

CYBER INSURANCE – WHAT EDUCATED POLICYHOLDERS NEED TO KNOW NOW

MILLER | FRIEL
PLLC

1200 New Hampshire Avenue, NW, Suite 800, Washington, DC 20036
373 Park Avenue South, 6th Floor, New York, New York 10016

PLI
Presentation

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CYBER INSURANCE TOPICS



- 1. The Problem: Cyber Attacks**
- 2. Potential Solution: Cyber Insurance**
- 3. Types of Insurance Policies Providing Coverage**
- 4. Best Practices**

1. THE PROBLEM: CYBER ATTACKS

- ❖ Understanding past cyber attacks helps us understand risks to be insured
 - ❖ Published studies
 - ❖ Recent cyber attacks

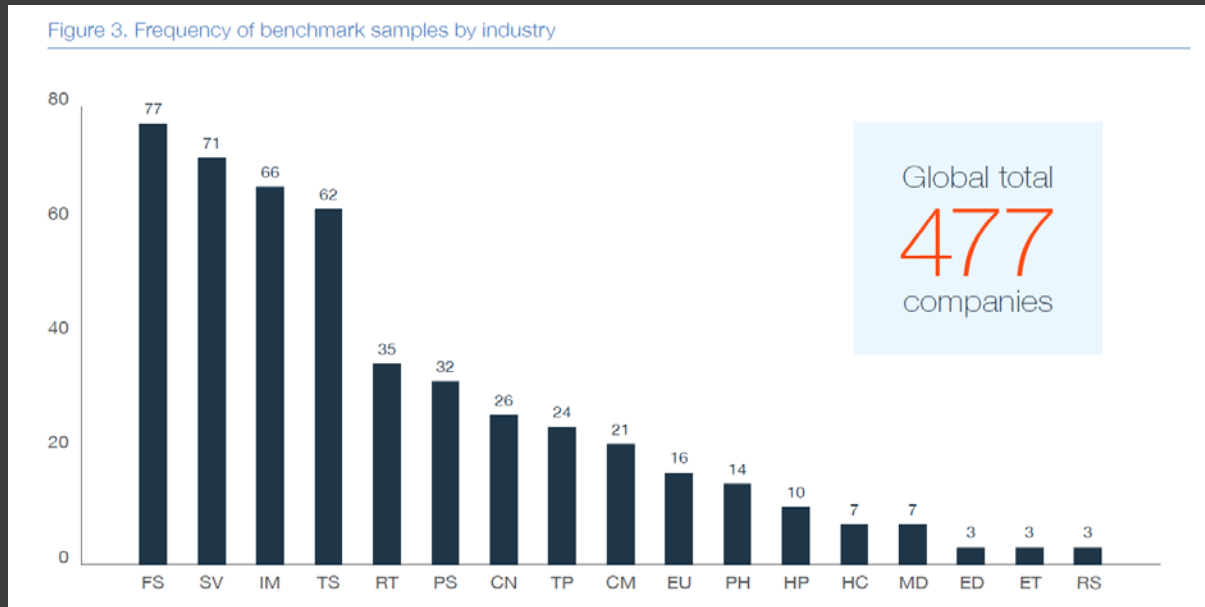
1. THE PROBLEM: CYBER ATTACKS

- ❖ **Published Studies (IBM Security Services – The 2018 Cost of a Data Breach Study by the Ponemon Institute) (“IBM Report”)**
 - ❖ **Looked at: (1) Typical Breach costs, and (2) Mega breach costs (over 1 million records) (Facebook and Equifax, etc.)**
 - ❖ **Types of costs:**
 1. **Detection and escalation**
 2. **Post breach response (legal, regulatory investigations, credit report monitoring, product discounts)**
 3. **Notification costs**
 4. **Lost business costs**

1. THE PROBLEM: CYBER ATTACKS

❖ IBM Report

❖ Typical cyber breach costs (average \$3.9 million)

