A MOST MEMORABLE CLAIM

A Cyber Claims Professional Discusses Her Role in Crisis Response

By Cayce Lynch

Rarely do claims professionals play a role in limiting liability, often because a loss has already occurred by the time they receive a new matter. That is one of the biggest differentiators in specializing in cyber-related claims, according to our next most-memorable claim interviewee, Christine Flammer.

Now a team leader in Cyber/Tech/Media for AXA XL (a division of AXA), Flammer has been handling cyber claims for more than a decade. She has a wealth of hands-on experience guiding insureds through catastrophic events, which helps to highlight the importance of including claims professionals on a crisis-response team. Here is what she has to say about her role and what she learned from one of her most memorable claims.

FROM YOUR EXPERIENCE HANDLING CYBER CLAIMS—SOMETHING THAT NOT ALL CLAIMS ADJUSTERS HAVE EXPERIENCE WITH—WHAT MAKES THIS PROGRAM SO UNIQUE?

"I think it is the immediacy and severity of these incidents that are most striking when compared to other lines of businesses. The moment a new incident comes in, the clock is ticking; an entire business has shut down completely as the result of a cyber event, and it is an all-hands-on-deck situation.

"In many other types of claims, a loss professional has time to review the claim, look at the coverage, and—in the event of a lawsuit—plan out the litigation

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strategy and defense. Cyber claims do not have the benefit of time—we are typically up against really tight deadlines."

IN YOUR YEARS OF HANDLING CYBER LOSSES, WHAT CLAIM STANDS OUT TO YOU AS MOST MEMORABLE?

"A few years ago, I answered a call that came through our 24/7 data breach hotline late one Saturday night. The insured was in the midst of a ransomware event. One of the company's executives was traveling at that moment to meet a Bitcoin broker at a roadside coffee shop—with $40,000 cash on hand—to try to pay the ransom demanded by the hackers."

THIS SOUNDS LIKE SOMETHING OUT OF A MOVIE. HOW DID THE CASE RESOLVE?

"In this situation, it was too late to call off the drop—the executive was already meeting with the Bitcoin broker. However, we were able to quickly connect the insured with the necessary vendors, including privacy counsel and forensics, to ensure things went smoothly from there on out.

"Fortunately, once the ransom was paid, the criminals returned the stolen information. We brought on additional vendors to work on the restoration efforts. People assume that once you make the payment in this kind of scenario, everything goes back to normal, but restoration is usually a long and tedious process. In this instance, we were able to get the company back up and running quickly."

OF ALL THE CLAIMS YOU HAVE HANDLED, WHY HAVE YOU CHOSEN TO SPEAK TO US ABOUT THIS ONE?

"This claim is the perfect example of what often happens when insureds experience a cyberattack: they panic. Who could blame them? Their entire business was essentially shutdown. At the time, companies were not training or planning for this type of breach like they are now. Imagine how panicked you have to be in order to decide that meeting a complete stranger with $40,000 in cash shoved into a bag is a good idea!

"This case really opened my eyes to the rash decisions people can make when their companies are on the line. Even very smart, capable businesspeople need someone to have their backs and help them figure out what needs to be done. They need someone to say, 'Let's not just make any decision; let's make the right decision.'"

