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CYBER SECURITY IN THE BUSINESS & CORPORATE LANDSCAPE

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CYBER & SOCIAL ENGINEERING RISKS

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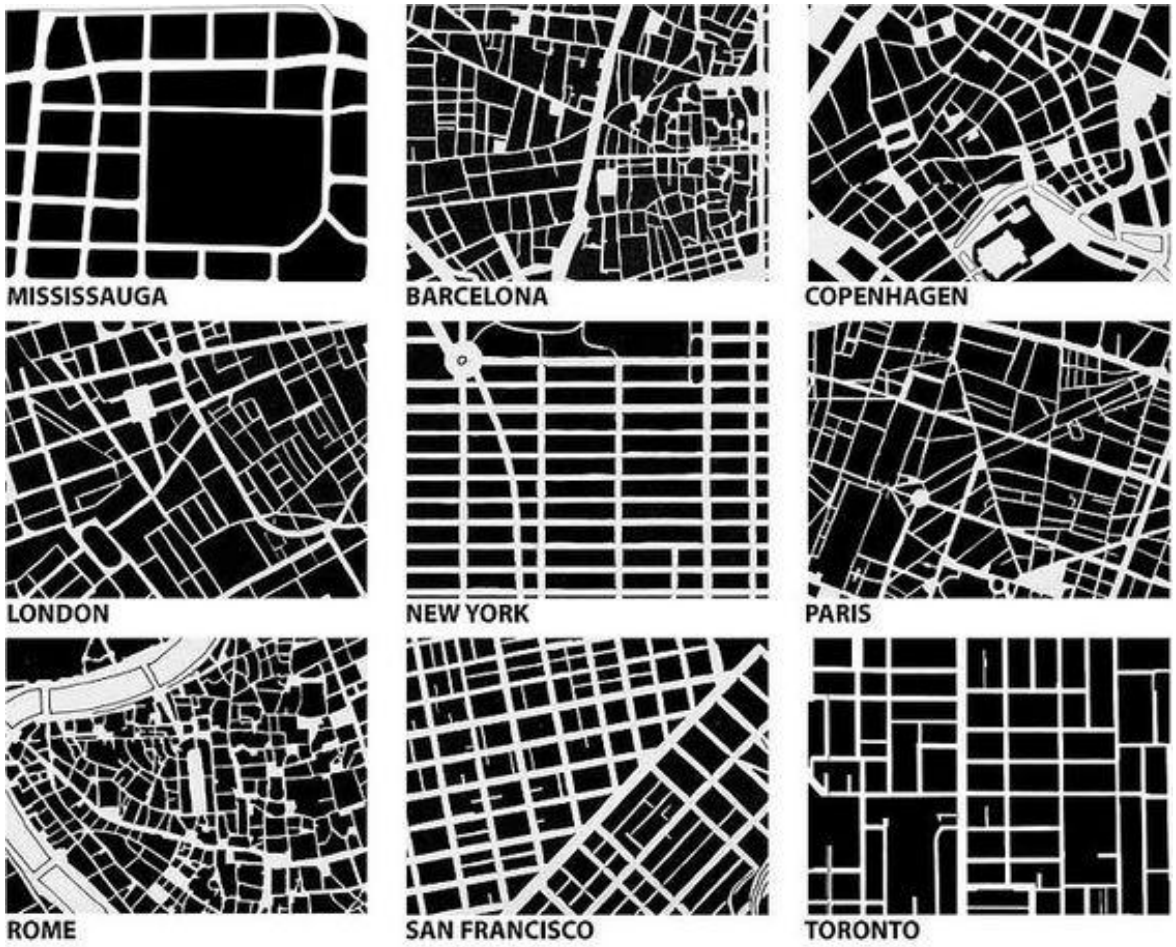
INSURING CYBER RISKS: COVERAGE EXPLAINED BY HISTORY, NOT BY PLAN



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OVERVIEW

- **Cyber Risks**
  - Cases Construing Cyber Policies
  - Cases Construing Coverage under Other Lines
- **Social Engineering Fraud**

CYBER RISKS: RISKS TO COMPUTER NETWORKS

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WHAT IS A CYBER RISK?