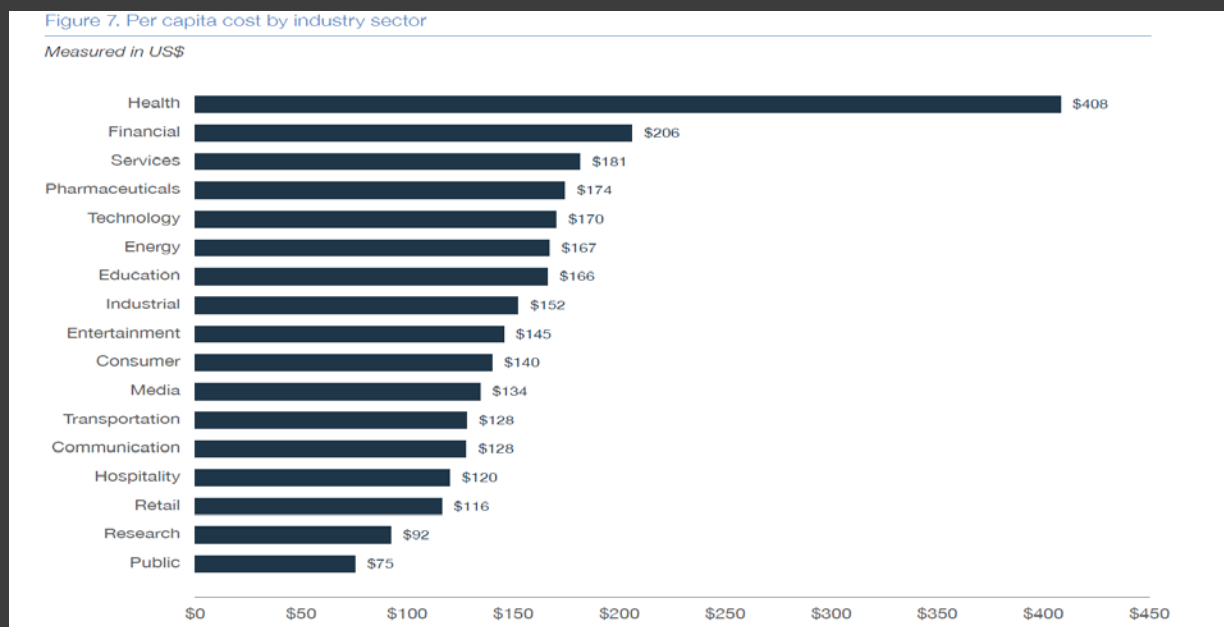


❖ Highest – Financial services, Services, Industrial Manufacturing, Technology, Retail, Public Sector

1. THE PROBLEM: CYBER ATTACKS

❖ IBM Report

❖ Cost per stolen record (average \$148)



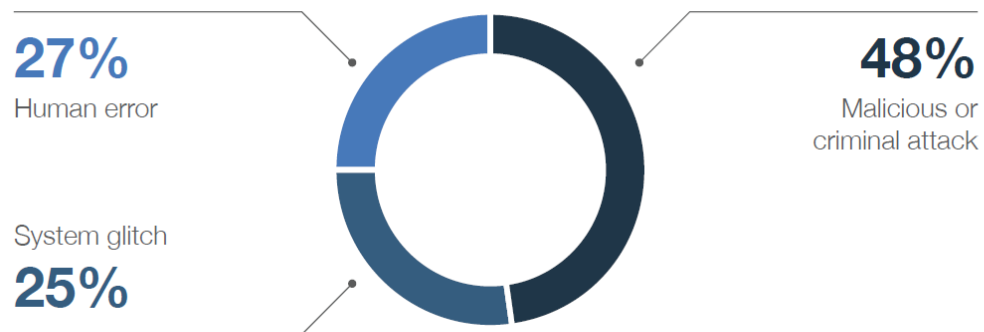
❖ Highest costs per stolen record – Health, Financial, Services, Pharmaceuticals, Technology

1. THE PROBLEM: CYBER ATTACKS

❖ IBM Report

❖ Root Causes

Figure 8. Distribution of the benchmark sample by root cause of the data breach

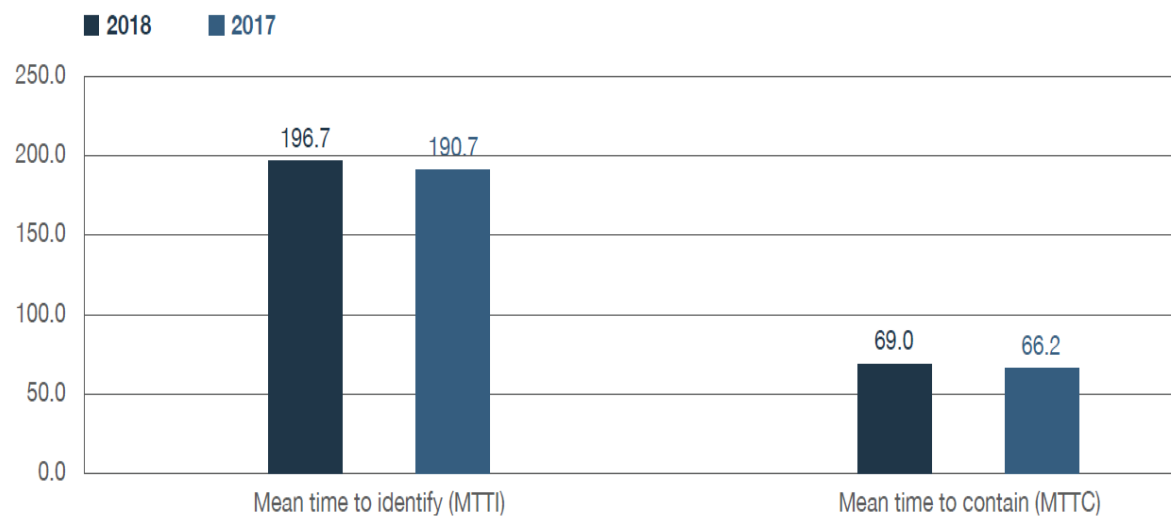


1. THE PROBLEM: CYBER ATTACKS

❖ IBM Report

- ❖ It takes a long time to identify and contain data breaches: 6 to 7 months to identify

