



Insurance Matters!

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A Newsletter of the **Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of The Florida Bar



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Analyzing Nonstandard Cyber and Privacy Insurance Policies

By: William K. Austin, CRIS, Austin & Stanovich Risk Managers, LLC., Holden, MA

"Plans are of little importance, but planning is essential."
-Winston Churchill

"How you climb a mountain is more important than reaching the top."
-Yvon Chouinard, founder of Patagonia

"It's not that I'm so smart, it's just that I stay with problems longer."
-Albert Einstein

It seems to be a daily occurrence—another large organization's computers are hacked, and private customer and employee information is released into the public domain. But cyber and privacy exposures are not for the large organization alone; these are exposures for organizations of any size, any industry, without any distinction between for-profit or nonprofit. But risk managers and insurance brokers alike ask me how to determine the proper coverage when cyber and privacy insurance policies are not standardized.

Risk management professionals—whether risk managers or insurance brokers—must determine how to create an insurance placement to address an organization's cyber and privacy exposures. But the use of insurance is not that easy when cyber and privacy insurance policies are not standardized and differ, sometimes significantly, in coverage terms and conditions by insurer. So how does the risk management professional decipher the various proposals from insurers to decide which policy may be best for the organization?



See **Analyzing Policies**, continued on Page 3

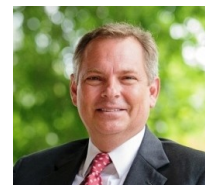
Yes "SIR," I Paid That ...

By: Jeffrey M. Paskert, Esq. and Ryan E. Baya, Esq., Mills, Paskert Divers, Tampa, FL

Now, a Subcontractor's indemnification payment can be used to satisfy a General Contractor's SIR

The recent Florida Supreme Court opinion *Intervest Construction of Jax, Inc. v. General Fidelity Ins. Co.*, 133 So. 3d 494 (Fla. 2014) illustrates the effect contract interpretation principles can have on the evaluation and scope of insurance policies and coverages. *Intervest* concerned the application of a Self-Insured Retention Endorsement ("SIR"), and whether a general contractor or its insurer was obligated to fund a settlement for a bodily injury claim.

During construction of a home the general contractor hired a subcontractor to install attic stairs. After construction was complete, the homeowner fell from the stairs, sustained injuries, and ultimately sued the general contractor. The general contractor sought indemnification from the non-party subcontractor under the terms of their subcontract agreement. At the time of the accident, the general contractor held a CGL insurance policy containing a \$1 million SIR. The SIR amended the policy to provide coverage only after the general contractor paid \$1



See **Yes "SIR,"** continued on Page 3

The Beginning of the End for Workers' Compensation?

By: Michael G. Meyer, Redding & Associates, P.A., Tampa, FL

Florida Workers Advocates v. Florida, Office of the Attorney General,
Order on Amended Motion for Summary Final Judgment,
Case No.: 11-13661 CA 25, 11th Judicial Circuit, August 13, 2014



The 11th Judicial Circuit Court case, *Florida Workers Advocates*, has drawn much attention lately, with some saying this case has laid the ground work for upending the workers compensation system in Florida. In ruling on the Petitioners/Intervenors' ("Petitioners") Motion for Summary Final Judgment on the Petitioners' Count IV for Declaratory Relief, Judge Jorge E. Cueto ruled that the Florida Workers' Compensation Act, Chapter 440, *Fla. Stat.*, "is facially unconstitutional as long as it contains §440.11 as an exclusive remedy." See p.19 of the Order. Moreover, the court further ruled that "§440.11 Fla. Stat. 2003 is unlawful, invalid and unconstitutional.

Arising from a complaint for damages brought by an employee against an employer upon the alleged negligence of the employer, the affirmative defense of workers' compensation immunity under the aforementioned Florida statute was timely raised. The Complaint was then timely amended to include the subject count for declaratory relief, which count was based on the grounds that §440.11 violates the Due process Clause of the 14th Amendment of the U.S. Constitution and several clauses of the Florida Constitution.

