

BAIRD HOLM LLP

TECHNOLOGY & DATA PROTECTION FORUM

17

AGENDA

8:30 a.m.
Registration Opens

9:00 a.m. - 9:45 a.m.
**Early Bird Session:
Security Risk Assessments 101**
Abigail T. Mohs, Michael W. Chase and
James E. O'Connor

10:00 a.m. - 10:15 a.m.
Welcome and Introduction
Vickie B. Ahlers and James E. O'Connor

10:15 a.m. - 11:00 a.m.
**Emerging Threats:
Security in the New World**
Ron Woerner, Bellevue University

11:00 a.m. - 12:30 p.m.
**Table Top Exercise:
What Would You Do?**
Eli A. Rosenberg, AriAnna C. Goldstein,
Grayson J. Derrick and Krista M. Eckhoff

12:30 p.m. - 2:30 p.m.
Working Lunch and Panel Presentation
Grab a boxed lunch and join us for a
panel discussion about hot topics,
including an audience Q&A.

Hot Topics:

1. Cyber Litigation Update
 2. Employment Law Update
 3. CFB Financial Update
 4. Indemnification Issues
 5. EU Data Protection Update
-

2:30 p.m. - 2:45 p.m. **Break**

2:45 p.m. - 3:45 p.m.
Insurance Retrospective
Jonathan J. Wegner, James E. O'Connor
and Justin W. Firestone

3:45 p.m. - 4:45 p.m.
**CEO in the Hot Seat:
Leadership in the Face of a Data Breach**
Moderated by Vickie B. Ahlers

4:45 p.m. **Adjourn and Reception**
Please join us for complimentary
cocktails and appetizers immediately
following the program.

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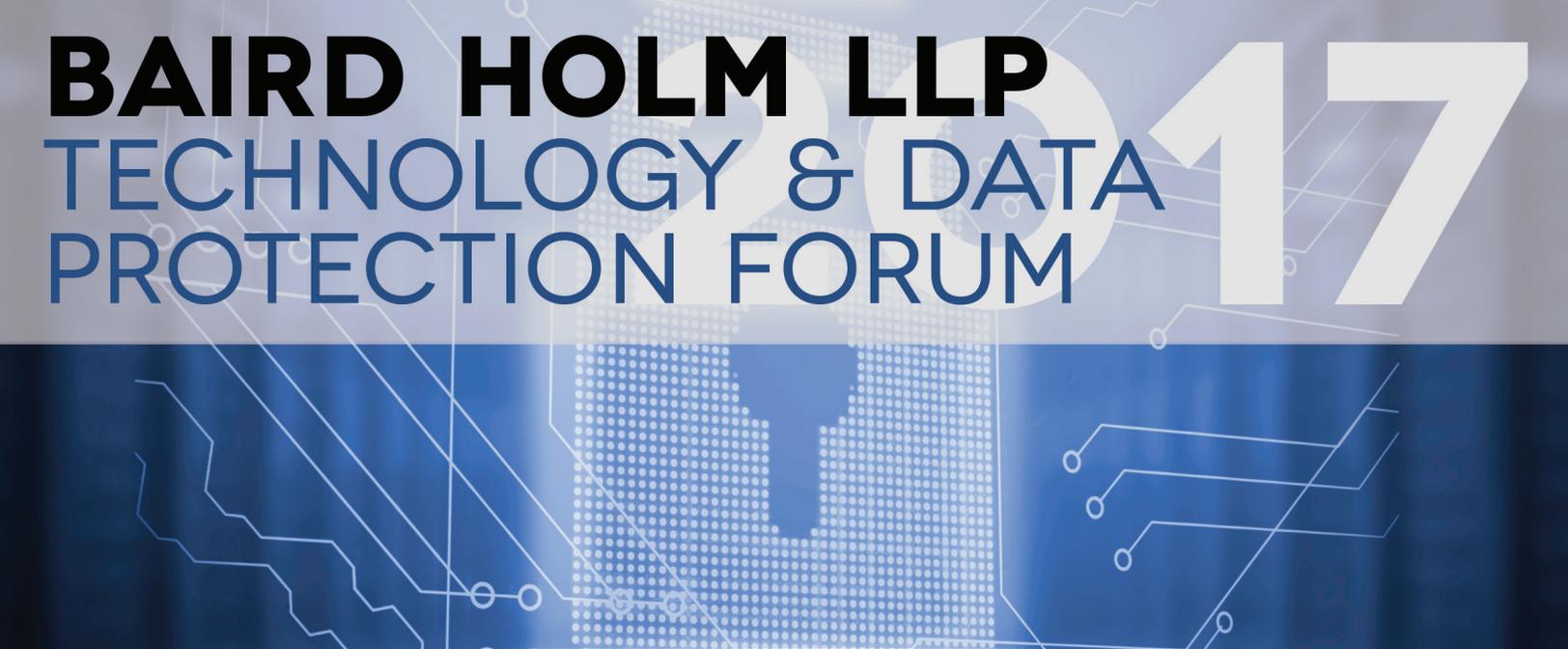
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Early Bird Session:
Security Risk Assessments 101

Abigail T. Mohs, Michael W. Chase and
James E. O'Connor

Security Risk Assessments 101

Michael W. Chase
Abigail T. Mohs
James E. O'Connor

Agenda

- Background/regulatory requirements
- "Reviews/evaluations" vs. "security risk assessments"
- Conducting a security risk assessment
 - Who; What; When; Where; Why; and How
- Common problems/traps to avoid

Background

- Now, more than ever, organizations are vulnerable to unanticipated information security threats
- Need to understand the risks to critical information and assets
- Will guide business decisions
 - Budgets/investments, human resources, and processes

Background

- IT department *and other stakeholders* (including the board, management, and other employees) need to understand the complex systems and ensure that all aspects of security are addressed
 - Assets, threats/vulnerabilities, awareness, prioritization

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Background

- All information security frameworks require assessment of risks
- Many organizations now require a risk assessment as a condition of doing business
- Federal and state regulations require information security risk assessments

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Regulatory Requirements

- Sarbanes-Oxley Act of 2002
 - Modern financial reporting systems depend on information technology
 - Section 404: must assess the effectiveness of internal controls (and report to SEC)
- Gramm-Leach-Bliley Act
 - Section 501: protection of nonpublic personal information

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Regulatory Requirements

- HIPAA Security Rule - 45 CFR 164.308(a)(1):
 - Covered entity (and business associates) must conduct an accurate and thorough assessment of the potential risks and vulnerabilities to the confidentiality, integrity, and availability of the ePHI held by the covered entity (or business associate)

Let's Get Started

So ... what is a Security Risk Assessment?

