



CYBER RISK AND INSURANCE ISSUES

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Holland & Hart LLP

Alaska Colorado Idaho Montana Nevada
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CYBER NIGHTMARE

\$225 per record

Cost of data breach sets new record high at an average cost of \$225 per compromised record.

\$380 health care
\$336 financial

Certain industries have higher costs such as health care (\$380/record) and financial services (\$336/record) than average.

\$7.35 million

Total average organizational cost of data breach is \$7.35 million.

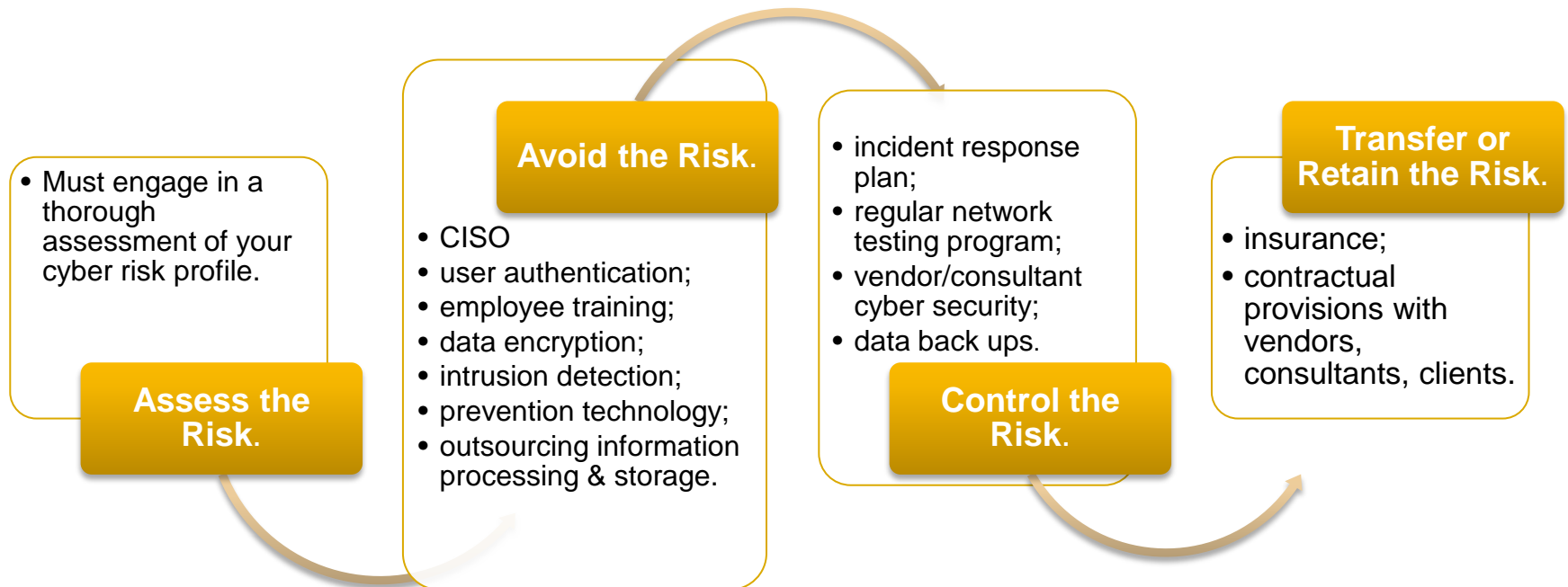
52% criminal

52% of data breaches are criminal, 24% involve negligent employees and 24% involve system glitches.

\$1B to \$2B

Ransomware costs doubled between 2016 (\$1B globally) and 2017 (\$2B globally).

CYBER RISK MANAGEMENT



Personal and Advertising Injury (Coverage B)

- An oral or written publication, in any manner, of material that violates a person’s right of privacy.
- Data breach involving personal information = personal injury potentially covered under B, but insurers argue no “publication.”

Coverage B does not provide

- First-party coverage, e.g. forensic investigations, data restoration, customer notification, credit monitoring; or regulatory penalties.

2014 Data Breach exclusion

Cyber insurance is a new product

No ISO form so it's complicated

Rapidly changing

Coverage can differ dramatically from one insurer to another

First-party coverage

Forensics and losses to policyholder's own data

Lost income and other harm to the policyholder's business resulting from breach

Pre-approval or use of insurer's service providers often required

Third-party coverage

Policyholder's liability to third parties arising from a data breach or cyber attack

FIRST-PARTY COVERAGE

Notification

- Covers expense of identifying and notifying victims; call centers; credit monitoring.

Forensic investigation

- Covers technical and legal services to identify, assess and stop an attack.

Computer Fraud

- Reimburses for losses due to breach of insured's computer system by a non-employee resulting in a disbursement of funds, property, etc.

