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## ACC NCR Privacy and Technology Conference

### Protecting Your Assets With Cyber Insurance and Contracts

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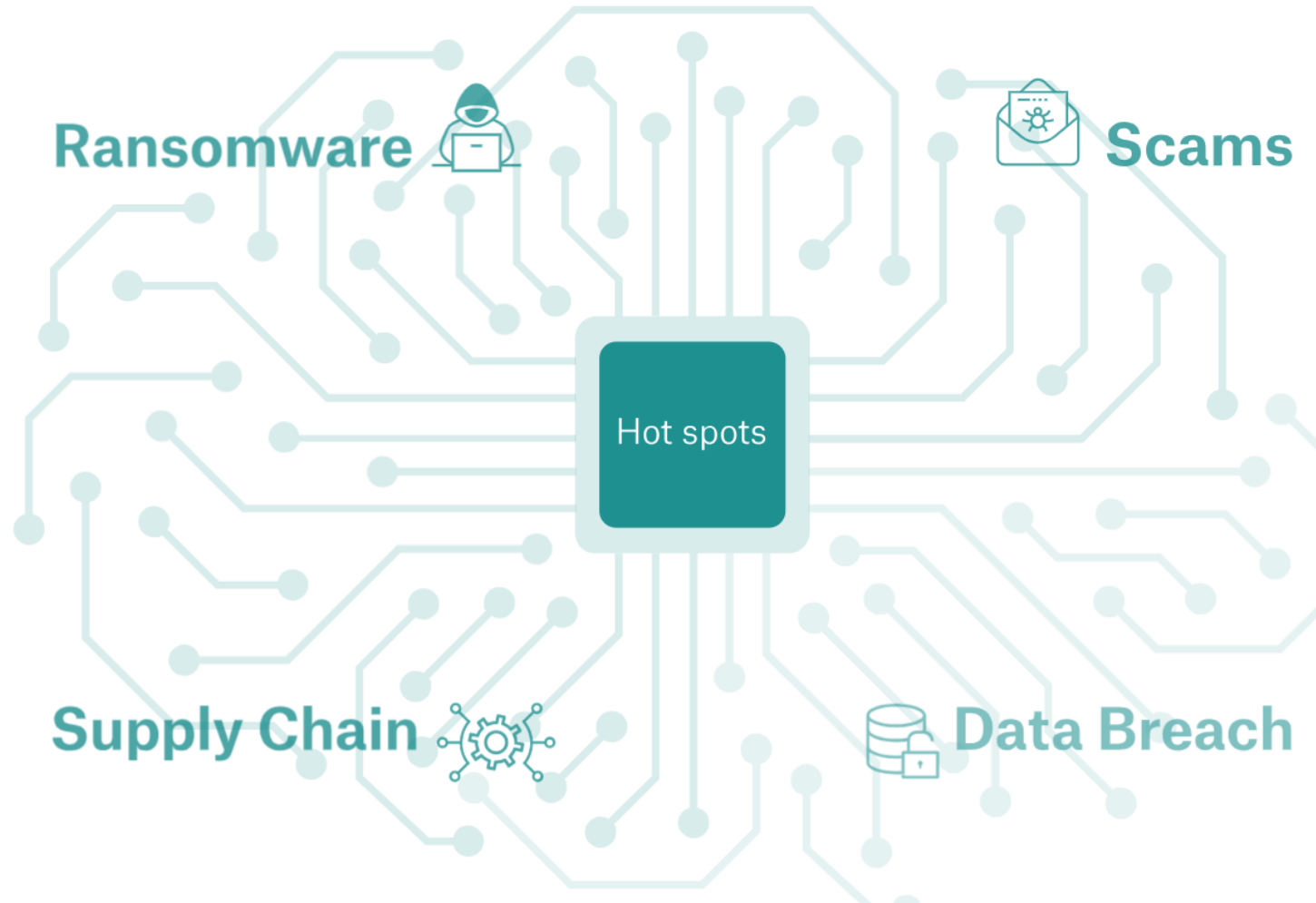
# Cyber Footprint: Understanding Your Technology/Data

- Identifying “where” your tech and data reside.
- Identifying the risks that keep you up at night.
- Translating real-world risks into insurance purchases and contract provisions that provide meaningful protection to the business.
- Selection, negotiation, and enforcement.
- Identifying gaps in protection that cannot be addressed through insurance and contractual risk transfer mechanisms so that the business can plan accordingly and consider additional means of mitigating its potential exposure.