Let's begin with what is NOT a Security Risk Assessment

"Other" Frameworks

- Gap assessments
- Information security review
- Security evaluation
- Other processes performed within the IT department with little or no input from others

Security Risk Analysis (sample)

Reasonably Foreseeable Internal and External Threats	Likelihood of Occurrence	Potential Business Impact	Inherent Risk Rating	Description of Current Policies, Procedures, Controls	Adequacy of Current Policies, Procedures, and Controls (S-Satisfactory, U-Unsatisfactory, O-Opportunity for Improvement)	Mitigation Plan	Priority	Responsibility	Timeline	Risk Rating		Overall Risk Rating
										Residual Risk Rating	Overall Risk Rating	
Loss of mobile device	Medium-high	Low-very high	High	None - Sensitive information is allowed on unencrypted mobile devices	Unsatisfactory	Encrypt all mobile devices	High	Michael Chase	Deadline 4/20/17	High	High	High
...

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Security Risk Analysis (simple)

Reasonably Foreseeable Internal and External Threats	Likelihood of Occurrence	Potential Business Impact	Inherent Risk Rating	Description of Current Policies, Procedures, Controls	Adequacy of Current Policies, Procedures, and Controls (S-Satisfactory, U-Unsatisfactory, O-Opportunity for Improvement)	Mitigation Plan	Priority	Responsibility	Timeline
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Security Risk Analysis (simple)



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Security Risk Analysis (simple)



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10 (high) - 1 (low)
Low (1)/Med (5)/High (10)

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Security Risk Analysis (simple)



Reasonably Foreseeable Internal and External Threats	Likelihood of Occurrence	Potential Business Impact	Inherent Risk Rating	Description of Current Policies, Procedures, Controls	Adequacy of Current Policies, Procedures, and Controls (S-Satisfactory, U-Unsatisfactory, O-Opportunity for Improvement)	Mitigation Plan	Priority	Responsibility	Timeline
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Likelihood x Impact

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Security Risk Analysis (simple)



Reasonably Foreseeable Internal and External Threats	Likelihood of Occurrence	Potential Business Impact	Inherent Risk Rating	Description of Current Policies, Procedures, Controls	Adequacy of Current Policies, Procedures, and Controls (S-Satisfactory, U-Unsatisfactory, O-Opportunity for Improvement)	Mitigation Plan	Priority	Responsibility	Timeline
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Security Risk Analysis (simple)



Reasonably Foreseeable Internal and External Threats	Likelihood of Occurrence	Potential Business Impact	Inherent Risk Rating	Description of Current Policies, Procedures, Controls	Adequacy of Current Policies, Procedures, and Controls (Satisfactory, D-Satisfactory, O-Opportunity for Improvement)	Mitigation Plan	Priority	Responsibility	Timeline
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Security Risk Analysis (simple)



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Initial Questions

- Do we do it internally?
 - Can help build an initial security program
 - Guidelines available (including National Institute of Standards and Technology (NIST); Office for Civil Rights (OCR); etc.)
- When do we do it?
- Should we engage a vendor?

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Problems and Traps

- Attorney-Client Privilege
- Report contains conclusions of law
- How detailed (and feasible) is the risk mitigation plan?
 - Is it being followed?

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Deadly Traps

- Failure to create mitigation plan
- Failure to follow mitigation plan
 - Some delays are acceptable (with rationale)
 - Indefinite delays are not

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Questions?

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2017

Emerging Threats: Security In the New World

Ron Woerner
Twitter: @ronw123

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**EMERGING THREATS: SECURITY IN
THE NEW WORLD**

Ron Woerner
Twitter: @ronw123

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Identity Paradox

Who am I?

- How do you know?
- How do I prove it to you?
Without compromising my privacy?



#1 Threat = Humans

Who I am

Ron Woerner

- Information Security Professional
- Professor of Cybersecurity Studies for Bellevue University
- BBB Cybersecurity expert
- FBI Citizen's academy alumni
- 25+ years experience in IT, 17 in security
- Keynote speaker on security and Internet safety

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Agenda

- **Why?** – Problem statement
- **Who?** – Victims & Attackers
- **What?** – Protecting Your Stuff
- **How?** – Hacking techniques
- Solutions
 - Awareness
 - Simple security measures

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Breaches Continue to Rise

Why?

Breaking Down the H1 2016 Data Breach Statistics:

- 3.04 million records compromised every day
- 126,936 records compromised every hour
- 2,116 records compromised every minute
- 35 records compromised every second



A 31% increase

Source: Gemalto

<http://blog.gemalto.com/security/2016/09/20/data-breach-statistics-2016-first-half-results/>
<http://www.informationisbeautiful.net/visualizations/worlds-biggest-data-breaches-hacks/>

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Breach Costs Continue to Rise



Source: 2016 Ponemon Cost of Data Breach Study
<http://www-03.ibm.com/security/data-breach/>

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Who?

Victims



- You
- Your clients
- Everyone

Attackers



- Organized Crime
- Nation states
- Insiders
- Anyone with opportunity

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Endpoints

What?

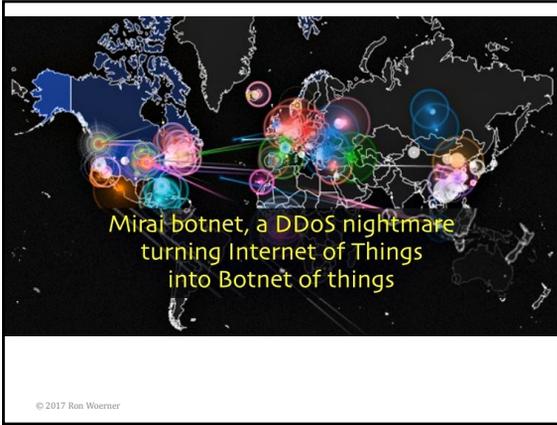


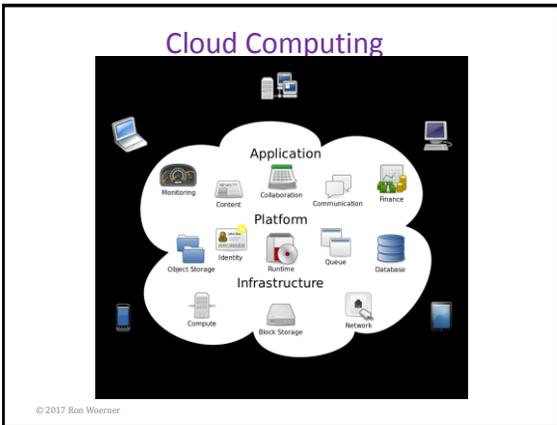
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Internet of Things (IoT)



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#1 Security Issue

ransom-ware, ransom, we(a)r/
noun

1. a type of malicious software designed to block access to a computer system until a sum of money is paid.
2. "although ransomware is usually aimed at individuals, it's only a matter of time before business is targeted as well"

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Data Breach – Top Causes

How?



