

Cyberinsurance Issues Coming for 2019

Trends, Vendor Management, and
Practical Tips For In House Counsel

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Barnes & Thornburg LLP



Scott, who has been described as “the most interesting insurance lawyer in the world” and the “godfather of cyberinsurance,” focused his insurance recovery practice on cybersecurity and privacy risks in 2008. He is a co-chair of the Data Security and Data Privacy Subcommittee of the American Bar Association Section of Litigation Insurance Coverage Litigation Committee and a frequent speaker at national seminars regarding insurance coverage for cyber risks.

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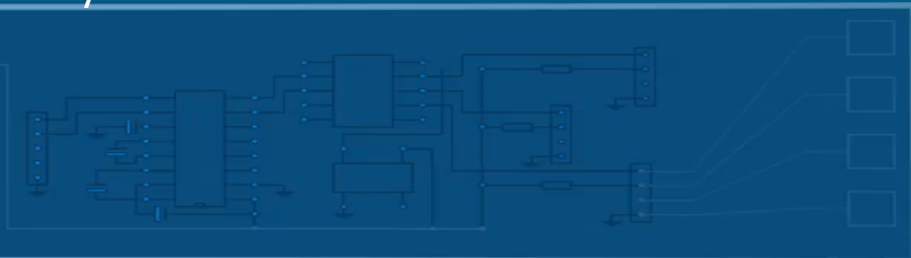
Caroline Chapman

**Senior Account Manager | AVP, Cyber Technology Practice
Lockton Companies (Northeast)**



Caroline is a Senior Account Manager—AVP with Lockton's Cyber Technology Practice. Her focus is primarily on professional, cyber, and media liability lines. She has experience with clients in a range of industries including but not limited to retail, energy, real estate, mortgage, technology, and consulting. Caroline works on all aspects of her client's Cyber program from risk identification, program design and negotiation, renewal placement, contract review, and claims handling. She holds a B.A. from The Catholic University of America and a M.S. from George Mason University

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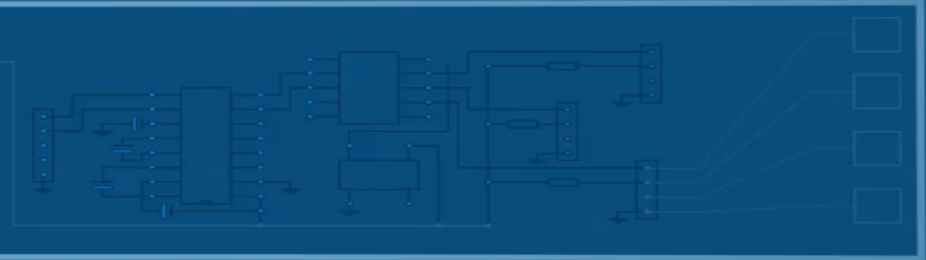


Margaret Hackbarth

Vice President | Risk Management Crescent Hotels & Resorts

Margaret is an experienced in-house legal counsel and risk manager. She provides advice and management in the following areas:

- commercial and civil law
- contract drafting, negotiation, revision and enforcement;
- corporate governance/company secretary;
- general legal consultancy;
- real estate development/transactions and construction law (commercial, industrial and residential);
- employment and labor law;
- risk management and compliance management;
- litigation management and dispute resolution;
- marketing and advertising law;
- external counsel management; and
- training regarding contracts, insurance, disputes and various other commercial and operational topics.



Overview of Topics



Trends

Trends related to insurance for cyber risks, both in terms of offerings from the insurance industry and what companies should expect at renewal, and in terms of how these policies have been tested and interpreted by courts



Vendor management

Best practices for in house counsel asking vendors to carry cyber insurance, including what coverage, which vendors, and other need-to-know issues



In-house checklist

Tips on what in house counsel should understand about cyberinsurance, from what's covered and what exclusions carriers raise, and what they need to be asking their risk managers at the time of purchase and if there's an incident

Trends

1

Changes in policy offerings

2

Forecasts for premiums

3

What have courts said?



