




## Cyber Liability: Data Breach and Social Media

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## Two Challenging Types of Claims

- Data Breach: Claims arising from a breach of company data (first and third-party)
- Cyber-Privacy: Claims arising from a compromise of employee cyber-privacy

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## Data Breach Claims

- Who is at risk?
  - Any entity that stores third-party data can be at risk, including (but certainly not limited to):
    - Retailers
    - Financial institutions
    - Health care providers
    - Law Firms

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## Data Breach Claims

- What is the risk?
  - First Party: losses suffered directly by the Insured
    - Public relations activity necessitated by a data breach
    - Remediation and repair of systems due to a data breach
    - Business interruption costs
    - Costs associated with theft or vandalism of a company's network or systems
    - Upgrades in network security
  - Third Party: losses associated with the Insured's liability for damages suffered by a third party
    - Actual loss (theft) of customer, client or employee data
    - Extortion based on a threatened loss of customer, client or employee data
    - Monitoring or repairing of credit reports for those effected by a data breach
    - Notices issued to those effected by a data breach
    - Lost profits caused by a data breach

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## Claim Example – Data Breach

- A financial services provider loses a data tape containing unencrypted customer account data. A class action lawsuit follows resulting in the following costs:
  - Technical Forensics
  - ID Theft Forensics
  - Mailing costs
  - Call Center
  - Credit Monitoring
  - Outside attorney expenses
  - Additional Settlement Costs
 (Average security breach in US is currently \$6.3 ML)

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## Data Breach Claims

- Assessing the Risk
  - What type of data was involved?
    - Personally Identifiable Information
    - Proprietary data of a vendor or internal proprietary data
  - What was the cause of the breach?
    - External hacking
    - Wrongdoing internal to the insured
    - Failure of controls or preventative measures
    - Failure of hardware or software
    - Wrongdoing or failure of a vendor or other related third-party entity
  - What are the potential damages to which the Insured is exposed?
    - Compensatory damages (although difficult to prove)
    - Consequential damages
    - Remediation of hardware and software
    - Lost profits and goodwill
    - Notification and monitoring of effected individuals/entities
    - Potential for Regulatory Scrutiny by the FTC and/or State Attorneys

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### Data Breach Claims

- How to Mitigate the Risk – Pre Claim
  - Using Encryption software
  - Creating a Notification Policy (consumers to be notified by email versus regular mail- to reduce expenses)
- How to Mitigate the Risk – Post Claim
  - Evaluate the potential scope of the loss, in terms of individuals effected
  - Consider informally notifying government regulators (to head off government investigation or formal requests for documents and information)
  - Maintain a written chronology of the breach (formal log of what the insured knows and when they became aware of the information)
  - Understand how mitigation strategies effect costs and coverage

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### Social Media Claims

- Who is at risk?
  - Employers using info from social networking sites
  - Employers accessing personal e-mail accounts used from the employers' computers
  - Employers monitoring personal e-mail messages sent by employees
  - Employers accessing text messages on employer-provided phones

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### Social Media Claims

- What is the risk?
  - Invasion of Privacy
  - Discrimination
  - Harassment
  - Defamation

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### Claim Examples - Social Media

- Teacher recently fired because of her posting on Facebook of herself with alcoholic beverages that the school thought was inappropriate.
- Defamatory statements made on sites re: individuals, co-workers or by kids
- Employee using company issued cell phone to send inappropriate texts &/or pictures

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### Social Media Claims

- Assessing the Risk – Invasion of Privacy
  - Did the employee have a reasonable expectation of privacy?
    - Employer-issued computer, cell phones or blackberries
    - Facebook/MySpace vs. Blogs
  - Did the employer have a social media policy?
    - Was the content clear and appropriate?
    - Was the policy communicated and enforced?
    - Did the policy have a reasonable relationship to a legitimate business interest of the insured?

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### Social Media Claims

- Assessing the Risk – Discrimination/Harassment
  - Hiring Practices Using Social Media Posts
    - Improper vs. Proper Use of Employee Social Media Postings
    - Protected vs. Unprotected Material
  - Firing an Employee Based on Social Media Posts
    - Protected Communications by Employees (concerted activity)
  - Vicarious Liability for Employee Postings

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### Social Media Claims

- Is it Covered?
  - Is it an “Occurrence” or “Personal & Advertising Injury” as defined by the policy?
  - Potential exclusions may apply including Expected or Intended Injury and Material Published with Knowledge of Falsity.
  - Example - May 2010 Sony lawsuits – GL carrier has filed DJ asking court to determine coverage under CGL policy
- Effect of coverage issues and CGL policies
  - Created opportunity for industry & carriers to create a specific policy to meet the need

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### Social Media Claims

- E-discovery
  - Significant increase in costs
  - Possible steps companies can do beforehand to minimize the time & cost
  - What should the adjuster do & ask for when the claim first comes in that would help

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