Source: 2016 BakerHostetler Data Security Incident Response Report

http://7.datasv.com/61/516/11618/BakerHostetler_2016_Data_Security_Incident_Response_Report.pdf

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How?

How Attackers Get into User Endpoints



How Attackers Bypass Endpoint Defenses



Source: <https://www.sans.org/reading-room/whitepapers/firewalls/exploits-endpoint-2016-threat-landscape-survey-37157>

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Hacking Techniques Quick Demos

- Human Hacking
- Google Hacking
- Email Hacking

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The Easiest Hack



Google Hacking



Google Search

I'm Feeling Lucky

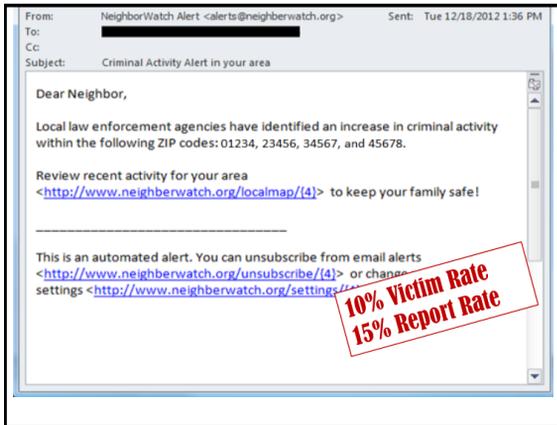
https://www.google.com/intl/en/help/features_list.html

Email Hacking

- Finding email addresses is trivial
- Inherently insecure
- Phishing, Spear Phishing, Whaling



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Problem

Most Nebraskans are Cyber Unaware

- Only basics cybersecurity principles are taught in schools
 - Little cybersecurity education for teachers
 - Only in place for ~ 5 years
- Need more consumer awareness
- Positive sources



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What does this mean?

You need to protect:

- Yourself / your stuff
- Client records
- Client access to portals storing these records
- Confidential case records
- Messages containing sensitive information



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You're still responsible

What can I do?



Simple Steps for Cyber Security

- “Trust, but verify”
 - When in doubt, ask...
- “Be Prepared”
 - It’s not if, but when...
- Protect your customers
- Keep a clean & updated machine
 - Pay a little now or a lot later
- Encrypt
- Stop-Think-Connect

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Trust, but Verify

- If it seems too good to be true...
- Trust your gut
- When in doubt, ask someone
 - #1 way to defeat social engineering
- Verify files & websites using Virus Total:
virustotal.com

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THINKING TWICE...



KEEP A CLEAN MACHINE.

Like your phone or PC, keep any machine that connects to the Internet free from viruses, malware and other online threats. Update apps that you use to control devices whenever a new version is available.



THINK TWICE ABOUT YOUR DEVICE.

Have a solid understanding of how a device works, the nature of its connection to the Internet and the kinds of information that is stored and transmitted.



YOU ARE ONLY AS STRONG AS THE NETWORK TO WHICH YOU CONNECT.

If you haven't properly secured the network you are connecting to with proper passwords, updated software and maintenance of other connected devices, your Internet of Things could be vulnerable.

[click here](#)

Protect Your Customers

Have (and follow) a privacy policy

Your company's website should have a privacy policy that tells customers what information you collect and how you use it.

Know what you have

You should be aware of all the personal information you have about your customers, where you're storing it, how you are using it, who has access to it and how you protect it.

Keep what you need and delete what you don't

While it's tempting to keep information for future use, the less you collect and store, the less opportunity there is for something to go wrong.

Protect what they give you

If you're holding onto information about your customers, you need to keep it secure.

<http://staysafeonline.org/business-safe-online/resources/protect-your-customers>

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Secure Your Access

- Multifactor authentication
- Long passwords
- Different passwords
- Passwords managers
 - KeePass
 - LastPass



<https://www.lockdownyourlogin.com/>

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Encrypting files

- AES Encrypt
 - <https://www.aesencrypt.com/>
- 7-Zip - Encrypt / Decrypt multiple files & folders
 - <http://www.7-zip.org/>
- Encrypting PDF documents
 - <https://acrobat.adobe.com/us/en/acrobat/how-to/pdf-file-password-permissions.html>
- Windows Bitlocker
 - Drive encryption
 - If you don't know what it is, ask your IT support



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<http://www.dhs.gov/stopthinkconnect>



<http://staysafeonline.org/>

Questions???



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I HAVE NO SPECIAL
TALENTS. I AM ONLY
**PASSIONATELY
CURIOUS.**
-ALBERT EINSTEIN



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Table Top Exercise: What Would You Do?

Eli A. Rosenberg, AriAnna C. Goldstein,
Grayson J. Derrick and Krista M. Eckhoff

Table Top Exercise: WHAT WOULD YOU DO?

Grayson J. Derrick
Krista M. Eckhoff
Ari C. Goldstein
Eli A. Rosenberg

What Are The Threats?

- More than 430 million new pieces of malware in 2015 – up 36% over the prior year
- In 2015, 429 million identities were exposed, which included nine mega breaches (defined as a breach of more than 10 million records)

Source: Symantec Internet Security Threat Report, Volume 21, April 2016

What Are The Threats?

- In the last 5 years, there has been a steady increase in attacks targeting small businesses (defined as less than 250 employees)
- It's not just Fortune 500 companies at risk – 43% of all attacks in 2015 were targeted at small businesses

Source: Symantec Internet Security Threat Report, Volume 21, April 2016

Why Is This Important?

- When asked about the effects of a data breach, breached organizations stated:
 - 22% of breached organizations lost customers
 - Almost 40% of those that lost customers lost 20% or more of their customer base

Source: Cisco 2017 Annual Cybersecurity Report

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Today's Exercise

- We will introduce a data breach scenario, piece by piece, involving various characters and exciting twists and turns
- Group discussion
- Participation is needed!

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Let's Meet The Players...