Trends

1

Changes in policy offerings



- A. Social engineering fraud endorsements
- B. Lost revenues due to reputational harm
- C. “Bricking coverage”
- D. Coverage for PCI-based liabilities
- E. Cloud-based triggers
- F. Business interruption
 - i. System failure triggers
 - ii. Waiting period
 - iii. Contingent business interruption
- G. Retroactive dates and full prior act coverage



Trends

2

Forecasts for premiums



2. Forecasts for premiums

- a. The market remains very competitive with new markets and additional capacity available.
- b. Lockton expects it to be moving towards uncertainty or correction within the next 6-to-18 months as increased first party activity have pushed underwriters to reassess their rating models for Business Interruption.
- c. Classes of business that continue to be highly scrutinized: healthcare, energy, education, retail, hospitality, and technology.



Trends

3

What have courts said?



3. What have courts said?

Failure to maintain security /
blame the policyholder's conduct



Trends

What have courts said? Failure to maintain security/ blame the policyholders conduct

First Bank v. Fed. Ins. Co., No. 09-532

(E.D. Mo. May 11, 2009), settled and dismissed
(Jul. 26, 2010)

Columbia Cas. Co. v. Cottage Health Sys.

No. 15-03432 (C.D. Cal. May 7, 2015);
Cottage Health Sys. v. Columbia Cas. Co.,
No. 16CV02310 (Cal. Super. Ct. May 31, 2016);
Columbia Cas. Co. v. Cottage Health Sys., No. 16-03759
(C.D. Cal. May 31, 2016)

Travelers Prop. & Cas. Co. v. Fed. Recovery Servs., Inc.

No. 14-170 TS (D. Utah May 11, 2015)



3. What have courts said?

PCI-related coverage and sublimits



Trends

What have courts said: PCI-related coverage and sublimits

Trends

What have courts said: PCI-related coverage and sublimits

P.F. Chang's v. Fed. Ins. Co., 2016

WL 3055111 (D. Ariz. May 31, 2016)

State Nat'l Ins. Co. v. Global Payments, Inc.

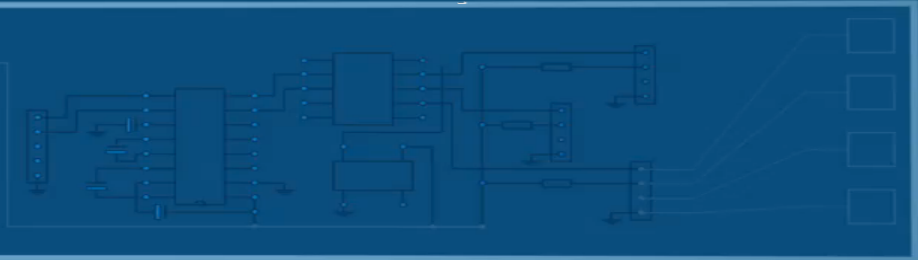
No. 1:13-cv-01205-CAP (N.D. Ga. Apr. 12, 2013), resolved by settlement and dismissed, (Jan. 10, 2014)

Other PCI-related sublimit cases

Other types of insurance policies?



Business email compromise coverage



Trends What have courts said? Business email compromise coverage

Am. Tooling Ctr., Inc. v. Travelers Cas. & Sur. Co.
895 F.3d 455 (6th Cir. 2018)

Other business email compromise cases



3. What have courts said?

Sublimits



Trends

What have courts said? Sublimits

*National Bank of Blackburg v. Everest
Nat'l Ins. Co.*, No. 7:18-CV-310 (W.D. Va.)



3. What have courts said?

Overlapping coverage for cyber / privacy risks



Trends

What have courts said? Overlapping coverage for cyber/ privacy risks

Atlantic Spec. Ins. Co. v. Premera Blue Cross

No. 15-1927, dkt. 75, 77 (W.D. Wash.)

Innovak Int'l, Inc. v. Hanover Ins. Co.

No. 18-2453 (M.D. Fla. Nov. 17, 2017)

Zurich Am. Ins. Co. v. Sony Corp. of Am.

No. 651982/2011 (N.Y. Sup. Ct. Feb. 24, 2014), settled after appellate arguments

Spec's Family Partners Ltd. v. Hanover Ins. Co.

