms under penalties of perjury:

1. I am an attorney duly admitted to practice in the Courts of the State of New York and am a member of Covington & Burling LLP, counsel for *Amicus Curiae* United Policyholders ("UP"), a non-profit organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. I submit this affirmation in support of the Motion for

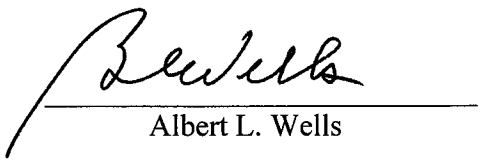
Leave of the Court to submit an *Amicus Curiae* Brief in conjunction with the Plaintiff-Defendants' brief appealing the decision of the Supreme Court of the State of New York, New York County, in *Zurich American Insurance Co. v. Sony Corp. of America et al*, 651982/2011, NYSCEF Dkt. No. 522 (February 24, 2014). A copy of the notice of appeal invoking the jurisdiction of this court is annexed hereto as Exhibit A.

2. At issue in this case is the foundational principle of insurance law that the words of the policy govern the coverage afforded to the policyholder. The insurers in this case have taken the position that the standard form Part B coverage for Personal and Advertising Injury Liability contains a hidden exclusion unsupported by any of the actual words contained therein. This argument, were it adopted by the Court, could affect thousands upon thousands of standard form policies that include this Part B coverage, as well as chip away at the legal protections New York law has conferred upon policyholders for decades.

3. Specifically, UP is able to make an original contribution to this case based on its years of experience advocating for the interests of myriad policyholders in all manner of coverage issues. UP's Executive Director has been appointed for six consecutive terms as an official consumer representative to the National Association of Insurance Commissioners, and works closely with State Insurance Commissioners on issues affecting insurance consumers. Accordingly, UP has significant experience providing insight to courts and regulators that must analyze complex insurance principles. Furthermore, UP's twenty-year history renders it uniquely-poised to draw the court's attention to the importance and real-word ramifications of the interpretive principles implicated in this case.

4. The undersigned respectfully requests that this Court grant the motion of UP to file an *Amicus Curiae* brief in the above-captioned matter. A copy of the UP's proposed brief is annexed hereto as Exhibit B.

Dated: New York, New York
January 16, 2015



Albert L. Wells

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

- against -

SONY CORPORATION OF AMERICA, *et al.*,

Defendants.

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Index No. 651982/2011
Hon. Jeffrey K. Oing
Commercial Part 48

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendants Sony Corporation of America and Sony Computer Entertainment America LLC (collectively, "Sony") hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, from the Court's Order, dated February 21, 2014, and So-Ordered Transcript, dated March 3, 2014, relating to Sony's Motion for Partial Summary Judgment Declaring That Zurich and Mitsui Have a Duty to Defend and Zurich's and Mitsui's Cross-Motions for Summary Judgment (Motion Sequence No. 14), docketed in the office of the New York County Clerk on February 24, 2014 and March 4, 2014, respectively, and with respect to which a Notice of Entry was filed and entered on March 10, 2014 (copies of all of which are attached hereto as Exhibit A).

Dated: New York, New York
April 9, 2014

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: */s/ Stephen G. Foresta*

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Attorneys for Defendants Sony Corporation of America and Sony Computer Entertainment America LLC

TO: See Attached Service List (Exhibit B)

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZURICH AMERICAN INSURANCE COMPANY, Plaintiff, -against- SONY CORPORATION OF AMERICA, et al., Defendants.	Index No.: 651982/2011 Commercial Part 48 (Oing, J.) **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached are true and correct copies of an Order, dated February 21, 2014, and So-Ordered Transcript, dated March 3, 2014, of the Supreme Court of the State of New York (Hon. Jeffrey K. Oing), which were entered by the Clerk of the Court on February 24, 2014 and March 4, 2014, respectively.

Dated: March 10, 2014
New York, New York

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TO:

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Daniel Stewart, Esq. White Fleischner & Fino, LLP 61 Broadway – 18th Floor New York, NY 10006 Richard H. Nicolaides, Jr. Robert S. Marshall Nicolaides, Fink, Thorpe, Michaelides Sullivan, LLP 71 South Wacker Drive, Suite 4400 Chicago, Illinois 60606	*Attorneys for Defendant, Mitsui Sumitomo Insurance Company of America*
Marsha J. Indych, Esq. Drinker Biddle & Reath LLP 1177 Avenue of the Americas 41st Floor New York, NY 10036	*Attorneys for Defendant,* *ACE American Insurance Company*

Laura A. Brady, Esq. William T. Corbett, Jr., Esq. Drinker Biddle & Reath, LLP 500 Campus Dr. Florham Park, NJ 07932-1047	
Dominic M. Pisani, Esq. L'Abbate, Balkan, Colavita & Contini, L.L.P. 1001 Franklin Avenue Garden City, NY 11530	*Attorneys for Defendant,* *Great American Insurance Company of New York*
Thomas A. Martin, Esq. Putney, Twombly, Hall & Hirson, LLP 521 Fifth Avenue New York, NY 10175 Paula Weseman Theisen Meagher & Geer, P.L.L.P. 33 South Sixth Street, Suite 4400 Minneapolis, MN 55402	*Attorneys for Defendant,* *St. Paul Fire and Marine Insurance Company*

FILED: NEW YORK COUNTY CLERK 02/24/2014 INDEX NO. 651982/2011
NYSCEF DOC. NO. 522 RECEIVED NYSCEF: 02/24/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING J.S.C. Justice PART 48

Index Number : 651982/2011
ZURICH AMERICAN INSURANCE
vs
SONY CORPORATION OF AMERICA
Sequence Number : 014
PARTIAL SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn for summary judgment denied
X mtns for summary judgment granted.
The reasons for the decision & order are set forth on the 2/21/14 record and are incorporated herein for all purposes.
If Zurich directed to order the transcript & submit it to the Court to be so ordered.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/21/14

JEFFREY K. OING, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART - 48

----------X

ZURICH AMERICAN INSURANCE COMPANY,
Plaintiff

INDEX NUMBER:
651982/2011

-against-

SONY CORPORATION OF AMERICA, SONY COMPUTER ENTERTAINMENT AMERICA LLC, SONY ONLINE ENTERTAINMENT LLC, SONY NETWORK ENTERTAINMENT INTERNATIONAL LLC, SONY NETWORK ENTERTAINMENT AMERICA, INC., MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA , NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., ACE AMERICAN INSURANCE COMPANY, XL INSURANCE COMPANY LIMITED-IRISH BRANCH, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, A-K INSURANCE COMPANIES (FICTITIOUS DEFENDANTS) and L-Z INSURANCE COMPANIES (FICTITIOUS DEFENDANTS),
Defendants

----------X

60 Centre Street
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February 21, 2014

BEFORE:
HONORABLE: Jeffrey K. Oing, JSC

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Delores Hilliard
Official Court Reporter

Proceedings

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Proceedings

COURT CLERK: Index Number 651982/2011.

In the matter of ZURICH AMERICAN INSURANCE COMPANY versus SONY CORPORATION OF AMERICA, et al.

THE COURT: Okay. The Court has before it the matters of Zurich American Insurance Company versus Sony Corporation of America, et al. Index number 651982 of 2011.

I have before me motion sequence number four, which is a motion by -- Fourteen. I am sorry, motion sequence number 14, which is a motion by the defendants, Sony Corporation of America, SCA and Sony Computer Entertainment America, SCEA for partial summary judgment on its first cross claim and first counter claim for a declaration that the defendant, Mitsui Sumitomo Insurance Company of America and Zurich are obligated to the defendant in the underlying lawsuits arising out of a data breach suffered by The Play Station network, Sony On-Line Entertainment Network, in April of 2011.

I also have within motion sequence number 14, Zurich and Mitsui's cross motion pursuant to CPLR 3212 for declarations that I have no duty to the defendant, SCEA and SCA, respectively.

Appearances for the record. For the plaintiff.

MR. COUGHLIN: Good morning, your Honor. Kevin Coughlin on behalf of Zurich American.

Proceedings

THE COURT: For the defendants.

MR. FORESTA: Good morning, your Honor. Stephen Foresta from Orrick, Herrington and Sutcliffe on behalf of the Sony defendants. With me is Richard De Natale and Peri Mahaley, also from Orrick , Herrington and Sutcliffe.

THE COURT: And for Mitsui.

MR. MARSHALL: Robert Marshall on behalf of the defendant and cross complaint, Mitsui Sumitomo Insurance Company of America.

I also have with me Amy Klie.

THE COURT: Okay. And you, sir?

MR. KELLY: Robert Kelly for Zurich, as well.

THE COURT: Okay. Thank you.

Since you're in the well you might as well tell me what your appearances are.

MR. VOSES: Marc Voses from the firm of Nelson Levine de Luca & Hamilton on behalf of National Union Fire Insurance Company, Pittsburg P.A., in opposition to the motion.

MR. CORBETT: William Corbett on behalf of Ace America Insurance Company.

MS. THEISEN: Paula Weseman Theisen on behalf of St. Paul Fire Insurance Company in opposition to the motion.

THE COURT: I know I have other motions pending. Since this one was keyed up first I think the

resolution of this motion may take care of the other motions that are sort of percolating out there.

The way I look at it, after we have done this today I would suggest that we let the dust settle on how this plays out. And then for you folks we will give you a control date. Then, at that point we will figure out what we should do next in terms of how we go about taking care of this case.

So, having said that , okay, we all know what the underlying facts are in this case.

There was a data breach of large scale proportions which was eclipsed now by the Target data breach, I think.

But, suffice it to say there is the lawsuit that is in California that is going forward.

There was an amended consolidated complaint. It was dismissed.

But, then the plaintiffs, the class action filed another complaint.

The Federal Court dismissed certain of those claims. But, suffice it to say, it is still alive and percolating out there in California, right, the underlying complaint?

MR. COUGHLIN: Barely so, but alive.

THE COURT: Why don't you do this first. Let's talk about the exclusion.

Because, the way I look at it why talk about coverage if at the end of the day if I do find coverage there is an exclusion that kicks in and gets rid of all of that. So, I want to do the exclusion first.

But, the first thing I want to talk about is Mitsui's argument with respect to SCA is not named in the amended class action complaint.

Is that your argument?

MR. MARSHALL: That's correct, your Honor.

THE COURT: Did you take a look at the policy endorsement of your insurance contract?

MR. MARSHALL: Which endorsement, your Honor?

THE COURT: The one that I have here which listed Sony Network Entertainment Incorporated International LLC as well as Sony Online Entertainment LLC.

MR. MARSHALL: Yes, they are still the defendants.

That is subject to a separate motion for summary judgment we filed which has not been briefed yet.

THE COURT: But, they are named. Right.

So, your argument in here about how there is an issue about whether or not there is coverage at all because they are not a policyholder, did I misread that argument?

MR. MARSHALL: No.

Our argument is that the underlying litigation does not trigger the defense.

And we are responding to, they brought the motion only on behalf of SCA, not on behalf of Sony Online or Sony Network Entertainment.

So, our argument is that the underlying litigation does not trigger the personal advertising injury offense.

If that is true, then the other motion becomes a mere formality because it is the same underlying litigation.

MR. De NATALE: Your Honor, we think that the underlying case does clearly cover the privacy coverage that triggered that duty to defend.

THE COURT: You represent all of the Sony entities, right?

MR. De NATALE: That's correct.

THE COURT: So, it doesn't matter if you pick and choose who you prep. The issue is still, my guy has a policy. The fact that I went with one of my clients as opposed to the other affiliate client, it doesn't matter.

I mean, the bottom line is we have got coverage or at least we are arguing that we have coverage. And everybody that is supposed to be on these policies is there.

MR. De NATALE: That's correct.

THE COURT: That's the bottom line.

MR. De NATALE: If there has been any claim it is a duty to end the entire case. We would have later proceedings about how much they have to pay for allocation.

But, that is not before The Court today.

