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The Docket: Eleventh Circuit Finds No Coverage for Fraudulent Wire Transfer Under Cybercrime Endorsement

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The Docket is a monthly TitleNews Online feature provided by ALTA's Title Counsel Committee which reviews significant court rulings and other legal developments and explains the relevance to the title insurance industry.

Stephen Gregory, claims counsel for WFG National Title Insurance Co., reviews a recent decision by the U.S. Eleventh Circuit Court of Appeals that affirmed a title company did not have coverage for a fraudulent wire transfer under the cybercrime endorsement of its cybersecurity policy. He can be reached at 75cavalier@gmail.com.

Citation: *Star Title Partners of Palm Harbor, LLC, v. Illinois Union Insurance Company, 2022 WL 4075048 (September 6, 2022) United States Court of Appeals, 11th Circuit (not reported in Fed. Rptr.)*

Facts: A settlement agent for Star Title handled a closing in 2019 for a seller who identified his mortgage lender as Capital Mortgage Services of Texas (CMS). After confirming by phone with CMS that it serviced the mortgage lien, the processor (Dee) was told to submit the payoff request by email, which she did to the address provided. In response, Dee received an email from a person who claimed to be a CMS payoff representative. The information matched what the seller had provided. Subsequently, Dee received a facsimile payoff statement purportedly also from CMS with information that matched the emailed statement. Dee input the information, including the wire instructions, into Star Title's software system. Star's procedures required the closer (Kathy) to review the information and cross-reference the hard copy of the wire instructions with the information in the system. When everything matched, Kathy released the wire to what turned out to be a fraudulent account. When Star Title was notified that CMS

hadn't been paid, it filed a claim with Illinois Union under the Cybercrime Endorsement to its insurance policy. In its claim, Star Title relied upon the following language:

We will pay for Your loss of Funds resulting directly from Your having transferred, paid or delivered any Funds from Your Account as the direct result of an intentional misleading of Your employee, through a misrepresentation of a material fact ("Deceptive Transfer") which is:

1. *relied upon by an employee, and*
2. *sent via a telephone call, email, text, instant message, social media related communication, or any other electronic instruction, including a phishing, spearphishing, social engineering, pretexting, diversion, or other confidence scheme, and,*
3. *sent by a person purporting to be an employee, customer, client or vendor; and,*
4. *the authenticity of such transfer request is verified in accordance with Your internal procedures.*

Illinois Union denied coverage under its policy. Star Title filed suit.

Holding: The United States Court of Appeals upheld the District Court's grant of summary judgment in favor of Illinois Union, analyzing the requirements for coverage under condition 3, above. The opinion cited Black's Law Dictionary and The Shorter Oxford English Dictionary to determine the parameters of "employee, customer, client, or vendor" and found that a lender does not fit into any of the four categories; "...CMS is a mortgage lender, not an employee, customer, client, or vendor of Star Title."

[Interestingly, the Policy also excluded coverage for "any loss resulting from ... any person purporting to be a representative of any financial institution, asset manager, broker-dealer, armored motor vehicle company, or any similar entity." In a footnote to the opinion, the court stated that because Star Title didn't meet the requirements for coverage, it didn't need to determine whether or not the exclusion applied.]

Relevance to the Title Industry: Friends of the author, who own and operate a cybersecurity and digital forensics company, have long maintained that there are only two kinds of companies in the business world—those that have been hacked and those that are going to be hacked. As cybercrimes increase, agents attempt to mitigate their risks and exposure by purchasing insurance against hacking that causes monetary loss. The Star Title case, though, cautions potential insureds to scrutinize the policy, not only to understand what is covered but also to negotiate the terms of the coverage before committing to purchase it.

Mentioned in passing in the opinion, but having no bearing on the outcome, was that Star Title at the time of the incident did not have a policy in place to call the lender directly to verify the wire transfer information. In other circumstances, the failure to implement such procedures may well be grounds for denial of what might otherwise be covered.

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