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7 Attorneys for Defendant
 ST. PAUL MERCURY INSURANCE COMPANY

8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT COURT OF CALIFORNIA**
 10 **SAN JOSE DIVISION**

11 NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and 12 AMERICAN ONLINE, INC., a Delaware corporation, 13 14 Plaintiffs, vs. 15 FEDERAL INSURANCE COMPANY, an Indiana corporation; et al., 16 17 Defendants.) CASE NO. 5:06-CV-00198 JW (PVT))) COMPENDIUM OF CERTAIN) AUTHORITIES IN SUPPORT OF ST.) PAUL'S MOTION FOR PARTIAL) SUMMARY JUDGMENT
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Gordon & Rees LLP
 275 Battery Street, Suite 2000
 San Francisco, CA 94111

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 19 Defendant St. Paul Mercury Insurance Company hereby attaches the following case
 20 authorities and statutes in connection with its Motion for Partial Summary Judgment:

21 **Cases**

- 22 TAB 1: *ACS Systems v. St. Paul Fire & Marine Ins. Co.*, Los Angeles County Superior
 Court, Case No. BC 305455
- 23 TAB 2: *State Farm Fire & Cas. Co. v. Singh*, 2006 WL 1520516 (E.D. Va. 2006)

24 **Statutes**

- 25 TAB 3: Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030
- 26 ///
- 27 ///

1 TAB 4: Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2511 and 2520

2

3 DATED: December 1, 2006

GORDON & REES LLP

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By: 

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Sara M. Thorpe

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D. Christopher Kerby

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Attorneys For Defendant ST. PAUL
MERCURY INSURANCE COMPANY

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TAB 1

07/16/04 FRI 11:28 FAX 213 817 7-36

L A SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/16/04

DEPT. 24

HONORABLE Robert L. Hess

JUDGE G. Charles

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

Deputy Sheriff

None

Reporter

8:30 am

BC305455

Plaintiff
Counsel

No Appearances

ACS SYSTEMS INC ET AL

Defendant
Counsel

VS

THE ST PAUL FIRE AND MARINE ET

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER

The Court now rules on defendant's demurrers, which are sustained with leave to amend as more fully set forth in the Court's Order filed this date.

A copy of the minute order and the Court's Order filed this date:

A copy of the minute order and the Court's Order are sent via facsimile transmission as follows:

Brad Westlye
415-391-8766

Carol Boyd
818-783-5507

MINUTES ENTERED
07/16/04
COUNTY CLERK

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FILED

LOS ANGELES SUPERIOR COURT

ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co. JUL 15 2004
BC305455Order on Submitted MotionBY Jessie G. O'Neil DEPUTY

This action came on regularly before the Court, the Honorable Robert L. Hess, Judge, presiding, on May 17, 2004, for hearing on defendants' demurrers and motion to strike portions of the Complaint. Plaintiffs ACS Systems, Inc., Micro General Corporation, and Fidelity National Information Solutions, Inc., appeared by Brad C. Westlye, Esq., of Wright, Robinson, Ostheimer & Tatum ; defendants St. Paul Fire & Marine Insurance Co., and St. Paul Mercury Insurance Co., appeared by Carol Boyd, Esq., of Michelman & Robinson. Having considered the moving and opposition papers, the arguments of counsel, and being fully advised, the Court rules as follows.

Background

Plaintiff ACS¹ created advertising about itself to be sent to the general public through facsimile machines, and arranged for an entity called DataMart Information Services Corporation (not a party to this action) to disseminate those fax ads. The Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(C), gave consumers the right to sue those sending unsolicited faxes.² On

¹ Micro General Corp. is the successor-in-interest through merger of ACS. Fidelity National Information Systems, Inc. is the parent of ACS.

² Section 227(b)(1)(C) of the TCPA provides, in pertinent part, that "[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." Sections 227(b)(3)(A) and (b) provide, respectively, for injunctive relief, and for actual damages or \$500 per violation, whichever is greater. Section 227(b)(3) also provides that, "[i]f the court finds that the defendant willfully or knowingly violated this subsection" it may impose treble the statutory damages for each violation.

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January 3, 2002, ACS was named a defendant (together with DataMart) in a putative class action called Kaufman v. ACS Systems, Inc. LASC case no. BC 222588.³ The complaint set forth claims for violations of the TCPA, unfair competition, negligence, and invasion of privacy.⁴

ACS was the insured under commercial general liability and umbrella liability policies issued by St. Paul Fire and Marine from February 1, 1998-February 1, 1999 (Complaint, Ex. A), and by St. Paul Mercury from February 1, 1999-April 1, 2000 (Complaint, Ex. B). The general liability policies had \$1,000,000 limits for property damage or advertising injury and the umbrella liability policies had \$25,000,000 limits for each.⁵

The policies contained similar provisions, including the right and duty to defend a protected person against covered events in the following provisions:

–“We’ll pay amounts any protected person is legally required to pay as damages for covered bodily injury, property damage, or premises damage that: (1) happens while this agreement is in effect; and (2) is caused by an event.” (Ex. A, Policy, p.1 and Ex.

³ Summary judgement for the defendants was reversed on appeal in Kaufman v. ACS Systems, Inc. (2003) 110 Cal. App. 4th 886.

⁴ The act of unfair competition was sending unsolicited faxes in violation of Business & Professions Code § 17538.4. The alleged negligence arose from breach of the duty not to violate the TCPA and section 17538.4, and not any independent common law duty. The invasion of privacy claim was asserted under the common law and under Article 1, § 1 of the California Constitution.

⁵ The Complaint is silent as to when the conduct by ACS occurred. The Complaint attaches the Kaufman Complaint as an exhibit, but it also does not specify when the conduct occurred. This may be significant because the policies are not “claims made” policies.

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B. Policy, p. 2)

—"Property damage" is defined as "(1) physical damage to tangible property of others, including all resulting loss of use of that property; or (2) loss of use of tangible property of others that isn't physically damaged."

—"Event" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Ex. A and B, Policy, p. 2.)

—"We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that: (1) results from the advertising of your products, work or completed work; and (2) is caused by an advertising injury offense committed while this agreement is in effect." (Ex. A, Policy, p. 2 and Ex. B, Policy, p. 3.)

—"Advertising injury" is defined as "injury, other than bodily injury or personal injury, caused by an advertising injury offense," and "advertising injury offense" is defined as (1) libel or slander, (2) making known to any person or organization written or spoken material that belittles the products, work or completed work of others, (3) making known to any person or organization written or spoken material that violates an individual's right of privacy, or (4) unauthorized taking or use of any advertising idea, material, slogan, style or title of others." (Ex. A, Policy, p. 2 and Ex. B, Policy, p. 3.)

