Cyber Liability Insurance

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ANNUAL MEETING

POINT CLEAR, ALABAMA

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Coverage items to watch for in selecting cyber policies:

The law is not very developed in this context, and available guidance may relate to employee theft, computer crime, or P&C policies (with or without added cyber coverage)

- Policies vary on definitions
- Exclusions vary greatly
- Some of the language developing in cyber policies is different from traditional policies, so application of court opinions from traditional contexts is limited
  - For example, "direct loss" is far from settled. *See Interactive Communications Int'l, Inc. v. Great Amer. Ins. Co.*, 731 Fed. App'x 929 (11th Cir. May 10, 2018)(holding, under a "computer fraud" policy, that a loss was not *directly* related to fraudulent manipulation of the insured's system by redeeming credits on debit cards multiple times). *Cf. Amer. Tooling Center, Inc. v. Travelers Cas. & Surety Co. of America*, 895 F.3d 455 (6th Cir. 2018)(distinguishing *Interactive Communications* and holding that the "point of no return" in stopping or retrieving the loss at issue was less distant and was therefore a "direct loss").

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Coverage items to watch for in selecting cyber policies:

Don't forget about paper data

- Some cyber policies focus exclusively on losses relating to computer systems, electronic data, or other intangible property
- Do not leave a gap in coverage, particularly with regard to privacy-related claims

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Coverage items to watch for in selecting cyber policies:

- What is your coverage regarding data entrusted to your vendors?
- Does the policy define "computer system" to include third-party vendor systems (i.e., hosted or cloud data) ?
- What if your vendor subcontracts?
- Are your firm's contractual obligations covered?

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Coverage items to watch for in selecting cyber policies:

Fraudulent wiring instructions:

- In a transaction, revised wiring instructions are received at the last minute
- Your employee either implements the changes or provides those to your client or another party
- Possible gaps:
  - The fraudster did not instruct the bank or the party directly. *But see Amer. Tooling Center*, 895 F.2d 455, holding that a crime policy covered a loss resulting from a chain of events internal to the insured company that was initiated by fraudulent wiring instructions.
  - The loss does not involve funds for which the insured is liable or over which the insured had control.

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Coverage items to watch for in selecting cyber policies:

Policy Definitions

- Is an informal request for documents from a government agency an occurrence?
- Is the cost of complying with a grand jury subpoena an occurrence?
- Are differences between data privacy and data security implicated?
- As various data incidents make the news, are you vetting your policy for coverage under those scenarios?

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Coverage items to watch for in selecting cyber policies:

As with many other decisions, multiple stakeholders should be involved in reviewing coverage:

- IT/IS
- Compliance
- HR
- Legal counsel
- Operations/business unit

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Coverage items to watch for in selecting cyber policies:

What is typically not insurable?

- Indirect costs
  - Clients you did not obtain
  - Key people lost following an incident
- Litigating coverage issues
- Where prohibited by law
  - Some jurisdictions do not allow coverage for fines and penalties
  - GDPR fines?
- Data as an asset

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