NO. X07 CV 09 5031734 S	:	SUPERIOR COURT
RECALL TOTAL INFORMATION MANAGEMENT, INC., ET AL.	:	COMPLEX LITIGATION DOCKET
V.	:	AT HARTFORD
FEDERAL INS. CO., ET AL.	:	JANUARY 17, 2012

MEMORANDUM OF DECISION

I

On November 5, 1999, one of the plaintiffs, Recall Total Information Management, Inc. (Recall), entered into a distribution agreement with International Business Machines Corporation (IBM).[1] As part of the distribution agreement, Recall entered into a vital records storage agreement (hereinafter, "storage agreement") with IBM in October of 2003 to transport and store various IBM electronic media.[2] In February, 2006, Recall entered into a secure transport subcontracting agreement (hereinafter, "Ex Log contract") with the coplaintiff, Executive Logistics Services, LLC (Ex Log), to transport the IBM media for Recall. Under the Ex Log contract, Ex Log was required to maintain a $2 million commercial general liability policy, a $1 million automobile liability policy, a $2 million fidelity bond/commercial crime

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[1] These facts are taken from the parties' joint stipulation of facts filed on May 20, 2011.

[2] The storage agreement referred to the distribution agreement as the "Master Agreement."

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policy, a $2 million professional liability policy and a $5 million umbrella/excess liability policy, all naming Recall as an additional insured.

On February 23, 2007, an IBM cart containing electronic media fell out of an Ex Log transport van near a highway exit ramp in New York state. The cart and approximately 130 computer data tapes, containing personal information for more than 500,000 IBM employees,[3] were then removed by an unknown person and never recovered.

IBM immediately took steps to prevent the dissemination of the information. On March 30, 2007 and on April 23, 2007, IBM wrote to Recall claiming a total of $6,192,468.30 in expenses – $2,467,245.10 for notifying current and/or former employees, $595,122.00 for maintaining call centers and $3,130,101.20 for credit monitoring services–as a result of the loss of the tapes. Recall entered into a settlement agreement with IBM for the full amount of the loss.

On May 17, 2007, Recall wrote to Ex Log claiming reimbursement and indemnification for the amounts paid to IBM. Recall and Ex Log provided notice of the claim to the defendants, Federal Insurance Company (Federal) and Scottsdale Insurance Company (Scottsdale). Federal had issued the commercial general liability policy with an occurrence limit of $1 million and an aggregate limit of $2 million and

[3] It is undisputed that these tapes are not encrypted, but "are not the type that can be read by personal computer."

Scottsdale had issued the commercial liability umbrella policy with both a $4 million occurrence limit and aggregate limit.[4]

Ex Log also filed insurance claims for the loss and received a $25,000 payment under its cargo policy, but was notified by Scottsdale, on May 30, 2007, and Federal, on August 16, 2007, that they were denying coverage on the claims. After a period of unsuccessful attempts to persuade the insurers to reverse their decisions, Recall entered into a settlement agreement with Ex Log. On June 22, 2009, Ex Log signed a promissory note in favor of Recall for $6,419,409.79 with a down payment of the $25,000 from the cargo policy proceeds and the remainder of the settlement to be paid from any amounts received from the insurers. Ex Log also assigned its rights under the policies–including the right to sue – to Recall.

Recall and Ex Log filed this action on July 24, 2009.[5] The amended complaint, filed on June 2, 2010, alleges several counts,[6] but the only count at issue

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[4] Both policies were issued prior to the Ex Log agreement for the term of May 6, 2005 to January 4, 2006 and both were renewed for two consecutive one year terms until January 4, 2008.

[5] The action was filed against Federal, Scottsdale and Sinclair Risk & Financial Services, LLP (Sinclair). A predecessor of Sinclair allegedly bought out the Arthur Noll Agency, which was Ex Log's insurance agent at the time the Ex Log contract was executed. Sinclair is not involved in the motions for summary judgment at issue herein.

