

Second Circuit Upholds Crime Insurance Coverage for Medidata in Cyber Scam Loss

New York, NY (July 9, 2018) - The U.S. Second Circuit has upheld a decision of the U.S. District Court for the Southern District of New York finding insurance coverage under a crime policy for Medidata Solutions Inc. for wire transfer losses resulting from a spoofing attack.

Anderson Kill P.C. filed an amicus brief in support of Medidata on behalf of United Policyholders, a nonprofit dedicated to educating policyholders and defending their access to coverage.

In *Medidata Solutions Inc. v. Federal Insurance Company*, 17-2492-cv (2d Cir. July 6, 2018), policyholder Medidata sought crime insurance coverage for losses that resulted when an employee, responding to a fraudster's email purporting to be from the company's president, wired nearly \$5 million to the fraudsters' account. Federal denied coverage on grounds that the theft was not a "direct loss" and that coverage was available only for a "hacking" incident, notwithstanding that the term "hacking" does not appear in the computer fraud insuring agreement of the crime policy.

The Second Circuit rejected both arguments. Noting that the policy provision in question "covered losses stemming from any 'entry of data into' or 'change to Data elements or program logic of' a computer system," the three-judge panel found that "While Medidata concedes that no hacking occurred, the fraudsters nonetheless crafted a computer-based attack that manipulated Medidata's email system, which the parties do not dispute constitutes a 'computer system' within the meaning of the policy."

With regard to the "direct loss" defense, the Second Circuit held that "Medidata is correct that New York courts generally equate the phrase 'direct loss' to proximate cause" and "It is clear to us that the spoofing attack was the proximate cause of Medidata's losses."

In its amicus brief, Anderson Kill argued that a case Federal cited to support its interpretation of 'direct loss,' *Universal Am. Corp. v. Nat'l Union Fire*, in which the New York Court of Appeals ruled that there were "no wrongful acts in manipulation of the computer system," actually demonstrated that policy language supported coverage for Medidata. According to the brief,

Unlike the circumstances in *Universal*, in this case, the integrity of Medidata Solutions' computer system was fraudulently manipulated by the coding used by the cyber criminal to display the executive's email profile to gain access to internal electronic communications amongst Medidata Solutions' employees.

The Second Circuit likewise held that the court's reasoning *Universal* pointed toward coverage in *Medidata*. While the fraud in *Universal* "only incidentally involved the use of computers," the Second Circuit held, "Here, by contrast, the fraud clearly implicates the 'computer system qua computer system,' since Medidata's email system itself was compromised."

Joshua Gold, Chair of the Cyber Insurance Recovery practice at Anderson Kill and amicus counsel to United Policyholders in the Medidata appeal stated: "The Second Circuit's rejection of arguments intended to undermine the very rationale for purchasing computer fraud insurance coverage is a most welcome result. This is a reminder that when money, securities or property are stolen by a cyber criminal, policyholders are well advised to consider insurance coverage under more than just dedicated specialty cyber policies and property policies. Crime insurance may be available to cover these types of cyber losses."

The Second Circuit's Order awards Medidata \$5,841,787.37 in damages and interest.

In addition to Mr. Gold, United Policyholders was represented in the amicus by Dennis J. Nolan and Peter A. Halprin of Anderson Kill, and by Amy Bach and Dan Wade of United Policyholders.

About Anderson Kill

Anderson Kill is a full-service law firm best known for its work in insurance recovery. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Philadelphia, PA, Stamford, CT, Washington, DC, Newark, NJ and Los Angeles, CA.