

ACC NCR FALL CONFERENCE
Advanced Topics for In-House Attorneys

**Privacy and Technology Conference –
Ransomware, Business Email
Compromises, and the Changing
Cyberinsurance Market**

September 13, 2023

Privacy and Technology Conference – Ransomware, Business Email Compromises, and the Changing Cyberinsurance Market

Association of Corporate
Counsel – National Capital
Region




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Scott Godes

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Co-chair of the firm's Insurance Recovery and Counseling and Data Security and Privacy Groups, Scott Godes is a skilled advocate, litigator and trial lawyer in matters involving insurance coverage and technology.

Scott is dedicated to helping his clients recover their insurance benefits. By taking on matters that are often difficult, complicated and untested – including two of the first cyberinsurance coverage cases in the country – Scott works to design a creative, optimized path to problem solving that enhances their chances of recovery. Effective, thorough and practical, Scott is valued by clients and colleagues alike for his depth and breadth of knowledge and experience in insurance law, and for finding the right solution to each client's distinct problem. He has helped insureds recover well in excess of \$1 billion.



Carrie Raver

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Carrie has resolved disputes pertaining to insurance coverage for policyholders in declaratory judgment, breach of contract and bad faith insurance coverage actions, insurer rehabilitation actions, and insurer liquidation actions. She has litigated and advised policyholder clients regarding insurance coverage for data breaches and cybersecurity issues; business email compromises and executive fraud; ransomware and social engineering claims; personal and advertising injury claims; directors and officers and securities claims; professional liability and errors and omissions claims; and crime and fidelity claims.

She also has wide-ranging experience in environmental property damage and underground storage tanks claims; consumer class action claims; general and excess liability claims; business interruption, extra expense and contingent business interruption claims; first-party property claims; product liability claims; and flood claims.



David Cox

Volkswagen of America, Inc
Assistant General Counsel, Privacy, Data
Governance & E-Discovery

I am responsible for Volkswagen Group of America legal matters related to US data privacy, cybersecurity, cross-entity and cross-border data system access and processing, legal and business document retention requirements, and general information governance. I also run the VWGoA E-discovery team within the company, and I am responsible for e-discovery matters arising from all litigation and investigations impacting the company in the US.

Format

- Panel discussion for part one
- Rapid Fire Round on Cyberinsurance 101
- Interview on Best Practices For Getting Coverage

Agenda

- Introduction
- Current Threat Landscape
- Insurance Coverage For Current Threats
- How Has The Insurance Landscape Changed in 2022

Part 1, Panel Discussion: Current Threat Landscape

- Ransomware
- Cyber Extortion
- Business Email Compromises
- Vendors

Part 1, Panel Discussion: Ransomware – What's Changing?

- Did you know?

The first use of ransomware dates back to 1989, when floppy disks were high-tech and the price of the ransom was a mere \$189.

What is the cost of ransomware today?

In 2021, the largest ransomware payout was made by an insurance company for \$40 million, setting a world record.

Part 1, Panel Discussion: Ransomware – What's Changing?

- Amounts of demands
- Second bite of the apple by threat actors
- Second attacks
- OFAC questions
- State law changes



Part 1, Panel Discussion: OFAC Guidance

- OFAC Overview
- Recent guidance: <https://bit.ly/39lkwAx>
- Potential liabilities for OFAC violations



Part 1, Panel Discussion: Business Email Compromises

- What typically happens?
- Parties potentially involved:
 - Defrauded payor
 - Defrauded payee
 - Bank(s)?
 - Insurance companies
 - Outsourced IT
- Causes of action?
 - Breach of contract?
 - Negligence?
 - Imposter rule?
 - Mutual mistake?
 - UCC?

Part 1, Panel Discussion: Business Email Compromises

- *Beau Townsend Ford Lincoln, Inc. v. Don Hinds Ford, Inc.*, 759 F. App'x 348, 349 (6th Cir. 2018).
 - “Don Hinds Ford agreed to purchase twenty Ford Explorers from Beau Townsend Ford for about \$736,225. When it came time to close the deal, Beau Townsend's commercial sales manager asked, via email, that Don Hinds pay via wire transfer to an out-of-state bank. Don Hinds agreed, wired the money, and picked up the Explorers.
 - Just one problem—a hacker had infiltrated the email account of the Beau Townsend manager and sent Don Hinds fraudulent wiring instructions. Although Don Hinds thought it had paid Beau Townsend for the Explorers, it had actually wired the \$736,225 to the hacker, who quickly drained the bank account and made off with the money. This case is about who must bear that loss.”