According to the Court's finding of facts, which were not in dispute, as of October 1, 2003, the Act, Chapter 440 of Florida Statutes, "no longer provided full medical care nor any compensation for partial loss of wage earning capacity." See p.3 of the Order; see also §440.15, and §440.13, Fla. Stat. 2003. Additionally, since 1970, the Act no longer provided to an employee the right to "opt-out" of the coverage of the workers' compensation scheme. The court found that with "the legislature eliminat[ing] all compensation for loss of wage earning capacity that is not total in character," in 2003, "[t]he last vestige of compensation for partial loss of wage earning capacity was repealed," with no reasonable alternative put in its place. See p.9 of the Order.

The court then cited the Florida Supreme Court, in *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973), for the rule that the Florida Legislature is without the power to repeal a right of access to the courts for redress for a particular injury that has been provided by statutory law predating the adoption of the 1968 Florida Constitution, "without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." Order at p.9, citing *Kluger*, 281 So. 2d at 4. The *Florida Workers* court further found that the Act failed this "*Kluger* test," that the Florida Constitution's right to be Rewarded for Industry has been "destroyed," and that the right to be compensated for permanent partial disability was completely eliminated in violation of the Constitution. *Id.* at 10.

When a statute impinges upon fundamental rights, including the right to be rewarded for industry and the right to trial by jury under the Florida Constitution, it is subject to strict scrutiny review. Here, the Act, supported by the use of the state's police powers, "eviscerated" those fundamental rights. The court explains that the test of constitutionality applicable to an act that invokes the state's police powers is whether or not there was an overpowering or compelling public necessity requirement to protect public morals, health, safety, or welfare. *Id.* at 11. When held to this constitutionality test, as the court put it "the Act and the rest of the Florida laws fail miserably." *Id.* The court further explains that "[w]hen a statute is subject to strict scrutiny it is first presumed to be *unconstitutional*." *Id.* at 12, citing *North Florida Women's Health v. State*, 866 So. 2d 612, Fn. 16, 19 (Fla. 2003). While the presumption can be rebutted by showing a) a compelling state interest; b) no reasonable alternative; and c) the statute is the least intrusive to the right, the court explained, however, that there was no such evidence presented. *Id.* at 12. And "[t]he Attorney General of the State of Florida declined to participate to defend the constitutionality of the Act." *Id.*

After determining that the Act failed "miserably" the strict scrutiny constitutionality test, the court then advised the Legislature that it "must now determine what must be included in a Florida workers' compensation law to meet the minimum threshold for it to be a constitutional exclusive remedy." *Id.* at 17. The court's parting minimum threshold of benefits included "full medical care" and "indemnity for permanent partial loss of wage earning capacity," without both of which the court believes such a revised act would fail. *Id.* at 19. The court then granted the Petitioners request for Declaratory Relief and found "§440.11 Fla. Stat. 2003 is unlawful, invalid and unconstitutional." *Id.* at p.20. IM

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Yes “SIR,” continued from page 1

million toward a covered loss. The subcontractor also maintained a CGL policy, but the general contractor was not an additional insured on that policy.

The parties ultimately settled the homeowner’s claim for \$1.6 million. The subcontractor’s insurer paid \$1 million to the general contractor to help settle the indemnification claim, which the general contractor, in turn, paid to the homeowner. However, the general contractor and its insurer disagreed about who between them was responsible for the remaining \$600,000. Eventually, each paid \$300,000, and reserved their rights to seek reimbursement from the other.

In a subsequent federal court action the general contractor and insurer pursued declaratory judgment claims, each seeking a ruling that the other was obligated to fund the \$600,000 settlement payment. The general contractor argued that it had satisfied its SIR by paying to the homeowner the \$1 million indemnification payment it had received from its subcontractor. The insurer argued that the subcontractor’s \$1 million payment did not satisfy the SIR, because the money originated from the subcontractor, and not the general contractor. Rather, the insurer argued, the SIR policy language required the general contractor to pay the SIR out of its own funds. The federal district court granted summary judgment in the insurer’s favor, and the general contractor appealed. On appeal, the Eleventh Circuit found no controlling precedent under Florida law and certified determinative questions to the Florida Supreme Court.