- Founded in 1995
- Based in Omaha
- 75 employees
- Movement from bricks and mortar to online presence
- Hired a developer to build its new online platform

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KOALA T
Bringing your pet quality products since 1995

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Photo credits, Koala T customers: Candice Goldstein, Rachel Neuendorf, Natalie Moriarty

Let's Meet The Players...

- Large Minneapolis-based developer
- Specializes in online payment platforms
- Works for several mid-sized e-commerce retailers
- Direct link to Koala T

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Let's Meet the Players...

MORE INFORMATION COMING SOON!

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LET THE HACKING GAMES

```

struct group_info init_groups = { .usage = ATOMIC_INIT(2) };
struct group_info *groups_alloc(int gidsetsize) {
    struct group_info *group_info;
    int nblocks;
    int i;
    nblocks = (gidsetsize + NGROUPS_PER_BLOCK - 1) / NGROUPS_PER_BLOCK;
    /* Make sure we always allocate at least one indirect block pointer */
    nblocks = nblocks ? 1 : 1;
    group_info = malloc(sizeof(*group_info)

```

ACCESS GRANTED

BEGIN

ingip.com

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Part I:
Koala T Learns of the Breach



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Koala T Learns of the Breach



- Roxanne Brown – Director of IT
- Familiar with Platforms-R-Us
- Roxanne has worked with Koala T to increase staff and bring policies and procedures in line with industry standards

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Koala T Learns of the Breach

- Every morning, Roxanne checks “Krabs on Security”
- “Krabs” is run by Eugene H. Krabs, a former restaurateur and reporter who now oversees a blog covering cybercrimes and data protection news
- On Thursday, Roxanne checks “Krabs” and sees the following . . .

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Koala T Learns of the Breach



KrabsOnSecurity
In-depth security news, investigation, and expertise

Apr 17

DATA BREACH AT PLATFORMS-R-US

KrabsOnSecurity has learned that Minneapolis based web-developer Platforms-R-Us has been the subject of an apparent data breach. While KrabsOnSecurity has not been able to conclusively determine the source or extent of the breach, an anonymous tipster going by the pseudonym “Patrick Star” indicated that the breach may extend to the company’s customers.

Platforms-R-Us specializes in developing online payment platforms for ecommerce websites. This is the first known incident of a data breach involving Platforms-R-Us.

KrabsOnSecurity will continue investigating this incident and will update readers on any new developments as they occur.

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to be part of our interactive poll.

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QUESTIONS FOR THE AUDIENCE

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Part II:
Investigating the Breach



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Investigating the Breach

- Platforms-R-Us breach was quite large
- Firewall logs, audit trails show Koala T's security WAS compromised
- Phishing email with embedded link
- Koala T's system likely compromised, but the source is unknown

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A Phone Call...

- A local news reporter, Cam Caleb, sees that, according to Platforms-R-Us's website, Koala T is a customer
- Cam Caleb then calls Roxanne...



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Cam Calls Roxanne



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QUESTIONS FOR THE AUDIENCE

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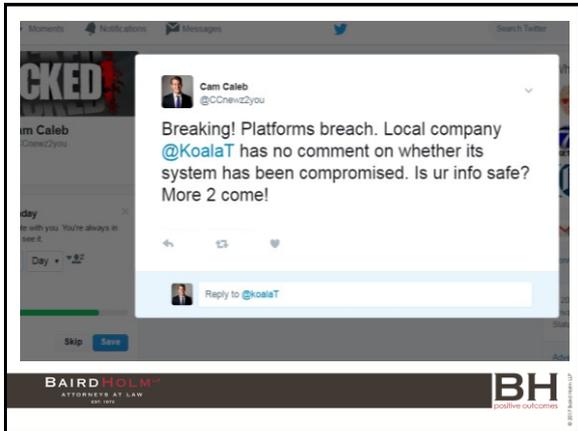
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THERE'S NO SUCH THING AS BAD PUBLICITY

(Or is there?)

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**It's now public.
How do you
recommend Koala T
handle?**



**Part III:
Confirming the Breach**



Koala T Confirms the Hack

- On Friday, Koala T contacts outside counsel for the first time
- Engages a forensic analyst
- No public statement, but local news is reporting a Koala T breach based on an anonymous, inside source

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Koala T Issues A Press Release



KOALA T STATEMENT ON PLATFORMS-R-US DATA BREACH

OSHAHA - April 14, 2017 Koala T Pet Suppliers announced today that it is aware of the reported unauthorized access to the systems of Platforms-R-US. Koala T confirmed that it is a customer of Platforms-R-US and Koala T is working to determine what impact, if any, the Platforms-R-US data breach had on Koala T's own systems and whether those systems were in any way compromised.

"Koala T's first priority is preserving the trust of our customers and we are moving swiftly to address this issue, so guests can shop with confidence. We regret any inconvenience this may cause," said Dan Smith, Koala T's president and chief executive officer.

Additional information will be made available via Koala T's corporate [website](#).

About KOALA T
Omaha-based Koala T Pet Suppliers is the preeminent online pet supply company for consumers, retailers and veterinary clinics. Since 1995, Koala T has given a portion of its profit to help provide assistance for homeless pets and therapy for single, unmarried car-owners; today, that giving equals thousands of dollars a month. For more information about Koala T's commitment to corporate responsibility, visit koala.com/corporate-responsibility.

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Koala T Confirms the Hack

- Over the weekend, the analyst determines Koala T's system was hacked
- Analyst concludes that the virus was transmitted from Platforms to Koala T
- Analyst concludes that the hackers gained access to Koala T's information

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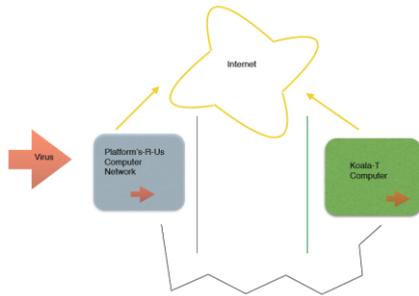
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This Just In!



ANATOMY OF A DATA BREACH



Part IV:

Type of Information Compromised



But First, Another Press Release



KOALAT STATEMENT ON PLATFORMS-R-US DATA BREACH

OMAHA -- April 18, 2017 Koala T Pet Suppliers confirmed today that approximately 500 of its customer accounts were accessed as part of the previously reported unauthorized access to the systems of Platforms-R-Us. Koala T has partnered with a third-party forensic firm to conduct a thorough investigation of the incident and its scope.

Additional information will be made available via Koala T's corporate [website](#).