Figure 24. Days to identify and contain the data breach over the past year



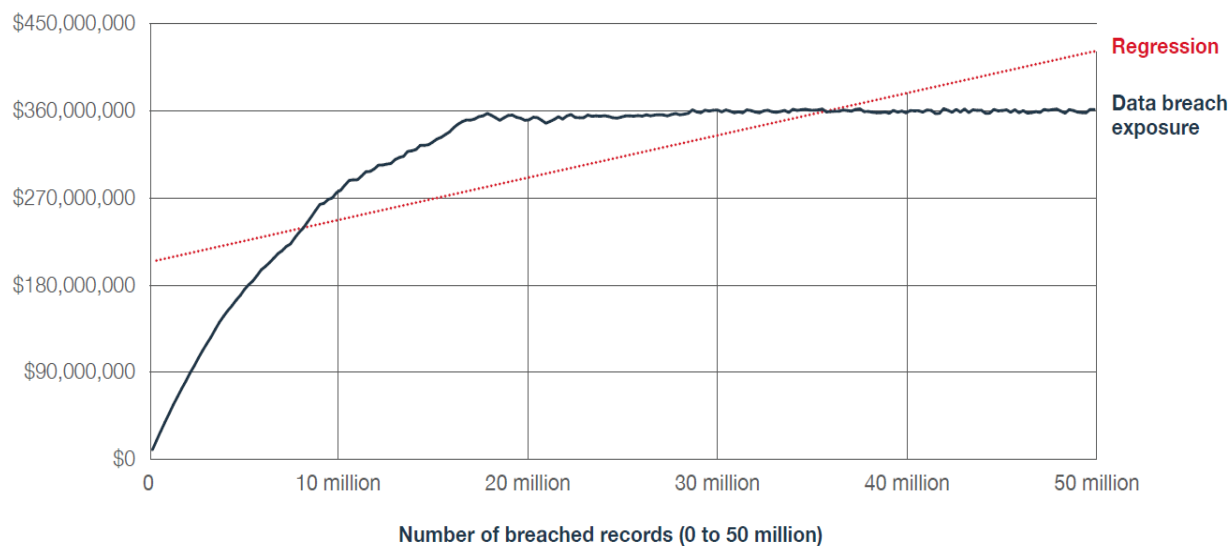
1. THE PROBLEM: CYBER ATTACKS

❖ IBM Report

❖ Mega Breaches (over 1 million records)

Figure 33. Simulated mega breach cost curve

Measured in US\$



1. THE PROBLEM: CYBER ATTACKS

- ❖ Understanding past cyber attacks helps us understand risks to be insured
 - ❖ Equifax
 - ❖ Maersk
 - ❖ Marriott

1. THE PROBLEM: CYBER ATTACKS

❖ Equifax (2017)

The Equifax logo is displayed in a bold, red, italicized sans-serif font. The letters are closely spaced, and the 'Q' has a distinctive shape with a tail that loops back. The logo is centered within a white rectangular box.

- ❖ Vulnerable web server enabled hackers to steal data
- ❖ Names, Addresses, Social Security numbers, birth dates, drivers licenses and credit card numbers stolen. 148 million consumers affected in breach

1. THE PROBLEM: CYBER ATTACKS

- ❖ **Equifax (continued)**
 - ❖ **Lawsuits: 240 plus class action lawsuits; state AG lawsuits, etc.**
 - ❖ **Investigations: 60 plus government investigations (U.S. state attorneys general, federal agencies, British and Canadian Governments)**
 - ❖ **Reported losses: \$439 million through March 2018 (could reach \$600 million)**
 - ❖ **\$4 billion hit to stock price**
 - ❖ **Insurance -- \$125 million xs \$7.5 million deductible; \$95 million recovered through Sept. 2018**

1. THE PROBLEM: CYBER ATTACKS

- ❖ A.P. Moller-Maersk (2017) (world's largest shipping conglomerate)



- ❖ Accidental victim of Russian Cyber-war with the Ukraine.
- ❖ Maersk Ukraine office infected with NotPetya virus.
- ❖ Virus completely disabled entire worldwide computing operation, halting operations.

1. THE PROBLEM: CYBER ATTACKS

- ❖ A.P. Moller-Maersk (2017) (continued)
 - ❖ Only one company computer was safe, located in Ghana (not operational due to power outage)
 - ❖ Took 10 days to rebuild entire network of 4,000 servers, 45,000 PCs, and 2,500 applications and close to 2 months to rebuild Maersk's entire network
 - ❖ Lost business and downtime, cost of rebuilding entire network, reimbursement of customers for expense of rerouting or storing marooned cargo. Cost \$300 million.

1. THE PROBLEM: CYBER ATTACKS

- ❖ **A.P. Moller-Maersk (continued)**
 - ❖ **Other companies infected with same NotPetya virus:**
 - ❖ **Merck (\$300 million)**
 - ❖ **TNT Express (Federal express European subsidiary) (\$400 million)**
 - ❖ **Saint-Gobain (French construction company) (\$384 million)**
 - ❖ **Mondelez (parent company of Nabisco) (\$188 million)**

1. THE PROBLEM: CYBER ATTACKS

❖ Marriott (2018)

❖ Customer database breach



- ❖ Unidentified hackers stole personal information including passport numbers
- ❖ Up to 500 million customers potentially impacted.

