ANDERSON KILL
Cyber Insurance Alert

Multiple Insurance Policy Lines Can Cover Ransomware Losses

By Joshua Gold

Key points:

The impact of ransomware and other cyber attacks continues to escalate

Along with preventive risk management, maximizing insurance coverage is vital to recovering from an attack

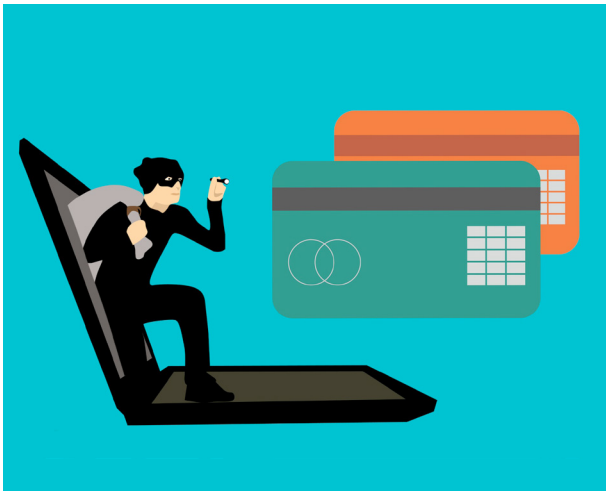
Along with cyber insurance policies, crime policies, all-risk property policies, D&O, E&O and EPLI policies may cover aspect of the losses and liabilities stemming from an attack

Ransomware attacks continue unabated, with cyber criminals demanding millions of dollars in ransom while simultaneously shutting down critical segments of our economy, infrastructure, and health care systems — including the attack on the Colonial Pipeline.

Virtually all businesses and organizations are now vulnerable to well-financed, organized hacking gangs that invest in targeted (and patient) hacks of high-value computer networks. Long gone are the days of ransomware attacks that required a modest payoff to regain system control and access to data.

From 2017 on, the trend has become decidedly worse for cyber crime targets. During the pandemic, hackers upped the ante by targeting organizations in some of our most crucial sectors, including hospitals and medical provider networks. As the *New York Times* reported in the fall of 2020, cyber attacks on hospitals and health systems "have become their own kind of pandemic."

While risk management on the loss prevention side remains critical to survival, maximizing insurance protection is also vital to remaining afloat in the wake of an attack. With a more serious risk scenario to combat, many policyholders should, at least, be able to find insurance coverage



for some of their most significant ransomware losses, not only under a specialty cyber policy, but also under crime insurance or all-risk property coverage.

Ransomware Tools Are More Potent / More Dangerous

While the amount of ransom demanded is exponentially larger these days, the ransom demand is not the only harm inflicted by ransomware attacks. Systems can be permanently damaged, with data files corrupted or compromised. Long-term computer functionality may be lost altogether. Further, the malware delivered to systems targeted in a ransomware attack may do far more than encrypt files or lock systems. Newer versions of ransomware enable the hacker

to exfiltrate data. As such, corporate data, including senior management communications, intellectual property, and client information can be stolen with certain types of ransomware attacks.

Sometimes, policyholders will not know the true motivations for the attack: get quick cash? Steal corporate information? Both? Cause targeted disruption for political or other purposes?

Regardless of the motivation, policyholders will want to have a sound game plan to deal with a ransomware incident, including effective pursuit of insurance coverage from all possible channels in the wake of an attack.

All Insurance Policies Have to Be On-Deck With a Serious Cyber Incident

Most cyber insurance policies expressly promise coverage for cyber extortion payments. Thus, policyholders should have insurance coverage for the ransoms they pay, the forensics that must be employed following an intrusion, and the fees and costs required to interface with regulators, law enforcement, and other stakeholders. Additionally, many cyber insurance policies promise to cover not just extortion payments, but also business interruption losses after a cyber attack (including a ransomware attack). As such, if the ransom is not paid (or even if it is paid but the hacker still refuses to relinquish control of systems and data), then the policyholder should be able to seek business income coverage above the retention amount.

While cyber insurance undeniably is an important insurance policy in the current environment, it is not the only option for insurance protection for cyber-related perils. Insurance coverage for losses stemming from ransomware exist under other insurance policies as well. In a recent pro-insurance coverage ruling, the Indiana Supreme Court found that crime insurance can cover ransom payments (see our **March 24 Alert** for a detailed discussion).

In that case, *G&G Oil Co. of Indiana, Inc. v. Contl. W. Ins. Co.*, the policyholder was victimized after a hacker installed "malicious computer code that renders the victim's computer useless by blocking access to the programs and data." After consulting with law enforcement, the policyholder paid $35,000 of bitcoin to the hacker and sought coverage under the computer fraud insuring provision under the crime section of its package business policy. The insurance company denied the claim, and the policyholder sued. Although the Supreme Court of Indiana could not resolve the case entirely, it did reverse the lower courts' rulings for the insurance company, holding that the ransomware caused a "direct loss" to the policyholder and would constitute a covered claim if further evidence indicated that the ransomware was injected into the computer system using some form of trickery. This case is also a lesson that policyholders should engage a computer forensics specialist that can analyze the attack and the methods used by the hacker to gain access.

Another decision from last year indicates that policyholders can also have property insurance coverage for damage to systems and loss of data as a result of ransomware. In *Nat'l Ink & Stitch, LLC, v. State Auto Prop. & Cas. Ins. Co.* (D. Md. Jan. 23, 2020), the court held that a policyholder that suffered serious damage and losses from a ransomware attack was entitled to all-risk property coverage for lost data, lost software, and a dysfunctional computer system and hardware. The court held in relevant part that:

> Here, not only did Plaintiff sustain a loss of its data and software, but Plaintiff is left with a slower sys-

When confronted with a cyber attack, there may be insurance coverage under more than one insurance policy line.

tem, which appears to be harboring a dormant virus, and is unable to access a significant portion of software and stored data. Because the plain language of the Policy provides coverage for such losses and damage, summary judgment will be granted in favor of Plaintiff's interpretation of the Policy terms.

In light of these and other decisions, policyholders should recognize that when confronted with a cyber attack, there may be insurance coverage under more than one insurance policy line. Indeed, it may be that beyond first party coverage, the policyholder will have (and need) third-party liability coverage for claims made when ransomware exfiltrates data, or where investors, customers, clients, regulators, or law enforcement claim against the policyholder in the wake of a malware attack. As such, D&O insurance, E&O insurance, CGL coverage, EPLI policies, and excess insurance must be considered, among other policy forms.

Further, it is safer to provide the earliest notice of claim you can and err on the side of being over-inclusive when choosing which insurance companies to notify after discovering a cyber incident. Even insurance company underwriters have indicated to us that this would be their approach if they were in the shoes of a policyholder confronting a serious cyber incident. Sound cyber risk management requires no less.

JOSHUA GOLD *is a shareholder in Anderson Kill's New York office and is co-chair of the firm's Cyber Insurance Recovery Group. Josh has represented corporate and nonprofit policyholders in various industries, with recoveries for his clients well in excess of $1.5 billion. His practice involves matters ranging from data security, international arbitration, directors and officers insurance, business income/property insurance, commercial crime insurance, admiralty, cargo, and marine insurance disputes.*
jgold@andersonkill.com
(212) 278-1886

We are interested in your feedback on topics for future articles and seminars. Please email us.

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Stamford, CT, Newark, NJ, Philadelphia, PA, Washington, D.C. and Los Angeles, CA.