



CYBER RISK INSURANCE:

Policies, Claims and Coverage



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Overview

- Searching for Coverage in Traditional Policies
- The *Sony* Decision
- New ISO Revisions

Data Breaches are Almost Daily News

J.P.Morgan

Anthem.
BlueCross BlueShield



STAPLES

TARGET



SUPERVALU

PlayStation[®]
Network



iCloud

UC DAVIS
MEDICAL CENTER



K
kmart

livingsocial

eBay

HealthCare.gov
Take health care into your own hands

The Cost of a Data Breach

- Average total cost increased from \$5.4 million to \$5.9 million*
- Average cost per lost or stolen record increased from \$188 to \$201*
- Healthcare breaches are the most costly at an average of \$223 per record
- Data breaches cost the United States \$50 billion per year*

* The Ponemon Institute
• www.CSID.com



Losses from Data Breaches

First-Party Losses:

- Business interruption
- Lost profits
- Damage to company's computer systems
- Cost to hire experts to:
 - Discover source of breach
 - Repair damage
 - Manage public relations
- Cost to assist victims:

Third-Party Losses:

- Liability for claims from victims
 - Negligence
 - Breach of warranty
 - Failure to protect data
 - False advertising
 - Unfair or deceptive trade practices
- Government fines and penalties



Searching for Coverage in Traditional Policies

WHO PAYS FOR ALL THIS?

Commercial General Liability ("CGL") Policies

- Provides coverage for third-party losses.
- Most policies provide coverage for “physical injury to tangible property, including all resulting loss of use of that property” and “[l]oss of use of tangible property that is not physically injured.”
- Is electronic data tangible property? Many courts say no.
- Newer forms may state electronic data is not tangible property.

CGL Policies (Cont'd.)

- Many CGL policies contain coverage for Personal and Advertising Injury Liability.
- Includes certain enumerated actions including:
 - “[o]ral or written publication, in any manner, of material that violates a person’s right of privacy.” ISO CGL Form No. CG 00 01 12 07, Coverage B– Personal and Advertising Injury.
 - Does this cover data breaches?

CGL Exclusions

This insurance does not apply to:

q. Electronic Data

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.

CGL Exclusions (Cont'd.)

- Violation of Statutes that Govern E-Mails, Fax, Phone Calls or other Methods of Sending Material or Information ISO Form No. CG 00 67 03 05
- Recording and Distribution of Material or Information in Violation of Law Exclusion ISO Form No. CG 68 05 09
- Information Distribution and Recording Violations Exclusion AAIS Form No. GL 1022 09 09

THE SONY DECISION

**IT
ONLY
DOES
EVERYTHING.™**

The Sony Case



- *Zurich American Insurance Co. v. Sony Corp.*, Index No. 651982/2011 in New York Supreme Court
- April 2001 hackers attacked Sony's Play Station Network, Qriocity services and the network platform for the Sony Online Entertainment Network
- Hackers obtained users' names, addresses, and credit card information
- There was no evidence the hackers used or disseminated the information

The Underlying Lawsuit

- 65 putative class actions were filed against Sony subsidiaries and affiliates
- Alleged the attacks resulted in unauthorized release of users' personal information
- Asserted claims including violations of the right to privacy



The Coverage Action

FILED: NEW YORK COUNTY CLERK 07/20/2011

NYSCEF DOC. NO. 1

INDEX NO. 651982/2011

RECEIVED NYSCEF: 07/20/2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZURICH AMERICAN INSURANCE
COMPANY and ZURICH INSURANCE
COMPANY LTD.

Plaintiffs,

-against-

SONY CORPORATION OF AMERICA, SONY
COMPUTER ENTERTAINMENT AMERICA
LLC, SONY ONLINE ENTERTAINMENT
LLC, SONY COMPUTER ENTERTAINMENT,
INC., SONY NETWORK ENTERTAINMENT
INTERNATIONAL LLC, SONY NETWORK
ENTERTAINMENT AMERICA, INC., SONY
PICTURES ENTERTAINMENT, INC., SONY
OF CANADA, LTD., SONY CORPORATION,
MITSUI SUMITOMO INSURANCE
COMPANY OF AMERICA, NATIONAL
UNION FIRE INSURANCE COMPANY OF
PITTSBURGH, PA., ACE AMERICAN
INSURANCE COMPANY, A-K INSURANCE
COMPANIES (FICTITIOUS DEFENDANTS),
and L-Z INSURANCE COMPANIES
(FICTITIOUS DEFENDANTS),

SUMMONS

Index No.:

Date Purchased:

Plaintiffs Designate New York County as
the place of trial

The basis venue is the residence of Plaintiff
Zurich American Insurance Company

- Sony tendered the suit to Zurich for defense and indemnity under its CGL policy
- Zurich denied coverage
- Zurich filed an action seeking a declaration that they have no duty to defend or indemnify Sony

Issue One: What is Publication?

