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Colonial Pipeline Hack

Understanding Cyberattacks, Supply Chain Breaks, and Data Breach Litigation Issues

Presenters

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Kristin Bryan, Senior Associate
Squire Patton Boggs, Cleveland, OH
kristin.bryan@squirepb.com

Ericka Johnson, Senior Associate
Squire Patton Boggs, Washington, D.C.
ericka.johnson@squirepb.com

Sarah Rathke, Partner
Squire Patton Boggs, Cleveland, OH
sara.rathke@squirepb.com

Agenda

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- Colonial Pipe Overview
- Cybersecurity Trends and Best Practices
- Supply Chain Considerations
- Data Breach Litigation

Ericka Johnson

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Colonial Pipe Ransomware Attack

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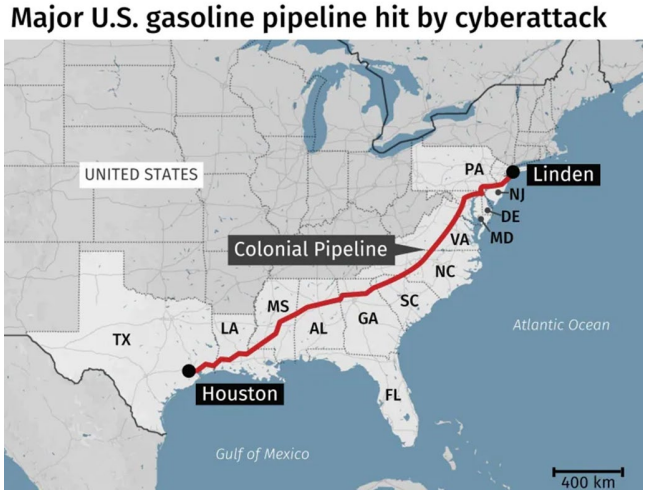

Trends and Government Response

- Exfiltration of Sensitive Data
- Higher Demand for Ransom
- President Biden’s Executive Order

Best Practices for Organizations

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- Identify and Protect Sensitive Data
- Develop an Incident Response Plan
- Conduct Due Diligence of Third Parties

Best Practices for Organizations

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- Implement Proactive IT Controls
- Remediate Following a Cyber Incident

Sarah Rathke

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What CYBER Dangers LURK in your supply chain contracts?

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- Non-safeguarded data
- Poor cybersecurity practices

ABA Cybersecurity Checklist - Vendors

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- Does Partner have appropriate security policies and procedures, including written policies necessary to create a “culture of security”?
- Does Partner have appropriate incident response and business continuity/disaster recovery plans, and does Partner test and update them regularly?
- Does Partner maintain a compliance program with all applicable laws?
- Does Partner use software and hardware with security and privacy controls?
- Does Partner assess the security practices of third parties with whom it does business?
- Does Partner monitor its systems for vulnerabilities and correct when found?
- Does Partner audit software for vulnerabilities before installation?

Representations and Warranties

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- *No undisclosed recent security incidents/breaches*
- *No events, claims, or legal/regulatory actions as a result of any security incident or vulnerability*
- *Partner has an information security program in place*
- *Partner employs personnel qualified to maintain information security program*
- *Partner monitors its operations for cybersecurity threats (malware, viruses, intrusions), including with regard to software management, infrastructure maintenance*
- *Partner has response and remediation procedures in place in the event of a cybersecurity incident*
- *Partner is in compliance with all laws*

https://www.americanbar.org/groups/business_law/publications/blt/2016/11/cyber_center/

Force Majeure

Force Majeure Issues

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- The doctrine that performance is excused or delayed upon the occurrence of certain events

- **Three components:**
  - Description of events that excuse/delay performance
  - Consequence of events occurring
  - Notice requirements if invoking

- *THE LAW HAS NOT CHANGED*

2-615 Excuse by Failure of Presupposed Conditions

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Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale **if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid**.

Kristin Bryan

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The Colonial Pipeline Data Breach Class Action

Reflecting a Trend of Data Privacy Litigation Regarding a Defendant's Failure to Maintain Reasonable Security

The *Dickerson* Complaint: First of Many?