[6] The amended complaint also alleges breach of the covenant of good faith and fair dealing against Federal and Scottsdale in the second count; violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815 et seq., against Federal and Scottsdale in the third count; breach of the brokerage contract against Sinclair by Recall in the fourth count; breach of the

here is the first count alleging breach of the insurance contract against Federal and Scottsdale. Federal and Scottsdale filed motions for summary judgment[7] on the first count of the amended complaint on the grounds that there is no genuine issue of material fact that their policies do not cover the loss of the IBM data tapes. Ex Log and Recall filed a memorandum in opposition on November 22, 2010 arguing that the policies cover the loss. Federal and Scottsdale filed memoranda in reply on December 17, 2010 and the court heard oral argument on September 19, 2011. The parties agree that Connecticut law should be applied in this case.

II

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 787, 967 A.2d 1 (2009).

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brokerage contract against Sinclair by Ex Log in the fifth count; breach of fiduciary duty against Sinclair by Recall in the sixth count; breach of fiduciary duty against Sinclair by Ex Log in the seventh count; negligence against Sinclair by Recall in the eighth count; and negligence against Sinclair by Ex Log in the ninth count.

[7] These motions were originally filed in September 23, 2010 in redacted form, but were refiled in May of 2011 after the carriers' joint motion to seal was denied.

"[C]onstruction of a contract of insurance presents a question of law for the court. . . . An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract. . . . In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . .

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy. . . . This rule of construction may not be applied, however, unless the policy terms are indeed ambiguous." (Citations omitted; internal quotation marks omitted.) *Connecticut Medical Ins. Co.* v. *Kulikowski*, 286 Conn. 1, 5-6, 942 A.2d 334 (2008).

"[W]hen the words of an insurance contract are, without violence, susceptible of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . [T]his rule of construction favorable to the insured extends to exclusion clauses. . . . Our jurisprudence makes clear, however, that [a]lthough ambiguities are to be construed against the insurer, when the language is plain, no such construction is to be applied. . . . Indeed, courts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties." (Internal quotation marks omitted.) *Galgano* v. *Metropolitan Property & Casualty Ins. Co.*, 267 Conn. 512, 519, 838 A.2d 993 (2004).

"Where, as in the present case, an insured alleges that an insurer improperly has failed to defend and provide coverage for underlying claims that the insured has settled the insured has the burden of proving that the claims were within the policy's coverage . . . ." *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, 249 Conn. 36, 55, 730 A.2d 51 (1999). "The burden of proving an exception to a risk is on the insurer." *O'Brien* v. *John Hancock Mutual Life Ins. Co.*, 143 Conn. 25, 29, 119 A.2d 329 (1955).

III

As an initial matter, Recall argues that the insurers are precluded from challenging the coverage issues by cases such as *Black* v. *Goodwin, Loomis & Britton, Inc.*, 239 Conn. 144, 681 A.2d 293 1102 (1996). In *Black*, the Supreme

Court observed, "It is well settled that an insurer who maintains that a claim is not covered under its insurance policy can either refuse to defend or it [can] defend under a reservation of its right to contest coverage under the various avenues which would subsequently be open to it for that purpose. . . . An insurer who chooses not to provide its insured with a defense and who is subsequently found to have breached its duty to do so must bear the consequences of its decision, including the payment of any reasonable settlement agreed to by the plaintiff and the insured." (Citations omitted; internal quotation marks omitted.) Id., 152-53. The court adopted the majority view that "when an insurer breaches its contractual duty to defend and, as a result, improperly leaves its insured to fend for itself, the insurer will not be heard to complain when the insured enters into a settlement agreement so long as the insured acts in good faith, and without fraud." (Internal quotation marks omitted.) Id., 154.

The insurers maintain that *Black* is inapplicable because the duty to defend is not implicated as IBM never sued.[8] The Federal policy requires it to provide a defense for a suit against the insured. Specifically, on page four of thirty-two, the policy states, "Subject to all the terms and conditions of this insurance, we will have the right and duty to defend the insured against a suit, even if such suit is false, fraudulent or groundless." "Suit" is defined in the policy as "a civil proceeding in which damages, to which this insurance applies, are sought. Suit includes an

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[8] "The duty to defend has a broader aspect than the duty to indemnify and does not depend on whether the injured party will prevail against the insured." *Missionaries of Co. of Mary, Inc.* v. *Aetna Casualty & Surety Co.*, 155 Conn. 104, 110, 230 A.2d 21 (1967).

arbitration or other dispute resolution proceeding in which such damages are sought and to which the insured must submit or does submit with our consent."[9] Under this definition, "suit" is unambiguous. See *Sunoco, Inc.* v. *Illinois National Ins. Co.*, United States District Court, Docket No. 04-4087, *19 (E.D. Pa. January 11, 2007) ("[g]iven that the parties specified what types of proceedings can give rise to the duty to defend, we find that the Policy's use of the word 'suit' is unambiguous").