# Square One: Evaluating Cyber Risks

- Understanding the nature, frequency, and potential severity of risks facing your organization is critical before embarking on any technology contracts and cyber insurance purchase.
- This requires a thorough risk analysis and a team effort leveraging insights from various constituencies.
- C-Suite, risk managers, technology & security personnel, brokers, and in-house/outside legal counsel all bring different insights to the table and play important roles.
- Continuing to monitoring emerging and growing risks in real time.

# Cyber Risk Landscape: Current Major Loss Drivers

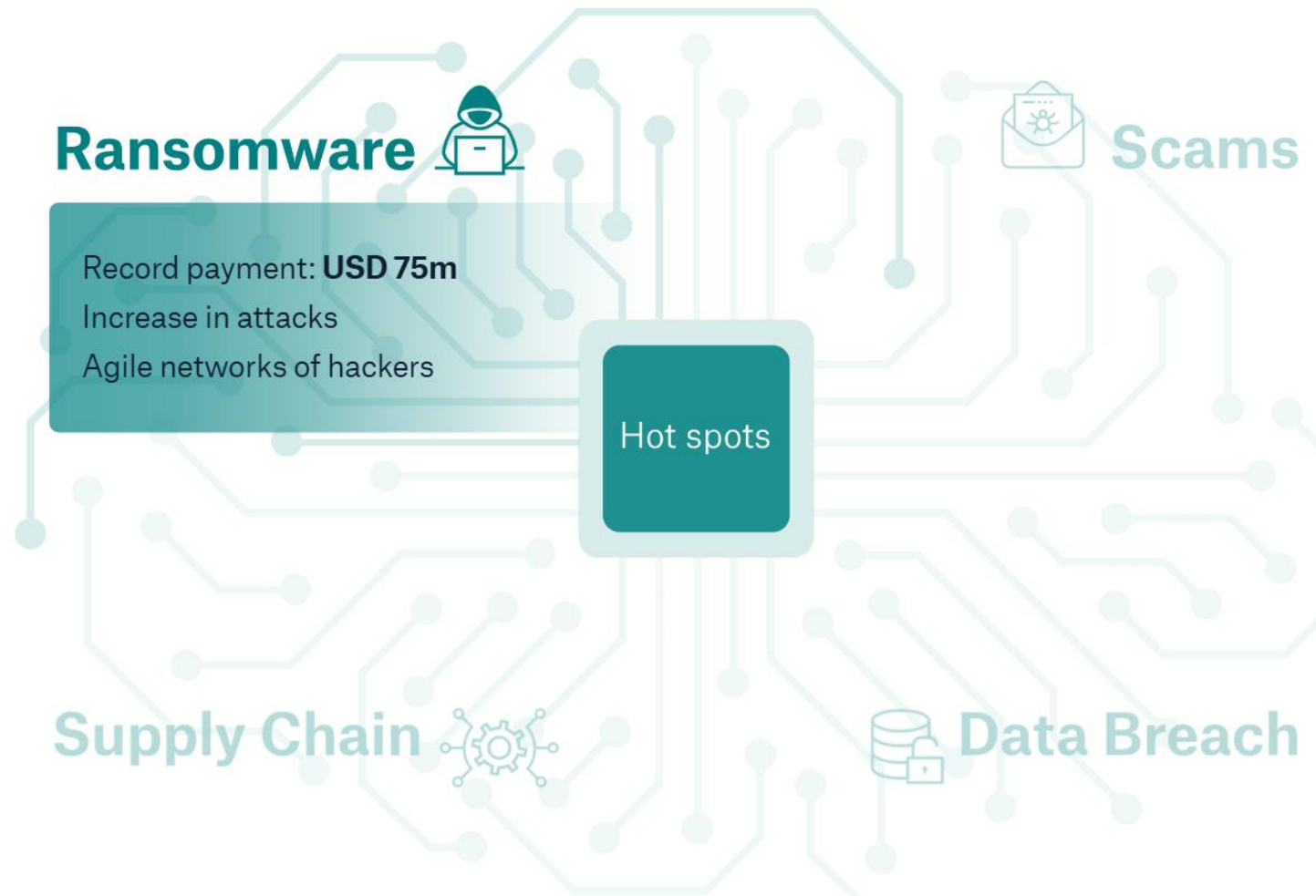


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# Cyber Risk Landscape: Current Major Loss Drivers

