

# ANDERSON KILL POLICYHOLDER ADVISOR

The Policyholder Law Firm



## Don't Assume No Coverage for GDPR

By Daniel J. Healy

**R**eady or not, GDPR, the European Union's General Data Protection Regulation, has arrived. And many are not ready: as recently as April 2018 it was reported that only 5% of likely affected companies were prepared to meet the stringent GDPR standards — which means they may have GDPR losses.

Insurance coverage is expected to be important in dealing with these losses. While considerations of GDPR liability often focus on the potentially large penalties, the losses take other forms as well, and raise important insurance considerations.

### Not All GDPR Losses Are Fines

One example of a potentially large loss imposed by GDPR rules is the cost of notifying persons whose data you hold when there is a *suspicion* of a breach. While some states in the U.S. require notification to be sent when there is a reasonable suspicion due to a breach that consumer data may have been compromised, GDPR goes further.<sup>1</sup> And, of course, GDPR applies to everyone in the EU. Just measuring the extent of required notification could prove cumbersome.

But from a substantive standpoint notification in Europe is not necessarily different than

notification in the U.S. A cyber policy may be intended to cover exactly such notification costs. Policyholders should take note of what policy language they have and what constitutes a covered notification. Even where there is limiting language, coverage may still be available and policyholders should take care to demonstrate that they are complying with coverage requirements.

Similar GDPR-mandated costs that are not fines may include appointing a “controller” of personal data, forming a breach response team, conducting forensic analyses, and taking remedial action when needed to contain a breach. Coverage should not be overlooked just because they are performed in compliance with GDPR.

### Losses From Penalties and Fines

Of course, the potentially draconian fines that GDPR may impose on a company cannot be ignored. Some cyber insurance policies specifically provide coverage for “fines and penalties.” That policy language should make coverage for GDPR fines and penalties relatively straightforward.

Other cyber policies may not contain specific language, but may include broad liability cover-

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age of all amounts owed to third parties, including government entities. Coverage for instances of “unauthorized access” to data can be broad and focused on the means of access rather than the form of loss. Other coverage grants that may provide applicable coverage include regulatory liability coverage and network security liability coverage.

Many of these fines could be incurred based on mere negligence and mistake. Depending on the conduct underlying a violation, different coverage may apply and, in the absence of exclusionary language, provide coverage for a resulting fine.

### Other Policy Language That May Provide Coverage

Companies adopting compliance programs to meet GDPR standards should consult the terms of their cyber policies. A point to consider is whether an employee’s breach of the employer’s privacy policy, and the resulting liability, triggers coverage.

### Potentially Exclusionary Language

Exclusions intended for spammers that defeat coverage for unlawful collection of data

or communications could be used inappropriately to deny coverage for alleged GDPR violations. Policyholders should be prepared to explain why these exclusions should not apply to GDPR claims.

Insurance companies can also be expected to point to the laws of European countries that specifically bar insurance against fines and penalties. These arguments may successfully defeat some, but not all, coverage obligations. For example, a U.S.-based company relying on an insurance policy delivered in the U.S. and subject to U.S. law may have arguments against the application of European laws to a coverage dispute.

### Other Policies

Lastly, policyholders should not forget to review other lines of coverage. In many cases, depending on the allegations and facts of the alleged violation, E&O and D&O liability policies may provide coverage. ▲

### ENDNOTE

<sup>1</sup> See, e.g., Maryland Personal Information Protection Act, Md. Code Com. Law § 14-3504.

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## About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C., and Los Angeles, CA.

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