At oral argument, Recall asserted that the settlement process between IBM and Recall constituted an "other dispute resolution proceeding" within the definition of "suit" and that Federal has failed to defend a suit by denying coverage. Federal asserts that, even if the process fell within the definition of "suit," the "other dispute resolution proceeding" was not undertaken with Federal's consent.

The parties have presented no evidence that convinces this court that the settlement process between Recall and IBM could be fairly characterized as an "other dispute resolution proceeding." Nevertheless, if the process was found to be an "other dispute resolution proceeding," every discussion, however informal, between an insured and a third party could be deemed a dispute resolution proceeding. Regardless, the settlement process between Recall and IBM is not an "other dispute

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[9] In the Scottsdale policy, "suit" is similarly defined as "a civil proceeding in which damages because of 'bodily injury,' 'property damage' or 'personal and advertising injury' to which this insurance applies are alleged. 'Suit' includes: a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent or the 'underlying insurer's' consent."

resolution proceeding" because there is no question that Federal did not give Recall its consent. See id., *19-*20 (finding no suggestion that insurer consented to plaintiff's negotiation). Thus, the waiver rule set forth in *Black* is not applicable here as Federal did not fail to defend Recall in a "suit."

A.

1.

The insurers first argue that Recall's claims are not covered under the policies because they do not qualify as property damage as the amounts paid to IBM are not for the loss of use of tangible property. They maintain that the plaintiffs' claims are only for the remedial or consequential damages from a loss of electronic data and that electronic data is excluded from the definition of tangible property in both policies.

Recall argues, somewhat hesitantly,[10] that the theft or loss of the tapes constitutes property damage and that the release between IBM and Recall implicitly included property damage claims, including all damages arising out of the incident. It is, however, undisputed that IBM did not claim damages for the tapes or the cart on which they were contained.

The commercial general liability policy issued by Federal, in relevant part, states: "Subject to all of the terms and conditions of this insurance, we will pay damages that the insured becomes legally obligated to pay by reason of liability:

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[10] Recall made clear at oral argument that it mainly seeks coverage under the personal injury section of the policy, but counsel's response to an inquiry as to whether it was withdrawing its claim under the property damage portion of the policy was essentially "I am not authorized to do that."

imposed by law; or assumed in an insured contract; for bodily injury or property damage caused by an occurrence to which this coverage applies."[11] "Insured contract" is, in relevant part, defined as "any other contract or agreement pertaining to your business . . . in which you assume the tort liability of another person or organization to pay damages, to which this insurance applies, sustained by a third person or organization."

In the distribution agreement between Recall and IBM, § 10.0.A states, "In case of loss or damage to the property transferred to [Recall], [Recall] will be liable for the full replacement value of the media." Nevertheless, § 11.0 of the distribution agreement also states, "Except for liability under the Section entitled Indemnification,[12] in no event will either party be liable to the other for any lost revenues, lost profits, incidental, indirect, consequential, special or punitive damages." Assuming the distribution agreement is an insured contract, Recall's claim for IBM's losses does not find support in the distribution agreement because it

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[11] The umbrella policy issued by Scottsdale, in relevant part, states: "We will pay on behalf of the insured the 'ultimate net loss' in excess of the 'retained limit' because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking damages for such 'bodily injury' or 'property damage' when the 'underlying insurance' does not provide coverage or the limits of 'underlying insurance' have been exhausted."

