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4:24-cv-107-DMB-DAS

October 15, 2024

Via Email

Robert. J. Dambrino, Esq.
Gore, Kilpatrick & Dambrino, PLLC

Insured:	Gore, Kilpatrick & Dambrino, PLLC
Matter:	Cyber Crime
Policy No:	FLY-CB-VS39FNCN9-003
Policy Period:	August 15, 2023 – August 15, 2024
Claim No:	CL01-FLY-VS39FNCN9-003

Dear Mr. Dambrino:

We have been retained as coverage counsel for Spinnaker Insurance Company (“Spinnaker”) with respect to the above-referenced social engineering coverage claim (“Claim”). We write in response to your September 18, 2024, correspondence requesting that Spinnaker reconsider its denial of coverage to Gore, Kilpatrick & Dambrino, PLLC (the “Insured”).

The Claim arises from a wire transfer on June 7, 2024, to a fraudster. The scam began on or about May 23, 2024, when the Insured received an inquiry through Martindale Hubbell from the fraudster, posing as David Casteel of Brooks Machinery, Inc. The fraudster sought the Insured’s assistance in recovering a debt from Mid-Delta Equipment LLC. On June 3, 2024, the fraudster entered into a retainer agreement with the Insured to retain it to recover the debt. The same day, the fraudster informed the Insured that Mid-Delta had agreed to pay the debt and would issue payment through the Insured. On June 5, 2024, the Insured received the payment from Mid-Delta. Two days later, the Insured requested the fraudster’s wire instructions. Upon receipt of these instructions, the Insured called the fraudster to confirm their accuracy and then wired the money. On June 17, 2024, the Insured received a returned check from Regions Bank.

For there to be coverage under the Social Engineering Endorsement, the following requirements must be met: (1) the insured must have been intentionally misled, (2) by an instruction transmitted via email, (3) purporting to be from a natural person or entity who exchanges, or is under contract to exchange, goods or services, with the insured for a fee, (4) which contained a fraudulent and material misrepresentation, and (5) was sent by an imposter. In this case, requirements (3) and (5) are not satisfied here because the entire transaction was a sham.

In Mississippi, insurance policies:



are contracts, and as such, they are to be enforced according to their provisions. When parties to a contract make mutual promises (barring some defense or condition which excuses performance), they are entitled to the benefit of their bargain. Thus, insurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions, in order to receive the benefit of their bargain and to ensure that rates have been properly calculated.

Under Mississippi law, a “policy must be considered as a whole, with all relevant clauses together.” *Architex Ass’n, Inc. v. Scottsdale Ins. Co.*, 27 So.3d 1148, 1157 (Miss. 2010). In doing so, “[a]ll parts must be harmonized as much as reasonably possible, and no part or word can be stricken unless the result is fairly inescapable.” *Mississippi Farm Bureau Mut. Ins. Co. v. Walters*, 908 So.2d 765, 769 (Miss. 2005).

As stated earlier, the **Social Engineering Incident** definition requires that the Insured be intentionally misled by an instruction transmitted via email “purporting to be from” “a natural person or entity who exchanges, or is under contract to exchange, goods or services with the Named Insured for a fee,” but which was actually sent by an imposter. The only reasonable interpretation of this language is that the fraudster cannot be both the imposter and the natural person or entity that entered into a contract with the Insured.

Critically, the Insured did not enter into any contract for services with the natural person Casteel or the entity Brooks Machinery (assuming they exist). Rather, the Insured entered into a contract with the fraudster. Thus, when the fraudster requested that the Insured wire money to his bank account, he was not “purporting to be” the natural person Casteel or the entity Brooks Machinery with whom the insured entered into a contract for services, because no such agreement existed. By requiring the email to come from an imposter, but purport to be from the natural person with whom the insured entered an agreement, the policy mandates that the transaction include at least three parties: the insured, the imposter and the natural person/entity. Interpreting this language to allow the fraudster to be both the natural person and imposter eviscerates this distinction. Accordingly, this loss does not qualify as a **Social Engineering Incident**.

Your argument to the contrary isolates the word “imposter” and then construes it in a vacuum, which is contrary to Mississippi rules of policy interpretation. *Southern Surgery Ctr., LLC v. Fid. & Guar. Ins. Co.*, 2008 U.S. Dist. LEXIS 80636 (S.D. Miss. Oct. 10, 2008) (rejecting policyholder’s interpretation that construes the policy terms in a vacuum). Construing the **Social Engineering Incident** as a whole, as the law requires, the only reasonable interpretation is that the imposter pose as the natural person or entity that entered into the contract with the Insured. They cannot be one and the same.

The coverage position set forth herein is based on the facts and circumstances known at this time. Spinnaker does not waive the right to raise other facts, terms, conditions, and/or exclusions that may become applicable to the claims presented as they become known to Spinnaker. In the event Spinnaker does not specify herein a basis upon which coverage may be disclaimed or limited, it is not done with the intention of waiving such basis and Spinnaker specifically reserves its rights to

rely on such other basis, whether that basis relates to facts or policy language, at some future date if and when appropriate. Should you come into the possession of any new or additional information at any time that you believe would affect Spinnaker's coverage position, please submit said information for our review and consideration.

If you believe Spinnaker's coverage position is incorrect or incomplete, either factually or legally, please provide us with information that supports that belief. Upon receipt of that information, Spinnaker will review its coverage position and revise that position if warranted.

Very truly yours,

WHITE AND WILLIAMS LLP

/s/ Gabriel E. Darwick

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