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AIG Must Cover Software Co.'s Deal In \$6M Email Scam Suit

By **Jeff Sistrunk**

Law360 (January 30, 2020, 4:25 PM EST) -- A New York federal judge ruled Wednesday that an AIG unit must cover investment software manager SS&C Technologies Holding Inc.'s settlement of litigation over its unwitting role in a \$6 million email-based scam that tanked a client's business.

U.S. District Judge Jed Rakoff found that AIG Specialty Insurance Co. had breached the policy it issued to SS&C when it denied coverage for the software manager's underlying settlement with Tillage Commodities Fund LLC. According to court papers, Tillage lost \$5.9 million to Hong Kong-based hackers after SS&C approved transfers requested in emails that were doctored to appear as though they were sent by Tillage.

AIG had argued that coverage for the deal was barred by the policy's "modified investment advisor" exclusion, which stated that SS&C is not covered for the loss of a client's funds due to the software manager's "exercise of any authority or discretionary control" over those funds.

Here, SS&C did not have authority or control over the funds lost to the fraudsters because it was only permitted to transfer the money upon specific instructions from Tillage, Judge Rakoff found. When SS&C employees signed off on the transfers, they mistakenly believed they were doing so with Tillage's authorization, the judge noted.

"Consistent with this provision, during the course of the Tillage action, SS&C and Tillage asserted that redemptions and withdrawals would be made 'upon approval from' Tillage, that SS&C itself did 'not have the ability to authorize transactions,' and that SS&C 'did not have authority to perform any management functions or make any management decisions with respect to the fund,'" Judge Rakoff wrote.

As a result, the district judge concluded that the modified investment adviser exclusion is inapplicable, and AIG's coverage obligation was triggered.

However, Judge Rakoff dismissed SS&C's claim that the insurer breached its duty of good faith and fair dealing, finding that AIG's denial of coverage was not "so totally frivolous as to warrant the inference that it was made in bad faith." The judge said that, although AIG changed its position on which policy exclusions may apply several times, it is normal for an insurer to make a slew of different arguments at the outset of a dispute, lest it waive its ability to assert them later on.

"Then, after further review, the [insurance] company will drop many of the asserted grounds for exclusion after more detailed inquiry," Judge Rakoff wrote. "This may be a hard-nosed approach, but it hardly amounts to bad faith."

The coverage dispute stems from a March 2016 scam in which hackers used lookalike, or “spoofed,” email credentials to loot the funds of Tillage, which had contracted with SS&C to administer its accounts and make transactions on its behalf. Acting on the bogus emails, SS&C made fraudulent transfers totaling \$5.9 million from Tillage to accounts in Hong Kong over 21 days. The fund folded after the losses, according to court documents.

Tillage sued SS&C in September 2016, accusing the firm of egregious lack of diligence, breach of contract, gross negligence and willful misconduct for being duped by the “amateurish” scheme, according to Tillage’s complaint. The companies settled for an undisclosed amount in May 2019.

AIG agreed to defend SS&C under the terms of its policy, which provides up to \$10 million in coverage for claims arising from negligence, errors or omissions, but refused to cover any settlement or judgment in the case. In response, SS&C **sued the insurer** in New York federal court last August.

An attorney for SS&C declined to comment, and counsel for AIG did not immediately respond to a request for comment Thursday.

SS&C is represented by Robin L. Cohen and James H. Smith of McKool Smith PC.

AIG is represented by JoAnna M. Doherty, Dennis O. Brown, Regen O'Malley and Greil I. Roberts of Gordon & Rees LLP.

The case is SS&C Technologies Holdings Inc. v. AIG Specialty Insurance Co., case number 1:19-cv-07859, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Jack Queen. Editing by Haylee Pearl.