THE COURT: The sense I get is that the vehicle is probably the wrong vehicle. But, nonetheless, it is still one of the vehicles in my lot that I'm pursuing.

And at the end of the day, Judge, the bottom line is that we are going to argue there is coverage. It doesn't matter who pushes the argument, either the parent corporation or the subsidiary. But, we are all covered at the end of the day.

MR. De NATALE: That is our argument, your Honor.

THE COURT: So, that's for the argument later on with respect to the coverage. I just wanted to get that out of the way in terms of exclusions now.

We have one thing where Zurich is saying there is an internet type business exclusion that applies.

Before we get started, I just want to get for the record, Zurich's insurance policy and the Mitsui are identical? I looked through both of them.

MR. COUGHLIN: No. There are differences to that. They were issued separately to different entities.

THE COURT: That's okay. I'm talking about the policy language that is at issue.

MR. COUGHLIN: There is a lot of overlap on the standard wording, the insurance grants, that sort of thing. You're correct in that way.

Proceedings

THE COURT: The particularities that you're disputing or at least arguing about today are identical?

MR. COUGHLIN: Correct.

THE COURT: That is important.

So, tell me why in terms of the internet type business? And that would be falling under the B coverage. B1, J,1,2 and 3.

MR. COUGHLIN: Your Honor, would you mind if I took the podium?

THE COURT: Whatever is convenient for you.

MR. COUGHLIN: It is necessary for my eyesight.

THE COURT: Mine, too.

MR. COUGHLIN: Your Honor, let me start, if I may, with the issue of the exclusion which obviously follows, as it must, the issues with respect to the insurer's view that there is a total absence of publication here and coverage B doesn't apply.

THE COURT: Putting that aside for the minute.

MR. COUGHLIN: Yes. The issue with the exclusion is wrapped up, your Honor, with other issues that have brought us here today that cannot be ignored.

And that is, the Zurich policy as well as the Mitsui policy was never intended to cover cyber losses.

THE COURT: You know, whatever your intent is, the bottom line is that I'm restricted to what the policy terms

are.

So, you can say intent. We only get to intent if I find there is an ambiguity.

If there is no ambiguity I don't have to go to the intent aspect of what you insurance companies thought you were providing and what the policyholders thought they were getting.

So, the bottom line is I just have to look at what we have here.

MR. COUGHLIN: I agree, your Honor.

THE COURT: So, hearing for the record what the exclusion says, personal and advertising injury, this is excluded. Personal and advertising injuries committed by an insured whose business is.

One and two are out. It is three, which says an internet search access content or service provider.

Now, the question then becomes is Sony or any of the Sony defendants here falling into that category.

MR. COUGHLIN: The answer for today, your Honor --

THE COURT: For today?

MR. COUGHLIN: Is that SCEA is an entity that fits within 3. Because, Sony decided to only move against my client on that entity.

That was a decision they made. So, it is not in front of your Honor today.

And what is interesting --

THE COURT: You know what, that is interesting that you say that, but for today.

I don't know how you folks want to do it, but I just want to be done with this. There is no today, tomorrow or yesterday.

I mean, I've got the Sony defendants all here. I have all of the insurance carriers here.

So, it is not going to change anything from today or tomorrow if I don't talk about whether or not the defendants, the Sony defendants, fall within the category of paragraph 3 altogether.

MR. De NATALE: Your Honor --

MR. COUGHLIN: The problem --

THE COURT: Hang on.

MR. COUGHLIN: The problem that Sony has put on your Honor's desk this morning --

THE COURT: Well, I think you're all guilty of that.

MR. COUGHLIN: Well, your Honor, respectfully, no.

They chose to move on only two entities. The SCA, parent against Mitsui and SCA against Zurich.

We were, frankly, somewhat mystified that they did it, too. But, they did it.

THE COURT: This is a summary judgment motion, so

that I can search the record.

So that as long as they are named, as long as they are a named defendant in this case when you move under 3212 I can do a lot of things. I'm not restricted to just the pleadings like a 3211 motion. I can search the record.

And I cannot stick my head in the sand and ignore something when it is jumping out at me.

MR. COUGHLIN: Your Honor, I'm happy to address our view of that.

Sony has taken positions that seem to focus exclusively on SCEA and to the omission of the other entities factually.

But, I'm happy to deal with section 3. Because, your Honor, we don't think there is any question that Sony, and I will use Sony Corp., SCA, SCEA, fits squarely into section 3 of that exclusion.

And what is interesting, your Honor, it wasn't until the summary judgment briefs that we see that the SCEA entities are now alleging it is not to them, technically. And we are really not an entertainment company, we are something else.

But, what is striking here is the public pronouncements by SCEA and Sony after the cyber breach where they were inundated with their concern about the ultimate risk here which thankfully has been de-risked substantially.

But, in those first months they issued press release after press release about who they are, what they do.

They were terribly concerned because members of Congress were crying out for an investigation. And the chairman of SCEA put a submission to them in the form of a letter describing who they are.

THE COURT: So, what you are saying then is because the defendant, SCEA, is moving for summary judgment and not the other Sony defendants, we are talking about SCEA, SCA. So that you are saying that there may be opportunities of, if I would rule, if you were not to prevail in that argument here that it is included under paragraph 3, you are saying that later on you may have an opportunity again because of the way this is teed up to argue that the other Sony defendants if they move that they may fall under paragraph 3.

MR. COUGHLIN: Well, your Honor, it is this way.

It is because the Sony entities have taken a view in the briefing that SCEA didn't have specific responsibility for the servers, for the Play Station network business, etc.. It is in their briefs that way. So, they tried to carve that out.

The other problem confronting us this morning is we believe all of their public statements, their pronouncements

where they are trying to get a handle on this problem from a public relations point of view, an over all legal view was it is SCEA. We are an internet content provider. We provide all sorts of access, Hulu, Netflix, all of these other things through the Play Station network to our subscribers.

And it is absolutely clear in those pronouncements.

THE COURT: Let me ask you in response to that question then, that that is sort of like a 3rd party service that they are doing. So, you're arguing that they fall under this paragraph 3 exclusionary language.

But, that's not the only thing they do.

They also do, according to The Federal Court's decision, which is at 2014 Westlaw 223677, that they also do in addition to what you just said, which is a 3rd party services provider.

MR. COUGHLIN: By the way, respectfully, I did not agree with that. I did not say it was a 3rd party service, your Honor.

THE COURT: I'm just using that. I'm using that analogy from what The Federal Court said here. This is how The Federal Court describes what Sony does.

Sony develops and markets the Play Station portable hand-held devices, PSP and the Play Station 3 console PSP, collectively, consoles and all consoles.

Both consoles allow users to play games, connect to the internet and access, Qriocity -- Q-R-I-O-C-I-T-Y.V

MR. COUGHLIN: Qriocity.

THE COURT: Qriocity. Sony Online Entertainment Services and the Play Station network PVS and collectively through the PSN, which is offered to consumers free of charge. Users can engage in multiple on-line games. And for additional one time fees the PS allows users to purchase video games, add on content defined as Mapsters, demos movies and movies selectively down-loaded. Users can also access various prepaid 3rd party services by connecting to Sony Online Services via their consoles or computers including Netflix, MLV, Dot TV and NSHL game center, collectively, 3rd party services.

Then, this goes on to say, before establishing a PSN Qriocity and/or SOE account plaintiffs and other consumers are required to enter into terms of identifying users with Sony and agree to Sony's privacy policy as part of this registration process.

Plaintiffs and their consumers were required to advise Sony with personal identification information including their names, mailing addresses, e-mail address, birth dates, credit and debit card information, card numbers, expiration dates and security code and log-in credentials, collectively, with personal information.

Proceedings

Now, I'm looking at that description of what Sony does. This is now in a decision. So, factually, I'm just looking at that for some guidance.

It sounds like they do more than being an internet search, or access, or content or service provider. They are sort of a hybrid. They do a lot of things.

MR. COUGHLIN: They certainly do, your Honor.

THE COURT: This policy doesn't say --

It's very clear as to what it says. It doesn't go on and say, and any other hybrid type of situation.

It's very clear. It lists 3 or 4 instances of internet search, which clearly this description doesn't fall into an internet search. Internet access, okay, internet access.

But, for internet access they do a lot of things, not just pure access.

For example as to Google or some other Internet Explorer, it is not content based in the sense that it is not just there for static information. And it is not a service provider in the sense that, oh, yes, it does service provide, but it allows people who pay up to play games on their Play Stations. So that it is sort of a hybrid.

It doesn't fall into any of these categories here at all.

MR. COUGHLIN: Well, respectfully, Judge, I think

it is a content provider. It is a service provider.

THE COURT: In what way?

MR. COUGHLIN: And the case law says it doesn't have to be the only business. It has to be a principal business.

THE COURT: That's not what this says. That is not what your policy said.

MR. COUGHLIN: Your Honor --

THE COURT: Where is it in this, your policy, in that paragraph that you say it is principally what you do?

MR. COUGHLIN: It is not there, Judge.

THE COURT: Okay.

MR. COUGHLIN: But --

THE COURT: And we know what the exclusionary language is.

The Court looked at that very carefully. Because, exclusionary language in a policy is strictly construed.

And if there is an ambiguity with respect to an exclusionary language the ambiguity is resolved in favor of the policyholder. That is pretty clear.

So that when you talk about that I would like you to point out in paragraph 3 where you get that principal language.

I looked at that policy. I didn't see it.

There was a lot of reading last night. Magnifying

glass work.

MR. COUGHLIN: Judge, the problem, Judge, and let me stay just inside of the policy and let me stay with what Sony has said outside of their briefs.

Our exhibit 16 to our motion, my affidavit, Sony describes the SCEA entity.

And they describe it, and it's on page two, that they operate the Play Station network, which is the access point.

THE COURT: Right.

MR. COUGHLIN: And it is a computer entertainment system and its on-line and network services, The Play Station network.

What I'm coming back to there in this problem, your Honor, for the reason that their on-line product and service, which is a significant component to their business, which if you look at the words of our policy -- and I don't, respectfully, believe it is just three. I think it is also paragraph two, sub-paragraph two.

THE COURT: Sub-paragraph two provides, designing or determining content of web sites for others.

MR. COUGHLIN: Yes. For their subscribers. Therein designing the Hulu and the Netflix, those are components.

They have come up with games. They have all

on-line products. A whole menu.

And your Honor, that is --

THE COURT: But, again, you don't have the word principally, principally designing or determining. It is doing a lot of things on this platform that they have.

MR. COUGHLIN: That's correct. This on-line platform, Judge.

So, that on-line platform, which is without doubt from their own witnesses a significant part of their business. Not the exclusive. We have never said that.

But, to say that unless it is the only part of their business the exclusion should not apply, I think misreads the intent of the words.

THE COURT: No. That's not misreading the intent of the words. That is just reading it on face value what the words say.

Because, there are issues in terms of these policies here.

And what you're asking me to do is you're asking me to read this, these straight forward words, unambiguous words. You're asking me to read this your way of saying that, well, it doesn't mean that's exclusively what they have to do, but principally what they have to do.

There is no such wording in here that says, either principally or exclusively.

Proceedings

But, you're asking me to read this that way.

MR. COUGHLIN: Correct.

THE COURT: And I cannot read this that way. That's not what it says.

MR. COUGHLIN: Your Honor, what Zurich is asking is that that exclusion be applied to the stated business of SCEA. That is our position, your Honor.

THE COURT: Okay.

MR. COUGHLIN: Not their's, our's.

THE COURT: Your response?

MR. De NATALE: Your Honor, this is an exclusion we are talking about. So, it has to be written out.

Zurich has a burden of proof to put in facts.

What they have done, they have pulled some statement out of a letter taken out of context and using it as some kind of admission.

We put facts in the record about what SCEA Sony Computer does. They make the Play Station.

The first Play Station that came out wasn't even connected to the internet.

THE COURT: I know.

MR. De NATALE: Most people still use it as a stand-alone product.