The Florida Supreme Court sided with the general contractor, and against the insurer. Citing contract interpretation principles which construe ambiguous insurance policies against insurers, the supreme court found that the policy language allowed the general contractor to use the subcontractor’s indemnification payment to satisfy the general contractor’s SIR. As a related aside, the court also held that the policy’s transfer of rights clause did not address the priority of reimbursement, and thus, the policy language did not abrogate Florida’s “made whole doctrine” which entitled the general contractor to be made whole first before its insurer.

Though *Intervest* leaves many questions unanswered, it underscores the importance that basic contract interpretation principles have on an insurance coverage dispute. 

Analyzing Policies, continued from page 1

They decide first by understanding the exposures contemplated for coverage and second by creating an analysis platform so dissimilar insurance policies can be compared as objectively and equally as possible. Thus, planning is a must-do first step, and the ability for the risk management professional to roll up his or her sleeves and dig into analysis is a very close second step. See the wisdom in simple statements made by Churchill, Chouinard, and Einstein above?

Cyber and privacy insurance analysis requires risk management professionals to have a plan, a method, and an understanding of what coverage is needed for the organization. But how, as these are not typical filed policies like forms from Insurance Services Office, Inc., or American Association of Insurance Services? Cyber and privacy policies will differ by insurer. It is in the planning. It is in the analysis. It is not throwing one’s hands up and getting lost in unnecessary details. It is a step-by-step plan to dissect policies to determine how the organization’s exposures can be most effectively covered and at the most efficient cost of deductible/retention plus premium.

Step 1: What Are the Exposures?

All risk management processes must start at the same point of exposure identification: one can not effectively insure what one does not understand. We start with what is considered cyber and privacy insurance and pull the exposures out of its definition. Let’s not let the word “cyber” cloud our concern for “privacy” exposures, as the loss of private data in paper form can be just as disastrous to an organization as a public release of its private e-data files. Let’s use excerpts from International Risk Management Institute’s definition of “Cyber and Privacy Insurance” to get an idea of exposures:

“... cyber and privacy policies cover a business’s liability for a data breach in which the firm’s customers’ personal information, such as Social Security or credit card numbers, is exposed or stolen by a hacker or other criminal who has gained access to the firm’s electronic network. The policies cover a variety of expenses associated with data breaches, including notification costs, credit monitoring, costs to defend claims by state regulators, fines and penalties, and loss resulting from identity theft. In addition, the policies cover liability arising from website media content ... property exposures from ... business interruption, data loss/destruction ... and cyber extortion.”

From the definition above, we can categorize exposures in order to compare exposure to coverage offered by an insurer’s terms/conditions on a policy-by-policy basis, even when policy language may not be the same. The categories can be such as these:

“... the
supreme court
found that the
policy language
allowed the
general
contractor to
use the
subcontractor’s
indemnification
payment to
satisfy the
general
contractor’s
SIR.”

See Analyzing Policies, continued on Page 4

Analyzing Policies, continued from page 3

- notification costs;
- credit monitoring;
- costs to defend claims by state regulators;
- fines and penalties;
- loss resulting from identity theft;
- website media content;
- business interruption;
- data loss/destruction; and
- cyber extortion.

Step 2: Define the Exposures in Terms of Coverage Needs

The risk management professional can create definitions that he or she feels are necessary for a specific organization's cyber/privacy exposures from breach of e-data and paper. This approach, while discussed for cyber/privacy insurance, is a starting point for anyone preparing any type of insurance policy analysis, not just cyber/privacy policy analysis. It is proper and expected that risk management professionals will ask for input from others within the organization, including but not limited to information technology (IT) staff. Risk management is most successful when it is conducted as a team sport.