[12] Section 9.0 entitled "Indemnification" states, "Each party will defend, hold harmless and indemnify, including attorney's fees, the other party against third party claims that arise or are alleged to have arisen as a result of negligent or intentional acts or omissions of the indemnifying party or its personnel or a material breach by it of any material term of this Agreement." Here, there is no evidence of a claim against IBM by a third party.

unambiguously excluded the obligation to pay consequential damages. See *Hartford* v. *International Assn. of Firefighters, Local 760*, 49 Conn. App. 805, 816, 717 A.2d 258 ("the appellate courts of this state have defined consequential damages as 'special damages [that] result from the *natural* consequences of the act complained of'" [emphasis in original]), cert. denied, 247 Conn. 920, 722 A.2d 809 (1998); see also Black's Law Dictionary 445-46 (9th ed. 2009) (defining consequential damages as "[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act").

2.

Presuming that Recall was legally obligated to pay IBM's damages because they were assumed in an insured contract or imposed by law,[13] the insurers argue that there is no coverage for the claims as property damage according to the unambiguous policy language. Specifically, they assert that both policies define property damage as damage to tangible property, that electronic data is not tangible property and that electronic data is explicitly excluded from the definition of tangible property. This court agrees.

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[13] Recall argues that IBM's expenditures may have been required to comply with applicable law. Both Connecticut and New York have statutes requiring that certain actions be taken when electronic data containing personal information is compromised. See General Statutes § 36a-701b; N.Y. Gen. Bus. Law § 899-aa (2) (McKinney 2005). As this argument does not control the outcome of these motions, the court assumes this without deciding whether the obligation was imposed by these statutes.

Under the Federal policy, "Property damage means: physical injury to tangible property, including resulting loss of use of that property. . . . or loss of use of tangible property that is not physically injured. Tangible property does not include any software, data or other information that is in electronic form."[14]

In the present case, there are no claims for actual damage to the tapes, the cost of the lost tapes or the cart. Indeed, the claims arise from the preventative measures taken by IBM because of the theft, or loss of use, of the *data* on the tapes – not the tapes themselves. This is not damage to tangible property. See *America Online, Inc.* v. *St. Paul Mercury Ins. Co.*, 347 F.3d 89, 96 (4th Cir. 2003) (upholding denial of claim for damage to computer's data from software finding no physical damage to tangible property); *State Auto Property & Casualty Ins. Co.* v. *Midwest Computers & More*, 147 F. Supp. 2d 1113, 1116 (W.D. Okla. 2001) ("Alone, computer data cannot

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[14] Similarly, Scottsdale's policy defines "property damage" as: "a. Physical injury to tangible property, including all resulting loss of use of that property. . . . or b. Loss of use of tangible property that is not physically injured. . . .

"For the purposes of this insurance, electronic data is not tangible property. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software (including systems and applications software), hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment."

Additionally, § 2.t of the policy excludes: "Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access or inability to manipulate electronic data. As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment."

be touched, held, or sensed by the human mind; it has no physical substance. It is not tangible property."). Furthermore, data is specifically excluded by the unambiguous policy language. See *Union Pump Co.* v. *Centrifugal Technology, Inc.*, United States District Court, Docket No. 05-0287, 2009 WL 3015076 *2 (W.D. La. September 18, 2009) (finding destruction of copies of electronic drawings not covered under policy because electronic data excluded). Thus, the court finds that there is no coverage for the claim as property damage.

B.

Recall primarily asserts that coverage is available under the personal injury section of the policy. As noted, the Federal policy states that "we will pay damages that the insured becomes legally obligated to pay by reason of liability: imposed by law; or assumed in an insured contract; for advertising injury or personal injury to which this coverage applies." "Personal injury" is defined, in relevant part, as "injury, other than bodily injury, property damage or advertising injury, caused by an offense of . . . [e]lectronic, oral, written or other publication of material that . . . violates a person's right of privacy . . . . "[15]

The insurers argue that there is no genuine issue of material fact that there is no evidence of publication. Recall maintains that publication to a third party is unnecessary. The word "publication" is not defined in the Federal policy, but Recall

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[15] The parties agree in their respective memoranda that the Scottsdale policy follows form to the personal injury coverage in Federal's policy. (See Recall's brief, p. 7, and Scottsdale's brief, p. 7.)

argues that the word should be interpreted very broadly to mean "making generally known." See *Hooters of Augusta, Inc.* v. *American Global Ins. Co.*, 157 Fed. Appx. 201, 208 (11th Cir. 2005).