It does have wi fi access. But, we showed in our papers, in fact, 90 percent of the company's revenues have

nothing to do with the internet or its profits have nothing to do with the internet.

The exclusion has to be applied on a company by company basis.

THE COURT: Yes.

What about their argument? He is saying that you're moving under this summary judgment, but SCA and SCEA and not the other Sony defendants.

So, for today only we are only going to be talking about this exclusionary language.

MR. De NATALE: I will be candid about that.

We brought this motion on behalf of two companies that we thought under no possible conception should be within the internet business exclusion.

We thought we would get a quick hearing. We were hoping to avoid any discovery.

The insurers insisted on taking all of this discovery and went through all of our files to try to prove the internet business exclusion.

They weren't able to come up with anything.

MR. MARSHALL: Your Honor --

THE COURT: Easy there, counsel. Relax.

MR. De NATALE: But, our motion seeks to establish coverage for all of the entities.

MR. MARSHALL: That's not --

Proceedings

MR. De NATALE: Counsel, give me the courtesy, please.

THE COURT: You've had too much coffee. Relax.

I give everybody an equal opportunity to be heard.

MR. De NATALE: Our motion seeks to establish the underlying cases allege a publication of private material.

THE COURT: I don't want to get into that now.

MR. De NATALE: That would apply to everyone.

But, on the exclusion we only moved on behalf of the two companies who under no conceivable way fall within the exclusion.

Later in the case they can try to show that the other two Sony defendants fall within the exclusion.

I think they will fail. But, that would be an open issue later in the case.

MR. MARSHALL: I think he clarified it.

Procedurally, Sony filed its motion for partial summary judgment on behalf of two entities, only. They weren't seeking coverage from all Sony entities.

They did so because they thought they had the best chance to avoid the exclusion on those two entities.

THE COURT: Okay.

MR. MARSHALL: After they filed that motion The Court allowed us to conduct discovery with respect to application of the exclusion.

So, that's why this is being briefed in two stages. Meaning, SCA, SCEA first. And then later we filed a motion for a summary judgment with respect to the on-line company and the network company. Because, there was discovery ongoing. And that's why it's separate.

So, that hearing should not decide coverage with respect to the on-line entity.

THE COURT: So far the issue that I have in front of me with respect to the exclusion is limited to SCA and SCEA.

And any ruling I make at this point on going forward even with respect to coverage, even with respect to-- I mean, when we get into the arguments with the coverage issue it's only as to, as Mr. Coughlin indicated being pressed, is only involving SCA and SCEA; correct?

MR. MARSHALL: Okay. I'm fine with that, your Honor.

THE COURT: This is evolving into a situation where, okay, if I have it for another day it will be teed up for another argument. It will be teed up for another argument.

MR. De NATALE: One last application.

SCA, Sony Corporation of America, there is no argument with respect to the exclusion. For SCA, Sony Corporation of America, the exclusion is irrelevant.

Proceedings

THE COURT: SCA. But, SCEA is in the mix. That's where Zurich is making the argument.

MR. MARSHALL: SCA had nothing to do with the network issues, so we don't make any arguments.

THE COURT: You know, I've heard the arguments here. I'm not convinced at this point that paragraph three that is involved here or paragraph two that is involved here with respect to -- I mean, paragraph two.

Let me just say this right here. It says, right here, I am sorry to repeat it for the record.

J, the heading for J is insurance in media and internet type businesses. Personal and advertising injury committed by an insured whose business is, and paragraph two, is being put in play, designing or determining content of web sites for others. Or three, and internet search access content or service provider.

I've heard the arguments here. And when you read this there is no qualifying language in this exclusionary clause here. It doesn't say principally. It doesn't say exclusively. It just lays out the words here in front of me. And it's very clear.

Under the facts that I have for SCEA, the defendant SCEA, it is clear. It is not just this.

Paragraph two and paragraph three does not come into mind at this point.

Because, I'm looking at The Federal Court's decision in terms of the description. Because, The Federal Court in The Judge's decision, Judge Battaglia's decision, a very thoughtful decision, he defines or at least he sort of describes what SCEA does. Because, he names SCEA right in the beginning of describing who the defendants are in this case.

And it gives me the sense that this is a hybrid situation where it does a lot of things, SCEA. It is not just limited to what is going on here in this exclusionary language.

So that when you don't have the qualifying language of exclusively or principally, although Mr. Coughlin, counsel is arguing that that's what is at play here, I'm not going to read in a term here that doesn't belong.

So, under those circumstances I don't find that SCA is not involved or implicated in this issue here.

But, I don't find SCEA falls within the exclusionary language that is set forth in this policy that I have in front of me.

As I said earlier, the case law is very clear. When you come to the exclusionary language it is read very strictly. It is construed strictly. There is no, I do not find any ambiguity here.

Under those circumstances, I don't find the

exclusion of J2 or J3 applicable to the defendant SCEA.

So, that's my decision with respect to that first issue.

Let's turn to the second issue, recording and distribution of material or information in violation of the law of exclusion.

That is your argument. That is Mitsui's argument, isn't it?

MR. MARSHALL: No.

THE COURT: I thought you wrote that in your demand for denial for coverage? No?

MR. MARSHALL: That's not the basis for our summary judgment motion.

THE COURT: That was in your denial letter. But, that's not being pressed here?

MR. MARSHALL: That is not part of our motion for summary judgment.

THE COURT: Then, the next one is the criminal acts. Same thing?

MR. MARSHALL: Not part of the issue.

THE COURT: That's not part of it, either? I just wanted to get that out there.

MR. MARSHALL: I can probably kind of cut to the chase, your Honor.

The only basis upon which Mitsui moves for partial

summary judgment is the fact that the publication of the personal advertising injury offense is not satisfied by the allegations of the underlying litigation.

THE COURT: All right. We are going to get to that in a minute. That's how we are going to get to the heart of it.

I have taken care of all of the exclusion stuff. Now, we are going to get to the coverage stuff here.

And I will turn to the Sony defendants to start that argument as to why they think there is coverage under this policy for what we have here.

MR. De NATALE: Thank you, your Honor.

For more than 20 years insurance companies in The United States have sold general liability policies just like the ones your Honor has before it that include coverage for privacy claims.

The clauses there are written broadly. It's intended to cover many types, a wide variety of privacy torts.

The clause has no limitations or restrictions that depend upon who makes the disclosure, how the material is disclosed or to how many people the material is disclosed.

And under New York law, since it is part of an insurance clause it must be issued broadly.

That's what the courts have done. The courts have

applied that clause to that wide variety of situations where there is a disclosure of private information or unauthorized access to private information.

In the year 2000 the language of this clause was expanded to make clear that it covered the internet. And that's the nature of insurance.

The world changes. New torts are being alleged all of the time. And old policies have to be adopted to cover new situations.

THE COURT: All right.

The provision here that is in dispute is in the definition section.

MR. De NATALE: Yes.

THE COURT: That's in the definition section 5.

We go to paragraph 14. And I will state for the record what paragraph 14 says.

Paragraph 14. (Reading). Personal and advertising injury means injury including consequential bodily injury arising out of one or more of the following offenses which provides, which there is coverage for.

A, false arrest, detention or imprisonment.

B, malicious prosecution.

C, the wrongful eviction from wrongful injury into or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies committed by or

on behalf of its owner, landlord or lessor.

D, oral or written publication in any manner of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services.

E, oral or written publication in any manner of the material that violates a person's right of privacy.

And F, the use of another's advertising idea in your advertisement.

G, infringing upon another's copyright, trade, dress or slogan in your advertisement.

And that is it. Right? That is it.

So, the focus now is, the dispute that we have here is the definition or is focused on E, which is oral or written publication in any manner of material that violates a person's right or privacy.

The case law out there is clearly, or at least not clearly, but having to do with pollution cases.

I haven't seen any data breach case of this magnitude involving this kind of policy.

And the courts haven't addressed this yet. It seems like this is the first one that has come up.

MR. De NATALE: Your Honor, there have been cases addressing all kinds of similar issues, unauthorized access.

THE COURT: Not like this nature where you had a

hacking into the system.

MR. De NATALE: I agree.

THE COURT: But, a lot of the other cases that we have seen have talked about environmental impact, pollution cases.

They all basically say it is not the 3rd party act that gets you coverage, but it has to be the policyholder/insurer's acts for you to get coverage, for coverage to apply.

MR. De NATALE: So, your Honor, the pollution cases that you're talking about are under section C, the wrongful injury prong. And nothing to do with the privacy prong.

If you see under section C, your Honor, there are additional words in that provision that say committed by or on behalf of owner, landlord or lessor. That is usually the policyholder.

In section C they added words saying the offense has to be committed by the policyholder.

THE COURT: But, aren't there cases out there that said - I looked at some, I don't remember what they are - but they kind of grouped A through E together and said this all has to be done by a policyholder. It cannot be affording coverage when this happens when a third party intervenes or does something.

MR. De NATALE: Your Honor, only under The County

of Columbia case. The cases don't say that under the privacy prong.

I think each one has to be considered separately.

This is a duty to the defendant motion.

And your Honor is well aware that the duty to defendant is exclusively broad in New York. Coverages are read broadly and the complaints are read broadly, here's what we have been sued for. In the underlying cases there are many, many examples.

The chief complaint says that Sony disclosed private information to unauthorized parties and invaded plaintiff's privacy.

The Deiter (phonetics) case says the same thing.

The complaint says that millions of customers had their financial data compromised and had their privacy rights violated.

There are five other complaints that say the same thing.

The John's (phonetics) complaint says this action is brought to address the defendant, Sony's, violations of consumers right of privacy. There are five other cases that say the same thing.

The NBL (phonetics) case, when it was all consolidated in a multi-district proceeding says that Sony breached the duty of care to protect personal information

from being disclosed to unauthorized parties and placed sensitive information in the hands of cyber hackers.

The amended NBL complaint, the most recent one, in four different places says the class members have suffered a loss of privacy.

These are the allegations, your Honor.

THE COURT: But, you're looking at those allegations in a vacuum. Because, the totality is that the hackers, that your security features weren't sufficient to prevent hackers from coming in and getting access.

While the plaintiffs have to say that you guys breached the duty to them, I mean, they are not going to sue the hackers because they cannot find the hackers. They can find the guy that had all of the information. That's you.

So, they are coming in and they hacked into your security system.

So, Sony is the victim here.

MR. De NATALE: We are the victim, but being sued.

THE COURT: You're being sued by others.

But, the question is, does this policy prevent, does this policy provide you coverage for you being the victim rather than being the perpetrator.

MR. De NATALE: Right.

So, we are being sued on this allegation that we collected people's private information, implemented security

factors that they claimed was inadequate that resulted in that disclosure of millions of people.

THE COURT: But, you didn't disclose. It wasn't your act of disclosure. Someone broke into your --

Who used the analogy of a bank robber going into a bank and taking money as being an unauthorized ATM withdrawal?

I mean, that is not your fault.

MR. De NATALE: And the policy grants coverage for publication in any manner of material that violates the right of privacy.

It doesn't say it has to be publication by the policyholder. It says in any manner.

And I think that is inconsistent with -- If they wanted to write a clause that says publication committed by the policyholder they could have done that. That's what they did in section C.

But, what they wrote in a clause that says publication in any manner, I think that's inconsistent with reading an implied requirement here that it has to be by the policyholder.

New York law doesn't allow implied exclusions.

THE COURT: F and G is also new, too. Because, I think, virtually all of the cases that I looked at dealt with A through E. No one talked about F and G.

Proceedings

I think F and G is a new insert in the CGL that hasn't been discussed yet.

MR. De NATALE: There used to be a separate, a separation of advertising injury and personal injury. They were combined together and F and G got added.

THE COURT: But, the interplay, I was curious to see what the interplay was or how courts review having F and G. How that would impact any of the A through E type of discussions that we have.

MR. De NATALE: Your Honor, may I point you to another provision?

I have a hand-out here, if that would be helpful to The Court, that blows up the language.

