



Alerts

No E&O Coverage for Title Agent's Phishing Losses

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Insights for Insurers: Cyber Coverage

A New Jersey federal district court recently ruled that there was no coverage under a title agent's errors and omissions policy for losses resulting from an email phishing scam. In *Authentic Title Services, Inc. v. Greenwich Insurance Company*, the title agent received emails purporting to be from a mortgage letter, directing the agent to transfer over \$480,000 to a specified bank account and to confirm the transfer by email only. The emails were in fact sent to the agent by a fraudster. The agent followed the directions in the spoofed emails, but later realized that the funds had been transferred to a fraudulent account. By that time, the money had been withdrawn from the fraudster's account and could not be recovered. The agent then tendered a claim for the loss under its E&O policy. The insurer denied coverage, citing exclusion 14(a) for "the commingling, improper use, theft, stealing, conversion, embezzlement or misappropriation of funds or accounts."

In the subsequent coverage action, the court agreed with the insurer that the exclusion applied, stating: "[T]he terms undoubtedly apply to the ... funds that [the agent] erroneously sent to the fraudster's account; it doesn't matter ... who committed the theft or other prohibited act, the insured or another party; if the claim arose from such an act (and it cannot reasonably be disputed that it did), the plain and ordinary meaning of the language in exclusion 14(a) supports [the insurer's] denial of coverage."

The agent argued that exclusion 14(a) should not apply because the agent had no knowledge of the fraud. In support of that argument, the agent noted that policy exclusion 8 for "criminal, intentionally wrongful, fraudulent or malicious acts or omissions" exempts situations where the insured had no knowledge of the acts in question. The court stated:

[The agent's] invitation to read exclusion 14(a) in the context of the policy as a whole helps [the insurer's] position rather than its own. [The agent] argues that exclusion 14(a) must be read to reach only conduct by the insured. But the language of other exclusions suggests that when [the insurer] intended that result, it expressly stated so. Exclusion 8 ... includes the carve-out language ... Exclusion 14(a) does not. As [the insurer] argues, this indicates that the company intended it to apply to conduct regardless of whether the insured was involved; in other words, this is the intended result of the language, rather than an unintended.

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The court concluded that the policy "language is not ambiguous, and the Court rejects [the agent's] arguments to the contrary, including its resort to the doctrine of the insured's reasonable expectations and its reliance of decisions that found ambiguity in policy language bearing no resemblance to the ... policy before the Court."