"The term 'publication,' however, generally refers to the communication of words to a third person." *Springdale Donuts, Inc.* v. *Aetna Casualty & Surety Co. of Illinois*, 247 Conn. 801, 810, 724 A.2d 1117 (1999). In the present case, there is no coverage under the personal injury section of the policy because there is no evidence of communication to a third party. Recall also argues that "other publication" occurred when the tapes fell from the van and were stolen by the thief. Such an argument must fail; *Springdale* is the controlling law and the communication must have been made to a third person.

Moreover, any plaintiff seeking damages for invasion of privacy[16] could not speculate and would be required to prove that personal information was accessed.

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[16] "The courts have found it analytically helpful to identify two meanings for 'the right of privacy': 'secrecy' and 'seclusion.' . . . A person who wants to conceal a criminal conviction, bankruptcy, or love affair from friends or business relations asserts a claim to privacy in the sense of secrecy. A person who wants to stop solicitors from ringing his doorbell and peddling vacuum cleaners at 9 p.m. asserts a claim to privacy in the sense of seclusion. . . . Thus a person claiming the privacy right of seclusion asserts the right to be free, in a particular location, from disturbance by others. A person claiming the privacy right of secrecy asserts the right to prevent disclosure of personal information to others. Invasion of the privacy right of seclusion involves the means, manner, and method of communication in a location (or at a time) which disturbs the recipient's seclusion. By contrast, invasion of the privacy right of secrecy involves the content of communication that occurs when someone's private, personal information is disclosed to a third person." (Citations omitted; internal quotation marks omitted.) *ACS Systems, Inc.* v. *St. Paul Fire & Marine Ins. Co.*, 147 Cal. App. 4th 137, 148-49, 53 Cal. Rptr. 3d 786 (2007).

Indeed, in a New York case similar to the facts herein, the court dismissed a class action in which the plaintiffs sought damages for an increased risk of identity theft resulting from lost backup tapes that fell from the back of a courier's truck. *Hammond* v. *Bank of New York Mellon Corp.*, United States District Court, No. 08 CV 6060, 2010 WL 2643307 (S.D.N.Y. June 25, 2010).[17] Additionally, in *Randolph* v. *ING Life Ins. & Annuity Co.*, 973 A.2d 702, 711-12 (D.C. 2009), the court stated, "An essential element of the tort (whether the focus is on 'intrusion upon . . . seclusion' or 'public disclosure of private facts') is that private facts must be accessed or publicly disclosed. . . . Without an allegation that the data involved here were disclosed to and viewed by someone unauthorized to do so, appellants have failed to state a claim for invasion of privacy." (Citation omitted.)

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[17] The *Hammond* court summarizes several cases "in which plaintiffs seek damages for the loss of personal identification information through accident or theft." Id., *1. "While there is a split in authority as to how to analyze these cases, every court to do so has ultimately dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Fed. R. Civ.P.") or under Rule 56 following the submission of a motion for summary judgment. Several courts, including federal district courts in Arkansas, Missouri, New Jersey, Ohio, and the District of Columbia, have determined that the potential risk of identity theft resulting from the loss of personal information is not an 'injury-in-fact' within the meaning of Article III of the United States Constitution and have dismissed these cases after concluding that plaintiffs lacked 'standing.'. . .

"Other courts have determined that similarly situated plaintiffs had standing but concluded, for one reason or another, that loss of identity information is not a legally cognizable claim." (Citations omitted.) Id., *1-*2. In *Shafran* v. *Harley-Davidson, Inc.*, United States District Court, No. 07 CV 01365, 2008 WL 763177, *2 (S.D.N.Y. March 20, 2008), the court observed that "an increased risk of future identity theft is not, in itself, an injury that the law is prepared to remedy."

With no publication, there has also been no injury to a person. IBM paid notification costs, but IBM is not a person and there is no allegation that its right to privacy was violated. Additionally, there is no evidence – even now, some four years after the incident – that any person suffered identity theft or that the privacy of any IBM employee was violated as a result of the loss or theft of the data tapes. According to Zanfardino's affidavit, "[t]wenty-four (24) of the persons who received notices submitted claims for credit restoration. While the identity theft incidents referenced in these claims could not be traced specifically to the loss of the IBM Tapes, based upon the timing of the incidents, IBM decided to grant credit restoration services to eighteen (18) of the claimants." Nevertheless, the notification letter attached to her affidavit states that IBM has had "no indication that the personal information on the missing tapes, which are not the type that can be read by personal computer, has been accessed or has been used for any improper purpose." More importantly, the parties have stipulated that "[n]o IBM employees have been harmed as a result of the lost data." Thus, while at first glance this might appear to present a genuine issue of material fact, there is simply no issue of fact – based upon the evidence and the stipulation – that a person has been injured as a result of this incident.