MR. COUGHLIN: I want to see the exhibit.

MR. De NATALE: It is section 1B of the policy.

THE COURT: 1B in the front?

MR. De NATALE: Yes, in the personal and advertising.

(Handed)

THE COURT: Hang on a second.

(Peruses)

THE COURT: Yes, I've got it.

MR. De NATALE: The reason this is important, your Honor, is that I want to be clear.

There are expressed requirements contained in this

coverage part A. They are here in paragraph 1B.

It says the insurance applies to personal and advertising injuries caused by an event or arising out of a business.

That is one requirement. It has to arise out of a business.

But, only if the offense was committed in the coverage territory. In the coverage territory, which is defined to be for internet offenses any part of the world.

And third, it has to be during the policy period. That's the third requirement.

It doesn't say by the policyholder. It doesn't say it has to be intentional and not negligent.

If the insurers wanted to write express requirements this is the place to put them.

They put three in here. We have met all three.

And now they are trying to re-imply restrictions in requirements which are just not in the text.

New York law doesn't let you do that.

THE COURT: But, you know, the problem with that argument is that when you say this insurance applies to, quote, "personal and advertising injury," unquote, what is that defined as?

You go here and look at paragraph 14 and that defines it. So, everything in paragraph 14 gets thrown in.

Proceedings

MR. De NATALE: Absolutely.

But, no where in 1B or 14 does it say it has to be by the policyholder. It just doesn't say that.

And you know, we use an example --

THE COURT: This doesn't say that. But this is a CGL policy that you've already said it's an insurance policy that insures the policyholder against its acts or acts of its employees or affiliates. You know, this covers all of those for their acts.

So that you're telling me now that that's not what it is? It actually embraces actions from 3rd parties in a hacker situation?

MR. De NATALE: The coverage for your acts, your Honor. But, it covers you for acts of negligence.

CGL policies traditionally covers you for acts of negligence.

If someone falls on your premises you haven't pushed them over.

THE COURT: By that argument, doesn't that expand the liability of the insurance company?

That's not what they bargained for. They are bargaining with the policyholder.

MR. De NATALE: Your Honor, absolutely, it's what they bargained for. It turns insurance on its head.

Insurance typically covers your negligence. When

someone slips and falls because your sidewalk is wet or when you build improperly and something falls down, that is negligence. And you're covered for your negligence.

THE COURT: That's why if you have those kinds of situations -- Let's go to construction contracts, for example.

You know, a contractor takes out an insurance. The insurance policy is not going to cover the sub. The sub has to name the contractor in their policy.

MR. De NATALE: But, the contractor can sue for the sub's negligence. The contractor is covered, it is. That's section 8 of property damage.

But, under section B, absent some express language that bars coverage for negligence, and there isn't any, it should be covered, your Honor.

And all of the other restrictions that they just want to, they turn the insurance on its head by reading this narrowly.

Let's talk about the word publication, which has been a big focus in that case.

The insurers say publication means only one thing, wide spread disclosure to the general public in the sense of a public announcement or a publication of a book or magazine. Those are meanings of the word.

But, there are other meanings of the word that are

narrower and simple and have the straight forward meaning of a disclosure, a statement or a disclosure.

If you look at Nisarrels (phonetics), we cite in our brief synonyms for publication are to disclose or simple disclosure. Black Law dictionary.

THE COURT: The term publication is very broad. I think the term disclosure is more narrow.

Disclosure is something where I think the person that has the information does something to disclose. I means, that's something.

Publication, I think, contemplates a situation where anybody and everybody can sort of get something out there, like the defamatory statements.

You have a publication. It is not necessarily the person that is actually doing the defaming that publicizes. Somebody else can pick it up and publicize it. Then, that person who actually wrote the piece can be sued for defamation. But, they didn't publish it. Somebody else published it and they got it out there. That's how you link up in terms of publication.

In my mind it's more broad. It doesn't necessarily mean that it is restricted to the actual wrong doer or tort feasor.

But, disclosure is a little bit different, a little more narrow.

MR. De NATALE: I think you can have a negative publication and you certainly can in a defamation context. That's the immediately previous paragraph that your Honor saw the same phrase, publication in any manner is used in a defamation clause and also used in the proxy clause. This must mean more or less the same thing.

And the restatement of defamation, your Honor, under the very interesting example of a cartoonist who wrote a defamatory cartoon and leaves it on his desk where co-workers go by and see it. And they see this person is defamed. That's a negligent publication of defamatory material, because the person allowed access to that defamatory material to others. And the victim was then defamed.

THE COURT: You know, the Butts case, the West Virginia case, it is not so bad what this says.

I mean, I know, you didn't --

MR. De NATALE: We don't like this.

THE COURT: You know, you should not be so quick to not like this. Because, what this did here is very interesting.

They talked about D and E in their decision.

The standard for D, the publication was not done by the defendant company. The publication was done by the doctor and an employee. More specifically, the doctor who

examined the injured plaintiff. And he put a report out there that the plaintiff said was defamatory.

So, with respect to D, and clearly that is not a situation where the insured, the policyholder made the publication, but it was the doctor. They said that was fine. They said that there is coverage or the duty to defend in that situation.

Before, for E they said that for E they needed somebody. They needed the actual person to do it. The policyholder had to do it for E.

So, I looked at that and I said, okay, they split this, D and E. They split it, saying that on the one hand they're saying you don't have to have the policyholder for D. But, on E they are saying you do have to have the policyholder act, to do the act.

I examined D and E very carefully. I looked at the D and E here. There is a big difference there.

D and E in my case here has "in any manner." It's very expansive.

MR. De NATALE: That's not in the Butts case; that's correct. That is not in the Butts case.

THE COURT: Not such a bad case.

MR. De NATALE: And it is not in The County of Columbia case either.

That's the case they rely on for that notion that

all of the courts require purposeful conduct and insurance only covers purposeful conduct.

The County of Columbia case, that case is focused on pollution. And this does make a statement about all of these clauses. But, it is really about the wrongful injury clause.

And that case was decided before this coverage was even part of the standard policy with endorsement and before the words "in any manner" came in.

THE COURT: I have got it. Have a seat.

Your response, Mr. Coughlin?

The "in any manner" is pretty broad don't you think? This is not the typical kind of language that I have seen in all of the other cases.

MR. MARSHALL: I just have to clarify one thing. We are getting ahead of ourselves.

THE COURT: I'm not getting ahead of myself.

MR. MARSHALL: When we are talking about the insured published anything, we are assuming that the underlying complaints are alleging that the hackers published something. But, it doesn't allege that.

THE COURT: I didn't assume that.

MR. MARSHALL: The plaintiffs are only alleging that they have a fear that the hackers may do so.

But, there is no allegation that the hackers

themselves published anything.

THE COURT: That is getting into real subtleties.

Because, I look at it as a Pandora's box. Once it is opened it doesn't matter who does what with it. It is out there. It is out there in the world, that information.

And whether or not it's actually used later on to get any benefit by the hackers, that in my mind is not the issue. The issue is that it was in their vault.

Let's just say to visualize this, the information was in Sony's vault. Somebody opened it up. It is now, this comes out of the vault. But, whether or not it's actually used that is something, that's separate.

On the one hand it is locked down and sealed. But, now you have opened it up.

You cannot ignore the fact that it's opened for everyone to look at.

So, that in the sense, that is why I had the discussion with counsel about publication versus disclosure. Publication is just getting it out there. Whether or not if this were in the box, still there is no publication.

When you open up the box, it's The Pandora's box. Everything comes out.

MR. MARSHALL: But, the information was stolen.

THE COURT: I know the information was stolen.

But, the way I look at it the information was

stolen, so that in itself is something that is out of the box. It is no longer in the box.

MR. MARSHALL: There is a New York case that tells you what publication is.

THE COURT: With a data breach situation?

MR. MARSHALL: Very similar. A hacking situation.

THE COURT: What is the case?

MR. MARSHALL: It was in our brief, Lunney versus Broad Prodigy Services Company.

THE COURT: Hold on a second. I think I might have it.

MR. De NATALE: Do you have a copy, counsel?

MR. MARSHALL: It is in our brief.

THE COURT: Hold on a second.

(Peruses)

THE COURT: You have got to like the decision when it starts out by saying, some infantile practical joker. You have got to like that.

(Peruses)

THE COURT: It says right here, the plaintiff now seeks monetary damages as compensation for the emotional distress which I consequently suffered not from the originator of this low brow practical joke, but instead from The Prodigy Services Company, hereinafter, Prodigy. The company which in effect furnished the medium through which

the offensive message was sent.

That's not the case here. That is not a hacking case.

MR. MARSHALL: Someone broke into Prodigy's system, created a fictional e-mail account and then transmitted obscene e-mails and put them on the bulletin board.

It's very similar.

THE COURT: That's breaking into or that's hacking into a system to send a message.

This is different. This is hacking into a system and getting information out.

One is using that system to transmit. The other, in my case here, is breaking into a system to get information.

This is not a getting information. This is giving information.

MR. MARSHALL: Well, if anything is publication it would have been hacking in hand, then transmitting information out to the public, which is Prodigy. Right?

That's more close to publication than stealing information.

THE COURT: No. That I would tend to agree The Court seeing that may not be a -- you're hacking into a system to get information out. That's less likely.

That's very different from my situation where, you

know, I've got something locked down in a box and sealed, at least I believe it is, for no one to get into. And all of a sudden someone pops it out and this just gets out.

Those are apples and oranges types of facts here. I'm not so sure I'm agreeing with that argument.

But, I think Mr. Coughlin wants to respond now.

MR. COUGHLIN: I've been waiting patiently.

Your Honor, I want to start with a comment that my adversary made when he was arguing about the clause in this definition. And he called it an exclusion.

It is not an exclusion.

THE COURT: No, it is not.

MR. COUGHLIN: It is what I would characterize as a gate keeper issue.

It is part of the insurance grant which Sony has the burden to satisfy.

THE COURT: It's a coverage portion.

MR. COUGHLIN: It is the insuring grant. You're absolutely right.

THE COURT: I'm not disputing that.

MR. COUGHLIN: Let's look at the history of this.

In their opening brief Sony says there was a publication.

And I refer you to a couple of words and a couple of the 50 odd class actions which have that word.

But, at the same time they were arguing in the consolidated class action that we didn't do anything wrong. We didn't disclose anything. We didn't publish anything. We did nothing. We are a victim, as your Honor has characterized this.

And they cited for The Court a number of cases which have dealt with that clause and the oral or written publication issue.

Every one of those cases that they cited to you included a finding by The Court that there was a necessary and affirmative act by the insured.

And the reason that's important, Judge, and I want to get --

THE COURT: That's all of the pollution cases.

MR. COUGHLIN: No, Judge. That has nothing to do with this point right here.

My adversary talked about slips and falls, and bodily injury and all of the rest of that.

Third party liability is addressed in part A of a general liability policy. And it protects an insured for 3rd party negligence and injury.

However, the personal injury section has specific enumerated torts which all have intention as part of their requirements.

And although Sony would like to ignore The County

of Columbia case, The Court of Appeals in that decision said you have to have intentional affirmative conduct by the insured here.

THE COURT: I know in that Columbia County case it has to do with a pollution case.

MR. COUGHLIN: But, The Court went on, Judge, though. The facts of that case dealt with seepage of pollution.

But, in that opinion The Court made it clear in their discussion of the personal injury section of the policy the view, which is the national view, that there must be affirmative conduct, action by the policyholder for that to kick in.

THE COURT: There we are talking about 14C; correct?

MR. COUGHLIN: No, Judge. With all due respect, they went beyond that.

Sony would like you to believe that that is all they did.

But, The Court, and I refer you to page 628. And they are talking about D.

THE COURT: Page 628? Hold on a second.

Got it.

MR. COUGHLIN: It is the last page of the decision, your Honor.

Proceedings

THE COURT: Yes.

MR. COUGHLIN: Evidence that only purposeful acts acting were to fall within the purview of the personal injury endorsement is provided in part by examining the types of torts, plural, enumerated in the endorsement in addition to wrongful entry/eviction and invasion.