The policies specifically exclude the following:

—"We won't cover personal injury or advertising injury that results from (1) the protected person knowingly breaking any criminal law; or (2) any person or organization breaking any criminal law with the consent or knowledge of the protected person." (Ex. A, Policy, p. 11 and Ex. B, Policy, p. 15.)

—"We won't cover bodily injury or property damage that's expected or intended by

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the protected person. Nor will we cover medical expenses that result from such bodily injury." (Ex. A, Policy, p. 12 and Ex. B, Policy, p. 15.)

Plaintiffs allege they notified defendants of the Kaufman litigation on January 25, 2000, and on February 8, 2000, defendants responded that the litigation did not appear to be covered under the policy. As a result, plaintiffs have been forced to pay for their own defense.

On November 3, 2003, plaintiffs filed this action for (1) breach of contract on the general liability policies; (2) breach of contract on the umbrella liability policies; (3) equitable subrogation; (4) implied indemnity; and (5) declaratory relief.

Discussion

The fundamental argument of the demurrers is that, as a matter of law, the facts (including the policy language) demonstrate that there was no coverage under either of the policies and no potential for coverage for any of the claims in the Kaufman action. More specifically, plaintiffs sent unsolicited fax advertisements in violation of both federal and state law. This does not constitute either accidental property damage or advertising injury as defined in the policies.

Plaintiffs contend that the property damage is to the recipients of the unwanted faxes in the form of ink and paper used and having their fax machines tied up. The "accident" lies in the fact that plaintiffs did not know that some of the recipients of the faxes sent by DataMart didn't want to receive them, and this result was unforeseen and unexpected. Plaintiffs argue that the faxes' unwanted intrusion into the recipients'

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privacy is the aspect of the violation that creates the advertising injury.⁵

All of plaintiffs' claims necessarily depend on whether there has been a breach of the insurance contracts. That breach must have occurred because they were covered by the policies; that is, within the scope of coverage and not subject to any exclusions. The insurance carrier has the burden of showing that the events at issue are not subject to coverage, because "the carrier must defend a suit which potentially seeks damages within the coverage of the policy." Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 275.

Was There an "Accident"?

Plaintiff has argued there was an "accident" triggering coverage because Plaintiff did not intend for its faxes to be sent to people who did not want the faxes, while Defendant argued that there was no "accident" because Plaintiff intended for the faxes to be sent.

"No all-inclusive definition of the word 'accident' can be given ... as a source and cause of damage to property, within the terms of an accident policy, [accident] is an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause."

Hogan v. Midland National Ins. Co. (1970) 3 Cal. 3d 553, 559, quoting Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co. (1959) 51 Cal.2d 558, 563-564.

In Quan v. Truck Ins. Exchange (1998) 67 Cal. App. 4th 583, an insured was accused of sexual misconduct (assault and battery, intentional infliction of

⁵ Both defendants and plaintiffs make additional arguments, which need not be specifically enumerated.

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emotional distress, negligence, and negligent infliction of emotional distress), and the insurer denied coverage. The policy's terms covered damages for "Bodily Injury," defined as "physical injury to, sickness or disease sustained by the body of any person," For purposes of "bodily injury," "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions which result in bodily injury or property damage you neither expected nor intended...." *Id.* at 592. The court ruled:

We reject appellants' argument that in construing the term 'accident,' chance or foreseeability should be applied to the resulting injury rather than to the acts causing the injury. In terms of fortuity and/or foreseeability, both 'the means as well as the result must be unforeseen, involuntary, unexpected and unusual.' [Citation.] We agree coverage is not always precluded merely because the insured acted intentionally and the victim was injured. An accident, however, is never present when the insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces the damage.

Id. at 598, quoting Merced Mutual Ins. Co. v. Mendez (1989) 213 Cal. App.3d 41, 50.

Whether or not a conduct was "intentional" was further discussed in Uhrich v. State Farm Fire & Cas. Co. (2003) 109 Cal. App. 4th 598:

"To avoid the consequences of the conclusion that no 'accident' has been alleged, the insured argues he might be found merely 'negligent,' Such arguments misconstrue the 'accident' requirement in standard general liability policies. 'Under California law, the term refers to the nature of the insured's conduct, not his state of mind.' [Citation.] 'Negligent' or not, in this case the insured's conduct alleged to have given rise to claimant's injuries is necessarily nonaccidental, not because any 'harm' was intended, but simply because the conduct could not be engaged in by 'accident.'" (Quan, supra, 67 Cal. App. 4th at 595-96.)

Although Uhrich claims the expected or intended exclusion "does not turn on the 'intentional' quality of the insured's conduct, but on the insured's intent or expectation regarding the outcome of his or her conduct," she provides no citation to authority for this proposition, which conflicts with the cases we have just discussed.

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Id. at 610.⁷

In this case, there is no dispute that the conduct in sending the faxes was intentional rather than accidental, and it was intended that the persons to whom they were sent should receive them. In order for the Kaufman plaintiffs to succeed on their claim that ACS violated the TCPA, they do not have to prove negligence, but only a volitional act. They do not have to prove ACS knew that particular persons did not wish to receive the faxes.⁸ In terms of the analysis in Quan, the acts causing the injury were not accidental, but were intended; the means were clearly foreseen. There was no accident because there was a deliberate act, and no "additional, unexpected, independent, and unforeseen happening occur[red] that produce[d] the damage."

Quan, supra, 67 Cal. App. 4th at 598.

The language of the analysis in Ulrich, which focuses on the nature of the

⁷ The court noted that it was the pleaded allegations coupled with the extrinsic facts which defines the insurer's coverage obligations. "Ulrich cannot invoke coverage simply by pleading 'negligence' in the complaint, nor by assuming all assaults, defamations and so forth must be covered, simply because those labels are included in the definition of personal injury." Id. at 610-11.

⁸ The additional criterion of "willfully or knowingly," which carries with it potential trebled statutory damages, requires proof of something more. See Kwan v. Mercedes-Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 180-187 (discussing "willful" instruction in various contexts).

Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, distinguished in Kwan, includes the following passage:

"In civil cases, the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent."

Id. at 894, quoting May v. New York M. Picture Corp. (1920) 45 Cal. App. 396, 404.