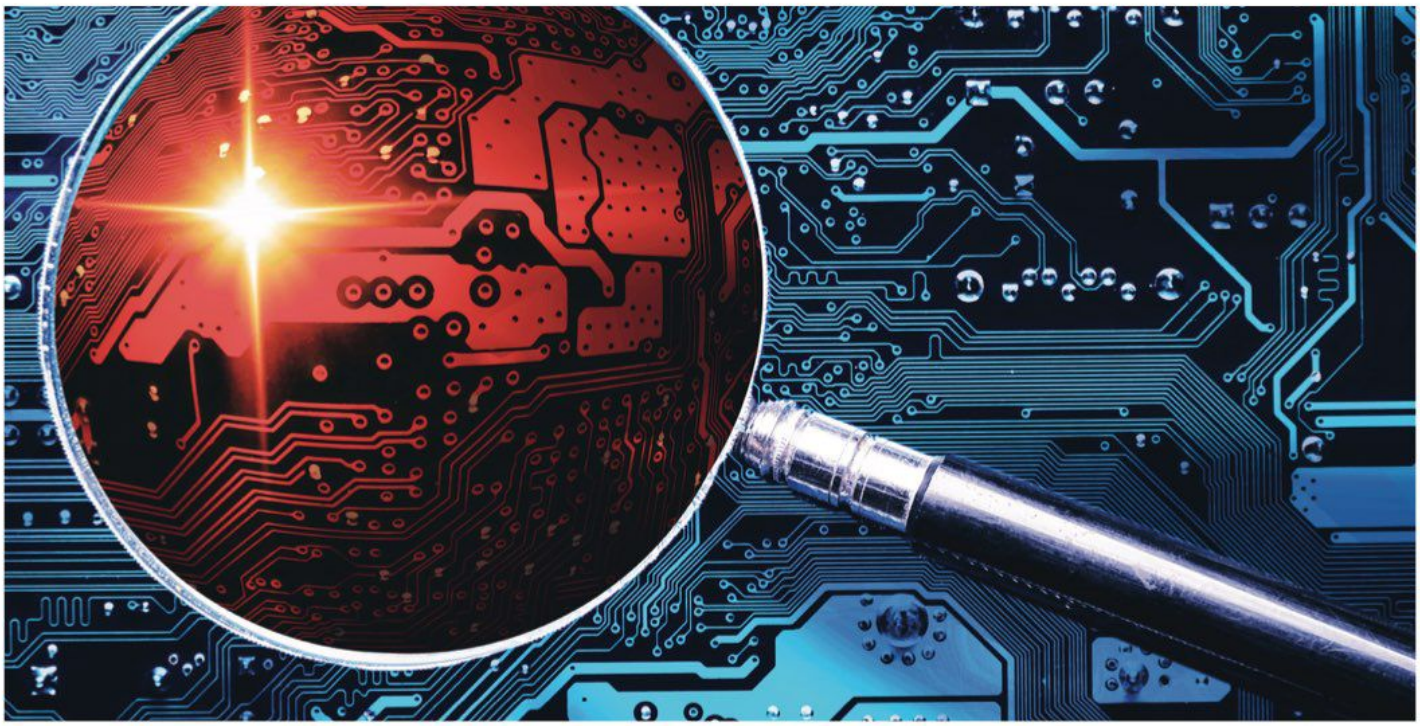
"Imagine how panicked you have to be in order to decide that meeting a complete stranger with $40,000 in cash shoved into a bag is a good idea!" says Flammer.

WERE THERE ANY ADDITIONAL LESSONS YOU TOOK AWAY FROM THIS INCIDENT?

"First, it is critical for businesses to have this kind of insurance. The moment a company is faced with a breach or threat, they can call us for help and we will work to put an experienced team together to determine the effect the incident may have on the business, whether a ransom payment is advisable, and how to make the payment if one is deemed necessary.

"Second, cyber claims professionals become part of the insured's crisis response team. It is a unique privilege to be able to guide a client through such a catastrophic event. One thing we try to impress upon our insureds is how they might unknowingly yet significantly increase their liability through their response to the crisis. A cyber breach is not a problem they can brush under the rug. If there should be some regulatory action or litigation as result, we want to put our best foot forward. It is important to collaborate with insureds to handle the situation correctly from the outset.

"While insureds may experience one or two breaches in their entire professional lives, cyber claims professionals handle breaches every day. Businesses suffering from a data breach or cyberattack are victims of a crime. While they might panic, we are there to guide them through a response as smoothly as possible." ■



DIGITAL BREADCRUMBS

The Role of Metadata in Claims and in Courts

By Mat Wyffels and Brandt Allen

Adjusting and litigating claims has evolved for the digital age. As companies make the shift from paper files to the digital landscape, they are creating more information than they may think.

In the not-so-distant past, claim documents were physically printed and stored. With the introduction of digital file maintenance, information we now see in digital claim files may only be part of the information known to the company. Metadata, or data about data, is an integral piece in all digital files housed by a party. Metadata is attached to pieces of digital information, from photos to internal email communications, associated with the handling of claims.

Metadata can be crucial to understanding an electronic document and can significantly improve a party's ability to access, search, and sort large numbers of documents. A digital photograph may contain the following metadata: name of photographer, height and width in pixels, date the photograph was taken, and even geolocation. Different types of digital information will contain different pieces of metadata. For example, Microsoft Word documents have the date and time the document was created, modified, and accessed. As this digital information may be discoverable, insurers and their claims partners must understand the metadata they create and be prepared to defend and discuss their metadata in litigated matters.

Although metadata is not directly addressed in the Federal Rules of Civil Procedure, courts have found that metadata is subject to the general rules of discovery. Thus, it will be discoverable if relevant to the claim or defense of any party, and is not privileged. Additional considerations found in the Federal Rules guide the request and production of electronically stored documents, including any corresponding metadata. Courts have observed that metadata generally lacks evidentiary value, although interest in metadata has become more prevalent as parties seek to access and view electronic records in the format available to the producing party.

