

Cover Your ASP: Insurance Coverage for IT and Other Matters

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What Insurance Is Available For IT And Technology Claims?

- Data Privacy Claims
- Technology Product Liability Claims
- Patent Infringement and Other Technology-Related Insurance Options

What Are The Risks Associated With The Failure To Keep Data Secure?

- Network Security Liability
- Privacy Liability
- Added Expenses and Lost Profits
- Shareholder Claims
- Technology Error and Omission Claims

What is Network Security Liability?

- Claims arising from lost or stolen data; for example, computer hacking, missing laptops
- Claims may be brought by –
 - Consumers alleging actual or potential identity theft
 - Banks who incurred costs, for example, to reissue credit cards
 - Vendors and other business partners, alleging damages from disruption in operations, or disclosure of trade secrets
- E.g., pending lawsuits against TJ Maxx arising out of hacker theft of credit card data
- E.g., Monster.com theft of personal background info, used to mount targeted “phishing”
- Violation of data breach notification laws (Cal Civ Code § 1798.82)
- MN law requiring adoption of Payment Card Industry (PCI) security standards

What is Privacy Liability?

- Misuse or improper disclosure of personal data (SS#, credit card numbers, etc.)
 - E.g., transfer of data to marketers, data brokers in breach of privacy policies
 - E.g., failure to control how data is used by those authorized to receive it
- FTC enforcement of privacy agreements and security safeguards, e.g., against Choicepoint
 - Failure to ensure recipients were legitimate
 - Substantial fines and injunctive relief
- Requirements for disposal of data (erasing from memory, destroying hard drives, etc.)

What Kind of Shareholder Claims Might Be Brought?

- Securities fraud class action
 - Section 10b-5 claims arising from stock price drop following disclosure of database security breach
 - Misrepresentations re security safeguards
 - Allegations of insider trading (by executives with knowledge of data security failings or breaches)
- Derivative suit
 - Against directors and officers for gross mismanagement of data security

What Do We Mean By Technology Error and Omission Claims?

- Suits against –
 - Providers of the hardware and software for the database security system
 - Consultants who designed, installed or operated the systems
 - Application service providers
- Because their products were defective or their services failed to meet the standard of care
- Resulting in data theft, disclosure of personal information, corruption or destruction of data

What Insurance Coverage Is Available For Data Privacy Risks?

- Recovery of the company's own added expenses and lost profits
- New specialized coverage forms for --
 - Network Security Liability
 - Privacy Liability
- Technology Errors and Omissions coverages
 - Product liability (hardware and software)
 - Professional services (consulting, service provider)
- Directors & Officers liability policies
- General Liability policies

What Insurance Protects Against The Company's Own Losses?

- “Reconstruction” costs: The expense to restore or re-collect lost or corrupted data
- Business interruption losses
 - Lost income and extra expenses
 - From temporary cessation of business or loss of productivity
- Coverage generally does not extend to:
 - Liability for another party's damages, or for legal expenses
 - Market value of lost data
 - The costs to upgrade the system
 - Costs to repair physical damage

What Insurance Covers Network Security Liability?

- Kinds of claims that are covered
 - Unauthorized access to database
 - Identity theft
 - Inability to gain authorized access
 - Denial, disruption of service
 - Inadvertent transmission of malicious code
- The Company and all employees are protected
- Limits, deductibles and premiums vary widely
- Defense costs covered, but may reduce limits of liability
- What event triggers coverage?
 - “Claims-made”: When a claim for liability is asserted
 - “Occurrence”: When the event took place

What *Doesn't* Network Security Liability Insurance Cover?

- Notable exclusions include:
 - Federal or state agency claims (e.g., FTC enforcement of “safeguard” rules)
 - Computer failure because of fire, explosion, electrical failure
 - Misappropriation of trade secrets
 - “Contractual liability”
 - Obligation to indemnify another for their liability
 - Unless you would be liable anyway
 - Emotional distress (e.g., fear of identity theft) may or may not be covered

What *Doesn't* Network Security Liability Insurance Cover?

- READ THESE NEW FORMS CAREFULLY
- For example, one form contains an exclusion for:
Security shortcomings you knew of ***or "ought reasonably to have known about"***
- If there is no coverage for negligence, what coverage is left?

What Insurance Covers Privacy Liability?

- Offered in package, or as a “module”, with network security liability and other coverages
- Kinds of claims that are covered
 - Invasion of privacy
 - Trespass and eavesdropping
 - Breach of your company’s privacy policy
 - Breach of statutes, regulations regarding control and use of personally identifiable information
- The Company and all employees are protected
- Limits, deductibles and premiums vary widely
- Defense costs covered, but may reduce limits
- What event triggers coverage?
 - “Claims-made”: When a claim for liability is asserted
 - “Occurrence”: When the event took place

What *Doesn't* Privacy Liability Insurance Cover?