1. THE PROBLEM: CYBER ATTACKS

❖ Marriott (continued)

- ❖ Marriott could face \$200 million in fines and litigation expenses, and a potential fine of about \$450 million under Europe's General Data Protection Regulation (GDPR). Will pay for web-monitoring service
- ❖ Legal Liability: Numerous investigations from state attorneys general, European regulators; Class action lawsuits

1. THE PROBLEM: CYBER ATTACKS

❖ Summary:

❖ What makes up losses:

- ❖ Government investigations (regulatory fines and penalties)
- ❖ Lawsuit defense and settlement costs
- ❖ Credit card reimbursements (PCI risks)
- ❖ Notification and remediation costs
- ❖ Forensic Investigations
- ❖ Lost business (financial losses)
- ❖ Interruption of business costs

1. THE PROBLEM: CYBER ATTACKS

❖ Summary:

- ❖ Average cost of data breach is \$3.86 million (IBM)
- ❖ IBM Study raises issues on coverage:
 - ❖ Coverage for cyber incidents caused by human error and system glitches
 - ❖ Notification costs (highest for regulated industries)
 - ❖ Product discounts
 - ❖ Lost business
 - ❖ Timing implications (claims made coverage, proof of loss claims submission deadlines)
 - ❖ Early expenditures -- Detection and escalation costs

2. POTENTIAL SOLUTION: CYBER INSURANCE

❖ Opportunity for insurance companies



- ❖ 1997 – \$0 premiums; today – \$2.0 billion; expected to increase to \$7.5 billion by 2020 (PWC)
- ❖ 2017 premiums grew nearly 32 percent over 2016

2. POTENTIAL SOLUTION: CYBER INSURANCE

- ❖ Opportunity for insurance companies
 - ❖ Lloyd's of London stated that cyber insurance sales would save the organization
 - ❖ Feeding frenzy of marketing and sales like no other we have seen in recent insurance history
 - ❖ “the [insurance] industry needs to sell the problem first, before discussing coverage” (Advisen)
 - ❖ “News of cyber related loss” was the top driver for growth in cyber insurance marketplace (Advisen)
 - ❖ Best's – “the cyber insurance market represents a meaningful growth opportunity for insurers”

2. POTENTIAL SOLUTION: CYBER INSURANCE

- ❖ Cyber insurance is the “Wild, Wild West” of insurance



- ❖ Unlike other kinds of insurance, stand-alone cyber insurance policies are unregulated

2. POTENTIAL SOLUTION: CYBER INSURANCE

- ❖ Cyber insurance unregulated
 - ❖ Most insurance products are regulated
 - ❖ Require the filing and approval of forms with state insurance commissioners
 - ❖ Not cyber insurance – sold on surplus lines market
 - ❖ With cyber, anything goes
 - ❖ Brokers sell problem – “look at all of these cyber attacks and what they cost”
 - ❖ Insurers provide glossy sales and promotional material
 - ❖ Only way to determine coverage: analyze policy language / law relating to coverage

2. POTENTIAL SOLUTION: CYBER INSURANCE

❖ Who is leading the race?

Stand-Alone and Package Cyber Coverage Combined
(Year-End 2015)

Rank	Company	Direct Written Premium (\$000)	Policies In-Force Claims Made	Policies In-Force Occurrence
1	American International Group	215,563	16,418	—
2	Chubb Limited	121,132	5,119	—
3	XL Group Ltd.	113,482	1,301	121
4	AXIS Capital Holdings Ltd.	83,223	3,067	—
5	Beazley Insurance Co.	68,954	13,324	—
6	Travelers Companies Inc.	65,026	31,887	—
7	CNA Financial Corp.	57,637	24,981	—
8	Allied World Assurance Co.	29,938	1,002	—
9	Berkshire Hathaway Inc.	20,467	72,909	8,715
10	Ironshore Inc.	17,272	1,615	—
	Industry	998,298	577,375	894,599

Note: Direct written premium includes both quantified and estimated premiums.

Source: SNL Financial via Fitch Ratings

2. POTENTIAL SOLUTION: CYBER INSURANCE

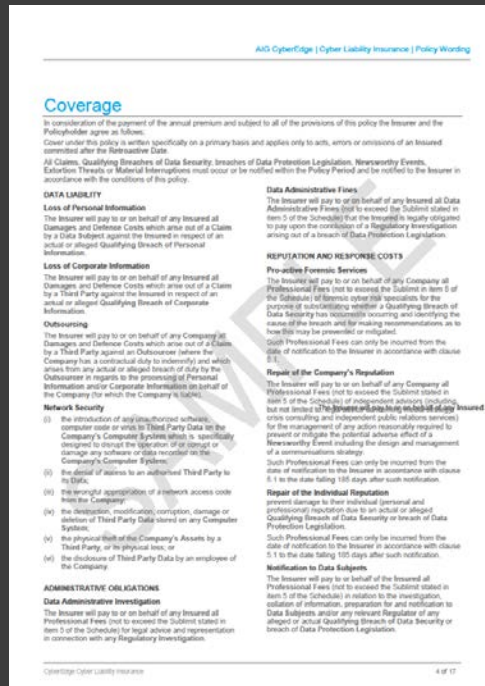
- ❖ **What is cyber liability insurance?**
 - ❖ **Covers risks of managing and controlling electronic data**
 - ❖ **Typically a combination of E&O, media liability, network security and privacy coverage**
 - ❖ **Storage, use and transmission of personal or private information or data**
 - ❖ **Computer / website risks**
 - ❖ **Insurance jargon is a problem**

