At-a-Glance

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'Triton' malware targeting North American companies next?

The internet of things (IoT), which broadly refers to the interconnectedness of devices via the internet, has become a highly discussed topic over the past few years as household items ranging from coffee makers to vacuums are now able to send and receive data over the internet. Specifically, a phenomenon known as the 'industrial IoT' has exploded, as facilities and plants around the world are increasingly enabling internet connectivity in a range of equipment. Cyber criminals developed Triton – a malware specifically designed to, among other things, bypass and allow hackers to take over safety instrumented systems - the last line of defense within a manufacturing or critical infrastructure plant. These safety systems are meant to respond if dangerous conditions are detected, shutting systems down or returning processes to safe levels. The full effect of this cyber-physical threat was on display at a petrochemical plant in Saudi Arabia in the summer of 2017, where, for the first time, the cybersecurity world witnessed the effect of Triton. While the malware was ultimately disabled, it left many wondering what could have been – there's no doubt among experts that the impact could have been devastating. If hackers had overridden safety systems and simultaneously triggered an unsafe situation in the plant, widespread bodily injury and property damage would surely have resulted.

Safety instrumented systems are found in companies ranging from nuclear power stations to water treatment facilities. And, according to cybersecurity investigators, there is evidence that the hackers who built Triton are researching targets in North America. Cyber liability insurance can provide valuable first and third-party coverage in the event of an actual or suspected cyber security breach, including indemnity for breach response costs, lost profit and extra expenses if business interruption results, and expenses to recreate lost data. If confidential third party corporate or personal identifiable information (PII) is compromised, or your network transmits malicious code to a third party or participates in a denial of service attack, a cyber insurance policy can provide legal defense costs, settlement and judgment amounts in the event of a lawsuit. While bodily injury and property damage resulting from a cyber security breach have historically been excluded under a cyber liability insurance policy, insurers are increasingly providing creative solutions to cover this risk. If your organization faces a high IoT risk that could result in bodily injury or property damage, speak to an experienced cyber broker to advise on potential risk transfer solutions.

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The first cannabis product liability class action in Canada gets certified

A Canadian medical cannabis producer, Organigram Inc., is facing a class action lawsuit after voluntarily recalling numerous products after some were found to contain traces of pesticides not authorized for use on cannabis plants. Headquartered in Moncton, New Brunswick, the producer became aware of the situation after a wholesaler had the protect tested by a third-party laboratory and alerted Organigram. The representative plaintiff is alleging that she suffered adverse health consequences as a result of consuming the recalled cannabis product and is claiming various remedies, including general and punitive damages. The Supreme Court of Nova Scotia certified the lawsuit as a class action proceeding on 18 January 2019.

Both medical cannabis producers and licensed cannabis producers under the recreational cannabis regime face the risk of litigation should a product be recalled. Directors' and officers' (D&O) liability insurance can provide valuable protection for board members and executives when faced with management liability claims. A D&O policy can also provide protection to the corporate entity when named in various lawsuits; this protection is typically limited to securities lawsuits for public companies, with non-public companies enjoying broader entity coverage. While most D&O policies exclude product liability lawsuits from entity coverage, it is possible, depending on the specific wording of the policy at issue, for a director or officer, should they be named in such an action, to receive valuable coverage for legal expenses, settlement and/or judgment amounts. Moreover, if a public company faces a downstream securities lawsuit following a product liability claim, such as can be the case if a product recall results in a stock price drop, a D&O policy may respond to provide coverage.

Insurance implications of the Supreme Court of Canada's *Redwater* decision

On 31 January 2019, the Supreme Court of Canada released its much-anticipated decision in *Orphan Well Association et al. v. Grant Thornton Limited et al.*, colloquially known as the 'Redwater' case. Closely monitored by energy sector participants and stakeholders, the court considered whether trustees in bankruptcy could renounce an insolvent debtor's interest in licensed, non-producing assets pursuant to s.14.06(4) of the federal *Bankruptcy and Insolvency Act* (BIA). In 2015, Redwater Energy Corp.'s (Redwater's) principal secured lender demanded repayment of Redwater's debt obligations; Grant Thornton Limited (GT) was subsequently appointed as receiver. GT advised the Alberta Energy Regulator (AER) that it would only take control of certain Redwater properties licensed by the AER that had value; the remaining properties were disclaimed by GT. AER subsequently issued a closure and abandonment order in respect of the disclaimed assets, and filed an application with the court to compel GT to comply with the order and fulfill Redwater's statutory abandonment and reclamation obligations (AROs) pertaining to all of the licensed assets. Redwater was subsequently assigned into bankruptcy, whereby GT became the trustee in bankruptcy. Shortly thereafter, GT disclaimed Redwater's uneconomic assets pursuant to s.14.06(4) of the BIA and indicated that it did not intend to comply with the AER's order.

The court of first instance concluded that GT was permitted to renounce an insolvent debtor's interest in uneconomic licensed assets while keeping and selling valuable licensed assets to maximize recovery for the debtor's estate. As such, the claim of Redwater's secured creditor had priority over provincial statutory ARO obligations. The Alberta Court of Appeal affirmed the decision. However, the Supreme Court of Canada ultimately overturned the ruling, finding that while s.14.06(4) protects the trustee from personal liability, it does not allow the trustee to walk away from the environmental liabilities of the bankrupt's estate. The court thus found that the AROs that Redwater's estate owed to the AER are not subject to the creditor priority scheme in the BIA. The result of this decision is that the AER can now require trustees in bankruptcy to expend estate assets to meet the estate's outstanding AROs, leaving less money for creditors subject to the BIA priority scheme. Lenders may now only recover in an insolvency after potentially millions of dollars are paid from the bankrupt's estate toward end-of-life statutorily mandated AROs.

While this decision will undoubtedly impact the investment and lending climate in the energy sector, the insurance implications are more remote. A directors' and officers' (D&O) liability insurance policy will not respond to fulfill a defunct corporate entity's ARO obligations, or any of its other environmental remediation responsibilities. Should environmental remediation obligations be imposed on directors or officers personally by operation of law, which was not the case in the Redwater decision, a D&O insurance policy could respond to provide a measure of protection for individual insureds. Aon's proprietary non-public D&O policy provides coverage for non-indemnifiable loss incurred by individual insureds in connection with an environmental remediation or clean up order. However, the coverage provided by public company D&O forms is more limited – some domestic insurers will offer a sub-limited endorsement to select companies providing select coverage for individual insureds should they be faced with clean-up costs imposed pursuant to section 17 or 18 of the *Ontario Environmental Protection Act*. Any potential gaps in environmental remediation costs coverage could potentially be filled by a D&O Side A Difference-in-Conditions (DIC) policy, which sits above the primary D&O policy and drops down to provide broad coverage for individual insureds for most matters not covered by the primary policy. In this vein, Aon has been successful in adding affirmative language to its proprietary Side A DIC form, which explicitly provides coverage for remediation costs incurred by individual insureds to comply with an order issued by an environmental regulator.

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