Part 1, Panel Discussion: Business Email Compromises

- *Peeples v. Carolina Container, LLC and William Ponder*, 19-cv-21, 2021 WL 4224009 (N.D. Ga. Sept. 16, 2021) (Delaware law).

- “This case arises from a botched wire transfer. Defendant Carolina Container, LLC was supposed to wire \$1.71 million to Plaintiff Lloyd C. Peeples, III under an asset purchase agreement. But it ended up wiring that money to a crook who hacked into the email account of Plaintiff's attorney (Defendant William Ponder) and used that account to send fraudulent payment instructions to Defendant Carolina. When the crook vanished with the money, Plaintiff sued Defendants to recover. Each party now moves for summary judgment. (Dkts. 149; 150; 152.) The Court grants Plaintiff's motion in part and denies Defendants' motions.”

From: william ponder <b_ponder@hotmail.com> on behalf of william ponder
Sent: Monday, July 2, 2018 12:47 PM
To: Lehrer, Andrew
Cc: Jim Cobery
Subject: Fw: Payout of Escrow (Bank details)
Attachments: Lloydpeebles (JAE Holdings).pdf

Andrew,

See attached wiring instruction for \$1,735,502.50, Please confirm once received and let me know when the wire will be done. Once again sorry for any inconveniences and thanks for your understanding. Will be looking forward to your email asap.

Thanks,
Bill

Part 1, Panel Discussion: Vendors

- How strong are the links in your chain of vendors and business partners?
 - Cybersecurity contractual provisions?
 - Indemnification?
 - Insurance requirements?
 - For the vendor to carry?
 - Additional insured status?



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Part 1, Panel Discussion: Insurance Coverage for Current Threats

- Potential Sources for Coverage
 - Cyberinsurance
 - Kidnap, ransom, and extortion
 - Crime insurance
 - Property insurance
 - Liability policies (CGL, E&O, D&O)
 - Other policies



Part 1, Panel Discussion: Insurance Coverage for Current Threats

■ Coverage Decisions

■ BECs

- *City of Unalaska v. Nat'l Union Fire Ins. Co.*, 2022 WL 826501 (D. Alaska Mar. 18, 2022) (full coverage under computer fraud provision vs. limited social engineering fraud coverage)
- *Principle Sols. Grp., LLC v. Ironshore Indem. Co.*, 944 F.3d 886 (11th Cir. 2019) (funds transfer fraud coverage)
- *Am. Tooling Ctr., Inc. v. Travelers Cas. & Sur. Co.*, 895 F.3d 455 (6th Cir. 2018) (computer fraud coverage)

■ Ransomware

- *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679 (D. Md. 2020) (property coverage)
- *G&G Oil Co. of Ind. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82 (Ind. 2021) (crime coverage)
- *Yoshida Foods Int'l, LLC v. Fed. Ins. Co.*, 2022 WL 17480070 (D. Or. Dec. 6, 2022) (crime coverage), *appeal filed*, (9th Cir. May 4, 2023),
- *Merck & Co., Inc. v. Ace Am. Ins. Co.*, 293 A.3d 535 (N.J. Super. Ct. App. Div. 2023) (property coverage and war exclusion), *motion for leave to appeal granted*, 2023 WL 4702179 (N.J. July 19, 2023)

Part 1, Panel Discussion: How Has The Insurance Landscape Changed In 2022? (Per Carriers And Their Friends)

- Prices have gone way up
- Offered limits might be lower
- More claims and more expensive claims?
- But is the sky *really* falling? Fitch Ratings reports:
 - “For standalone cyber coverage, direct incurred losses and defense and cost containment (DCC) expenses expanded by over 300% since 2018. Still, in 2021 earned premium growth exceeded the change in incurred losses and ***the standalone cyber loss ratio improved to 65% from 72% a year earlier.***”

- Fitch Ratings, *US Cyber Insurance See Rapid Premium Growth, Declining Loss Ratios* (Apr. 13, 2022), available at <https://bit.ly/3SSjmqr>.