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insured's conduct rather than its state of mind, supports the same result. The issue is not whether the harm was intended, but rather whether the conduct was engaged in "by accident." Uhrich emphatically rejected what appears to be plaintiffs' argument here—that ACS' intent or expectations regarding the outcome of its conduct should control—as unsupported in law. Uhrich, supra, 109 Cal. App. 4th at 610. The Court concludes that the defendants' arguments with respect to the "accident" argument are more persuasive on the facts presented here.

"Advertising Injury" / Violation of "right to privacy"

Plaintiffs have argued there was an "advertising injury" triggering coverage because plaintiffs sent faxes that disturbed the recipients' right to solitude and right to be left alone. They cite to the definition of "advertising injury offense" which includes "making known to any person or organization written or spoken material that violates an individual's right of privacy." The defendants have argued there was no violation of the right to privacy because there was no public dissemination of private facts, which is what this provision really deals with.

Fibreboard Corp. v. Hartford Accident & Indemnity Co. (1993) 16 Cal. App. 4th 492, 513-514, discussed the meaning of the "right to privacy" in the context of an analysis why claims against the asbestos manufacturer/insured based on nuisance were not covered. In the process, it relied heavily on the analyses of the right to privacy in Miller v. National Broadcasting Co. (1986) 187 Cal. App. 3d 1463, 1481-83, and upon the Restatement 2d of Torts, §§ 652A and 652B.. The court's analysis suggests that the right to privacy (for the purpose of insurance coverage) extends to that branch of the

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right to privacy which protects against intrusion against seclusion within the meaning of § 652B of the Restatement.

On the other hand, Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254, discussed the scope of advertising injury coverage in a comprehensive general liability policy. Although the Supreme Court's focus was primarily upon the portion of the definition relating to unfair competition, it did discuss the other portions of the definition, which included "violation of right of privacy." Id. at 1276. It said: "Violation of right of privacy," in the advertising context, is virtually synonymous with unwanted publicity. (See, e.g., Civ. Code, § 3344.)" Id.

The Court concludes that the issue with respect to the violation of individuals' rights to privacy cannot be definitively decided at this juncture. There may be a basis for concluding that an objectively reasonable insured would expect "advertising injury" coverage to extend this far, but it has not yet been pleaded.

The Motion to Strike

Plaintiffs have failed to plead a statutory or a contractual basis for their claim of attorneys fees from bringing this action, as distinguished from attorneys fees incurred in defending the Kaufman action. In addition, on the waiver issue, the authorities cited suggest that while if plaintiffs prevail they can seek reimbursement of all their costs in the Kaufman litigation and the insurer is limited in what costs it can question. However, these authorities do not appear to stand for the proposition that the insurer cannot contest the reasonableness of the fees and costs.

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Disposition

Because this is plaintiffs' first attempt to plead these claims, defendants' demurrers to all five causes of action will be sustained with 20 days leave to amend. It is possible that plaintiffs may be able to plead facts to properly present an "advertising injury" claim, but the Court's analysis of the "accident" issue leaves it somewhat skeptical that this claim on the policy can be sustained. Because a demurrer can only be addressed to a cause of action or to a complaint, and not to just a portion of a cause of action, it may be too blunt an instrument to separate these two claims against the policy. The motion to strike is off calendar as moot.

Dated: July 15, 2004



Robert L. Hess
Judge of the Superior Court

FILED
ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co. BC222588 SUPERIOR COURT

Order Sustaining Demurrer Without Leave To Amend

FEB 09 2005

BY *James J. Walsh*
DEPUTY

This action came on regularly before the Court, the Honorable Robert L. Hess, Judge, presiding, on October 20, 2004, for hearing on defendants' demurrers to the First Amended Complaint. Plaintiff appeared by Brad C. Westlye, Esq., of Wright, Robinson, Osthimer & Tatum; the defendants appeared by Carol Boyd, Esq., of Michelman & Robinson. At the conclusion of the hearing, the Court announced its ruling. Defendant thereafter submitted a proposed form of order, to which plaintiff objected. Although the Court believes it signed an order in 2004, the original form of order and the original objections cannot be located. Accordingly, the following is intended to restate the Courts oral decision.

Briefly stated, these claims arise from ACS Systems' use of DataMart Information Systems to send unsolicited advertising by fax to persons who did not wish to receive those communications, allegedly in violation of the federal Telephone Consumer Protection Act of 1991 ("TCPA"). A class action suit filed in 2000 called Kaufman v. ACS Systems, Inc., LASC case no. BC222588, sought injunctive and statutory remedies for this conduct. ACS sought coverage for defense of the Kaufman case from St. Paul, its insurer, who refused on the ground that there was no possibility of coverage, and it owed no duty to defend.

The Court is persuaded by defendant's arguments that there is no potential for coverage under either the personal injury/property damage or the advertising injury rationales, as articulated in the First and Second Causes of Action. This conclusion has several components.

As a matter of law, it appears that there has been no "event" or "accident" of the type necessary to trigger coverage. This situation does not present an unintentional act; rather, everything about it involves intentional acts by persons acting at the instruction of and on behalf of ACS. The sending of the fax messages with this particular content to particular recipients at specific telephone numbers was exactly what was intended. The exact persons to whom the faxes were intended to be directed received them; the only "fortuity" was that the persons to whom the faxes were directed didn't want them. This is not the type of "accident" which triggers coverage under the policy.

The Court is also not persuaded that these circumstances fall within the definition of "advertising injury," and more specifically, that the acts constitute "making known to any person or organization written or spoken material that violates an individual's right to privacy." The right to privacy—whether as a matter of federal constitutional law, California constitutional law, or California common law—does not encompass the offense allegedly committed here. The conduct here does not appear to have been tortious or wrongful in any sense prior to the enactment of the TCPA. Indeed, the reason the federal statute was invoked in the Kaufman suit is because it explicitly prohibits conduct which previously had been permissible.¹

Although these grounds dispose of the motion, the Court also finds merit

¹ In 1992, after the TCPA was passed, California enacted former Business & Professions Code § 15738.4, which prohibited unsolicited fax advertisements unless the sender met certain requirements. This was regarded as a stop-gap measure to protect California residents until the Federal Communications Commission adopted regulations implementing the TCPA. The statute was amended in 1998, and then repealed in 2002. See Kaufman v. ACS Systems, Inc. (2003) 110 Cal. App. 4th 886, 890-94, 896-905.

in defendant's argument that allowing insurance coverage to cover costs of defense and to reimburse any civil or administrative penalties for this conduct—which is expressly prohibited by federal law—would be in violation of public policy.