In summary, the loss and the subsequent theft of the tapes, while constituting an offense in normal parlance, is not the offense, publication or invasion of privacy, that the policy contemplates to trigger the personal injury coverage. Ex Log's failure

to secure the door of its truck does not constitute "other" publication. Therefore, as there is no evidence of publication or of a violation to a person's right to privacy or of an injury to a person, the personal injury coverage of the policy is not triggered.[18]

C.

Finally, Recall argues that the additional insured endorsement provides it an independent coverage grant. Federal counters that the endorsement provides no additional coverage to Recall.

"The insurance contract includes the printed form policy, declarations therein, and any endorsements thereto. . . . In construing an endorsement to an insurance policy, the endorsement and policy must be read together, *and the policy remains in full force and effect except as altered by the words of the endorsement*; conversely the endorsement modifies, to [the] extent of the endorsement, the terms and conditions of the original insurance contract. . . . If any irreconcilable conflict exists between provisions of the policy and provisions of an endorsement, then the latter must control." (Emphasis added; internal quotation marks omitted.) *Schultz* v. *Hartford Fire Ins. Co.*, 213 Conn. 696, 705, 569 A.2d 1131 (1990).

The blanket endorsement states: "DESIGNATED OWNERS, REAL ESTATE MANAGING AGENTS OR LESSEES AND CUSTOMERS OF THE INSURED AS

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[18] Additionally, the insurers argue that the policies contain several other exclusions that apply. While many of the exclusions, including the "care custody or control" exclusion, the "auto exclusion," and the "enhancement, maintenance, or prevention" exclusion, likely would apply, it is unnecessary to address these arguments as the theft or loss of the data tapes is not covered as property damage or personal injury under the unambiguous policy language.

PER CERTIFICATES ON FILE WITH THE COMPANY BUT LIMITED TO LIABILITY THAT SHALL ARISE OUT OF DELIVERIES PERFORMED BY THE NAMED INSURED. All other terms and conditions remain unchanged."

When reading the endorsement and the policy together, the endorsement – at best and in context–only potentially added Recall to the policy as a customer of Ex Log. The first sentence is poorly drafted and perhaps ambiguous, but to conclude as Recall[19] does that this phrase provides an independent basis, and thereby a limitless liability, for anything arising out of an Ex Log delivery would render the second sentence– and consequently the policy–meaningless. "[I]f it is reasonably possible to do so, every provision of an insurance policy must be given operative effect . . . because parties ordinarily do not insert meaningless provisions in their agreements." (Citations omitted.) *Ceci* v. *National Indemnity Co.*, 225 Conn. 165, 175-76, 622 A.2d 545 (1993). By the unambiguous terms of the second sentence, all other terms and conditions of the policy remained in effect. Hence, the court finds that the endorsement does not provide an independent coverage grant to Recall.

IV

These corporate parties fully memorialized their respective duties, obligations and remedies in the several contracts among them, including the various insurance

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[19] It is noted that Recall's argument is limited to the conclusion that the endorsement "expands coverage for Recall to *all liability* arising from negligence during deliveries, without restriction." (Emphasis in original.) It has not presented any evidence that creates a genuine issue of material fact regarding the endorsement. See *Metropolitan Life Ins. Co.* v. *Aetna Casualty & Surety Co.*, supra, 249 Conn. 55 ("insured has the burden of proving that the claims were within the policy's coverage").

policies; the plaintiffs' damages are limited by the terms of those contracts. The loss of the tapes was not unforeseeable. See footnote 17 of this memorandum of decision. Coverage for such loss was apparently provided for, perhaps insufficiently, in the cargo policy; it was not provided for in the insurance policies herein. For the above reasons, Federal's and Scottsdale's motions for summary judgment as to the first count are granted.

Berger

Berger, J.