- **Cyber Attacks: Viruses, DoS or DDoS attacks, Malware, Botnets (a/k/a zombie army)**
  - Examples: Sony, Github
  - Ransomware
- **Data Breaches: Exposing Private Information, inadvertently or as a result of hackers**
  - Examples: Target, Home Depot
- **Internet of Things: Cyber Risks of Bodily Injury or Property Damage**

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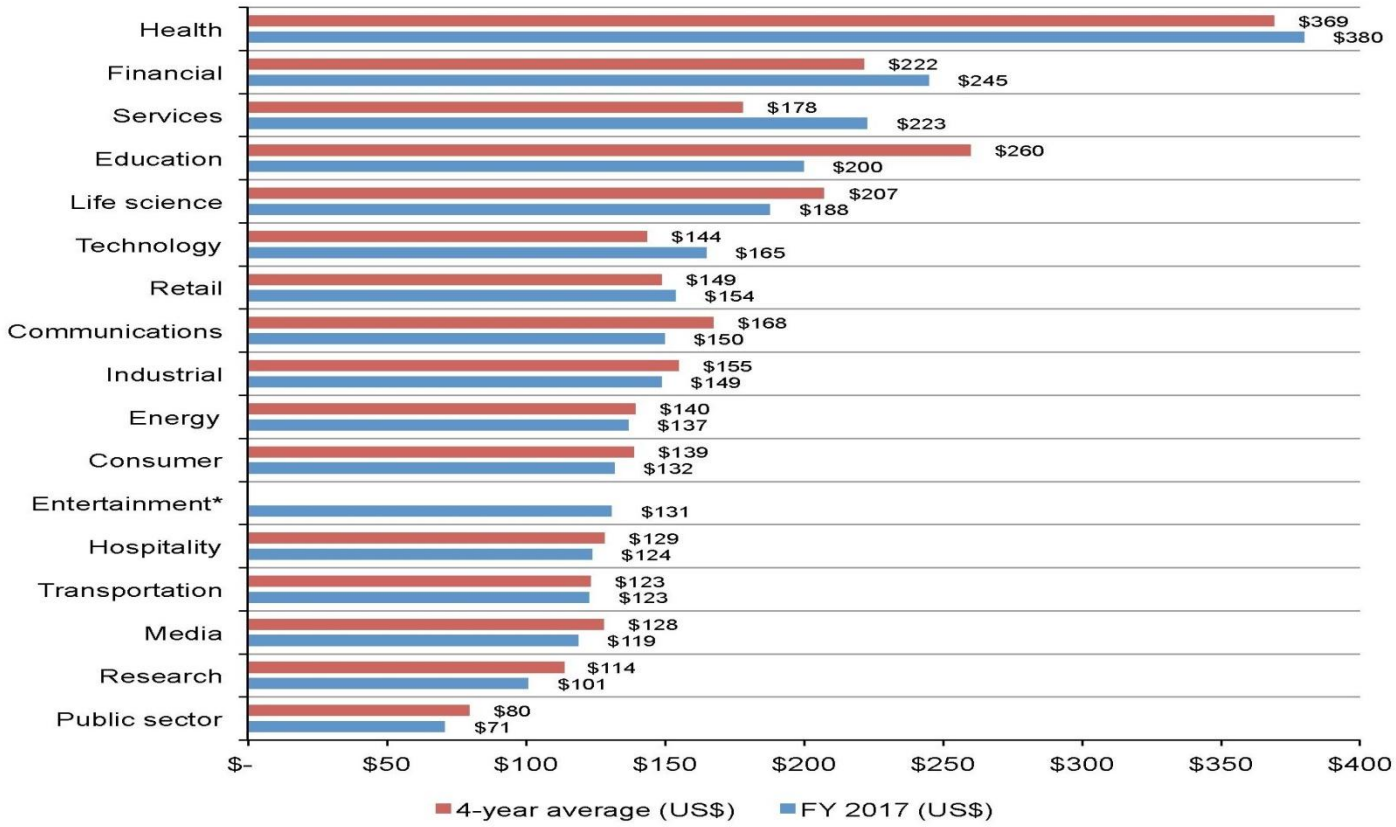
Figure 5. Per capita cost by industry classification
*Historical data are not available for all years
Measured in US$