2. POTENTIAL SOLUTION: CYBER INSURANCE

- ❖ Starting point: what kinds of things are represented as covered:
 - ❖ Liability flowing from data breach may include:
 - ❖ Costs of notifying costumers regarding data breach
 - ❖ Forensic investigations into cause of breach
 - ❖ Consumer lawsuits
 - ❖ Costs associated with regulatory investigations, fines, penalties
 - ❖ Loss of business and customers

2. POTENTIAL SOLUTION: CYBER INSURANCE

❖ Ending point: what is covered - Policy language is all that matters



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

- ❖ Kinds of insurance policies that can provide coverage for cyber losses
 - ❖ General liability insurance policies
 - ❖ Cyber endorsements to general liability and other liability insurance policies (E&O, etc.)
 - ❖ Commercial crime
 - ❖ Stand-alone cyber insurance policies

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

- ❖ Every organization has them



- ❖ Cover suits alleging “bodily injury,” “property damage,” “advertising injury” and “personal injury”

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ “Property damage” language providing coverage:

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

For the purposes of this insurance, electronic data is not tangible property.

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ “Property damage” coverage

- ❖ Scenario – web based content causes computers to become non-functional
- ❖ Key issue – is there damage or loss of use of “tangible property”?
- ❖ Text book example of what is covered – NotPetya virus rendering computers unusable; but only responds to third-party liability

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ Leading “property damage” cases:

- ❖ *Eyeblander, Inc. v. Federal Ins. Co.*, 613 F.3d 797 (8th Cir. 2010) (“*Eyeblander*”)



- ❖ *Retail Systems, Inc. v. CNA Ins. Co.*, 469 N.W.2d 735 (Minn. Ct. App. 1991) (“*Retail Systems*”)



- ❖ *Ciber, Inc. v. Federal Ins. Co.*, 2018 WL 1203157 (D. Colo. 2018) (“*Ciber, Inc.*”)



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ *Eyeblaster* – leading “property damage” coverage case:

- ❖ Key issue – is there damage or loss of use of “tangible property”?
- ❖ Underlying lawsuit alleged plaintiff’s computer was infected with spyware when he visited an Eyeblaster site – computer froze up.
- ❖ Typical GL coverage for loss of use of tangible property not physically injured
- ❖ Policy states electronic data is not “tangible property”
- ❖ Caused computer to freeze; lost data on tax returns; repair costs incurred

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ *Eyeblander* – Leading “property damage” coverage case:

- ❖ Court found coverage
- ❖ Damage was to computer (loss of use), not to electronic data
- ❖ Some GL policies exempt electronic data from definition of “tangible property” with respect to property damage coverage – not an issue if there was “loss of use of tangible property.”

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ *Retail Systems* – leading “property damage” coverage case:

- ❖ Lost computer tape, which included data
- ❖ Technically, not a cyber-insurance case, but analysis applies
- ❖ Broad definition of “tangible property”
- ❖ Computer tapes and data are tangible property
- ❖ Court found coverage
- ❖ Court held that, “[a]t best, the policy’s requirement that only tangible property is covered is ambiguous,” and construed coverage in favor of policyholder

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ *Ciber, Inc.* – recent “property damage” coverage case illustrating that coverage is factually dependent:

- ❖ Plaintiff designed new software system which was defective and failed to operate properly
- ❖ Court denied coverage where complaint alleged only inadequacies in the new software, and not loss of use of the computer systems
- ❖ Case distinguished *Eyeblaster*, which found coverage where computer system no longer functioned after integration of software

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ “Personal and advertising injury” language providing coverage:

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
- a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
 - d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
 - e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
 - f. The use of another's advertising idea in your "advertisement"; or
 - g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ “Personal and advertising injury” coverage:

- ❖ Scenario – personal information published in a way that violates a person’s privacy rights
- ❖ Key issue – Is there a “publication”?