There is no possibility that further amendment can state a valid cause of action on these facts. The demurrers are sustained without leave to amend.

Dated: Feb. 9, 2005



Robert L. Hess
Judge of the Superior Court

TAB 2

Westlaw

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Slip Copy, 2006 WL 1520516 (E.D.Va.)
(Cite as: Slip Copy)

Page 1

CBriefs and Other Related Documents

State Farm Fire & Cas. Co. v. Singh E.D.Va., 2006. Only the Westlaw citation is currently available.

United States District Court, E.D. Virginia.

STATE FARM FIRE & CASUALTY COMPANY,
Plaintiff,
v.

Pirithi SINGH, et al., Defendants.
No. Civ. 3:05CV834.

May 25, 2006.

MEMORANDUM OPINION

DOHNAL, Magistrate J.

*1 This matter is a declaratory judgment action that is before the court by consent of the parties (28 U.S.C. § 636(c)(1)) on cross motions for summary judgment. 28 U.S.C. § 2201 et seq. The Plaintiff, State Farm Fire & Casualty Company (State Farm), moves the court to decide as a matter of law that it has no obligation, including the duty to defend, against the claims that are being pursued in a state court action by Catherine E. Fitzpatrick (Fitzpatrick) against Pirithi Singh, his business partner, Kaur P. Singh, their business, P & G Associates, Inc. (P & G), and Manchester Marketing, Inc. (Manchester), a related business entity, for injuries Fitzpatrick allegedly incurred as the result of an assault by Singh.^{FN1} Any obligation of State Farm for providing a defense and to indemnify its insured against any recovery arises under either of two liability insurance policies that each name P & G as the insured. State Farm has joined Fitzpatrick and the state action defendants as defendants in this case in order to resolve all potential coverage issues.^{FN2} Fitzpatrick opposes State Farm's motion and has filed a cross motion for summary judgment for a determination that either there is coverage, or that the question of coverage is a question of material fact that cannot be resolved on summary judgment. State Farm seeks a declaration that it has no duties pursuant to either the governing Business Policy or the Umbrella Policy under the circumstances giving rise to the state court action.

^{FN1} Fitzpatrick is the only defendant that has filed any responsive pleadings.

Manchester Marketing was dismissed as a party defendant in the state action, but State Farm has joined it as an additional party defendant in this case, presumably in order to resolve all potential coverage issues.

^{FN2} The two policies at issue are a Business Policy, policy number 96-KL-2926-4 (ex. 2 to Pl.'s Mem. Supp. Mot. Summ. J.) (Pl.'s Mem.) and Commercial Liability Umbrella Policy policy number 96-KL-2928-8 (ex. 3 to Pl.'s Mem.).

The relevant portions of the Business Policy are:

Coverage L-Business Liability

We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury ... This insurance applies only:

1. to bodily injury or property damage caused by an occurrence which takes place in the coverage territory during the policy period;
2. To personal injury caused by an occurrence committed in the coverage territory during the policy period. The occurrence must arise out of the conduct of your business, excluding advertising;

Right and Duty To Defend

We will have the right and duty to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false or fraudulent. The amount we will pay for damages is limited as described in Limits of Insurance. Damages because of bodily injury include damages claimed by any person or organization for care, loss of services or death resulting at any time from the bodily injury. We may investigate and settle any claim or suit at our discretion. Our right and duty to defend and when we have used up the applicable limit of insurance in the payment of judgments or settlements or medical expenses.

Business Liability Exclusions

Under coverage L, this insurance does not apply:

1. to bodily injury or property damage ...
- b. to any person or property which is the result of willful and malicious acts of the insured.

*2 5. To bodily injury or personal injury to any

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Slip Copy, 2006 WL 1520516 (E.D.Va.)
(Cite as: Slip Copy)

employee of the insured arising out of and in the course of their employment ... by the insured ...

16. To personal injury ...

c. arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured;

Who is an Insured

2. Each of the following is also an insured:

a. your employees ... but only for acts within the scope of their employment by you. However, no employee is an insured for

(1) bodily injury or personal injury to you or to a fellow employee while in the course of his or her employment ...

Definitions

3. bodily injury means bodily injury, sickness or disease sustained by a person ...

10. occurrence means:

b. the commission of an offense, or a series of similar related offenses, which results in personal injury ...

11. personal injury means injury, other than bodily injury, arising out of one or more of the following offenses:

a. false arrest, detention or imprisonment;

(Pl.'s Mem., ex. 2 at 20-22, 24, 27, 32).

The relevant portions of the Umbrella Policy are:

This insurance applies only:

1. to bodily injury ... caused by an occurrence which takes place in the coverage territory during the policy period;

2. to personal injury caused by an occurrence committed in the coverage territory during the policy period. The occurrence must arise out of the conduct of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

Right and Duty to Defend

1. When underlying insurance or any other insurance does not apply to an occurrence:

If a claim or suit is covered by this policy but not covered by any underlying insurance or any other insurance available to the insured, we will have the right and duty to defend any claim or suit seeking damages payable under this policy even though the allegations of the suit may be groundless, false or fraudulent. We may investigate and settle any claim or suit at our discretion. Our right and duty to defend and when we have used up the applicable limit of insurance in the payments of judgment or settlements. The cost of defense and investigation are in addition to the amount of the net loss payable. If we are not permitted by law or otherwise to carry out the duties set forth above, we will pay the insured for any expense incurred with our written consent.

Business Liability Exclusions

Under Coverage L-Business Liability, this insurance does not apply:

1. to bodily injury or property damage:

b. to any person or property which is the result of willful and malicious acts of the insured.

5. To bodily injury ... to any employee of the insured arising out of and in the course of their employment by the insured ...

15. to personal injury unless the underlying insurance provides coverage for the loss;

*3 18. to personal injury ...

c. arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured ...

Designation of Insured

Who is an Insured

2. Each of the following is also an insured:

a. your employees ... while acting within the scope of their employment by you ...

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 (Cite as: Slip Copy)

Page 3

Definitions

3. bodily injury means bodily injury, sickness or disease sustained by a person ...

10. occurrence means:

b. the commission of an offense, or a series of similar related offenses, which results in personal injury ...

11. personal injury means injury, other than bodily injury, arising out of one or more of the following offenses:

a. false arrest, detention or imprisonment;

(Pl.'s Mem., ex. 3 at 1-2, 4, 6-7, 11-12).