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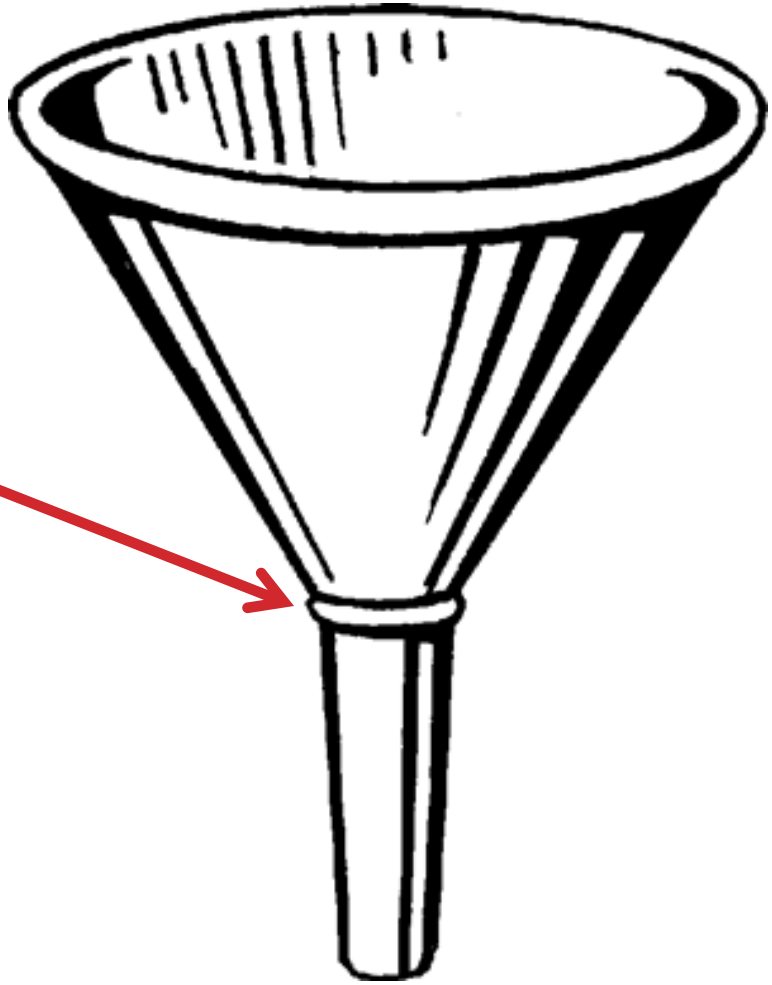
CGL Policies

Exclusion P



Other Lines

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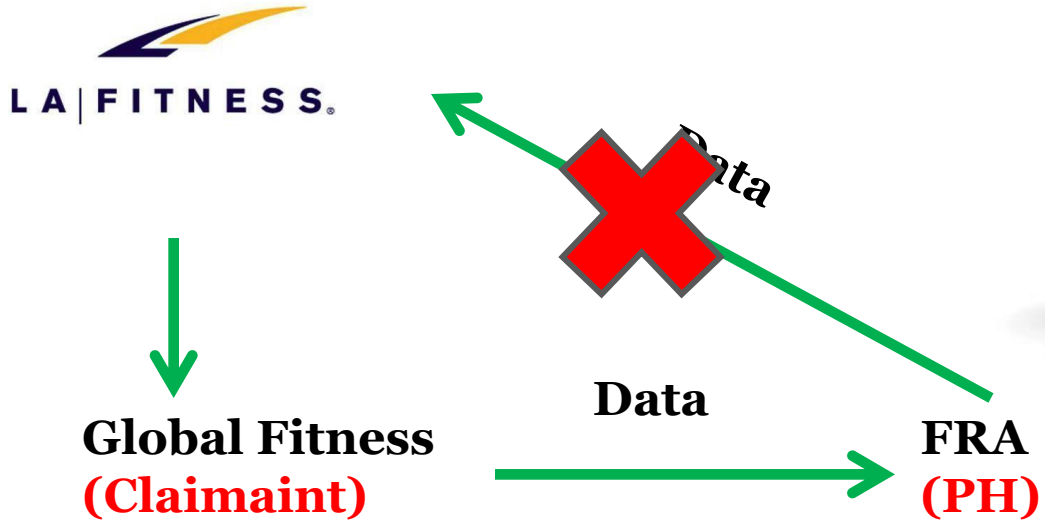
The Data Hostage

Travelers Prop. Cas. Co. of Am. v. Fed. Recovery Servs., Inc., 103 F.Supp.3d 1297 (D. Utah 2015)



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The Data Hostage (Cont.)