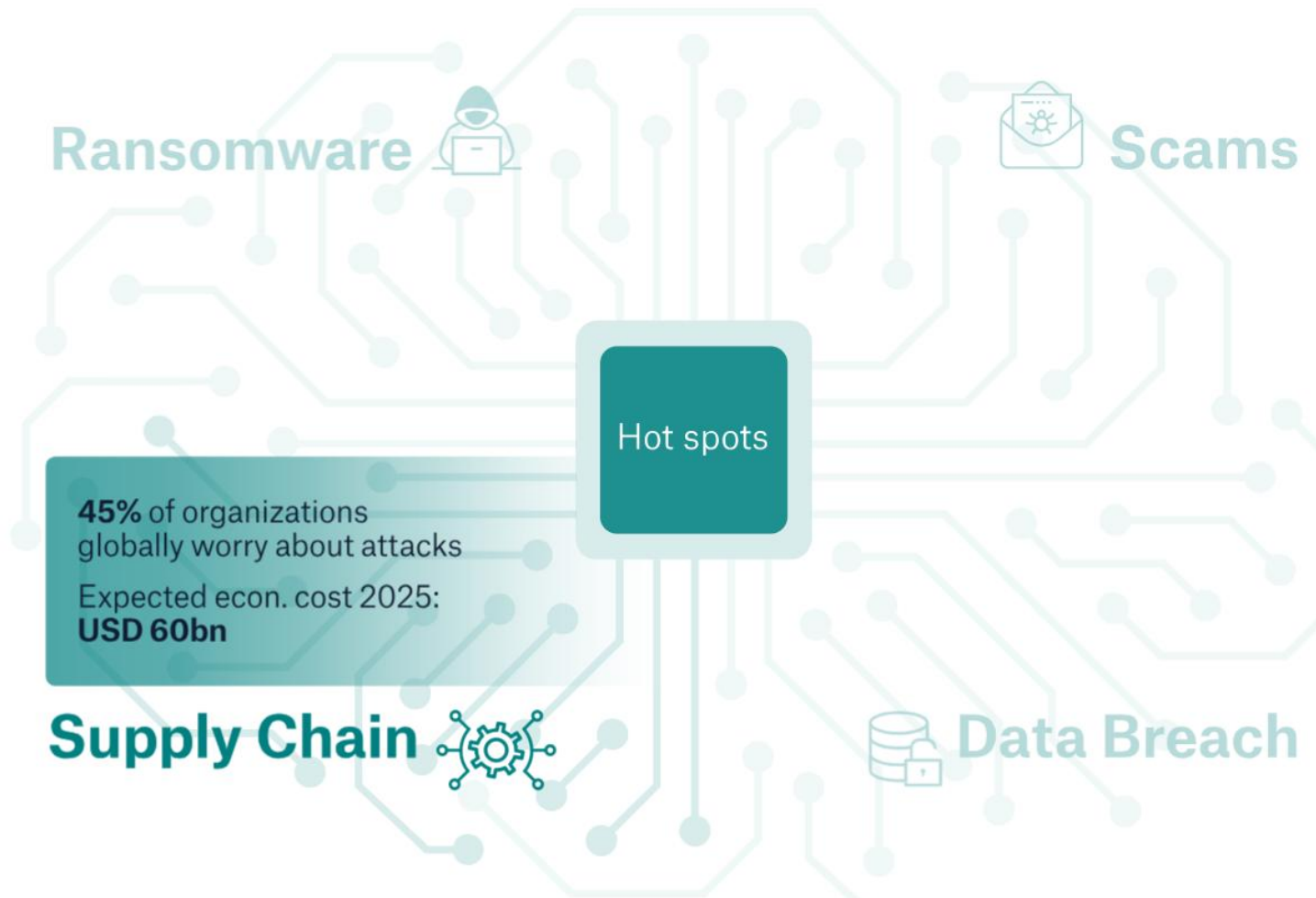


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