Part 1, Panel Discussion: How Has The Insurance Landscape Changed In 2022? (What Insureds Are Seeing)

- More aggressive claim adjustment
- Common use of outside coverage counsel to adjust and investigate claims
- Litigation
 - *Travelers Property Casualty Co. of America v. International Control Services Inc.*, No. 22-cv-2145 (C.D. Ill. July 6, 2022) (rescission question)

Part 1, Panel Discussion: How Has The Insurance Landscape Changed In 2022? (Changes In Policy Offerings)

- New ransomware-based exclusions and limitations
- Social engineering fraud endorsements
- Lost revenues due to reputational harm
- “Bricking coverage”
- Coverage for PCI-based liabilities
- Cloud-based triggers
- Business interruption
- System failure triggers
- Waiting period
- Contingent business interruption
- Retroactive dates and full prior act coverage

Part 2: Rapid Fire Round on Cyber Insurance 101 (Part 1 – Common Questions)

- Which department typically “owns” a cyber policy?
- Translate insurance speak to English:
 - “Breach response coverage”
 - “First party coverage”
 - “Third party coverage”
 - Sublimits
 - Computer fraud, social engineering fraud, and invoice manipulation fraud
- Can we negotiate a policy like a commercial contract?
- Can we use the law firms and vendors of our choice?
- When a law firm acts as a claim adjuster for the carrier, are they acting neutrally?
- What does a reservation of rights letter mean?
- Is my broker acting in my best interest?
- Is everything discussed with my carrier privileged?
- Is everything discussed with my broker privileged?

Part 2: Rapid Fire Round on Cyber Insurance 101 (Part 2 – Preparation)

- Tabletop exercises
 - Implementing an incident response plan
 - Using coverage
- Incident Response Plan
 - Who drafts this?
 - Who updates this?
 - Who maintains this?
 - Are there offline copies?
 - Where does insurance fit in?

Part 2: Rapid Fire Round on Cyber Insurance 101 (Part 2 – Incident Process)

- Incident process
 - Discovery of event
 - Incident Response Plan
 - First phone calls
 - Recipients
 - Carrier and/or broker?
 - Incident response counsel?
 - Forensics?
 - Who places the calls?
 - Risk manager?
 - Counsel?
 - CISO?
- Incident process (cont'd)
 - Updates and reporting
 - Updates to carrier and privilege?
 - Regulatory disclosures?
 - Public statements (if any)?
 - Statements to regulators?
 - Trouble in paradise
 - What does the reservation of rights letter mean?
 - Is the carrier being adversarial?

Part 3: Best Practices For Getting Coverage (When Buying)

1. How does that proposed coverage compare to last year's coverage, including limits, retentions, terms, exclusions, and sublimits?
2. Should you (can you) expand the coverages that you are buying, either terms, limits, or both?
3. Are all the representations in the application accurate and verified to be true? And verified by whom? Who reviewed and verified the answers?
4. Who has reviewed the actual policy terms?
 - a. Primary layer
 - b. Excess layers

Part 3: Best Practices For Getting Coverage (Traps During The Claim Process)

1. Ransomware

- a. OFAC questions

2. Exclusions for failure to maintain security (*e.g.*, MFA) or rescission threats

3. Selection of counsel and vendors

- a. Required use of panel counsel, vendors, ransom negotiator, other crisis managers?
- b. Rate issues?

4. Consent to settle, cooperation, and form of settlement

- a. Settlement discussions
- b. Customer resolutions
- c. Form of compensation

Part 3: Best Practices For Getting Coverage (Traps During The Claim Process)

5. Retroactive date

- a. Full prior acts coverage?
- b. Same retroactive date throughout the tower?

6. Business email compromise / social engineering / wire fraud losses

- a. Overlapping coverages?
- b. Sublimits?
- c. Causes of action?
- d. Actual demands? And actual liability?

7. Fines and penalties – GDPR, CaCPA?

- a. What law governs?

Part 3: Best Practices For Getting Coverage (Traps During The Claim Process)

8. “Other Insurance” and order of payment

- a. Overlapping coverages
- b. Vendor / additional insured coverages

9. Excess issues

- a. Will excess coverage drop down if there are sublimits?
- b. Will excess coverage apply if there is a settlement of a layer for less than full limits?
- c. What does “following form” mean?

10. Notice

11. Retentions and deductibles

Part 3: Best Practices For Getting Coverage (Final Takeaways)

1. Establish effective lines of communication from minute 1

- Notice, notice, notice! (Cyberinsurance and more)
- Look for coordination between legal and risk management
- Consider whether a third party should indemnify your company
- Consider whether you are going to use vendors and counsel that are approved by the carrier

Part 3: Best Practices For Getting Coverage (Final Takeaways)

- 2. Be cognizant of a duty to cooperate, a tri-partite privilege, insurance company buy-in, and a consent to settle**
- 3. Pay close attention to carrier position letters and consider carefully your next steps**
 - What does the carrier say might not be covered?
 - Why is the carrier asking for the information it is seeking?
 - Who is the carrier using to investigate the matter? And why?
 - Who on the team is working on response letters?
 - Do your team members have the experience to respond to the issues best?

THANK YOU

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