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Advanced Issues in Insurance Coverage

*Cyber Insurance-
Cyber Risks: The Oldest New Thing*

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Cyber Risks: The Oldest New Thing

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Brouse McDowell



A Legal Professional Association

A brief history of new bad things happening ...

Era ...	Bad Thing ...
 <p data-bbox="645 541 774 558">You hunter gatherer?</p>	
	
	

THE TECHNOLOGICAL AGE





cybermap.kaspersky.com

Figure 4. The average total cost of a data breach by country or region

Measured in US\$ millions



The average total cost for all samples was \$3.86 million compared to an average of \$3.62 million last year.



Organizations in the United States had the highest total average cost at \$7.91 million, followed by the Middle East at \$5.31 million.

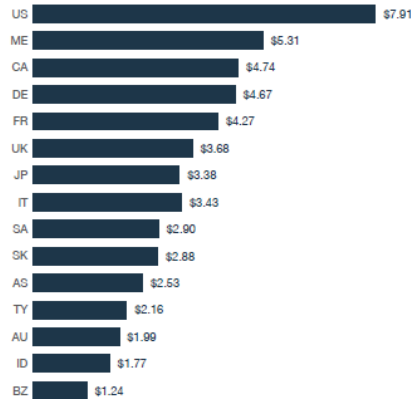


Indian and Brazilian organizations had the lowest total average cost at \$1.77 million and \$1.24 million, respectively.

Global averages



By country or region



\$0.00 \$1.00 \$2.00 \$3.00 \$4.00 \$5.00 \$6.00 \$7.00 \$8.00







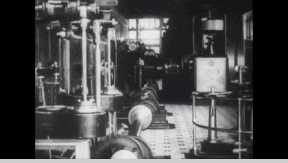




Root causes

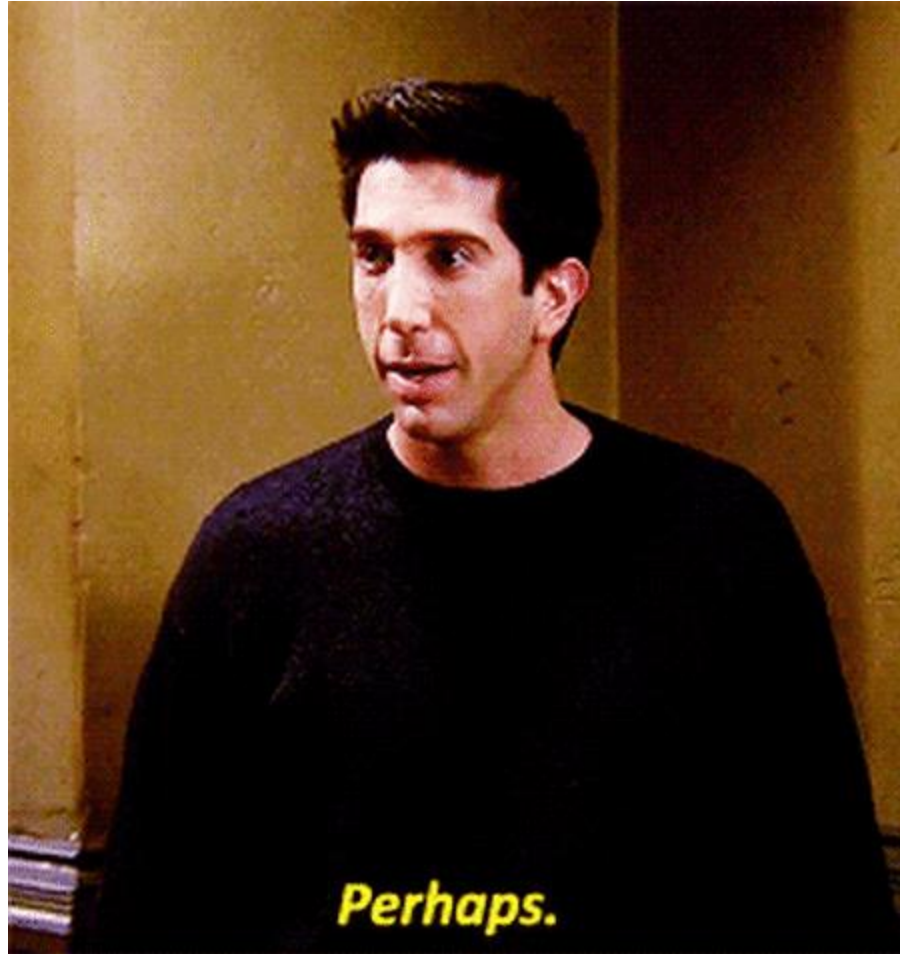
Malicious or criminal attacks cause the most data breaches¹⁰. Figure 8 provides a summary of the main root causes of data breaches on a consolidated basis for organizations in all countries. 48 percent of incidents involved a malicious or criminal attack, 27 percent were due to negligent employees or contractors (human factor) and 25 percent involved system glitches, including both IT and business process failures¹¹.