About Koala T

Omaha-based Koala T Pet Suppliers is the preeminent online pet supply company for consumers, retailers and veterinary clinics. Since 1995, Koala T has given a portion of its profit to help provide assistance for homeless pets and therapy for single, unmarried cat-owners; today, that giving equals thousands of dollars a month. For more information about Koala T's commitment to corporate responsibility, visit koalat.com/corporateresponsibility.



Information Compromised

- Accessed information includes: names, addresses, birthdates, bank accounts
- Access to personally identifiable information ("PII") often triggers a breach notification requirement
- What is PII?



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QUESTIONS FOR THE AUDIENCE

Part V: Consequences



Consequences of Data Breach: Litigation

- Contract provisions
- Lawsuit (or threat of lawsuit) can result from a data breach
 - Credit card processors; affected customers; shareholders
- Later presentations will provide a detailed update

Consequences of Data Breach: Government Enforcement

- Federal government enforcement
 - FTC
 - CFPB
 - SEC
 - HHS OCR

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Consequences of Data Breach: Government Enforcement

- State government enforcement
 - 47 states have breach notification laws
 - States will work together
 - Even small businesses can be targeted

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"Platforms shall indemnify, and hold harmless Koala T, its affiliates and licensors, and each of their respective employees, officers, directors, and representatives from and against any claims, damages, losses, liabilities, costs, and expenses (including reasonable attorneys' fees) arising out of or relating to any third party claim concerning (i) a breach of Platforms obligations under Section 7 (Network Security) of this Agreement; or (ii) a violation of law by Platforms."

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"Platforms shall indemnify, and hold harmless Koala T, its affiliates and licensors, and each of their respective employees, officers, directors, and representatives from and against any claims, damages, losses, liabilities, costs, and expenses (including reasonable attorneys' fees) arising out of or relating to any third party claim concerning (i) a breach of Platforms obligations under Section 7 (Network Security) of this Agreement; or (ii) a violation of law by Platforms."

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Part VI:

What Happened to Koala T?



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Part VI:

What Happened to Koala T?



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TECHNOLOGY & DATA PROTECTION FORUM

2017

Working Lunch and Panel Presentation

Grab a boxed lunch and join us for a panel discussion about hot topics, including an audience Q&A.

Hot Topics:

1. Cyber Litigation Update
2. Employment Law Update
3. CFB Financial Update
4. Indemnification Issues
5. EU Data Protection Update

Hot Topics

Panel of
Baird Holm LLP Attorneys

2017 Data Breach Litigation Update

Jill R. Ackerman

Consumer Case Statistics

- 83 new federal class action cases were filed between 8/14 and 12/15
- 21 unique defendants
- 75% of cases include a count of negligence
- Class Litigation by Industry
 - Medical industry (37%) – Premera and Anthem breaches
 - Consumer Reporting Agencies (18%) – Experian
 - Retail Industry (11%)
 - Social Network Industry (10%) – Dating websites

Source: Bryan Cave 2017 Data Breach Litigation Update

Top Legal Theories for Consumers

- Negligence (37%)
- Breach of Contract (11%)
- FCRA, State Consumer Protection Acts, and Federal Privacy Act (9% each)
- Unfair Competition (5%)
- Bailments - New theory of liability based in property law alleged in 21% of cases

Litigation Update

Source: Bryan Cave 2017 Data Breach

"the delivery of personal property (PERSONAL DATA) for some particular purpose or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it or otherwise dealt with according to the person's directions or kept until reclaimed, as the case may be." *Nebraska Supreme Court (2013)*

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Recent Supreme Court Decision

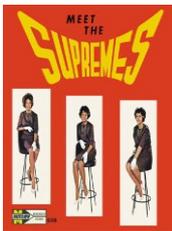


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Spokeo Inc. v. Robins, 578 U.S. ___, 136 S.Ct. 1540 (2016)



- Statutory violation of FCRA
- Court: did plaintiff allege an injury that was "concrete" as well as "particularized" (affecting the plaintiff personally)
- Cannot allege bare procedural violation divorced from any concrete harm
- Concrete defined as "de facto; that is, it must actually exist"; not necessarily synonymous with tangible

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Standing is Still not Resolved in the Federal Reported Cases



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Horizon Healthcare Breach



Horizon Blue Cross Blue Shield of New Jersey*

Making Healthcare Work®

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In re Horizon Healthcare Data Breach Litigation (3d Cir. Jan. 20, 2017)

Facts

- Breach occurred in November of 2013
- Two laptops from health insurer Horizon Healthcare
- Types of data accessed: names, DoBs, SSNs, addresses, telephone numbers, member identification numbers, financial payment information, and medical insurance claims
- District court dismissed plaintiffs' claim because they did not have standing under the Fair Credit Reporting Act (FCRA) and because of that the district court did not have supplemental jurisdiction over plaintiffs' other state claims. Plaintiffs appeal.

Discussion and Holding

- Third Circuit reversed and concluded that plaintiffs have standing due to Horizon's alleged violation of FCRA.
- The court concluded the Supreme Court's ruling in *Spokeo, Inc. v. Robins* "meant to reiterate traditional notions of standing."
- Ultimately, the court held Congress, in passing the FCRA, "established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself—whether or not the disclosure of that information increased the risk of identity or some other future harm."

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Excellus Health Breach



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Fero v. Excellus Health Plain, Inc. (W. D. NY Feb. 22, 2017)

Facts

- Breach occurred on Dec. 23, 2013
- Hackers installed malware
- As many as 10 million clients nationwide affected
- Types of data accessed: names, DoBs, SSNs, addresses, telephone numbers, member identification numbers, financial payment information, and medical insurance claims
- Forensic investigation "did not determine that any PII was removed from Excellus's systems, and Excellus had no evidence that PII was used inappropriately."

Discussion and Holding

- Plaintiffs alleged 10 causes of action. Defendants moved to dismiss because some of the plaintiffs did not have standing.
 - Court split plaintiffs into two groups:
 - suffered misuse of data, and non-misuse
- Post-Clapper courts are still split on the issue of whether the potential of future injury due to the misuse of data satisfies standing threshold. The court concluded that non-misuse plaintiffs **did not have standing**, stating "the alleged injuries are neither concrete, nor actual and imminent because the alleged injuries rely on a chain of possibilities."

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Experian Breach



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In re Experian Data Breach Litigation (C. D. CA Dec. 29, 2016)

Facts

- Breach lasted two years: Sept. 2013 – Sept. 2015
- Experian's servers were compromised and 15 million social security numbers of people who applied for financing from T-Mobile USA were exposed.
- Defendants (Experian) moved to dismiss plaintiffs' FCRA, negligence, and other state law claims under Fed. R. Civ. Procedure 12(b)(6).

