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## **US court says insurer has no duty to defend cyber attack negligence lawsuit**

**Bronte Cullum** | **04 October 2018**

The Orlando federal district court has ruled that an insurance company does not have to defend its insured for damage caused by a third-party hack.

St Paul Fire & Marine Insurance Company had sought a declaratory judgment to clarify whether it had to defend Rosen Millennium against a claim made by Rosen Hotels & Resorts.

Millennium was responsible for the data security of Rosen Hotels & Resorts when the latter became aware of a 2016 credit card information leak caused by malware on Rosen Hotels & Resorts' payment system. Rosen Hotels & Resorts said Millennium's negligence caused the incident.

Judge Carlos Mendoza in the US District Court for the Middle District of Florida ruled on 28 September that while insurance companies have historically been forced to defend their insured in the event of data breaches, this duty would not extend to those perpetrated by third parties.

The defendant had argued that the loss of credit card use suffered by its customers was property damage, falling under St Paul Fire & Marine Insurance Company's personal injury offence coverage in its general policy.

Walter Andrews, a partner at Hunton Andrews Kurth in Miami, said that he was "not very impressed" by the court's decision, and noted that it had relied on past cases construing South Carolina law despite the case at hand concerning Florida-specific laws.

Judge Mendoza said that he was persuaded by *Innovak International v Hanover Insurance Company*. In that case, a South Carolina federal court denied coverage because it believed that construing the policy to include the acts of third parties would expand coverage beyond what the insurer had knowingly entered into.

The policy in the present case held that a personal injury offence included "making known to any person or organisation covered material that violates a person's right of privacy". The policy covered the breached credit card information, but also required the damage to "result from the insured's business activities."

Andrews said that he believed the court to have placed too much reliance on the South Carolina case law. "Florida state law makes it very clear that coverage is meant to be construed in favour of the policyholder where there is ambiguity," he said. "To me, it's clear that there were two reasonable interpretations of the insurance policy here."

He added that there is a lesson to be learned from this decision: “Given how strenuously the insurers are fighting to deny coverage for data breach claims, a readable takeaway is that policyholders should consider getting very specific cyber insurance coverage.”

R Hugh Lumpkin at Ver Ploeg & Lumpkin in Miami commented on the nature of the insurance policy held by Millennium: “General liability insurance occupies the role of responding to previously unknown or unforeseen risk. This type of risk – that hacking would cause this kind of damage – is no longer something we can claim as unforeseen and novel.”

Lumpkin said that the company “should have had a cyber risk policy which has been written to cover these sorts of problems.”

Rosen Hotels & Resorts has not sued Millennium for the alleged negligence.

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