Travelers Prop. Cas. Co. of Am. v. Fed. Recovery Servs., Inc., 103 F.Supp.3d 1297 (D. Utah 2015)

- **Policy: Travelers' CyberFirst Policy**
- **E&O Coverage: "errors and omissions wrongful act" defined as any "error, omission or negligent act"**
- **Duty to Defend?**
  - FRA argued, yes, since it was possible that the allegations that FRA 'withheld' data was broad enough to encompass possible error, omission, or negligent act.
- **Court held: No**
  - While acknowledging that "a duty to defend remains until any uncertainty has been resolved," the court held that the underlying action presented "no such uncertainty."
  - Court pointed out that there were not alternative causes of action pleaded against FRA. None sounded in negligence.
  - Different result under Ohio law.

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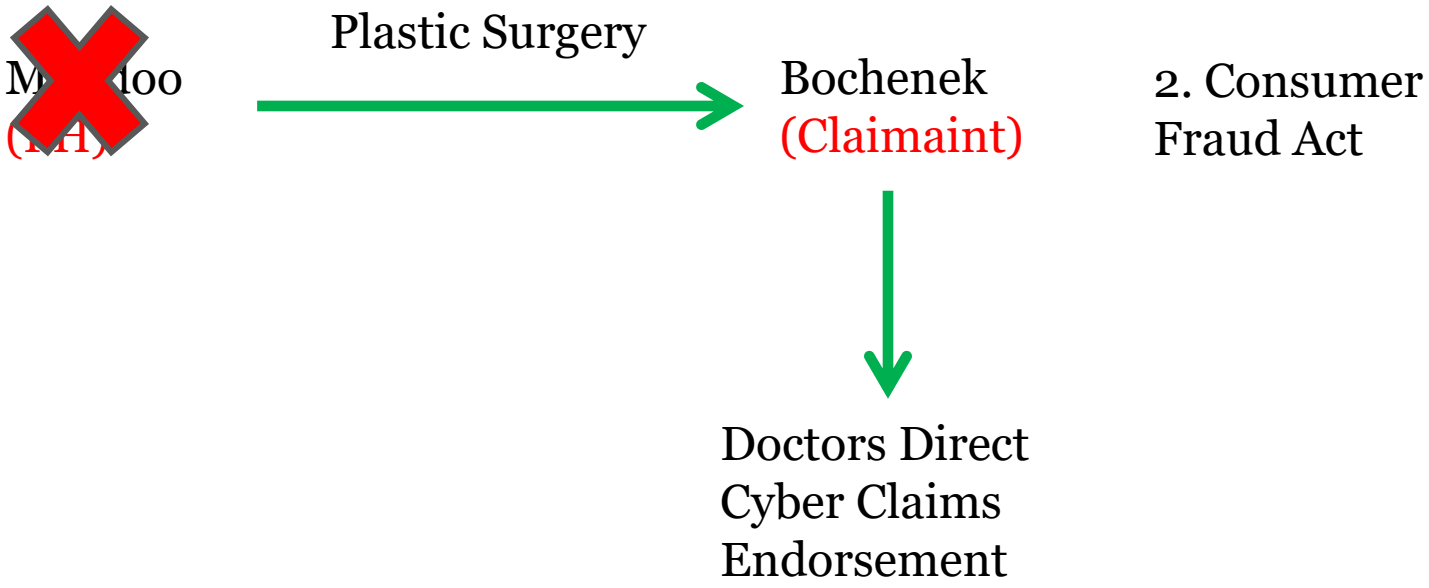
The Analog Statutes

Doctors Direct Ins., Inc. v. Bochenek, 38 N.E.3d 116 (Ill. App. Ct. 2015)



1. TCPA

2. Consumer Fraud Act

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The Analog Statutes (Cont.)

Doctors Direct Ins., Inc. v. Bochenek, 38 N.E.3d 116 (Ill. App. Ct. 2015)

- **"Privacy Wrongful Act"**
- **Any breach or violation**
- **of U.S. Federal, state, or local statutes and regulations**
- **associated with the control and use of personally identifiable financial, credit or medical information ….**