And then they go on to say, false arrest, detention, imprisonment, malicious prosecution, defamation and invasion of privacy by publication.

Read, and I'm quoting, "Read in the context of these other enumerated torts the provision here could not have been intended to cover the kind of indirect and incremental harm that results from property injury from pollution."

The importance of that clause, Judge, to this case is significant.

And Judge, the other part that I think is very important is the total shift --

Would you like me to wait, Judge?

THE COURT: Yes. Give me a second. I'm just looking at something.

(Peruses)

THE COURT: Here's the question I have for you on that Columbia case.

It says here, we agree with The Appellate Division

that coverage under the personal injury endorsement provision in question was intended to reach only purposeful actions undertaken by the insured or its agents.

Then, this goes on to say, evidence that only purposeful acts were to fall within the purview of the personal injury endorsement provided, in fact, by examining the types of torts enumerated in the endorsement in addition to wrongful injury, eviction, invasion, false arrest, detention, and malicious prosecution, defamation and invasion of privacy by publication.

In the context of these other enumerated torts the provisions could not be intended to cover the kind of indirect nor incremental harm that results from property injury from pollution.

I looked at that. And that's what I said earlier. I mentioned this to counsel earlier.

There is case law that lumps A through E together. Right? It's a policyholder.

The only way you're going to get coverage or the only way this is coverage, the policyholder has to commit these acts under A through E.

MR. COUGHLIN: Respectfully, they don't lump them together, Judge.

This is such a unique grant of coverage. They separated out.

THE COURT: But, they ultimately say, it's the policyholder that has to do it; right?

MR. COUGHLIN: There is no question. The Court of Appeals is in a main stream on that.

THE COURT: Here's the question I have for you.

Looking at that, F and G, that we have here now, they didn't talk about. But, we have that F and G here now.

Counsel is saying that at some point there was some shifting of the policy, some sort of changing. But, in any case, F and G is in here in this definition section. Okay.

All right. So, F says "The use of another's advertising idea in your advertisement." That's in quotes. Or G, "Infringing upon another's copyright, trade, dress or slogan in your advertisement." And that's in quotes.

So, I thought, okay. What does advertisement mean?

So, you go back to the beginning of advertisement. And where it says in advertisement, it's very interesting what it says in section 5, 1. Advertisement, in quotes, "Means a notice that is broadcast or published to the general public or specific market segment about your goods, products or services for the purpose of attracting customers or supporters for the purpose of this definition."

A, notices in a publication include material placed on the internet or similar electronic means for communication.

And B, regarding the web sites, only that part of the web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

When I looked at that definition of advertisement, that doesn't say anywhere that it says by the policyholder. That says, generally speaking.

I mean, not even generally speaking. It says, advertisement. It doesn't say that you, the policyholder.

MR. COUGHLIN: You have got to go back to the start. The personal injury section talks about the insured's business.

This has nothing to do with this case, Judge, nothing.

THE COURT: That has a lot to do with the case. Because, I'm trying to figure out whether or not E, that is at issue here, requires that it has to be committed by the policyholder or it can be read the way it is written to include not only the policy holder's acts but other people's acts.

MR. COUGHLIN: With all due respect, it is not written that way.

And The Court of Appeals, which is governing law, recognized that it has to be an affirmative act.

THE COURT: I understand that. But, The Court of

Appeals did not have F and G in front of it.

MR. COUGHLIN: Judge, you don't have F and G in front of you.

It is not, respectfully, it is not an issue in that case.

THE COURT: You know, when I make this an issue this becomes an issue.

That's what I have in front of me.

Look, it is not Orwellian where I can say it doesn't exist, and I'm not going to look at it and I'm just going to limit myself to what you put in front of me.

I'm an educated fellow, I can read everything.

I cannot look at these policy provisions in a vacuum and say this is what it is, I don't care what the other clause says. That is not how you read policies.

MR. COUGHLIN: Judge, Sony is invoking coverage through the oral or written publication clause.

THE COURT: Right. And the fight between you two now is that you are saying that E means it has to be conduct by, has to be perpetrated or performed by a policyholder.

They are arguing saying, no, that is not how it is read. It can include not just us but other actions or acts by other people.

That's what the fight is.

MR. COUGHLIN: Well, truthfully, Judge, they are

arguing both.

In their opening brief they argue they satisfied the publication requirement. Because, they pulled a couple of words out and they cited a whole bunch of cases to you.

All of them require, however, purposeful conduct.

THE COURT: I'm not so sure I agree with them saying that they are the publication. That they published it. Okay. That is one aspect.

MR. COUGHLIN: That is part one.

In the reply they shifted gears completely.

To satisfy their burden they are now saying, ignore the oral or written publication issue. Replace the word publication with disclosure of personal information.

And your Honor brought up the "in any manner."

In any manner is a clause that affects the publication issue. It is not disclosure of personal information in any manner. It doesn't modify that phrase. It modifies the prior one just on sentence construction.

But, the idea, and this goes back to some comments your Honor made on the exclusion section, the idea that you can ignore words in a contract and say we are going to ignore the oral or written phrase, we're going to white it out. We don't like the idea of publication. So, we are going to call it disclosure now. And we are going to read just disclosure of personal information, which could be by

anybody anywhere, that is not what this coverage provides.

And the words negligent disclosure, that is not on this part of the policy, your Honor.

But, everybody knows there is no coverage under part A of the policy.

THE COURT: The thing I look at in terms of the County of Columbia case, they don't use the wording in any manner anywhere in their description. So, I don't know if they had that issue in front of them with the phrase, in any manner. That's number one.

Number two, with respect to the coverage provision in A, under A for bodily injury and property injury, there is no personal and advertising injury in there. Right?

MR. COUGHLIN: Judge, that's not a part of the case. They acknowledge.

THE COURT: I know. But, you brought it to my attention.

MR. COUGHLIN: I didn't. They did.

THE COURT: Okay. Whoever brought it to my attention, it is not there.

So, I'm only focusing on the coverage B.

MR. COUGHLIN: Correct.

THE COURT: I'm not so sure that in any manner can be just read the way you're reading this.

Why would you put in any manner? If you wanted to

keep it simple and not even make this more complicated than it is? You could have just left it alone and done what the West Virginia court did and just have it like that without using "in any manner."

Why all of a sudden? How can I ignore in any manner?

MR. COUGHLIN: You don't need to ignore this, Judge. You put this where it belongs.

THE COURT: Wait a minute. When you say where it belongs, I'm not putting this anywhere. I'm just reading it the way it is here.

It says oral or written publication in any manner of material that violates a person's right of privacy.

MR. COUGHLIN: Correct. Oral or written publication in any manner.

THE COURT: So, what does that mean to you?

MR. COUGHLIN: This means that there are many ways to publicize it. An oral or written publication in any way.

It doesn't mean you can replace the word publication with disclosure. And it doesn't mean --

THE COURT: I agree with you. That's fine.

MR. COUGHLIN: Well, they cannot get beyond that issue, your Honor.

But, also, you don't apply it the way the sentence structure is drafted to the disclosure of personal

information. It does not apply there. It applies to the prior clause.

And I think it's clear there.

And there are cases, Judge, around the country. And there are a handful of them. Every one of those cases recognized they had to find a publication that was caused by the policyholder. And there are like 7 or 8.

In their opening brief they cite a bunch. We cite many of them for the same proposition.

THE COURT: Those publications had to do with defamation, though, right?

MR. COUGHLIN: No. These are data disclosure cases, Judge. All of them, every one of them is data disclosure case.

Judge, can I just point out a case that I think answers your question from The Federal Circuit, The 11th Circuit?

THE COURT: These are all cases outside of state, though. Therefore, not guidance in the sense that I can look at to see where I want to go with them.

MR. COUGHLIN: Correct, Judge. But, I was answering your direct question.

In our brief we point out that in the Creative Hospitality Ventures case The Court ruled the phrase, in any manner, merely expands the category of publications such as

e-mails, handwritten letters and perhaps blast factors covered by the policy.

THE COURT: What is the cite of the case? What is the name of the case?

MR. COUGHLIN: I am sorry. It's Creative Hospitality Ventures versus US Liability Insurance Company.

THE COURT: Do you have a copy? I don't have that.

MR. COUGHLIN: I don't have it with me, your Honor.

MR. MARSHALL: Yes, your Honor.

We are going to pull out the whole case.

THE COURT: A piece meal of it. Okay.

MR. MARSHALL: Yes. Cited in our brief, your Honor.

(Handed)

THE COURT: I am not sure I understand what they are trying to say.

"We likewise reject the ETL argument that the phrase in any manner expands the definition of publication to include the provision of a written receipt."

And then they go on to say, The District Court noted the phrase "in my manner" merely expands the categories of publications such as e-mails, handwritten letters and perhaps blast factors covered by the policy. But, the phrase cannot change the plain meaning of the underlying terms of publication.

So, why isn't a written receipt a publication?

I mean, it looks like an inconsistency there.

MR. COUGHLIN: No. Because, they took the written receipt as being a disclosure from the, I believe it was that cash register backed out into the public to the person who gave the credit card.

THE COURT: Okay.

An argument is, the way this is set up, an oral or written publication in any manner is the medium in terms of how that's being transmitted.

MR. COUGHLIN: Yes. We view that's how that has to be read.

The problem, Judge, is the theory that Sony is urging you to adopt requires you to take out the oral or written publication part of the enumerated defense and just put in the word disclosure in any manner of personal information. Which is, by the way, in that case, absolutely applies to the hackers.

And that is not what this coverage was intended to do.

And The Court of Appeals, I know they don't like the case, but The Court of Appeals made it clear what their version of the personal injury protection or coverage grant is, Judge.

And it is so special, Judge. Because, it is so

different than the 3rd party liability cases.

Your Honor brought up the construction defect cases, which as we all know New York County is a unique animal in that litigation in the country.

But, those cases, Judge, and the AI issues between the subs and the generals and the owners, etc, they all stay in part A. And they have absolutely no applicability to this problem.

This is a limited grant of coverage by definition, which is what The Court in County of Columbia was saying.

And your Honor, it is consistent with the cases nationally, the cases on the data breach issue and the violation issues that are springing up around the country, every one of them.

And I'm saying 100 percent of them have required an affirmative act by the policyholder and a publication. Every one of them.

That's why, Judge, Sony flipped in their reply and said, we are getting away from the publication issue. Forget it. We said that, no, we are going to go only at the disclosure of personal information issue.

And by the way, Judge, they don't cite one case in support of that issue, because there isn't one out there.

This is a gate keeper issue. This is one that they cannot get into the coverage without satisfying.

And as The Court of Appeals said over and over again, in insurance contracts you have to apply all the terms.

The only way they get here is to replace the terms.

THE COURT: Okay. Let me ask Mitsui one question.

Why did you add data breach exclusion after the fact if you believed this wasn't covered in this language?

MR. MARSHALL: We would never have expected to even be in this litigation.

I mean, to equate publication with the theft of information is such an extraordinary expansion of the policy that one would never even contemplate that we would be in this battle.

There was no, it didn't alter the premium. We didn't pull any coverage. There was no carve-out in the exclusion. It was simply meant to clarify the intent of the policy.

But, that policy is not at issue here. The policy at issue says oral or written publication.

And I need to pose a rhetorical question. That is, what is the oral or written publication?

MR. De NATALE: May I respond, your Honor?

THE COURT: I'll give you a minute.

MR. MARSHALL: I pose that rhetorical question because the argument has been the language or the phrase,

"in any manner," somehow expands it to the notion of the theft of information or inadequate security.

But, the only court in the country that squarely addresses the "in any manner" language is The 11th Circuit in the Creative Hospitality case. That is the only case in the country.

And they say, and quite clearly and I think quite logically, that the "in any manner" language is meant to go to like you said, the media of the publication. It doesn't weed out the publication.

