

## Home Depot Hack Coverage Loss Gives Policyholders Pause

By Jennifer Mandato

Law360 (September 14, 2023, 9:24 PM EDT) -- Home Depot's failure to secure \$50 million in coverage for a 2014 data breach suit may have policyholders reassessing if they have potential cyber coverage under broad-based policies, attorneys said even as the retail giant appeals its August loss.



Home Depot said a 2014 data breach compromised about 56 million different credit card numbers. (AP Photo/Steven Senne, File)

U.S. District Judge Susan J. Dlott agreed with The Home Depot Inc. that the stolen cards' cancellation was considered a loss of use of tangible property caused by an occurrence, **but ultimately granted** Steadfast Insurance Co. and Great American Assurance Co. a win based on an electronic data exclusion. Home Depot notified the Sixth Circuit in the beginning of September of its plan to appeal.

The lower court's holding came as a shock to policyholder attorneys, who felt that the exclusion should have been read more narrowly because other elements of the loss were deemed to have triggered

coverage. Typically, under principles of insurance law, an exclusion eliminates coverage only if it eliminates all of a policyholder's advantages and all of its potential causes of liability, Scott Godes, a partner at Barnes & Thornburg LLP who represents policyholders, told Law360.

"Here, my take is that the damage to the cards and the loss of use of the physical cards can be divorced from the electronic data exclusion," Godes said. Historically, the electronic data exclusion was designed for circumstances in which there was only a loss of electronic data, with no other physical aspect to that loss, he added.

"It's not the electronic data that's being lost here, it's actually the card," policyholder attorney Joshua Gold of Anderson Kill PC said., "And I think the court's correlation between the card and the new electronic data residing on a computer system ... is a step too far for the court."

The court's initial determinations over whether there was a loss of use and what constitutes an occurrence were in keeping with a prior court's **ruling in a similar loss** of card use case, Target Corporation v. ACE American Insurance Company et al., Gold offered.

However, when it comes to the electronic data exclusion prevailing over general liability coverage, the exclusion could have been "severed" into multiple components, he said. The actual cost of the cards that were lost could have been separated from the electronic information, offering a more "sophisticated" breakdown of what the policyholders' damages were.

The cards "have an actual economic cost you attach, the cost of that card having been printed up and embossed with the numbers and everything else that is very much a physical attribute of the card, the court could have said that is a covered loss of use," Gold said.

The 2014 data breach compromised about 56 million different credit card numbers, according to Home Depot. While the retailer conceded that the policies didn't cover the loss of use of the electronic data stored on the cards, it maintained that the loss of use of the physical numbers on the card was covered.

Judge Dlott, however, found that the physical card numbers' loss of use stems from the loss of use of the electronically stored card numbers, triggering the electronic data exclusion and barring Home Depot from recovering a combined total of \$50 million from its Great American Umbrella and Steadfast Excess commercial general liability policy limits.

When it comes to coverage, Godes called the decision a "mixed bag," saying that it was the right decision for the court to find that the loss of the payment cards was physical damage to tangible property. However, with the electronic data exclusion reigning over that physical damage to tangible property, he said it remains to be seen how the decision will implicate policy language going forward.

Overall, the decision is "an indication that thinking broadly about coverage — particularly, coverage that's written broadly in an elastic fashion, like a general liability policy — is the way to go," Godes offered, "But it also indicates that when it comes to large losses like this, the insurance industry has no qualms about being in court and pushing new arguments as to coverage."

Jonathan Schwartz of Freeman Mathis & Gary LLP, who represents a number of property and casualty insurers, told Law360 that this case signals that CGL policies are not the proper recourse or remedy for a data breach loss.

CGL insurers have tried to make it clear to policyholders that if they're looking for coverage of losses associated with a data breach event, policyholders should look to their cyberinsurance rather than their CGL insurance, Schwartz said.

"I think for the most part, carriers are trying to button up their policies to avoid those kinds of scenarios," Schwartz said, "It's really not in insurers' best interest to have their policies be open to claims that they didn't intend to insure."

Joan D'Ambrosio, a founding partner and insurer representative at Atheria Law, told Law360 she wasn't surprised by the court's ruling, based on insurers' diligence over the years in excluding what they don't want to cover when it comes to cyber-related events.

As the first line of defense in these types of incidents, cyberinsurers are making adaptations because CGL and property insurers have increasingly tried to exclude or at least narrow the coverage for damages arising from electronic data in recent years, D'Ambrosio said. Changes in policy language over the past 10 years highlighted cyber carriers' attention to limitations or gaps in CGL or property policies, she added.

Referring to instances where the possibility for coverage exists beyond a typical cyberinsurance policy, Godes labeled this ruling as another instance of "silent cyber."

"I expect underwriters to say even more strongly than they had in the past that you shouldn't bother to look to policies other than cyber for losses of this nature," he said.

The Home Depot ruling emphasized the importance of policyholders constantly monitoring their cyberinsurance policies for new risks or gaps in coverage, Andrea DeField, a partner at Hunton Andrews Kurth who represents policyholders, told Law360. Unlike commercial general liability policies, which are more formulaic, cyber insurance policies are constantly responding to new risks in that field, DeField said.

"This just underscores the importance of policyholders, every year at renewal, really auditing their cyber insurance program and making sure it's robust enough to fit all of their needs and respond to all the risks that they have," she said.

However, any attempt by policyholders to drop any similar data exclusions from their non-cyber policies could make for some "difficult negotiations" in terms of policy renewals, Daniel J. Healy, a partner at Brown Rudnick who represents policyholders, told Law360.

Looking ahead, Gold also offered direct advice for policyholders in the aftermath of the court's decision.

"It is not uncommon these days, sadly, from the policyholder perspective to see lots of cyber-related exclusions now baked into CGL policies," Gold said.

"If you're a policyholder and you're looking at these issues, yes, absolutely try and fight the inclusion of these kinds of electronic or cyber-related exclusions into really all of your policy, whether it's CGL or crime or property insurance or D&O insurance, very important to resist that," he advised.

Prior to this incident, Home Depot may not have considered the cost of replacing physical credit cards as a big risk, Healy noted.

Now, however, when it comes to what policyholders may have previously brushed off as what constitutes a big risk or potential coverage dispute, this incident and other high-profile breaches have shown a ripple effect in terms of damages and extent of the loss, he said.

"As policyholders are going into renewals, I think one of the things that you think about are what are those extra layers of risk and loss and do they have coverage, whether it's under their CGL policy or another policy," Healy advised.

--Additional reporting by Elizabeth Daley. Editing by Nick Petruncio.