While production of documents in their native format is not without complication, parties and courts must consider the probative value of metadata and whether it will enhance the functional utility of the electronic information. Metadata is generally

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available to litigants who seek the information in their initial document requests when the documents have not yet been produced in any form. However, if metadata is not sought in the initial request, courts are reluctant to order its production on relevance grounds. Thus, if a party believes metadata may inform its prosecution or defense of a case, steps should be taken to seek this information as early as possible. However, understanding the need for, or potential use of, metadata in a particular dispute may not be as clear.

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METADATA IN THE COURTS

In *Tarasyuk v. Mutual of Enumclaw Insurance Company*, the Washington Court of Appeals addressed the implications of metadata in the context of a bad faith claim. The dispute centered on a homeowner's policy and the insured's use of a shed on the property for business purposes. As part of the policy application, the insured stated that no business was being operated on the property. A homeowner's policy was issued providing coverage for structures on the premises, but excluding structures used for business purposes.

After the policy was issued, underwriters requested photos of the property. An agent photographed the property, including a sign reading "MV Auto and Boat Repair" and a number of cars on the property. The insured claimed she told the agent the cars were being fixed and that the repairs were performed outside of the shed. The insurer, however, claimed the insured advised the agent that repairs were performed in the shed, but only on vehicles and boats belonging to friends and family. Various photos and emails were exchanged between the agent and the insurer, including photos of varying clarity depicting the shed.

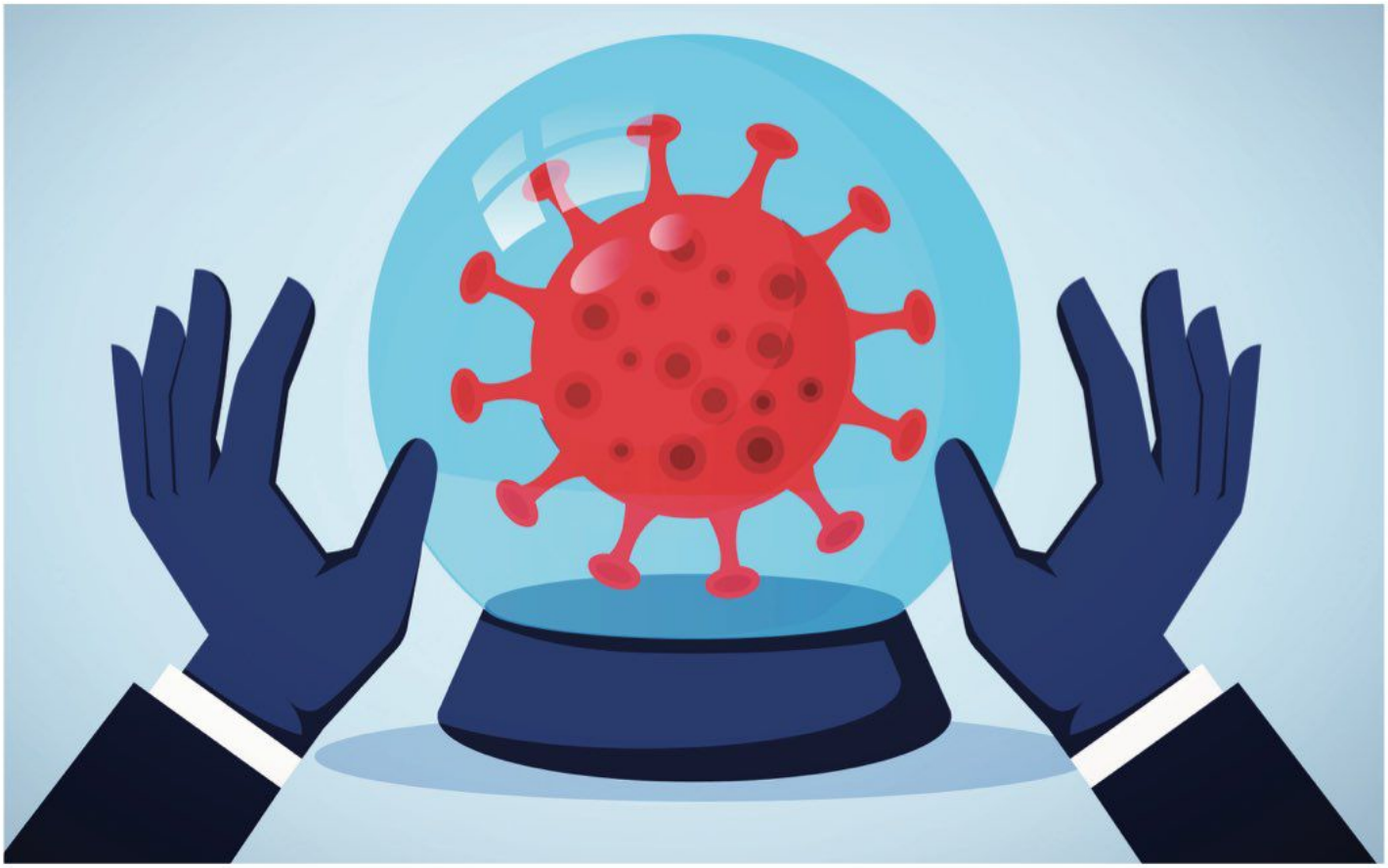
Coverage was denied after a fire subsequently damaged the shed and personal property therein used for the insured's repair business. The insured asserted a bad faith claim against the insurer, arguing that photos were destroyed or missing showing the repair operations and that metadata was altered relative to the photos. The agent denied erasing any photo metadata or purposefully omitting photos of the shed. An expert retained by the insured to examine metadata for the photos testified that the metadata showed that photos were missing due to the lack of sequential numbering and some were resized and possibly cropped, which the insured argued was the insurer's effort to lead her to believe the shed was covered to collect premiums. The court was tasked with weighing the impact of the metadata testimony and eventually concluded that the testimony did not support the insured's bad faith claim.

