

Eleventh Circuit to Weigh in on ‘Business Email Compromise’ Coverage Under Fidelity Bond

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Banks have historically been at the forefront of technological advances in commerce. So it should be no surprise that they and other financial institutions were also among the first to suffer losses related to computer fraud and hacking

Financial institution bonds or "fidelity" bonds were developed long ago to insure banks and other financial institutions against theft and fraud. These policies have not changed much from their original form, but insurers have responded to new risks by adding riders. These include the "computer fraud" rider, which became prominent in the 1990s in response to technological advances that allowed hacking crimes to propagate.

Recently, there has been a spate of coverage litigation regarding whether "business email compromise" (BEC) or "social engineering" schemes are covered events under the standard computer fraud rider. And related losses are mounting. According to FBI data, since January 1, 2015, BEC losses in the United States have grown an astonishing 1,300 percent, reaching 22,143 cases with losses totaling over \$3 billion.

Courts have struggled with whether these schemes are covered "computer fraud" because they do not rely necessarily on the use of computers, and, even if they do, they do not necessarily entail a fraudulent "alteration" or "change" to a computer system, as would be the case with an ordinary hacking, required for coverage to obtain. Insurers have argued that these schemes are not covered. In *Pestmaster Servs., Inc. v. Travelers Cas. & Sur. Co. of Am.*, *Apache Corp. v. Great Am. Ins. Co.*, and *Taylor & Lieberman v. Federal Insurance Company*, three circuit courts of appeals decisions appeared to put the issue to rest, siding with insurers in finding these events are not covered.

But the story isn't over. Despite notice of the *Pestmaster*, *Apache* and *Taylor* decisions, in *Principle Solutions Group, LLC v. Ironshore Indem., Inc.*, a Georgia federal court bucked the trend and found coverage for a BEC scheme. The insurer defendant filed a notice of appeal and the case will move to the Eleventh Circuit Court of Appeals. A similar case remains pending in federal court in New York, awaiting decision on the parties' cross-motions for summary judgment.

Thus, the issue remains unsettled. Fidelity policyholders and insurers alike should stay abreast of the shifting coverage landscape, and what it could mean if a policyholder suffers losses from BEC schemes. It is important to discuss coverage and particular concerns like BEC scheme losses before they happen to make sure your company will be protected by the most up-to-date insurance products in this developing sphere.