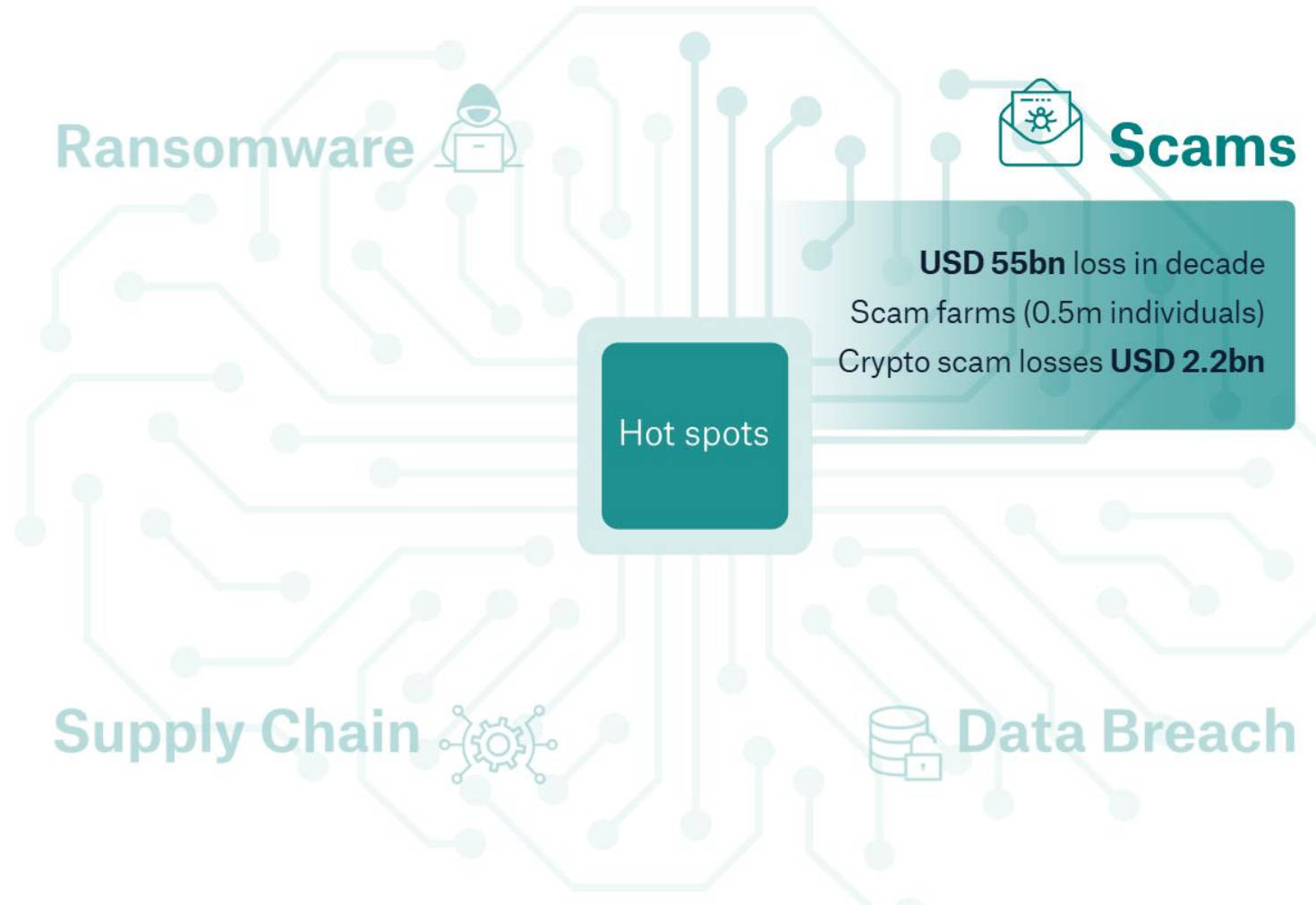
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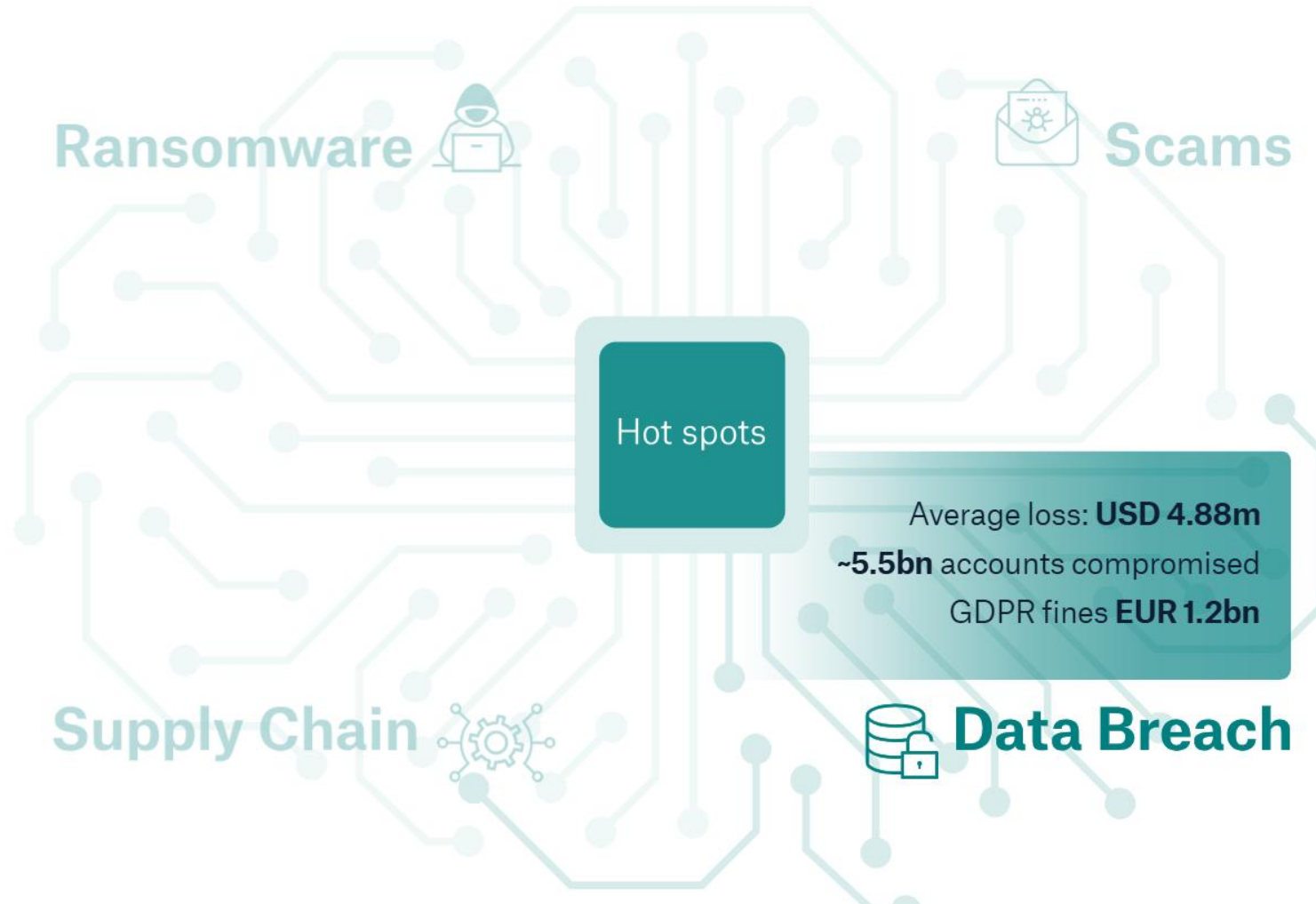
