Cyber Warfare – Battles in the Courts

Presented by Daniel Lamkin

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War Exclusion
+
Property Policy

- Merk and International Indemnity v. ACE
- New Jersey Superior Court

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Merck
What Happened?

- Merck Pharma was hit with NotPetya in 2017 that resulted in $1.75B of losses.
- Coverage denied due to War Exclusion.
- Court issued ruling stating that the War Exclusion in the all-risk Property policy CANNOT be applied to the ransomware hack.
- "Insurers did nothing to change the language of the exemption to reasonably put the insured on notice that it intended to exclude cyberattacks," the judge emphasized.

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Example of a War Exclusion

o. War and Military Action

(1) War, including undeclared war;

(2) Hostile or warlike action, in time of peace or war, including action in hindering, combating or defending against an actual or expected attack; by any of the following:

- **(a)** Government or sovereign power (including quasi and de facto forms), or by any authority maintaining or using military, naval or air forces;
- **(b)** Military, naval or air forces; or
- **(c)** An agent of any such government, power, authority or forces.

- The current war exclusions preclude coverage for attacks sponsored by nation-states.

- Very hard to pinpoint where an attack originated from without any nation-state taking responsibility for it

- "The London insurance market has drafted several new exclusions that expressly encompass cyberwarfare as well as bystander attacks such as the one at issue in the Merck case," – Attorney Michael S. Savett, Clark & Fox

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OFAC Sanctions on Ransomware

- Office of Foreign Assets Control keeps list of designated bad actors
- Paying ransom to a designated actor, may be subject to sanctions from US Treasury.

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Ransomware Losses + Property Coverage

- EMOI Services, LLC v. Owners Insurance Company
- Court of Appeals for Ohio, Second Appellate District

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EMOI
What Happened?

- Hackers encrypted all the files on EMOI's computer system.
- EMOI regained access to most of its files but was unable to decrypt some files and its automated phone system.
- EMOI then transitioned to a new domain with better security, but this change caused problems because the various software systems that EMOI used could no longer communicate with each other.
- Filed claim on Property policy for damaged systems.

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What did the policy cover?

- Electronic Equipment endorsement, - “we will pay for direct physical loss of or damage to **‘media’** which you own.”
- **media,** defined as "materials on which information is recorded. "media" includes "computer software and reproduction of data contained on covered media.”
- Court interpreted covered media to mean media that is insured under the endorsement. It was not defined in policy.

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Result of court's interpretations

- Court ruled that since the ransomware altered the files, it could be considered damage to them.
- The policy was interpreted broadly and found the Electronic Equipment endorsement covered software in addition to hardware.
- This case is very specific to individual policy wordings.
- It will likely cause revisions in language and definitions in many policies.
- Possible COVID Biz Int implications? The court recognized that an "incursion" onto covered property can give rise to a claim. The presence of COVID-19 or another virus that renders the property unusable is also an incursion and, under the *EMOI* analysis, should give rise to coverage.

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Silent Cyber in CGL
+
Expanding definition of Publication

- Landry's, Inc. v. The Insurance Co. of the State of Pennsylvania
- US Court of Appeals, Fifth Circuit

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Landry's What happened?

- Landry's operates hotels/restaurants.
- It uses Paymentech to process credit cards.
- Paymentech's contracts with VISA/MC requires Paymentech to take liability for fraud losses on cards.
- Landry's indemnifies Paymentech for security losses.
- Hacker installed skimming software on Landry's card scanners.
- Paymentech sues Landry's for "publishing credit card data"
- Landry's filed claim on CGL – Personal and Advertising Injury

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What did the policy cover?

- Insuring Agreement:
  - **"will pay those sums that [Landry's] becomes legally obligated to pay as damages because of 'personal and advertising injury' "**

- Definition **"Personal and Advertising Injury":**
  - **"injury ... arising out of"** several offenses, including **"[o]ral or written publication, in any manner, of material that violates a person's right of privacy."**

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District Court's decision

- District court denied Landry's claims against Carrier.
- Ruled that a hacking into system and stealing CC data was not a **publication**.
- Ruled no **Violation of a person's right to privacy** because underlying claim was based on contract breach, not cardholder's privacy claim.

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Does data hack = Publication?

YES – Covered.

- Policy did not define “publication”
- Court used broad dictionary definition.
- Underlying claim by Paymentech specifically claims Landry’s published CC data.
- Court ruled that a hacker stealing CC Data is a publication!

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Tort vs Contract – Does it matter?

- Carrier claimed it only has a duty to defend when individuals sue for privacy breach, not contract breach.
- Policy states "arising out of ... the violation of a person's right of privacy.“
- **Arising out of** backfires against carrier.
- Court rules that the contract action **arose out of** the violation of right of privacy.

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Effect of case

- This ruling greatly expands the accepted definition of “Publication”.
- We should watch all policies to see if “Publication” is defined.
- This case was CGL, but has cyber implications.
- Comparing to a Cyber Policy: **Privacy Breach** means a breach of **…** violation of any rights to privacy, including but not limited to … breach of a person’s right of publicity, … seclusion, public disclosure of a person’s private information…”
- Publicity/disclosure are not defined and now will be open to very broad interpretations that include a hacker taking data.

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Biometric + How exclusions can differ

- West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan Inc
- Illinois Supreme Court
- Massachusetts Bay Insurance Co. v. Impact Fulfillment Services
- US District Court, Middle District of North Carolina

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Biometric Information Privacy Act

Two cases Two outcomes

- In West Bend, national chain salon required members to give fingerprints to access membership.
- In Mass Bay, employer required staff to give fingerprints for clock-in/clock-out.
- Both cases alleged violations of IL BIPA statute.
- West Bend = Covered
- Mass Bay = Not Covered

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West Bend Covered

- Used same reasoning in Landry's (broad "publication" definition) to establish coverage obligation.
- West Bend alleged that the **Distribution of Material** exclusion should apply. This is an older version of the exclusion
- That exclusion dealt solely with TCPA, CAN-SPAM, and FCRA acts guarding faxes and emails not the use of fingerprinting software.
- Court ruled the exclusion did not apply.

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Mass Bay – Not Covered

- This case played out almost exactly the same as West Bend.
- Policy had newer version of exclusion **Recording and Distribution of Material or Information in Violation of Law** which adds:

> **(4)** Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

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The Policy Makes All the Difference

- The difference in the policy language in the two cases was a good example of how exclusions have to be read carefully.
- In West Bend, the exclusion was too narrow to get the point across.
- In Mass Bay, same facts, but a reworked exclusion that is much broader and future-proofs for new statutes.

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Looking Ahead

Big Ruling from Supreme Court

- *Ramirez v. TransUnion*
- *US Supreme Court*

US Supreme Court Ruling

- USSC has issued new ruling on what constitutes "Injury in Fact"

- ***"Only plaintiffs concretely harmed by a defendant's statutory violation have Article III standing to seek damages against that private defendant in federal court."***

- Article III standing requires
  - (1) an injury in fact;
  - (2) the injury was caused by defendant's conduct; and
  - (3) the injury can likely be redressed by a favorable judicial decision

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What does this mean?

- Plaintiffs must have suffered the actual harm before they will be allowed to join the class action lawsuit.
- In Ramirez, the mere existence of erroneous credit reporting data will not be enough to join the class.
- Plaintiffs must have been harmed in some way by the erroneous data.
- This may apply to cyber data breaches. Must prove the release of your data resulted in actual harm.

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THANK YOU!

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