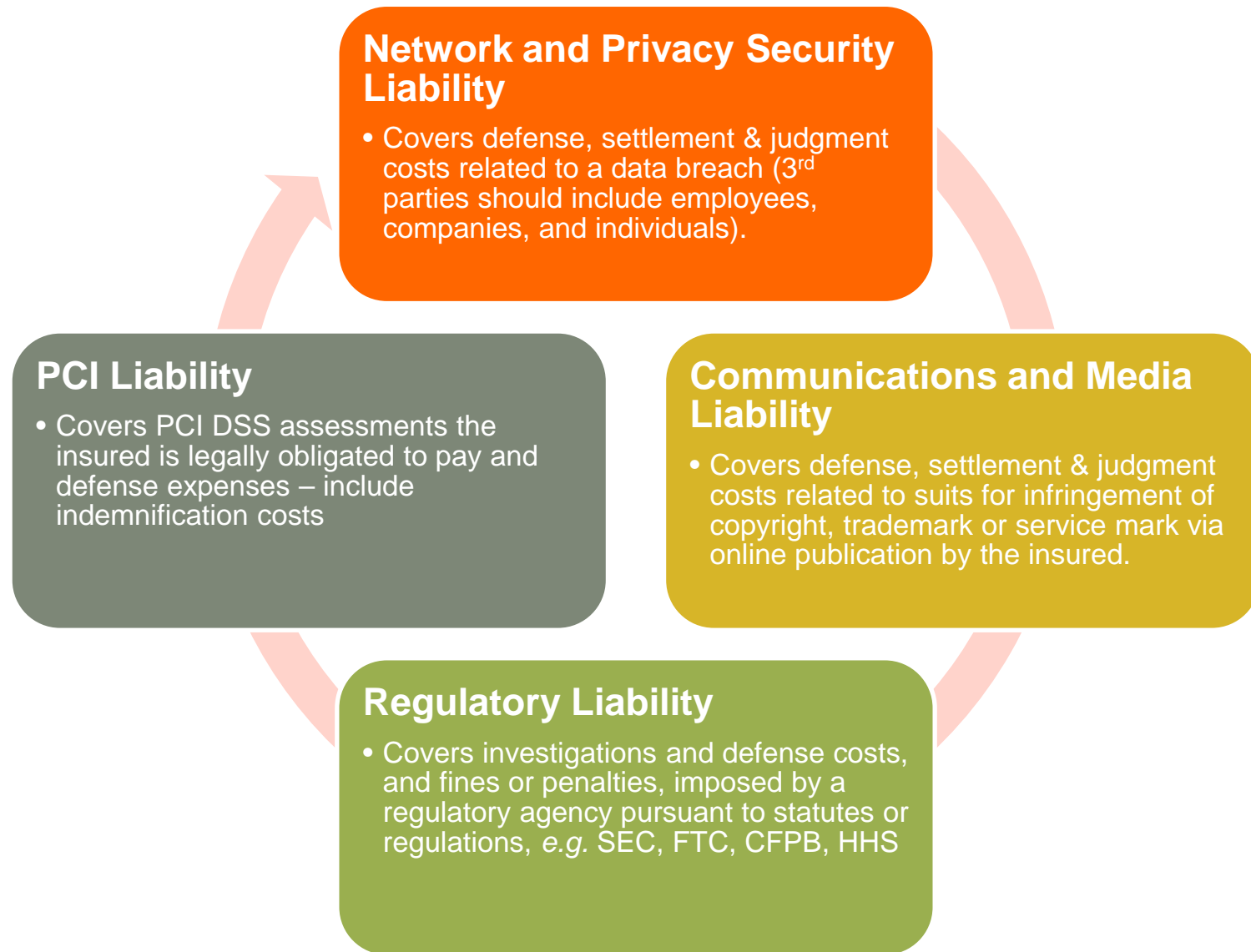
Funds Transfer Fraud

- Reimburses for losses due to fraudulent instructions transmitted via computer to a bank purportedly by the insured directing a transfer of funds from the insured's account.

FIRST-PARTY COVERAGE, CONT'D.

Business Interruption	<ul style="list-style-type: none">• Covers lost income and extra expenses due to an interruption in business resulting from a cyber event or data loss.
Extortion	<ul style="list-style-type: none">• Covers costs to respond to threatened cyber attacks against the insured's systems and for payments to extortionists.
Computer Data Restoration	<ul style="list-style-type: none">• Covers costs to replace, recreate or restore electronic data and computer software to pre-breach condition.
Crisis Management	<ul style="list-style-type: none">• Covers public relations expenses.
Cyber Terrorism	<ul style="list-style-type: none">• Covers income loss, business interruption expenses and forensic costs resulting from an act of terrorism.

