

Cyber Health

ACAI: Using the spelling of the nutritious fruit as an acronym helps clear questions about cyber insurance.

Back in 2016, I wrote that cyber coverage cases are difficult to track because the insurance policies in this area are varied. But, the acai berry gives a framework. Because despite the differences in policy language and differences in courts' reasoning, most cyber coverage cases concern one or more of the following issues: authority, causation, act, and injury—ACAI.

- **Authority:** Many policies limit coverage to the actions of users who are not authorized.
- **Causation:** Many policies limit coverage to damage caused directly by computers.
- **Act:** Many policies are limited to specific acts.
- **Injury:** Only some injuries are insured.

Recent cases in this area continue to validate the ACAI Rule. For example, in the second half of 2017, we saw an interesting cyber coverage case from the U.S. District Court for the Eastern District of Michigan, *American Tooling Center v. Travelers*.

In this case, a thief pretended to be the policyholder's vendor. The thief sent emails requesting payment. The emails addressed outstanding invoices that were legitimate. The emails also sent new banking instructions for payment, and the banking instructions were, of course, not legitimate.

The policyholder paid the bills—\$800,000. But, the payment did not go to the vendor; it went to the thief.

The policyholder then sought coverage for its payment. But, the insurer cited two of the ACAI



By
Alan Rutkin

Most cyber coverage cases concern one or more of the following issues: authority, causation, act, and injury.

restrictions—causation and act. The insurer said that the loss was not “directly caused” by the use of the computer. That is, the phony emails may have set the process in motion, but the computer itself was not used to fraudulently cause a transfer of the funds. The insurer denied the claim. The policyholder sued. And the court upheld the insurer's position, and found no coverage.

More specifically, the insurer argued that the policyholder did not suffer a “direct loss” that was “directly caused” by “the use of any computer.” The policyholder received emails. The policyholder confirmed that the amounts were due and authorized payments under the new banking instructions. But the policyholder did not try to independently verify the account change. The court held that these intervening steps meant that there was not a “direct” loss “directly caused” by the use of a computer. Verifying amounts due, authorizing transfers and failing to verify bank information were held to be intervening steps.

The court also found an issue as to the “act.” Merely sending emails was found not to be using a computer to “fraudulently cause a transfer.” Here, we again see a court distinguishing hacking a computer—a rare and covered act—from merely using a computer (a common act that is not covered).

We see three key takeaways from this decision.

First, some courts are strictly construing the language of policy provisions for cyber-related acts.

Second, decisions in this area are just not consistent, particularly on the issue of causation. Judges disagree about what constitutes a direct cause.

Third, not only is the acai berry delicious and nutritious, it is also a helpful acronym for tracking the key coverage issues in this area.

BR

Best's Review columnist **Alan Rutkin** is a partner at Rivkin Radler in Uniondale, N.Y. He can be reached at alan.rutkin@rivkin.com.