New developments may affect how Comprehensive General Liability (CGL) responds to Cyber liability

On April 26, 2011, Sony Corporation (Sony) disclosed that 77 million records were released by virtue of a known vulnerability exploited by hackers around the world. The breach included information that could be used to commit identity theft that included names, addresses, email addresses, birthdates, passwords and logins, online ID, profile data, purchase history and credit card numbers. This breach was the seventh largest on record, and it also attracted a number of lawsuits by plaintiffs claiming injury due to the breach. The lawsuits included one by Sony’s comprehensive general liability insurance (“CGL”) carrier.

Why would an insurer sue its customer? In brief, Sony’s carrier asked the court to rule that it was not obligated to defend or indemnify Sony in the multitude of lawsuits triggered by the breach. The policy in question covered “bodily injury, property damage or personal and advertising injury”. Part B of the CGL policy has been interpreted by some courts to provide coverage for privacy breaches under “personal and advertising injury”, if there is a finding of consequential “bodily injury”, arising out of oral or written publication, in any manner, of material that violates a person’s right of privacy.

A reasonable interpretation is that Sony’s carrier, recognizing that the law was uncertain and that the stakes were high, chose to have a court decide the issue rather than negotiate with its insured. Its gamble paid off, at least in the short term, as the New York court agreed with the carrier on February 14, 2014.

It is important to note that not every court which has viewed this issue agrees with the New York court, nor is it certain that this opinion would withstand appeal or rehearing. In light of this continuing uncertainty, one should expect CGL carriers to take action in the near future.

Most insurance professionals would agree that CGL carriers do not actuarially price for cyber liability and do not intend to cover data breaches. Pricing models were developed well before cyber liability was a concern. When the “personal and advertising injury” policy language is interpreted to cover cyber liability, CGL carriers believe it an unfair distortion. On the other hand, policyholders find that the coverage is the result of established case law and modern risk needs. As such, litigation has accompanied this disconnect between insured and the insurer.
Insurance carriers are less fond of litigation than their customers. Their reluctance to act in the past can be attributed to the industry’s belief that their policy language would ultimately be interpreted “correctly” or that changing it would constitute an admission of error. In any case, it is likely that the standard CGL form will be changed to better reflect the almost universal intent of the carriers who sell comprehensive general liability insurance.

An explicit “Unauthorized Access Exclusion” will likely be added either to the form itself or by endorsement. This will be more specific language intended to eliminate any idea that coverage exists in the CGL policy for data breach litigation. While language may vary, insureds should expect something such as the following:

“There will be no coverage for Loss arising out of any unauthorized access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, financial information, credit card information, health information or any other type of non-public information”

Of course, all claims are different: Policyholders and courts may yet find this language open to interpretation.

Still, 2014 would seem to be the time to exercise prudent risk management of cyber exposure by accepting that the “C” in CGL does not mean “Cyber”.

Cyber liability policies are clearly written to provide robust coverage not only for privacy breach litigation, but also for liability arising from the spread of malicious code and distributed denial of service attacks. In addition, first party coverage has been refined to offer expansive breach response costs (legal advisory, forensics investigations, notification and credit monitoring and public relations), network business interruption including dependent business interruption and cyber extortion.

Moreover, coverage is widely available, negotiable and reasonably priced. Cyber Liability is the right tool for the job and Cyber liability insurance is not your average “C”GL.

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