

EMERGING COVERAGE ISSUES
IN
CYBER, CYBERSECURITY AND
DATA BREACH CASES

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Panelists

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Cyber Insurance Policy Characteristics

“There are organizations that have breaches and know it and there are organizations that have breaches and don’t know it – yet.”

-The Betterly Report, June 2013

First and Third Party Losses

- ▣ Description of first and third party losses

Specific Cyber Risk Insurance Products

- ▣ General overview
- ▣ Policy characteristics
- ▣ Potential Cyber Risk Insurance Problems

Cyber Insurance Policy Characteristics

- **THREE COVERAGE TYPES**
 - **Liability** – defense and settlement costs for the insured's liability from failing to secure data
 - **Remediation** – post-breach response costs (public relations, notifications, credit monitoring, etc.)
 - **Fines and Penalties** – costs to investigate, defend and settle fines and penalties assessed by regulators.

Cyber Insurance Policy Characteristics

- REMEDIATION COVERAGE – Important!
 - Crisis management services
 - Notification of affected individuals
 - Credit monitoring for affected individuals
 - Costs to re-secure data
 - Not uncommonly, pre-packaged and pre-negotiated third party services for the remediation

Cyber Insurance Policy Characteristics

▣ COVERAGE TRIGGERS

- Failure to secure data
- Loss caused by agents and employees
- Loss from actions of third-parties
- Loss of data secondary to the loss of private property (laptops, storage devices, etc.)

Cyber Insurance Policy Characteristics

▣ POTENTIAL COVERAGE DEFENSES

■ Exclusions

- ▣ Most currently-available cyber insurance policies exclude coverage for third-party claims alleging bodily injury or property damage, ostensibly because these risks are already covered by commercial general liability (CGL) insurance
- ▣ Dishonest/fraudulent/criminal /malicious acts
- ▣ Intentional acts

■ Defenses that come with claims-made policies

- ▣ Misrepresentation
- ▣ Late notice

Other Coverage Issues

Other Potential Coverage Exclusions:

- ▣ Expected/Intended Exclusion
- ▣ Impaired Property Exclusion
- ▣ Intentionally Dishonest/Illegal Activity
- ▣ Other Insurance Clauses

Cyber Coverage - Types of Policies

- ▣ CGL Policies
- ▣ Crime Policies
- ▣ D & O Policies
- ▣ Standalone Cyber Policies

Coverage Under Commercial General Liability Policies

- ▣ Policyholders focus on:
 - What is covered property damage
 - Personal and advertising injury

Coverage Under Commercial General Liability Policies

- ▣ The standard-form CGL policy was (as of 2004) rewritten to exclude “[d]amages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.” (Some – but not all – CGL policies incorporate a subsequent refinement restoring coverage for bodily injury.)
 - The clear intent of the exclusion was to preclude coverage for more typical “cyber risks,” such as loss of data or computer functionality.
 - Some courts in other contexts have taken an unreasonably broad view of the inherently-vague phrase “arising out of,” which could lead those courts to give the exclusion a scope that it was not intended to have, an interpretation that violates policyholders’ reasonable expectations and unjustifiably narrows what is supposed to be broad coverage.

*JD Supra; Business Advisor 9/7/2016

Coverage Under Commercial General Liability Policies

Damage to Data Constitutes Physical Loss or Damage to Tangible Property

- ▣ *Retail Systems, Inc. v. CNA Ins. Co.*, 469 N.W.2d 735 (Minn. App. 1991).
- ▣ *Eyeblander, Inc. v. Federal Ins. Co.*, 613 F.3d 797 (8th Cir. 2010)

Coverage Under Commercial General Liability Policies

Damage to Data Does Not Constitute Physical Loss or
Damage to Tangible Property

- ▣ *America Online, Inc. v. St. Paul Mercury Ins. Co.*,
347 F.3d 89, 96 (4th Cir. 2003)

Coverage Under Commercial General Liability Policies

Data Breach Not Constitute an “Advertising Injury”

Zurich American Ins. Co. v. Sony Corp., Index No.
651982/2011 (N.Y. Sup. Ct. Feb 21, 2014).

Coverage Under Commercial General Liability Policies

Data Breach Constituted an “Advertising Injury”

*Travelers Indemnity v. Portal Healthcare Solutions,
L.L.C.* No. 14-1944 (4th Cir. Apr. 11, 2016).

Coverage Under Crime Policies

Crime Policy Included Data Breach Coverage:

Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co., 691 F.3d 821 (6th Cir. 2012)

- ❑ Hacker accessed wireless network of DSW retail stores and stole credit card / debit card info from 1.4 million customers.
- ❑ AIG argued exclusion for “*loss of proprietary information, trade secrets, confidential processing methods, or other confidential information of any kind*” applied.
- ❑ Court held exclusion applied only to “secret information of [the policyholders] involving the manner in which business is operated” and did not apply to DSW’s claim
- ❑ Customers’ banking information was not confidential information of DSW and did not involve the manner in which it operated its business.

Coverage Under Crime Policies

Crime Policy Did Not Include Data Breach Coverage :

Peoples Telephone Co., Inc. v. Hartford Fire Insurance Co., 36 F. Supp. 2d 1335 (S.D. Fla. 1997)

Director and Officers (D&O) Policies

Sometimes there is limited D&O coverage available for cyber breaches.

Examples:

- ▣ Some not-for-profit healthcare organizations (e.g., hospitals, large physician practices) may include an extension by endorsement for HIPAA Fines & Penalties.

Director and Officers (D&O) Policies

Examples :

- ❑ Shareholder lawsuits may follow a data breach event which alleges wrongdoing by a company's leadership. Such lawsuits may implicate D&O coverage.
- ❑ Some D&O policies – generally those purchased by private companies – may also provide “entity” or company coverage for a loss like a data breach as well

Stand-Alone Policies

Recent Cases:

P.F. Chang's v. Federal Insurance Co, No. CV-15-01322-PHX (D. Ariz. May 26, 2016)

Questions?