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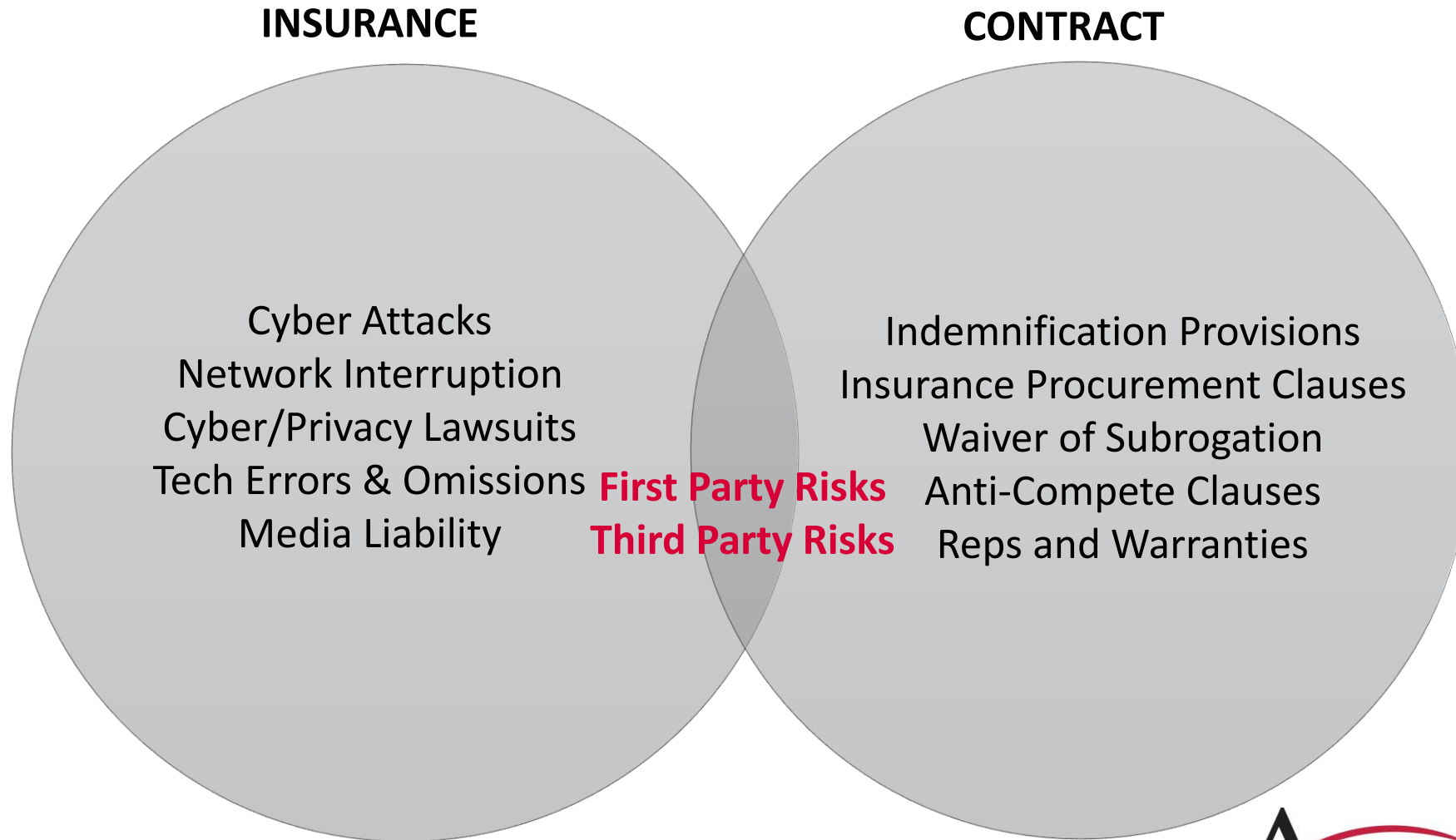