The District Court of Maryland also addressed the implications of metadata in *Steak In A Sack Inc. v. Covington Specialty Insurance Company*. Steak in a Sack, Inc. maintained a policy for its restaurant operations. The insurer's agent performed an inspection of the restaurant and recommended the installation of a fire extinguisher, without which the insurer would need to issue an additional premium endorsement or notice of cancellation. Having received no response from the insured, a notice of cancellation was sent. Thereafter, the insured advised that it had implemented the recommendation and subsequently emailed a photograph to the agent of the fire extinguisher sitting on a counter.

Unsatisfied with the uninstalled extinguisher, the agent contended that it emailed the insured and requested photographic proof of the extinguisher's installation and documentation identifying the type of extinguisher. After the policy was temporarily reinstated to allow the insured time to satisfy the agent's request, the agent contended no response was received, and the policy was cancelled again. After a fire occurred at the restaurant, the insurer denied coverage and a bad faith claim was initiated. The insured argued, in part, that it never received the emails and that there were irregularities with the dates of the agent's emails. While the insurer produced the emails with an explanation that metadata establishes the accuracy of the date and time the emails were sent, the court stated that it was not a metadata expert and no expert evidence was presented by the insurer to establish the authenticity of the metadata. Thus, the court found an issue of fact existed precluding summary judgment.

Similar metadata disputes have occurred in bad faith contexts when addressing internal reserve changes, the creation date of a claimed witness statement, authorship of affidavits, etc. How metadata is utilized and interpreted generally creates a fact issue, and parties should be mindful of the digital breadcrumbs they are creating when underwriting policies and adjusting claims.

Metadata and its functions are still evolving in all aspects of our everyday lives. Although metadata can be important to litigation matters, seeking this information must be relevant and timely. The insurance and legal industries will continue to find new uses for metadata. While the law will undoubtedly evolve to address the pervasiveness of electronic information in today's digital world, the existence and nature of metadata can create complex issues of fact for a jury and companies should strive to understand the scope, use, and implications of their digital records. ■



CONSULTING THE COMP CRYSTAL BALL

What Does the Future Hold for Current COVID-19 Workers' Compensation Claims?

By Kiara Hartwell and Georgia Herrera

Before the COVID-19 pandemic, workers' compensation occupational disease claims most commonly arose from latent conditions such as cancer, carpal tunnel syndrome, and asbestos-related illness. In cases like these, the burden of proof generally lays with injured workers to prove that their conditions arose out of and in the course of their employment. While excluding "ordinary diseases of life," such as the common flu, workers' compensation laws have, over time, incorporated diseases that are characteristic to a particular job. [See N.J.S.A. § 34:15-31 (covering "all diseases arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment") (New Jersey); CA Labor Code § 5500.6 (California); 77 P.S. Workers' Compensation § 1401(c) (Pennsylvania).] While some occupational claims involved infectious diseases, like methicillin-resistant staphylococcus aureus (MRSA), such claims generally were only common in health care settings.

With the emergence of COVID-19, some states amended their governing laws to shift the burden of proof for COVID-19-related cases to the employer and impose a presumption of compensability (i.e. infected workers were presumed to have contracted COVID-19 at work).