Furthermore, your Honor mentioned the advertising injury cases as support for the proposition that, hey, there may be situations here where it doesn't require conduct by the policyholder. Well, the case law does not say that.

And in our brief on page 24 we direct your Honor to case law addressing that. Micon Sales Incorporated versus Diamond State Insurance Company, which cited to the reported California decision.

This involved the lawsuit against the insured for manufacturing clothing wrongfully bearing the plaintiff's trademark and against a retailer for advertising and selling the infringed clothing.

The insured argued that the claim implicated advertising coverage on the basis that it reasonably could have expected coverage to the extent of advertising

activities of others even though there was no allegation that the insured engaged in advertising activity.

The Court rejected that. The Court said that construing provisions to the acts of the 3rd party who was not privy to the contract cannot be considered an obviously reasonable expectation.

And in denying coverage The Court found the liability insurance purchase to protect against actions of the insured, not remote 3rd parties.

So, also, in the advertising injury context the courts have ruled this requires affirmative conduct by the insured, which we do not have here.

Moreover, every case that SCA cites in support of their position, every case they cite in support of their provision that has to do with the invasion of privacy involved the affirmative purposeful transmittal of material by the party against whom liability is asserted.

THE COURT: You know --

MR. MARSHALL: Affirmative purposeful transmittal of information.

THE COURT: You know, the oral and written publication in any manner phrase, I understand what the defense counsel -- I mean, plaintiff's counsel is arguing.

Well, before I say anything, why don't you tell me your response.

Proceedings

MR. De NATALE: If I may, your Honor. I'm glad your Honor mentioned the exclusion in the next Mitsui policy, the 2012 policy.

It shows that insurers knew how to exclude risk when they want to. When they want to exclude things they do. And that is what they did after the data breach.

What I hear here is that we are struggling mightily to put words in the policy that just aren't there.

The policy doesn't say it has to be by the policyholder.

THE COURT: The point that I'm hearing very clearly is that oral written publication in any manner, it talks about the medium in getting the case that discusses that.

MR. De NATALE: I see that case and that's not what it says.

Your Honor says correctly that would create a pollution in saying that it is saying that in any manner means in any media.

They could have written that. They could have said oral or written publication in any media.

It says, in any manner.

When I read in any manner this sounds to me whether this be negligent or intentional.

It says publication in any manner. To me that says whether this be by the policy holder or whether the policy

holder's negligence allows someone else to make the publication.

THE COURT: That's interesting that you make that point.

That First Department case where they make this distinction in that construction case where it had to do with acts and omission versus negligent acts and omission, they did not, The First Department held they didn't use the word negligent acting and omissions. Therefore, it is only merely acts and omissions that count that determines whether or not there is coverage.

That drops it down to a lower threshold. Because, when you talk about negligent acting and omissions you would have to go through all of the breach of duty and proximate cause.

If you just drop it down to just merely acts and omission that's a simpler thing to get over. Whether there was an act or omission that the trier of facts has to find to trigger coverage.

That's interesting. This doesn't say negligent or intentional. It just says in any manner.

MR. De NATALE: The County of Columbia case, I think the insurers are putting too much weight on that case.

THE COURT: But, the problem with that is that this entire policy it talks about, it's very policyholder

oriented.

Everything talks about the policyholder has to do this, the insured has to do that; this, that.

Now, we get down to this one area here where you are saying, no, that does not mean insured only. It means anybody.

So that you're asking me in that sense now to carve-out this little island for you saying, well, in this one particular -- never mind what you read throughout this entire policy which just says insured, insured, insured, here. And there are also provisions later on talking about third party acts.

But, when you get to this anything provision here, and I was pointing out F and G and how there was a dichotomy there and there might be a problem. When you point to E you say that has to be treated differently, like the tail wagging the dog.

MR. De NATALE: We are not.

These policies cover a policy hold. When you buy insurance it's the claim made against you. If you are sued for these kinds of offenses you're covered.

And you can be sued as a principal, as a respondent. You can be sued because you allowed someone else to do something.

If the claim against you is for defamation, or for

privacy or for copyright infringement, you can negligently infringe on somebody's copyright.

It's the claim against you that is covered , not necessarily your own conduct.

You can be liable for a claim, you're entitled to a defense.

THE COURT: Mr. Coughlin, isn't the medium to be arguably the hackers themselves or the medium that transmitted or publicized all of this information?

MR. COUGHLIN: No. Because, it is the manner in which the policyholder and its affirmative act published the information. That is the difference here, Judge.

The hackers, the criminals have no tie to Sony.

So, no. It cannot fit within that shoehorn.

THE COURT: Where does it say it has to be tied to Sony? Where does it say that the publication --

MR. COUGHLIN: The oral or written publication by every interpretation deals with the specific affirmative act by the policyholder.

Every one, every court in the country that has dealt with it, your Honor, has found that.

MR. De NATALE: That is not true.

MR. COUGHLIN: Excuse me. May I have the floor?

THE COURT: Hold on. You guys didn't hear what I said. You will get your opportunity.

MR. COUGHLIN: Your Honor, the oral or written publication goes to an enumerated tort under the personal injury coverage.

Every court that has looked at it says that the oral or written publication has to be by the policyholder. Every one of them. There is no exception.

THE COURT: But, those courts on a large scale data breach as this would say the same thing?

Is that what you're arguing?

MR. COUGHLIN: Absolutely.

We know now, Judge, that this case has been seriously de-risked.

That's not an issue. It is not relevant to the coverage issue. It's not relevant at all, respectfully. The disclosure --

And by the way, Sony knows they have a real problem with the oral or written publication issue. Because, in their opening brief to you that was all over their brief.

And their justification was to pull out the word publication from a couple of the complaints and ignore New York law that says you look to the gravamen of the problem.

But, then they see our reply, our responsive brief where we even point out that every case they cited to you in support of their publication issue actually supports insurers.

So, in the reply, their response, they flipped. Completely put aside publication. We are not arguing that. We are now substituting disclosure, the word, and taking out oral or written publication. And they only want that phrase to read, disclosure of personal information.

MR. MARSHALL: I have an answer for your Honor to your question.

THE COURT: What is that?

MR. MARSHALL: That is, The Court has addressed a data breach of this magnitude.

THE COURT: Yes?

MR. MARSHALL: It's an unpublished decision from Connecticut. It is called, Recall Total Information Management versus Fed Insurance Company, 2012 Westlaw, 469988.

And in that case a cart containing electronic media fell out of a transport van near a highway. So, it was under the control of the insured that it fell out of the van.

The cart and, approximately, 130 computer data tapes containing personal information for more than 500,000 IBM employees were then removed by an unknown person and never recovered.

The insured was then sued for that negligence.

And in that case The Court found that there was no

publication.

So, that is a data breach of the magnitude we are dealing with here.

And I think it's very important to understand that every case cited by Sony in support of the proposition that negligent security can be equated with publication, again, involved affirmative conduct by the insured. Every one of their cases.

And if this Court were to hold that these underlying data breach claims implicate the oral or written publication offense you would, essentially, weed out the first phrase of that offense. It would become meaningless.

Because, if that is covered then somebody that breaks into this courthouse and steals the confidential pleadings filed in this case, if that occurred then this court would be deemed to have published the information.

That is what we are dealing with here. We are dealing with the theft of information.

Moreover, the hackers themselves aren't alleged to have published. There is no oral or written publication.

MR. De NATALE: Your Honor, if I may?

Counsel keeps saying things that are just not right.

You have to address them. There are cases from around the country that have found that in situations of

passive access to information or inadvertent access to information can be a publication within the meaning of that policy case.

The Barrier (phonetics) case from West Virginia, a hotel installed surveillance cameras to a certain part of the hotel that could be accessed from the manager's office.

THE COURT: That was all of the policyholders.

MR. De NATALE: But, hear me out.

The Court said, installing the cameras was a violation. But, also the fact that there were people who could inadvertently see those clients and see the recordings, that was a publication.

THE COURT: The primary actor in the case was the policy holder?

MR. De NATALE: I think we are parsing this too fine.

In the NWN case from Oklahoma, the company had baby monitors installed in confidential counseling sessions. And the court found that the fact that that could be overheard by other people in the waiting room accessed, being overheard, that kind of passive access amounted to a publication.

THE COURT: The publication, you know, the issue I don't think it's that difficult here.

But, the question that I have, the hard question

that counsel keeps driving home you cannot get around.

His argument is, if I were to find that E allows for coverage for 3rd party acts, the hackers, I would be essentially rewriting this contract, the insurance contract. And expanding liabilities that they said that the coverage, expanding coverage when it was never contemplated.

MR. De NATALE: With all due respect, I think the after the fact argument --

The Lens Crafter's case from California, the matter personally involved, one of the issues in the Lens Crafter's case was when you went into Lens Crafter's and had your eyes examined.

THE COURT: Hold on a second.

(Short pause)

THE COURT: Go ahead.

MR. De NATALE: One of the issues in the Lens Crafter's case was when you went into Lens Crafter's and gave your eye exam to your optometrist there was another person sitting in the room who was not authorized to be there. That person didn't do anything but listen. That person heard you disclose your confidential information and had unauthorized access to that confidential information.

That was deemed to be a publication within the meaning of the privacy law.

It's a situation where passive access is not an

affirmative act. The only person speaking is the patient.

But, the passive access by the unauthorized person gave rise to a claim that it was covered under the privacy clause.

THE COURT: The Court said there was coverage.

That's a situation where they were inside Lens Crafter's and Lens Crafter's themselves let someone unauthorized sit in that room.

You know, we are getting really far away from the actual facts in the case that I have versus the facts in your case.

I mean, that is not a situation where you got the information, the patient's information and then someone on the outside is hacking into the Lens Crafter's computer system and taking all of that information.

MR. De NATALE: I'm saying, these are cases of passive access not purposeful by the policyholder.

There is no case on point either way. There is not a single case that says a massive data breach.

If I could make one other point.

In a duty to defend case, this isn't ultimate coverage.

Your Honor is well aware of how broad the duty to defend is.

I hear a struggling mightily to read words into the

policy that aren't there.

Committed by the policyholder, section C says that. Section G does not say that.

And we are looking at the underlying complaints and they are saying, yes, it says publication.

We have been sued in underlying cases for invasion of privacy, violation of privacy rights, disclosing confidential information. And I don't think we have to work that hard to establish that we are entitled to a defense absent some clear language.

THE COURT: But, it is your burden when you have to decide coverage.

MR. De NATALE: But, the policy has to be read broadly. That's their burden.

THE COURT: Mitsui made a good point. What is the oral written aspect of this publication?

MR. De NATALE: The publication here is that the information was reviewed due to Sony's alleged negligence.

THE COURT: What was oral or written about this?

MR. De NATALE: Oral or written includes electronics. That's absolutely clear.

The insurer cannot contest that. And their policy says that.

The publication was the hacking, taking and copying and potentially putting on the cyber black market the

information of millions and millions of customers.

They are taking that from Sony. That's a release of information, disclosure of information, an inadvertent publication of private information of millions of customers.

The policy says publication in any manner. And when someone else gets into your system and releases information into the internet, that's a publication.

And in the absence of clear language in the policy that excludes that kind of act we have coverage. And we have a defense.

MR. MARSHALL: With all due respect, your Honor, we are not trying to read into the policy exclusions that don't exist. We are asking --

THE COURT: We are trying to figure out coverage.

Let's get the terms correct here. The terms are not interchangeable.

This is all strictly a coverage issue here that I have to figure out whether or not I'm going to agree with the plaintiff Zurich or the defendant Sony with respect to this coverage issue.

MR. MARSHALL: Yes.

THE COURT: That is the bottom line.

MR. MARSHALL: And the bottom line is that we are asking The Court to preserve the language as written.

We are asking The Court to not gloss over the oral

or written publication language.

This would be a very different case, and I would admit this would be a very different case had Sony negligently posted personal information on line which was then accessible to third parties. It would be a totally different case.

But, that's not what happened here.

What happened here was information was stolen.