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ “Personal and advertising injury” coverage leading cases

- ❖ *Travelers Indem. Co. of Am. v. Portal Healthcare Solutions, LLC*, 35 F. Supp. 3d 765 (E.D. Va. 2014) (*Portal Healthcare*)



- ❖ *Recall Total Info. Mgmt. v. Federal Ins. Co.*, 83 A.3d 664 (Conn. App. Ct. 2014) (*Recall Total*)



- ❖ *Zurich Am. Ins. Co. v. Sony Corp. of Am.*, Case No. 651982/2011 (N.Y. Sup. Ct) (*Sony*)



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ *Portal Healthcare* – “personal and advertising injury” coverage case

- ❖ Policyholder specialized in electronic safekeeping of medical records
- ❖ Confidential patient records available on-line
- ❖ Policy covered electronic publication of material that discloses information about a person’s private life
- ❖ Issue was whether there was “publication”
- ❖ Court held yes, and ordered insurer to defend

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ *Recall Total Case* – “personal and advertising injury” coverage case

- ❖ Insured had vital records storage agreement with IBM
- ❖ Tapes containing employment-related data fall of truck and are taken (not technically a cyber case)
- ❖ IBM retained consultant, took remedial action (notification costs) and made demand for payment from insured
- ❖ Personal injury coverage sought: “injury . . . caused by an offense . . . electronic, oral, written or other publication of material that ... violated a person’s right to privacy”

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ *Recall Total Case* – “personal and advertising injury” coverage case

❖ Court held no coverage

❖ No evidence info on tapes was “published” to anyone other than the thief;

❖ Court stated,

“As the complaint and affidavits are entirely devoid of facts suggesting that the personal information actually was accessed, there has been no publication.”

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

- ❖ Advertising Injury cases – Most recent creative attack by insurers -- no coverage because plaintiff insured did not publish information.

- ❖ *Sony* -- 69 class action lawsuits; claims stemming from cyber attacks by hackers on PlayStation Network

 - ❖ Theft of users' personal and financial information

 - ❖ Trial court finds no coverage because Sony did not “publish” material resulting in privacy violation

 - ❖ Court reasoned that publication by third-party hackers does not trigger coverage

 - ❖ Questionable ruling; case settled during appeal

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

- ❖ 1. General liability insurance policies
 - ❖ Two federal court decisions from M.D. Fla. following *Sony* decision
 - ❖ Data breaches caused by third-party hackers
 - ❖ Courts found no coverage because third-parties released personal information
 - ❖ Found, inexplicably, that coverage exists only where the insured publishes personal information



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

- ❖ Cases finding coverage under GL policies are problematic for insurers, but they are fighting back hard
- ❖ Industry sought regulatory approval for new endorsements limiting coverage
 - ❖ Example: CG 21 06 05 14: Excludes coverage for injury or damage arising out of access to or disclosure of confidential or personal information
- ❖ Coverage is typically denied outright, based on new argument that policyholder must publish data itself (not insurance policy based, but has taken hold by some courts)

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 1. General liability insurance policies

❖ Lessons learned:

- ❖ Coverage is provided for certain kinds of cases including:
 - ❖ Loss of use of third-party computer systems
 - ❖ Internet publication of personal information
- ❖ On renewal, refuse endorsements diminishing coverage
- ❖ If you have a cyber claim, analyze it for coverage under GL policies, even if separate cyber-only policies were purchased
- ❖ More than one policy may apply
- ❖ Provide notice to GL carriers, even if frowned upon by insurance brokers

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

- ❖ 2. Cyber liability endorsements
 - ❖ Added on to other policies: GL, E&O, etc.
 - ❖ Coverage depends on endorsement

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 2. Cyber liability endorsements

❖ ISO Electronic Data Liability endorsement

- ❖ Adds electronic data to definition of property damage

POLICY NUMBER: _____ COMMERCIAL GENERAL LIABILITY
CG 04 37 12 04

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ELECTRONIC DATA LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Schedule

Loss Of Electronic Data Limit	1
-------------------------------	---

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Exclusion 2(a) of Coverage A – Bodily Injury And Property Damage Liability in Section 1 – Coverages is replaced by the following:

2. Exclusions

This insurance does not apply to:

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption or inability to access, or inability to manipulate "electronic data" that does not result from physical injury to tangible property.

B. The following paragraph is added to Section III – Limits Of Insurance:

Subject to 6. above, the Loss of Electronic Data Limit shown in the Schedule above is the limit we will pay under Coverage A for "property damage," because of all loss of "electronic data" arising out of any one "occurrence".

C. The following definition is added to the Definitions Section:

"Electronic data" means information, facts or programs stored on, or on, created or used on, or transmitted to or from computer software (including systems and applications), software, hard or floppy disks, CD-ROMs, optical drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

D. For the purposes of the coverage provided by this endorsement, the definition of "Property Damage" in the Definitions Section is replaced by the following:

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it.

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

c. Loss of loss of use of, damage to, corruption of, inability to access, or inability to property manipulate "electronic data", resulting from physical injury to tangible property. All such loss of "electronic data" shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, "electronic data" is not tangible property.

CG 04 37 12 04 © ISO Properties, Inc., 2003 Page 1 of 1

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

- ❖ 2. Cyber liability endorsements
- ❖ ISO Electronic Data Liability Coverage Form
- ❖ Claims-made add-on coverage

COMMERCIAL GENERAL LIABILITY
CG 60 65-12 04

ELECTRONIC DATA LIABILITY COVERAGE FORM

SECTION I - THIS FORM PROVIDES
CLAIMS-MADE COVERAGE
PLEASE READ THE ENTIRE FORM CAREFULLY

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered. Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance. The word "insured" means any person or organization qualifying as such under Section II - Who Is An Insured. Other words and phrases that appear in quotation marks have special meanings. Refer to Section V - Definitions.

