

JAMES E. ARNOLD & ASSOCIATES WINS \$7 MILLION COMPUTER HACKING APPEAL

In Case of First Impression under Ohio Law, Sixth Circuit Holds that Crime-Fraud Insurance Policy Covered Losses Proximately Caused by Computer Hacking Incident

James E. Arnold & Associates recently won a hard-fought appeal in the Sixth Circuit Court of Appeals in favor of Columbus-based shoe retailer, DSW Inc. The victory resulted in an award of over \$7.1 million against National Union Fire Insurance Company of Pittsburgh, PA., which had issued a computer crime liability policy to DSW. DSW's insurance claim arose out of a computer hacking incident in early 2005, when a computer hacker fraudulently accessed DSW's computer systems and downloaded data containing customer transaction information from over 100 DSW store locations. Over 1 million customer credit cards and/or checking accounts were compromised.

In the wake of the hacking incident, DSW incurred millions of dollars in expenses for customer communications, public relations, customer claims and lawsuits, attorney fees, and most significantly, charge-backs imposed by the credit card companies for fraudulent credit card charges. National Union denied coverage for DSW's expenses contending that DSW's losses were not "direct losses" from the hacking incident as required by the policy. In addition, National Union argued that DSW's losses were barred under a policy provision excluding coverage for the loss of confidential and proprietary information.

In a case of first impression under Ohio law, the Court of Appeals affirmed the U.S. District Court for the Southern District of Ohio's 2009 decision. The Court unanimously rejected National Union's arguments that DSW's losses were "indirectly" caused by the hacking incident itself and, therefore, not covered under the policy's "direct loss" requirement. Recognizing that no Ohio case had specifically decided what causation standard to apply in the commercial crime policy or fidelity bond context, the Court of Appeals agreed with DSW that the best and most relevant cases under Ohio law "applied a proximate cause standard to determine whether there was a 'direct loss' under other kinds of first party coverage."

The Court of Appeals also rejected National Union's argument that coverage was unavailable due to the policy's exclusion for "any loss of proprietary information, Trade Secrets, Confidential Processing methods, or other confidential information of any kind." Rather, because the customer information was owned or held by the customer, a financial institution, and any merchants to whom the information is provided in the ordinary stream of commerce, the stolen customer information was not DSW's proprietary information, and coverage for its loss was not excluded.

To read the Court of Appeals decision in its entirety, [click here](#).