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- First complaint filed on May 18, 2021 in federal court in Georgia.
- Names as Defendants owners of the Colonial Pipeline.
- Alleges that Defendants failed "to properly secure the Colonial Pipeline's critical infrastructure – leaving it subjected to potential ransomware attacks like the one that took place on May 7, 2021."
  - Also alleges that the Defendants "***failed to implement and maintain reasonable security measures, procedures, and practices appropriate*** to the nature and scope of [Defendants' business operations]."

Key Allegations in the *Dickerson* Complaint

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- Assertion that Defendants "owed a duty of care to use security measures consistent with industry standards and other requirements in order to ensure that its systems. . . were adequately protected and safeguarded."
- The Complaint alleges a breach of Defendants' duty of care, including the following acts and omissions:
  - **(1)** Failing to ***adopt, implement***, and ***maintain*** necessary and ***adequate security measures*** in order to protect its systems (and, thus, the pipeline);
  - **(2)** Failing to ***adequately monitor*** the security of their networks and systems;
  - **(3)** Failing to ensure that their systems had ***necessary safeguards*** to be protected from malicious ransomware; and, perhaps most importantly,
  - **(4)** Failing to ensure that they ***could maintain*** their critical fuel transmission ***operations*** even in the event of computer system failure."

Dickerson Cont'd: Not Your Typical Data Breach Litigation

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- The Complaint includes two claims, for negligence and for declaratory judgment.
- But what is the harm alleged by Plaintiffs?
  - The Complaint seek to certify a nationwide class consisting of ***"[a]ll entities and natural persons*** who purchased gasoline from May 7, 2021 through Present and ***who paid higher prices for gasoline as a result of the Defendant's conduct alleged herein."***
- *Dickerson*: A consumer pricing class action in the framework of a data breach litigation.

Data Breach Litigation Trends

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Trend #1: Creative Plaintiff's Lawyers Don't Limit Themselves to Statutory Theories of Liability

- Notwithstanding enactment of California Consumer Protection Act and other data privacy statutes…..
- Contract-based and/or tort-based theories of recovery typically included as tag-alongs or alternatively as primary causes of action.
  - Negligence-based claims typically (but not always) include allegations regarding defendant's failure to maintain reasonable security procedures theories of liability.
- But what exactly is "reasonable security"?

Data Breach Litigation Trends

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Trend #2: Litigation Brought by Plaintiffs In the Wake of a Data Event, Even in the Absence of Identity Theft or Fraudulent Charges on Accounts

- Article III Standing
  - Area of disagreement among the federal courts, notwithstanding Second Circuit's recent attempt at reconciliation. *McMorris v. Carlos Lopez & Assocs.*, 2021 U.S. App. LEXIS 12328 (2d Cir. Apr. 27, 2021).
- Second Circuit in *McMorris* adopts multi-factor, factual specific inquiry:
  - **(1)** Targeted attack intended to obtain the plaintiffs' data." The Second Circuit described this as the most important consideration?
  - **(2)** Any evidence of data misuse?
  - **(3)** Type of data at issue suggests increased risk of ID theft or fraud?
- Other approaches?

Data Breach Litigation Trends

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Trend #3 Plaintiffs Will Keep Asking for Production of Forensic Reports in Discovery to Bolster Claims

- Are you sure privilege applies to that?
- Two recent high-profile examples in which defendants were ordered to turn over copies of forensic report prepared in wake of data breach to plaintiffs in data privacy litigation.
  - *Wengui v. Clark Hill*, 2021 U.S. Dist. LEXIS 5395 (D.D.C. Jan. 12, 2021).
  - *In re Capital One Consumer Data Sec. Breach Litig.*, 2020 U.S. Dist. LEXIS 91736 (E.D Va. May 26, 2020).

Questions for Presenters

Kristin Bryan

Ericka Johnson

Sarah Rathke

CLE

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- For those of you who require CLE credits please note the following states have been approved for CLE in AZ, CA, LA, NJ, and NY. The program is pending CLE in OH.

- For IAPP credit please contact Robin Hallagan at robin.hallagan@squirepb.com.

- Please write down the following affirmation code [CPH525]

- A couple business days after today's session you will receive an email with a copy of the uniform certificate of attendance and program evaluation to complete and SUBMIT to my colleague, Robin Hallagan at robin.hallagan@squirepb.com.