Coverage Category	Claim/Exposure
Regulatory Proceeding	Costs incurred to defend organization for failure to disclose an event to governmental authorities when required by any security breach notice law
Security and Privacy Liability	Cost to defend organization from allegations of privacy violation including costs of settlement or judgment
Digital Asset Loss	Cost to replace lost/damaged e-files
Event Breach Costs	Cost incurred by organization arising out of (1) forensic investigation of breach; (2) use of public relations, crisis management firms, law firms; (3) notifications costs (i.e., printing, advertising, and mailing); (4) cost of identity theft call centers, credit file monitoring, and similar costs; (5) other costs as may be approved by the insurer
Network Interruption	Loss of income from material interruption of organization computer systems due to security/breach event and costs incurred as a result of the network interruption. Depending on the organization, this may not be a significant exposure and may not need to be insured.
Cyber extortion	Costs incurred when insurer approves extortion payment(s) made to hacker or other criminal party to stop a planned event from occurring. Coverage also can include costs to conduct an investigation after the fact into the act of extortion.
Internet Media Liability	Cost to defend organization from allegations of privacy violation from unauthorized website changes, including costs of settlement or judgment

An important exposure issue that is often overlooked when comparing cyber/privacy policies is if the named insured is allowed to release others from liability if done in writing prior to loss. This act by the named insured will limit or eliminate an insurer's right of subrogation at time of loss. Many cyber/privacy policies do not allow any restriction in the ability of the insurer to subrogate. This means that, if a release of liability is entered into, the policy may be void at time of loss. Many IT service vendors require a partial or full release of liability as part of their service contracts with organizations. These pre-loss releases may not be fully known, understood, or even shared with the risk management professional, thus putting a policy condition in effect that can void coverage. This exposure needs proper vetting and careful policy analysis.

Step 3: What Are the Expected and/or Catastrophic Costs of a Data Breach Event?

Matching coverage to exposure is only a portion of the analysis. Proper insurance limits are required as part of the policy analysis. Pursuit of insurance limits is not a perfect activity, as one must consider limit availability and cost of limits as part of the overall limit equation. There are many issues to consider when limits are to be quantified for cyber/privacy insurance.

- There is no formula to set a reasonable coverage and/or policy limit.
- Use of settlement and/or judgment information is suspect, as there is not sufficient credible public information. Caselaw is still developing on damages a person or organization can claim when personal information is used by unauthorized persons. There is not adequate quantification of damages by persons for costs, judgments, or settlements from mass breach of e-data or paper records.

Risk management is most successful when it is conducted as a team sport.



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Analyzing Policies, continued from page 4

- Direct costs (i.e., "event breach costs") for US data breaches (i.e., forensic experts, outsourced hotline support, free credit monitoring subscriptions, and discounts for future products and services) are estimated to be \$188 per record by the Ponemon Institute in its "2013 Research Report" based on calendar 2012 data. These costs can become staggering as the number of breached records increases.

Breached E-Records	Estimated Direct Costs
1,000	\$188,000
10,000	\$1,880,000
100,000	\$18,800,000
1,000,000	\$188,000,000

A thoughtful and careful approach to understanding cyber/privacy exposures and coverage will allow a risk management professional to have a better understanding of coverage needed for his or her organization.

The direct costs above are just "event breach costs" and do not include third-party-related defense or settlement/judgment costs for damages claimed by injured parties. Thus, the overall costs of a cyber/privacy breach can increase substantially from those direct costs shown above. This means that there may be millions of dollars of potential liability for an organization when all costs are known from a data breach. But the direct costs are a sound starting point for limit analysis by the risk management professional.

Step 4: Read and Understand a Complete Proposal

First, request not just a proposal of terms/conditions, limits, deductible, and premium but also a specimen of how the policy will be issued with coverage part and all expected endorsements. Second, read each proposal and sample policy completely to become familiar with how the policy and its coverage will address a cyber/privacy event. Third, now that you understand the nuances of a specific policy (i.e., the pros and cons), you can effectively compare it to other proposals and other sample policies.

Step 5: Create a Spreadsheet for Policy Analysis and Comparison

I find it easiest to create a line-by-line spreadsheet of policy attributes in order to compare each important policy term, condition, exclusion, or other point of coverage—whether enhancement or restriction.

The spreadsheet left-hand column is essentially an outline of the policy being reviewed, listing insuring agreements, general conditions, exclusions, and other important coverage provisions and/or restrictions. I start with one policy and use it to create the initial outline. As I review other policies, I may find new items to compare from that policy with the prior one and add to the left column as needed. Review of other policies may increase the outline further.

