Email and Diverted Wire Transfers

Description

Let the Sender Be Frustrated. Actually, get frustrated now. This is the most frustrating article you will read in the next several months, I hopeâ?¦

The title and escrow industry has been alarmed by the increase in clever wire fraud schemes. However, the exposure is not limited to closings in which fraudulent wiring instructions can get buried in a last-minute flurry of emails. Any company paying for goods or services by wire is exposed. Both cases merit your attention and some discussion with your clients. The news actually gets worse, if you can believe that. There is a growing consensus that there is no insurance coverage for misdirected wires under the â??computer fraudâ?• coverage that you should have if you do not already. That coverage generally compensates only for instances of â??hackingâ?•, i.e., when someone has gained unauthorized access to your own computer system to divert payments. The problem with a misdirected wire is that no one has gained unauthorized access to your own computer system.

THE PROBLEM-LIKELIHOOD OF COVERAGE SMALL

Am. Tooling Ctr., Inc. v. Travelers Cas. & Sur. Co. of Am., 2017 U.S. Dist. LEXIS 120473 E.D. Mich. 2017). The policy at issue in this case protected the insured from â??computer fraudâ?•. The policy defined â??computer fraudâ?• as the use of the computer to cause a fraudulent transfer of funds from inside the business (or the businessâ??s bank) to a third party.

After receiving emails that appeared to be from one of its vendors, ATC authorized payments to a bank account ATC believed belonged to the vendor. The email addresses were virtually identical. The domain name for the legitimate vendor was â?• yifeng-**m**ould.comâ?•. The domain name used to perpetrate the fraud was â?• yifeng-**rn**ouldâ?•. The emails were fraudulent, however, and the payments were received by the persons perpetrating the fraud, not ATCâ??s vendor. ATC contends that it

suffered loss covered under the â??computer fraudâ?• provision of its Travelers policy. Travelers argued that ATC did not incur a covered loss under the policy. The *American Tooling* court noted that â??â?¦courts repeatedly have denied coverage under similar computer fraud provisions, except in cases of hacking where a computer is used to cause another computer to make an unauthorized, direct transfer of property or moneyâ?¦â?• However, because the transfer did not occur â??fraudulentlyâ?•, there was no coverage under this portion of the policy.

Medidata Solutions, Inc. v. Federal Insurance Co., 268 F.Supp.3d 471 (S.D.N.Y. 2017) was a win (in my view, one of the few) for a defrauded insured in this context. In that case, three employees of a sophisticated data management company received a group email purportedly sent from the companyâ??s president stating: â??Iâ??m currently undergoing a financial operation in which I need you to process and approve a payment on my behalf. I already spoke with Alicia, she will file the wire and I would need you two to sign off.â?•

The email contained the presidentâ??s email address in the â??Fromâ?• field and a picture next to his name. In response, the employees logged into the companyâ??s bank account to initiate a wire transfer, and, following company procedure, received the required approvals from the other employees directed to assist in the transfer. As a result, a total of $4,770,226.00 was wired to a phony account supposedly under the control of the companyâ??s president.

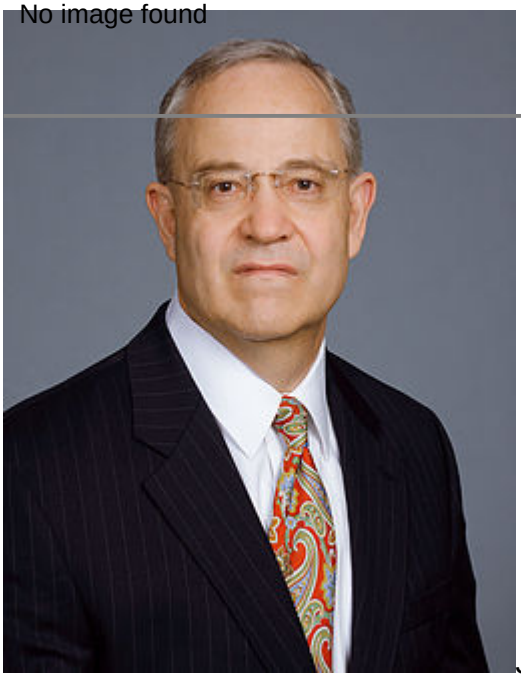
The insurance policy that the company had was somewhat better the policy involved in the ATC case described above. However, the insurance company made the same arguments and the case, in my view, could have gone either way. Although the company won coverage, the insurance company has filed an appeal.

THE SOLUTION THAT IS NOT A SOLUTION-THE FRUSTRATING PART

As the owners of small businesses, you probably do not include paying really clever attorneys high hourly rates to make arguments in federal court over insurance coverage as part of your ordinary business model. Not explicitly, anyway. However, with the obvious increase in this sort of fraud, you are in fact including this as part of your business model. The legal profession is grateful. Your bottom line is probably less grateful. There is a solution but it is not a magic wand.

You can protect yourself with insurance which is referred generically as insurance against â??social engineering fraudâ?•. However, you must sit down with your insurance agent and discuss carefully the coverages available to you. There is no shortcut. You must be satisfied that your insurance will cover you in the event of a misdirected wire. Thomas Edison once said that people often miss an opportunity because opportunity usually appears on your doorstep dressed in coveralls and looking like work. Do not miss this opportunity to protect yourself.

-C. Jay Robbins, IV, P.C.



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