And to equate publication with the theft of information is to essentially say, I'm going to ignore the word publication. Because, no definition of publication includes theft.

THE COURT: Okay. Mr. Coughlin, your response?

MR. COUGHLIN: I have nothing further, your Honor. Thank you for your time.

THE COURT: All right. I have heard the argument. I'm giving you a decision and order right now. Because, I think it's important enough that it needs to seek Appellate review as quickly as possible.

You know, there is that struggle here with respect to paragraph E here, 14E, oral or written publication in any manner of material that violates a person's right of privacy.

It is clear that the courts have passed on portions of this type of coverage here and required that the

coverage, for coverage to actually get triggered it would have to be, the acts have to be conducted or perpetrated by the policyholder.

What I'm being asked now, and the cases are clear about that, the policyholder has to act. And it's very limited circumstances.

The West Virginia court is one of them.

The Butts case has limited the instance where it says it would be a 3rd party with respect to the dissemination or publication of slanderous material. That's the case where they took a little bit of a twist there.

But, at the bottom here, the bottom line is the question of whether or not paragraph E requires, or at least coverage is only available when it is performed or done, undertaken by the policyholder or the policyholder's affiliates and employees and so forth.

In this case here I have a situation where we have a hacking, an illegal intrusion into the defendant Sony's secured sites where they had all of the information.

That information is there. It's supposed to be safeguarded. That is the agreement that they had with the consumers that partake or participated in that system.

So that in the box it is safe and it is secured. Once it is opened, it comes out.

And this is where I believe that's where the

publication comes in. It's been opened. It comes out. It doesn't matter if it has to be oral or written.

We are talking about the internet now. We are talking about the electronic age that we live in. So that in itself, by just merely opening up that safeguard or that safe box where all of the information was, in my mind my finding is that that is publication. It's done.

The question now becomes, was that a publication that was perpetrated by Sony or was that done by the hackers.

There is no way I can find that Sony did that.

As Mitsui's counsel said, this would have been a totally different case if Sony negligently opened the box and let all of that information out. I don't think we would be here today if that were the case.

This is a case where Sony tried or continued to maintain security for this information. It was to no avail. Hackers got in, criminally got in. They opened it up and they took the information.

So, the question then becomes is that something of the kind that is an oral or written publication in any manner.

You know, I heard the arguments going back and forth.

I am not convinced that that is oral or written

publication in any manner done by Sony.

That is an oral or written publication that was perpetrated by the hackers.

In any manner, as Zurich's counsel pointed out, means oral or written publication in any manner. It is the medium. It is the kind of way it is being publicized. It's either by fax, it is either by e-mail, either by so forth. But, it doesn't define who actually sends that kind of publication.

And in this case it is without doubt in my mind, my finding is the hackers did this.

The 3rd party hackers took it. They breached the security. They have gotten through all of the security levels and they were able to get access to this.

That is not the same as saying Sony did this.

But, when I read E, E can only be in my mind read that it requires the policyholder to perpetrate or commit the act.

It does not expand. It cannot be expanded to include 3rd party acts.

As we are going back and forth, back and forth, the policy could be read this way and that way, the bottom line is it is written the way it is written.

And my finding is when you read oral or written publication in my manner, that talks about the kind of way

that it is sent out there and disseminated in the world.

It doesn't talk about who is actually doing that dissemination for that sort of a publication.

In my mind that does not alter the policy language here that covers an insured policyholder for their acts or for their negligence and so forth.

I cannot help but think that if you look at the entire policy, when I focus on this area here, paragraph E, that that has to take a different approach. That now, all of a sudden, the policy in general takes a different approach and includes acts by 3rd parties.

That's not what this says. It is just not what this says. And I cannot read it to say that.

And if I were to read it to include that , that would run into what we had discussed or argued earlier. That would be expanding coverage beyond what the insurance carriers were entering into or knowingly entering into.

That's not an expansion of coverage that I'm willing to permit under the language, of the clear language that we have here.

They had to go back and forth. But, I cannot read this in any other way than that this requires the policy holders to act. Okay.

So, under these circumstances my finding, as I said earlier, is that paragraph E that is at issue in that case

requires coverage or provides coverage only in that situation where the defendants, Sony, SCA or SCEA, commits or perpetrates the act of publicizing the information.

In this case, they didn't do that. This was done by hackers, as I said.

And that is my decision and order.

The declaration is that there is no coverage under this policy for SCA or SCEA as a result of the hacking that was done with respect to the data breach in the underlying action.

So, that is, the motion, the motion for summary judgment by SCA, SCEA is denied.

The cross motion by Zurich and Mitsui is granted.

And the declaration is under paragraph E of this policy that I have in front of me today.

Paragraph E requires an act by or some kind of act or conduct by the policyholder in order for coverage to be present.

In this case my finding is that there was no act or conduct perpetrated by Sony, but it was done by 3rd party hackers illegally breaking into that security system. And that alone does not fall under paragraph E's coverage provision.

That's my decision and order.

So, I guess to finish that up there is no duty to

defend by following that through.

Since this is something that is of a declaration, I am sufficient to have it the way it is set out here.

If you want to memorialize it and put it in a clearer language or order for me to sign, I'm happy to do that.

MR. COUGHLIN: Do you have a preference?

THE COURT: Why don't we leave it like this. Because, I think it is going to require immediate Appellate authority. So, you're Sony.

MR. COUGHLIN: I prevail. I will do the order.

THE COURT: You order the transcript. I will so order it. You will have it for your records.

I will put on the gray sheets that it is decided. I will put down that the motion is denied. Cross motion is granted. So, you will have an appealable order if you need to seek Appellate review right away. So, you don't have to wait for the transcript.

MR. MARSHALL: While we are on the record, may I ask Sony a question?

That is, given The Court's ruling and the fact that Mitsui moved on the same basis with respect to SOE and SNEI, does Sony wish to continue with this litigation and continue briefing that similar motion?

THE COURT: I'll answer for them.

Proceedings

I think that that is something that you guys have to talk about outside of the courtroom. I won't put that on the record.

The dust will settle. You guys will have your work cut out for you in the next few weeks.

I'll let the dust settle on this.

Check with my part clerk to give you a control date as to where we are going to go with this. Okay?

Thank you. Have a good weekend.

***

Certified to be a true and accurate transcription of said stenographic notes.

Official Court Reporter

3/3/14

Index No. 651982/11

mm seq no. 14

So Ordered

JEFFREY K. OING
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZURICH AMERICAN INSURANCE COMPANY, Plaintiff, -against- SONY CORPORATION OF AMERICA, et al. Defendants.	**Index No.: 651982/2011** Commercial Part 48 (Oing, J.)

NOTICE OF ENTRY

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EXHIBIT B

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Index No. 651982/2011
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Exhibit B

New York County Clerk's Index No. 651982/11

NEW YORK SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff-Respondent,

—against—

SONY CORPORATION OF AMERICA and

SONY COMPUTER ENTERTAINMENT AMERICA LLC,

Defendant-Appellants,

—and—

MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA. and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendant-Respondents,

—and—

SONY ONLINE ENTERTAINMENT LLC, SONY NETWORK ENTERTAINMENT INTERNATIONAL LLC, SONY NETWORK ENTERTAINMENT AMERICA INC., ACE AMERICAN INSURANCE COMPANY, XL INSURANCE COMPANY LIMITED – IRISH BRANCH and GREAT AMERICAN INSURANCE COMPANY OF NEW YORK,

Defendants.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF DEFENDANT-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

United Policyholders ("UP") respectfully requests leave to file this brief *amicus curiae* in support of Appellants. UP is a non-profit organization founded in 1991 and dedicated to educating the public on insurance issues and consumer rights. UP serves as an information resource and a voice for a diverse range of insurance consumers across the United States, from low income homeowners to international businesses. Donations, foundation grants and volunteer labor support the organization's work, which is divided into three program areas: Roadmap to Recovery (helping disaster victims navigate the insurance claim process and recover fair settlements), Roadmap to Preparedness (promoting disaster preparedness and insurance literacy for homeowners and businesses), and Advocacy and Action (advancing the interests of insurance consumers in courts of law and before regulators).

UP serves an important purpose by representing the interests of policyholders. Most consumers can scarcely afford legal counsel to pursue their rights under their insurance policies, whereas insurance companies have extensive resources to retain lawyers at major law firms to oppose providing coverage to their policyholders. In coverage disputes, the insurers also enjoy a major advantage because their policies are written on standardized forms, which individual policyholders have no power to revise. UP seeks to level the playing

field by offering similar resources and comparable counsel to represent otherwise vulnerable policyholders in cases raising important insurance coverage issues.

UP has been active since its founding in helping a diverse range of policyholders throughout the United States. UP's Executive Director has been appointed for six consecutive terms as an official consumer representative to the National Association of Insurance Commissioners, and works closely with State Insurance Commissioners on issues affecting insurance consumers. Media and academics also regularly seek UP's input on insurance consumer issues. Since its founding, UP has filed *amicus curiae* briefs in numerous federal and state courts in over 350 cases.[1]

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[1] UP's arguments were adopted by the Texas Supreme Court in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools Inc.*, 246 S.W.3d 42 (Tex. 2008), as well as by the California Supreme Court in *Vandenberg v. Superior Court*, 88 Cal. Rptr. 2d 366 (1999), and numerous other proceedings including *TRB Investments, Inc. v. Fireman's Fund Insurance Co.*, 145 P.3d 472 (Cal. 2006), and *In Re Salem Suede, Inc.*, 221 B.R. 586 (D. Mass. 1998). UP has also been granted leave to file briefs as an *amicus curiae* in numerous U.S. Supreme Court cases, including the following: *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 134 S. Ct. 604 (2013); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013); *Hardt v. Reliance Standard Life Insurance Co.*, 130 S. Ct. 2149 (2010); *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

INTRODUCTION

All of the insurance policies at issue in this case provide coverage for injury arising out of an "[o]ral or written publication, *in any manner*, of material that violates a person's right of privacy." (Italics added.) The policies contain no language restricting this coverage only to instances in which the policyholder is alleged to have published the material, as opposed to having negligently permitted publication by a third party. Accordingly, a plain reading of the policy language applies (*e.g., White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 (2007)), which in this instance means that each policy's open-ended language encompasses both circumstances. Under hornbook principles of New York insurance law, the insurers may not rely upon – and no Court may insert – limiting language not included in the policy. *See, e.g., Fieldston Prop. Owners Assn., Inc. v. Hermitage Ins. Co., Inc.*, 16 N.Y.3d 257, 264 (2011) ("If the plain language of the policy is determinative, we cannot rewrite the agreement by disregarding that language.").

But that is exactly what the insurers seek here. Their position is that – even though the words used in their policies do not condition coverage on a publication *by the policyholder* – the Sony Insureds should have known that coverage was so limited because, twenty-one years ago, a Court of Appeals decision concerning coverage for pollution-related torts included a statement to the effect that a now-superseded version of a standard-form Personal Injury Endorsement "was intended

to reach only purposeful acts undertaken by the insured or its agents." *County of Columbia v. Continental Ins. Co.*, 83 N.Y.2d 618, 627-28 (1994). The insurers contend, in essence, that this claimed coverage limitation, implied from the 1994 decision in the pollution case, should be read into Sony Insureds' 2011-2012 insurance policies. The Court should reject this contention for several reasons.

First, and most fundamentally, the portion of *County of Columbia* relied upon by the insurers is *dicta*; it does not bind this Court. *See Pollicino v. Roemer and Featherstonhaugh P.C.*, 277 A.D.2d 666, 668 (3d Dep't 2000) ("Language that is not necessary to resolve an issue, however, constitutes dicta and should not be accorded preclusive effect."). This Court can and should consider the language actually included in the relevant policies and apply its own reasoned judgment to this case.