2018 WL 3120794 (5th Cir. June 25, 2018)

EPLI; Kidnap, Ransom, & Extortion



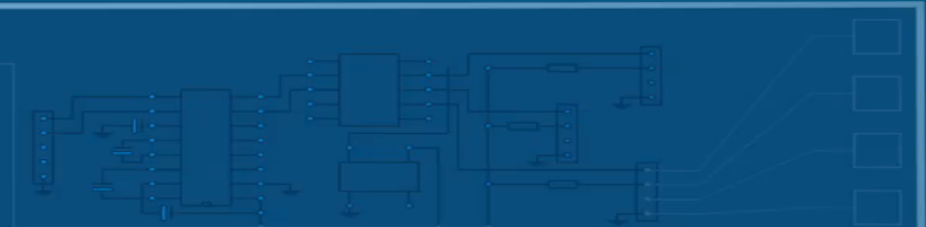
Vendor Management



- Cyberinsurance Requirements

- What to require?
- What limits to request?
- Which vendors?

- Insurance vs. Indemnity Agreements



In-House Checklist:



Who's who?

Basic coverages within cyberinsurance

Traps to coverage

**Best practices for discussions with your risk managers
at the time of purchase**

Best practices at the time of claim?



In-House Checklist:



The list of players

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In-House Checklist: Who's who?

1. Privacy / cybersecurity / defense counsel

- a. Usually recommended by or agreed to by the insurer; paid by the insurer
- b. Directs investigation and defends claims and lawsuits against the insured

2. Forensic firm

- a. Usually recommended by or agreed to by the insurer; paid by the insurer
- b. Performs forensic investigation

3. Coverage counsel

- a. Not recommended by the insurer; not paid by the insurer
- b. Provides advice as to how coverage should apply to the claim and losses



In-House Checklist:



Basic coverages within cyberinsurance

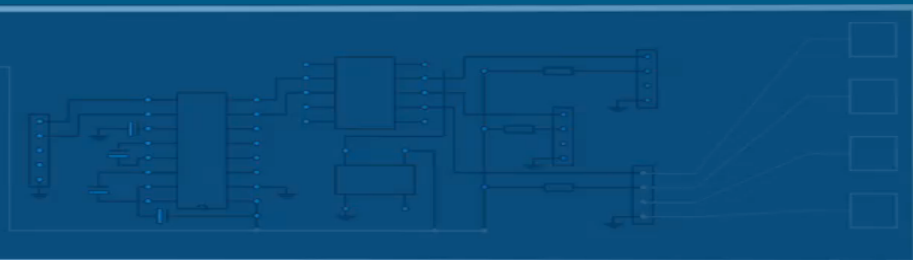
In-House Checklist: Basic coverages within cyberinsurance

1. In the beginning (forensics)

- a. Did something go wrong? (“First Party Breach Response”)

2. Working through initial obligations under state and federal law

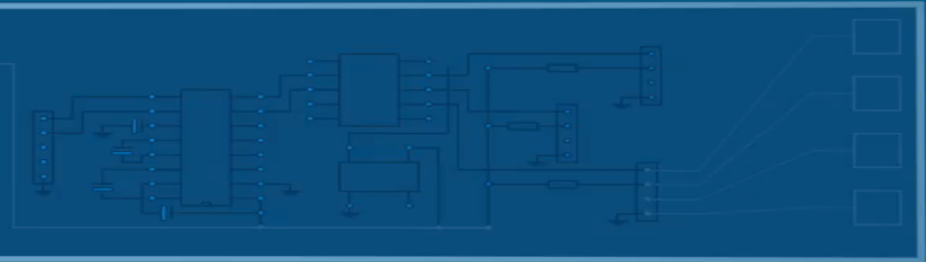
- a. Something went wrong ... or maybe it did ... and we need to do something about it (“First Party Breach Response”)



In-House Checklist: Basic coverages within cyberinsurance

3. Third party lawsuits, regulatory investigations, liabilities, and claims

- a. Someone's accusing us of doing something wrong, including a privacy breach, network security breach, or inability to access our services ("Third Party Liability Coverage")
- b. Business customers think that we did something wrong ("Tech E&O")
- c. Someone alleges that we published something that was defamatory, infringing, or otherwise ("Multimedia Liability")
- d. Regulators want to determine if we did something wrong ("Regulatory Investigation," "Regulatory Claim," "Regulatory Action," etc.)
- e. Payment card brands and/or processors think that we did something wrong [Area of contention]



