Insurance Coverage For Emerging Cyber-risk Claims

By Keven Drummond Eiber, Paul A. Rose and Caroline Marks

Companies today face cyber risks under laws such as the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030, and the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §§ 2510-21 and 2701-11. These acts aim to protect the privacy interests of consumers in an age when information can be disseminated more broadly and more rapidly than ever before, and such legislation, along with rapid technological advances and changes in insurance policy forms, create an array of moving targets for policyholders, risk managers, insurers and the courts with respect to coverage issues. Those targets, however, can be brought into focus through the lens of well-established insurance coverage principles.

The CFAA prohibits unauthorized access of a third party's computer in certain circumstances and provides for a private right of action. It covers a broad range of conduct including when a person or entity knowingly transmits a program, code or command with the intent to cause harm to a computer or information stored on the computer, without the knowledge and authorization of the person responsible for the computer being attacked.

The ECPA, in contrast, is intended to protect persons from the interception and monitoring of their electronic communications and provides that anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" may be liable, 18 U.S.C. §§ 2511(1)(a). With some exceptions, the monitoring of email, voice mail and data stored electronically, is generally prohibited by the ECPA.

Cases brought under the CFAA and the ECPA are fraught with coverage issues. Some of these coverage issues were addressed in *Netscape Communications Corp. v. Federal Ins. Co.*, No. 5:06-cv-00198-JW, 2007 U.S. Dist. LEXIS 78400 (N.D. Cal. Oct. 10, 2007), rev'd, No. 08-15120, 2009 WL 2634945 (9th Cir. Aug. 27, 2009). In that case, St. Paul Mercury Ins. Co. ("St. Paul") had issued a general liability policy to AOL and Netscape, which included personal injury coverage. The policy defined "personal injury" to include "making known to any person or organization written or oral material that violates a person's right to privacy." The policy, however, contained a new "online activities" exclusion, which the insurer argued was intended to avoid overlap between the traditional personal and advertising injury coverage afforded by the policy and the coverage provided by separate multimedia and professional liability policies issued by other carriers to Netscape. The exclusion defined "online activities" as "providing e-mail services, instant messaging services, third party advertising, supplying third party content and providing internet access to 3rd parties."

The coverage dispute arose after customers of AOL and Netscape brought a series of class actions against service providers for violations of the CFAA and the ECPA. The complaints alleged that AOL and Netscape used a "SmartDownload" utility to wrongfully intercept and collect consumers' private email messages. The Northern District of California held that these allegations asserted claims that were potentially within the personal injury coverage of the policy and that the criminal activity exclusion did not apply. The court, however, interpreted the "online activities" exclusion broadly, finding it to be applicable. On appeal, the Ninth Circuit reversed. Although the Ninth Circuit agreed that the underlying allegations were within the personal injury coverage of the policy, notwithstanding that AOL had only "made known" the content of the intercepted emails internally, it disagreed that the "online activities" exclusion barred coverage, concluding that the "SmartDownload" utility did not operate to provide an internet connection. The Ninth Circuit thus interpreted the "online activities" exclusion narrowly, and construed the personal injury grant of coverage in Netscape's CGL policy broadly, to find coverage.

Another coverage issue that frequently occurs in cyber cases is whether intentional acts are covered. This issue can arise from the definition of "error" in an E&O policy, from the definition of "occurrence" in a CGL policy, or in connection with an "intentional acts" exclusion. For example, in *Compaq Computer Corp. v. St. Paul Fire and Marine Ins. Co.*, No. C3-02-2222, 2003 WL 22039551 (Minn. App. Sept. 2, 2003), the underlying complaints alleged that Compaq intentionally sold computers with a defective floppy disk controller and floppy disk controller microcodes that caused the loss of use, corruption and destruction of data without prior warning to the computer user. Two civil class action complaints filed against Compaq alleged, among other claims, violations of the CFAA. The Minnesota Court of Appeals held that the complaints overwhelmingly alleged intentional conduct and therefore did not allege an "error" in order to be covered by Compaq's Technology Errors & Omissions ("E&O") policy. In addition, unlike the Ninth

Continued on page 5

Continued from page 4

Circuit in *Netscape,* the Minnesota court determined that the allegations in two class actions against Compaq were not covered because the CFAA is a criminal statute, and the policy explicitly excluded coverage for "criminal, dishonest, or fraudulent acts."

Interestingly, the Eighth Circuit, in a second coverage case involving a third civil class action against Compaq with respect to its faulty floppy disk controller, determined that the claims were within the definition of "error" in the same Technology E&O policy. According to the Eighth Circuit, the term "error" "'encompasses intentional, non-negligent acts like those associated with breach of contract,' as well as omissions and negligent acts." *St. Paul Fire and Marine Ins. Co. v. Compaq Computer Corp.,* 539 F.3d 809, 815 (8th Cir. 2008)(applying Texas law).

These cases demonstrate that courts navigating the uncharted reaches of cyber-space have stayed grounded in traditional principles of insurance policy construction. Courts continue to demonstrate a willingness to scrutinize carefully the allegations in the underlying complaints and apply those principles in making coverage determinations, often finding coverage for policyholders.

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