# Times When Risk is Analyzed

1. Starting/Initiating Business
2. Adding/Acquiring New Business Venture
3. Selling a Business
4. During an Annual Insurance Renewal or Risk Management Review
5. New Partnerships, Financial Relationships
6. A Loss Event Happens (To You or Someone Else)

**Takeaway:** risk is present during all business operations

# Planning for Business Risk



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# Contractual Mitigation of Liability Risks

- Indemnities and Hold Harmless Clauses
- Waivers of Liability
- Assumption of Risk
- Limitations on Damages
- Forum and Choice of Law Selection
- Insurance Requirements for Others
  - Specify the types of policies required.
  - Specify the minimum level of insurance necessary.
  - Request “additional insured” status and waiver of subrogation.
  - Request separate notice of cancellation and the option to continue the policy in the event the vendor fails to pay the necessary premiums.

# Mitigating Risks to Your Business

- Force Majeure
- Cancellation Provisions
- Delay Provisions
- Limitations on Contract Damages
- Limited Agency Agreements
- Indirect Contracting
- Priority Protection for AR and Extensions of Financing

# Cyber Risk: From An Insurance Perspective

## First-Party Insurance

- Insures against a company's direct losses and costs resulting from a covered cyber incident
- Examples:
  - Breach investigation and response costs
  - Network interruption
  - Dependent network interruption
  - Ransom payment
  - Fraudulently stolen funds



# Cyber Risk: From An Insurance Perspective

## Third-Party Liability Insurance

- Insures against third-party liability claims arising from a covered cyber incident.
- Examples:
  - Claims alleging covered privacy events
  - Claims alleging covered security failures
  - Certain regulatory fines and penalties
  - PCI DSS assessments
- Commonly includes coverage for defense costs pursuant to either a duty to defend or a duty to reimburse



# Cyber Coverages: General Types

## Cyber Insurance

- First-party losses and costs resulting from covered cyber incidents
- Third-party liabilities and defense costs resulting from covered privacy and security failure related claims

## Technology Errors & Omissions

- Third party liabilities and defense costs arising from claims alleging errors, omissions, etc. in the provision of technology related products or services.