Discussion and Holding

- Court dismissed plaintiffs' FCRA claim because defendants did not "furnish" a "consumer report"; "it was stolen by a third party, not furnished to the third party."
- Court denied defendants' motion because plaintiffs sufficiently alleged facts under the independent-duty exception to the economic loss rule.
- Takeaway: Plaintiffs adopt a "see what sticks" approach to these cases.

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What's Happening in the Courts

Takeaways

- Facts of case make a substantial difference
- Statistics generally won't help
- Offering credit monitoring may hurt defense
- Plaintiffs' counsel continue to get increasingly creative to find statutes giving cause of action based on violation of statute
- Phase of case may make a difference in Court willingness/unwillingness to find standing – motion to dismiss (accept allegations as true) vs. summary judgment

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Consumers are Not the Only Plaintiffs:

- Financial Institutions
- Insureds
- Shareholders

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Arby's Breach – Credit Union Suit



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Midwest Am. Fed. Credit Union v. Arby's (N. D. GA Feb. 2, 2017)

- Breach occurred between Oct. 2016 and Jan. 2017
- Credit and debit card numbers, cardholder name, primary account numbers, expiration date, and PIN numbers exposed
- Hackers installed malware via POS system
- Class comprised of financial institutions alleging:
 - Arby's should have been aware that a data breach was an industry concern (citing Target, Sony, and Home Depot breach events)
 - Arby's breached Card Operating Regulations
 - Arby's did not upgrade to EMV compatible readers
 - Arby's policy and procedures did not comply with PCI DSS v. 3.1.
- Plaintiffs alleged the following:
 - Negligence
 - Interesting theory: FTC statute creates "duty" because it requires merchants "to take reasonable measures to protect data"
 - Negligence per se
 - Requests declaratory and injunctive relief

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Suit Against Chubb Insurance



- P.F. Chang's sued Chubb under Cyber Policy
- Court determined that policy did not cover PCI DSS assessments
- These were the MasterCard contractual fees of \$1.9 Million for reissuing cards and the management of that process

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Officers and Directors Suit



- 19 Current and Former Officers and Directors
- Breach fiduciary duty, waste of corporate assets, unjust enrichment, gross mismanagement
- Damages, corporate governance reforms, and restitution of benefits and compensation

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Officers and Directors Timeline



- Data breach 10/2015 – 6/2016
- 2/2016 – Announcement malware
- 6/2016 – Announcement of broader breach
- Sued by financial institutions to recover costs
- Sued by customers
- 12/16/2016 D&O Suit filed
 - Detailed allegations to substantiate demand on D&O's to bring lawsuit futile based on family relationships and substantial ownership

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Officers and Directors Suit



- January 24, 2017
- Based on Securities Violations not Breach of Fiduciary Duty
- Failed to encrypt data + breach foreseeable = Material Misstatements
- Alleged price decline:
 - 9/2016 Disclosure ↓ 3.06 %
 - 12/2016 Disclosure ↓ 6.11%

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BEST DEFENSES TO D&O SUITS

- Corporate Boards and Committees
OVERSEE Data Protection
- Document Steps Taken
- Security Policies
- Security Audits
- Take serious reports and evaluations
and act
- Proper insurance protections

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Federal Contractor Privacy Training

Kelli P. Lieurance

What is a Federal Contract?

- Contract with an Executive Branch agency related to “acquisitions,” “supplies,” and “services;
- No monetary threshold

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What Is *Not* Considered A Federal Contract?

- Non-procurement contracts
- Grants
- Federal financial assistance (i.e., Medicare parts A and B, Medicaid reimbursement)
- Purchases/leases of real property

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Personally Identifiable Information (“PII”)

- Any information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual.

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Requirements

- Annual training to employees who:
 - Have access to a system of records;
 - Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information on behalf of the agency; or
 - Design, develop, maintain, or operate a system of records

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Content of Training

- The provisions of the Privacy Act of 1974 (including penalties);
- The appropriate handling and safeguarding of PII;
- The authorized and official use of a system of records or any other PII;
- The restriction on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise access PII;
- The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of PII; and
- Procedures to be followed in the event of a suspected or confirmed breach of a system of records or unauthorized disclosure, access, handling, or use of PII.

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Other Requirements

- Must be tailored to specific positions
- Must provide basic foundational education on privacy
- Must provide advanced training
- Must involve some system to test knowledge at end of training

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What Now?

- Look for reference to training requirement in federal contracts
- Flow down requirement to subcontractors, if applicable
- Explore training options

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Thank you

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CFPB State of the Union

Eli A. Rosenberg

CFPB Background

- Established by Dodd-Frank
- Supervisory, Rulemaking, and Enforcement Authority
- Regulates Financial Services Industry
- Unique Structural Attributes

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The PHH Case

- Brief summary of case background
- Why was the CFPB's structure ruled unconstitutional?
- Current status? Has the Trump Administration weighed in?
- Impact on the CFPB if the ruling is upheld

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Congressional Bills Aimed at Weakening the CFPB

- Financial Choice Act
 - Limits the CFPB's enforcement capabilities
 - Replace single director with five person panel
 - Make the CFPB's budget Congressional approval/oversight
 - Remove ability to designate banks as "too big to fail" (systemically important)
 - Repeal the "Durbin Amendment"

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Indemnification

Jonathan J. Wegner

Indemnification

- Damages
 - Direct
 - Indirect/Consequential
- Special Riders
 - Privacy
 - Information Security

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Indemnification

- Drilling in on Data Breach Damages
 - Third-party claims
 - Out-of-pocket expenses
 - Legal Expenses
 - Notification Expenses
 - Call Centers
 - Credit Monitoring Services

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Limitations on Liability

- Caps / Exclusions
 - Revenues
 - Multiples of Revenues
- Excluded Damages
- Uncapped Damages
- Linkage to Insurance Coverages

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The EU General Data Protection Regulation

Why is it important to me???

Grayson J. Derrick

A New Data Protection Landscape

- It's a regulation, not just a directive
- You need to comply – even if you're not in the EU
- This is a stricter law

Internet Service Providers

They can sell what???

What Happened and What Now?

- On March 28th, the House voted to repeal rules that formerly prohibited Internet service providers from selling their customers' data without their permission
- ISPs will have the ability to collect, store, share and sell certain types of data – browsing history, app usage data, location information – all without users' consent

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Hasn't This Been Going On?