The use of a color scheme will help point out key differences by policy. Different colors are used to separate issues in each quotation. It is possible that a quotation with more "green" than other quotations may be more restrictive at time of loss, depending on the circumstances of the loss and resulting claim(s).

See Insert for a Sample Cyber and Privacy Worksheet

Step 6: Review Cyber/Privacy Coverage Proposals

The insurance proposals, specimen insurance policies, and spreadsheet analysis should be reviewed together with the appropriate personnel of the organization. An objective decision to purchase cyber/privacy coverage can be reached after all cyber/privacy insurance documents are reviewed and, most important, understood.

Conclusion

A thoughtful and careful approach to understanding cyber/privacy exposures and coverage will allow a risk management professional to have a better understanding of coverage needed for his or her organization. The process outlined in this article can be easily adapted to other types of exposures and coverage analysis

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Join us for our Monthly Meeting in December

On December 15, 2014, Charles E. Comiskey, an insurance industry expert out of Houston, TX and the President of RiskTech, Inc. and Senior Vice President for Brady, Chapman, Holland & Associates, Inc will present a FREE CLE as part of the Insurance and Surety Committee's monthly conference call. The CLE is entitled "Insurance Gaps – In the Eyes of the Beholder" and will cover selected indemnity and coverage issues and gaps that will be of great benefit to the transactional attorney and his clients. It will also cover a few of the more critical gaps in coverage and deficiencies in insurance policies and real property contracts and will provide guidance on how to fix them to ensure appropriate coverage of risks to clients. 

Committee Mission Statement

The purpose of the Insurance and Surety Committee is to educate the RPPTL Section of the Florida Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management. 

Leadership & Subcommittees

Interested in getting involved? Contact one of the persons below:

Co-Chair - Wm. Cary Wright (cwright@cfjblaw.com.com)
 Co-Chair - Frederick R. ("Fred") Dudley (dudley@mylicenselaw.com)
 Vice-Chair and CLE - Michael G. Meyer (mgmeyer83@gmail.com)
 Vice-Chair, Secretary & Newsletter - Scott P. Pence (spence@cfjblaw.com.com)
 Legislative Subcommittee—Sanjay Kurian (skurian@becker-poliakoff.com)
 Website - *Position Open*
 Legislative Liaison - Louis E. "Trey" Goldman (treyg@floridarealtors.org)

Schedule of Upcoming Committee Meetings

- Do you know the difference between the various forms of additional insured endorsements?
- Do you understand your ethical obligations when representing sureties and their principals?
- Do you know what a "your work" exclusion is?
- Can you describe the difference between an additional insured and a loss payee?
- Do you understand the risks to your clients if they fail to obtain a waiver of subrogation?
- Do you know the difference between "claims made" and "occurrence" based insurance policies?

Get answers to these, and many other questions, by attending our **FREE** monthly CLE programs.

When: Noon - 1:00 P.M. ET on the third Monday of every month, excluding government holidays.
 Where: Via Teleconference
 How: Dial-in number: **888-376-5050**
 Participate Code: **8425484201#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that lasts approximately 45-60 minutes.

If you, or someone you know, might be interested in presenting at an upcoming meeting, please let us know.

Schedule of Upcoming RPPTL Section Meetings

March 19-22, 2015
 Executive Council Meeting
 Ritz Carlton Grande Lakes
 Orlando, Florida

June 4-7, 2015
 Executive Council Meeting/
 RPPTL Convention
 Fontainebleau Florida Hotel
 Miami Beach, Florida



Scott P. Pence
Editor

If you, or someone you know, would like to submit an article for possible inclusion in a future issue of **Insurance Matters!**, please contact me at spence@cfjblaw.com.

UPCOMING CLE:

A special RPPTL Section-wide CLE presentation by **Bruce Partington** on behalf of the Insurance and Surety Committee.

Practical Advice for Clients on Development and Construction Insurance Issues and Claims

Check the RPPTL Section's web page for more details about this and other CLE programs.

Did you know?

You can access previous issues of Insurance Matters!, as well as agendas, meeting minutes, presentation materials & CLE posting information from past committee meetings at our Committee Page once you've logged in to the RPPTL website located at <http://www.rpptl.org>.

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