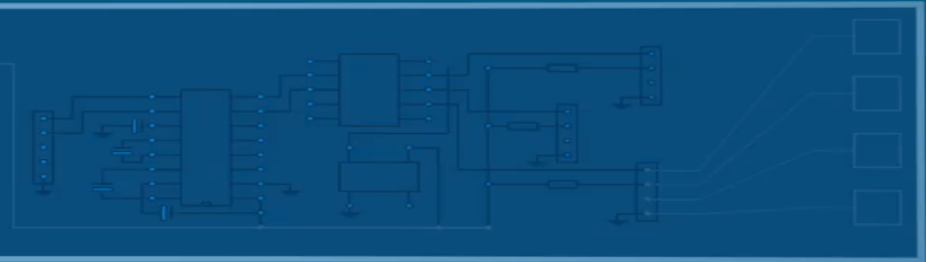
In-House Checklist: Basic coverages within cyberinsurance

4. Business impact, lost sales

- a. Our reputation has been harmed (Reputational harm coverage; “First Party Breach Response”/PR)

5. Impact on the ability to conduct business

- a. Our business has been interrupted or it's more expensive to stay in business (“Business Interruption,” “Extra Expense,” “Contingent BI/EE”)
 - a. Note the triggers: cyberattack *and* system failure?
- b. Our business was interrupted because of a third party's interruption or failure (“Dependent Business Interruption,” “Dependent System Failure”)
- c. Our data is gone (“Data Restoration”)



In-House Checklist:

Basic coverages within cyberinsurance

6. Threats to expose or delete data

- a. Someone is threatening to expose our data (“Cyber Extortion”)
- b. Someone has locked up our data and/or network (“Ransomware/Cyber Extortion”)

7. Spear phishing/spoofing

- a. Business Email Compromise / Someone fraudulently induced us to wire funds
[Area of contention – cyberinsurance **and** crime insurance]
- b. Someone hacked our email and induced business partners to act (Multiple coverages – cyberinsurance **and** crime insurance?)
- c. Someone fraudulently induced us to send out sensitive data (Multiple coverages)



In-House Checklist: Basic coverages within cyberinsurance

8. Other third party liability claims

- a. People say that we texted or faxed them without permission (Exclusions?)
- b. People say that we collected their information (*e.g.*, ZIP codes) without permission (Exclusions?)

9. Non-claim based additional services and benefits

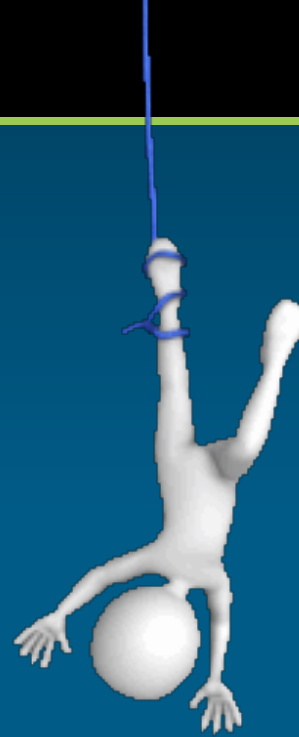
- a. Discounted cybersecurity services (and possibly free initial time for breach response services)
- b. Table top exercises
- c. Breach coaching



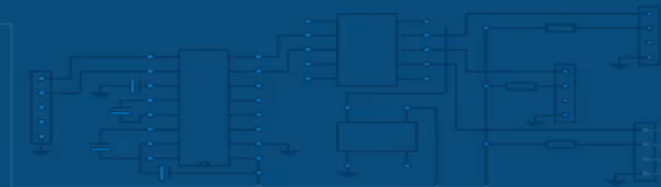
In-House Checklist:



Traps to coverage



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In-House Checklist: Traps to Coverage

1. Cloud- and vendor-related issues

- a. Is the cloud within the insuring agreement or definition of “computer system” ?
 - i. For third party risks?
 - ii. For traditional first party risks?
- b. What policy limits and retentions apply to cloud-based losses?



In-House Checklist: Traps to Coverage

2. Notable exclusions specific to health-related information?

- a. How does the policy cover obligations as a covered entity vs. business associate?
(And other contractual liability questions?)
- b. How does the policy cover investigations by and resolutions with agencies?

3. Sublimits?

- a. Will excess coverage drop down if there are sublimits?



