

To Be or To Be On Behalf Of: That Is the Question

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On August 10, 2022, the U.S. District Court for the Middle District of Florida held, on a motion to dismiss, that losses allegedly caused by fraudulent payment requests by persons purporting **to be** the insured qualified for "Funds Transfer Fraud" coverage under a commercial crime policy, but those caused by an entity purporting to act **on behalf of** the insured did not.

The insured, The Landings Yacht, Golf and Tennis Club (the Club), allegedly lost nearly \$7,000 when unspecified "unauthorized users purport[ing] to be [the insured]" made digital requests for payment from the Club's Bank of America account. In addition, the Club allegedly lost over \$575,000 when payroll company Paychex, "purport[ing] to act on behalf of the Club," made unauthorized payment requests from the same account. See *The Landings Yacht, Golf & Tennis Club, Inc. v. Travelers Casualty & Surety Company of America*, No. 2:22-cv-464-SPC-NPM, 2022 U.S. Dist. LEXIS 142874 (M.D. Fla. Aug. 10, 2022).

The Club's commercial crime policy, issued by Travelers Casualty and Surety Company of America, provided "Funds Transfer Fraud" coverage for "the Insured's direct loss of Money and Securities contained in the Insured's Transfer Account directly caused by Funds Transfer Fraud." The policy defined Funds Transfer Fraud, in relevant part, as a payment instruction directed to a financial institution "which . . . purports to have been transmitted by the Insured, but was in fact fraudulently transmitted by someone other than the Insured without the Insured's knowledge or consent"

Considering a motion to dismiss filed by Travelers, the Middle District of Florida determined that the alleged payment requests by the unauthorized users who purported **to be** the Club could fall within the policy definition of "Funds Transfer Fraud." But the court also determined that Paychex's payment requests, as alleged, could not constitute "Funds Transfer Fraud" because Paychex merely purported to make those requests **on behalf of** the Club. The court reasoned that "purporting to act on behalf of an entity is a far cry from purporting to be the entity itself" and "[u]nder the Policy's plain language, that difference is significant." As Travelers' motion put it, "'Paychex' purported to be itself," not—as required by policy—the Club.

Accordingly, the court denied Travelers' motion to dismiss with respect to the alleged payment requests by the unauthorized users, but granted the motion with respect to the alleged payment requests by Paychex and dismissed the Club's complaint without prejudice. The next day, the Club filed an amended complaint newly asserting that "unauthorized users, through Paychex, Inc. identified themselves to be the Club, by presenting the Club's identifying routing and account numbers" for payment of over \$575,000 and "[i]n this manner, [these] unauthorized users purported to be the account holder (i.e., the Club)" Travelers has not yet challenged the amended complaint, but may do so on grounds that a third party's presenting routing and account numbers does not equate to the requisite allegation of an instruction purporting to have been transmitted *by the Insured*.

If you have any questions or would like further information, contact Celestine Montague (montaguec@whiteandwilliams.com; 215.864.6813) or Lynndon K. Groff (groffl@whiteandwilliams.com; 215.864.7033).

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