- Notable exclusions include
 - Federal or state agency claims (e.g., FTC)
 - “Contractual liability”
 - Obligation to indemnify another for their liability
 - Unless you would be liable anyway
 - Collection of private information (e.g., cookies, adequacy of the company’s notice regarding how information will be used)
 - Integrity of private information
 - Emotional distress (e.g., fear of identity theft) may or may not be covered

How Do I Apply for Network Security and Privacy Liability Policies?

- Requires a detailed application form, with input from company's
 - Risk manager
 - IT specialists
 - General counsel
- Provide additional materials, such as SEC filings, privacy policies, data security safeguards, etc.
 - All materials are deemed incorporated into application form
 - Do mistakes in these documents give the insurer grounds for rescission?
- Will the insurer require an independent audit of
 - data security safeguards
 - adequacy/enforcement of privacy policies?

What Insurance Covers Technology Errors and Omissions Liability?

- Policies provide liability coverage for product defects, in hardware or software
- Often in a package policy with general liability coverage
- Covered damages include consequential damages
- Notable exclusions are for
 - Costs to recall a product from market
 - Costs to repair or replace the bad product itself
 - Cost overruns on, e.g., software development contracts
- Policies provide liability coverage for professional service claims (consultants, service providers)

What Insurance Covers Technology Errors and Omissions Liability?

- Avoid a trap for the unwary
- “Claims-made” coverage requires special attention to timely notice of
 - Potential claims, in the policy application, and
 - Actual claims, in a notice of loss
- The business environment of technology companies increases the possibility that notice to the insurer will be overlooked

Do Directors & Officers Liability Policies Provide Any Coverage For These Claims?

- Typically, **no** data privacy or intellectual property exclusions
- Coverage would extend to claims brought against directors and officers individually (and perhaps all employees)
- But don't count on individuals being sued
- The company itself may be covered only for securities claims

Do General Liability Policies Provide Any Coverage For These Claims?

- Is there “property damage”?
 - Physical injury to tangible property
 - Computer data or code held not to be tangible property, so probably no coverage for lost data
 - Hardware defects or faulty software may cause physical injury to computer components and trigger coverage
 - Loss of use of tangible property which is *not* physically injured
 - E.g., computer stops working because of hardware, software failure
 - Generally no coverage if from mere product defect
 - What about a bank’s costs to replace credit cards after a security breach?

Do General Liability Policies Provide Any Coverage For These Claims?

- Is there “personal injury”?
 - Violation of right of privacy is covered
 - But is data theft the “oral or written publication of material”?

Do General Liability Policies Provide Any Coverage For These Claims?

- New exclusions attempt to address new data privacy and other technology claims
 - “Property damage” is defined to expressly state that computer data is not tangible property
 - Intellectual property exclusion:

“This insurance does not apply to personal injury or advertising injury arising out of the actual or alleged infringement or violation of any of the following: trade dress . . . trademark . . . copyright (except in an advertisement) or any other intellectual property rights or laws.”

Is Insurance Available to Cover Patent Infringement Claims?

- No coverage under general liability policies
- Special policies cover –
 - Patent infringement liability, or
 - Costs to enforce your patent (“abatement” insurance)
- Very few insurers offer
 - Intellectual Property Insurance Services Corporation
 - Darwin Insurance Co. (limited in scope)

What is Media Liability Coverage?

- Coverage for principally intellectual property and unfair competition risks for companies
 - Advertising and selling over the Internet
 - Providing services for Internet businesses (e.g., website hosting, application service provider)
- Infringement of copyright, trademark, unfair competition, defamation, invasion of privacy
- Claims-made or occurrence
- Exclusions
 - Trade secret misappropriation
 - Antitrust
 - Patent infringement
 - Professional services, including Internet services

Checklist for Corporate Counsel

- Identify potential risks
 - Data security
 - Data privacy
 - Hardware or software defects
 - Professional service errors
 - Added business costs; lost productivity and profits
 - Internet-related intellectual property risks
 - Patent infringement
- Work with broker to identify insurance products
- Participate in insurance application process
 - Ensure application *and attachments* are accurate (coordinate with IT specialists)
 - Study proposed policy forms: network security, privacy liability, technology errors and omissions, internet media liability
 - Propose language changes as needed
- Review contractual indemnity provisions
- Consider requiring vendors and partners to obtain specialty insurance (not just general liability insurance)