Figure 8. Distribution of the benchmark sample by root cause of the data breach



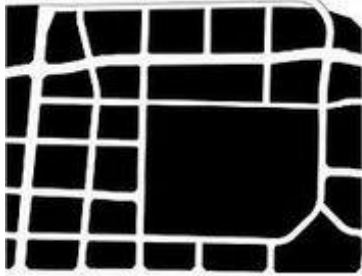
Can I insure It ... Through the Ages!

Era ...	Bad Thing ...	Insurable?
		
		
		
		



THINGS THAT ARE IMPORTANT

1. Market is still developing



MISSISSAUGA



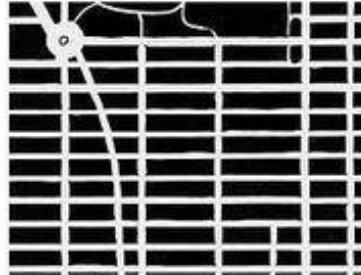
BARCELONA



COPENHAGEN



LONDON



NEW YORK



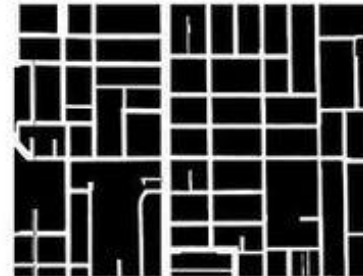
PARIS



ROME



SAN FRANCISCO



TORONTO

THINGS THAT ARE IMPORTANT

1. Market is still developing
2. Courts Avoid Overreach

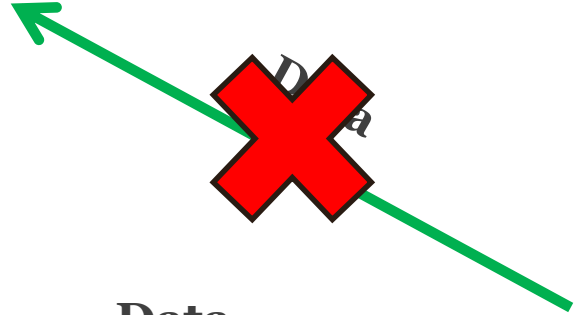
The Data Hostage

Travelers Prop. Cas. Co. of Am. v. Fed. Recovery Servs., Inc., 103 F.Supp.2d 1297 (D.Utah 2015)


LA | FITNESS.



**Global Fitness
(Claimaint)**



Data

**FRA
(PH)**



The Data Hostage

- ❑ 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.

The Analog Statutes

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



Texts re:
Plastic Surgery



Bochenek
(Claimant)



Doctors Direct
Cyber Claims
Endorsement

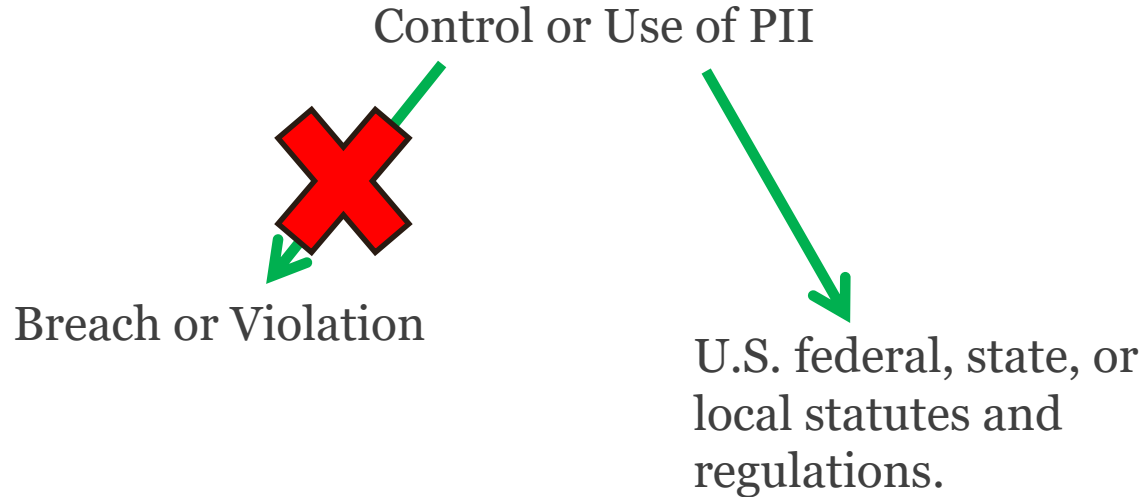
1. TCPA

2. Consumer
Fraud Act

The Analog Statutes

- ❑ “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

The Analog Statutes



Last Antecedent Rule:

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

The Analog Statutes

- ❑ I once shot an elephant wearing my pajamas.



The Analog Statutes

- 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.

THINGS THAT ARE IMPORTANT

1. Market is still developing
2. Courts Avoid Overreach
3. Review Exclusions

Failure to Follow Minimum Required Practices

- ❑ *Columbia Casualty Co. v. Cottage Health System*, No. 2:15-cv-03432 (C.D.Ca.)
 - **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.



Failure to Follow Minimum Required Practices

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**

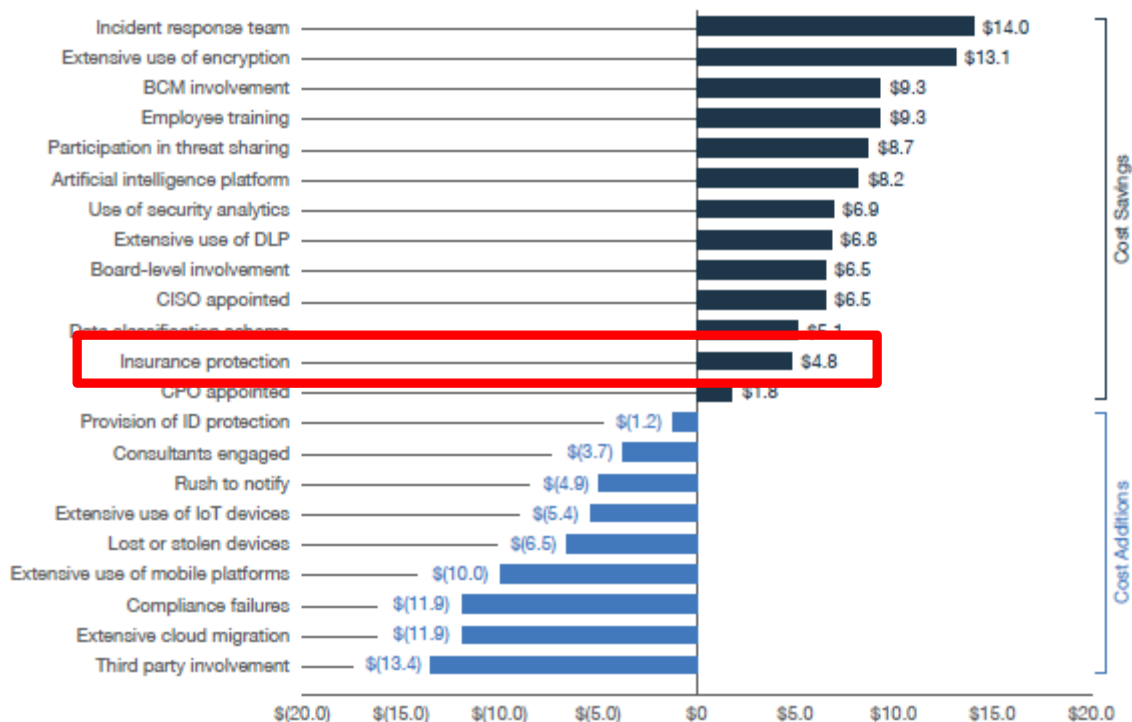


Factors that influence the cost of a data breach

Certain factors decrease or increase the cost of a data breach. Figure 12 provides a list of 22 factors that increase or decrease the per capita cost of a data breach.

Figure 12. Impact of 22 factors on the per capita cost of data breach

Measured in US\$



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; ...



Insured Contract Exclusion

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



60K Credit Card
Numbers

Insured Contract Exclusion

- ❑ 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.”



THINGS THAT ARE IMPORTANT

1. Market is still developing
2. Courts Avoid Overreach
3. Review Exclusions
4. Review Limits

The ATM Limit

Nat'l Bank of Blacksburg v. Everest Nat'l Ins. Co., No. 7:18CV310 (W.D.Va.)



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4. Review Limits