THIRD-PARTY COVERAGE



SECURITY AND PRIVACY LIABILITY COVERAGE (8 defined terms)

Subject to the limits of liability specified in Section IV of this **endorsement**, MIEC will pay

- 1. **Damages** which **you** become legally obligated to pay
- 2. **Defense costs**,
- resulting from a **claim** for an actual or alleged **security and privacy wrongful act**, provided that
 - 1. Such **claim** is first made against **you** during the **policy period**
 - 2. **You** report such **claim** in writing to MIEC during the **policy period**
 - 3. The **security and privacy wrongful act** occurs on or after the **retroactive date**

THE INSURANCE PROVISIONS LOOK SIMPLE BUT ARE COMPLICATED

Definitions are not straightforward

SECURITY AND PRIVACY LIABILITY COVERAGE

- 8 defined terms

Damages (one of the 8 terms)

- 2 defined Damage terms
- 10 items **Damages** do not include

Damage Terms (2 defined)

- Multimedia Liability
- Security and Privacy

Damage Terms (10 excluded)

- Taxes
- 3rd party payments
- Amounts owed under contract
- Your future profits
- Punitive, liquidated, or exemplary damages
- Fines, Sanctions, Penalties
- Items Uninsurable under Applicable Law
- Costs to comply
- Financial advantage
- Settlements

THE DEFINITIONS ARE COMPLICATED

Definitions are not straightforward

SECURITY AND PRIVACY LIABILITY COVERAGE

- Contains 8 defined terms
- Security and privacy wrongful act (contains 13 defined terms)

Security and privacy wrongful act (one of the 8 defined terms)

- Contains 13 defined terms

Security Breach (one of the 13 Security and privacy wrongful act terms)

(1) **Unauthorized access** to, or **unauthorized use** of, an **insured computer system**, including **unauthorized access** or **unauthorized use** resulting from the theft of a password from an **insured computer system** or from any **insured**;

(2) A **denial of service attack** against an **insured computer system**; or

(3) Infection of an **insured computer system** by **malicious code** or the transmission of **malicious code** from an **insured computer system**,

whether any of the foregoing is a specifically targeted attack or a generally distributed attack. A series of continuing **security breaches**, related or repeated **security breaches**, or multiple **security breaches** resulting from a continuing failure of computer security will be considered a single **security breach** and will be deemed to have occurred when the first of such **security breaches** occurred.

BPO service provider (one of the 13 Security and privacy wrongful act terms)

- **BPO service provider** means any third party independent contractor that provides business process outsourcing services for **your** benefit under a written contract with **you**, including, but not limited to, call center services, fulfillment services, and logistical support.
- **Independent Contractor**

RED FLAG EXCLUSIONS OR CONDITIONS

Retroactive or Continuity Date/Prior Acts

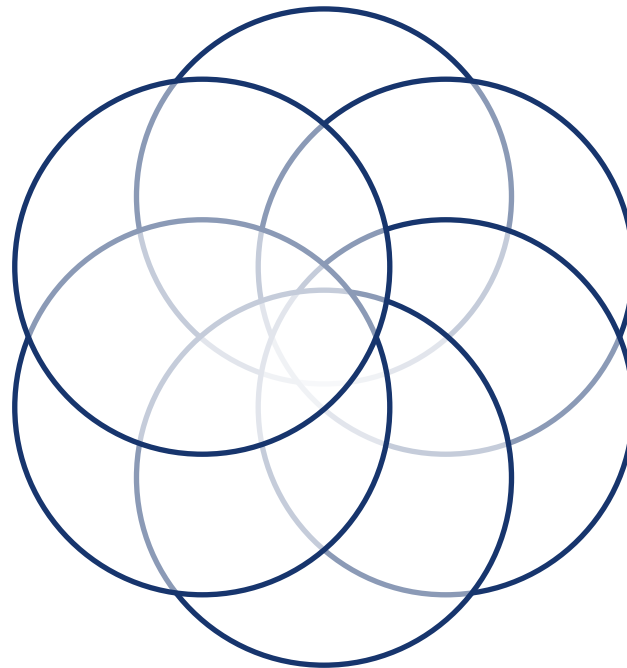
- Excludes cover for breaches prior to a specific date – often policy inception date – but breach can occur months prior to discovery.

Fraudulent, Intentional or Illegal Conduct

- In almost every liability policy, ensure a “final, non-appealable adjudication in underlying litigation” provision.

Act of War

- Often exclusion is broad enough to include cyber terrorism.



Portable Electronic Devices

- Excludes cover for breaches that occur through accessing a laptop or cell phone, except encrypted devices.

Private Information

- May cover only private information of natural persons, not confidential corporate information you may possess.

Third Parties with Insured's Information

- May not cover data breaches accessing your information when it is in the possession of a third party vendor or consultant (third party's insurance may not cover either).

LIABILITY & COVERAGE LIMITS

Anthem

- \$1.7 million in regulatory (HHS) fines.

Equifax

- \$439 M total costs – \$125 M covered by insurance.

Sony

- \$15 million in remediation costs.

Experian

- \$20 million in notification costs.

Yahoo

- \$80 M to settle securities suit – 3 billion records hit.

LIABILITY & COVERAGE LIMITS, CONT'D.

Duty to
Defend

Eroding
Limits

\$1 – \$5 million based on
internal cyber risk
assessment.

If not going to renew with
same insurer purchase
extended reporting period
coverage.

Defense expenses could
cost \geq \$500k.

\$2 - \$5 million based on
internal cyber risk
assessment.

If not going to renew with
same insurer purchase
extended reporting period
coverage.

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