The related state action that is pending in the Circuit Court of the City of Richmond, Virginia, asserts six claims on behalf of Fitzpatrick against the various defendants: Count I for assault and battery of Fitzpatrick by Pirthi Singh and P & G Associates; Count II for intentional infliction of emotional distress to Fitzpatrick by Pirthi Singh and P & G Associates; Count III for False Imprisonment of Fitzpatrick by Pirthi Singh and P & G Associates; Count IV for negligent hiring and/or retention of Pirthi Singh by Kaur P. Singh, P & G Associates, and Manchester Marketing; Count V for negligent failure by P & G Associates and Manchester Marketing to protect employees, including Fitzpatrick, from foreseeable danger of physical and sexual assault; and Count VI for punitive damages against all defendants.^{FN3}

FN3. The underlying lawsuit includes no allegation of sexual harassment as State Farm asserts. (Pl.'s Mem. at 1).

In the state action, Fitzpatrick alleges that on March 25, 2004, she was assaulted by Pirthi Singh at a Dairy Queen in Chesterfield, Virginia, where she was employed as a server and cashier. At that time, Pirthi Singh was a co-owner, President, and Director of P & G Associates while Kaur P. Singh was also a co-owner, director, and officer of P & G, which owns and operates the business. (Pl.'s Mem., ex. 1 ¶¶ 1-9).^{FN4} Specifically, it is alleged that Pirthi Singh "patted Ms. Fitzpatrick on the back and hugged her. When Ms. Fitzpatrick pulled away from him, he pulled her back into him, hugged her tighter and grabbed her left breast." *Id.* ¶ 10. Fitzpatrick reported the incident to the police who conducted an investigation that discovered that a surveillance video that had recorded the alleged assault. *Id.* ¶ 11. Pirthi Singh was subsequently convicted of assault as a result of the incident. *Id.* ¶ 12.

FN4. Manchester Marketing is a Dairy Queen franchisee that controlled the operation and/or participated in the operation and management of the particular business premises involved. (P.'s Mem., ex. 1 (Fitzpatrick Mot. J.) ¶¶ 2, 7-8). It was removed as a party in the state action in any event.

Fitzpatrick asserts that both she and Pirthi Singh were performing services in the course and scope of their respective employment when he engaged in the unwanted touching and restraint of Fitzpatrick resulting in her being physically injured, restrained, groped, put in fear and terror, filled with anxiety, placed in reasonable apprehension of bodily harm, degraded, humiliated; all such activity causing mental and emotional anguish, pain, suffering, and related injury. *Id.* ¶¶ 14-15; 20-25; 28-30, 40, 49, 55. In the state action, Fitzpatrick seeks damages for bodily and personal injuries against P & G, as the employer, for the actions of its agent (Pirthi Singh), pursuant to the doctrines of agency, respondeat superior, and vicarious liability (Counts I, II, III). *Id.* ¶¶ 26, 31, 39. The state action also contains allegations that P & G, together with Kaur P. Singh and Manchester Marketing, are liable for negligence in the hiring and retention of Pirthi Singh and that the Defendants acted both negligently and willfully so as to justify an award of punitive damages in addition to other requested monetary relief (Counts IV, V, VI). *Id.* ¶¶ 41-55.

Question Presented

*4 Whether State Farm is obligated to defend and indemnify the Defendants in the state court action.

Analysis

In order to decide whether State Farm has any duties under the policies at issue, the court must determine whether the conduct alleged in the state action is "covered" under the policies. *Travelers Indem. Co. v. Obenshain*, 245 S.E.2d 247, 249 (1978). To find that an insurer has a duty to defend under Virginia law pursuant to a policy of insurance, the court must examine: "(1) the policy language to ascertain terms of the coverage and (2) the underlying complaint to determine whether any claims alleged therein are covered by the policy." *Town Crier, Inc. v. Hume*, 721 F.Supp. 99, 103 (E.D.Va.1989). State Farm

concedes that the state action here adequately includes allegations of both “bodily injury” (with respect to all defendants in counts I, II, IV, V) and “personal injury” (with respect to Pirthi Singh and P & G in count III) as defined in the subject policies. (Pl.’s Mem. at 11-12). However, State Farm argues that it nonetheless has no duty to defend or to indemnify under the controlling policies because specific coverage exclusions apply.

Exclusions are to be narrowly interpreted and an insurer bears the burden of establishing that an exclusion in issue is applicable to the acts giving rise to the claim. Am. Reliance Ins. Co. v. Mitchell, 385 S.E.2d 583, 585 (1989). Here, both policies specifically exclude “bodily injury to any employee of the insured arising out of and in the course of their employment by the insured ...” (Pl.’s Mem., ex. 2 at 22; ex. 3 at 2). Indeed, the allegations of the state action specifically assert that on May 25, 2004, Fitzpatrick “was working as a server and cashier at the Dairy Queen” when the incident occurred in which she encountered an unknown man in the women’s restroom and “reported the incident to Pirthi Singh,” who was acting in the course of his employment as an owner and agent of the business, whereupon the assault took place. (Pl.’s Mem., ex. 1 ¶¶ 2, 9, 14-16, 18, 25). Additional allegations asserting that the incident “arose out of and in the course of [Fitzpatrick’s] employment by the insured” are set forth in the state action, as noted by State Farm, and must be considered as true for purposes of resolving the pending motions. (Pl.’s Mem., ex. 1 ¶ 48 (the employment of Pirthi Singh “was likely to cause ... injury and harm to female employees, including Catherine E. Fitzpatrick”); ¶ 51 (Ms. Fitzpatrick was invited onto the business premises as an employee); ¶ 52 (“the danger of injury to employees, including Ms. Fitzpatrick,” was foreseeable); and ¶ 54 (regarding a duty to “provide warnings to protect employees, including Ms. Fitzpatrick”). Moreover, Fitzpatrick alleges that Pirthi Singh was “acting in the course and scope of his employment with and ownership of P & G ... [a]t all relevant times.” *Id.* ¶¶ 15, 18, 25. The state action further alleges that P & G, Kaur P. Singh, and Manchester Marketing, acted through their agent, Pirthi Singh, further confirming the employment context in which the incident occurred and the relationship of the various party defendants. *Id.* ¶¶ 26, 29, 31.

