



Cyber Liability and Insurance

Seminar Topic: This program details of cyber liability and current insurance policy protection information. The financial and medical communities are major targets of data breaches, or the “hacking” phenomenon. Errors made during a breach response can be extremely costly to business.

Participants will learn that companies need to have insurance coverage and a plan for both first-party and third-party breaches. Responsible companies have a duty to persevere with technology and take the necessary steps to protect confidential and proprietary information.

At the conclusion of this program session you will be equipped to better understand the ever-evolving characteristics of cyber liability insurance.

This material is intended to be a guide in general. As always, if you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.



Copyright © 2015

Printed in the United States of America. All rights reserved. No part of this monograph may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, except for citation within legal documents filed with a tribunal, without permission in writing from the publisher.

Disclaimer: The views expressed herein are not a legal opinion. Every fact situation is different and the reader is encouraged to seek legal advice for their particular situation.

The Apex Jurist, www.ApexJurst.com is
Published by ApexCLE, Inc.
www.ApexCLE.com

119 South Emerson St.,
Suite 248
Mount Prospect, Illinois 60056
Toll Free 866-657-2004

920 South Spring Street
Springfield, Illinois 62704
Toll Free 866-657-2004

Ordering Information:

Copies of this monograph may be ordered direct from the publisher for \$24.95 plus \$4.25 shipping and handling. Please enclose your check or money order and shipping information. For educational, government or multiple copy pricing, please contact the publisher.

Library of Congress Cataloging-in-Publication Data

ApexCLE, Inc.

1. ApexCLE, Inc. 2. Law-United States – Guide-books.
3. Legal Guide 4. Legal Education.



About The Author

Mr. Jernberg graduated from Vanderbilt University with a Bachelor of Arts degree, magna cum laude and Phi Beta Kappa, in 1969. He graduated from Northwestern University, cum laude, with his law degree in 1972. Mr. Jernberg attended the University of Alabama from 1976-1977 and is now an associate professor of law.

For 12 years, Mr. Jernberg has had his own law practice, Jernberg Law Group, which focuses on insurance, litigation, and general corporate matters. Previously, Mr. Jernberg worked with Oppenheimer, Wolff, and Donnelly to help establish the Chicago office of the 350 lawyer firm. He also worked with Isham, Lincoln, and Beale and established their environmental insurance coverage practice. Additionally, he worked with Williams and Montgomery which focused on insurance defense and insurance coverage practice. He is licensed in Illinois, United States Supreme Court and various federal district and circuit courts.

Mr. Jernberg is the founding member of the environmental law committee of the Torts and Insurance Practice section of the ABA. He was appointed to ABA Blue Ribbon Committee in Discovery in Major Environmental Coverage Litigation and he is a member of National Arbitration Association panel of arbitrators, certified mediator and member of Cook County panel of major case arbitrators.

Mr. Jernberg is also the author of approximately 30 articles in the area of insurance coverage and dispute resolution. He is a frequent lecturer on insurance coverage matters, including major addresses at the national conventions of the CPCU Society and the Casualty Actuarial Society. Mr. Jernberg is a member of the North American Reinsurance faculty that provided annual week long classes for insurance claim professionals.

Author's Email Address: djernberg@jernberglaw.com

Author's Mailing Jernberg Law Group LLC

Address: 905 N Carlyle Ln

Arlington Hts, IL 60004-5764

Author's Phone 847-259-0953

Number: 312-953-4038



What is Cyber Liability?

- Most commonly thought of as “hacking”
- In 2011, 414 reported security breaches
 - 23,000,000 confidential records
- Costs per breach (2012): \$3.7M insured \$5.5 total
 - 194 per record
 - 2015 Sample 155 insurance claims: Average cost \$673.767 (\$499,710 Crisis Management)
 - 2015 Average claim for large companies \$4.8 million; healthcare \$1.3 million
- “There are only two types of companies: those who have been hacked and those that will be.” FBI Director Mueller

Who Is Suffering Cyber Breaches?

