



**SWIPE RIGHT ON
INSURANCE: RISKS AND
COVERAGE IMPLICATIONS
FOR MOBILE APPS AND
SOCIAL MEDIA PLATFORMS**

**RIMS Hawaii Chapter
Meeting**

Plaza Club
February 15, 2018
11:30 am – 1:00 pm



Disclaimer

The views expressed by the participants in this program are not those of the participants' employers, their clients, or any other organization. The opinions expressed do not constitute legal advice, or risk management advice. The views discussed are for educational purposes only, and provided only for use during this session.

SPEAKER:



Dennis J. Nolan, Esq.

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Dennis J. Nolan, a shareholder in Anderson Kill's New York office, concentrates his practice in commercial litigation with an emphasis on insurance recovery. Mr. Nolan's insurance recovery work includes arbitrations in London and litigation of coverage disputes involving Directors and Officers, Errors and Omissions, Employment Practices Liability, Marine Cargo, and long-tail asbestos claims, among others. His clients in insurance recovery cases include companies in the financial services, technology, manufacturing, fitness, and commodity trading industries.

Mr. Nolan has represented clients including a major financial services institution in an Errors and Omissions and Directors' & Officers' insurance dispute in connection with a bankrupt subsidiary; a leading technology company in a London arbitration of an insurance coverage dispute hinging on policy periods; and "feeder fund" defendants in the Madoff bankruptcy.

He has also handled diverse matters in commercial litigation, including employment and partnership disputes, copyright infringement, fraud and breach of fiduciary duty claims against officers and directors, and antitrust. In the wake of Superstorm Sandy, Mr. Nolan provided pro bono counsel to homeowners who suffered property damage in the storm.

Mr. Nolan is co-chair of Anderson Kill's Marine Cargo Industry Group and a member of the firm's Cyber Insurance Recovery Group.

HOW DID WE GET HERE?



Source: http://www.nbcnews.com/id/16242528/ns/us_news-life/t/time-magazines-person-year-you/

WHAT IS SOCIAL MEDIA?

- A two-way interactive experience often in real time
- Instant and direct interaction with publishers of media
- Allows consumers of social media to interact with each other
- Everyone can be a commentator, editor, content creator, producer and distributor

WHAT IS SOCIAL MEDIA?



WHO IS USING SOCIAL MEDIA?



HOW IS SOCIAL MEDIA BEING USED?

- By Companies
 - Marketing and Advertising
 - Measurement of Public Perception
 - Research Tool
- By Employees
 - Professionally
 - Socially

WHAT ARE MOBILE APPS?