- Facebook and Google have been selling user data for years
- This is more than targeted ads
- FCC won't be able to pass privacy restrictions protection web browsing history

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How Do I Protect My Privacy?

- Use a VPN
- Other tools to mask your identity
- HTTPS sites

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TECHNOLOGY & DATA PROTECTION FORUM

2017

Insurance Retrospective

Jonathan J. Wegner, James E. O'Connor
and Justin W. Firestone

Insurance Retrospective

Justin W. Firestone
James E. O'Connor
Jonathan J. Wegner

Agenda

- Current trends
- Application process
- Anatomy of a cyber insurance policy
- Selected provisions
- Notice of claim
- Captive insurance

Current Trends

- Growth in cyber insurance
 - 2015: 2.5 billion
 - 2020: 7.5 billion (Cyber Risk Threat and Opportunity Report)
- 2015: 63% of companies had coverage (Statista)

Current Trends

- More than ¼ of underwriters report client seek higher limits (2016 Survey of Cyber Insurance Market Trends by Advisen)
- 2016: healthcare entities driving growth (2016 Survey of Cyber Insurance Market Trends by Advisen)

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Application Process

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Application Process

- Please respond to answers clearly. Underwriters will rely on all statements made in this application. This form must be dated and signed by the CEO, CFO, President, Risk Manager or General Counsel. Completion of this submission may require input from your organization's risk management, information technology, finance, and legal departments:

Source: ACE Cyber and Privacy Insurance Application

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Application Process

Cyber and Privacy Insurance Application

- Over eight pages of detailed questions
- "Does the Applicant have a formal process in place to automatically push updates to all computing resources for critical updates, patches, and security hot-fixes?"
- When performing due diligence on new vendors, do you:
 - Make formal assessments of the security risk associated with the vendor?
 - Verify the vendor's security framework (e.g., SAS70)?
 - Require contractual indemnification for privacy or security losses?"

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Application Process

By signing this application, the applicant **warrants** to the company that all statements made in this application and attachments hereto about the applicant and its operations are **true and complete**, and that no material facts have been **misstated or misrepresented** in this application, **suppressed or concealed**. The undersigned agrees that if after the date of this application and prior to the effective date of any policy based on this application, any occurrence, event or other circumstance should render **any of the information contained in this application inaccurate or incomplete**, then the undersigned shall notify the company of such occurrence, event or circumstance and shall provide the company with information that would complete, update or correct such information.

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Application Process

ANY SECURITY ASSESSMENT, **ALL REPRESENTATIONS** MADE WITH RESPECT TO ANY SECURITY ASSESSMENT, AND ALL INFORMATION CONTAINED IN OR PROVIDED BY APPLICANT WITH RESPECT TO ANY SECURITY ASSESSMENT, REGARDLESS OF WHETHER SUCH DOCUMENTS, INFORMATION OR REPRESENTATIONS ARE ATTACHED TO THE POLICY, **ARE HEREBY INCORPORATED BY REFERENCE** INTO THIS APPLICATION **AND MADE A PART HEREOF**.

SIGNING OF THIS APPLICATION DOES NOT BIND THE APPLICANT OR THE INSURER TO COMPLETE THE INSURANCE, BUT IT IS AGREED THAT THIS APPLICATION AND ANY INFORMATION INCORPORATED BY REFERENCE HERETO, SHALL BE THE BASIS OF THE CONTRACT SHOULD A POLICY BE ISSUED, AND **IS INCORPORATED INTO AND IS PART OF THE POLICY**.

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Key Insuring Agreements

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Key Insuring Agreements

- First Party
 - Breach and Notification
 - Business Interruption
 - System Damage
 - Cyber Extortion
- Third Party
 - Network Liability
 - Privacy Liability
 - Regulatory Proceedings

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Key Insuring Agreements

- **First Party**
 - Breach and Notification
 - Business Interruption
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 - Cyber Extortion
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 - Regulatory Proceedings

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Key Insuring Agreements

- First Party
 - Breach and Notification → Forensic investigation
 - Business Interruption
 - System Damage
 - Cyber Extortion
- Third Party
 - Network Liability
 - Privacy Liability
 - Regulatory Proceedings

Legal
Notification
Credit monitoring
Public relations

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Key Insuring Agreements

- First Party
 - Breach and Notification
 - Business Interruption → Lost profits
 - System Damage
 - Cyber Extortion
- Third Party
 - Network Liability
 - Privacy Liability
 - Regulatory Proceedings

Extra expenses

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Key Insuring Agreements

- First Party
 - Breach and Notification
 - Business Interruption
 - System Damage → Rectification costs
 - Cyber Extortion
- Third Party
 - Network Liability
 - Privacy Liability
 - Regulatory Proceedings

Damage to data
- Due to cyber peril

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Key Insuring Agreements

- First Party
 - Breach and Notification
 - Business Interruption
 - System Damage
 - **Cyber Extortion**
- Third Party
 - Network Liability
 - Privacy Liability
 - Regulatory Proceedings



Loss due to threats

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Key Insuring Agreements

- First Party
 - Breach and Notification
 - Business Interruption
 - System Damage
 - Cyber Extortion
- Third Party
 - **Network Liability**
 - **Privacy Liability**
 - Regulatory Proceedings



Legal defense
Settlements
Demands
Judgements

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Key Insuring Agreements

- First Party
 - Breach and Notification
 - Business Interruption
 - System Damage
 - Cyber Extortion
- Third Party
 - Network Liability
 - Privacy Liability
 - **Regulatory Proceedings**



Legal defense
Fines and penalties

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Gotchas

Gotchas – Selected Provisions

- "Claims Made and Reported" vs. "Occurrence"
- Approved legal and forensic teams
- Clearly defining the scope of your Professional Services or Technology Services (for third-party liability)

Gotchas – Selected Definitions

- "Privacy Event" (Privacy Liability or Breach Costs)
 - Unauthorized disclosure, loss, or theft of:
 - PII, PHI, other nonpublic personal information "in any format"
 - Confidential information if protected under written NDA or similar agreement
- "Network Security Wrongful Act" (Network Liability)
 - Causes a breach of network security that causes harm or loss

Gotchas – Selected Exclusions

- Electromagnetic Fields (EMPs)
- Bodily Injury and Property Damage
- Intentional acts
- Unencrypted mobile devices
- Violations of consumer protection laws
- Failure to meet basic security practices

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Gotchas – Selected Exclusions

- War, whether declared or not
- Terrorism or cyberterrorism

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Gotchas – Selected Exclusions

- War, whether declared or not
- Terrorism or cyberterrorism
 - "alleging, based upon, arising out of or attributable to war, invasion, acts of foreign enemies, hostilities or warlike operations (whether war is declared or not), strike, lock-out, riot, civil war, rebellion, revolution, insurrection, civil commotion assuming the proportions of or amounting to an uprising, military or usurped power."