- Large companies – Target etc. (2013)
- Recent: J.P. Morgan (83,000,000 customers), Home Depot, U.S. Government
- Financial and medical remain major targets
- Heartland Payment Systems –130,000,000 credit card numbers, cost \$68,198,380
- TJ Max, 74,000,000 names/address, cost \$64,113,000
72% involved small and midsized
- “A Jernberg Prediction”

Emerging issues

- Cost impact small banks versus large banks
- Insuring municipal leagues
- Utilities
- Intercepting and rerouting

Other Causes of Cyber Liability

- Lost equipment
- Negligence – sent in error
- Power interruptions
- Faulty hardware software
- Denial of access
- Malware, operating system damage
- Document encryption/ extortion
- Pump and dump stock scheme

What Do Businesses Seem to Be Doing

- Worrying a lot: majority public companies view as the major risk
- Not insuring against risk: 65 % public companies did not carry specific cyber liability insurance
- Why not carrying insurance?
- Is enhancing security the strategy?
- Insurance agents: Adding to E&O coverage and adding cyber liability to agency coverage checklist (document declination)

Basic Costs and Damages

- First Party (may be covered by insurance)
 - Notification
 - Credit monitoring
 - Call center
 - Forensics
 - Legal counsel
 - Public relations
- Lost profits
- Business interruption
- Data recovery
- Business reputation
- Extortion?

Lawyer Cyber Liability

- General malpractice policy; errors and omissions in providing professional services
- Lawyers have significant amount of personal and confidential material
- Specific cyber coverage is available for firms from 1 to 25 lawyers
- Broad coverage
- Breach of security – third party claims, transmission of malicious code
- Breach response costs
- Business interruption
- Cyber extortion

Liability for EU Data Transfers

- EU-US Safe Harbor framework, instituted in 2000, no longer valid, and U.S. companies may be faced with the daunting task of complying with the regulations of 28 separate EU Member States for legal data transfer and handling (*Schrems v. Data Protection Commissioner*, referred to as “Europe v. Facebook”)
- If no resolution is reached by January, individual EU Member States may begin launching their own regulatory investigations into data handling of EU citizens by US companies
- Cyber liability offered as a separate policy or add-on; whether covered by “personal and advertising” provision often litigated (*Zurich American Insurance Co v. Sony*, Index No. 651982/2011 – Settled in April 2015 after appeal on ruling in favor of Zurich)
- Cyber liability insurers may decline or fail to renew coverage based on a company’s likelihood of exposure to an EU regulatory investigation, since this situation is often covered in cyber liability insurance policies

Post safe harbor international considerations

- Evaluate risk profiles of companies seeking cyber liability insurance post-Safe Harbor
 - If no transmittal of data with the EU, no coverage risk of EU regulatory investigations
 - Data transfer can be made legal using EU Model Clause Contracts regardless of whether new Safe Harbor regulations are passed, minimal coverage risk of EU regulatory investigations
 - Companies previously certified as Safe Harbor-compliant risk losing coverage if additional steps are not taken to protect data beyond those required of Safe Harbor, moderate to high risk if additional compliance steps not taken
 - Consider exclusionary clauses (similar to no PCI coverage for companies not PCI-compliant)

Common Insurance Policies

- General Liability
- Property damage
- Business owner protection (“BOP”)
- Homeowners
- Auto: personal and commercial
- Employer liability
- Directors and officer
- Theft and fiduciary coverages

Commercial General Liability Policies

- Protection against third party claims
- Three basic parts: bodily injury, property damage, personal injury
- Property damage: loss or damage to tangible property
- Issue: Is loss or damage to digital data damage to tangible property?
- Bitcoins? IRS ruling said they are property.

Some Property Damage Cases

- Tangible means recognizable by the senses: *American Online Inc. v. St. Paul Mercury Insurance Company*, 347 F.3d 89 (4th Cir. 2003); *Ward General Insurance Services v. The Employers Fire Insurance Co.*, 7 Cal Rptr. 3d 844 (Cal. App.2003); *Carlton v. Delaget*, 2012 WL 1954146 (W.D. Wis. 2012)
- Limiting property damage to “recognizable by senses” is archaic: *American Guarantee Liability v. Ingram Micro Inc.* 2000 WL 726789 (D.C. Arz. 2000)
- “Loss of use” coverage: *Eyeblander Inc. v. Federal Insurance Company*, 613 F.3d 797 (8th Cir. 2010)

Examples Other Cases

- Homeowners policy (disc stolen from car): *Nationwide Insurance Company v. Central Laborers Pension Fund*, 704 F.3d 522 (7th Cir. 2013)
- Employee dishonesty exclusion (destruction versus damage): *NMS Services, Inc. v. The Hartford*, 2003 WL 1904413 (4th Cir 2003)
- **The takeaway:** look at all insurance policies and subtle distinctions can make a difference

Specific Cyber Liability Policies

- “Beware the technology BOP”
- First party coverage
 - What is covered and what is not
- Third party coverage
 - What is covered and what is not
- Claims made versus discovery coverage

Some Conclusions

- All businesses are at risk for cyber liability or loss
- Common insurance policies may not provide coverage
- Nonetheless, carefully scrutinize all policies if there is a loss
- There are specific cyber liability policies
 - Understand the risk and then compare to the coverage
 - Alert clients to potential gaps