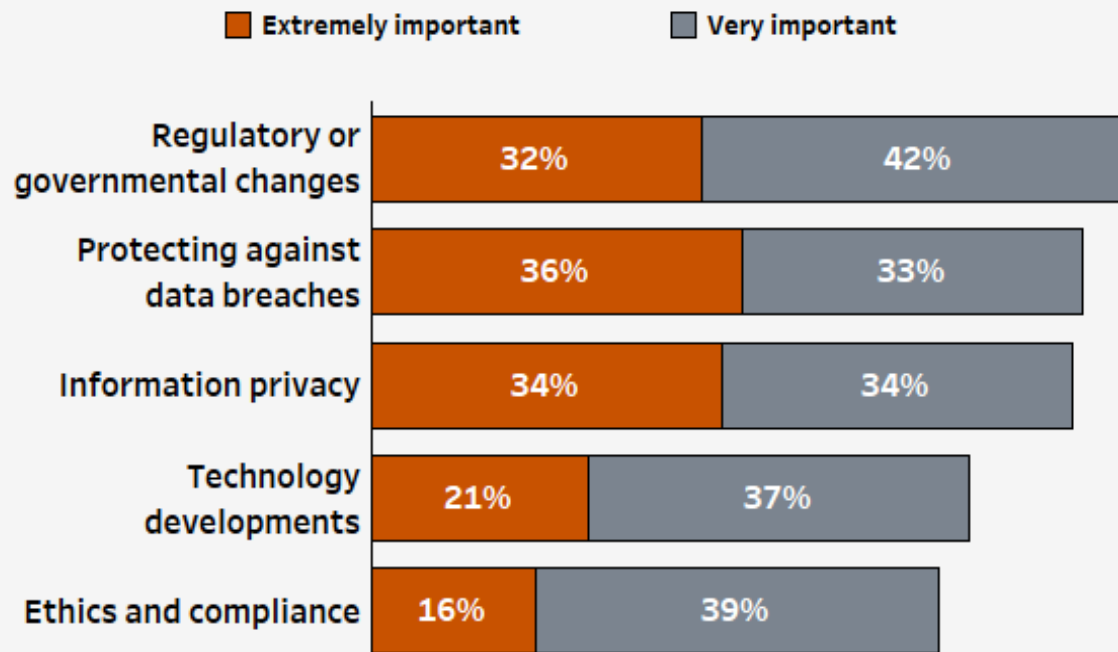


SO WHAT'S THE PROBLEM?



WHAT'S KEEPING CLO'S UP AT NIGHT

What's Keeping CLOs Up At Night



Source: ACC Chief Legal Officer 2018 Survey

Source: <https://www.law360.com/articles/1006528/print?section=insurance>

SOCIAL MEDIA AND APP RISKS

- Privacy Risks
- Employment
- Reputational Risks
- Intellectual Property or Media Risks
- Bodily Injury and Property Damage
- Business Torts
- Cyber Exposure

PRIVACY RISKS

- Protecting the privacy of public on your social networking pages
- Disclosure of sensitive client or company information through “crowdsourcing”
- Inadvertent disclosure of competitive intelligence through social media content

THE DARK SIDE OF SOCIAL MEDIA AND APPS

- Access to a trove of personal information
 - age, gender, usernames, passwords
 - likes, dislikes, search engine habits
 - phone and email contacts and call logs
 - internet data
 - calendar data
 - data about the device's or your location
 - the device's unique IDs
 - information about how you use the app or platform itself



LET'S TALK ABOUT...

- Sex
- Rock-and-Roll
- The Kids
- Things



EMPLOYMENT RISKS

- Harassment and Discrimination Claims
- Use of social media in employment investigations and hiring
- Monitoring of employees
- Social Media Policies



REPUTATIONAL RISKS

- Amplified by vast reach of social media.
- Third parties AND your own employees can be a problem.
- Disparagement of your product or business ethics.
- Praise by your own employees.



BUSINESS TORTS

- Tortious Interference Claims
- False Advertising
- Business Disparagement
- Deceptive or unfair trade practices



INTELLECTUAL PROPERTY RISKS

- Infringement of copyright
- Disclosure of intellectual property
- Defamatory remarks

BODILY INJURY AND PROPERTY DAMAGE



CYBER EXPOSURES

- Malware/Spyware
- Blockers
- Cyber Extortion



REGULATORY ENVIRONMENT

- NIST
- NAIC & NACD
- SEC, FTC & OTHER FEDERAL REQUIREMENTS
- STATE LAWS

NIST, NAIC, NACD

- Top down governance issues
- Industry standards and norms for evaluating reasonableness
- Handbooks, guidance and other literature

FEDERAL LAWS

- Section 5 of Federal Trade Commission Act (“FTC Act”)
 - Prohibits unfair or deceptive acts and practices
 - FTC regularly uses Section 5 to ensure companies honor their security promises and provide reasonable security measures to safeguard personal data they maintain
- SEC/FINRA
- HHS/FDA

REGULATORY ENFORCEMENT

- FTC v. Wyndham Worldwide
- FTC v. Uber
- SEC v. Craig
- SEC v. McKeown and Ryan
- OCR – Presence Health
- OCR – Children’s Medical Center of Dallas

STATE LAWS

- 47 states have breach notification and data security laws
 - Notification duties are based on risk of compromise, not proof
- New York's Cybersecurity Rule, 23 NYCRR 500
 - Adopted by NY DFS in 2016
 - More prescriptive than other data breach notice laws
 - A covered entity must notify NY DFS Superintendent of cyber events with a "reasonably likelihood of materially affecting the [entity's] normal operations or that affects [n]onpublic [i]nformation" within 72 hours of becoming aware of the event. 23 NYCRR 500.17

