



By
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Shadowy Risks, Invisible Ruling

Cyber liability is a new frontier both for insurers and the legal system.

Claims from cyber activities can be divided into two broad categories: passive and active.

At a recent American Bar Association meeting of insurance lawyers, everyone seemed to be talking about insurance coverage claims arising from computer activity. If lawyer chatter is a guide, cyber liability is the next big thing.

Cyber liability is capturing attention for many reasons. Cyber activities are scary. These activities are intangible and, consequently, difficult to track and measure. Also, the causative acts can be undertaken at a place very far from the consequences, and the consequences can occur and multiply very fast.

And not only are cyber activities capable of harm, they're sometimes intentionally used to create harm.

In the broadest sense, the anticipated range of claims from cyber activities can be divided into two broad categories: passive and active.

In passive claims, a third party attacks the insured's computer system. The third party might be seeking to hurt the insured's customers by disrupting the insured's operations. Or, the third party might be trying to steal valuable information.

In active claims, the insured entity's computer system injures a third party on its own. The insured's computers might have released a virus that affected third-party computers. Or, perhaps the insured or one of its employees used a computer inappropriately.

Right now, I have seen very little insurance coverage case

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law in this area. A few cases have reviewed the question of whether data is "property damage"—generally it's not. But I have not found any cases considering whether, for example, a cyber attack is covered.

It's impossible to definitively identify the controlling issues of hypothetical claims under hypothetical policies, but we can make a few educated guesses.

The first area of concern will probably be whether these claims present insured injuries: Do the claims involve bodily injury, property damage or personal injury, as these terms are defined under the policies? This will be a fundamental question for both passive and active claims.

The second question probably will be: Do restrictions concerning intentions and expectations bar coverage? Almost all, if not all, insurance policies include provisions that bar coverage for certain activities that are intended and expected. Policies approach this issue differently. Some focus on the act. Others focus on the injury. Others focus on both. Courts have addressed this issue differently. This issue will be a point of contention, but it will probably be a bigger issue with the active claims.

The third and overriding question will be: How will courts resolve these issues in the cyber context? Cyber circumstances create new factual scenarios, but so too have many other technologies. For example, while the Internet may be a new vehicle for fraud and defamation, the core conduct has existed for centuries. Inevitably courts will analogize cyber circumstances to those in which the law is already developed. In fact, some courts have turned to this approach when considering liability (as opposed to coverage) issues arising from cyber activities.

Coverage for cyber liability claims is certainly an evolving area to watch.

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