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Gotchas – Selected Exclusions

- War, whether declared or not
- Terrorism or cyberterrorism
- Violation of law

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Gotchas – Selected Exclusions

- War, whether declared or not
- Terrorism or cyberterrorism
- Violation of law

excludes any claim "alleging, based upon, arising out of or attributable to any dishonest, fraudulent, criminal, or malicious act, error or omission, or any intentional or knowing violation of the law by an Insured".

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Gotchas – Selected Exclusions

- War, whether declared or not
- Terrorism or cyberterrorism
- Violation of law
- Promises beyond legal requirement

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Gotchas – Selected Exclusions

- War, whether declared or not
- Terrorism or cyberterrorism
- Violation of law
- Promises beyond legal requirement

"breach of any express, implied, actual or constructive contract, warranty, guarantee, or promise, including any actual or alleged liability assumed by the **Insured**, unless such liability would have attached to the **Insured** even in the absence of such contract, warranty or guarantee."

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Gotchas – Limits and Sub limits

Coverages:	Limit of Liability Each Claim and Maximum Total Policy Period Aggregate:	Self-Insured Retention:	Retrospective Date:
C. Privacy Breach Costs			Not Applicable
"Endurance Breach Assist Counsel"	\$500,000	First dollar coverage*	
"Breach Response Expenses"	\$500,000	\$500,000	
"Notification, Monitoring and Restoration Services"	\$5,000,000	\$500,000	
"Foreign Notifications"	\$250,000	\$500,000	
* First dollar coverage subject to limitations in Section III, as amended.			
Maximum Total Policy Period Aggregate Privacy Breach Costs Limit:		\$5,000,000	

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Example: Privacy Breach Costs

- Disclosure of 200,000 medical records
- \$600,000 in legal breach consulting
 - \$500,000 coverage (sublimit), no SIR
- \$800,000 in forensic analysis
 - \$300,000 in coverage (\$500,000 SIR)

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Example: Privacy Breach Costs

- \$2,500,000 in restoration and notification costs
 - \$2,000,000 in coverage (\$500,000 SIR)
- \$500,000 in foreign notification costs
 - No coverage (\$500,000 SIR)

Example: Privacy Breach Costs

- Good news!
 - You still have \$2,200,000 in coverage for your aggregate policy limit
- Bad news!
 - You've been sued for \$50,000,000 in damages from a class-action lawsuit
 - And you failed to mail the foreign notices in time

How to Handle "Gotchas"

- Discuss with your broker
- Add rider

Notice of Claim

- **Claim** means: a written demand received by any Insured for money or services, including the service of a suit or institution of regulatory or arbitration proceedings
- **Notice of Claim:**
 - If any Claim is made against the Insured, the Insured shall forward as soon as practicable ... notice of such **Claim**
 - If, during the **Policy Period**, the **Insured** becomes aware of any circumstances that could reasonably be the basis for a **Claim** it may give written notice

Focus on Captive Insurance

Jonathan J. Wegner

Overview

- What is a captive?
- Why form a captive?
- Sample policy provisions
- Good candidates for captives
- Legal parameters
- Bespoke vs. turnkey options

“Insurance Insurance”



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What is a captive?

- Your own private insurance company
 - Insures risks the company already has
 - Creates reserves over time
 - Tax incentives for small captives (up to \$2.2MM in premium per year)

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What is a captive?

- A licensed insurance company
 - State-domicile only (not admitted elsewhere)
 - Insurance “regulation lite”
 - Writes real insurance policies
 - Must be underwritten
 - Actuarial standards

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Why form a captive?

- Leverage with insurers
- Lack of coverage availability
- Build reserves
- Reduced cost and stable premiums
- Control claims process
- Tax planning

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Sample Policy Provisions

- Breach caused by hacking/virus
 - Unauthorized access that causes:
 - Unauthorized publication of PII
 - Transmission of viruses to third parties
 - Loss includes
 - All amounts paid to third parties for damages
 - Audit/attorney/expert fees
 - Notifications
 - Cost to restore data

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Sample Policy Provisions

- Computer System Failure
- Deductible Reimbursement
- Difference in Conditions
 - Claim otherwise covered under third-party insurance but for policy exclusion or policy limits

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Sample Policy Provisions

- Intellectual Property Event
- Legislative or Regulatory Change
- Administrative Actions
- Privacy Liability
- Representations and Warranties
- Reputational Risk

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Sample Policy Provisions

- Bank-specific provisions
 - Core deposit intangible
 - Impaired borrower collateral
 - Regulatory audit

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Good Candidates

- EBITDA: \$2MM+
- Revenue: \$10MM+
- Insurable risks
- Lack of coverages

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Good Candidates

- Professionals
- Manufacturers
- Import/Export
- Construction and Real Estate
- Oil and Gas
- Hospitality
- Freight

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Legal Parameters

- Onshore v. Offshore
- Up to \$2.2MM in premium
- Insurance
 - Risk sharing / risk shifting
 - 51% (now 80/20 if not wholly owned)
 - 12 or more insureds

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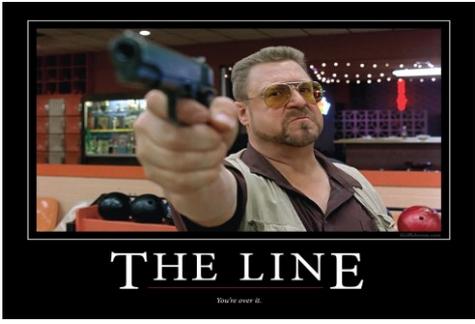
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Legal Parameters

- 831 (b) Election
 - Premiums deductible to insured
 - Premiums not taxable to insurer
 - Investment income taxable to insurer
- Premium Taxes

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THE LINE
You're over it.

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Legal Requirements

- Abuses
 - Sham insurance policies
 - Estate planning abuses
- Notice 2016-66
- Transaction of Interest

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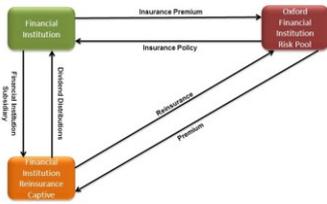
Bespoke v. Turnkey



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Turnkey Structure



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Questions?

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