*5 State Farm cites a number of decisions for the proposition that similar exclusionary language has been upheld to preclude coverage for workplace

claims of sexual harassment and sexual assault. (Pl.’s Mem. at 13-15). Two of the decisions cited are from within this federal circuit, including the court of appeals holding in Gates, Hudson & Assoc. v. The Federal Ins. Co., 141 F.3d 500 (4th Cir.1997), in which the court held that a similar exclusion denied coverage in a workplace employee sexual harassment and wrongful termination context. See also West Am. Ins. Co. v. Bank of Isle of Wight, 673 F.Supp. 760 (E.D.Va.1987)(exclusionary language regarding workplace “bodily injury” barred coverage for wrongful termination, negligence, and breach of fiduciary duty). Fitzpatrick attempts to distinguish such case precedent by arguing that the holdings were dependent upon what the courts found to be encompassed within the meaning of “bodily injury,” as defined by the controlling policy language, as opposed to whether the activity occurred within the course of the claimant’s employment, and that the activity involved intentional conduct by an employer that does not have to be established to sustain a finding of negligence as regards P & G pursuant to a theory of respondeat superior.

The court concludes that where the allegations of the state action clearly demonstrate that Fitzpatrick was an employee of the insured when the incident occurred, the exclusion for precluding coverage for bodily injury occurring in the course of employment is triggered, which, in simple terms, is intended to preclude coverage for any “in-house” occurrence that would have to be the subject of separate coverage.^{FN5} Counts I, II, IV and V allege bodily injury as defined by policy language (“bodily injury means bodily injury, sickness or disease sustained by a person”). (Pl.’s Mem., ex. 1 ¶¶ 25, 30, 40, 49, 55). Therefore, there is no coverage for any of those claims alleging bodily injury where Fitzpatrick has alleged she was an employee at all relevant times.

^{FN5}. The fact that Fitzpatrick allegedly suffered injury inflicted by a co-employee is irrelevant to the applicability of the exclusion based on whether the incident occurred while she was engaged in her employment, although the circumstance implicates another exclusion concerning actions attributable to a “co-insured” as discussed later herein.

“Personal injury” is defined in relevant part in both policies as “injury, other than bodily injury, arising out of one or more of the following offenses: a. false arrest, detention or imprisonment....” (Pl.’s Mem., ex.

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(Cite as: Slip Copy)

2 at 32; ex. 3 at 12). The only remaining claim of false imprisonment by Pirthi Singh and P & G (Count III) to the effect that Pirthi Singh *restrained*, patted, hugged, fondled, sexually abused and molested Fitzpatrick, involves an allegation of “personal injury” in the sense of detention within the policy language. However, an additional exclusion to the “in course of employment” exception precludes coverage for any injury resulting from the willful violation of a penal statute. (Pl.’s Mem., ex. 2 at 24, ¶ 16c; ex. 3 at 4, ¶ 18c). It is not disputed that Pirthi Singh was convicted of assault as a result of the incident^{FN6} and the acts complained as asserted in Count III of the state action are the same that were the basis of Singh’s conviction. Therefore, the exclusions of both policies for injury resulting from such willful conduct apply to the claim for false imprisonment as well. Palmetto Ford, Inc. v. First Southern Ins. Co., 1993 WL 369248, at *7 (4th Cir.1993).^{FN7}

^{FN6}. The record does not include a copy of the judgment in the criminal case. However, because it has not been challenged, the court accepts as true that the Defendant Pirthi Singh was convicted of assault as a result of the subject incident as alleged in the state court action.

^{FN7}. Although not necessary for resolution of the pending motions since relief is premised on alternative grounds, in the interest of completeness and possible review, it is further noted that separate policy language that precludes coverage for acts by a co-insured employee is contained in the umbrella policy whereby where all employees are considered to be “insureds,” but coverage would only apply if provided for in the “underlying insurance” (the Business Policy) which specifically excludes coverage for employment-related injury as previously discussed. (Pl.’s Mem. at 9, 19; ex. 3 at 4-5).

*6 A corporation acts through its agents. Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348 (1985). Accordingly, a corporation is liable for the acts of its employees, directors, officers, and other agents while they act within the scope of employment. Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 543 (1999). In this case, Pirthi Singh was an employee and officer of P & G at the time it is alleged he committed the intentional acts described in the state court action. Under controlling Virginia law,

even intentional torts may be within the scope of employment where the focus is not on an offending employee’s motive, but the context in which the action occurred. Commercial Bus. Sys. Inc. v. Bellsouth Servs. Inc., 453 S.E.2d 261, 266 (Va.1995); Plummer v. Ctr. for Psychiatrists, Ltd., 476 S.E.2d 172, 174-175 (Va.1996). The incident here arose in the course of a normal work schedule, on the business premises where both Pirthi Singh and Fitzpatrick were working. The initial encounter occurred when Fitzpatrick reported a concern to Singh (that there was a man in the women’s bathroom) which was an activity (the reporting and receipt of such information) that was within the scope of each of their positions. Though P & G is liable for the acts of its agents, including Pirthi Singh, the exclusion for willful violation of a penal statute precludes coverage for both the principal, P & G, and its agents.

Fitzpatrick argues that whether she was an employee of the defendants (Kaur Singh, P & G and Manchester) at the time she was assaulted is “irrelevant to the issue at hand” because the allegations of the complaint are based on the theory of respondeat superior.^{FN8} (Fitzpatrick’s Mem. Supp. Cross Mot. Summ. J. at 3). Fitzpatrick argues that the discretion of a trial judge to determine the scope of employment as a matter of law is limited and whether an employee’s acts were within the scope of his employment by insureds when committing a willful act should be a question for a jury. *Id.*; Commercial Bus. Sys., Inc., 453 S.E.2d at 265 (Va.1995). This analysis is incorrect.

^{FN8}. Fitzpatrick’s negligence claims against Kaur P. Singh, P & G, and Manchester (counts IV and V) are claims for bodily injury. Negligence is not one of the specified offenses that constitutes personal injury under the policies. (Pl.’s Mem., ex. 1 at 32).