## Media Liability

- Third party liabilities and defense costs for claims arising from content creation, distribution, and media-related activities.

## Crime Insurance

- First party losses resulting from certain computer frauds.



# Cyber Protection and Coverage: Selection & Negotiation

- For sophisticated entities with diverse risks, “off-the-shell” coverage will rarely be a perfect fit.
- Rather, “off-the-shell” policies should be viewed as merely the starting point for further evaluation and negotiations.
- Evaluate proposals and select the best options to start negotiating from based on your unique risk profile.
- Brokers can provide useful insight into the state of the market and whether more competitive terms on an issue are being offered by others.
- Coverage counsel can leverage their knowledge of insurance law and previous disputes to customize the policy language to avoid common pitfalls and improve the chances of recovery.



# Negotiation Tips

- **Multiple Levels of Negotiation.**
- Do not confuse specificity with breadth. Policy language should be broad enough to address specific concerns while flexible enough to respond to unforeseen threats.
- Never consider proposed changes in isolation. Even minor changes can have ripple effects across the policy that could lead to detrimental results. Each change should be closely scrutinized to understand the total impact on coverage.
- Review your breach response plan and internal protocols to ensure that they align with the policy's conditions for coverage (preferred vendors, verification requirements, etc.).
- Never rely on coverage “summaries” or informational certificates rather than the policy language itself.

# Avoiding Common Disputes Through Proactive Negotiation

- Do the notice requirements align with your internal processes?
- Does the defense coverage meet your needs?
- How do deductibles and the self-insured retentions apply?
- Requirements for the attachment of excess insurance?
- Does the insurance address the treatment of “mixed” claims?
- What valuation methods are used for network interruption coverage?
- The interaction between insurance and other risk transfer mechanisms?
- Key exclusions narrowly tailored? Appropriate caveats in place?
- Governing law?
- Dispute resolution?

# Enforcing Your Insurance Rights

- Fundamental Principles
  - When analyzing an insurance issue, begin with the assumption that there is coverage unless it can be unequivocally shown that there is no potential for coverage.
  - Do not blindly accept ‘conventional wisdom’ about what is and is not covered – conventional wisdom is often incorrect. The result will often turn on the facts and state law.
  - Adhere to the notice and claim submission requirements in the policy to insulate against claims of forfeiture.
  - Framing matters: Carefully consider and present the claim in a manner that maximizes coverage and/or leaves sufficient flexibility when the full extent of the facts remain unknown.

# Enforcing Your Insurance Rights

- Remember the Basic Rules of Construction:
  - Words in a policy are construed by their “ordinary and popular,” or “plain meaning,” not some technical meaning known only to insurance specialists.

*See, e.g., Buckeye State Mut. Ins. Co. v. Carfield*, 914 N.E.2d 315, 318 (Ind. Ct. App. 2009); *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990)

- If the words are reasonably susceptible of more than one meaning, they are ambiguous and must be construed in favor of coverage.

*See, e.g., Mega Life & Health Ins. Co. v. Pieniozek*, 585 F.3d 1399, 1406 (11th Cir. 2009); *Int’l Bus. Machs. Corp. v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 424 (2d Cir. 2002)

# Enforcing Your Insurance Rights

- Remember the Basic Rules of Construction:
  - A policyholder does not have to show that its interpretation is the only permissible one, or the best one, only that its interpretation is a reasonable one.

*See, e.g., Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984);  
*Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 153 (Minn. Ct. App. 2001)