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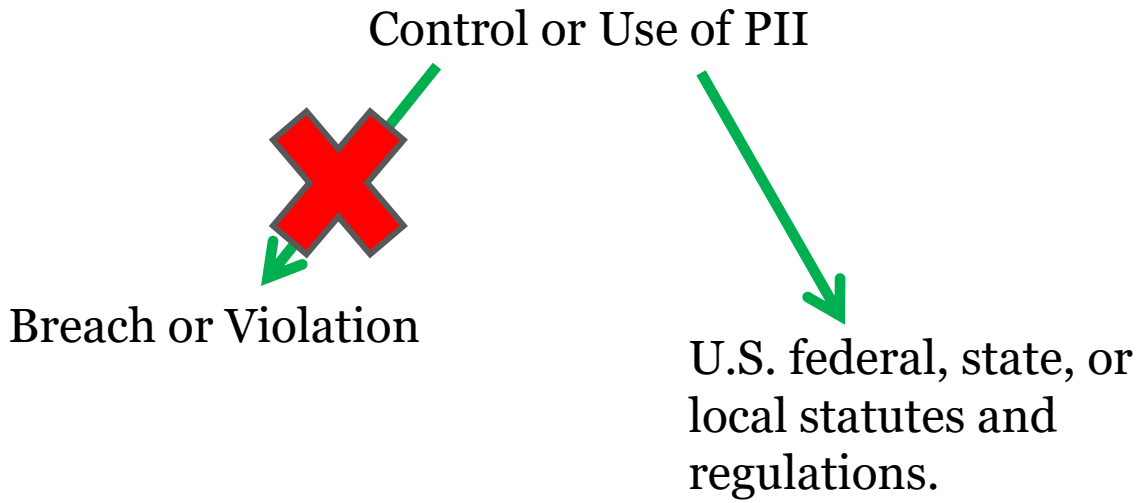
The Analog Statutes (Cont.)

Doctors Direct Ins., Inc. v. Bochenek, 38 N.E.3d 116 (Ill. App. Ct. 2015)



Last Antecedent Rule:
A qualifying phrase is confined to the last antecedent unless there is something in the instrument that requires a different construction.

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The Analog Statutes (Cont.)

Doctors Direct Ins., Inc. v. Bochenek, 38 N.E.3d 116 (Ill. App. Ct. 2015)

I once shot an elephant wearing my pajamas.

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The Analog Statutes (Cont.)

Doctors Direct Ins., Inc. v. Bochenek, 38 N.E.3d 116 (Ill. App. Ct. 2015)

- **TCPA: Not related to PII**
- **Consumer Fraud Act: Not related to PII**
- **Personal Information Protection Act**
  - Violating this act is a violation of the CFA
  - But the federal complaints do not allege PII covered by PIPA.
  - So no allegation of a claim under CFA that would be covered by Doctors Direct Policy
- **This is internally inconsistent.**
  - If "Control or Use of PII" applies *only* to last antecedent, then it shouldn't matter *how* the statute is violated.
  - But, here, they look at the *way* it was violated, totally undermining the last antecedent rule.

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The Bare Minimum

Columbia Cas. Co. v. Cottage Health Sys., No. 2:15-cv-03432 (C.D. Cal. filed May 7, 2015)

- **Underlying Complaint:** Alleges that between October 8, 2013, and December 2, 2013, confidential medical records of ~32,500 of Cottage Hospitals' patients were disclosed on the internet.
- **Why?** Because they stored medical records on a system that was fully accessible to the internet but failed to install encryption or take other security measure to protect PII from being available on the internet.
- **No, really, why?** The File Transfer Protocol Settings on Cottage's internet servers permitted anonymous user access with a simple Google search. This was the result of Cottage's failure to replace factory default settings.

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The Bare Minimum

Columbia Cas. Co. v. Cottage Health Sys., No. 2:15-cv-03432 (C.D. Cal. filed May 7, 2015)

- **Policy:** NetProtect360
- **Application:** "Risk Control Self Assessment"
  - Do you check for security patches to your systems at least weekly and implement them within 30 days? YES
  - Do you replace factory default settings to ensure your information security systems are securely configured? YES