In this case, the agency relationship between is Pirthi Singh and P & G is undisputed and, therefore, it is well-settled under Virginia law that the burden is on the principal to prove that the agent was not acting within the scope of his employment. Commercial Bus. Sys., Inc., 453 S.E.2d at 265. Here, the court must take the facts pled in the motion for judgment as established for the purpose of analysis to determine whether coverage exists. Town Crier, 721 F.Supp. at 103. The motion for judgment not only states that Pirthi Singh was an officer, director and owner of P & G and the Dairy Queen, but also that “at all

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relevant times, Pirthi Singh was acting in the course and scope of his employment with and ownership of P & G Associates, Inc., at the Dairy Queen,” that he was “performing services in the course and scope of his employment” when he “engaged in wrongful conduct” under the “actual and apparent authority given to him by P & G Associates,” and that his actions arose “out of his performance of his duties as an owner and employee of P & G ... in the course of his employment ... to supervise and control the store and premises.” (Pl.’s Mem., ex. 1 ¶¶ 13-15, 18). Fitzpatrick is the only party that elected to respond or oppose State Farm’s request for declaratory judgment. Therefore, there has been no action by the principal to challenge Pirthi Singh’s status as an employee.

*7 The motion for judgment in the state court action sets forth facts that demonstrate that Pirthi Singh was acting within the scope of his employment, presumably as Fitzpatrick’s supervisor, and the person to whom employees should report things such as strange circumstances in the women’s bathroom. Even given the egregious, intentional nature of the assault described in the complaint, under Virginia law, Singh was engaged as an employee in his role as supervisor when he assaulted Fitzpatrick. Doyle-Penne v. Muhammad, 2000 WL 1086906, at *2 (4th Cir.2000)(unpublished)(describing in detail why an intentional tort was within the scope of employment where an assistant assaulted her supervisor by pinning her against a wall and repeatedly punching her in the chest, the court found that the “dispute arose out of Muhammad’s performance of her duties ... during a normal business day, inside the offices ... where both parties were employed. The altercation was caused by Muhammad transferring a telephone call to Doyle-Penne. Transferring calls was part of Muhammad’s job. Indeed, few things are as synonymous with office routine as the use of the telephone system. Finally, the dispute occurred when Doyle-Penne, a more senior employee, attempted to correct a deficiency in Muhammad’s performance of her job.”).

Fitzpatrick’s argument that the trial court’s fact-finder must decide whether Singh was acting within the course and scope of his employment, and thus whether P & G is liable as the principal, is not the standard applicable in the questions presented in this case because the court must treat the facts in the complaint as true. Town Crier, 721 F.Supp. at 103. Moreover, under both Virginia’s broad interpretation of respondeat superior, as well as this court’s required application of Virginia’s law, there is no factual dispute but that Singh was acting within the course

and scope of his employment. Doyle-Penne, 2000 WL 1086906, at *2. Finally, and conclusively, the employee exclusion to the bodily injury claims does not relate to Pirthi Singh’s status, but rather to Fitzpatrick’s status as an employee.

However, Pirthi Singh’s status as an employee is also established for purposes of determining that the co-insured exclusion also applies under the terms of the Umbrella Policy—there is no coverage for “a claim for damages arising out of bodily injury [or] personal injury ... which any insured ... covered by this policy initiates, alleges, or causes to be brought against any other insured ... covered by this policy.” (Pl.’s Mem., ex. 3 at 5). If, as Fitzpatrick urges, Pirthi Singh were not an insured because he was acting outside the scope of his employment, then P & G, Kaur P. Singh, and Manchester Marketing would all be relieved of any liability under the theory of respondeat superior and thus no coverage would be implicated. Kidd v. DeWitt, 105 S.E. 124, 126 (Va.1923)(citing old case precedent to demonstrate that an employee must totally depart from the scope of his employment, not merely deviate from it, to preclude employer liability for an employee’s wrongful conduct). Not only does the language used in the policies clearly exclude claims based on bodily injury to an employee, additional language excludes claims for personal injury arising out of the willful violation of a penal statute, and claims by one insured (an employee, Fitzpatrick) against another insured (an employee, Pirthi Singh). (Pl.’s Mem., ex. 1 ¶¶ 9, 13-14).

Conclusion

*8 State Farm has demonstrated that it is under no duty to defend or indemnify P & G, Pirthi Singh, Kaur P. Singh, or Manchester Marketing under any theory advanced by Fitzpatrick and, therefore, the Plaintiff is entitled to judgment in its favor.

An appropriate Order shall issue.

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Briefs and Other Related Documents ([Back to top](#))

• [3:05cv00834](#) (Docket) (Dec. 6, 2005)

END OF DOCUMENT

TAB 3

18 U.S.C.A. § 1030

▷

Effective: [See Notes]

UNITED STATES CODE ANNOTATED
United States Code Annotated Currentness
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
Title 18. Crimes and Criminal Procedure (Refs & Annos)
PART I--CRIMES
Part I. Crimes (Refs & Annos)
CHAPTER 47--FRAUD AND FALSE STATEMENTS
Chapter 47. Fraud and False Statements (Refs & Annos)

> > § 1030. Fraud and related activity in connection with computers

(a) Whoever--

(1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--

(A) information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(B) information from any department or agency of the United States; or

(C) information from any protected computer if the conduct involved an interstate or foreign communication;

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States;

(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$5,000 in any 1-year period;

(5)(A)(i) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;

(ii) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or

(iii) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; and

(B) by conduct described in clause (i), (ii), or (iii) of subparagraph (A), caused (or, in the case of an attempted offense, would, if completed, have caused)--

(i) loss to 1 or more persons during any 1-year period (and, for purposes of an investigation, prosecution, or other proceeding brought by the United States only, loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least \$5,000 in value;

(ii) the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals;

(iii) physical injury to any person;

(iv) a threat to public health or safety; or

(v) damage affecting a computer system used by or for a government entity in furtherance of the administration of justice, national defense, or national security;

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if--

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States; [FN1]

(7) with intent to extort from any person any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to cause damage to a protected computer;

shall be punished as provided in subsection (c) of this section.

(b) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is--

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(2)(A) except as provided in subparagraph (B), a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3), (a)(5)(A)(iii), or (a)(6) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(B) a fine under this title or imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(2), or an attempt to commit an offense punishable under this subparagraph, if--

(i) the offense was committed for purposes of commercial advantage or private financial gain;

(ii) the offense was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State; or

(iii) the value of the information obtained exceeds \$5,000; and

(C) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection (a)(4) or (a)(7) of this section which does not occur after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(4) [FN2] (a)(5)(A)(iii), or (a)(7) of this section which occurs after a conviction for another offense under this section, or an attempt to commit an offense punishable under this subparagraph;

(4)(A) except as provided in paragraph (5), a fine under this title, imprisonment for not more than 10 years, or both, in the case of an offense under subsection (a)(5)(A)(i), or an attempt to commit an offense punishable under that subsection;

(B) a fine under this title, imprisonment for not more than 5 years, or both, in the case of an offense under subsection (a)(5)(A)(ii), or an attempt to commit an offense punishable under that subsection;

(C) except as provided in paragraph (5), a fine under this title, imprisonment for not more than 20 years, or both, in the case of an offense under subsection (a)(5)(A)(i) or (a)(5)(A)(ii), or an attempt to commit an offense punishable under either subsection, that occurs after a conviction for another offense under this section; and

(5)(A) if the offender knowingly or recklessly causes or attempts to cause serious bodily injury from conduct in violation of subsection (a)(5)(A)(i), a fine under this title or imprisonment for not more than 20 years, or both; and

(B) if the offender knowingly or recklessly causes or attempts to cause death from conduct in violation of subsection (a)(5)(A)(i), a fine under this title or imprisonment for any term of years or for life, or both.

