

## Insight

# A Lesson in Cyber

Acai is not just a healthy fruit. It can also be used to remember four important aspects of cyber coverage: Authority, Causation, Act, Injury.

Insurance coverage for cyber liability is generating both dollars and questions. Surprisingly, the best guide to the questions can be found with the help of the acai berry.

Cyber's growth is indisputable. According to a 2015 white paper from the Insurance Information Institute, more than 60 insurers now offer stand-alone cyber policies. In 2014, the U.S. cyber insurance market grossed more than \$2 billion in premiums, with the potential to grow to \$5 billion by 2018 and \$7.5 billion by 2020.

With so much activity we need to track the issues, and that brings us back to the berry. ACAI is important because it's a useful acronym for the four issues that frequently arise in this area: authority, causation, act and injury.

**Authority** is important because many policies strictly limit coverage to actions of users who are not authorized. Sometimes this concept is incorporated through employee exclusion—there is no coverage for harm caused by employees or authorized representatives. Other times, the authorization concept is expressed by limiting coverage to damage caused by people who actually break into the computer; if the evildoer was authorized to use the computer, then that person was not a hacker. This concept requires us to distinguish between using a computer (a common event) and hacking a computer (a comparatively rare event).

**Causation** comes into play because coverage is sometimes limited to damage directly caused by the computer activity. Like in torts, this issue comes down to how long a chain will be recognized. At what point is an act too distant from an injury for the act to be considered the cause? Also like in torts, causation case law is inconsistent. Some courts will accept a long chain of events as causation, while



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other courts reject seemingly shorter chains.

**Act** is the next issue, and here I've cheated a bit to maintain my acronym. Act involves many subquestions:

- What constitutes hacking? Hacking may be the most frequent and significant subquestion. Again, hacking means breaking into a computer. Nearly everyone uses computers, but only a small share of users are hackers.

- When does bad intent preclude coverage? Generally, for bad intent to preclude coverage, the policyholder must have had the bad intent. A third party's bad intent usually won't bar coverage.

- What constitutes "publication"? Clearly, publication has a broader meaning than printing on paper. At least one court found that a possible release is not a publication, but another court reached nearly the opposite conclusion and found there was a publication if data was merely accessible on the internet.

- What is an "occurrence"? Generally, if the policyholder expected or intended the damage, there is no occurrence and no coverage.

- What are best practices, and is coverage barred when a policyholder falls short of best practices? In 2015, an insurer sued to bar coverage because the policyholder allegedly failed to follow the best practices specified in the application. The suit was resolved without a decision from the court, but the policyholder bar has criticized the insurer severely. This issue will surely arise again.

- When does a statutory exclusion apply? Some policies have exclusions for violations of statutes concerning certain transmissions and communications.

**Injury** is the last issue. Which injuries are insurable? Now that commercial general liability policies say electronic data is not tangible property, the injury issue is less common. But questions still arise as to whether losses fall within policy terms for covered injury.

Ultimately, ACAI is not the answer, but it does give us a structure for considering the questions in this area. **BR**

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