SECTION I - COVERAGES
DAMAGE TO ELECTRONIC DATA LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "loss of electronic data" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages to which this insurance does not apply. We may, at our discretion, investigate any "electronic data incident" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III - Limit Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

b. This insurance applies to "loss of electronic data" only if:

(1) The "loss of electronic data":

(a) Is caused by an "electronic data incident";

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- ❖ Express coverage for "loss of electronic data"

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 2. Cyber liability endorsements

❖ Cyber endorsements may have holes

❖ Leading Case: *Camp's Grocery, Inc. v. State Farm Firm & Cas. Co.*, Case No. 4:16-cv-0204-JEO, 2016 WL 6217161 (N.D. Ala. Oct. 25, 2016) (“*Camp's Grocery*”)



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 2. Cyber liability endorsements

❖ *Camp's Grocery*

- ❖ Hackers accessed network and compromised customer credit and debit card information
- ❖ Credit unions file suit for losses to cardholder accounts, interest, transaction fees, lost customers, diminished good will
- ❖ Coverage sought under Computer Programs and Electronic Data extension
- ❖ Court finds extensions apply only to first-party coverage; not third-party liability claims (no duty to defend or indemnify against third-party lawsuits)

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 2. Cyber liability endorsements

❖ Lessons learned:

- ❖ Cyber endorsements must be closely analyzed to ensure comprehensive coverage
- ❖ In some situations, cyber endorsements should be requested as a matter of course – even if stand alone cyber coverage is purchased
- ❖ Depending on business needs, cyber liability endorsements may not provide the amount of coverage desired

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 3. Commercial crime

❖ **Optional coverage section for crime coverage found in D&O/Executive Management Policies:**

- ❖ Computer fraud coverage
- ❖ Funds transfer fraud coverage
- ❖ Forgery coverage

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 3. Commercial crime

❖ *Medidata Solutions, Inc. v. Federal Ins. Co.* (S.D.N.Y. 2017), *aff'd* (2d. Cir. 2018)

❖ Spoofing

❖ Email purportedly from company's president directing wire transfer

❖ Court finds coverage under Computer Fraud Coverage Section


❖ Manipulation of e-mail system triggers coverage



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 3. Commercial crime

❖ *American Tooling Center v. Travelers* (6th Cir. 2018)

- ❖ Transferred funds in response to fraudulent emails from purported vendor
- ❖ Sought coverage under computer fraud provision
- ❖ Covered “direct” loss of money or property due to Computer Fraud
- ❖ Loss was “direct” 
- ❖ Causing employee to fraudulently enter wire transfer was “computer fraud”

❖ *Medidata* and *American Tooling* expand coverage over several prior 9th circuit cases

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 3. Commercial crime

❖ *Lessons learned:*

- ❖ Email scams “spoofing” are becoming more and more sophisticated
- ❖ Endorsements are valuable for spoofing losses
- ❖ Case law is rapidly developing; coverage may be more problematic in certain jurisdictions

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ Scope of coverage

- ❖ Third-Party

- ❖ First-Party

❖ Claims are on the rise (Best's):

- ❖ 2016 – 5,595

- ❖ 2017 – 9,017

❖ Developing case law; inconsistent policy language makes it hard to draw conclusions as to coverage

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

- ❖ 4. Stand alone cyber insurance policies
 - ❖ “All risk” cyber coverage not yet available in the market
 - ❖ Insurers describe coverage like this:



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ Scope of coverage: third-party

❖ Network security

- ❖ Viruses / malware

❖ Data protection

- ❖ Lawsuits for failure to protect customer data or private information
 - ❖ Data typically includes personally-identifiable information & corporate information
 - ❖ Coverage includes defense and settlement costs
- ❖ Regulatory proceedings / investigations stemming from privacy breaches

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ Scope of coverage: third-party (cont'd)

❖ Third-party errors and omissions

- ❖ Third-party liability arising from technology services

❖ Media liability

- ❖ Copyright infringement
- ❖ Trademark
- ❖ Defamation

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ Scope of coverage: first-party (cont'd)

- ❖ Costs of responding to cyber breach
 - ❖ Forensic investigation into cause
- ❖ Costs of notification
- ❖ Credit monitoring for customers
- ❖ Public relations / crisis management
- ❖ Contingent business interruption
 - ❖ Loss of data at third party location causes business interruption for insured
- ❖ Data recovery costs

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ Scope of coverage: first-party (con't)

- ❖ First-party cyber extortion expense
- ❖ Theft of goods, services or money over the internet
 - ❖ “Social engineering”
- ❖ Network business interruption

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ Case law is rapidly developing

❖ Shocking what some insurance carriers have done

❖ Look at two cases:

❖ *P.F. Chang's China Bistro, Inc. v. Federal Ins. Co.*,
No. CV-15-01322-PHX-SMM, 2016 WL 3055111
(D. Ariz. May 31, 2016) ("*P.F. Chang's*")