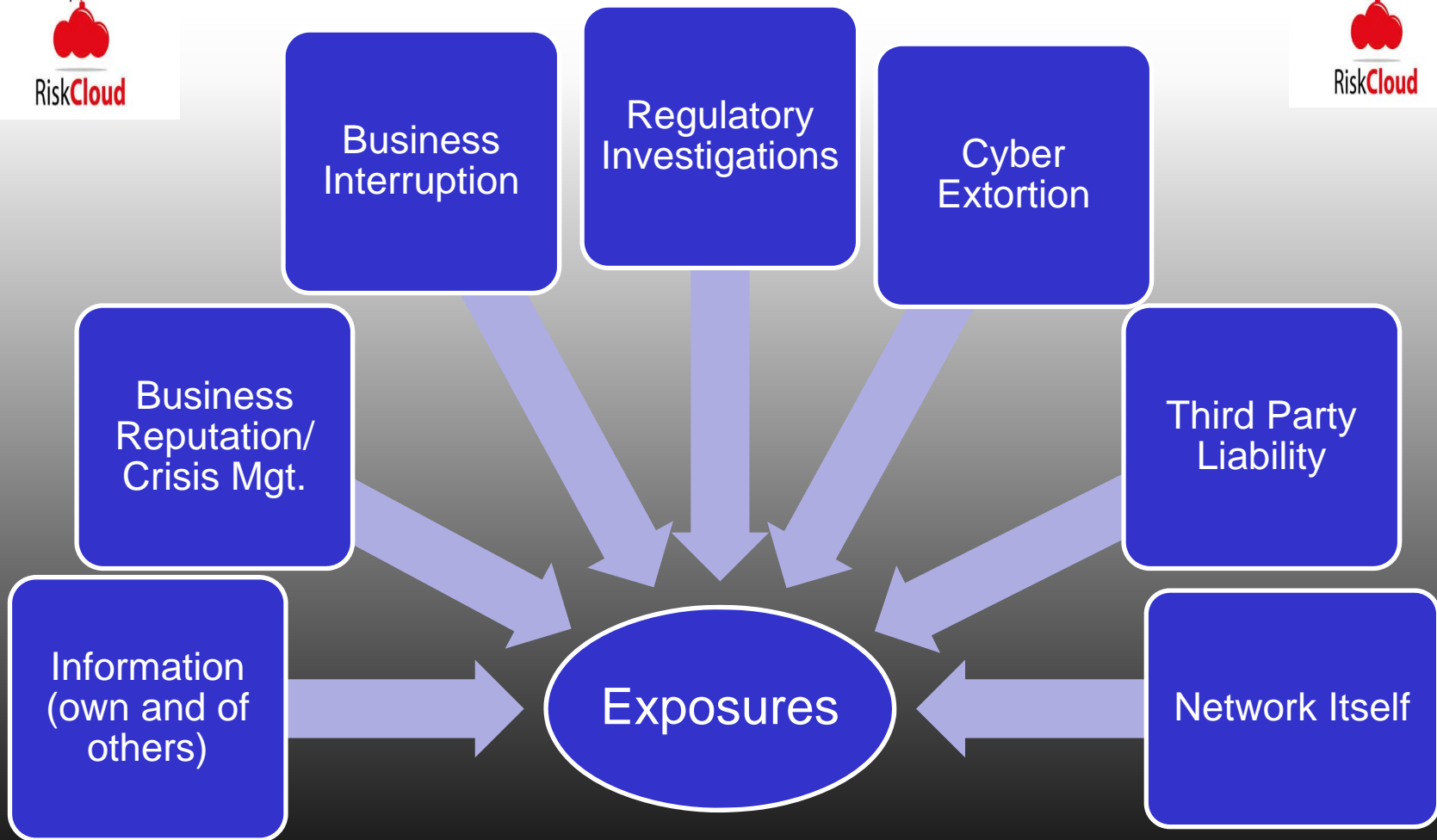
COSTS OF DATA BREACHES

- Average Cost of a Data Breach in the USA in 2017: \$7.35 million¹
- Factors affecting cost:
 - Size of the breach (Average Cost per record: \$141²)
 - Time it takes to identify and contain the breach
 - Detection and escalation costs
 - Assessment and audit services; Forensic investigation; Crisis management
- Post breach costs:
 - Costs of notification (help desk costs, communications, remediation, etc.)
 - Litigation; Loss of customers

1. PONEMON INSTITUTE, 2017 COST OF DATA BREACH STUDY 10 (June 2017)

2. *Id.* at 8

ALIGNING POTENTIAL RISKS WITH COVERAGE



POLICIES COVERING LOSS

- Take Inventory of Policies
- GL, EPLI, E&O, D&O, Crime, FIB/Fidelity, All Risk Property, Cyber Policies
- 1st Party, 3rd Party, Hybrid Coverage Issues
- Exclusions and Endorsements



