

INSURANCE JOURNAL

THE NATIONAL PROPERTY CASUALTY MAGAZINE

JULY 25, 2016 | VOL. 94, NO. 14

WEST REGION

\$30M Bristol-Myers Settlement

Calif.'s Workers' Comp Rates, Suits

CDI Accuses Agent in \$100K Scheme

E&S

**2016 National Directory of Excess,
Surplus and Specialty Markets**

Volume II

What to Know About Liability and Legal Costs Arising from the Development and Use of Mobile Device Applications



By Daven Lowhurst and



Brian McDonald

The purchase and use of smartphones, tablets, wearable computers and other mobile computing devices (MCDs) connected to the internet have experienced staggering growth in the past several years. Soon after the Apple App Store opened in July 2008, there were approximately 500 different apps available for the iPhone. Seven years later, in mid-2015, apps available in the store had grown to 1.5 million. Equally impressive, the number of individual apps downloaded from the Apple App Store in the past seven years has surpassed 100 billion.

Litigation Never Far Behind

This phenomenal growth has fueled many disputes and, not surprisingly, litigation. Examples of recent app-related lawsuits alleging violations of federal and state laws, including copyright infringement and violations of consumer protection statutes, include:

- An app developer claims that defendants improperly shared information about a game app.
- TV broadcasters who license copyrighted programming allege infringement against the manufacturer of a device that allows customers to download an app and receive streaming TV over the internet.
- An illustrator alleges that an app developer infringed copyrighted fish illustrations.
- Game users allege that a game manufacturer removed “lives” purchased in-app by one user and donated to another user, forcing users to buy replacement lives.
- Purchasers of Apple devices sued Apple over the functionality of Apple’s Maps app.
- Parents seek to void in-app charges made by their minor children on apps downloaded without parental knowledge or consent.
- Consumers allege that the defendant’s apps surreptitiously intercepted personal data and communications.
- The National Federation of the Blind alleges that a digital library’s website and apps violate the American with Disabilities Act.
- Car collision victim sued Snapchat claiming that the col-

lision was caused by another driver’s use of Snapchat’s app that displays the user’s speed, which the other driver was using to post a picture showing her excessive speed to gain a reward from Snapchat.

State and federal laws provide a target-rich environment for claims and remedies arising out of the development and use of apps. Claims may include violations of federal and state privacy laws (including statutes like the Electronic Communications Privacy Act, Computer Fraud and Abuse Act, Federal Wiretap Act, state laws prohibiting the invasion of privacy, as well as common law privacy torts); consumer protection laws (including laws prohibiting unfair, unlawful, or deceptive advertising, competition, or business practices); copyright infringement; ADA; penal code; unjust enrichment; express or implied warranties; and contracts.

Insurance to Protect Against App Liability

While parties may seek to eliminate or transfer risk through contractual releases, liability waivers or indemnifications, insurance is an important source of protection against

app-related liability. For claims asserted by consumers and other litigants claiming to have been wronged by the development or use of apps, insurance products may offer front-line protection.

Below are four common contenders. All four typically cover both defense costs (i.e., the cost of an attorney in defending against claims) and indemnity amounts (i.e., settlements or judgments). All four types also contain exclusions that may take away coverage, and the exclusions must be considered in assessing whether a particular claim is covered.

Commercial General Liability

Commercial general liability (CGL) policies may protect against claims seeking to impose liability related to apps. Standard CGL policies may cover liability due to bodily injury, property damage and personal and advertising injury. Bodily injury means physical harm to another person. Property damage typically includes both physical injury to and lost use of property. Some policies carve out electronic data (such as software programs) from the definition of property, but there is typically coverage where electronic data causes damage to other property.

continued on page 28



continued from page 26

Personal and advertising injury usually covers publications that slander, libel, disparage, or invade privacy, as well as certain types of injuries to third parties through a policyholder's advertisements.

The following are examples of where a policyholder facing app-related claims may want to consider CGL coverage:

- The user of a healthcare app alleges that she suffered bodily injury by following the advice or instructions provided.
- The user of an app that coordinates or monitors manufacturing equipment alleges that the app malfunctioned, causing damage to equipment.
- A company claims that a competitor's in-app advertising of its products disparages the company's products or wrongfully uses its advertising ideas.

Technology Errors and Omissions Liability

Technology errors and omissions liability coverage (tech E&O) may also provide a policyholder with protection. Tech E&O policies are designed to

protect policyholders against claims based on alleged errors and omissions in connection with their technology products and services, and, under some policies, for the negligent acts of their independent contractors. A tech E&O policy may be an essential complement to a CGL policy by covering exposures not covered under CGL policies. A tech E&O policy might be triggered by:

- The user of an app alleges that it does not provide the quality or performance characteristics consistent with the app's advertisements.
- The user of a financial management app claims that the app incorrectly calculated financial information, causing financial harm to the user/company that purchased the app.

Cyber Insurance

Cyber policies may overlap with tech E&O policies, such as providing coverage for negligence or errors in a policyholder's product line, but a cyber policy is often a more comprehensive way to address app-related exposures. Cyber

policies cover liability to third parties resulting from a cyber attack or data breach and may also offer additional protections for liability resulting from denial of network access, unauthorized network access, theft or destruction of data, exposure of personally identifiable information (PII), and governmental investigations of any of the above. Cyber policies may also cover a policyholder's own costs to investigate a breach, notify consumers, and restore the network and system data, as well as lost profits suffered by the policyholder.

In the context of app-related liabilities, a cyber policy might be helpful in:


- A company's network is hacked and consumer PII gathered via the company's app is stolen and published on the internet, resulting in a class action lawsuit and government investigation.
- A malfunction in a company's app results in mass distribution of confidential consumer PII to users of the app.
- A company providing an app for online storage of consumer data is hacked, and all data is destroyed.

Directors & Officers

Directors and officers (D&O) liability insurance is designed to protect a policyholder company and its directors and officers from loss resulting from claims alleging wrongful acts of the company and its directors and officers. D&O policies are sold to both public and private com-

panies, although public company policies frequently limit coverage for claims against the company to securities claims, typically defined as claims alleging violation of federal and state securities laws, whereas private company D&O covers a wider variety of claims against any insured. For example:

- A class action lawsuit against a public company and its board of directors alleging misrepresentations in a filing with the Securities & Exchange Commission regarding the success and functionality of an app sold by the company.
- A derivative lawsuit against a company's directors and officers alleging breach of fiduciary duties regarding due diligence in connection with the purchase of an app developer.
- A government investigation of a company's directors and officers arising out of an app's alleged invasion of user privacy by tracking user location and other information.

As new apps are developed at a seemingly exponential rate, so too will liability exposure related to the use and development of apps. Companies developing or using apps increasingly will need to consider insurance products such as CGL, tech E&O, cyber, and D&O to provide defense and indemnity protection against claims. 

Share this article.

IJMAG.COM/0725HH   



Lowhurst and McDonald are partners in Jones Day's San Francisco office and members of the firm's Insurance Recovery Practice. Email: DLowhurst@JonesDay.com and BDMcDonald@JonesDay.com.