- The policy covers: “Oral or written publication, in any manner, of material that violates a person's right of privacy.”
- Zurich: publication means public dissemination --
There was no evidence of public dissemination.
- Sony: “in any manner” includes negligent disclosure of information -- Sony’s failure to protect the information was publication.

Issue One: Sony Wins!

- The court held publication occurred when computer hackers accessed and stole the data.
- “[M]erely opening up that safeguard or that safe box where all of the information was, in my mind my finding is that that is publication.”



Issue Two: Who has to Publish?

- Does the policy provide coverage where a third party published the information?
- Zurich: the policy covered liability for acts by Sony, and Sony did not publish the data
- Sony: nothing in the policy language required the policyholder to commit the publication, and had the insurer meant to limit coverage it could have done so as it did in other places in the policy

Issue Two (Cont'd.)

- “In any manner” – does it include third-party acts?
- Zurich: “in any manner” refers to the means of publication (i.e., e-mails, letters, blog postings, faxes, etc.)
- Sony: “in any manner” included third-party acts



Issue Two: Zurich Wins!

- Publication must be committed by the policyholder
- Because the hackers performed the publication, there was no coverage

Issue Three: Is Sony an “Internet Type Business”?

The Policy Excluded:

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of websites for others; or

(3) An Internet search, access, content or service provider.

Issue Three (Cont'd.)

- Not defined in the policy
- Zurich argued: Sony fell under the second and third categories because it “principally” engaged in those activities

Issue Three: Sony Wins!

The Court found Sony engaged in a “hybrid” of activities and refused to read in language that would broaden the exclusion



Implications and Takeaways from *Sony*

- Requiring the policyholder perform the publication severely limits coverage for acts by third-parties such as:
 - Vendors
 - Contractors
 - Software developers
- Finding that publication includes unauthorized access to data, even without public dissemination, is not a huge help to policyholders

Sony: Game Over or is a New Version Coming?

- Sony is currently on appeal
- Issues center around the three key rulings:
 - Access, without more, is publication
 - Policyholder must commit the publication
 - “Insureds in Media and Internet Type Businesses” does not include companies engaged in a “hybrid” of activity



RECENT ISO CHANGES

Broadening the Gap for Data Breach Coverage

New ISO Endorsements & Exclusions

- New exclusion amends the definition of Personal and Advertising Liability to eliminate coverage for invasion of privacy
- New language broadens the exclusion for Distribution of Material in Violation of Statutes:
 - Now includes “recording” and distribution
 - Includes Fair Credit Reporting Act (FCRA) and Fair and Accurate Credit Transaction Act (FACTA)
- Trend appears to be signaling an intent to encourage policyholders to purchase specialized cyber liability policies

OTHER TRADITIONAL SOURCES OF COVERAGE

Addressing the Possibility of Coverage Under Property,
D&O, and E&O Policies

Property Insurance

- Covers “direct physical loss of or damage to Covered Property... caused by or resulting from a Covered Cause of Loss”
- Electronic data is generally excluded from a Building and Personal Property Coverage Form

Property Exclusions

“The cost to replace or restore the information on valuable papers and records, including those which exist as electronic data. Valuable papers and records include but are not limited to proprietary information, books of account, deeds, manuscripts, abstracts, drawings and card index systems....”

ISO Building and Personal Property Coverage Form CP 00 10 10 12
(emphasis added)

D&O and E&O Policies

D&O

- Covers defense costs and indemnification for wrongful acts of policyholder's "directors and officers"
- Usually only covers negligent, not intentional, conduct
- Unlikely to cover first-party losses
- Many exclude claims for violations of privacy rights

E&O

- Cover losses or liabilities stemming from policyholder's negligent acts in the course of professional services
- Often apply to quasi "professional" services
- Could be a source of coverage for companies working in IT, data security, software or other technology