INSURANCE FOR SOCIAL MEDIA & APPS: CGL

- Personal Injury
- Advertising Injury
 - Slander, libel
 - Misappropriation of advertising ideas
 - Copyright infringement
- Definition of “advertisement”
 - ISO Policy language now addressing material on internet and websites
- Property Damage
 - Impact of spyware, malware through social media

INSURANCE FOR SOCIAL MEDIA & APPS: CGL

- Beware and Understand Exclusions
 - Infringement of Copyright, Patent Trademark
 - Exception to the exclusion if infringement is in your “advertisement”
 - Definition of “advertisement” key
 - Internet Type Business
 - ISO Form Endorsement CG 06 05 14
 - “for injury or damage arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information.”

INSURANCE FOR SOCIAL MEDIA & APPS: EPLI

- Similar to E&O, will depend upon nature of “wrongful employment action”
- Claims of discrimination, harassment, violations of employment laws may be covered
- Beware of exclusions

INSURANCE FOR SOCIAL MEDIA & APPS: E&O/D&O

- Wrongful Act
- Professional services
- Exclusions?

WHEN CONVENTIONAL IS NOT ENOUGH

CYBER POLICIES!



INSURANCE FOR SOCIAL MEDIA RISKS: CYBER POLICIES

- New products
- Originated with technology-oriented business, now expanding
- Security breaches
- Damage to third-party's content or hardware
- May include libel, slander, defamation or intellectual property losses



CURRENTLY AVAILABLE CYBER INSURANCE

- Privacy Injury Liability
- Privacy Regulatory Proceedings and PCI Fines
- Network and Content Liability
- Crisis Management Fund
- Network Loss or Damage
- Business Interruption
- Electronic Theft
- Network Extortion



TYPICAL FORMS OF CYBER COVERAGE

Exposure Category		Description
Network Security Liability		Promises liability coverage if an Insured's Computer System fails to prevent a Security Breach or a Privacy Breach
Privacy Liability		Promises liability coverage if an Insured fails to protect electronic or non-electronic information in their care custody and control
Media Liability		Promises coverage for Intellectual Property and Personal Injury perils the result from an error or omission in content (coverage for Patent and Trade Secrets are generally not provided)
Regulatory Liability		Promises coverage for lawsuits or investigations by Federal, State, or Foreign regulators relating to Privacy Laws
Breach Response / Crisis Management	Notification / Legal Expense	1st Party expenses to comply with Privacy Law notification requirements ; In many instances goodwill notification; Legal Advisory
	Credit Monitoring Expense	1st Party expenses to provide up to 12 months credit monitoring
	Forensic Investigations	1st Party expenses to investigate a system intrusion into an Insured Computer System
	Public Relations	1st Party expenses to hire a Public Relations firm
Data Recovery		1st party expenses to recover data damaged on an Insured Computer System as a result of a Failure of Security
Business Interruption		1st party expenses for lost income from an interruption to an Insured Computer System as a result of a Failure of Security
Cyber Extortion		Payments made to a party threatening to attack an Insured's Computer System in order to avert a cyber attack
Technology Services/Products & Professional Errors & Omission Liability		Technology Products & Services and Miscellaneous E&O can be added to a policy when applicable

EXCLUSIONS

- Breach of contract (unless liable in absence of a contract)
- Patent infringement / Misappropriation of Trade Secret
- Return of Fees or Recall Expense
- Direct Bodily Injury or Property Damage (mental anguish/distress from Cyber breach?)
- False/Deceptive Advertising
- Known network security vulnerabilities
- Unsolicited communication
- Unauthorized or wrongful collection of information (coverage varies)
- Breaches or security failures that began prior to retro date
- Intentional acts or fraud by management
- Liquidated damages
- Coupons, discounts, or incentives to Insured's customers
- System upgrades or repairs
- Cyber Terrorism and Cyber War

TIME SENSITIVE PROVISIONS

- Fear of Reporting Claims?
- Timely Notice
- Proofs of Loss
- Suit Limitation Clauses



LITIGATION ISSUES

- Not a Ton of Precedent
- What Exists is Not Uniform
- Careful What Gets Disclosed During Discovery:
 - E.g., Sensitive Data, Customer Information, Network Security Blueprints



QUESTIONS?



THANK YOU.



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