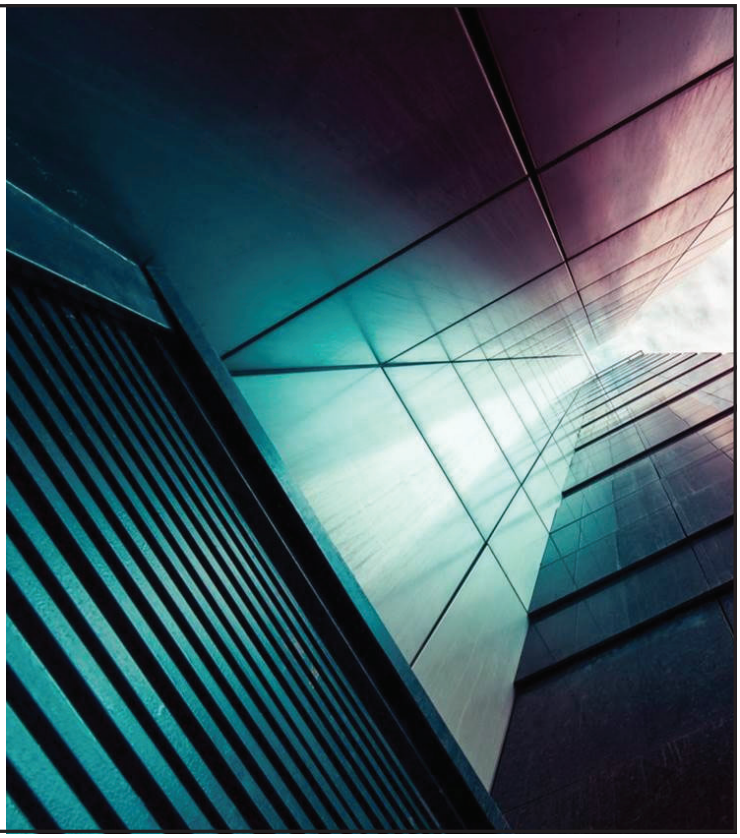
NORTON ROSE FULBRIGHT

Legal Nuances of Breach Response

Will R. Daugherty, Partner



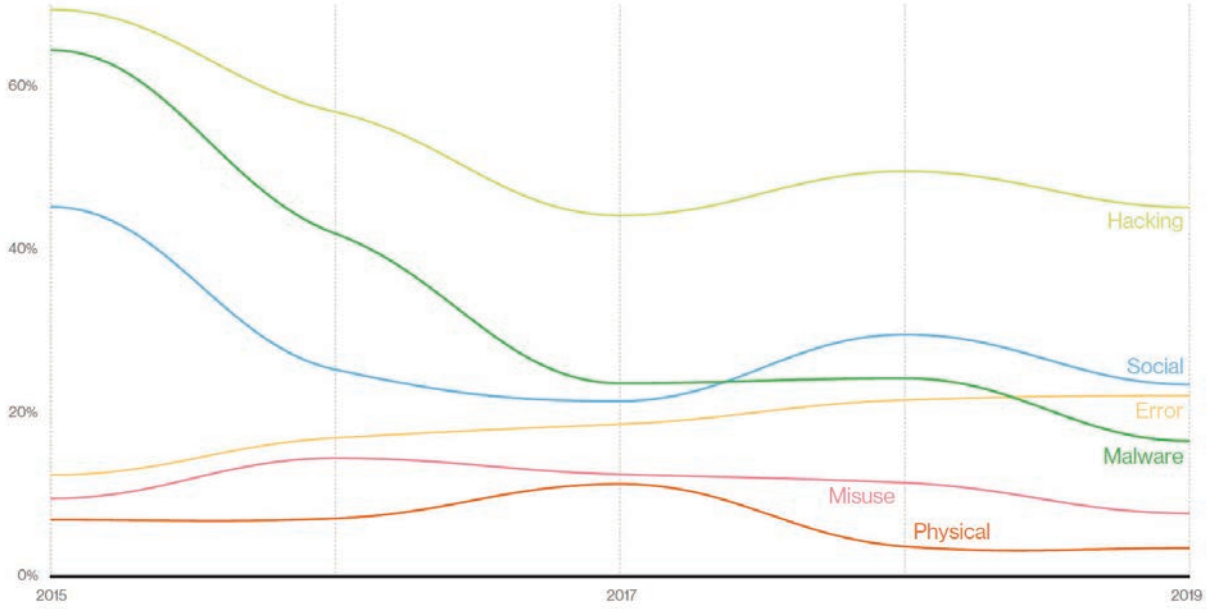
Norton Rose Fulbright US LLP
June 12, 2020