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According to the National Council on Compensation Insurance, these states included Alaska, Arkansas, California, Connecticut, Illinois, Kentucky, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, North Dakota, Utah, Vermont, Washington, and Wisconsin. While the language of the presumption does not vary greatly from state to state, the states differ with regard to its application. Differences include the types of employees covered, how the initial presumption is met, and how employers can rebut it.

Rebutting the presumption of compensability will likely be the biggest challenge for employers. In some of the states listed previously, the presumption can be overcome by "a preponderance of the evidence" that demonstrates an injured worker was exposed outside of the workplace.

Since the official declaration by the World Health Organization of the COVID-19 pandemic more than a year ago, states have reported large numbers of COVID-19 workers' compensation claims. In California, there were 56,854 COVID-19 reported injuries from Jan. 1, 2020 to Nov. 30, 2020, whereas in Florida, there were 23,452 claims filed from Jan. 1 to Oct. 31, 2020. Courts around the nation are still developing and fine-tuning what facts are necessary and what is needed from experts in litigating COVID-19 workers' compensation cases. In the meantime, however, most claims have resolved quietly, especially in the states that have adopted a presumption of compensability. Thus far, the body of published case law is scarce.

For guidance, employers should consider a recent decision by Delaware's Industrial Accident Board, though this case is currently on appeal to the Superior Court in Kent County under No. K21A-01-002 NEP. In *Carl Fowler v. Perdue Inc.*, No. 1501167 (Del. I.A.B. Dec. 31, 2020), the board found that a worker failed to meet his burden of proving that it was more likely than not that he contracted COVID-19 at his place of employment. The worker alleged that he contracted the virus in March 2020 at work, where he was stationed in a box room on the night shift, had 30-minute meal breaks, and visited the lunchroom on a regular basis with approximately 200 other employees. He claimed that, prior to the onset of his symptoms on March 27, 2020, he did not eat out, go shopping, or socialize with friends. However, his wife testified that he went shopping at Walmart and Royal Farms at least weekly.

The employer, through its safety manager, testified that, although there were other employees who tested positive for COVID-19 between March 18 and April 15, 2020, the worker was the only COVID-19 positive employee who worked in the box room on the night shift.

Medical evidence was presented by the worker's family physician, who testified that the worker most likely was exposed at work, but acknowledged that he could not opine to a reasonable degree of medical probability as to where, specifically, the worker contracted the disease. The physician had only briefly discussed the worker's other activities/contacts outside of work.

Interestingly, the employer presented an internist who specialized in infectious diseases, who also opined that the worker likely contracted COVID-19 at work. However, despite both experts' opinions that the worker likely acquired COVID-19 at work, in determining the injured worker had not met his burden of proof, the board noted the case was "incredibly fact-intensive" and pointed to the significance of the lack of credibility of the injured worker's testimony and lack of complete information obtained by the medical experts.

While Delaware is not one of the states that has adopted a presumption of compensability, *Fowler* nevertheless offers employers an in-depth look into the facts and circumstances relevant for proving—and for defending—workers' compensation claims involving COVID-19.

But some attorneys in New Jersey, where the presumption exists, who have conferenced COVID-19 cases, have offered insight into what courts may be looking for. It is undoubtedly difficult for employers to obtain information to demonstrate a worker contracted COVID-19 outside of work. Unlike the Delaware case, employers will likely have to provide more concrete evidence of COVID-19 exposure elsewhere, i.e. a positive test by a family member or exposure from a different source, such as a grocery store, restaurant, etc., with confirmed cases. Of course, there are other serious ramifications, such as whether family members' medical records should be available to employers and whether other stores would provide the public with more specific COVID-19 information, especially if it pertains to confidential employee information.

Claims adjusters, employers, attorneys, and the courts are still trying to navigate COVID-19 claims and determine what information is needed, particularly with respect to rebutting the presumption of compensability. The best strategy will always be reducing risk through compliance with public health guidelines. This could include providing employees with personal protective equipment in the form of masks, gloves, and gowns; performing temperature checks before shifts; filling out log-in sheets; and encouraging handwashing and staying home if any symptoms are present.

However, if a claim is filed, an adjuster should be involved with the employer from the onset to try and identify the place of exposure. Having the employee fill out a COVID-19 questionnaire with tailored questions should assist in obtaining information on other possible sites of exposure. This investigation should include interviewing co-workers and supervisors as well as searching social media to determine if the employee was potentially exposed outside the workplace. The more information that can be presented to the court about where the potential for exposure was, the more likely it will be that the presumption of compensability can be overcome. As more decisions become available from various jurisdictions, it will help more narrowly tailor the type and extent of proof required by employers to overcome the presumption. ■