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One Man's Trash: Wisconsin Court of Appeals Punts On The Electronic Data Exclusion And Reinforces The Four Corners Rule In A Case Of $1 Million Videos

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Somewhere in the depths of their condo's storage room, my parents have a few boxes of videos showcasing my (melo)dramatic exploits from age 11 to 22. These are, in the opinion of approximately three residents of planet Earth, priceless. But everyone would agree that the source of this alleged value is the videos' content, not their cheap plastic shell—right?

Maybe not. In a lawsuit concerning the loss of several boxes of old videotapes alleged to be worth $1 million, the Wisconsin Court of Appeals punted on the opportunity to construe a CGL policy's electronic data exclusion. The court instead reinforced the sovereignty of the four corners rule, concluding that the exclusion did not apply because the complaint could be read to allege damages based on the loss of the tapes themselves, not just their content. *See Country World Media Group, Inc. v. Erie Insurance Co.*, 2016AP1343 (Wis. Ct. App. Dist. III May 2, 2017).

The fact pattern is straight out of Hoarders: Business Edition (if there were such a thing). The plaintiff, a media company, stored several boxes of "television show tapes, cookbooks and videos" in a closet in the defendant production company's leased office. Long story short, the property manager, seemingly unaware that he was sitting on $1 million of archival footage, stored them instead in the dumpster out back. After the boxes had long disappeared into the bowels of a garbage truck, the media company discovered their loss and sued.

A coverage dispute arose between the defendant production company and its CGL carrier, Erie Insurance Company. Erie claimed it had no duty to defend because the allegations fell within its policy's electronic data exclusion—which excludes coverage for *"[d]amages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data."* The policy defines *"electronic data"* as *"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."*

The trial court applied the exclusion and concluded that Erie had no duty to defend—but the Court of Appeals reversed. Although the parties sparred over the meaning of the electronic data exclusion, the court said it didn't have to decide "whether the content of the discarded tapes constitutes electronic

data.” The court instead based its ruling on the four corners of the complaint, which alleged the loss of “television shows, master copies and field footage.” “Construed liberally,” the court concluded, “these allegations assert an entitlement to damages for both the loss of the intangible data contained on the tapes and the loss of the tapes themselves.”

Our take? As a factual matter, it’s difficult to see how the value of the plastic videos themselves, rather than their content, was at issue. These weren’t vintage records, in which the plastic medium itself confers some value. They were dusty old VHS tapes that happened to contain archival footage that was valuable to this plaintiff. Even the plaintiff’s counsel, at oral argument, expressly stated that his client was “seeking the value of what’s on the videotapes,” and did not regard “the value of these boxes” to be "six dollar videotapes contained in them.”

The interesting question here is the one that the court didn’t decide: what does the electronic data exclusion mean, in particular when applied to data that didn’t necessarily come from a computer? The policyholder, pointing out that the electronic data had to have been “stored as or on, created or used on, or transmitted to or from computer software,” argued there was “no evidence in the record that the content of the lost tapes ‘had any connection at all with computer software.’” How, then, does the exclusion apply to electronic data from the recent past—created before computers, cameras, and phones all blurred into one? That question is left unanswered.

Ultimately, the four corners rule is gospel, and we appreciate any decision that reinforces its standing. The rule doesn’t discriminate—in this case it may have favored the policyholder, but it just as often will favor the carrier. And for insurers, the importance of being able to rely on the four corners of the complaint to assess coverage is critical. Still, we were surprised that the court went so far as to say that the four corners rule meant that “[s]tatements made in the circuit court by” the plaintiff’s attorney are “irrelevant.” We’re not sure that statements by the attorney who drafted the complaint should properly be considered “extrinsic evidence,” as the court suggested.

The media company and production company ultimately settled out of the case, so we may never know how much the tapes were really worth. As for my own video archive, the only income they’re ever likely to generate is the money I pay my parents to ensure they never see the light of day.

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