Agenda

- Threat Landscape
- Legal Landscape
- Forensic Firm Engagement
- Ransomware Attacks
- Business Email Compromise Attacks
- Network Intrusions
  - Payment Card Incidents
  - Covered Defense Information
  - Educational Records (FERPA)
- Publicly Traded Companies – SEC Reporting

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Threat Landscape



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Source Verizon Data Breach Investigations Report 2020

Legal Landscape

- U.S. State Laws
  - All 50 States, D.C., Territories
  - Laws vary between jurisdictions and varying level of enforcement by state attorneys general
  - Notification obligations to individuals and certain regulators
  - Triggered by unauthorized access to and/or acquisition of "personal information"
  - Definition of "Personal Information" varies among states but generally defined to include name in combination with SSN, DL#, financial account numbers. Some states include username/password to online account, health information, health insurance information, biometric data, and date of birth
  - Various safe harbors and exceptions (risk of harm; encryption; good faith acquisition by employee)
  - Many require "reasonable security" of personal information
- States are frequently amending the breach notification laws to expand obligations
  - Texas (Jan. 1, 2020): requires breach notifications (1) to affected individuals without "unreasonable delay," but no later than 60-days after identifying breach, and (2) to the Texas Attorney General within 60-days if breach effects at least 250 Texas residents
  - CCPA (Jan. 1, 2020): creates private business's violation of the duty to implement and maintain reasonable security procedures ($100 - $750 per violation)

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Legal Landscape

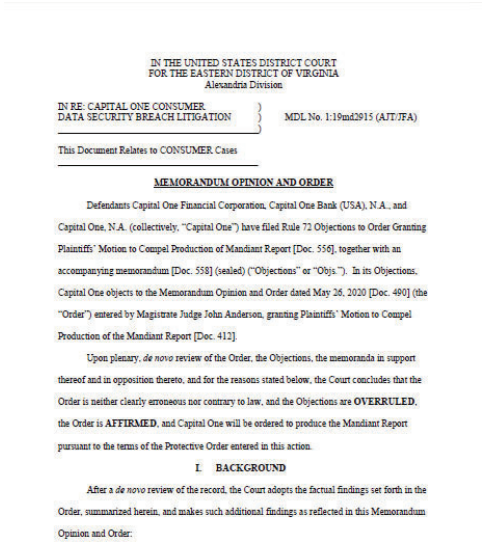
- Federal Laws
  - Gramm Leach Bliley Act (GLBA)
  - HIPAA / HITECH
  - FTC Act – Section 5 and FTC Enforcement
- International Laws
  - EU General Data Protection Regulation: notification to data protection authority within 72 hours of personal data breach
  - Other countries adopting laws similar to GDRP, such as Brazil and Thailand



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Investigation

- Engagement of Counsel and Forensic Firm
  - Structure the engagement to facilitate privilege arguments over communications and work-product
- Implications of *In Re: Capital One Consumer Data Security Breach Litigation* (MDL No.1:19md2915) (E.D. Va. 6/25/2020)
  - New, Well-Defined Legal Scope of Work
  - Different forensic team then involved in prior business-related work
  - Legal department pay forensic fees
  - Is the forensic report necessary?
  - Limit distribution of forensic report



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE: CAPITAL ONE CONSUMER DATA SECURITY BREACH LITIGATION — MDL No. 1:19md2915 (AJT/JFA)

This Document Relates to CONSUMER Cases

MEMORANDUM OPINION AND ORDER

Defendants Capital One Financial Corporation, Capital One Bank (USA), N.A., and Capital One, N.A. (collectively, "Capital One") have filed Rule 72 Objections to Order Granting Plaintiffs' Motion to Compel Production of Mandiant Report [Doc. 556], together with an accompanying memorandum [Doc. 558] (sealed) ("Objections" or "Objs."). In its Objections, Capital One objects to the Memorandum Opinion and Order dated May 26, 2020 [Doc. 490] (the "Order") entered by Magistrate Judge John Anderson, granting Plaintiffs' Motion to Compel Production of the Mandiant Report [Doc. 412].

Upon plenary, *de novo* review of the Order, the Objections, the memoranda in support thereof and in opposition thereto, and for the reasons stated below, the Court concludes that the Order is neither clearly erroneous nor contrary to law, and the Objections are **OVERRULED**, the Order is **AFFIRMED**, and Capital One will be ordered to produce the Mandiant Report pursuant to the terms of the Protective Order entered in this action.

I. BACKGROUND

After a *de novo* review of the record, the Court adopts the factual findings set forth in the Order, summarized herein, and makes such additional findings as reflected in this Memorandum Opinion and Order:

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First appeared as part of the conference materials for the
2020 Essential Cybersecurity Law session
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