In-House Checklist: Traps to Coverage

4. Exclusions for failure to maintain security/rescission
5. Retroactive date
 - a. Full prior acts coverage?
 - b. Same retroactive date throughout the tower?
6. Panel counsel, panel vendors
 - a. Required use of panel counsel, vendors?
 - b. Rate issues?
7. Business email compromise losses
 - a. Crime insurance, cyberinsurance, endorsements, and sublimits
8. Fines and penalties
 - a. Choice of law issues?

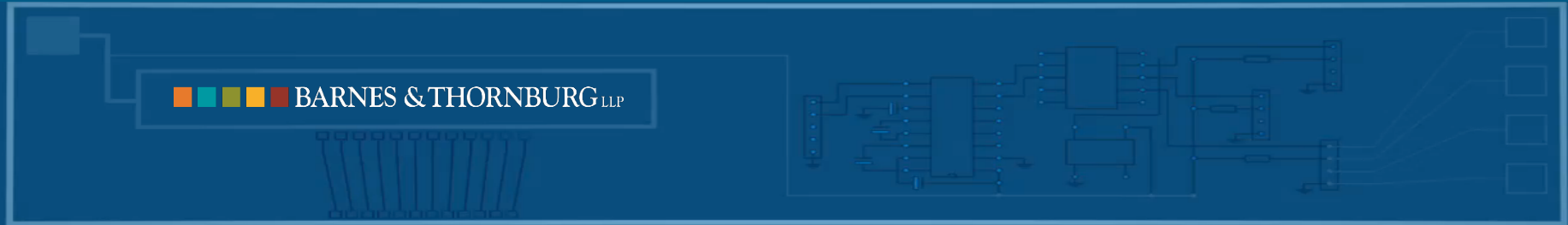


In-House Checklist: Traps to Coverage

9. Claims handling reputation?

10. Other policies? (Ignore conventional wisdom)

- a. Crime insurance
- b. CGL
- c. D&O
- d. E&O
- e. EPLI
- f. Kidnap, Ransom & Extortion
- g. Property



In-House Checklist: Traps to Coverage

11. Vendor coverage requirements

- a. “Usual” insurance requirements
- b. Insurance for cyber risks
 - i. Types of coverage? (Tech E&O, cyberinsurance?)
 - ii. Limits?
 - iii. Ideal terms and conditions?
 - 1) Consider working with broker and/or counsel familiar with insurance issues
 - iv. Additional insured status?



In-House Checklist:



Best practices for discussions with your risk managers at the time of purchase



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In-House Checklist:

Best practices for discussions with your risk managers at the time of purchase

1. How does that compare to last year's coverage, including limits, retentions, and terms?
2. Should you expand the coverages that you are buying, either terms, limits, or both?

What affirmative coverages are you buying?



In-House Checklist:

How has the offered policy form changed since last year?

What changes have occurred within or outside the company that you would want to raise during the process?

Is it time to comparison shop?

What new cyber or privacy risks have manifested or legal changes have passed that you would like to have covered?



In-House Checklist: Best practices for discussions with your risk managers at the time of purchase

Sublimits?

Retroactive date?

Policy not construed against the drafter?

Contractual-based exclusions?

PCI coverage?

Exclusions specific to your line(s) of business

Business email compromise coverage?

What about traps?

In-House Checklist: Best practices for discussions with your risk managers at the time of purchase

*Do you have the ability
to use the law firm and
vendors of your choice?*

In-House Checklist: Best practices for discussions with your risk managers at the time of purchase

Are there differences in terms between the primary and excess layer(s)?

Will excess layers drop down or attach if there is a donut hole?

How is your excess program structured?

In-House Checklist:



Getting Claims Covered



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In-House Checklist: Getting Claims Covered

1. Establish effective lines of communication

- a. Cast a wide net for a broad understanding of how insurance will (or won't) cover (including your own and third parties')
 - i. Consider closely the possibility of other types of insurance policies providing coverage
 - ii. Consider whether vendors' insurance will apply
 - iii. Consider whether a third party should indemnify your company
- b. Look for coordination between legal and risk management
- c. Think early and often about notice

In-House Checklist: Getting Claims Covered

2. Pay close attention to carrier position letters and consider carefully your next steps
 - a. Who on the team is working on response letters?
 - b. Do your team members have the experience to respond to the issues best?
3. Be cognizant of a duty to cooperate, a tri-partite privilege, and insurance company buy-in





Questions? More Information?

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