Second, even if the language the insurers cite from the *County of Columbia* case were a holding, it could not resolve this coverage dispute because the Court of Appeals was construing a differently-worded coverage grant, and not enunciating a general rule that would apply for all time, no matter what the contract language provides. The Personal Injury Endorsement analyzed in *County of Columbia* was drafted years before Part B coverage existed and contains significantly different language. The Court cannot apply *County of Columbia* to the Sony Insureds' 2011-2012 policies without first analyzing the new language contained in those

policies. *See Fieldston*, 16 N.Y.3d at 264 ("In resolving insurance disputes, we first look to the language of the applicable policies."). The actual policy language at issue in this case demonstrates that only some of the covered offenses were intended to be restricted to the purposeful acts of the insured, while others – like the grant of coverage for a "oral or written publication" at issue here – were not.

Third, adopting the insurers' position would flip well-settled New York insurance law on its head, to the detriment of all policyholders. Rather than simply being able to read their own (already lengthy) insurance policies to determine what was covered and what was not, policyholders would be forced to scour legal repositories to see if any dicta construing different insurance policy language could possibly limit their rights of recovery. No principle of New York insurance law supports the creation of this novel phantom exclusion. It should be rejected.

For these reasons, the Court should reverse the finding of the trial court that Part B's coverage for injury arising from "[o]ral or written publication, *in any manner*, of material that violates a person's right of privacy" is implicitly limited to publication in a single manner – where the policyholder is alleged to have published the offending material itself.

ARGUMENT

I. The Language the Insurers Cite from *County of Columbia* Is Dicta

The insurers rely upon language in the Court of Appeals decision in *County of Columbia*, which stated that "coverage under the personal injury endorsement provision in question was intended to reach only purposeful acts undertaken by the insured or its agents." 83 N.Y.2d at 627. The insurers claim that this observation constitutes binding authority as to the interpretation of the "oral or written publication" grant of coverage at issue in this case. They are mistaken. *County of Columbia* concerned a completely different grant of coverage under the Personal Injury Endorsement for a completely different type of claim. As discussed in detail below, the single paragraph in the opinion cited by the insurers was not necessary to the actual issue decided by the Court – the interpretation of the phrase "invasion of private occupancy" – and is thus not precedential. *See Pollicino*, 277 A.D.2d at 668 ("Language that is not necessary to resolve an issue, however, constitutes dicta and should not be accorded preclusive effect.").

In *County of Columbia*, the policyholder (the "County") ran a waste management facility and was sued by an adjacent land-owner for continuing nuisance and trespass arising from alleged leachate contamination. The County's insurers denied coverage based on a pollution exclusion that applied to all Bodily Injury and Property Damage Liability. While the County admitted that the

pollution exclusion barred coverage for the lawsuit under the Bodily Injury and Property Damage insuring agreement, the County argued that coverage was still available under the separate Personal Injury Endorsement, which included an insuring agreement granting coverage for lawsuits alleging "wrongful entry or eviction or other invasion of the right of private occupancy" and to which the pollution exclusion arguably did not apply. *Id.* at 394.

The trial court found for the insurers and the Appellate Division affirmed. The Appellate Division reasoned that the interpretation of "the phrase 'invasion of the right of private occupancy' lies in the definition of 'wrongful entry' and 'eviction', both of which involve actual interference with possessory rights to real property." *Id.* at 395. Accordingly, the Appellate Division concluded that the term "invasion of the right of private occupancy" was limited to liability for "purposeful acts aimed at dispossession of real property by someone asserting an interest therein," which was not present in the pollution-related claims brought in the underlying lawsuit. *Id.* That Court further reasoned that, were the County's interpretation to prevail, "extending personal injury coverage to occurrences which fall squarely within the property damage coverage would have the effect of rendering the pollution exclusion meaningless." *Id.* at 395-96.

The Court of Appeals affirmed. Like the Appellate Division, the Court of Appeals found the County's position unsupportable because it would read the

pollution exclusion into a nullity. *See* 83 N.Y.2d at 628 ("It would be illogical to conclude that the claims fail because of the pollution exclusion while also concluding that the insurer wrote a personal injury endorsement to cover the same eventuality."). The Court of Appeals further noted that the types of torts enumerated in the Personal Injury Endorsement suggested that the language "could not have been intended to cover the kind of indirect and incremental harm that results to property interests from pollution." *Id.* However, the Court of Appeals took its analysis beyond the scope of the language actually at issue in that case (*i.e.*, the phrase "invasion of the right of private occupancy") by observing that the list of *all torts* contained in the Personal Injury Endorsement suggested that "only purposeful acts were to fall within the purview of the personal injury endorsement." *Id.* at 627.

That last observation – which is the only language in *County of Columbia* upon which the insurers rely – is dicta. The torts mentioned in that paragraph by the Court of Appeals (*e.g.*, false arrest, detention, imprisonment, malicious prosecution, defamation and invasion of privacy by publication) appeared in subsections of the Personal Injury Endorsement that were not at issue in the case. Accordingly, the Court of Appeals' brief and uncritical interpretation of that language was not necessary to the resolution of the issue before it: whether the

phrase "invasion of the right of private occupancy" encompassed the pollution-related torts at issue in the underlying lawsuit.

II. The Reasoning of County of Columbia Does Not Apply to the Language At Issue in This Case

Even were the overbroad language Court of Appeal's decision in *County of Columbia* precedential, it would not apply here because the insuring agreement that the Court of Appeals interpreted in that case contained materially different language from that at issue in this case.

The policies in *County of Columbia* included a Personal Injury Endorsement commonly used in insurance policies issued from 1970 through 1986, before Personal and Advertising Injury Liability Coverage was added to the standard commercial general liability insurance policy form. That Endorsement defined "Personal Injury" as:

> [I]njury arising out of one or more of the following offenses committed during the policy period:
>
> (1) false arrest, detention, imprisonment, or malicious prosecution;
>
> (2) wrongful entry or eviction or other invasion of the right of private occupancy;
>
> (3) a publication or utterance [constituting defamation or invasion of an individual's right of privacy]".

County of Columbia, 189 A.D.2d at 393-94 (bracketed words in original). This three-part definition of "Personal Injury" was completely silent as to whether the

enumerated torts must be carried out by the insured. Thus, although the Court of Appeals' determination that the policy conditioned coverage on the purposeful action of the insured was beyond the scope of the issues involved in *County of Columbia*, its interpretation of that language could be defended given this silence.

The same is not true of the "Part B" Coverage at issue here. In response to *County of Columbia* and many similar cases in other jurisdictions, the new Part B insuring agreement for Personal and Advertising Injury Liability was drafted to specify which torts the insured must be alleged to have committed itself, and which were not so limited. The Part B coverage defines "Personal and Advertising Injury" as injury arising from:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's good, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

The changes to the standard form renders the Court of Appeals' analysis in *County of Columbia* inapplicable. First, the new language removed the ambiguity at the heart of the *County of Columbia* case from the policy by specifying that the wrongful entry, eviction, or invasion of privacy must be "committed by or on behalf of its owner, landlord or lessor." *Id.*[2] In other words, the insurers did what they should have done back in the 1980's, which is specify the actor required to be alleged to have committed the enumerated tort if they intended coverage to be so limited. Similarly, the new definition's use of the phrase "your advertisement" in subsections (f) and (g) specified that it was *the policyholder's* advertisement – and not a third-party advertisement – that must form the basis for the advertising-related damages sought under the policy.

The new Part B policy form could have easily been amended to specify the same for subsection (e)'s grant of coverage for oral or written publications that violate a right to privacy. It would have taken the addition of a single word: "*Your* oral or written publication, in any manner, of material that violates a person's right

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[2] *See* Woodward et al., *Commercial Liability Insurance* (International Risk Management Institute, Inc. 2012) pp. IV.F.12 (noting that the 1988 Part B coverage form was amended to require the invasion of the right of private occupancy to be "committed by or on behalf of its owner, landlord or lessor" in an effort to prevent insureds from obtaining coverage for pollution liability through the grant of personal and advertising injury coverage).

of privacy." The insurers chose not to include that language; they cannot second-guess that decision now. The insurers' conscious choice to specify the actor for some – but not all – of the enumerated torts in Part B leads to the inescapable conclusion that coverage for some – but not all – of the enumerated torts is so limited. *See United States Fid. & Guar. Co. v Annunziata*, 67 N.Y.2d 229, 233 (1986) (holding that a fire insurance policy's clear requirement that the insured submit to questioning under oath and the "omission of any similar reference to the mortgagee in the clause pertaining to examinations under oath must be assumed to have been intentional under accepted canons of contract construction."); *Rosado v. Eveready Ins. Co.*, 34 N.Y.2d 43, 48 (1974) (applying the canon of *expressio unius est exclusio alterius, i.e.*, the expression of one thing is the exclusion of another).

At the very least, the changes in the Part B form demonstrate that the interpretation advocated by the Sony Insureds is a reasonable one, in which case the Court must find in favor of coverage. *See General Assur. Co. v. Schmitt,* 696 N.Y.S.2d 72, 74 (2d Dep't 1999) ("The law is clear that if an insurance policy is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the insured against the insurer.") (citation omitted).

III. Enforcing the Insurers' Phantom Exclusion Would Contradict the Foundational Principles of New York Insurance Law

The insurers cannot direct the Court to any policy language that limits Part B's coverage solely to publications made by the policyholder (as opposed to a third party where the policyholder is found legally responsible). That language does not exist. Instead, the insurers ask this Court to reach back twenty-one years to a Court of Appeals decision interpreting substantially different language in order to *imply* a limitation into their policies' otherwise broad grant of coverage. Numerous principles of New York insurance law preclude this tactic.

First, it is well-settled New York law that "[i]nsurance contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured." *Dean v. Tower Ins. Co. of New York*, 19 N.Y.3d 704, 708 (2012) (citation omitted); *see also Michaels v. City of Buffalo*, 628 N.Y.S.2d 253, 254 (1995) ("'an insurance policy term must be construed "as would the ordinary [person]") (bracketed word in original) (citation omitted). Of course, no "average insured" or "ordinary person" would construe the open-ended policy language at issue here as carrying the insurers' unspoken limitation.

Second, restrictions to coverage will not be enforced unless the policy contains "clear and unmistakable language" limiting coverage. *See Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 307 (2009) (quoting *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984)). Limitations "are not to be extended by interpretation or implication," *id.*, and are enforced only

where they are found to "have a definite and precise meaning, unattended by danger of misconception . . . and concerning which there is no reasonable basis for a difference of opinion," *id.* (citing *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 353 (1978). In this case, no clear and unmistakable policy language conditions coverage for injury arising from a "publication" in the manner suggested by the insurers. In order to enforce that restriction, the Court would necessarily be required to read an exclusion into the policy by implication, which New York law does not permit.

Third, where an ambiguity exists in a policy form drafted by an insurer, that ambiguity must be read in favor of coverage. *See Schmitt*, 696 N.Y.S.2d at 74 (2d Dep't 1999) ("The law is clear that if an insurance policy is written in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the insured against the insurer.") (citation omitted). Here, the insurers' failure to clearly exclude coverage for third-party publications for which the policyholder is legally responsible renders the policy ambiguous at the very least. The insurers may not enforce their unspoken exclusion without violating this tenet of insurance policy interpretation.

Fourth, adopting the insurers' argument would substantially lessen the incentive for all insurers to draft clear and easily understandable policy forms. Policyholders should be able to read their insurance policies (which can already

number in the hundreds of pages) and determine what coverage is and is not available. They should not be forced to guess whether, by implication, the enumerated torts in Coverage B apply only when the policyholder is alleged to have committed the requisite act, or whether they also apply when the policyholder is alleged to be legally responsible for a third party's act. If there is a question, there should be coverage. Holding otherwise incentivizes insurers to promise seemingly broad coverage (like the language at issue here) but then insist that its broad language actually contains hidden limitations when the time to pay a claim arrives. This is antithetical to established insurance law in every jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's decision and hold that the policies at issue in this case provide coverage for injury arising from any oral or written publication that violates a person's right of privacy for which the policyholder is responsible, regardless of whether the policyholder or a third party is alleged to have made that publication.

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