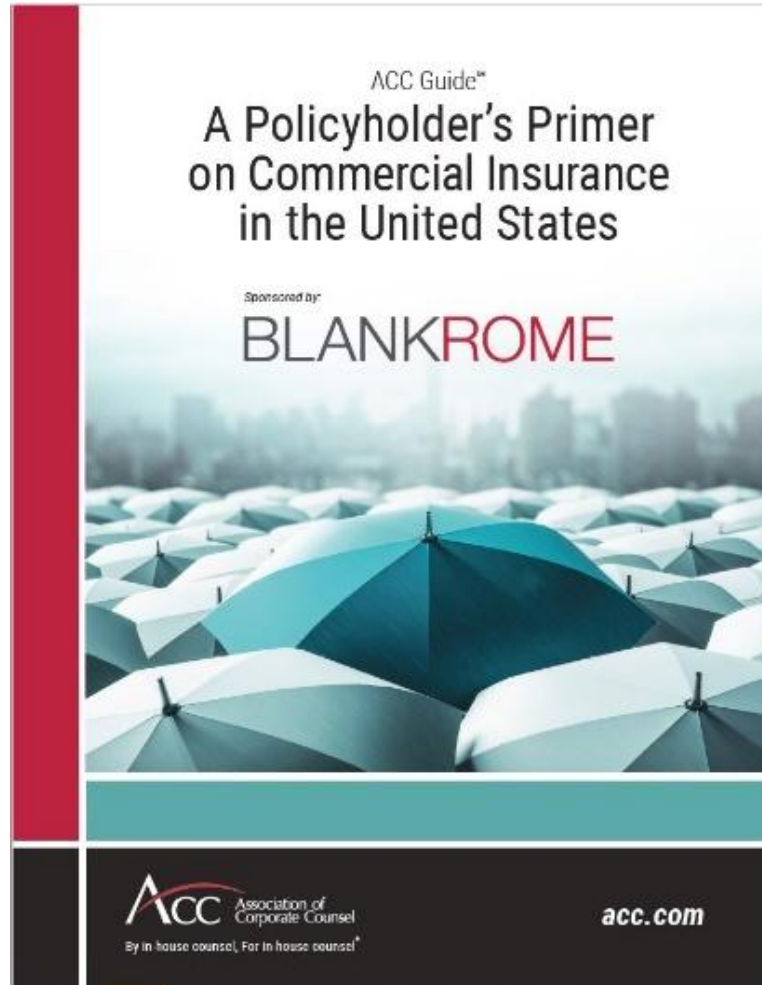
- The insurance should be interpreted to give the insurance policy and risk transfer real meaning.

*See, e.g., USAA Cas. Ins. Co. v. Carr*, 225 A.3d 357 (Del. 2020)

# Document Your Claim

- Require the insurer to investigate and to explain its analysis to you.
- Push back on delays, denials, and on incomplete or incorrect analysis by the insurer.
- Document your claim in formal written correspondence with the insurers. Do not rely on oral communications.

# ACC Guide: A Policyholder's Primer on Commercial Insurance



*Scan code below to download the Blank Rome Insurance Primer from the ACC website:*



**QUESTIONS?**

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# PANELISTS

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Carnot is Vice President and Senior Legal Counsel at Marriott International, where he advises on all manner of technology issues, including risks related to technology implementation, procurement, vendor management, and contract issues, including those related to data privacy and cybersecurity. He brings a crucial in-house perspective on the practical challenges and strategies for ensuring adequate protection of corporate assets, whether through contracts, insurance or otherwise.



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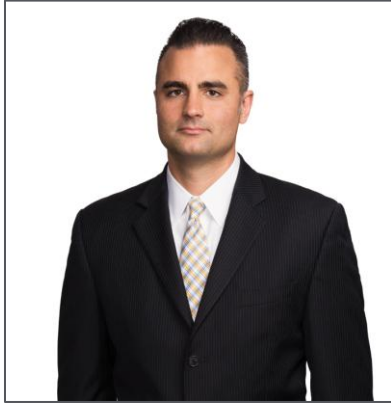
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John is a partner and Co-Chair of Blank Rome's national policyholder-only Insurance Recovery practice. His practice focuses on advising corporate policyholders about their insurance policy rights and recovery insurance assets, either through negotiation or trial. With 25 years of experience, he maintains an active national trial practice, and in the past decade has, through negotiations, litigation, and trial verdicts, enforced clients' rights to more than \$3 billion worth of insurance. John is the principal author and editor of the Association of Corporate Counsel's *A Policyholder's Primer on Commercial Insurance in the United States*.



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Omid is a Chambers-ranked Insurance Recovery practice partner at Blank Rome, focusing on all aspects of insurance coverage, including cyber insurance. Named “Insurance Litigator of the Year” by Benchmark Litigation, he has also been recognized by *Washington Business Journal*, *Law360*, and *National Law Journal*. Omid has successfully represented policyholders in a broad range of disputes across the United States. In the last five years alone, Omid has helped clients secure insurance recoveries and judgments worth nearly \$500 million.



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Deborah serves as the US Cyber & Technology Claims Leader at Lockton Companies, a global professional services firm. Her deep industry knowledge provides a valuable perspective on the nuances of cyber insurance claims, and the key points companies need to understand to effectively mitigate risk.

