

Installation of Software a "Wrongful Act" Under Technology E&O Policy

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Applying Minnesota law, the United States Court of Appeals for the Eighth Circuit has held that an insurer had a duty to defend under a "Information and Network Technology Errors and Omissions" policy because a lawsuit asserting that the insured software manufacturer installed tracking cookies and "spyware" on the underlying claimant's computer alleged a "wrongful act." *Eyeblaster, Inc. v. Fed. Ins. Co.*, 2010 WL 2869547 (8th Cir. July 23, 2010).

The underlying litigation alleged that the plaintiff's computer was infected with a spyware program from the insured's software, causing the computer to freeze up and lose data. The insured tendered the claim to the insurer under an errors and omissions policy that covered financial injury caused by a wrongful act that results in a failure of the insured's product to perform its intended function or to serve its intended purpose. The policy defined "wrongful act" as an "error, an unintentional omission, or a negligent act."

The insurer argued that the underlying complaint did not allege a "wrongful act" because the underlying claimant asserted that the insured intentionally placed its software on the claimant's computer. The court rejected this argument, holding that the claim fell within policy's coverage and gave rise to a duty to defend. The court noted that it had previously defined "error" in a technology errors and omissions policy "to include intentional, non-negligent acts but to exclude intentionally wrongful conduct." Here, the court said, the claimant alleged that the insurer installed tracking cookies and other software on his computer, which was an intentional act. However, the court determined that the insurer could point to no evidence that doing so was "intentionally wrongful," noting that the insurer's parent company used such technology on its own website. Because the underlying complaint did not allege "intentional acts that were either negligent or wrongful," the insurer could not show that the use of such technology was outside the policy's coverage.