(d)(1) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section.

(2) The Federal Bureau of Investigation shall have primary authority to investigate offenses under subsection (a)(1) for any cases involving espionage, foreign counterintelligence, information protected against unauthorized disclosure for reasons of national defense or foreign relations, or Restricted Data (as that term is defined in section 11y of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)), except for offenses affecting the duties of the United States Secret Service pursuant to section 3056(a) of this title.

(3) Such authority shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section--

(1) the term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or

communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term "protected computer" means a computer--

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

(B) which is used in interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

(3) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States;

(4) the term "financial institution" means--

(A) an institution, [FN3] with deposits insured by the Federal Deposit Insurance Corporation;

(B) the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank;

(C) a credit union with accounts insured by the National Credit Union Administration;

(D) a member of the Federal home loan bank system and any home loan bank;

(E) any institution of the Farm Credit System under the Farm Credit Act of 1971;

(F) a broker-dealer registered with the Securities and Exchange Commission pursuant to section 15 of the Securities Exchange Act of 1934;

(G) the Securities Investor Protection Corporation;

(H) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); and

(I) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

(5) the term "financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution;

(6) the term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter;

(7) the term "department of the United States" means the legislative or judicial branch of the Government or one of the executive departments enumerated in section 101 of title 5;

(8) the term "damage" means any impairment to the integrity or availability of data, a program, a system, or information;

(9) the term "government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country;

(10) the term "conviction" shall include a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer;

(11) the term "loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service; and

(12) the term "person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity.

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves 1 of the factors set forth in clause (i), (ii), (iii), (iv), or (v) of subsection (a)(5)(B). Damages for a violation involving only conduct described in subsection (a)(5)(B)(i) are limited to economic damages. No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage. No action may be brought under this subsection for the negligent design or manufacture of computer hardware, computer software, or firmware.

(h) The Attorney General and the Secretary of the Treasury shall report to the Congress annually, during the first 3 years following the date of the enactment of this subsection, concerning investigations and prosecutions under subsection (a)(5).

[FN1] So in original. Probably should be followed by "or".

[FN2] So in original. Probably should be followed by a comma.

[FN3] So in original. The comma probably should not appear.

18 U.S.C.A. § 1030, 18 USCA § 1030

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TAB 4

18 U.S.C.A. § 2511

▷

Effective: November 25, 2002

UNITED STATES CODE ANNOTATED

United States Code Annotated Currentness

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

Title 18. Crimes and Criminal Procedure (Refs & Annos)

PART I--CRIMES

Part I. Crimes (Refs & Annos)

CHAPTER 119--WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Chapter 119. Wire and Electronic Communications Interception and Interception of Oral Communications (Refs & Annos)

> > § 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who--

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through

the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with--

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No provider of wire or electronic communication service, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order or certification under this chapter, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any such disclosure, shall render such person liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order, statutory authorization, or certification under this chapter.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire or electronic communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the

purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(e) Notwithstanding any other provision of this title or section 705 or 706 of the Communications Act of 1934, it shall not be unlawful for an officer, employee, or agent of the United States in the normal course of his official duty to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, as authorized by that Act.

(f) Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.

(g) It shall not be unlawful under this chapter or chapter 121 of this title for any person--

(i) to intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) to intercept any radio communication which is transmitted--

(I) by any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;

(II) by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public;

(III) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or

(IV) by any marine or aeronautical communications system;

(iii) to engage in any conduct which--

(I) is prohibited by section 633 of the Communications Act of 1934; or

(II) is excepted from the application of section 705(a) of the Communications Act of 1934 by section 705(b) of that Act;

(iv) to intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of such interference; or

(v) for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted.

(h) It shall not be unlawful under this chapter--

(i) to use a pen register or a trap and trace device (as those terms are defined for the purposes of chapter 206

(relating to pen registers and trap and trace devices) of this title); or

(ii) for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful or abusive use of such service.

(i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if--

(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

(II) the person acting under color of law is lawfully engaged in an investigation;

(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication--

(i) as otherwise authorized in section 2511(2)(a) or 2517 of this title;

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission that is not encrypted or scrambled and that is transmitted--

(i) to a broadcasting station for purposes of retransmission to the general public; or

(ii) as an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls,

is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

[(c) Redesignated (b)]

(5)(a)(i) If the communication is--

(A) a private satellite video communication that is not scrambled or encrypted and the conduct in violation of this chapter is the private viewing of that communication and is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain; or

(B) a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct in violation of this chapter is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain,

then the person who engages in such conduct shall be subject to suit by the Federal Government in a court of competent jurisdiction.

(ii) In an action under this subsection--

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory \$500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than \$500 for each violation of such an injunction.

18 U.S.C.A. § 2511, 18 USCA § 2511

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18 U.S.C.A. § 2520

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Effective: [See Notes]

UNITED STATES CODE ANNOTATED

United States Code Annotated Currentness

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

Title 18. Crimes and Criminal Procedure (Refs & Annos)

PART I--CRIMES

Part I. Crimes (Refs & Annos)

CHAPTER 119--WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

Chapter 119. Wire and Electronic Communications Interception and Interception of Oral Communications (Refs & Annos)

> > § 2520. Recovery of civil damages authorized

(a) In general.--Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief.--In an action under this section, appropriate relief includes--

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages.--(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$50 and not more than \$500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$100 and not more than \$1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of--

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.

(d) Defense.--A good faith reliance on--

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) or 2511(2)(i) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation.--A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(f) Administrative discipline.--If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(g) Improper disclosure is violation.--Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2520(a).

18 U.S.C.A. § 2520, 18 USCA § 2520

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