❖ *Columbia Cas. Co. v. Cottage Health System*, No.
2:15-cv-03432 (May 7, 2015) (Complaint)
 ("*Cottage Health*")



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ *P.F. Chang's*

- ❖ Hackers obtain and post 60,000 credit card numbers
- ❖ Fees incurred to third-party credit card processor
 - ❖ Fraud recovery fee: \$1.7 million
 - ❖ Operational reimbursement: \$163,122
 - ❖ Case management fee; \$50,000
- ❖ Certain fees covered by policy's insuring agreements:
 - ❖ Privacy Notification Expense
 - ❖ Extra Expense

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ *P.F. Chang's*

- ❖ Court held that coverage for all assessments excluded
- ❖ Why: P.F. Chang's, like every other retailer in the world, has contracts with the credit card companies, and pursuant to those contracts, they were obligated to pay back the credit card companies for fraud losses
- ❖ This is the major risk retailers want to insure, and the second largest cyber-insurer (Chubb) denied coverage based on seemingly senseless argument:
 - ❖ Assumption of liability under contract
 - ❖ And, court bought it



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies

❖ *Cottage Health* (case dismissed for lack of jurisdiction, subject to arbitration)

❖ Insurer denied coverage based on exclusion:

❖ Failure to follow minimum required practices

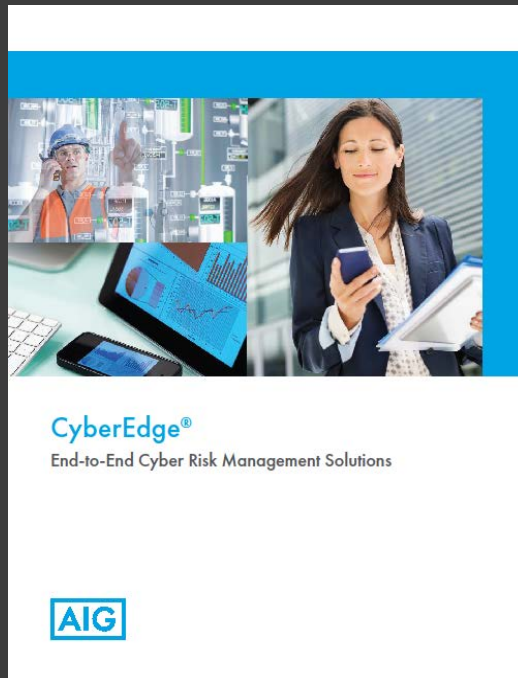
❖ “failure . . . to continuously implement the procedures and risk controls identified in the insured’s application . . .”



❖ Implications: Could render cyber coverage worthless in many situations, i.e., NotPetya virus.

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

- ❖ 4. Stand alone cyber insurance policies lessons learned
 - ❖ Don't be enticed by marketing materials:



3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies lessons learned

- ❖ Starting point: what kinds of things are represented as covered:
 - ❖ Liability for the spread of viruses and malware (network security)
 - ❖ Cyber theft, extortion, fraud (social engineering)
 - ❖ Copyright or trademark infringement, invasion of privacy, disparagement (media liability)

3. TYPES OF INSURANCE POLICIES PROVIDING COVERAGE

❖ 4. Stand alone cyber insurance policies lessons learned

❖ Ending point: what is covered - focus on policy language

- ❖ Insurance policy meaning requires a legal determination as to what is or is not covered
- ❖ Case law seldom follows insurance industry custom and practice
- ❖ An ever-changing body of case law on cyber insurance can make it difficult to stay up to date
- ❖ Insurance brokers are an excellent starting point for discussion, but insurance brokers cannot practice law (or interpret what may or may not be covered)

4. BEST PRACTICES

❖ Procuring coverage:

- ❖ We are still in the “Wild, Wild West”
- ❖ Some policyholders may be placing too much emphasis on marketing materials (from brokers and insurers)
- ❖ policies sold as broad, but, may contain onerous language and exclusions
 - ❖ Use of best industry practices for preventing cyber-incidents
 - ❖ Application related exclusions
 - ❖ Limited coverage grants in light of liability

4. BEST PRACTICES

❖ Procuring coverage (cont.):

- ❖ Assess what risks are important
- ❖ Understand whether or not those risks are covered
- ❖ Insurance brokers are great at putting together competing products for review
- ❖ Understanding what policies cover is for lawyers, and this is not an easy task
- ❖ If you retain outside counsel, select counsel without insurance company conflicts

4. BEST PRACTICES

❖ Claims:

- ❖ Some insurers are aggressively fighting valid claims, asserting exclusions that were never intended to preclude coverage
- ❖ Policy language controls
- ❖ Evaluate coverage under multiple lines of insurance
 - CGL, E&O, D&O, Cyber-specific
- ❖ Provide notice under correct policies, which may or may not be current policies
- ❖ Evaluate potential claims prior to policy expiration
- ❖ For significant claims, consider hiring outside counsel
- ❖ Policyholder claim mistakes are not uncommon

CONTACT INFORMATION

Mark E. Miller
Direct: (202) 760-3161
millerm@millerfriel.com