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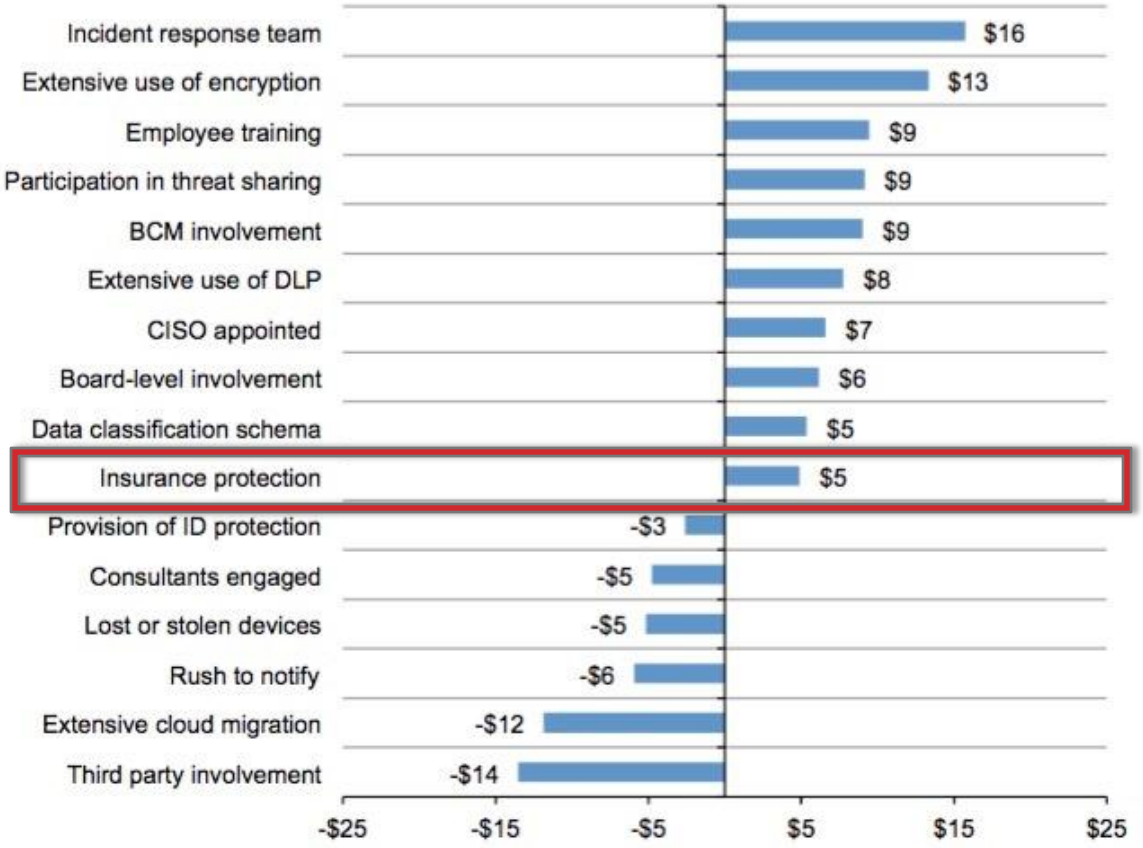
The Bare Minimum (Cont.)

Columbia Cas. Co. v. Cottage Health Sys., No. 2:15-cv-03432 (C.D. Cal. filed May 7, 2015)

Figure 8. Impact of 16 factors on the per capita cost of data breach
Consolidated view (n=383), measured in US$



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The Bare Minimum

Columbia Cas. Co. v. Cottage Health Sys., No. 2:15-cv-03432 (C.D. Cal. filed May 7, 2015)

- **Failure to Follow Minimum Required Practices**
- Based upon, directly or indirectly arising out of, or in any way involving:
  - Any failure of an Insured to continuously implement the procedures and risk controls identified in the Insured's application for this Insurance and all related information submitted to the Insurer in conjunction with such application whether orally or in writing; …
- **Case was sent to Arbitration**
- **Analogy to Protective Safeguards Endorsement Breaks Down**
  - Too many points of potential human error in system to prevent cyber breaches

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The Indemnitor

Pf Chang's China Bistro, Inc. v. Federal Ins. Co., No. CV-15-01322, 2016 WL 3055111 (D. Ariz. May 31, 2016)

60K Credit Card Numbers

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The Indemnitor (Cont.)

Pf Chang's China Bistro, Inc. v. Federal Ins. Co., No. CV-15-01322, 2016 WL 3055111 (D. Ariz. May 31, 2016)

- **$1.7 Million pursuant to the Policy for costs incurred as a result of the security compromise.**
- **Additional $1.7 Million Account Data Compromise Operational Reimbursement**
- **Exclusion:** Bar coverage for contractual obligations an insured assumes with a third-party.
  - "Does not apply to the extent that an insured would have been liable in the absence of the contract or agreement."
- **The Court:** No evidence that PF Chang's would have been liable for these Assessments absent its agreement with BAMS. So, no coverage.

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Key Takeaways from the Case law to date

- **If it doesn't fit, the judge will quit … reading the policy**
  - In those cases that don't quite fit the picture of a regular data breach or hack, judges have been straining to find no coverage. (Data Hostage; Analog Statutes)
- **An ounce of prevention is worth millions in coverage**
  - Negotiate out PSE (The Bare Minimum)
  - Include an "Insured Contract" Exception to Exclusion for Contractual Liability (the Indemnitor)

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